

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.10.2019

PRONOUNCED ON: 11.11.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

A.S.No.58 of 2011

1. M.Jayalakshmi [Deceased]
2. K.M.Manoharan
3. K.M.Rajendran
4. C.Kasturi
5. S.Vimala
6. D.Kanthimathi
7. J.Gomala

[First appellant died. Appellants 2 to 7 and Respondents 2 to 7 are the LRs of the deceased first appellant as per the memo dated 16.08.2019, (SR.No.24066) and vide Court order dated 05.09.2019] ... Appellants

Vs.

1. Loganayaki
2. K.Sreedhar
3. K.Uma
4. K.Jaganraj
5. B.Valarmathi
6. Minor. Girija @ Kalaivani
7. Minor. Hemalatha
8. R.Gopal

[Minors R6 & R7 are represented by Guardian next friend Father R.Gopal (8th respondent herein)
[RR6 and R7 declared as Major and discharged the guardian R8. Memo recorded vide order of Court dated 30.09.2019]

... Respondents

Prayer:

First Appeal filed under Section 96 of C.P.C., against the judgment and Decree made in O.S.No.12 of 2005 on the file of the Additional District and Sessions Judge, (Fast Track Court), Tirupathur, Vellore District, dated 06.09.2010.

For Appellants : Mr.K.A.Ravindran

For RR1 to R4 : Mr.K.Govindan

For RR5 to R8 :Set exparte vide order dated 16.10.2019.

J U D G M E N T

Aggrieved over the judgment and Decree dated 06.09.2010 passed in O.S.No.12 of 2005 on the file of the Additional District and Sessions Judge, (Fast Track Court), Tirupathur, Vellore District, the defendants 1 to 6 and 8th defendant had filed the present First Appeal.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. Suit for partition and mense profits.

4. The case of the plaintiffs in brief is that the suit properties comprised in item Nos.1 to 11 and 13 belonged to Murugesu Mudaliar ancestrally as well as by way of purchase. Murugesu Mudaliar died intestate during 1982. After his demise, the properties left behind him were enjoyed by his legal heirs and the first plaintiff is the wife of the deceased K.M.Kuppusamy and the plaintiffs 2 to 4 are the children of the deceased K.M.Kuppusamy. K.M.Kuppusamy is the son of the deceased Murugesu Mudaliar. K.M.Kuppusamy died on 07.11.1993. The deceased Kanchana is the daughter of the deceased Murugesu Mudaliar and she died leaving behind her daughters namely the defendants 9 and 10 and the 11th defendant is her husband. K.M.Kuppusamy had been suffering from ill-health for a considerable period of time and thereafter lost his consciousness and died on 07.11.1993. After his demise, inasmuch as the plaintiffs were unable to enjoy the properties left behind by Murugesu Mudaliar jointly along with the defendants, they demanded the partition and separate possession of their shares, however the defendants had been delaying the same and when the plaintiffs insisted for the allotment of their shares, it was represented by the defendants 1 to 3 that the properties had already been divided amongst the defendants 1 to 3 on 18.10.1993 and therefore there is no need for effecting another partition and thereafter the plaintiffs applied for the

copy of the partition deed dated 18.10.1993 and found that the abovesaid partition deed had been effected by the defendants 1 to 3 and K.M.Kuppusamy while he was not in a fit state of health and it is highly fraudulent. K.M.Kuppusamy had signed in the abovesaid partition deed. Furthermore, the other legal heirs of Murugesu Mudaliar had not been joined in the abovesaid partition deed. The abovesaid partition deed had been brought by taking advantage of the ill health of K.M.Kuppusamy and due to the compulsion exerted on him by the defendants 1 to 3 and therefore the plaintiffs are entitled to ignore the abovesaid partition deed. As per the partition deed dated 18.10.1993, the property lying in Kolar gold fields had been allotted to the share of K.M.Kuppusamy, however the abovesaid property had been acquired by the first plaintiff by selling the jewels offered to her as stridhana as well as by alienating the share given to her in her family and the house had been put up in the said property out of the income derived from K.M.Kuppusamy as well as by the sale of jewels belonging to the first plaintiff and suppressing the same, the abovesaid property had been included as the joint family property in the partition deed dated 18.10.1993 and the same had come to be allotted to the share of K.M.Kuppusamy. The other properties had been taken by the defendants 1 to 3. The defendants by exercising compulsion had obtained the signature of K.M.Kuppusamy when he was fighting for his health in the hospital and therefore the abovesaid partition is not binding upon the plaintiffs. Furthermore, K.M.Kuppusamy even during his life time had chosen to alienate the property said to have been allotted to him by entering into a sale agreement to third parties and also received an advance amount and therefore the case of the defendants that the abovesaid properties had been allotted to K.M.Kuppusamy is not true and further according to the plaintiffs, the item No.12 of the plaint schedule properties had been acquired out of the income derived from the joint family properties in the name of the third defendant and therefore item No.12 is also the joint family property and accordingly claiming 11/40 share in the suit properties, the suit has come to be laid by the plaintiffs for appropriate reliefs.

5. The second defendant has filed the written statement adopted by the defendants 1 and 3 to 8 and the defendants put forth the case that after admitting the relationship between the parties and the death of K.M.Kuppusamy on 07.11.1993 and also admitting that the suit properties excepting item No.12 belong to the deceased Murugesu Mudaliar and according to the defendants, item No.12 of the plaint schedule properties never belong to the family, but it belongs to one Thoppasamy and the third defendant is residing therein as a tenant. Further it is put forth that by way of a registered partition deed dated 18.10.1993, the family properties were

divided amongst K.M.Kuppusamy and the defendants 1 to 3 and it was duly executed voluntarily by K.M.Kuppusamy and registered when he was in full consciousness and in a good state of mind and therefore the abovesaid partition deed is true, valid and binding on the plaintiffs. The plaintiffs cannot ignore the same and seek the partition without setting aside the abovesaid partition deed. Hence the suit for partition laid by the plaintiffs is not legally maintainable. The plaintiffs had not paid the proper court fees. The deceased K.M.Kuppusamy was employed in Bharath Earth Movers at Kolar gold fields and left the job and returned to Ambur and residing in the family house during June 1989. The first plaintiff deserted him and she was residing at Gudiyatham with other plaintiffs and further she she did not return to her husband's home thereafter. The plaintiffs have filed a petition against the deceased Kuppusamy for maintenance in the court of the Judicial Magistrate, Gudiyatham, further the deceased K.M.Kuppusamy had filed petition for divorce against the first plaintiff on the file of the Civil Court, Vellore. There was no love lost between the first plaintiff and K.M.Kuppusamy since 1989. K.M.Kuppusamy has been residing at Ambur with the first defendant, the mother and he was suffering from ulcer and expressed his inability to manage the lands and hence, it was decided to effect partition and the defendants 4 to 8 were married and well settled in life, hence they stated that they did not want any share in the suit properties. The building in the site in Kolar Gold Fields purchased by K.M.Kuppusamy was constructed from and out of the income from the suit lands and he had thrown it in the family hotchpot and blended with the family properties. The deceased Kuppusamy represented that the abovesaid property alone be allotted to him and accordingly the partition deed dated 18.10.1993 was effected and the said partition deed is true, valid and binding on all the parties thereto. K.M.Kuppusamy subsequently died on 07.11.1993 due to heart attack. The other defendants had attested the partition deed. The daughters were married prior to 1998 and have no right or share in the coparcener's property. After the demise of Kuppusamy, the plaintiffs have sold 1/3rd portion of the site at Kolar Gold Fields to one Nayagam and others and remaining 2/3rd portion to one G.Mahalakshmi under a registered sale deed dated 12.09.1996 and they have stated in the abovesaid sale deed that the abovesaid property had been purchased and the house had been built by the deceased Kuppusamy. The allegation that the deceased Kuppusamy had received the advance for the sale of the property at Kolar Gold Fields is false. There is no cause of action for the suit and the suit is liable to be dismissed.

6. The defendants 9 to 11 have filed the written statement and put forth the case that they have no objection in allotting the share in the plaint schedule properties in favour

of the plaintiffs as prayed for and the defendants further putforth the case that their shares should also be partitioned and the possession to be delivered to them and accordingly prayed for the disposal of the plaintiffs' suit.

7. On the basis of the above pleas set out by the respective parties, the following issues were framed by the trial court for consideration:-

i. Whether the item 12 of the plaint schedule properties is the joint family property of the plaintiffs and the defendants as putforth by the plaintiffs?

ii. Whether the partition deed dated 18.10.1993 is true and valid?

iii. Whether the plaintiffs are correct in laying the suit for partition without settingaside the partition deed dated 18.10.1993?

iv. Whether the daughters of the deceased Murugesha Mudaliar are entitled to claim share in the plaint schedule properties?

v. Whether the suit property had been properly valued?

vi. Whether the plaintiffs are entitled to obtain the relief prayed for?

vii. Whether the defendants 9 and 10 are entitled to claim the share in the plaint schedule properties ?

viii. To what other reliefs?

8. In support of the plaintiffs' case, P.Ws.1 to 3 were examined. Exs.A1 to A7 were marked. On the side of the defendants, D.Ws.1 to 3 were marked. Exs.B1 to B16 were marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to declare that the plaintiffs are entitled to 11/40 share in the plaint schedule properties and relegated the determination of the mense profits by way of a separate proceeding and accordingly granted the preliminary decree in favour of the plaintiffs. Impugning the same, the defendants 1 to 6 and 8 had preferred the present First Appeal.

10. The following points arise for determination in the First Appeal:

i. Whether the partition deed dated 18.10.1993 is true and valid?

ii. Whether the plaintiffs are entitled to maintain the suit for partition without setting aside the partition deed dated 18.10.1993?

iii. Whether the item No.12 of the plaint schedule properties is the joint family property as putforth by the plaintiffs?

iv. Whether the plaintiffs are entitled to claim the partition and separate possession of 11/40 share in the plaint schedule properties as prayed for?

v. To what relief the plaintiffs are entitled to?

vi. To what relief the defendants/appellants are entitled to?

Point Nos.1 to 4:

11. The relationship between the parties is not in dispute. It is also admitted that the items 1 to 11 and 13 of the plaint schedule properties belonged to Murugesha Mudaliar ancestrally as well as by way of purchase. The first defendant is the wife of the deceased Murugesha Mudaliar and the defendants 2 and 3 and the deceased K.M.Kuppusamy are the sons and the defendants 4 to 8 and the deceased Kanchana are the daughters of the deceased Murugesha Mudaliar. The defendants 9 and 10 are the daughters and the 11th defendant is the husband of the deceased Kanchana. The first plaintiff is the wife and the plaintiffs 2 to 4 are the children of the deceased K.M.Kuppusamy. K.M.Kuppusamy died on 07.11.1993. It is also not in dispute that Murugesha Mudaliar had died during 1982 intestate.

12. Claiming that the plaint schedule properties are the joint family properties of the deceased Murugesha Mudaliar and accordingly the plaintiffs being the legal heir of his deceased son, according to the plaintiffs, they are entitled to claim share in the plaint schedule properties and inasmuch as, the defendants had refused to allot their share in the plaint schedule properties despite repeated demands, according to the plaintiffs, they had been necessitated to lay the suit for partition.

13. The defendants had mainly putforth the case that in respect of the properties left behind by the deceased Murugesha Mudaliar, the partition had already been effected on 18.10.1993 amongst the first defendant and the sons of the deceased Murugesha Mudaliar inclusive of the deceased K.M.Kuppusamy and therefore according to them, the plaintiffs are not entitled to claim another partition in respect of the properties which had already been divided, as above pointed out and further the defendants would also putforth the case that without setting aside the partition deed dated 18.10.1993, the plaintiffs are not entitled to maintain the partition suit

legally and further according to them the item No.12 of the plaint schedule properties does not belong to the family of Murugesha Mudaliar and accordingly sought for the dismissal of the plaintiffs' suit.

14. The defendants 9 and 10 plus the 11th defendant had supported the plaintiffs' case and also claimed the allotment of their lawful shares in the plaint schedule properties.

15. As regards the claim of the plaintiffs that the item No.12 of the plaint schedule properties is the joint family property belonging to the deceased Murugesha Mudaliar, the plaintiffs would only plead that the item No.12 had been acquired in the name of the third defendant out of the income derived from the ancestral properties. However, the abovesaid case of the plaintiffs had been challenged by the contesting defendants. Despite the same, the plaintiffs have not placed any material to show that the item No.12 of the plaint schedule properties had been acquired in the name of the third defendant or in the name of the members of the family of the deceased Murugesha Mudaliar. Furthermore, there is no material to hold that the item No.12 of the plaint schedule properties had been treated and enjoyed as the joint family property of the deceased Murugesha Mudaliar. In the light of the abovesaid factors, as rightly determined by the trial court, based on the oral testimony adduced on the plaintiffs, it cannot be inferred or held that the item No.12 of the plaint schedule properties is the joint family property of the deceased Murugesha Mudaliar and the same is also liable for partition. In the light of the abovesaid discussions, the determination of the trial court that the plaintiffs had failed to establish that the item No.12 of the plaint schedule properties is the joint family property of the deceased Murugesha Mudaliar does not warrant any interference.

16. The main defence put forth by the contesting defendants is that the properties left behind by the deceased Murugesha Mudaliar had been partitioned amongst the defendants 1 to 3 and the deceased K.M.Kuppusamy. The abovesaid partition had been marked as Ex.B1. On a perusal of Ex.B1 partition deed, it is found that the deceased K.M.Kuppusamy was a party to the same and accordingly it is found that he has also joined in the execution of the abovesaid partition deed. Though the plaintiffs would claim that the deceased K.M.Kuppusamy was not maintaining good health and the defendants 1 to 3 taking advantage of his illness and unfit state of mind had brought about the abovesaid partition deed, however with reference to the abovesaid case of the plaintiffs, there is no acceptable and reliable materials put forth by the plaintiffs. On the other

hand, considering the materials available on record, it is found that the plaintiffs and the deceased K.M.Kuppusamy had not been residing together since 1989 and it is thus found that K.M.Kuppusamy has been residing only with the defendants in the suit village. The materials available on record go to show that inasmuch as, the plaintiffs have been living separately, claiming maintenance from the deceased K.M.Kuppusamy, it is found that they have lodged the maintenance case against him in M.C.No.1 of 1993 on the file of the judicial Magistrate Court, Gudiyatham. The same could be gathered from the documents marked as Exs.B2 and B3. Furthermore, inasmuch as the marital life between the first plaintiff and the deceased K.M.Kuppusamy had become estranged, it is found that the deceased K.M.Kuppusamy sought for divorce from the first plaintiff and lodged the H.M.O.P.No.94 of 1993 on the file of the Subordinate Court, Vellore. The same could be gathered from the documents marked as Exs.B4 to B6. Therefore, when it is found that the deceased K.M.Kuppusamy had died on 07.11.1993 and when from 1989 onwards, the plaintiffs had not been maintaining smooth and cordial relationship with him and both the plaintiffs and the deceased K.M.Kuppusamy are found to be living separately since then, in such view of the matter and particularly, when the deceased K.M.Kuppusamy during 1993 had been living in the suit village along with the defendants 1 to 3, in such view of the matter, the claim of the plaintiffs that the defendants 1 to 3 had brought about Ex.B1 partition deed by taking advantage of the illness and the unfit state of mind of K.M.Kuppusamy, as such, cannot be believed and accepted.

17. From the materials available on record, it is found that the property in Kolar Gold Fields had been acquired only in the name of the deceased K.M.Kuppusamy. Therefore, when it is found that the deceased K.M.Kuppusamy though had acquired the property in his name at Kolar Gold Fields, had chosen to throw the same into the family hotchpot and blend the same with the joint family properties of the deceased Murugesha Mudaliar and accordingly chosen to effect the partition in respect of the joint family properties inclusive of the property at Kolar Gold Fields and when the deceased K.M.Kuppusamy is found to be a signatory to the abovesaid partition deed voluntarily and without any compulsion exercised on the part of the defendants, in such view of the matter, when the plaintiffs particularly, the first plaintiff has failed to establish that it was she who had acquired the property at Kolar Gold Fields out of her own assets as put forth in the plaint and as above pointed out, the property at Kolar Gold Fields admittedly stands only in the name of the deceased K.M.Kuppusamy, in all, it is found that when the deceased Kuppusamy along with other defendants had chosen to effect the partition of all the properties inclusive of the property at Kolar Gold Fields, he

had chosen to take only the property at Kolar Gold Fields and given the other properties belonging to the joint family to the defendants. In such view of the matter, particularly when the partition deed Ex.B1 had been not shown to be effected by exercising any compulsion on the deceased Kuppusamy or by taking advantage of his alleged illness as projected by the plaintiffs, in all, it is found that the case of the plaintiffs that the partition deed Ex.B1 has been brought about by the defendants by exercising compulsion and taking advantage of the illness of the deceased Kuppusamy, as such, cannot be believed and accepted and rightly disbelieved by the trial court. In such view of the matter, it is found that the partition deed Ex.B1 has been truly effected by all the parties who were associated thereto.

18. However, on a perusal of the partition deed Ex.B1, it is found that two daughters of the deceased Murugesha Mudaliar had not executed the same. When it is found that the deceased Murugesha Mudaliar had died during 1982 intestate, accordingly applying the provisions of law applicable at that point of time, it is found that as determined by the trial court, notional partition should have been effected in respect of the family properties belonging to the deceased Murugesha Mudaliar on his demise and so viewed, it is found that by way of the notional partition, the deceased Murugesha Mudaliar and his three sons would be each entitled to secure 1/4 share in the family properties and resultantly the deceased Murugesha Mudaliar having died intestate during 1982, as regards the 1/4 share in the family properties belonging to the deceased Murugesha Mudaliar, the same would devolve upon his legal heirs as per section 8 of the Hindu Succession Act and in such view of the matter, when the daughters of the deceased Murugesha Mudaliar would also be entitled to claim their shares out of the share allotted to the deceased Murugesha Mudaliar as above pointed out, in such view of the matter, when the 7th defendant and the deceased Kanchana, the daughters of the deceased Murugesha Mudaliar are not signatories to Ex.B1 partition deed, in such view of the matter, the abovesaid partition deed cannot be held to have been validly effected by including all the sharers as per law and in such view of the matter, the trial court is found to be justified in holding that the partition deed Ex.B1 has become void and unenforceable on account of not joining all the legal heirs of Murugesha Mudaliar and in such view of the matter, further rightly determined that the plaintiffs are not necessitated to seek for any cancellation of the abovesaid partition deed as such. The abovesaid determination of the trial court, accordingly do not warrant any interference.

19. Considering the fact that the plaintiffs as the legal heirs of the deceased Kuppusamy are also entitled to claim share in the joint family properties and the partition effected

by way of Ex.B1 deed could not be validly countenanced on account of the failure to include all the sharers to the same, as above pointed out, in such view of the matter, it is found that as regards the 1/4 share of the deceased Murugesas Mudaliar, inasmuch as, he had left behind his wife, three sons and six daughters, accordingly each sharer would be entitled to obtain 1/40 share out of 1/4 share to which the deceased Murugesas Mudaliar would be entitled in the family properties. In all, it is found that the trial court had rightly determined that the plaintiffs are entitled to obtain 11/40 share in the plaint schedule properties barring the item No.12 of the plaint schedule properties. Further the trial court is also found to be justified in declaring that the defendants 9 and 10 are entitled to partition and separate possession of 1/40 share in the abovesaid properties. The trial court is also found to be correct in directing the determination of the mense profits by way of a separate proceeding.

20. During the course of arguments, the counsel for the contesting defendants has putforth the argument/contention that the share allotted to the deceased K.M.Kuppusamy under Ex.B1 partition deed had been alienated by the plaintiffs and therefore the suit is bad for partial partition. However the defendants having not raised the plea of partial partition in the written statement, hence the abovesaid contention does not merit acceptance and therefore the claim of the defendants' counsel that the plaintiffs' suit is bad for partial partition cannot be countenanced in the absence of any plea to that effect and particularly, when the same had not been projected before the trial court and hence the abovesaid plea cannot be allowed to be raised by the defendants in the appellate court without any pleas and evidence pointing to the same.

21. The contention has also been putforth by the defendants' counsel that the partition of the joint family properties had already been effected under Ex.B1 deed and therefore the plaintiffs are not entitled to maintain any claim of fresh partition. Though Ex.B1 partition deed had been brought about by the defendants 1 to 3 and the deceased K.M.Kuppusamy, inasmuch as, all the sharers of the family properties had not been made as parties thereto and when admittedly two daughters had not executed the same, in such view of the matter, the conclusion arrived at by the trial court that the abovesaid partition deed would be rendered void and therefore the family properties are liable to be partitioned again as determined by it do not warrant any interference. Accordingly, as above pointed out, the trial court had rightly determined the quantum of share to which the plaintiffs are entitled to in the family properties.

22. In support of his contentions, the counsel for the defendants placed reliance upon the decisions reported in 2014 (1) CTC 188 [Karthik V.R.Thondaiman and another Vs. Rajagopala Thondaiman and others] and 2018 (1) MWN (Civil) 290 [R.Sudha Vs. Shanmugam and others]. The principles of law outlined in the above decisions are taken into consideration and followed as applicable to the case at hand.

23. In the light of the abovesaid discussions, I hold that though the partition deed dated 18.10.1993 is true, however, inasmuch as, all the sharers of the family properties had not executed the same as above pointed out, the abovesaid partition deed has been rendered void and unenforceable and therefore the family properties are liable to be partitioned again and in such view of the matter, the plaintiffs are not necessitated to seek for the cancellation of the abovesaid partition deed for claiming partition in respect of the family properties. I further hold that the plaintiffs had failed to establish the item No.12 of the plaint schedule properties is the joint family property. I further hold that the plaintiffs are entitled to claim partition and separate possession of 11/40 share in the plaint schedule properties barring item No.12. Accordingly, Point Nos.1 to 4 are answered.

Point Nos.5 and 6

24. For the reasons aforestated, the judgment and decree dated 06.09.2010 passed in O.S.No.12 of 2005 on the file of the Additional District and Sessions Judge, (Fast Track Court), Tirupathur, Vellore District are confirmed and resultantly, the First Appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar

// True Copy//

Sub Assistant Registrar

mfa

To

The Additional District and Sessions Judge,
Fast Track Court,
Tirupathur,
Vellore District.

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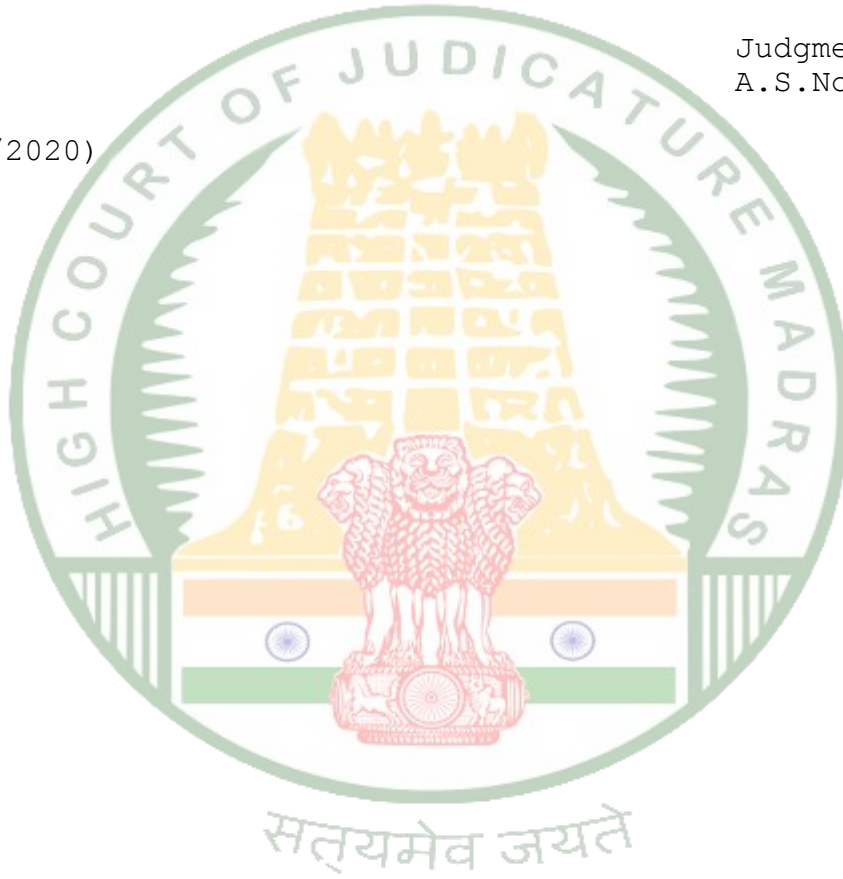
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KS (CO)
CSR(02/01/2020)

Judgment made in
A.S.No.58 of 2011



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