



*AS.No.1016 of 2012
and SA No.443 of 2015*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **28.11.2023**

CORAM

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and

THE HONOURABLE MR.JUSTICE **N.SENTHILKUMAR**

A.S.No.1016 of 2012 and MP No.1 of 2012
and SA No.443 of 2015 & MP No.1 of 2015

AS No.1016/2012

1. Periya Chennai Naicken

2. Palanisamy

3. Dhavamani

4. Saroja

... Appellants

VS.

1. Chenna Naicken

2. Amulraj

3. Dharmaraj

4. Mutha Naicken

5. Duraisamy



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WEB COPY 6. Chinnaraj

7. Rangammal

8. Lakshmi

9. Rajammal

... Respondents

Appeal suit has been filed under Section 96 read with Order XLI Rule 1 of the Civil Procedure Code, against the judgment and decree dated 03.07.2012 made in O.S.No.68 of 2007 on the file of the I Additional District Court, Erode.

For Appellants : Mr.N.Manokaran

For Respondents : Mr.M.Guruprasad, for RR4 to 6

RR 1 to 3 & 7 to 9 – served
– No appearance

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1. Muthu Naicker

2. M.Duraisamy

3. P.M.Chinnaraj

4. P.D.Rajagopalan

5. D.Saravanan



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6. C.Jaganathan

..Appellants

Vs.

Muthanaicker (Died)

1. Palanisamy

2. Thavamani

3. Saraja

4. Periya Chenna Naicker

5. Chenna Naicker

6. Minor Kumaresan

son of Chinnaraj

Minor Rep. Court Guardian T.Senthil Kumar

Pachapali, Mettunasuvampalayam Village,

Erode Taluk, Erode District.

7. L.Latha

8. Rangammal

..Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 05.06.2013 made in A.S.No.8 of 2013 on the file of Principal District Court, Erode confirming the findings of the judgment and decree dated 21.07.2011 made in O.S.No.262 of 2010 on the file of Principal Sub Court, Erode.



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For Appellants : Mr.M.Guruprasad

For Respondents : Mr.N.Manokaran, for RR1 to 3

Mr.K.Vasanthanayagan
for Ms.Kavya Silambanan, for R7

RR 4 to 6 & 8 – No appearance

COMMON JUDGMENT

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

These Appeals have been posted together since a common question relating to validity of a document styled as a Partition Deed dated 29.05.1961, entered into between the parties to these Appeals, arises for consideration in both the appeals.

2. The facts leading to the Appeals are as follows:

One Muthiyalu Naicker, had two sons Periya Mara Naicker and Mara Naicker. They constituted a joint Hindu family and it was possessed of various properties. Periya Mara Naicker had three sons by name Periya Chenna Naicker, Mutha Naicker and Chenna Naicker. Mara



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Naicker had one son by name Mutha Naicker and a daughter Rangammal. Two sons of Periya Mara Naicker viz. Periya Chenna Naicker and Mutha Naicker launched a suit in OS No.68 of 2007 seeking partition and separate possession of their 4/16th share in the suit properties, claiming that as per the Registered Deed of Partition dated 29.05.1961, the branch of Periya Mara Naicker was allotted 3/4th share in the suit properties and 1/4th share was allotted to the branch of Mara Naicker, the younger brother.

3. The entire suit was based on the registered document dated 29.05.1961 and it was in respect of two items of properties situate in MettuNasuvanpalayam Village, Erode District. One son of Periya Mara Naicker viz. Chenna Naicker was made the first defendant in that suit. The son of Mara Naicker viz. Mutha Naicker was the fourth defendant and Rangammal daughter of Mara Naicker was the seventh defendant. While defendants 2 and 3 are the children of Chenna Naicker, the defendants 5, 6 and 8 are the children of Mutha Naicker. Since one of the sons of Mutha Naicker, by name Chenna Naicker died his wife



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Rajammal was impleaded as the ninth defendant.

4. This suit was resisted by the defendants therein including Chenna Naicker one of the sons of Periya Mara Naicker, contending that there was no partition under the document dated 29.05.1961. The plaintiffs were put to strict proof of their claim that there was a partition on 29.05.1961 and there was a division of properties under the said instrument. It was also contended that Periya Mara Naicker and Mara Naicker died within a very short span of time, about 30 years prior to the suit and soon after the death of the brothers, the parties had divided the properties orally by metes and bounds and have been in enjoyment of their respective shares. Mutation of the Revenue Records was also effected.

5. The seventh defendant Rangammal filed a two paragraph written statement contending that the pleadings in the plaint are false and she paid Court fee for allotment of her share in the properties.



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6. On the above pleadings, the Trial Court framed the following issues:

1. Whether the partition was effected between the parties soon after the death of the plaintiff's father;

2. Whether the 1st defendant has effected improvements in the property allotted to him;

3. Whether mutation has been effected by the Revenue authorities to the divided properties;

4. Whether the plaintiffs are entitled for a decree for partition;

5. To what reliefs the plaintiffs are entitled to?

7. At trial on the side of the plaintiffs, the first plaintiff was examined as P.W.1 and Exhibits A1 to A11 were marked. The fourth defendant viz. Mutha Naicker was examined as D.W.1 and the seventh defendant Rangammal was examined as D.W.2. No documents were produced on the side of the defendants.



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8. The Trial Court on a consideration of the evidence came to the conclusion that Ex.A1 Partition Deed dated 29.05.1961 cannot be termed as a partition, since there is no division of properties by metes and bounds. The document does not disclose an actual division and hence the same is not valid. The Trial Court also disbelieved the theory of oral partition as claimed, but, however, chose to dismiss the suit in its entirety on the ground that the suit is bad for partial partition, since the properties situate in another Village viz. Nallagoundanpalayam were not included. This judgment and decree are under challenge at the instance of the plaintiffs in the said suit.

9. Another suit in OS No.262 of 2010 was filed by one of the sons of Periya Mara Naicker viz. Mutha Naicker for partition and separate possession of his 4/16th share in the properties that are situate at Nallagoundenpalayam again based on the said Partition Deed dated 29.05.1961. In that suit, the first plaintiff in OS No.68 of 2007 viz. the partition suit relating to the properties at Mettunasuvanpalayam was



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impleaded as the first defendant and the other defendants were also shown as defendants in the said suit.

10. The first defendant filed a separate written statement in the said suit denying the partition dated 29.05.1961. The other defendants also took a similar plea. It was also contended that the suit was bad for partial partition. The tenth defendant filed a separate written statement.

11. On the pleadings, the Trial Court framed the following issues:

1. Whether the suit is bad for non-joinder of necessary parties;

2. Whether the description of suit properties is correct;

3. Whether the Partition Deed dated 29.05.1961 is true, valid and acted upon;

4. Whether the claim that there is a change in the survey numbers is correct:

5. Whether the plaintiffs are in joint possession of



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the suit properties;

*6. Whether the plaintiffs are entitled to a decree
as prayed for;*

7. To what reliefs the plaintiffs are entitled to?

Following additional issues were framed subsequently on 09.03.2010:

*1. whether it is correct to contend that the
Partition Deed dated 29.05.1961 will not bind the 11th
defendant;*

*2. whether the properties were purchased out of
the income from the ancestral properties;*

*3. Whether the Eleventh defendant is entitled to
the share in the suit properties; and*

4. Whether the suit is bad for partial partition.

12. At trial in the said suit, the first plaintiff Mutha Naicker was examined as P.W.1 and the second plaintiff Palanisamy was examined as P.W.2, Exhibits A1 to A15 were marked. The third defendant Muthu Naicker was examined as D.W.1 and Exhibits B1 to B10 were marked.



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13. The learned Trial Judge concluded that as per the Partition Deed dated 29.05.1961, the plaintiffs would be entitled to 4/16th share, while upholding the said partition. A preliminary decree was also granted. Aggrieved the defendants preferred an Appeal in AS No.8 of 2013. The learned Appellate Judge on the contentions of the parties framed the following points for determination:

- 1. Whether the suit is bad for partial partition;*
- 2. Whether the suit is not maintainable in view of non-joinder of necessary parties;*
- 3. Whether the plaintiffs are entitled to a share as claimed in the plaint.*

14. The learned Appellate Judge held that the suit is not bad for partial partition, he also came to the conclusion that the suit is not bad for non-joinder of necessary parties and on the above findings, confirmed the conclusions of the learned Trial Judge and dismissed the appeal, hence the Second Appeal.



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15. The following questions of law were framed for determination in the Second Appeal.

a. Whether the Courts below are right in decreeing the suit when the claim of partial partition is forbidden under the law;

b. Whether the Courts below are right in decreeing the suit when the suit itself is not maintainable for non-joinder for necessary parties;

c. Whether the Courts below are right in holding that Ex.A1 is acted upon without proper and necessary evidence for the same.

16. We must at the outset point out that wholly unsatisfactory manner in which the suits have been handled by the lawyers in the Trial Court as well as the Appellate Court. Same counsel has appeared for the plaintiffs in both the suits viz. OS No.68 of 2007 and OS. No.263 of 2007. Both the suits have been filed in very closed proximity, while OS



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No. 68 of 2007 has been filed on 19.04.2007 and OS No.263 of 2007 has been filed on 31.07.2007. Both the suits were filed before the Additional District Court, but subsequently OS No.263 of 2007 was transferred to Sub Court due to the enhancement of the pecuniary jurisdiction of the Sub Court. Even at that time steps should have been taken to club both the suits, since the same issue was involved in both the suits. That was not done.

17. The first plaintiff in OS No.68 of 2007, who is the first defendant in OS No.263 of 2010, takes conflicting stands. While he seeks a decree for partition based on the Partition Deed dated 29.05.1961 in OS No.68 of 2007, he filed the written statement in OS No.263 of 2007 denying the Partition. Fortunately, he is not represented in the second appeal before us by another counsel which would have put us in an unwanted predicament. It is also stated that there is another suit filed by the daughter of Mara Naicker viz. Rangammal, the seventh defendant in OS No.68 of 2007 and the Eleventh defendant in OS No.263 of 2017, seeking partition and it is stated to be pending.



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18. While the Trial Court in OS No.68 of 2017 had held that there was no partition by metes and bounds and therefore, the document dated 29.05.1961 cannot be treated as a partition, the Court in OS No.263 of 2017 accepted the said instrument, based on a joint written statement filed by the parties in a suit filed by third parties. This finding relating to validity of the instrument dated 29.05.1961 is based on a joint written statement filed by the plaintiffs and the defendants in these suits in another suit filed by a third-party in OS No.98 of 2005. It was held that they are estopped from questioning the document after having admitted the same in earlier proceedings.

19. Be that as it may, the change in the law as to entitlement of daughters to a share in the ancestral property brought about by the amendment of Section 6 by the Amending Act 39 of 2005, has not been taken note of by any of the Courts while disposing of either the suit or the Appeal.



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20. The Appellate Court in AS No.8 of 2013 has not framed any issue regarding the status of Rangammal, who figured as the ninth respondent in the Appeal. The learned District Judge had gone on to uphold the document on the ground that it will be covered by the proviso to Section 6 of the Hindu Succession Act as amended by Act 39 of 2005. We find that the said finding may not be sustainable in view of the fact that there was no partition by metes and bounds under the document dated 29.05.1961. We will advert to this fact a little later.

21. We have heard Mr.N.Manokaran, learned counsel appearing for the appellants in AS No.1016 of 2012 and respondents 1, 2 & 3 in the Second Appeal No.443 of 2015, Mr.M.Guruprasad, learned counsel appearing for the respondents 4, 5 and 6 in AS No.1016 of 2012 and the appellants in the Second Appeal and Mr.K.Vasanthanayagan, learned counsel appearing for Ms.KavyaSilambanan, for the seventh respondent in the second appeal.



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22. While Mr.N.Manokaran, learned counsel would vehemently contend that the document in Ex.A1 dated 29.05.1961 is a valid instrument which declares the rights of the parties and the parties having entered into an understanding by way of a registered instrument are bound by the same. He would also point out that in the written statement filed in OS No.98 of 2005, the defendants in both the suits viz. OS No.68 of 2007 and OS No.263 of 2007 had taken the plea that the partition dated 29.05.1961 is valid. The learned counsel would also further contend that since the partition has taken place even during the life time of Mara Naicker, son of Muthiyalu Naicker, Rangammal cannot seek to reopen the partition.

23. Contending contra, Mr.M.Guruprasad, learned counsel appearing for the respondents would submit that Ex.A1 dated 29.05.1961 cannot be treated as a partition that would fall under the proviso to Section 6 of the Hindu Succession Act, which reads as follows:

“Provided that nothing contained in this sub-



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section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.”

Explanation to the said Section regarding the meaning of the word “partition” appearing in the proviso is as follows:

“Explanation.-For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.”

24. Mr.M.Guruprasad, learned counsel, would submit that Ex.A1 is not a partition by itself since it is not a partition by metes and bound. He would also invite our attention to the judgment of the Hon’ble Supreme Court in ***S.Sai Reddy vs. S.Narayana Reddy and others***, reported in ***(1991) 3 SCC 647***, wherein a similar expression appearing in Section 29-A of the Hindu Succession Act, Andhra Pradesh Amendment,



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was considered by the Hon'ble Supreme Court and it was held that in order to come within the exception the partition should be by metes and bounds and a preliminary decree for partition will not satisfy the requirements of the proviso to Section 29-A. While doing so, the Hon'ble Supreme Court observed as follows:

“7. The question that falls for our consideration is whether the preliminary decree has the effect of depriving respondents 2 to 5 of the benefits of the amendment. The learned counsel placed reliance on clause (iv) of Section 29-A to support his contention that it does. Clause (ii) of the section provides that a daughter shall be allotted share like a son in the same manner treating her to be a son at the partition of the joint family property. However, the legislature was conscious that prior to the enforcement of the amending Act, partitions will already have taken place in some families and arrangements with regard to the disposition of the properties would have been made and marriage expenses would have been incurred etc. The legislature, therefore, did not want to unsettle the settled positions. Hence, it enacted clause (iv) providing that clause (ii) would not apply to a



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daughter married prior to the partition or to a partition which had already been effected before the commencement of the amending Act. Thus if prior to the partition of family property a daughter had been married, she was disentitled to any share in the property. Similarly, if the partition had been effected before September 5, 1985 the date on which the amending Act came into force, the daughter even though unmarried was not given a share in the family property. The crucial question, however, is as to when a partition can be said to have been effected for the purposes of the amended provision. A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which



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determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which clause (ii) of Section 29-A of the Act became applicable. This intervening event which gave shares to respondents 2 to 5 had the effect of varying shares of the parties like any supervening development. Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares



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which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendmen.(emphasis supplied). Spurious family settlements, instruments of partitions not to speak of oral partitions will spring up and nullify the beneficial effect of the legislation depriving a vast section of women of its benefits.”

25. A reading of the document that has been placed before us viz. Ex.A1 dated 29.05.1961 shows that it is just declaration of shares and there has been no partition by metes and bounds. In order to have the benefit of the proviso to Section 6 of the Hindu Succession Act, there should have been a partition by metes and bounds and a mere declaration of shares in the form of a preliminary decree or in the form of a registered instrument would not suffice. In ***Vineeta Sharma V. Rakesh Sharma***, reported in ***2020 (9) SCC 1***, the Hon’ble Supreme Court has



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clarified the law relating to the entitlement of a daughter as a coparcener and in paragraph 137, the Hon'ble Supreme Court held as follows:

“137.1. The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after the amendment in the same manner as son with same rights and liabilities.

137.2. The rights can be claimed by the daughter born earlier with effect from 9-9-2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before the 20th day of December, 2004.

137.3. Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9-9-2005.

137.4. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession



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Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the 1956 Act or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

137.5. In view of the rigour of provisions of the Explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a



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court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected (sic effected) by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly.”

26. Though the Hon’ble Supreme Court concluded that in view of the explanation to Section 6(5) of the Hindu Succession Act, oral partition cannot be accepted as a statutory recognized mode of partition, it however, made an exception that the plea an oral partition supported by public documents and partition is finally evinced in the same manner as it has been effected by a decree of Court, it may be accepted. Therefore, it may now be open to the parties to show that there was an oral partition which had in fact effected in a division by metes and bounds followed by mutation of Revenue records, but, at the same time, merely because there is a registered instrument, the same may not be



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sufficient to exclude the operation of the main Section 6 of the Hindu Succession Act, and bring the parties within the proviso to Section 6, as what is contemplated is an actual division of the properties by metes and bounds, as pointed by the Hon'ble Supreme Court in ***S.Sai Reddy vs. S.Narayana Reddy and others.***

27. Once it is concluded that the partition dated 29.05.1961 will not be a partition as contemplated under proviso to Section 6(5) of the Hindu Succession Act, then the seventh defendant in OS No.68 of 2007 would be entitled to ignore the partition and seek a declaration of her share in the property. We find that she had paid Court Fee also. We therefore, conclude that Ex.A1 cannot be held to be a valid partition in order to enable the other parties to exclude the seventh defendant's claim as a coparcener. Once we conclude that the Partition dated 29.05.1961 is not binding on the seventh defendant and it suffers the vice of being an inconclusive instrument not resulting in a complete division of the properties naturally a decree for partition must follow.



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28. We therefore, answer the question of law (c) framed in Second Appeal No. 443 of 2015, which reads as follows:

“c. Whether the Courts below are right in holding that Ex.A1 is acted upon without proper and necessary evidence for the same.”

in favour of the appellants therein and conclude that the said partition cannot be acted upon. In the light of the said finding, it is not necessary for us to answer the other two questions of law.

29. In fine, the Second Appeal in SA No.443 of 2015 will stand **allowed**, the First Appeal No.1016 of 2012 will also stand **allowed**. The dismissal of the suit in OS No.68 of 2007 will be set aside. There will be a preliminary decree for partition in respect of the properties covered by both the suits.

30. We shall now work out the shares that the parties would be entitled to. Muthiyalu Naicker, the original ancestor died leaving behind two sons, each of them would be entitled to a half share in the properties.



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Upon the death of Periya Mara Naicker, his half share would devolve on his three sons viz. Periya Chenna Naicker, Mutha Naicker and Chenna Naicker. The half share of Mara Naicker would devolve on his son Mutha Naicker and a daughter Rangammal equally. Therefore, the two plaintiffs in OS No.68 of 2007 viz. Periya Chenna Naicker and Mutha Naicker would each be entitled to $1/6^{\text{th}}$ share and the first defendant would be entitled to $1/6^{\text{th}}$ share. The fourth defendant would be entitled to $1/4^{\text{th}}$ share and the seventh defendant Rangammal would be entitled to $1/4^{\text{th}}$ share. It is stated that Mutha Naicker/the second plaintiff in OS No.68 of 2007 is no more, his $1/6^{\text{th}}$ share will devolve on the plaintiffs 3, 4 and 5 equally.

31. In fine, there will be a preliminary decree declaring the $1/6^{\text{th}}$ share each of plaintiffs 1 and 2 and the first defendant in OS No. 68 of 2007 and the $1/4^{\text{th}}$ share of Rangammal, the seventh defendant. There will be a preliminary decree for partition in OS No.263 of 2007 renumbered as OS No.262 of 2010 declaring $1/6^{\text{th}}$ share of the first



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plaintiff therein. It will be open to the other sharers to pay Court Fee and have their shares declared as pointed out earlier.

32. It will be open to the third-party purchaser to claim equity in the final decree proceedings, if he is a purchaser prior to the suit. Considering the relation between the parties, we do not impose any costs. Consequently, the connected miscellaneous petitions are closed.

(R.SUBRAMANIAN, J.) (N.SENTHILKUMAR, J.)
28.11.2023

Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking order
jv



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To

1. The Principal District Judge,
Erode.
2. The I Additional District Judge,
Erode.
3. The Principal Sub Court,
Erode.
2. The Section Officer,
V.R.Section,
Madras High Court.



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