

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **31.10.2017**

CORAM:

**THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN**

**A.S.No.582 of 2008
and Cross Objection No.10 of 2009
and M.P.No.1 of 2008 and C.M.P.No.14638 of 2017**

A.S.No.582 of 2008

K.M.Balasubramaniam

.. Appellant

Vs.

1. Saranya
2. Minor Sowmiya
3. Savithri
4. Meenakshi
5. Kasthuri
6. Eswari @ Rajeswari
7. Manonmani

.. Respondents

Prayer : Appeal Suit filed under Section 96 of the Code of Civil Procedure, against the Judgment and Decree, dated 14.03.2008 made in O.S.No.26 of 2006 on the file of the Additional District Court / FTC No.1, Erode.

For appellant : Mr.N.Manokaran

For respondents : Mrs.Chitra Sampath, Senior counsel
for Mr.T.S.Baskaran for R1 to R3
No appearance for R4 to R6
Notice Dispensed with for R7

Cross Objection No.10 of 2009

1. Saranya
2. Minor Sowmiya

.. Cross Objectors

Vs.

K.M.Balasubramaniam

.. Respondent

Prayer : Cross Objection filed under Order 41 Rule 22 of the Code of Civil Procedure, against the Judgment and Decree, dated 14.03.2008 made in O.S.No.26 of 2006 on the file of the Additional District Court / FTC No.1, Erode.

For Cross Objectors: Mrs.Chitra Sampath, Senior counsel
for Mr.T.S.Baskaran

For respondent : Mr.N.Manokaran

COMMON JUDGMENT

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

The present Appeal Suit has been filed by the first defendant against the Judgment and Decree passed by the Additional District Court / Fast Track Court No.1, Erode, dated 14.03.2008 in O.S.No.26 of 2006 allotting 2/3 share in first item of "A" schedule and Item Nos.1 and 2 of "B" schedule suit property to plaintiffs 1 and 2 by way of preliminary decree and also awarding Rs.3,000/- per month as maintenance to the third plaintiff with a charge over the share of the first defendant in Item No.1 of "A" schedule and Item Nos.1 and 2 of "B" schedule suit properties.

2. The first plaintiff and minor second plaintiff through her guardian mother filed Cross-Objection against the dismissal of the suit with respect to Item Nos.2 and 3 of "A" schedule properties as self-acquired property of the first defendant.

3. In the plaint, the plaintiffs sought for the specific performance of agreement alleged to have been executed by the first defendant in favour of the third plaintiff and in alternative for a preliminary decree of partition of the suit properties and allot 2/3 share to the plaintiffs 1 and 2 and also for maintenance to the third plaintiff.

4. Before the trial Court, the plaintiffs gave up the relief of specific performance and proceeded for the alternative relief of partition and maintenance. It is suffice to analyse the divergent contentions of the parties with respect to the partition and maintenance.

5. One Mosu Gounder had two wives. Through first wife, third defendant was born. Through second wife, who is arrayed as second defendant, defendant 1, 4, 5 and 6 were born. D1 married the third plaintiff and they were blessed with children, plaintiffs 1

and 2. The suit properties are the ancestral properties of the family of the first defendant and plaintiffs 1 and 2. The first defendant has also purchased some of the properties from out of the joint family income and all the properties were always treated as joint family properties. The defendants 2 to 6 executed a release deed in respect of their share in favour of the first defendant under the registered release deed dated 02.05.1990. From the said date, the defendants 2 to 6 have absolutely no right, possession or title to the suit property. After filing of this suit, the first defendant had set up the defendants 2 to 6 and filed a collusive suit in O.S.No.148 of 2003 on the file of the Additional Subordinate Judge, Erode and obtained an ex parte decree declaring the release deed dated 02.05.1990 as null and void. The above suit was also barred by limitation and the suit itself ought not to have been taken on file. The plaintiffs are not parties to the above suit. The plaintiffs are ignoring the said decree as it is not valid and binding upon the plaintiffs. However, defendants 2 to 6 are added as parties. During the pendency of the suit, D2 died. The plaintiffs 1 and 2 are entitled to 2/3 share in the suit properties. The third plaintiff is also entitled for maintenance of Rs.5,000/- per month taking into consideration of income, family status, age and the cost of living and she is entitled to claim maintenance from the date of suit till

her life time.

6. It is averred in the written statement of the first defendant that the suit properties are not ancestral properties. The relationship of the parties is admitted. Mosu Gounder father of the first defendant died 20 years back. The first defendant and his father were the joint family members and were entitled to 1/2 share each in the ancestral joint family properties. On the death of Mosu Gounder, his second wife D2 and daughters D3 to D6 inherited the properties. It is false to say that plaintiffs 1 and 2 are entitled to 2/3 share in the suit properties. The third plaintiff is not entitled to maintenance. She wilfully and wantonly deserted and neglected the first defendant.

7. In the written statement filed by the third defendant and adopted by other defendants, it is averred that the defendants 2 to 6 executed release deed in favour of first defendant on 02.05.1990 to facilitate the first defendant to fetch loan from the bank and on his assurance that he would discharge the bank debt within three years. But the first defendant failed to keep up his promise. There was no consideration. Therefore, defendants 2 to 6 filed suit in O.S.No.148 of 2003 on the file of the Additional Sub-Court, Erode for declaration that the release deed executed in

favour of the first defendant, dated 02.05.1990 is not true and valid. The suit was also decreed as prayed for with costs. The defendants 2 to 6 are entitled to 5/12 share and the first defendant is entitled to 7/12 share. The plaintiffs and the first defendant are colluding and acting against the interest of the defendants 2 to 6. There is absolutely no cause of action and therefore, the suit is to be dismissed.

8. The learned trial Judge framed necessary issues and after analysing both the oral and documentary evidence, passed the preliminary decree allotting 2/3 share to the plaintiff 1 and 2 in Item No.1 of "A" schedule and Item Nos.1 and 2 of "B" schedule of suit properties and also awarded monthly maintenance of Rs.3,000/- per month to the third plaintiff. With respect to Item Nos.2 and 3 of "A" schedule suit property, the suit was dismissed. Aggrieved by the Judgment and Decree, the first defendant preferred Appeal Suit. The plaintiffs 1 and 2 filed Cross Objection No.10 of 2009 in this appeal against the dismissal of the suit with respect to Item Nos.2 and 3 of "A" schedule property.

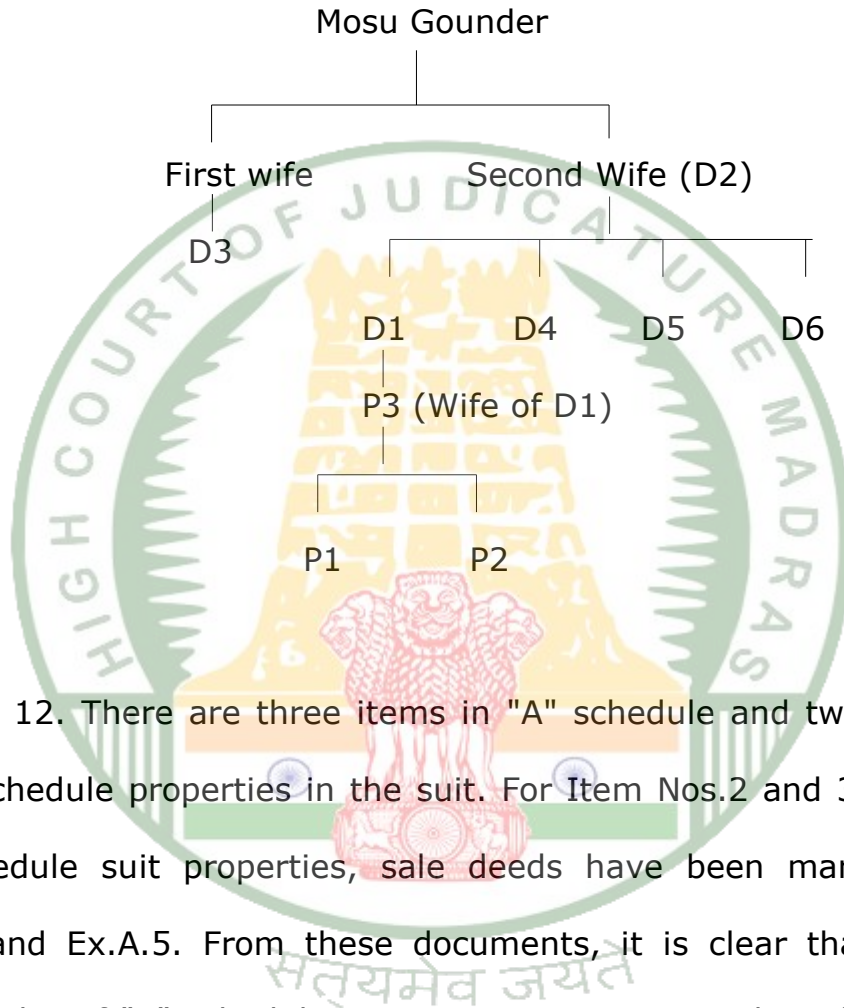
9. The learned counsel appearing for the appellant / first defendant argued with great vehemence that the suit for partition

filed by the children claiming share in their grand father's property is not maintainable and Section 8 of the Hindu Succession Act confers right of succession only on the son and son of the pre-deceased son and not on the grand children when the father is living at the time of succession. It is further contended that decree in O.S.No.148 of 2003 on the file of the Additional Sub-Court, Erode came to a finality and the same cannot be gone into in the present suit. It is also contended that the appellant / first defendant has settled valuable properties in the name of the third plaintiff even as per her admission in her evidence and therefore, the question of payment of maintenance does not arise.

10. The learned Senior counsel appearing for the respondents 1 to 3 per contra contends that the suit properties are ancestral joint family properties; that the joint family has not disrupted and the joint family properties passed on to the surviving coparcener, namely first defendant and the properties continued to be the joint family properties. By virtue of Amendment Act 2005, the plaintiffs 1 and 2 being coparceners are entitled to the share as per Section 6 of Hindu Succession Act. Further it is contended that in the absence of any proof for notional partition on the death of Mosu Gounder neither the release deed nor the decree obtained in

a time barred suit affects the right of the plaintiffs.

11. The family tree is given below :



12. There are three items in "A" schedule and two items in "B" schedule properties in the suit. For Item Nos.2 and 3 of the "A" schedule suit properties, sale deeds have been marked as Ex.A.4 and Ex.A.5. From these documents, it is clear that Item Nos.2 and 3 of "A" schedule suit properties were purchased by the first defendant. There is evidence in abundance both oral and documentary that the first defendant was doing finance business and he was also under the scan of Income Tax. Thus from the above two documents, it is clear that Item Nos.2 and 3 of "A" schedule suit properties have been purchased by the first defendant. There is absolutely no evidence that the above

properties were purchased from the joint nucleus. Therefore, the trial Court has rightly found that the Item Nos.2 and 3 of "A" schedule suit properties are separate properties of D1 and therefore, the Cross-Objection No.10 of 2009 is liable to be dismissed.

13. On the side of the plaintiffs, two partition deeds, one dated 21.11.1927 and another dated 24.04.1954 are marked as Ex.A.1 and Ex.A.2. Ex.A.1 relates to the partition made among the family members of Avinashi Gounder. Ex.A.2, dated 24.04.1954 is the partition deed executed between Pongiannan, Sennimalai Gounder and Mosu Gounder. In the first document, it has been specifically mentioned that the property subjected to partition are joint family properties. Similarly in Ex.A.2, it has been stated that the properties in joint enjoyment are subjected to partition. The first defendant examined as D.W.1 admits during cross-examination that the suit properties are his father's ancestral properties. Considering the admission of D.W.1 and the recital of Ex.A.2, it is clear that Item No.1 of "A" schedule and Item Nos.1 and 2 of "B" schedule suit properties are the joint family properties. It is pertinent to note that it is not the case of the first defendant that there was partition between him and his father.

14. The only question that arise in this Appeal Suit is whether the plaintiffs 1 and 2 being grand children can claim partition over Item No.1 of "A" schedule and Item Nos. 1 and 2 of "B" schedule properties in the suit.

15. The learned counsel appearing for the appellant placed reliance on two Supreme Court Judgments and one Judgment of the Division Bench of this Court for the contention that if a male Hindu dies intestate, his properties shall devolve upon his son's, daughter's by virtue of Section 8 of the Hindu Succession Act.

16. The first Judgment cited by the learned counsel appearing for the appellant is **Bhanwar Singh v. Puran** reported in **(2008) 3 SCC 87**. In that case one Bhima was the owner of the property. He died leaving behind his son Sant Ram and three daughters. The properties in the suit were then partitioned between Sant Ram and his sisters. Thereafter the appellant who was the son of Sant Ram was born. Subsequently Sant Ram transferred a part of properties. On the premise that the properties of Bhima were

joint family properties, the appellant filed a suit for setting aside the said transaction on the ground that the said transaction was done without any legal necessity therefor. The Supreme Court in the above Judgment has held that having regard to Section 8 as also Section 19 of the Hindu Succession Act, the properties ceased to be joint family property and all the heirs and legal representatives of Bhima would succeed to his interest as tenants in common and not as joint tenants.

17. The second Judgment cited by the learned counsel appearing for the appellant is **Uttam v. Saubhag Singh** reported in **2016 (2) CTC 306**. In this Judgment, the Hon'ble Supreme Court has held as follows :

"15. On application of the principles contained in the aforesaid decisions, it becomes clear that, on the death of Jagannath Singh in 1973, the proviso to Section 6 would apply inasmuch as Jagannath Singh had left behind his widow, who was a Class I female heir. Equally, upon the application of explanation 1 to the said Section, a partition must be said to have been effected by operation of law immediately before his death. This being the case, it is clear that the plaintiff would be entitled to a share on this partition taking

place in 1973. We were informed, however, that the plaintiff was born only in 1977, and that, for this reason, (his birth being after his grandfather's death) obviously no such share could be allotted to him...

...

...

21. Applying the law to the facts of this case, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act. This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, and the other coparceners and his widow held the property as tenants in common and not as joint tenants. This being the case, on the date of the birth of the appellant in 1977 the said ancestral property, not being joint family property, the suit for partition of such property would not be maintainable..."

18. The learned counsel appearing for the appellant cited the Judgment of the Division Bench of this Court in **Arunagiri v. Ayyar Muthuraja**, reported in **2014 (1) CTC 73**. In this Judgment, it has been held as follows :

"12. As narrated earlier, the admitted facts are that a registered partition has taken place on 24.09.1970 amongst the said Chinnathu Muthuraja, his wife and their three sons who have been arrayed as defendants 1 to 3 wherein 'A and B' schedule properties have been allotted to the shares of Chinnathu Muthuraja and his wife and they passed away in the year 1973 and 1975 respectively leaving behind them the present defendants 1 to 3 as their legal heirs. The plaintiff is the son of the first defendant. Since the plaintiff is the son of the first defendant, the Court has to analyse as to whether he is having locus standi to institute the present Suit in view of Sections 8 and 15 of the Hindu Succession Act, 1956...

...

14. As narrated earlier, the suit properties have been allotted to the share of Chinnathu Muthuraja and his wife by virtue of the partition deed dated 24.09.1970 and a registration copy of the same has been marked as Ex.A1. Since the suit properties have been allotted to the share of Chinnathu Muthuraja and his wife, it is needless to say that the suit properties are the separate and absolute properties of the said Chinnathu Muthuraja and his wife. It is an admitted fact that

Chinnathu Muthuraja has passed away in the year 1973 and his wife has passed away in the year 1975. Since both of them have passed away after enactment of Hindu Succession Act, 1956, it is needless to say that the Court has to rely upon only the provision of Sections 8 and 15 of the said Act and it need not look into the observations or example given in Hindu Law by Raghavachari.

...
16. Even at the risk of repetition, the Court would like to sum up the following aspects. The admitted case of both parties is that a registered partition has come into existence on 24.09.1970, wherein the suit properties have been allotted to the share of Chinnathu Muthuraja and his wife and both of them have passed away in the year 1973 and 1975 respectively. Under the said circumstances, the defendants 1 to 3 are alone their legal heirs as per Sections 8 and 15 of the Hindu Succession Act, 1956. Since the defendants 1 to 3 are alone legal heirs of the deceased Chinnathu Muthuraja and his wife, the plaintiff, as rightly pointed out by the trial Court has no locus standi to institute the present Suit for the relief of partition. Since the plaintiff has no locus standi to institute the present Suit, it is needless to say that the relief sought for in the

plaint cannot be granted."

19. In all the above cases, the joint family has disrupted on one point either because of partition or because of the death. Once joint family is disrupted the properties becomes separate property and devolution will be as per Section 8 of Hindu Succession Act.

20. The learned Senior counsel appearing for the respondents 1 to 3 cited the Judgment of the Hon'ble Supreme Court, **Dharma S. Agalawe v. Pandurang M. Agalawe**, reported in **(1988) 2 SCC 126** and contended that the joint family property devolving to the hands of sole surviving coparcener will become joint family property if a son is born to him. In the above Judgment, it has been held as follows :

"We respectfully agree with the above observations of this Court in Vasant's case [(1969) 2 SCC 544]). The joint family property does not cease to be joint family property when it passes to the hands of a sole surviving coparcener. If a son is born to the sole surviving coparcener, the said properties become the joint family properties in his

hands and in the hands of his son. The only difference between the right of a manager of a joint Hindu family over the joint family properties where there are two or more coparceners and the right of a sole surviving coparcener in respect of the joint family properties is that while the former can alienate the joint family properties only for legal necessity or for family benefit, the latter is entitled to dispose of the coparcenary property as if it were his separate property as long as he remains a sole surviving coparcener and he may sell or mortgage the coparcenary property even though there is no legal necessity or family benefit or may even make a gift of the coparcenary property. If a son is subsequently born to or adopted by the sole surviving coparcener or a new coparcener is inducted into the family on an adoption made by a widow of a deceased coparcener an alienation made by the sole surviving coparcener before the birth of a new coparcener or the induction of a coparcener by adoption into the family whether by way of sale, mortgage or gift would however stand, for the coparcener who is born or adopted after the alienation cannot object to alienations made before he was begotten or adopted."

21. Thus it is well settled that if the property is the separate property of a male Hindu, who died intestate, it will devolve as per Section 8 of the Hindu Succession Act. Even if the joint family property passes to the sole surviving coparcener, the same does not cease to be joint family property and becomes the joint family property on the birth of a son or daughter (Coparcener). If the sole coparcener to whom the joint family property passes on transfers or encumbers a portion or the whole property, the same cannot be questioned by the son or daughter subsequently born as a coparcener. Son or daughter born subsequently has the coparcenary right in the joint family properties that are available on the date of his / her birth. If the property is the joint family property, devolution is governed as per Section 6 of the Hindu Succession Act, 1956.

22. In this case on hand, Mosu Gounder died around 1974 leaving behind his son / D1, the only coparcener. The other legal heirs available at that time are Mosu Gounder's second wife and daughters namely D2 to D6.

23. There is no acceptable proof or evidence as to the fact

that partition was effected after the demise of Mosu Gounder among the first defendant and other legal heirs. Only in 1990, D2 to D6 executed release deed with respect to their share in favour of the first defendant. The defendants 2 to 6 filed Original Suit in 2003 and got an ex parte decree declaring the release deed as null and void. Release Deed executed after about 15 years that too in the absence of any description of share allotted to each sharer cannot be considered as evidence for the partition among the sharers. Therefore it is to be construed that all the joint family properties passed on to the hands of the sole coparcener namely the first defendant. Subsequently plaintiffs 1 and 2 were born to the first defendant and his wife / third plaintiff. On their birth they became coparceners along with the first defendant. As per Section 6 of the Hindu Succession Amendment Act, 2005, the properties passed to first defendant becomes joint family property of the first defendant and plaintiffs 1 and 2 and therefore, the plaintiffs 1 and 2 are entitled to 1/3rd share each in the Item No.1 of "A" schedule and Item Nos.1 and 2 of "B" schedule of suit properties.

24. As far as maintenance is concerned, no doubt P.W.1 admits that she has been settled one item of property by her husband. But there is no evidence that the property so settled fetches any regular income so as to meet third plaintiff's

maintenance. The documents filed on the side of the defendant shows that he is with means and hence, he is bound to maintain his wife. Considering the status of the parties and the income of the first defendant, the trial Court has rightly fixed the maintenance at Rs.3,000/- per month.

25. The trial Court has rightly allotted shares to the plaintiffs 1 and 2 and maintenance to the third plaintiff and this Court does not find any reason to interfere with the Judgment and Decree passed by the Court below.

26. In the result, both the A.S.No.582 of 2008 and Cross Objection No.10 of 2009 are dismissed with costs, confirming the Judgment and Decree, 14.03.2008 made in O.S.No.26 of 2006 on the file of the Additional District Court / FTC No.1, Erode. Consequently, connected M.P.No.1 of 2008 and C.M.P.No.14638 of 2017 are closed.

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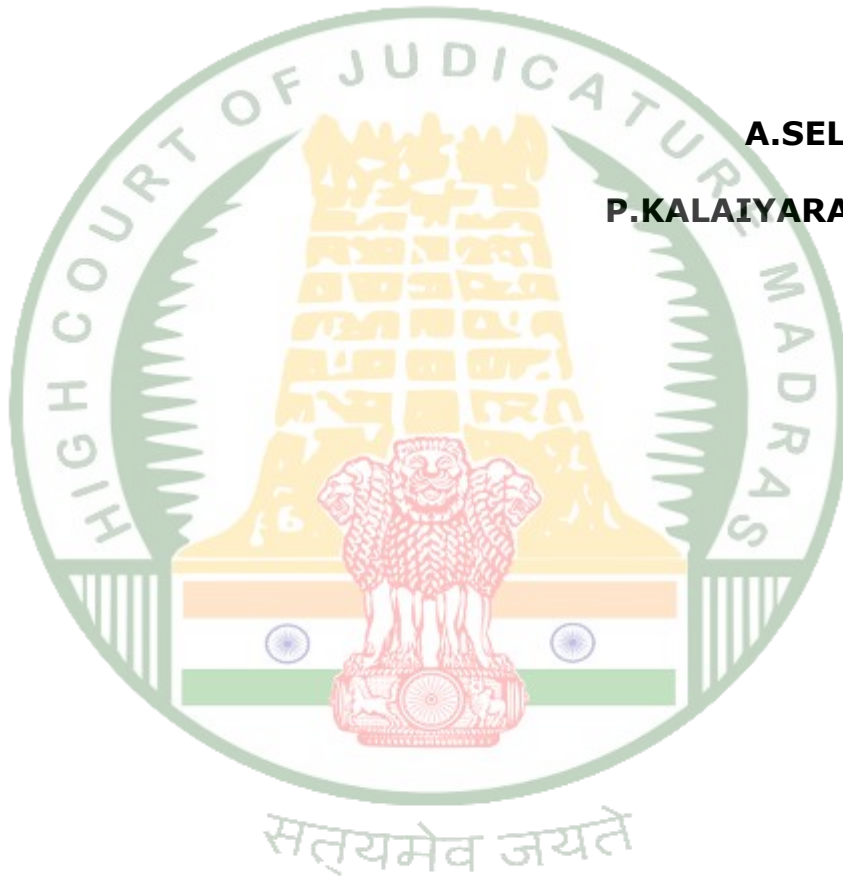
(A.S.,J.) (P.K.,J)
31-10-2017

Index :Yes / No

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To

The Additional District Court / FTC No.1
Erode.

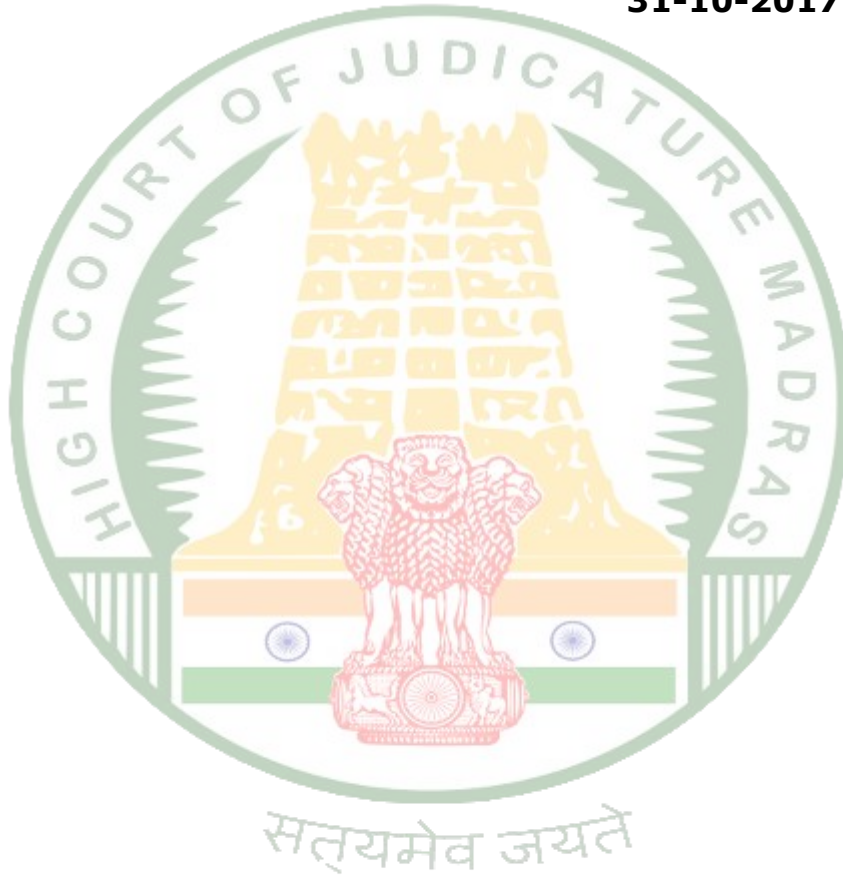


**A.SELVAM,J.
AND
P.KALAIYARASAN,J.**

tsvn

**Pre Delivery
Common Judgment in
A.S.No.582 of 2008
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Cross Objection
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