

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.06.2012

CORAM:

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

C.S.No.418 of 2007

1.Sumathi Devi (deceased)
2.Suresh Kumar Sharma
3.Inderchand Sharma Plaintiffs
(2nd & 3rd plaintiffs and 9th defendant
are recorded as the legal representatives
of the deceased first plaintiff as per
the Order dated 02.07.2010 in memo filed
in C.S.No.418 of 2007 and further Order
dated 26.07.2010 in A.No.3932 of 2010)

Vs.

1.Basanthi Bai
2.Guneswarlal Sharma
3.Chandrapal Sharma
4.Mahendra Kumar Sharma
5.Nirmala Devi
6.Manju Devi
7.Santhosh Devi
8.Ratanlal Sharma
9.Prakash Chand Sharma ... Defendants

Prayer: Suit is filed under Order XXIV Rule 1 O.S. Rules
1956 r/w Order VII Rule 1 C.P.C., seeking the following
reliefs:

a. For declaration that the plaintiffs are
entitled to 1/3rd share in the 1/3rd share of
Late.Ramlal Sharma in the properties described
in suit schedule A and B;

b. For a partition by metes and bounds of the
property more fully described in suit schedule

- c. For permanent injunction restraining the defendants 1 to 8, their men, agents, servants, or any person claiming through or under them from in any manner interfering with the peaceful possession of the plaintiffs in the property bearing Old Door No.157, New No.323, Mint Street, Sowcarpet, Chennai-600 079 (more fully described in the suit schedule A & B);
- d. For recovery of Rs.4,32,000/- from the defendants 1 to 8 towards mesne profits in respect of the properties described in the suit schedule A & B; and
- e. For future mesne profits in respect of the properties described in the suit schedule A & B.

For plaintiffs : Mr.B.Balachandran

For defendants : D1, D5, D6, D7 & D8 -Exparte
Mr.P.Gururamachandran for D2
Mr.M.L.Ramesh for D3 & D4
Mr.A.Rahman for D9

J U D G M E N T

1. The facts, which are absolutely necessary for the disposal of this suit may be summarised as under:

1.1. The property described in the plaint A-Schedule

was purchased on 24.02.1975 by Mr.Bansilal Sharma,
Mr.Ramlal Sharma and Mr.Ratanlal Sharma under a registered

sale deed bearing document No.134 of 1975, on the file of the sub-registrar at Sowcarpet, Chennai.

1.2. Similarly, the property described in the plaint B-Schedule was purchased on 30.04.1975 by Mr.Bansilal Sharma, Mr.Ramlal Sharma and Mr.Ratanlal Sharma from one Mr.C.Gopal under a registered sale deed bearing document No.339 of 1975, on the file of the sub-registrar at Sowcarpet, Chennai.

1.3. Mr.Ramlal Sharma is the husband of the first plaintiff (since deceased) and the father of the plaintiffs 2, 3 and 9th defendant. Mr.Bansilal Sharma is the elder brother of Mr.Ramlal Sharma and Mr.Ratanlal Sharma. The eighth defendant Mr.Ratanlal Sharma is their younger brother. Subsequent to the execution of the above said sale deeds, Mr.Bansilal Sharma, Mr.Ramlal Sharma and Mr.Ratanlal Sharma became the absolute co-owners of the properties described in the suit schedule A & B and each became entitled to an undivided 1/3rd share.

1.4. Mr.Ramlal Sharma had expired on 22.07.1977 leaving behind him his widow Mrs.Sumathi Devi, who is the first plaintiff herein (since deceased), his sons Mr.Suresh Kumar Sharma, who is the second plaintiff and Mr.Inderchand Sharma, who is the third plaintiff herein and Mr.Prakashchand Sharma, who is the 9th defendant herein as

1.5. During the pendency of the suit, the first plaintiff had passed away and therefore in view of the Order dated 26.07.2010 and made in Application No.3932 of 2010, the plaintiffs 2 and 3 and the 9th defendant have been recorded as the legal heirs of the deceased first plaintiff.

1.6. Mr.Bansilal Sharma, who is the elder brother of Mr.Ramlal Sharma and Mr.Ratanlal Sharma had expired on 06.12.1995, leaving behind him, his widow Mrs.Basanthi Bai, who is the first defendant herein and the defendants 2 to 7 viz., Mr.Ganeswarlal Sharma, Mr.Chandrapal Sharma, Mr.Mahendrakumar Sharma, Mrs.Nirmala Devi, Mrs.Manju Devi and Mrs.Santhosh Devi as his legal heirs.

1.7. After the demise of Mr.Ramlal Sharma on 22.07.1977, the plaintiffs and the 9th defendant became entitled to his 1/3rd share in the properties described in the suit schedule A & B. Similarly, subsequent to the demise of Mr.Bansilal Sharma on 06.12.1995, the defendants 1 to 7 became entitled to his 1/3rd share in the properties described in the suit schedule A & B. The 8th defendant, being their younger brother, is entitled to an undivided 1/3rd share in the properties described in the suit schedule A & B.

1.8. The first plaintiff was residing in the fourth floor along with the second plaintiff. The third plaintiff has been residing in the fifth floor. The ground floor,

first floor and second floor have been occupied by the defendants, while there are few tenants in the third floor. The tenants in the second and third floors are residential in nature. The defendants 1 to 8 are collecting the substantial rents from the tenants in the building and have been unauthorisedly misappropriating the entire amount collected from each tenant, without even paying a single rupee to the plaintiffs and the 9th defendant.

1.9. The plaintiffs have computed the rental income derived at Rs.50,000/- per month tentatively. The plaintiffs are also entitled to mesne profits from the rents received from the said properties from 22.07.1977, which is the date of death of Mr.Ramlal Sharma.

1.10. The plaintiffs and their brother, 9th defendant would be entitled for a sum of Rs.21,333.33 altogether, while each of the plaintiff herein would be entitled to a sum of Rs.5,333.33 per month.

1.11. After taking into account of the expenses that are involved in the maintenance of the premises, provision of amenities etc., each of the plaintiffs should be entitled to atleast a sum of Rs.4,000/- per month, while the defendants 1 to 8 are liable to pay the plaintiffs for a period of three years preceding the suit.

plaintiffs undertake to pay necessary Court fee for this claim. Besides this, the plaintiffs are also entitled to get future mesne profits at the rate, which may be determined by this Court.

1.13. Subsequent to the demise of Mr.Bansilal Sharma on 06.12.1995, the plaintiffs and the 9th defendant had requested the defendants 1 to 8 to partition the suit property and hand over the separate possession of their shares and also their shares in the rents and income derived from the property from 22.07.1977 onwards. But, they have not done so.

1.14. The 9th defendant had already filed a suit in C.S.No.1460 of 1993 seeking the relief of partition of the properties described in the suit schedule A & B and for declaring that he is entitled to 1/12th share and other reliefs. That suit was decreed exparte on 30.01.2004 and the defendants 1 to 8 have not so far complied with the above decree. Hence, this suit.

1.15. The defendants 1, 5 to 8 remained exparte. The defendants 2, 3 and 4 alone have contested the suit by filing their respective written statement.

1.16. The second defendant, in his written statement, has contended that he admits the suit for partition subject to allotment of 1/4th share of the plaint schedule properties for all the defendants viz., D1 to D7. It is

for him to have his share along with the defendants 1 to 7.

1.17. The plaintiffs and the 9th defendant are jointly entitled to 1/4th share and the 8th defendant alone is entitled to 1/4th share in the plaint schedule properties.

1.18. He has also contended that he has been away from the family group for a longer period of 25 years and had not received any benefit from the suit property in any manner and hence he need not pay any amount to the plaintiffs and the 9th defendant as claimed by them in the suit. At the time of partition, his claim in respect of such benefit has to be ascertained and awarded.

1.19. The earlier suit filed by the 9th defendant in C.S.No.1460 of 1993 for partition is bad in law in all respects as the defendants 1 to 7 were not brought on record as the legal heirs, since it was decreed on 30.01.2004 after the demise of Mr.Bansilal Sharma. The decree in the above said suit obtained by the 9th defendant is nullity for non-joinder and mis-joinder of proper parties and partial partition.

1.20. The 8th defendant is the accounting party and he is liable to render true and proper accounts of the management. Incase the property is indivisible, it can be sold in auction and the sale proceedings be divided among the parties in the suit.

concerned are in the arena of parties to this suit and if all the parties for partition among the suit properties are fully brought out in the schedule, he would submit for preliminary decree for partition.

1.22. The third defendant in his written statement has contended that the suit is not maintainable as it has been hit by Section 11 of the Code of Civil Procedure, in view of the exparte decree passed by this Court in C.S.No.1460 of 1993, which was filed by the 9th defendant. He does not collect any rental amount much less Rs.50,000/- per mensem along with the defendants 1, 2, 4 and 8. He has been residing outside the property, whereas all the other defendants are residing together and they are having common kitchen and living as joint family and therefore he has got nothing to do with the income of the property.

1.23. The 8th defendant is the paternal uncle and he is also the Kartha of the family. He has been maintaining the entire joint family. The plaintiffs are not entitled for mesne profits from the year 1977. The joint family still continues and it has not been severed.

1.24. Since he has been living and carrying on business out side of the suit property, the question of his harassment does not arise.

1.25. The property is found to be indivisible and hence he is entitled to purchase the share which may be

allotted to the plaintiffs by this Court as per the provisions of the Partition Act.

1.26. The plaintiffs had never requested for effecting partition. The plaintiffs were also parties in the suit in C.S.No.1460 of 1993, which was decreed earlier and therefore the plaintiffs could have very well filed an application seeking for a final decree. Without filing the application for passing final decree, the present suit by way of another ground litigation is nothing, but an abuse of process of Court.

1.27. The 4th defendant has adopted the written statement of the third defendant.

1.28. The 9th defendant has not filed his written statement as he has been sailing along with the plaintiffs.

2. Based on the averments of the plaintiff as well as the written statement filed by the defendants 2, 3 and 4 and on the material proposition of fact, the following issues have been framed for the better adjudication of the suit:

- 1. Are not the plaintiffs entitled for a declaration that they are entitled to 1/3rd share in the 1/3rd share of their late father Ramlal Sharma in the suit schedule properties?*

2. Are not the plaintiffs entitled to a decree for partition by metes and bounds in respect of the suit schedule properties?
3. Are not the plaintiffs entitled for a decree for permanent injunction against the defendants 1 to 8, from in any manner interfering with plaintiffs' peaceful possession of the suit schedule properties?
4. Are not the plaintiffs entitled for recovery of Rs.4,32,000/- from the defendants 1 to 8 towards mesne profits in respect of the suit schedule properties?
5. Are not the plaintiffs entitled for future mesne profits in respect of the suit schedule properties?

3. Based on the written statement filed by the defendants 2 and 3, the following additional issues have also been framed:

1. Whether the suit is barred by res judicata?
2. Whether the defendants 3 and 4 are liable to pay mesne profits?

4. Heard Mr.B.Balachandran, learned counsel appearing

for M/s.Menon and Gokalaney, learned counsel, who is on
<https://hcservices.ecourts.gov.in/hcservices/>

record for the plaintiffs, Mr.P.Gururamachandran, learned counsel for the 2nd defendant and Mr.M.L.Ramesh, learned counsel for the defendants 3 and 4.

5. This Court has perused the averments of the plaint as well as the written statement and also made meticulous analysis on the testimony of P.W.1 as well as the documentary evidences ranging from Exs.P1 to P6. Since the third defendant has contended that the present suit is hit by the doctrine of resjudicata, the additional issue No.1 assumes importance and therefore this Court finds that it may be better to settle this issue at first.

Additional Issue No.1:

6. Ex.P6 is the exparte decree passed by this Court on 30.01.2004 and made in C.S.No.1460 of 1993, which appears to have been filed by the 9th defendant herein seeking the relief of declaration to declare that he is entitled to 1/12th share in the suit property.

7. The first defendant therein is one Mr.Bansilal Sharma. He is none other than the husband of the first defendant and father of the defendants 2 to 7 herein.

8. The second defendant in the above suit viz., C.S.No.1460 of 1993 is one Mr.Rathanlal Sharma and he has been arrayed as 8th defendant in the present suit and the defendants 3 to 5 therein are the wife and other sons of

9. Exs.P4 and P5, legal heir certificates, would go to establish the relationship of the parties to the suit.

10. Admittedly, the defendants 1 to 5 and 7 are not parties to the suit in C.S.No.1460 of 1993, because at the time of filing of the suit the husband of the first defendant and the father of the defendants 2 to 7 Mr.Bansilal Sharma was alive. Therefore, the question of their impleadment in the previous suit did not arise.

11. Apparently, the defendants in the previous suit viz., C.S.No.1460 of 1993 did not contest the suit and allowed the same to be decreed exparte on 30.01.2004.

12. As argued by Mr.M.L.Ramesh, learned counsel appearing for the defendants 3 and 4 that even after passing of an exparte preliminary decree in the previous suit in C.S.No.1460 of 1993, the parties to that suit did not file an application to set aside the exparte decree, which was passed against them or even not preferred any appeal.

13. It is also more relevant to note here that the plaintiff in that suit, who is the 9th defendant in the present suit has also not chosen to file any application to pass a final decree based on the exparte decree. Now it remains as it is and it is still in force.

14. In this connection, Mr.M.L.Ramesh, learned

though it is termed as exparte decree, it has become final and as such the present suit for passing yet another preliminary decree is not maintainable.

15. Mr.Bansilal Sharma, Mr.Ramlal Sharma and Mr.Rathanlal Sharma are brothers. They had jointly purchased the suit properties under two separate registered sale deeds dated 24.02.1975 and 30.04.1975, which have been marked as Exs.P1 and P2 respectively.

16. Mr.Ramlal Sharma had passed away at Chennai on 22.07.1977, leaving behind the plaintiffs and the 9th defendant as his legal heirs (Ex.P5 is the legal heirship certificate).

17. Mr.Bansilal Sharma had passed away on 06.12.1995, leaving behind the defendants 1 to 7 as his legal heirs (Ex.P4 is the legal heirship certificate).

18. The first defendant, being the wife of Mr.Ramlal Sharma is no more. Hence, the plaintiffs 2 and 3 as well as the 9th defendant have been recognized as her legal heirs. This suit is filed by the plaintiffs seeking the relief of 1/3rd share in the 1/3rd share of Mr.Ramlal Sharma in the properties described in the plaint schedule.

19. There is no dispute with regard to the properties as well as the allotment of shares. As observed herein above, the defendants 1, 5 to 8 have not contested the suit. The defendants 2, 3 and 4 have mainly projected

their contention that the suit is hit by the doctrine of resjudicata as contemplated under Section 11 of the Code of Civil Procedure in view of the exparte decree dated 30.01.2004 and made in the suit in C.S.No.1460 of 1993, which was filed by the 9th defendant herein on the file of this Court.

20. Therefore, the whole case is revolving around the additional issue No.1 relating to the bar of the suit under Section 11 of the Code of Civil Procedure.

21. Another question was also raised by Mr.M.L.Ramesh, the learned counsel appearing for the defendants 3 and 4, during the course of his argument with regard to the maintainability of the instant suit claiming second preliminary decree when earlier preliminary decree was passed in the suit in C.S.No.1460 of 1993.

22. Having regard to this fact, this Court is of view that the other remaining issues have become pale into insignificance.

23. Prior to go into the additional issue No.1 in detail, this Court finds that it may be more relevant to place it on record the contention of the 2nd defendant made in his written statement. It reads as under:

*"The earlier suit filed by the 9th
defendant in C.S.No.1460 of 1993 for*

as the defendants 1 to 7 were not brought on record as the legal heirs, since it was decreed on 30.01.2004 after the demise of Mr.Bansilal Sharma. The decree in the above said suit obtained by the 9th defendant is nullity for non-joinder and mis-joinder of proper parties and partial partition."

24. From the above context, it is thus made clear that according to the 2nd defendant, exparte decree dated 30.01.2004 and made in C.S.No.1460 of 1993 is nullity for non-joinder and mis-joinder of proper parties and also for partial partition. When such is the stand taken by the second defendant, an important question is arisen as to why there shall not be another preliminary decree to define the respective shares of the parties after the demise of Mr.Bansilal Sharma.

25. It is pertinent to note here that the defendants 2 and 3 alone have participated in the cross-examination of P.W.1. Thereafter, they did not choose to produce any sort of evidence either in oral or in documentary on their side and hence their side was closed.

26. Mr.B.Balachandran, learned counsel appearing for

for the plaintiffs has advanced his arguments saying that 'In a partition suit, when a preliminary decree has not attained finality, the subsequent suit for passing another preliminary decree due to change of circumstance is not barred by resjudicata'.

27. The learned counsel has also canvassed that the previous suit in C.S.No.1460 of 1993 was not heard and disposed of finally and an exparte decree alone was passed on 30.01.2004. He has also made reference during the course of his arguments to the written statement of the second defendant saying that after the demise of Mr.Bansilal Sharma, his legal heirs were not brought on record by the plaintiff therein, who is the 9th defendant herein and in the present suit the legal heirs of the said Bansilal Sharma have been impleaded as defendants 1 to 7 and the respective shares of all the parties have to be redefined and hence on account of subsequent changes in the circumstance, it has become imperative on the part of the plaintiffs to file this suit seeking the relief of partition and therefore passing of yet another preliminary decree could not be termed as barred by resjudicata as contemplated under Section 11 of the Code of Civil Procedure.

28. In support of his contention, he has placed

and another vs. Chakiri Yanadi and another, reported in **2012 (1) CLT 284**. The facts of the above quoted decision need not be reiterated herein.

29. In the above cited case, His Lordship the Hon'ble **Mr. JUSTICE R.M. LODHA**, while speaking on behalf of the Division Bench of the Hon'ble Supreme Court of India, has observed in paragraph Nos.16 and 17 as follows:

"16. The legal position is settled that partition of a Joint Hindu family can be effected by various modes, inter-alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the present case, admittedly, the partition has not been effected before December 20, 2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition filed by the respondent no.1 is the determination of shares vide preliminary decree dated March 19, 1999 which came to be amended on September 27, 2003 and the receipt of the report of the Commissioner.

17. A preliminary decree determines the

rights and interests of the parties. The suit for

partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation. We are fortified in our view by a Three Judge Bench decision of this Court in the case of **Phoolchand and Anr. Vs. Gopal Lal** [AIR 1967 SC

1470] wherein this Court stated as follows:

"We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when

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parties die and shares of other parties are thereby augmented. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. . . for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree..... ."

30. Having given careful consideration to the above quoted decision, this Court is of view that the above legal position is wholly and squarely applicable to the instant case on hand.

31. Apart from this, His Lordship the Hon'ble **Mr. JUSTICE R.M.LODHA** has also highlighted the proposition of law in regard to the passing of another preliminary decree in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree as under:

"It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree."

32. The above proposition of law has also been envisaged in **Abdul Kareem Sab vs. Gowlivada S. Silar Saheb and another**, reported in **AIR 1957 AP 40 (V 44 C 19 Mar.)**

(1). In this case, the learned single Judge of the Andhra Pradesh High Court has observed as follows:

"When a preliminary decree declaring a right to partition or the shares of the parties, has not been given effect to by the parties proceeding to partition in accordance with it and the property continues to be jointly held by the co-sharers, their right to partition continues. So long as they continue to be interested in the joint property as co-sharers, it is competent for them to bring a suit for declaration of their right and for partition in case their right to partition is denied or challenged. Such a suit is not barred by res judicata."

33. The non-application of the doctrine of resjudicata as contemplated under Section 11 of the Code of Civil Procedure has more been defined by the Hon'ble Supreme Court of India in an another decision in **Santan Narain Tewari vs. Saran Narain Tewari and others**, reported in **AIR**

1959 Patna 331 (Vol.46, C.89) as under:

"A co-sharer has got a right to seek fresh partition if for some reason the previous decree for partition becomes unenforceable so that there has not been actually breaking up of the title and possession of the co-sharer by actual delivery to each of them of the specific portion of the joint property allotted to him by that decree. This principle follows from the fundamental concept of joint ownership and possession giving each joint owner a right to transfer from this joint ownership and possession into several and independent ownership and possession, but this transformation cannot in the eye of law be held to have been brought about unless and until the entire process of transformation starting from the ascertainment of the share of each joint owner, and ending in the actual delivery to him of the property given to him forming his share of the joint

property, has been gone through; no long as this does not take place, the title and possession of all the co-sharers continues to be joint. It is only when the last stage has been completed that each owner ceases to be a co-sharer with the other. The matter, of course, might be different if in a particular case the facts proved show that the person seeking fresh partition is guilty of any conduct amounting to fraud on his co-sharers or on the court, preventing directly or indirectly thereby the completion of the previous partition suit by actual delivery of the properties allotted to each co-share by the previous decree. Where the parties treated the previous decree to be infructuous and continued to remain in possession as co-sharers of the properties as before, a fresh suit for partition is not barred."

34. On coming to the instant case on hand, it is obvious to note here that the defendants 1 to 7 were not parties to the earlier suit in C.S.No.1460 of 1993. It is also pertinent to note here that their respective shares have not been finally carved out and determined in the earlier suit and their interest over the property as the co-sharers and their respective shares are yet to be adjudicated in the instant suit. Therefore, the proposition that so long as a certain interest has not been adjudicated upon in a partition suit, the fact that it might conceivably have been adjudicated upon in that suit will never bar a subsequent suit. This view has been fortified by the decision in **N.Venkatarama Iyer vs. Abdul Karim alias Nurpasha and others**, reported in 1964 MLJ 268.

35. In **Fida Hussain and others vs. Moradabad Development Authority and another**, reported in CDJ 2011 SC 687, it has also been held that:

"With regard to the contention that the decision of the Court in the case of Gafardid not operate as resjudicata for the present batch of cases, we are of the view that the principles of resjudicata would apply only when the lis was inter-parties and had attained

finality of the issues involved. The said principles will, however, have no application inter alia in a case where the Judgment and/or order had been passed by a Court having no jurisdiction thereof and/or involving a pure question of law. The principle of res judicata will, therefore, have no application in the facts of the present case."

36. On the other hand, Mr.M.L.Ramesh, learned counsel appearing for the defendants 3 and 4 has fairly conceded while advancing his arguments saying that the defendants 3 and 4 have not disputed the rights of the plaintiffs and that their claim of share has also not been disputed by them. What he would argue is that this is the second suit for partition for the very same properties and that the parties are also one and the same and that an exparte decree dated 30.01.2004 in the suit in C.S.No.1460 of 1993 filed by the 9th defendant was passed earlier. He has also argued that in the cause of action paragraph, there is no reference about the previous suit in C.S.No.1460 of 1993.

37. He has also maintained that when already a preliminary decree in C.S.No.1460 of 1993 was passed

exparte, the present suit for another preliminary decree is not maintainable as it is hit by Section 11 of the Code of Civil Procedure. This argument advanced by the learned counsel Mr.M.L.Ramesh is not discernible.

38. His reliance on ***Dr.S.Jayakumar and another vs. K.Kandasamy Gounder***, reported in ***CDJ 2005 MHC 1050*** is also not made applicable to the instant case on hand. The case of law, which has been relied upon by Mr.M.L.Ramesh, learned counsel appearing for the defendants 3 and 4 is mainly based on Order IX Rule 9 and Order XXIII Rule 1(4) C.P.C., While pronouncing Judgment, the learned single Judge of this Court has observed that:

"One of the most abuse of process of Court is re-litigation. Re-litigation is an abuse of process of Court and contrary to justice and public policy. When the party re-agitates the same subject matter on the same cause of action, the same may or may not be barred by resjudicata; but if the same subject matter is sought to be reagitated, it amounts to abuse of process of the Court. Such tendency of filing frivolous or vexatious suits are

to be curbed by strong Judicial Hand especially where the proceedings are culmination of several rounds of litigation. In exercising the power of superintendence the High Court has the power to stop summarily to prevent the time of the Public and Court being wasted....."

39. The facts and circumstances of the instant case on hand is apparently different and distinct from the facts and circumstances narrated in the decision in **Dr.S.Jayakumar and another vs. K.Kandasamy Gounder**, reported in **CDJ 2005 MHC 1050** and hence the above cited decision cannot be equated with the instant case on hand.

40. On the other hand, the decisions in **P.Paul James alias Paulus vs. P.Jesudas Cyril and others**, reported in **1996 1 MLJ 376** and **Baliah Nadar and another vs. Rayappan and others**, reported in **1991 (1) MLJ 60**, which are relied upon by Mr.B.Balachender, learned counsel appearing for the plaintiffs are made applicable to the present case.

41. Admittedly, the defendants 1 to 7 were not impleaded as parties to the earlier suit in C.S.No.1460 of 1993. During the pendency of the suit, Mr.Bansilal Sharma,

who is the husband of the first defendant herein and the father of the defendants 2 to 7 had passed away on 06.12.1995. Even after passing of Mr.Bansilal Sharma, his legal heirs viz., the defendants 1 to 7 had not been impleaded in the above said suit.

42. It may be appropriate to reiterate that the earlier suit in C.S.No.1460 of 1993 filed by the 9th defendant herein was admittedly decreed exparte on 30.01.2004.

43. The shares of the parties have not been declared and determined in the earlier suit. On the death of Mr.Bansilal Sharma his share has now been devolved on the defendants 1 to 7. In order to make more clarity on this context, this Court places reliance upon the decision in **Hanumantappa Dyamappa Jadar vs. Mallavva and others**, reported in **AIR 1996 Karnataka 183**, wherein it has been held that nothing in the Code of Civil Procedure, which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree parties die and shares of other parties are thereby augmented.

44. Even though an exparte preliminary decree was passed in the earlier suit, admittedly the partition has not been actually effected between the parties. As rightly

observed in the decisions referred to supra, a preliminary decree determines the rights and interest of the parties. The suit for partition is not disposed of by passing of the preliminary decree. But, it is a final decree that the immovable property of Hindu joint family is partitioned by metes and bounds. After passing of the preliminary decree, the suit continues until the final decree is passed. The events and supervening circumstances which occur subsequent to passing of the preliminary decree necessitating changes in the shares and there is no impediment for the Court for amending the preliminary decree or pass another preliminary decree redetermining the rights and interest of the parties having regard to the changed situation.

45. Under this circumstance, this Court finds that the instant suit on hand is not barred by the doctrine of resjudicata under Section 11 of the Code of Civil Procedure.

46. Similarly, the question of limitation also does not arise as the proceedings after passing of preliminary decree are continued for the purpose of actually effecting a partition and hence a final decree for partition by metes and bounds may be passed. Hence, the question of limitation governed by Article 181 of the Limitation Act does not arise.

for filing a final decree application and any number of final decree applications could be filed until the suit is finally disposed of; and by mere passing of preliminary decree the suit is not disposed of. The application for the passing of a final decree in a suit for partition is not an execution application. This principle is laid down in ***Murugan vs. Chidambaram Pillai and others***, reported in ***AIR 1991 Madras 307***.

48. The additional issue No.1 is accordingly answered in favour of the plaintiffs.

Issue Nos.1 and 2:

49. As discussed herein above, the defendants 1, 5 to 8 have not contested the suit and remained exparte. The contesting defendants 2 to 4 have not disputed the claim of the plaintiffs. Their only contention is that this suit for passing second preliminary decree has been barred by doctrine of resjudicata under Section 11 of the Code of Civil Procedure. This contention has been negated by this Court in the additional issue No.1 herein above.

50. Keeping in view of the discussions made in the additional issue No.1, this Court finds that the plaintiffs are entitled for a declaration that they are entitled to $1/3^{\text{rd}}$ share in the $1/3^{\text{rd}}$ share of Mr.Ramlal Sharma in the suit schedule properties. Further, it is determined that

metes and bounds in respect of the suit schedule properties.

Issue Nos.4 and 5 and additional issue No.2:

51. The plaintiffs have contended that in their plaint saying that the first plaintiff was residing in the fourth floor along with the second plaintiff. The third plaintiff has been residing in the fifth floor. The ground floor, first floor and second floor have been occupied by the defendants while there are few tenants in the third floor. The tenants in the second and third floors are residential in nature. The defendants 1 to 8 have been collecting substantial rents from the tenants in the building and have been unauthorisedly misappropriating the entire amount collected from each tenant, without even paying a single rupee to the plaintiffs and the 9th defendant.

52. The plaintiffs have also computed the rental income derived at Rs.50,000/- per month tentatively and hence they claimed that they are entitled to mesne profits from the rents received from the said properties from 22.07.1977 i.e. from the date of death of Mr. Ramlal Sharma. They have also claimed that they along with the 9th defendant are entitled for a sum of Rs.21,333.33 altogether while each of the plaintiff would be entitled to a sum of Rs.5,333.33 per month.

53. They have also claimed that after taking into

<https://hcservices.ecourts.gov.in/hcservices/> account of the expenses that are involved in the

maintenance of the premises, provision of amenities etc., each of the plaintiff is entitled to atleast a sum of Rs.4,000/- per month, while the defendants 1 to 8 are liable to pay the plaintiffs for a period of three years preceding the suit and that the amount payable by the defendants towards mesne profits have been calculated at Rs.4,24,000/-.

54. On the other hand, Mr.M.L.Ramesh, learned counsel has contended that the 2nd defendant has been away from the family group for a longer period of 25 years and hence he had not received any benefit from the suit property in any manner and hence he need not pay any amount to the plaintiffs.

55. He has also added that the 3rd defendant did not collect any rent much less Rs.50,000/- per month along with defendants 1, 2, 4 and 8 and that he has been residing outside the property, whereas all the other defendants have been residing together and they having common kitchen and living as joint family and therefore the 3rd defendant has nothing to do with the income of the property.

56. He would further submit that the 8th defendant being the paternal uncle and the kartha of the family alone has been maintaining the entire joint family. He would submit further that the plaintiffs are not at all entitled

still continues and has not been severed.

57. It is pertinent to note here that the plaintiffs have not come with definite claim in respect of the rental income said to have been derived from the joint family property. Though they have stated that the defendants have been collecting Rs.50,000/- per month, they have miserably failed to give the fraction account to that effect.

58. It is pertinent to note here that the plaintiffs have also stated that the claim of Rs.50,000/- towards rental income is merely tentative. In his cross-examination, P.W.1 has admitted that the 8th defendant has been dealing with the entire property and that the defendants 2 and 6 have been residing out side the property and as such they are not collecting the rents.

59. Since P.W.1 himself has admitted that the defendants 2 and 5 are not collecting the rents as they have been residing out side the property, this Court finds that they are not entitled to give mesne profits.

60. Under this circumstance, this Court determines that the plaintiffs are entitled for recovery of mesne profits in respect of the suit schedule properties both past and future. But, it cannot be ascertained that the plaintiffs are entitled for recovery of Rs.4,32,000/- from the defendants 1 to 8 towards mesne profits. Therefore,

for the purpose of determining exact mesne profits, derived from the property altogether and the exact amount which could be claimed by the plaintiffs under Order XX Rule 12 (c) C.P.C.,

61. The plaintiffs, besides the relief of partition and their separate possession of 1/3rd share in the 1/3rd share of their father Late.Ramlal Sharma in the suit schedule properties, have also sought the relief of permanent injunction against the defendants 1 to 8, from in any manner interfering with their peaceful possession of the suit schedule properties.

62. At the outset, this Court would like to place it on record that no adequate evidence is forthcoming on the part of the plaintiffs to substantiate their claim of permanent injunction. Insofar as the relief of permanent injunction is concerned, this Court is of considered view that the plaintiffs have not made out any prima facie materials.

63. It is revealed from the averments of the plaint as well as from the proof affidavit of P.W.1 that the 2nd and 3rd plaintiffs' mother, who is the first plaintiff herein (since deceased), while she was alive, was residing in the fourth floor along with P.W.1 till her demise, while the third plaintiff has been residing in the fifth floor. The

the defendants and few tenants are in the occupation of third floor. The tenants in the ground floor and first floor are non-residential tenants while the tenants in the second and third floor are residential in nature.

64. When the matter stood thus, the plaintiffs have contended that the 8th defendant along with the defendants 3 and 4 were attempting to harass the plaintiffs as well as the 9th defendant for the reasons best known to them. The have also contended that on 15.12.1991 the defendants viz.D3, D4 and D8 had assaulted the 9th defendant in front of several residents of the building. Excepting this, there is no other source of information saying that the defendants had been interfering with the peaceful possession and enjoyment of the suit schedule properties, which are in the occupation of the plaintiffs.

65. In the absence of the prima facie material to indicate that the plaintiffs have made out a case for the granting the relief of permanent injunction, it cannot be heard to say that the plaintiffs are entitled to the relief of permanent injunction. Accordingly, the issue No.3 is answered as against the plaintiffs.

66. Apparently, the defendants have not chosen to lead any oral evidence on their part and they have also not chosen to produce any documentary evidence in support of

67. Under this circumstance, this Court has carefully appreciated the testimony of P.W.1 as well as the documentary evidences ranging from Exs.P1 to P6 and after giving careful consideration, this Court finds that notwithstanding earlier preliminary decree, which was passed exparte in the suit in C.S.No.1460 of 1993 filed by the 9th defendant, the plaintiffs are entitled to get 1/3rd share in the 1/3rd share of their father Late.Ramlal Sharma in the properties described in the suit schedule-A and B. This Court also finds that the plaintiffs are not entitled for the relief of permanent injunction.

68. Accordingly, a preliminary decree after finding that the plaintiffs are entitled to 1/3rd share in the 1/3rd share of their father Late.Ramlal Sharma in the property described in the suit schedule-A and B is passed.

69. Accordingly, a preliminary decree is passed defining the shares of the plaintiffs 2 and 3. Each plaintiff is entitled to get 1/3rd share in the 1/3rd share of their father Late.Ramlal Sharma in the properties described in the suit schedule A and B. Similarly, the second defendant is entitled to get 1/21th share in the 1/3rd share of his father Late.Bansilal Sharma in the properties described in the suit schedule A and B. The second defendant has separately paid the Court fee of Rs.500/-.

this Court to place it on record that the second defendant has claimed in his written statement that he has been away from the family group for a longer period of 25 years and had not received any benefit from the suit properties in any manner. It shows that he has not been in joint possession of the suit property and therefore Registry is directed to verify as to whether the Court fee paid by the second defendant separately along with the written statement is correct or not.

71. With regard to the claim of mesne profits both past and future, this Court directs an enquiry for the purpose of determining exact mesne profits derived from the properties altogether and the exact amount which may be entitled by the plaintiffs under Order XX Rule 12 clause (ba) & (c) C.P.C., Considering the nature of relationship of the parties, the parties are directed to incur their respective costs.

Sd/- T.M.J
22.06.2012

//Certified to be a true copy//
Dated this the day of 2012.

R.S/18.10.2012

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.