

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.11.2020

CORAM

THE HON'BLE MR. JUSTICE N. SATHISH KUMAR

C.S.No.288 of 2014
and A.Nos.1750 & 1751 of 2020
and 5590 of 2014

1. Douglas Mendez
2. Gladwin Mendez

... Plaintiffs

Vs.

Jerome R.Mendez

... Defendant

Prayer:- Plaint filed under Order IV Rule 1 of O.S. Rules read with Order VII Rule 1 and Section 26 of the Code of Civil Procedure to

a) pass a preliminary decree for partition and separate possession of the schedule mentioned properties by allotting the plaintiffs 2/3 share in the same.

b) appoint an Advocate Commissioner to divide the properties by metes and bounds and allot to the plaintiffs their respective 1/3rd share in the suit schedule mentioned properties.

c) direct the defendant to pay to the plaintiffs the sum of Rs.67,14,600/- towards past mesne profits and and continue to pay the mesne profits @

of Rs.15,000/- per month from the date of plaint till realisation.

- d) direct the defendant to render true and proper accounts of the business carried on under the name and style R.Mendez & Sons
- e) to pay the costs.

For Plaintiffs : Mr.M.K.Kabir

Senior Counsel
for Mr.T.Jayaraman

For Defendant : M/s.Saravana Sowmiyan

JUDGMENT

The suit has been filed for partition and for separate possession of the property by allotting 2/3rd share to the plaintiffs and for other reliefs.

2. The learned Senior Counsel appearing for the plaintiffs submitted that the property originally owned by the father of both the parties herein and he has left a Will dated 01.06.1988 thereby bequeathing the property giving a life interest to the tune of 1/3rd share to each of the plaintiffs and the defendant and the vested remainder to their children. Therefore the suit has been filed for claiming 1/3rd share of the plaintiffs.

3. Admitting the Will, the learned counsel for the defendant

submitted that only the life interest alone to be shared, therefore the suit for partition is not maintainable and he further contended that father had an intention to retain the property together, therefore, any partition and demarcation will defeat the object of the Will. Therefore, the prayer for partition cannot be maintainable.

4. As the dispute is narrowed down, there is no dispute with regard to the $\frac{1}{3}^{\text{rd}}$ share life interest to all sons and after their life time to their children. The preliminary decree can be passed based on the admission in the pleadings. There is no need to go for a trial. Admittedly life interest is given to all three sons and each son has right to retain $\frac{1}{3}^{\text{rd}}$ share in the property. Absolute right will go to their children. Plaintiffs children together will get $\frac{2}{3}^{\text{rd}}$ share after the life time of the plaintiffs. Similarly defendant's children will be getting $\frac{1}{3}^{\text{rd}}$ together after the defendant's life time. Therefore it cannot be said that the property cannot be partitioned. Even during the life time, the plaintiffs and defendant can enjoy their respective shares given as a life interest for that purpose alone preliminary decree can be passed. Accordingly, preliminary decree is passed and the plaintiffs and defendant each are entitled to $\frac{1}{3}^{\text{rd}}$ share to enjoy the property during their life time. The contention of the learned

counsel for the defendant that since the Will stipulates that the property should be kept intact cannot be countenanced for the simple reason that any condition restraining the alienation in respect of the property is void, similarly any restriction which is repugnant to interest created also can be ignored and void to that extent as per Sections 10 and 11 of the Transfer of Property Act. Such view of the fact, this suit is decreed for dividing the suit property into three equal shares and plaintiffs together are entitled for $\frac{2}{3}$ rd share, defendant also entitled for $\frac{1}{3}$ rd share, they can enjoy their respective shares during their life time, thereafter the property shall vest with their children as per the Will.

5. With the above observation, suit itself is decreed in terms of admission as to the rights to the parties as per order 12 rule 6 of CPC. Considering the relief there shall be no order as to costs. Consequently connected applications are also closed.

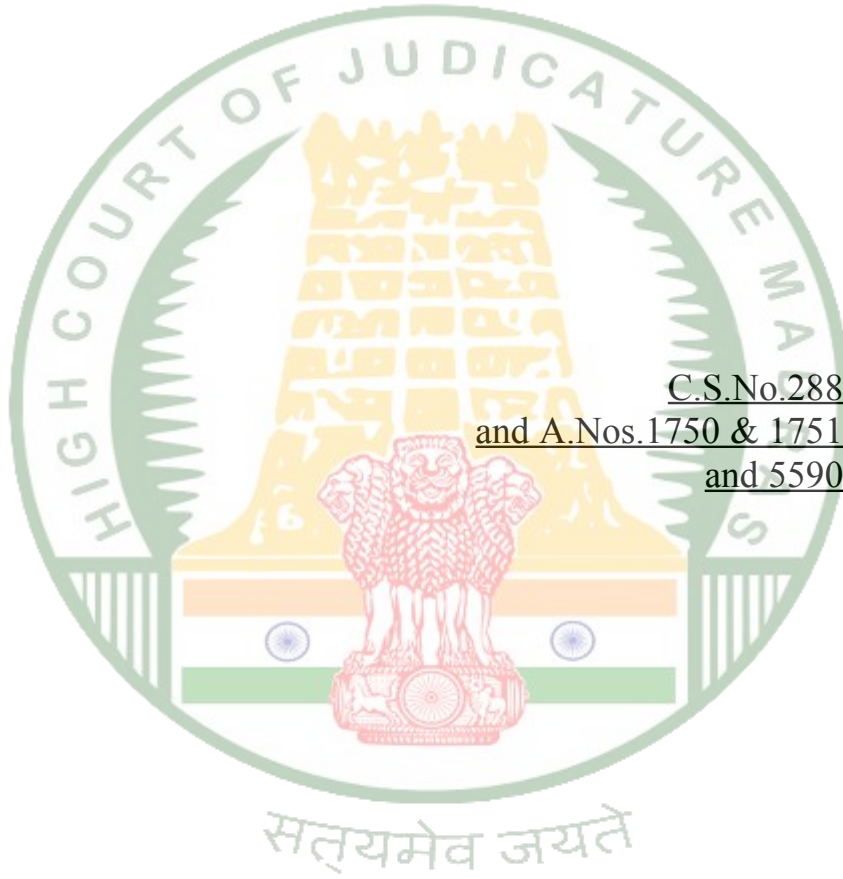
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09.11.2020

Index: Yes/No
Speaking order/Non speaking order
dpq

N. SATHISH KUMAR, J.

dpq



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