

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.04.2015

Delivered on : 09.06.2015

CORAM

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR

A.S.No.127 of 2004

1.M.Chellammal, [deceased]
W/o.Madhava Naidu

2.M.Krishnamoorthy

3.M.Kannan

4.M.Lakshamanakumar

5.M.Rangammal

6.Pommie @ Kasthuri

7.Devi [deceased]

[Appellants 2 to 6 recorded as
LRS of deceased 1st appellant
as per order dated 10.04.2014
in CMP No.963 to 965 of 2012
in A.S.No.127 of 2004]

....Appellants/Defendants

Versus

1.C.Shanthi,
W/o.M.Chandrababu

2.C.Gomathi,

[R2 declared major and R1 discharged from
guardianship vide order of the
Court dt.27.01.2014
in CMP.No.55 and 56/2013]

3.Samraj @ Subramani

Rep. by his father and next friend

B.Prakash

.... Respondents/Plaintiffs

[R3 brought on record as legal
representative of the deceased
7th appellant vide order of court
dt.10.04.2014 in CMP.Nos.963 to 965/2012]

Appeal Suit filed under Section 96 of Code of Civil Procedure against the Judgment and Decree in O.S.No.7282 of 1999 dated 13.08.2003 on the file of the Additional District Judge-cum-FTC-V, Chennai.

For Appellants 1, 2 & 4 : Mr.M.V.Venkataseshan

Mr.K.Kannan for Appellants 3, 5 & 6

For Respondents : Ms.C.R.Rukmani [for RR1, RR2]

Mr.Y.Mohamed Ghouse [for RR3]

J U D G M E N T

The defendants in O.S.No.7282 of 1999 on the file of the V Additional Judge, City Civil Court, Chennai preferred this appeal against the Decree of the Trial Court dated 13.08.2003 made in the said suit. The plaintiffs in the said suit are the respondents 1 and 2 in this appeal. Since the 7th appellant/7th defendant died after filing of the appeal, Samraj alias Subramani, represented by his father and next friend B.Prakash has been impleaded as 3rd respondent in this appeal.

2. The respondents 1 and 2 herein are respectively the wife and daughter of M.Chandrababu Naidu, S/o.Late Madhava Naidu. The deceased 1st appellant Chellammal was the wife of the above said Madhava Naidu. Krishnamoorthy, Kannan and Lakshmana Kumar [appellants 2 to 4/defendants 2 to 4] are the sons of late Madhava Naidu. Rangammal and Pommie alias Kasthuri are the daughters of Madhava Naidu. The 7th appellant/7th defendant Devi was yet another daughter of Madhava Naidu. Madhava Naidu and the 1st appellant had one more son by name Chandrababu Naidu. The respondents 1 and 2/plaintiffs 1 and 2 are respectively his wife and daughter. The above said relationship remains undisputed.

3. Contending that when the 1st respondent/1st plaintiff was carrying the 2nd respondent/2nd plaintiff in the womb, her husband Chandrababu Naidu deserted her; that thereafter, his whereabouts were not known and that he was not heard of living for about 13 years, giving rise to a presumption of death under Section 108 of the Indian Evidence Act, 1872, the original suit came to be filed by the 1st respondent Shanthi for herself and as guardian of the 2nd respondent/2nd plaintiff Gomathi for a declaration that the said

Chandrababu Naidu was deemed to have died.

4. Contending further that the suit properties were self acquisitions of and hence absolute properties of Madhava Naidu; that he died intestate; that the appellants 2 to 7 and Chandrababu Naidu, being the sons and daughters of Madhava Naidu, alone were the legal heirs of late Madhava Naidu and thus all the 7 persons were entitled to 1/7th share each and that since Chandrababu Naidu was deemed to be dead, his 1/7th share devolved upon the respondents 1 and 2/plaintiffs 1 and 2, they had prayed for the relief of partition and separate possession and also for mesne profits.

5. The appellants 1 to 7/defendants 1 to 7 resisted the suit denying the plaint averments regarding the alleged civil death by Chandrababu Naidu and contending that the suit B-schedule property being the self acquired property of Chellammal, the 1st appellant/1st defendant, respondents 1 and 2/plaintiffs 1 and 2 did not have any right to share in it; that in respect of plaint A-schedule property, Chandrababu Naidu himself collected the value of his share and that hence, respondents 1 and 2/plaintiffs 1 and 2 were not entitled to any share either in the plaint A-schedule property or in the B-schedule property.

6. According to the respondents 1 and 2/plaintiffs 1 and 2, late Madhava Naidu got title to the suit B-schedule property under a Gift Settlement Deed and hence, the same was also his self acquisition. The appellants 1 to 7/defendants 1 to 7 contended that the suit B-schedule property was the self acquired property of the 1st appellant/1st defendant and the Settlement Deed executed by her in favour of her husband Madhava Naidu was a sham and nominal document. They also contended that even otherwise, the appellants/defendants 1 to 7 had preferred title by continuous possession ousting Chandrababu Naidu and that hence, the respondents 1 and 2/plaintiffs 1 and 2 could not get any relief as prayed for in the suit.

7. The Trial Court framed the following issues:

- i. Are the plaintiffs entitled to a decree for declaration that Chandrababu Naidu is dead ?
- ii. Are the plaintiffs entitled to a preliminary decree for partition of the plaintiffs 1/7th share in the suit properties ?
- iii. Are the plaintiffs entitled to mesne profits ? If so, to what extent ?
- iv. Whether the suit is maintainable ?
- v. Is there no cause of action ?
- vi. To what extent and to what relief ?

8. Based on the above said issues framed by the Trial Court, the parties went for trial and in the trial, two witnesses were examined as PW1 and PW2 and eight documents were marked as Ex.A1 to Ex.A8 on the side of the respondents 1 and 2/plaintiffs 1 and 2, whereas one witness was examined as DW1 and no document was produced on the side of the appellants herein/defendants.

9. At the conclusion of trial, the learned Trial Judge, after hearing the arguments advanced on both sides, considered the pleadings and evidence of the respective parties and upon such consideration, answered all the issues in favour of the respondents 1 and 2/plaintiffs 1 and 2 and granted a decree declaring that Chandrababu Naidu was presumed to be dead and a preliminary decree for partition, holding the respondents 1 and 2/plaintiffs 1 and 2 jointly entitled to 1/7th share in plaint A and B-schedule properties and directing the division of said properties into 7 equal share and the allotment of one such share jointly to the respondents 1 and 2/plaintiffs 1 and 2. The learned Trial Judge also chose to hold that the respondents 1 and 2/plaintiffs 1 and 2 were entitled to Rs.4,000/- per month as their share in the mesne profits from the date of plaint i.e., 15.11.1999 till the date of delivery of the share of the respondents 1 and 2/plaintiffs 1 and 2. The learned Trial Judge also chose to award cost against the appellants herein/defendants.

10. As against the said decree granting declaration that Chandrababu Naidu is deemed to be dead and a preliminary decree holding the respondents 1 and 2/plaintiffs 1 and 2 herein entitled to 1/7th share in the A and B-schedule properties and directing partition of the same and also the direction directing payment of mesne profits at the rate of Rs.4,000/- per month from the date of plaint till delivery of possession of the share of the plaintiffs, the appellants/defendants have brought forth this appeal under Section 96 of the Code of Civil Procedure on various grounds set out in the memorandum of grounds of appeal.

11. The points that arise for consideration in this appeal are as follows:

1. Whether Chandrababu Naidu, the husband of the 1st respondent/1st plaintiff is presumed to have died as per Section 108 of the Indian Evidence Act, 1872 ?
2. Whether the suit second item was the absolute property of the 1st defendant Chellammal ?
3. Whether Chandrababu Naidu relinquished his share after getting the money value of his share in the suit

properties ?

4. Whether the plea of ouster and adverse possession taken by the appellants/defendants has been substantiated ?
5. Whether the respondents 1 and 2/plaintiffs 1 and 2 are entitled to 1/7th share in the suit properties in their capacity as legal heirs of Chandrababu Naidu ?
6. Whether the Trial Court committed an error in fixing the mesne profits and directing payment of Rs.4,000/- per month as the share of the plaintiffs without relegating the decision regarding mesne profits to a separate proceedings under Order XX Rule 12 CPC ?
7. What are the other reliefs to which the parties are entitled ?

12. The arguments advanced by Mr.M.V.Venkateshan, learned counsel for the appellants and by Ms.C.R.Rukmani, learned counsel for the respondents 1 and 2 were heard. The Judgment and Decree of the Court below and the materials available on record sent for from the court below were also perused and taken into consideration.

13. The arguments advanced by the learned counsel for the appellants are four fold:

i] The first and foremost contention raised on behalf of the appellants is that the respondents 1 and 2/plaintiffs 1 and 2 failed to prove the necessary conditions for drawing a presumption under Section 108 of the Indian Evidence Act, 1872; that since the respondents/plaintiffs themselves do admit that Chandrababu Naidu was alive within 30 years prior to the filing of the suit, the burden of proving that he is no more shall lie upon the respondents 1 and 2/plaintiffs 1 and 2 under Section 107 of the Indian Evidence Act, 1872, and that the respondents 1 and 2/plaintiffs 1 and 2 have failed to adduce evidence sufficient enough to discharge the burden and cause the shifting of burden on the appellants to prove that the said Chandrababu Naidu was found living within 7 years prior to the filing of the suit, to attract Section 108 of the Indian Evidence Act, 1872.

ii] The second contention of the appellants/defendants is that though plaint A-schedule property was the self acquired property of late Madhava Naidu, he was not the owner of plaint B-schedule property; that the said property had been purchased by the 1st appellant/1st defendant from her own funds; that the Settlement Deed relied on by

respondents 1 and 2/plaintiffs 1 and 2 was the one executed by her in favour of her husband as a sham and nominal deed and it was not acted upon and that therefore, even Chandrababu Naidu did not have any right to share in the said property as against the 1st appellant/1st defendant.

iii] The third contention raised on behalf of the appellants is that even if it is assumed that both A and B-schedule properties were the absolute properties of late Madhava Naidu, the Chandrababu Naidu got the value of the share from other sharers and relinquished his share in favour of others and that in view of the same, Chandrababu Naidu had left nothing in the suit A and B schedule properties to devolve upon the respondents 1 and 2/plaintiffs 1 and 2.

iv] The fourth contention raised on behalf of the appellants/defendants is that in any event, the appellants excluded Chandrababu Naidu from the enjoyment of the suit properties and by such exclusion, the appellants have perfected title by adverse possession in respect of Chandrababu Naidu's share also.

14. The above said contentions raised on behalf of the appellants are sought to be refuted by the contesting respondents, namely respondents 1 and 2/plaintiffs 1 and 2 based on their submissions that Section 108 and not Section 107 of the Indian Evidence Act, 1872, shall be applicable to the facts of the case; that by sufficient evidence, the respondents 1 and 2/plaintiffs 1 and 2 have substantiated their contention that Chandrababu Naidu, the husband of the 1st respondent was not heard of living by any of the persons who would have originally come across him within 7 years before the date of filing of the suit and that hence, the presumption contemplated under Section 108 of the Indian Evidence Act, 1872 stands attracted. According to the contention made by the learned counsel for the respondents 1 and 2, Section 108 serves as a proviso to Section 107 and hence, whenever a case falls under Section 108, the same will be excluded from the purview of Section 107 of the Indian Evidence Act, 1872. It is the further contention raised on behalf of the respondents 1 and 2/plaintiffs 1 and 2 that the alleged relinquishment of share by Chandrababu Naidu after getting the money value has not been substantiated by reliable evidence, besides such contention being unsustainable in law and that the further contention of the appellants/defendants to the effect that they had ousted a co-owner and thereby perfected title by adverse possession, in respect of the share of such co-owner has also not been substantiated. The learned counsel for the respondents 1 and 2/plaintiffs 1 and 2 also contends that the case of the

appellants/defendants that the plaint B-schedule property was not the property of Madhava Naidu and that the Settlement Deed executed by the 1st appellant in favour of her husband Madhava Naidu was a sham and nominal deed and it was also not acted upon, has not been substantiated by reliable evidence. The learned counsel for the respondents 1 and 2/plaintiffs 1 and 2 also pointed out the fact that, except the interested testimony of PW1, the appellants/defendants adduced no other evidence, either oral or documentary and contended that the lower Court on preponderance of probabilities arrived at a correct conclusion that the said contentions of the appellants/defendants were not substantiated.

15. This Court gave its consideration to the above said submissions made on both sides.
Point No.1:-

16. The relationship of the parties set out in the earlier part of this Judgment has been admitted and there is no dispute regarding the same. Late Madhava Naidu had four sons and three daughters who are the defendants 2 to 4, Chandrababu Naidu and defendants 5 to 7. It is also not in dispute that Madhava Naidu died intestate without leaving any Will. Though the date of death of Madhava Naidu was not furnished either in the plaint or in the written statements, the respondents 1 and 2/plaintiffs 1 and 2 have produced Ex.A3-Death Certificate and thus proved that Madhava Naidu died on 13.01.1979 and the death was registered on 17.01.1979. According to the admitted facts, the marriage of the 1st respondent/1st plaintiff with Chandrababu Naidu took place on 01.07.1984. The Wedding Invitation has been produced as Ex.A1. From the testimony of PW1 and Ex.A1, it is quite obvious that Chandrababu Naidu married the 1st respondent/1st plaintiff Shanthi on 01.07.1984 and his father Madhava Naidu had predeceased him. The respondents 1 and 2/plaintiffs have made a clear averment in the plaint that Chandrababu Naidu deserted the 1st respondent/1st plaintiff when she was pregnant and that thereafter, he never turned up and he was not heard of living by any person who would have come across him had he been alive.

17. It is also the clear testimony of PW1, which is also corroborated by PW2, that the in-laws of the 1st respondent/1st plaintiff, who came to the residence of the father of the 1st respondent/1st plaintiff, after she gave birth to the 2nd respondent/2nd plaintiff, informed that the whereabouts of Chandrababu Naidu were not known. The Birth Certificate of the 2nd respondent/2nd plaintiff has been produced as Ex.A2. From Ex.A2, it is obvious that the 1st respondent gave birth to a female child at 6.05 a.m. on 19.08.1986 and the birth was registered on the very next day, namely 20.08.1986. Therefore, Chandrababu Naidu ought to have been alive at least at the

time of gestation, which can be taken as 280 days prior to 19.08.1986. Hence, it is a case that falls under Section 107 of the Indian Evidence Act, 1872, because it has been admitted by the respondents 1 and 2/plaintiffs 1 and 2 that Chandrababu Naidu was seen alive within 30 years prior to the filing of the suit. Besides the said admission made by the respondents 1 and 2/plaintiffs 1 and 2, it is also obvious from Ex.A2-Birth Certificate of the 2nd respondent/2nd plaintiff and Ex.A1-the wedding invitation. Of course as per the provision contained in Section 107, when a party claims that a particular person is not alive and it is either admitted or proved that the said person was alive within 30 years, the burden of proving that such person is dead shall be on the person affirming it.

18. However, Section 108 of the Evidence Act, serving as a proviso to Section 107, states that when the question is whether a person is alive or dead, and it is proved that he has not been heard of for 7 years, the burden of proving that he is alive shall stand shifted on the person who contends that such person is alive. For better appreciation, Sections 107 and 108 of the Evidence Act are extracted hereunder:-

"107. Burden of proving death of person known to have been alive who within thirty years.

When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for 7 years.

[provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it."

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19. It is not the case in which the respondents 1 and 2/plaintiffs 1 and 2 that Chandrababu Naidu died on a particular day, in which event the burden of proving that he died on a particular day shall be on them. On the other hand, it is their contention that for more than 13 years, the whereabouts of Chandrababu Naidu was not known and no one who would have heard of him if he had been alive, has heard of him within 7 years prior to the filing of the suit. There is no evidence adduced on the side of the appellants to prove

Chandrababu Naidu was seen alive by any one within 7 years prior to the filing of the suit. On the other hand besides making a clear plea, the respondents/plaintiffs have adduced reliable evidence to the effect that for more than 13 years prior to the filing of the suit, Chandrababu Naidu was not heard of by those who would have heard of him if he had been alive. The respondents 1 and 2/plaintiffs 1 and 2 have made a plea that after Chandrababu Naidu deserted his wife while she was pregnant, he did not turn up and he was not heard of living even after the birth of the 2nd respondent/2nd plaintiff, who was aged 13 years at the time of filing of the suit. However, the 1st respondent/1st plaintiff who figured as PW1 would state that from 01.09.1986, her husband disappeared and his whereabouts were not known and that even after hectic search, they were not in a position to ascertain whether he is alive or not. It is her further evidence that she went to her parents' house in the year 1985 and from that moment itself, her husband stopped paying visits to her. It is her further assertion that her in-laws, who came to see her, informed her that the whereabouts of Chandrababu Naidu were not known. She is corroborated by PW2, who would state that the in-laws of 1st respondent/1st plaintiff came to see the child after 9 months from the date of birth of 2nd respondent and at that point of time, they informed that the whereabouts of Chandrababu Naidu were not known.

20. As against such a clear and categorical evidence, having the effect of showing that Chandrababu Naidu was not heard of for nearly 13 years [specifically more than 7 years], there is no contra evidence adduced on the side of appellants/defendants to show that Chandrababu Naidu was seen alive or heard of being alive by any person within 7 years prior to the filing of the suit. Though DW1, who is none other than the 4th defendant, would state in his evidence in chief examination that his brother Chandrababu Naidu was alive on the date of his examination, during cross examination, he has admitted that he had not met Chandrababu Naidu and on the other hand, Chandrababu Naidu had contacted him over phone. However, in the subsequent part of his evidence in cross examination, he chose to state that he saw Chandrababu Naidu a year prior to the date of his examination viz., 28.11.2002. It is pertinent to note that during the period referred to by DW1, the suit was pending. But DW2, would state that he did not discuss anything with Chandrababu Naidu regarding the suit. Except the interested testimony of DW1, which also contained inbuilt contradiction, there is no other piece of evidence to show that anyone had seen Chandrababu Naidu alive within 7 years prior to the date of filing of the suit. DW1 also has not furnished the dates on which Chandrababu Naidu contacted them over phone or the date on which, he allegedly met Chandrababu Naidu. If

at all Chandrababu Naidu was alive and he had been having contact with the appellants over telephone, they would not have failed to gather his address from him and tried to met him.

21. On the other hand, the said evidence of DW1 turns out to be unreliable in the light of Ex.A7. Ex.A7 is the certified copy of the Power of Attorney dated 09.12.1993 under which one B.Rajendran S/o.Balaram Naidu was appointed as Power Agent in respect of another property left by late Madhava Naidu. It was executed by the 1st respondent/1st plaintiff [W/o.Chandrababu Naidu], other sons and daughter of Madhava Naidu and the wife of Madhava Naidu. Ex.A8 is the certified copy of the Sale Deed executed by the Power Agent by virtue of the original of which Ex.A7 in favour of Balaram Naidu, S/o.Varadappa Naidu. The same was executed by B.Rajendran, S/o.Balaram Naidu as Power Agent of appellants 1 to 5 and the 1st respondent/ 1st plaintiff. The very fact that Chandrababu Naidu was not made as a vendor to the above said sale and on the other hand his wife Shanthi, namely the 1st respondent/1st plaintiff, was made as a vendor for the said sale, will make it clear that the appellants were also aware of the fact that Chandrababu Naidu had not been heard of several years [for more than 7 years] by those who have naturally heard of him, he had been alive. Therefore, it is quite clear that even on the dates of Ex.A7 and Ex.A8, the appellants were of the view that the Chandrababu Naidu was not heard of living for more than 7 years and the same was the reason why the 1st respondent/1st plaintiff was made as a vendor to represent the share of Chandrababu Naidu in respect of another property left by his father Madhava Naidu. Hence, the burden of proving that Chandrababu Naidu is alive shall stand cast on the appellants/defendants under Section 108 of the Indian Evidence Act, 1872.

22. The learned Trial Judge marshalling the evidence in proper perspective with a clear version and applying the correct principles of law in proper perspective, arrived at a conclusion that Chandrababu Naidu was not heard of living for more than 7 years and hence, he was presumed to be dead in accordance with Section 108 of the Indian Evidence Act, 1872. This Court does not find any defect or infirmity in the above said finding of the learned Trial Judge, warranting interference in exercise of its appellate power. Point No.1 is answered accordingly.

Point No.2:-

23. The second contention of the appellants is that Madhava Naidu was the owner of plaint A-schedule property alone and the plaint B-schedule property did not belong to Madhava Naidu. It is the further contention of the appellants that the plaint B-schedule

property was the self acquired property of the 1st appellant and that though the 1st appellant executed a Settlement Deed in favour of her husband, it was a sham and nominal deed and the same was not acted upon. In this regard, the respondents 1 and 2/plaintiffs 1 and 2 have chosen to produce Ex.A6-certified copy of the Settlement Deed dated 24.07.1969 executed by the 1st appellant Chellammal in favour of her husband Madhava Naidu. It is obvious from Ex.A6 that the self acquired property of the 1st appellant/1st defendant was gifted to Madhava Naidu under the gift Settlement Deed dated 24.07.1969 and a certified copy of the same has been marked as Ex.A6. The appellants/defendants contended that the said Settlement Deed was not acted upon and it was only a sham and nominal deed. The executant of the original of Ex.A6, who claimed the same to be sham and nominal, did not enter the box to depose as a witness in substantiation of the above said contention. The 4th appellant/4th defendant alone figured as the sole witness [DW1] on the side of the appellants/defendants. His age as on the date of plaint was furnished as 40 years. The plaint was presented in the year 1999. Hence, he could have born in the year 1959. His age as on the date of the original of Ex.A6 would have been only 10 years. Hence, he could not have got direct knowledge as to whether the said Deed was executed as a sham and nominal one. In this regard, his evidence is also somewhat evasive. He states that the suit 'B-schedule property' had been purchased by his mother and that it was wrong to state that the said property was settled on his father. It was also his statement that he would not admit the document shown to him, namely Ex.A6.

24. On the other hand, it is the clear and categorical assertion of PW1 that the suit B-schedule property had been purchased by Madhava Naidu, with his funds, in the name of his wife, namely the 1st appellant/1st defendant and that thereafter, he got the said property transferred to his name. The suggestion made on behalf of the appellants/defendants to the effect that the Settlement Deed was not acted upon was stoutly denied by PW1. As against such clear testimony of PW1, which is also corroborated by Ex.A6, there is no evidence on the side of the defendants, except the confusing and contradictory statement of DW1 in his evidence. There is no proof that even after the execution of the Settlement Deed in favour of Madhava Naidu, public records continued to be in the name of the 1st appellant/1st defendant and it was the 1st appellant/1st defendant who paid the public outgoings relating to suit B-schedule property. Not even a scrap of paper has been produced to show that either the assessment of tax for the plaint B-schedule property continued in the name of the 1st appellant/1st defendant even after the execution of the original of Ex.A6-Settlement Deed till the death of Madhava Naidu or

at least that the assessment was made in the name of the 1st appellant/1st defendant alone excluding the other legal heirs of Madhava Naidu after the death of Madhava Naidu.

25. The foregoing discussions will make it clear that the respondents 1 and 2/plaintiffs were able to prove that the suit B-schedule property was the self acquired property of late Madhava Naidu and on the other hand, the appellants/defendants failed to substantiate their case that it belongs to the 1st appellant/1st defendant to the exclusion of Madhava Naidu and other legal heirs of Madhava Naidu. So far as the plaint A-schedule property is concerned, it has been admitted by the appellants/defendants that it was the self acquired property of late Madhava Naidu. It is also not in dispute that Madhava Naidu died intestate leaving behind his wife, 4 sons [including Chandrababu Naidu] and 3 daughters as his legal heirs. Hence, on the death of Madhava Naidu as per the general rule of succession provided in Section 8 of the Hindu Succession Act, 1956, the class I legal heirs, namely the wife, sons and daughters became entitled to equal shares. As such, all the 8 persons including the 1st appellant would have become entitled to 1/8th share each. Point No.2 is answered accordingly.

Point No.3:-

26. The third contention of the appellants/defendants is that though Chandrababu Naidu would have got a share in the suit properties, he relinquished his share after receiving the value of his share. But the said contention has not been substantiated by reliable evidence. Moreover, such relinquishment could not have been made orally. Hence the said contention was rightly rejected by the learned Trial Judge. Point No.3 is answered accordingly.

Point No.4:-

24. The fourth contention of the appellants is that Chandrababu Naidu had been ousted from enjoyment of the suit properties and thus the appellants perfected their title by adverse possession even in respect of the share of Chandrababu Naidu. Evidence is lacking to substantiate the said contention. The very fact that the 1st respondent/1st plaintiff Shanthi W/o.Chandrababu Naidu also joined the other sons and daughters and wife of Madhava Naidu in executing Ex.A7 Power of Attorney in favour of Rajendran S/o.Balaram Naidu on 09.12.1993 will be enough to negative the plea of ouster taken by the appellants/defendants. At least up to 09.12.1993 the plaintiffs were not ousted. Ex.A8 Sale Deed came to be executed by the said Power Agent Rajendran on 17.12.1993 on the strength of Ex.A7. Hence even as on 17.12.1993 they could not have been ousted from the suit properties. Within 6 years thereafter the suit came to be filed.

Hence plea of perfection of title by ouster order by the appellants/defendants was rightly rejected by the Trial Court. Point No.4 is answered accordingly.

Point No.5:-

28. We have seen that Chandrababu Naidu had 1/8th share in the suit properties and since he is presumed to be dead under Section 108 of the Evidence Act, his legal heirs viz. 1st and 2nd respondents/plaintiffs 1 and 2 became entitled to his share. It has also been held that the plea of ouster set up by the appellant/defendant was not substantiated. Hence the respondents 1 and 2/plaintiffs 1 and 2, as legal heirs of Chandrababu Naidu were entitled to 1/8th share in the suit properties. However, the respondents 1 and 2/plaintiffs 1 and 2 have wrongly claimed that the 1st appellant/1st defendant who was the widow of Madhava Naidu would not get any share in the estate left by Madhava Naidu. Such a contention is totally contrary to the provision of law relating to intestate succession of the property of a made Hindu provided under Section 8 and 10 of the Hindu Succession Act, 1956.

29. The learned Trial Judge, without adverting to the relevant provisions of law, blindfoldly accepted the contention of the respondents/plaintiffs that the sons and daughters of Madhava Naidu alone were entitled to share the properties left by Madhava Naidu and his widow, namely the 1st appellant/ 1st defendant did not get any share in them. The said finding of the learned Trial Judge is discrepant and hence, deserves to be interfered with. Accordingly, this Court hereby holds that out of the properties described in plaint A and B schedule, all the 7 appellants/defendants 1 to 7 and Chandrababu Naidu became co-sharers on the death of Madhava Naidu and each one was entitled to 1/8th share as against 1/7th share claimed by the plaintiffs and accepted by the Trial Court.

30. In view of the above findings that Chandrababu Naidu was presumed to be dead and that he had only 1/8th share in the suit properties, the respondents 1 and 2/plaintiffs 1 and 2 being his wife [widow] and daughter have become entitled to the 1/8th share of Chandrababu Naidu. Even in respect of the 1/8th share of Chandrababu Naidu, the 1st respondent/1st plaintiff and the 2nd respondent/2nd plaintiff have become entitle to equal shares again as per the provision made in the Hindu Succession Act. However, the respondents 1 and 2/plaintiffs 1 and 2 have chosen to commit a mistake in contending that the 1st respondent/1st plaintiff was not entitled to any share and the 2nd respondent/2nd plaintiff alone be entitled to the entire share of Chandrababu Naidu.

31. In fact the respondents 1 and 2/plaintiffs 1 and 2 have contended that the widow of Madhava Naidu and the wife/widow of Chandrababu Naidu were not entitled to succeed to their properties, on a misconception and ignorance of the provisions of law relating to succession among Hindus. Without properly advertng to the said pleadings made by the respondents/plaintiffs and assuming that the claim of 1/7th share made jointly by the respondents 1 and 2/plaintiffs 1 and 2 was correct, the learned Trial Judge chose to pass a decree holding them entitled to 1/7th share and directing the division of the same. The said approach made by the learned Trial Judge is erroneous. The learned Trial Judge ought to have given a finding that the widow of Madhava Naidu was also entitled to an equal share along with her sons and daughters and that thus each one of them were entitled to 1/8th share alone in the properties left by Madhava Naidu. The learned Trial Judge ought to have held that 1/8th share of Chandrababu Naidu alone was available to the respondents 1 and 2/plaintiffs and they were jointly entitled to the said 1/8th share. The said mistake committed by the Trial Court deserves to be rectified as indicated supra and the preliminary decree for partition deserves to be modified accordingly.

32. However, the supervening circumstances cannot be ignored and they have to be taken into account by this Court. Though the preliminary decree passed by the Trial Court regarding the extent of shares held by the respondents 1 and 2/plaintiffs is erroneous, the supervening event, namely the death of the 1st appellant/1st defendant, during the pendency of the appeal will have the effect of increasing the share of the respondents 1 and 2/plaintiffs from 1/8 provided the 1st appellant/1st defendant died intestate. Though a memo came to be filed informing the court that the 1st appellant died and the remaining appellants 2 to 7 were the legal heirs as per the provisions of the Hindu Succession Act, 1956, there is no plea that the 1st appellant/ 1st defendant Chellammal left a Will bequeathing her share to the appellants 2 to 7 alone. Even during the arguments advanced in the appeal, it was not contended on behalf of the appellants that the 1st appellant did not die intestate and she had left a Will. Hence, it has to be taken that the 1st appellant/1st defendant Chellammal died intestate without making any bequest for the devolution of her share in the suit properties. As per Section 15 of the Hindu Succession Act, her 1/8th share would devolve upon her sons and daughters including the children of the predeceased son. Accordingly, her 1/8th share would have devolve upon the appellants 2 to 7 and the 2nd plaintiff being the daughter of her predeceased son in equal shares. Thus, the shares of each one of the remaining appellants, namely appellants 2 to 7 would have got increased by 1/56 and similarly the 2nd plaintiff's share of 1/16 will get increased by

1/56 and thus, the share of each one of the appellants/defendants 2 to 7 has got increased to $1/8 + 1/56 = 8/56 = 1/7$. Plaintiffs 1 and 2 were entitled to a equal share in the $1/8^{\text{th}}$ share of Chandrababu Naidu. Thus, the 1st plaintiff became entitled to $1/16^{\text{th}}$ share and the 2nd plaintiff became entitled to $1/16^{\text{th}}$ share in the total properties left by Madhava Naidu. Pursuant to the death of 1st appellant/1st defendant, the 2nd plaintiff alone would have got $1/7^{\text{th}}$ share out of the $1/8^{\text{th}}$ share of the 1st appellant/1st defendant. Thus, the 2nd plaintiff's share would have got increased by $1/56$ i.e., $1/16 + 1/56 = 9/112$. Respondents 1 and 2/plaintiffs 1 and 2 together would be entitled to $7/112 + 9/112 = 16/112 = 1/7$. Hence, the preliminary decree granted by the Trial Court for the relief of partition has to be suitably modified by holding that the respondents 1 and 2/plaintiffs 1 and 2 jointly entitled to $1/8^{\text{th}}$ share [each one entitled to $1/16$] in the suit properties left by Madhava Naidu; that the same has got enhanced to $1/7^{\text{th}}$ share [share of the 1st plaintiff is $7/112$ and the share of the 2nd plaintiff is $9/112$] and that they are entitled to a preliminary decree directing separation of the said shares of the plaintiffs from the shares of the rest of the persons. Point No.5 is answered accordingly.

Point Nos.6 and 7:-

33. The learned Trial Judge would have conveniently relegated the decision regarding mesne profits to a separate proceedings under Order XX Rule 12 CPC. Instead of doing it, the learned Trial Judge has chosen to decide the quantum of mesne profits arbitrarily fixing the net monthly income from the suit properties at Rs.28,000/- and fixing the share of the plaintiffs at Rs.4,000/- per month. In this regard, though the respondents 1 and 2/plaintiffs would have stated that the appellants were deriving a rental income of Rs.50,000/- per month, there is paucity of evidence in this regard either on the plaintiffs' side or on the defendants' side. In fact PW1 does not state anything about the actual income derived from the suit properties. PW2's evidence is also not helpful in this regard. The only witness examined on the side of the appellants/defendants, without producing any document, simply stated that they were getting only a sum of Rs.5,000/- per month as rental income from the suit properties.

34. Plaint A-schedule property is a storeyed building consisting of shops and residential portions built up in a plinth area of 1800 sq.ft. in Audiappa Naicken Street, Chennai-1. Plaint B-schedule property is a house on the plot bearing an extent of 11,400 sq.ft. situated at No.4, Varadappa Maistry Street, New Washermanpet, Chennai. Both the areas are, of course, highly potential areas. Such vast extent cannot be said to be yielding a meagre sum of Rs.5,000/-

as rent per month. Without getting the report of building surveyor and without giving opportunity to the parties to adduce evidence regarding the value of the properties, the nature of construction and the actual rental value, the learned Trial Judge arbitrarily arrived at a figure of Rs.20,000/- be the rental value. Such a procedure adopted by the Trial Court is quite unwarranted and the same was not get the stamp of approval of this Court.

35. In addition to the said mistake committed by the Trial Court, there is utter confusion in the direction as to from which date to which date the mesne profits fixed by the Trial Court has to be paid. Paragraph No.11 of the judgment contains a finding that the defendants 1 to 7 were liable to pay mesne profits at the rate of Rs.4,000/- per month from the date of plaint, namely 15.11.1999 till the date of delivery of the share of the plaintiffs. However in clause No.4 of the decree, it has been stated that the mesne profits at the rate of Rs.4,000/- per month shall be paid from the date of plaint till the date of decree. Clause 4 of the decree reads as follows:

"4. That the defendants do pay to the plaintiff a sum of Rs.4,000/- p.m. [Rupees four thousand only] towards the mesne profits for 1/7th share in the suit properties from the date of plaint i.e. 15.11.1999 till the date of decree and that such ascertained the amount shall be recoverable only on payment of requisite court fee paid by the plaintiff."

Hence, it is obvious that the decree has not been drafted in line with the Judgment. For all the reasons stated above, this Court comes to the conclusion that the direction in the decree with regard to the payment of mesne profits has got to be set aside and the said question shall be left to be decided in a separate proceeding under Order XX Rule 12 CPC.

36. In the result, the appeal is allowed in part without cost and the decree passed by the Trial Court shall stand modified as follows:

- i. There shall be a declaration that Chandrababu Naidu, husband of the 1st plaintiff and father of the 2nd plaintiff is deemed to be dead as per Section 108 of the Indian Evidence Act.
- ii. The plaintiffs [respondents 1 and 2 in the appeal] are granted a preliminary decree declaring that they are jointly entitled to 1/8th share [each one entitled to 1/16th share] of the suit properties as legal heirs of Chandrababu Naidu, S/o.Madhava Naidu and that on the death of the 1st defendant, the

- share of the 2nd plaintiff alone got enhanced to 9/112 making the total share of the plaintiffs 1 and 2 to 1/7th share and directing the division of the suit property into 7 equal shares and allotment of one such share jointly to the plaintiffs 1 and 2.
- iii. The decision regarding mesne profits is relegated to a separate proceeding under Order XX Rule 12 CPC.
- iv. Costs of the plaintiffs shall be paid by the defendants.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

gya

To

The V Additional Judge,
Fast Track Court,
City Civil Court,
Chennai.

Copy to

The Section Officer,
V.R.Section, High Court,
Madras.

1 CC to Mr.M.V.Venkataseshan, Advocate SR.No. 28042

1 CC to Ms.C.R.Rukmani, Advocate SR.No. 28059

KV (CO)
PSI (02.07.2015)

A.S.No.127 of 2004

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