



A.S.No.335 of 1998

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 12.07.2023

PRONOUNCED ON:07.08.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

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1.Pangajam
2.Jayakumar : Appellants /Respondents 9 & 10

Vs.

1.Venkateswara Ettu : 1st Respondent/ Plaintiff

2.Ayyadurai Naicker
3.Ayyasamy Naicker
4.Pechaiammal(died)
5.Subbulakshmi(died)
6.Thangalakshmi(died)
7.Parimala(died)
8.Kalavathy(died)
9.Jayalakshmi
10.Vijayalakshmi(died)
11.Meena : Respondents 2 to 11/Defendants 2 to 8
and 11 to 13

12.Shanmuga Sundaram
13.Vijayamahalakshmi
14.Saraswathi
(R.12 to R.14 are brought on record)



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as LR's of the deceased R.7
vide order dated 18.06.2019 made
in M.P.Nos.1 to 3 of 2009)

15.Bathrakumar
16.Balakumar
17.Bharathi
18.Chandrasekaran
19.Kumar
20.Malini
21.Raguraj
(R.18 to R.21 are brought on record as
LR's of the deceased R.10, vide
order dated 15.07.2019 made in
C.M.P.Nos.5509 to 5511 of 2009)

22.M.N.Lingaraj
23.R.Vijaya
24.L.M.Murali
(R.22 to R.24 are brought on record
as LR's of the deceased R.5, vide
order dated 11.11.2022 made in
C.M.P.(MD)No.10648 of 2022) : Respondents 12 to 24

PRAYER:- Appeal Suit filed under Section 96 r/w Order 41 Rule of the
Code of Civil Procedure against the Judgment and Decree, dated
04.03.1996 passed in O.S.No.196 of 1989, on the file of the Subordinate
Court, Tuticorin.

For Appellants : Mr.S.Parthasarathy
Senior Counsel
for Mr.K.Govindarajan



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For Respondents : Mr.M.P.Senthil
for R.1
: Mr.N.Rahamadullah
for R.12 to R.17
: Mr.R.Devaraj
for R.11
: Mr.P.Rajesh
for R.22 to R.24
: No Appearance
for R.2, R.3, R.6, R.8, R.9

: R.4, R.5, R.7 and R.10-died
: R.18 to R.21 served

JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.196 of 1989, dated 04.03.1996 on the file of the Subordinate Court, Tuticorin.

2. The suit is for partition.

3. The plaintiff has filed the suit originally against his father – first defendant and two other persons, who were the purchasers of some of the properties from the first defendant. After filing of the suit, the first defendant died on 16.11.1989. The plaintiff has impleaded her sisters as defendants 4 to 8. The ninth defendant, claiming to be the second wife



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and the defendants 10 to 13 claiming to be the children of the first defendant through the ninth defendant have got themselves impleaded.

4. The case of the plaintiff is that the suit properties are the ancestral and joint family properties of the plaintiff and the first defendant, that both of them have entered into a registered partition on 26.07.1979 in respect of the ancestral house and the vacant sites and they had been in separate possession and enjoyment of the properties allotted to them, that the defendants 2 and 3 purchased the items 10 and 11 of Ist Schedule of the suit properties from the first defendant vide sale deeds dated 20.04.1998 and 20.08.1998 and the said sales will not bind the plaintiff, that the plaintiff after coming to know that the first defendant has been attempting to sell the other items of the suit properties, demanded partition of the suit properties and that since the first defendant has not chosen to effect partition, the plaintiff was constrained to file the above suit for partition and allotment of 1/2 share in the suit properties. After the death of the first defendant, the plaintiff has amended the plaint and claimed 7/12 shares in the suit properties.



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5. The plaintiff's sisters – the defendants 4 to 8 have filed a written statement admitting the case of the plaintiff and prayed for allotment of 1/12 share for each of them.

6. The defendants 2 and 3 and the defendants 9, 11 to 13 had remained exparte.

7. The defence of the tenth defendant is that after the death of the first defendant's wife, the first defendant married the ninth defendant in 1960, that the defendants 10 to 13 were born to the defendants 1 and 9, that the first defendant divided the joint family properties and gave $\frac{1}{2}$ share to the plaintiff by a registered partition deed dated 26.07.1979 and therefore, the plaintiff has no claim in the suit properties, that the first defendant while he was in good health, has executed a registered Will dated 22.12.1978. bequeathing his properties including the suit properties to his second wife / ninth defendant and his son born through the second wife - 10th defendant, even before the partition effected with the plaintiff, that the first defendant has subsequently executed another Will dated 17.08.1979, cancelling the earlier registered Will dated 22.12.1978 and that after the death of the first defendant, the Will came



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into force and the properties of the first defendant came to be owned by the defendants 9 and 10.

8. It is the further case of the tenth defendant that the properties of the first defendant were obtained in the partition suit in O.S.No.31 of 1940, on the file of the Subordinate Court, Tuticorin filed by the first defendant against his uncle Muthusamy with regard to their ancestral properties, that out of 381.94 acres of land in Jameen Chenkalpadai Village, the first defendant was allotted 277.60 acres and his uncle Muthusamy was allotted 104.34 acres besides other properties, that the first defendant's paternal uncle Muthusamy has executed a Will bequeathing his properties to the plaintiff and the first defendant jointly, that the first defendant and the plaintiff entered into a partition on 22.11.1994, whereunder 20 acres in Chenkalpadai village and 42 acres out of the first defendant's 277.60 acres and the entire properties of Muthusamy received under the Will of Muthusamy were allotted to the plaintiff and the first defendant was allotted with 77 acres out of 104.34 acres of Muthusamy's share, that the first defendant out of 277.60 acres transferred 125 acres by patta transfer to his daughters and gave 102 acres to the plaintiff and 50 acres to the tenth defendant, that though the



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tenth defendant is entitled to share equally with the plaintiff in respect of the ancestral properties, to avoid bitterness in the family, mediation by respectable people was arranged and they effected division of properties between the plaintiff and the tenth defendant and that therefore, the plaintiff and the defendants 4 to 8 were not entitled to claim the suit properties.

9. The learned trial Judge, upon considering the above pleadings, has framed the following issues:

(1) Whether the defendants 4 to 8 are entitled to get 1/12 share in the suit properties?

(2) Whether the plaintiff is entitled to get $\frac{1}{2}$ share?

(3) To what other reliefs, the plaintiff is entitled to?

After the death of the first defendant, the second issue has been recasted as “ Whether the plaintiff is entitled to get 7/12 share?”

10. During the pendency of the above suit, the defendants 7 and 8 – sisters of the plaintiff, have filed a suit in O.S.No.225 of 1989 against their father, brother, sisters and against the defendants 9 to 13 claiming partition in respect of 24 acres of land.



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11. The defendants 10 to 13 have filed a written statement to the suit in O.S.No.225 of 1989 admitting the claim of the defendants 7 and 8 and stated that though the suit came to be filed at the instigation of the plaintiff, they have no objection to grant the decree as claimed by them. The other defendants in O.S.No.225 of 1989 including the plaintiff in O.S.No.196 of 1989 have stated that they have no objection to decree the suit.

12. In view of the joint memo filed by both the parties, a joint trial was ordered. During trial, the plaintiff has examined himself as P.W.1 and exhibited 17 documents as Exs.A.1 to A.17. The tenth defendant has examined himself as D.W.1 and examined 3 other witnesses as D.W.2 to D.W.4 and exhibited 17 documents as Exs.B.1 to B.17. The learned trial Judge, upon considering the evidence, both oral and documentary and on hearing the arguments of both sides, has passed a common judgment dated 04.03.1996, granting preliminary decree that the plaintiff is entitled to get 7/12 shares and the defendants 4 to 8, 5/12 shares in respect of the items 1 to 9 of I schedule, III and IV schedule of the suit properties and dismissed the suit with respect to the items 10 and 11 of I schedule and II



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and V schedule of the suit properties and also granting a preliminary decree as prayed for in O.S.No.225 of 1989. Aggrieved by the granting of preliminary decree in O.S.No.196 of 1989, the defendants 9 and 10 have preferred the present Appeal Suit.

13. In the common judgment, the learned trial Judge has given a specific finding that the ninth defendant is not a legally wedded second wife of the first defendant and that the defendants 10 to 13 are not the legal heirs of the deceased first defendant. The trial Court has also recorded a finding that since the tenth defendant himself admitted that the earlier Will dated 22.12.1978 was superseded and cancelled by the second Will dated 17.08.1979, the first Will cannot be looked into and that they have not proved the second Will as required by law.

14. The learned Senior Counsel appearing for the appellants would submit that the plaintiff himself has admitted in the recitals in Ex.B.1 that the ninth defendant is his step mother and the defendants 10 to 13 are the children of the first defendant and in the absence of any evidence to prove that he subscribed to Ex.B.1 under force or coercion and in the light of the evidence of D.W.4 that the tenth defendant and the plaintiff



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signed Ex.B.1 voluntarily and willingly and therefore, the trial Court should have accepted Ex.B.1 and held that the ninth defendant was treated and accepted as wife of the first defendant and the defendants 10 to 13 were accepted as their legitimate children, that the plaintiff has specifically admitted that the first defendant lived together with the ninth defendant separately right from 1960 and they have begotten the children - the defendants 10 to 13, that the factum of marriage should be inferred and that the first defendant in some of the documents had described the ninth defendant as Abimana Sthri and in some other documents such as Exs.A.12 and A.15, he has described as his bariyal (wife).

15. The learned Senior Counsel would further contend that the evidence of P.W.1 along with Exs.A.1, B.1 and B.17 coupled with undisputable fact that the first defendant and the ninth defendant were living together for a long spell and the same had been accepted in the society as husband and wife, that the plaintiff himself has admitted that the defendants 1 and 2 were living under the same roof, that the settlement deed under Ex.B.1 executed between the plaintiff and the tenth defendant would go to show that the plaintiff and all family members have accepted the existence of husband and wife relationship



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between the first defendant and the ninth defendant and also recognized the right accrued to the children born to the ninth defendant through the first defendant, in respect of the properties left by the first defendant and that it is a long held principle that the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years.

16. The learned Senior Counsel would further contend that Exs.B.8 and B.14 would go to show that the defendants 9 to 13 were in exclusive possession and enjoyment of the properties in schedule III and IV, which fortifies the execution of Exs.B.15 and B.16 by the first defendant, that the first defendant in his Ex.B.15 consciously used the word “முத்தாரம்” which impliedly denotes that the ninth defendant is the second wife, that the partition was effected between the plaintiff and the first defendant as per Ex.A.1 and the properties fell to the share of the first defendant became his independent properties wherein all the children of the first defendant including the defendants 10 to 13 are entitled to get equal share.

17. The learned Counsel for the first respondent/plaintiff would



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submit that the appellants, who have suffered with common judgment and separate decrees in O.S.No.196 of 1989 and O.S.No.225 of 1989, has filed only one appeal, that they had not challenged the common judgment and decree passed in the other suit in O.S.No.225 of 1989 and that therefore the present Appeal Suit is legally not maintainable, as the same is barred by the doctrine of *res judicata*.

18. The learned Counsel would further contend that the ninth defendant who claims to be the second wife of the first defendant did not choose to examine herself as witness in order to substantiate and prove the alleged marriage between her as well as the first defendant, that the ninth defendant has not even chosen to contest the suit and remained ex-parte, that the tenth defendant has not chosen to examine any other independent witness to prove the marriage between the first defendant and the ninth defendant, that the tenth defendant has not furnished any particulars regarding the date, place in which the marriage was taken place and the persons who had witnessed the same, that the learned trial Judge, considering the recitals to the documents marked under Exs.A.6, B.15 and B.16 has come to a decision that the ninth defendant is only a concubine and not the second wife of the plaintiff's father and that



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therefore, the ninth defendant and her children are not entitled to get any share in the suit properties.

19. The learned Counsel would further submit that even in the partition deed under Ex.A.6, the ninth defendant is a party to the document and she was not referred as second wife and as such, she cannot now claim contrary to the said recitals. The learned Counsel would further submit that Exs.B.15 and B.16 Wills were not proved as per the provisions of Section 68 of the Indian Evidence Act, that the learned trial Judge has given a specific finding that the last unregistered Will dated 17.08.1979 has not been proved by the defendants 9 and 10 in accordance with law, that the appellants have themselves specifically taken a plea that the first Will dated 22.12.1978 has been superseded on the basis of the unregistered Will dated 17.08.1979, that the appellants have not taken any steps to prove the Will under Ex.B.16 in accordance with Sections 63 of the Indian Succession Act and under Section 68 of the Indian Evidence Act, that the very contention of the appellant that even the last Will under Ex.B.16 remains unproved, still they could fall back on the earlier Will, is contrary to their own pleadings as well as the evidence of D.W.1 and that since the last Will dated 17.08.1979 is not



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proved by the tenth defendant, he cannot claim any right under the earlier Will dated 22.12.1978.

20. The points for determination are:

(1) In view of the common judgment passed in O.S.No.196 of 1989 and O.S.No.225 of 1989, whether the only appeal filed with respect to O.S.No.196 of 1989 is legally maintainable, by virtue of constructive res-judicata?

(2) Whether the learned trial Judge erred in rendering a finding that the ninth defendant is not the second wife and the defendants 10 to 13 are not the legitimate children of the first defendant, despite producing ample evidence to prove the very long cohabitation between the defendants 1 and 9 and their treatment by the society as husband and wife and referring the ninth defendant and the defendants 10 to 13 as his wife and children in the documents executed by the first defendant and also the very admission of the plaintiff that the defendants 10 to 13 were born to the first defendant through the ninth defendant?

(3) Whether the trial Court erred in giving a finding that since the Will dated 22.12.1978 was not the last Will of the first defendant and that the same was superseded by the subsequent Will dated 17.08.1979, the



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earlier Will cannot be looked into, without considering the facts that since the second Will was held to be not proved, the same cannot operate to cancel the earlier Will and as such, there is no legal bar or prohibition for the propounder of the Will to fall back on the earlier Will?

(4) Whether the ninth defendant is the second wife of the first defendant?

(5) Whether the Will dated 22.12.1978 alleged to have been executed by the first defendant is true, valid and is proved in accordance with law?

(6) Whether the impugned judgment and decree dated 04.03.1996, passed in O.S.No.196 of 1989 is liable to be interfered with?

(7) To what other reliefs the parties are entitled?

Points 1 to 7:



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21. Admittedly, the plaintiff is the son and the defendants 3 to 8 are the daughters of the first defendant. It is the specific case of the appellants/defendants 9 and 10 that after the death of Saraswathy Ammal – first wife of the first defendant, the first defendant married the ninth defendant in the year 1960 and due to their wedlock, the defendants 10 to 13 were born to them.

22. The plaintiff has taken a stand that the ninth defendant is not the legitimate wife and the defendants 10 to 13 are not the legitimate children of the first defendant. It is not the case of the plaintiff that there was no connection whatever between his father and the ninth defendant and that the defendants 10 to 13 were not born to his father. The plaintiff as P.W.1, in his evidence before the trial Court, would say that there was no marriage between his father and the ninth defendant, that he had arranged the marriage for his sisers – defendants 7 and 8 and that his father has not made any arrangements for the marriage of the defendants 7 and 8 as he was with the ninth defendant at that time. In cross-examination, he would say that his father and the ninth defendant were residing in one house and he was residing in another house and that his



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father alone had conducted the marriage of the defendants 11 to 13 and the relevant portion is extracted hereunder for better appreciation:

“ மின்படி எனது தகப்பனார் 2வது மனைவி மக்களும் சொத்து உண்டு என்ற அடிப்படையில்தான் மி1 எழுதப்பட்டது. எனது அப்பாவும் பக்கஜம் அம்மாளும் ுவறு வீட்டிலும் நான் தனியா ுவறு வீட்டிலும் நேந்தன். 11 முதல் 13 பிரதிவாதிகள் பக்கஜ அம்மாளின் வாரிசுகள். அவர்களுடைய திருமணத்திற்கு தகப்பனார் ஏற்பாடு செய்திருக்கிறார். 1972க்கு முன்பு என் அப்பா பக்கஜம் அம்மாளுடன் எந்த வீட்டில் நேந்தார் என்று எனக்கு தெரியாது. எங்கள் ஊரில் நேந்தார்கள்.”

23. The learned Counsel for the first respondent/plaintiff would submit that the first defendant in the documents executed by him, has nowhere stated that the ninth defendant is the legally wedded second wife and that the words referred by him to describe the ninth defendant would only mean that she is a concubine.

24. As rightly pointed out by the learned Counsel for the plaintiff, in Ex.A.6 – partition deed, dated 29.09.1970 executed between the first defendant and the ninth defendant for herself and on behalf of her minor



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children, the first defendant has referred the ninth defendant as “அபிமானத்திற்குரிய பக்கஜம்மாள்” and subsequently as “நம்மில் 1 லக்கமிட்டவரை காதலித்து தன் பாரியாகாவ கருதி குடும்பம் நடத்தி வருகிறார்.” In Ex.B.15 – Will dated 22.12.1978 and Ex.B.16 – Will dated 17.08.1979, as pointed out by the plaintiff's side, the first defendant has referred the ninth defendant as “ பக்கஜம் என்பவளை நான் உருசித்து நாட்கள் சதிரதிகளாக குடும்பம் நடத்தி வருகிறாம்.” But as rightly pointed out by the learned Senior Counsel for the appellants, in the said Wills, the first defendant has referred the plaintiff as his son through the senior wife (முத்ததார மகன்)and that too in three places. No doubt, the Wills are now under challenge.

25. The learned Senior Counsel for the appellants would submit that the first defendant's paternal uncle Muthusamy, who had no issues, had imposed a condition to the first defendant that in case if he recognises the ninth defendant as his legally wedded wife, he would not give his properties to the first defendant and that in order to convince his paternal uncle, the first defendant was constrained not to refer the ninth defendant as his legally wedded wife.



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26. Admittedly, the said Muthusamy had executed a Will dated 12.12.1958 bequeathing his properties to the first defendant and the plaintiff jointly, but the documents above referred, no doubt, came to be executed from 1970 onwards. Whatever it is, as rightly contended by the learned Senior Counsel for the appellants, the first defendant in the subsequent documents, more particularly in the gift deeds, has specifically referred the ninth defendant as his wife. In the gift deeds executed under Exs.B.3 to B.6 in favour of the defendants 10 to 13, who were then minors represented by their mother and guardian, Pangajam - 9th defendant, the first defendant has referred the ninth defendant as “புனர்”. As per the Winslow's Comprehensive Tamil-English dictionary, the word “புனர்” would mean, a lawful wife, earth, bed stead, fine cloth, night watch. The word “புனர்” is also referred as புனர்வையிடு புனர்பாள் to mean a wife.

27. The learned Counsel for the appellants would submit that the plaintiff has also executed a gift deed in favour of his minor daughter Saraswathy represented by her mother and guardian Manimegalai on 26.11.1974, the date on which Exs.B.3 to B.6 gift deeds and the gift deed executed by the first defendant in favour of the 8th defendant – daughter



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through his first wife under Ex.B.7 came to be executed and in the gift deed executed by the plaintiff, he has also referred his wife as “புரீ மணிமகலை”. No doubt, the said gift deed alleged to have been executed by the plaintiff is not in evidence, but the said factum has not been disputed by the plaintiff.

28. As rightly pointed out by the tenth defendant's side, in Exs.B. 15 and B.16 Wills, the first defendant has specifically stated that he has been residing with the ninth defendant and his children born through the ninth defendant in the house bearing Door No.53 and that the plaintiff, son of his elder wife, has been residing in the house bearing Door No.54, Pound street, which was allotted to him in the partition. The plaintiff, in his evidence, would admit that his father and the ninth defendant were residing in one house and he was residing in another house and that the ninth defendant has come to his neighbouring house in the year 1972.

29. It is pertinent to note that the first defendant along with the tenth defendant have filed a suit against the plaintiff, defendants 9, 11 to 13 in O.S.No.117 of 1978, on the file of the Principal Subordinate Court, Tuticorin claiming partition and allotment of 2/3 shares to them and also



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for maintenance for the ninth defendant herein and for the marriage expenses for the defendants 10 to 12 herein and it is evident from the decree passed in the said suit in O.S.No.117 of 1978, under Ex.A.7 that the defendants 1 and 10 were shown to be residing in the house bearing No.53, Pound street, Ettaiyapuram, Kovilpatti Taluk. It is not in dispute that the first defendant along with the tenth defendant has executed two sale deeds dated 20.04.1998 in favour of the defendants 2 and 3 and in the above sale deeds also, the defendants 1 and 10 were shown to be residing in the same address.

30. As rightly contended by the learned Senior Counsel for the appellants, considering the evidence of the plaintiff and the documents referred above, it can easily be presumed that the defendants 1 and 9 had been in long cohabitation as husband and wife for a period between 1960 and 1989 till the death of the first defendant.

31. The learned Counsel appearing for the plaintiff would submit that the presumption of legitimate marriage cannot be drawn merely on the ground of prolonged cohabitation of the couple, that the appellants have not produced any strong evidence to prove the alleged marriage



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between the defendants 1 and 9 and that the appellants have not even furnished the date and place of marriage and that in the absence of any evidence to prove the factum of marriage, the ninth defendant cannot be considered as the legally wedded wife of the first defendant and in support of his contentions, he relied on the following decisions:

(i) *AIR 1994 SC 135 (Surjit Kaur Vs. Garja Singh and others):*

“Reliance placed on Charan Singh case' is not correct because that will apply only if the widow were to marry the brother of the husband. But, here Gulaba Singh was a stranger. As rightly contended by the respondent, mere living as husband and wife does not, at any rate, confer the status of wife and husband. In B.S. Lokhande case (AIR 1965 SC 1564), it was laid down that the bare fact of the man and woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before the society as husband and wife and the society treats them as such. The following extract is useful for this purpose.

"Prima facie, the expression 'whoever ... marries' must mean 'whoever ... marries validly' or 'whoever ... marries and whose marriage is a valid one'. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its



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taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.”

(ii) 2015-4-L.W.509 (Baby @ Rohini (deceased) and others Vs.

Kamalam Kumerasan and others):

“30. As per the decision of the Hon'ble Apex Court reported in (2000) 2 Supreme Court Cases 431, [Rameshwari Devi v. State of Bihar and Others](#), the cohabitation for a long period gives rise to a strong presumption of wedlock and therefore, the second spouse need not prove her marriage in the court of law. But after the introduction of the Madras Hindu (Bigamy Prevention and [Divorce](#)) Act, 1949, during the subsistence of the first marriage, even though there is a long cohabitation of a male and female, they cannot be presumed to be a Husband and Wife. However, the learned counsel for the appellants would submit that the children born to void and voidable marriage are legitimate and they are entitled to share in their parent's property, as per [Section 16](#) of the Hindu Marriage Act, 1955.



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31. *Section 16* thus enacts a complete Code with regard to the off-springs of void or voidable marriages. Firstly, it declares the status of such a child being one as legitimate. Secondly, it recognises rights in the property of the parents. The provision itself thus is for the benefit of the children and will have to be applied in full so as to confer status with interest in property. So, this Court has to decide whether it is a voidable marriage? If the children are born out of voidable marriage, then they are legitimate children as per *Section 16* of the Hindu Marriage Act.

32. In the instant case, it is the duty of the appellants/plaintiffs to prove the factum of marriage between the deceased Kumaresan and Chandra. Even on perusal of the evidence of P.W.1/Ravikumar, it is seen that he has not stated that the deceased Kumaresan and his mother Chandra were married. It is true that no child will witness the marriage of their parents. However, once they are claiming share in the properties, it is their duty to prove the factum of marriage by examining the witnesses namely, close relatives and family friends. As already stated, the appellants/plaintiffs had not pleaded the factum of marriage neither in their plaint nor in their proof affidavit. So, it has to be concluded that the factum of marriage between the deceased Kumaresan and Chandra has not been proved.



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33. *In such circumstances, I am of the view that the long cohabitation alone will not give the status of legitimacy to the children born to the deceased Kumaresan and Chandra, since the first marriage was in subsistence.”*

(iii) (2009)8 MLJ 1371 (D.Nagamani and another Vs. Chief Educational Officer, Educational Department of Tamil Nadu, Coimbatore -641 001 and others):

“22. To sum up, the burden is heavy on the appellants to show that presumption of marriage could be drawn on long cohabitation of Damodharan and first appellant which has not been discharged. There exists no marital relationship between them. Further, the Marriage Register Ex.A.1 does not support the version of the first appellant. As such, no question of entitlement to inherit the estate of the deceased Damodharan would arise as far as the second appellant is concerned.”

32. In the first decision above referred, the appellant therein has taken a stand that she was the legally wedded wife of Gulaba Singh, who had contracted karewa form marriage with her, but no such custom was pleaded and by observing that that is not the case of widow's remarriage



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to the husband's brother as Gulaba Singh was a totally stranger, the Hon'ble Supreme Court dismissed the appeal, confirming the judgment of the High Court.

33. In the second decision, paragraph No.33 of the said judgment referred supra would clinch the issue that the learned Judge of this Court had taken the view that the long cohabitation alone will not give the status of the legitimacy to the children born to the deceased Kumaresan and Chandra, since the first marriage was in subsistence.

34. In the third case, no evidence was adduced to show that both the first appellant therein and Damodharan had been living together for a long time and also taking note of the fact that the second appellant, son of the first appellant was born earlier to the marriage between the first appellant and Natarajan @ Damodharan, a learned Judge of this Court, by holding that the legitimacy of the second appellant could not be decided and he cannot be made competent to get any benefit from his father's estate, even under Section 16 of the Hindu Marriage Act, dismissed the Second Appeal.



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35. To counter the said arguments, the learned Senior Counsel for the appellants would submit that there are catena of judgments of the Hon'ble Supreme Court settling the legal position that if a man and woman are living together for a long time as husband and wife, though never married, there would be a presumption of marriage and their children could not be called to be illegitimate.

36. To begin with the decision of Privy Council in the case of ***A.Dinohamy Vs. W.L.Balahamy*** reported in ***AIR 1927 PC 185***, their Lordships of the Privy Council have held that where a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved that they were living together in consequence of a valid marriage and not in a state of concubinage and the relevant portion is extracted hereunder:

"The parties lived together for twenty years in the same house, and eight children were born to them. The husband during his life recognized, by affectionate provisions, his wife, and children, The evidence' of the Registrar of the District shows that for a long course of years the parties were recognized as married citizens, and even the family functions and



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ceremonies, such as, in particular, the reception of the relations and other guests in the family house by Don Andris and Balahamy as host and hostess--all such functions were conducted on the footing alone that they were man and wife. No evidence whatsoever is afforded of repudiation of this relation by husband or wife or anybody."

37. The Privy Council has once again in ***Mohabbat Ali Khan Vs. Mohd.Ibrahim Khan*** reported in ***AIR 1929 PC 138***, held that the law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years.

38. The Hon'ble Supreme Court in ***Gokal Chand Vs. Parvin Kumari*** reported in ***AIR 1952 SC 231***, has specifically observed that continuous cohabitation of a man and woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.



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39. In ***Badri Prasad Vs. Deputy Director of Consolidation and others*** reported in ***(1978)3 SCC 527***, the Hon'ble Apex Court has held that a strong presumption arises in favour of wedlock where two partners have lived together for long spell as husband and wife and that although the presumption is rebuttable, a heavy burden lies on him who seek to deprive the relationship of the legal origin.

40. The Hon'ble Supreme Court in ***S.P.S.Balasubramanyam Vs. Suruttayan alias Andali Padayachi and others*** reported in ***(1994)1 SCC 460***, has held that what has been settled by this Court is that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two, but the presumption is rebuttable.

41. In ***Tulsa and Others Vs. Durghatiya and Others*** reported in ***(2008)4 SCC 520***, the Hon'ble Supreme Court referring to the decisions of the Privy Council and the other decisions above referred and also taking note of Sections 50 and 114 of the Indian Evidence Act, has held that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the



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facts of a particular case.

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42. In ***Chellamma Vs. Tilaga and Others*** reported in **(2009)9 SCC 299**, the Hon'ble Apex Court has taken the same view following its earlier decision in Tulsa's case above referred.

43. In ***Dhannulal and Others Vs. Ganeshram and Others*** reported in **(2015)12 SCC 301**, the Hon'ble Supreme Court, by referring to the decisions referred above, has held as follows:

“15. It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin. In the instant case, instead of adducing unimpeachable evidence by the plaintiff, a plea was taken that the defendant has failed to prove the fact that Phoolbasa Bai was the legally married wife of Chhatrapati. The High Court, therefore, came to a correct conclusion by recording a finding that Phoolbasa Bai was



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the legally married wife of Chhatrapati.

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44. The Hon'ble Supreme Court in ***Kattukandi Edathil Krishnan and Others Vs. Kattukandi Edathil Valsan and Others*** reported in ***AIR 2020 SC 2841***, after referring to the earlier two decisions, has held that it is well settled that if a man and a woman live together for long years as husband and wife, there would be a presumption in favour of wedlock. and such a presumption could be drawn under Section 114 of the Evidence Act and that although, the presumption is rebuttable, a heavy burden lies on him who seek to deprive the relationship of legal origin to prove that no marriage took place.

45. The settled legal position reiterated by the Hon'ble Supreme Court is squarely applicable to the case on hand. As already pointed out, in the case on hand, there is ample evidence to show that the first defendant and the ninth defendant have cohabited for a long time. It is not the case of the plaintiff that his father had lived with the ninth defendant secretly. But on the other hand, the tenth defendant has proved that the first defendant had been living with his mother – ninth defendant, openly, continuously and with the knowledge of everyone in



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the locality including the plaintiff. Consequently, a presumption can be raised in favour of their marriage from their long cohabitation. But the plaintiff, having heavy burden to prove that no marriage had taken place, has not adduced any evidence or materials to rebut the presumption drawn. Moreover, it is pertinent to note that law leans in favour of legitimacy and frowns upon bastardy.

46. As already pointed out, the first defendant had been treating the ninth defendant as his wife throughout, lived together, along with the children born to the ninth defendant in the house adjacent to the plaintiff's house and that too for a period of more than 25 years. Considering the above, as rightly contended by the learned Senior Counsel for the appellant, the plaintiff cannot be allowed to canvass an argument that there was no marriage, but only concubinage. Hence, this Court has no hesitation in drawing the presumption that there was a marriage between the first defendant and the ninth defendant and as a necessary corollary which follows that the defendants 10 to 13 are their legitimate children.

47. It is the specific contention of the tenth defendant that the



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properties of the first defendant were obtained by him in the partition suit in O.S.No.31 of 1940, on the file of the Subordinate Court, Tuticorin, filed by the first defendant against his paternal uncle Muthusamy with regard to their ancestral properties. The tenth defendant has produced and exhibited the copy of the decree passed in O.S.No.31 of 1940, on the file of the Subordinate Court, Tuticorin dated 23.02.1944, wherein it is evident that the first defendant herein and his mother Lakshmi Ammal filed the above suit against his paternal uncle Muthusamy for partition and that a decree came to be passed on the basis of the compromise. It is also not in dispute that the said Muthusamy has executed a Will dated 12.12.1958 bequeathing the entire properties allotted to him in the decree passed in O.S.No.31 of 1940, on the file of the Subordinate Court, Tuticorin in favour of the plaintiff and the first defendant.

48. It is the specific case of the tenth defendant that the first defendant and the plaintiff entered into a partition agreement on 22.11.1974, whereunder 20 acres in Samil Chenkalpadai Village and 42 acres out of 277.60 acres and the entire property of Muthusamy received under the Will of Muthusamy were allotted to the plaintiff and the first defendant was allotted 77 acres out of 104.34 acres of Muthusamy's



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share, that though the plaintiff was entitled to half share in the property of Muthusamy, the entire properties were given to the plaintiff and the properties other than Zamin Chenkalpadai Village properties received under the final decree in O.S.No.31 of 1940 were allotted to the first defendant for his share, that out of 277.60 acres in Chenkalpadai Village, the first defendant in view of the Land Ceiling Act, had transferred 125 acres by patta transfer to his daughters and gave 102 acres to the plaintiff and 50 acres to the tenth defendant, that the first defendant out of 77 acres received under Muthusamy's Will, gifted 12 acres each to the first defendant's four daughters through his first wife and 12 acres each to his two daughters through the second wife.

49. It is the further case of the tenth defendant that the plaintiff and the first defendant have entered into another partition dated 26.07.1979 reiterating the earlier partition agreement and that the present suit properties were allotted to the share of the first defendant and that therefore, the plaintiff has absolutely no right to claim any share in the suit properties. It is not in dispute that the first defendant and the plaintiff have entered into a partition deed dated 26.07.1979 under Ex.A. 1 to confirm the earlier partition agreement entered into between them on 04.05.1972.



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50. As rightly pointed out by the learned Senior Counsel for the appellants, in Ex.A.1 partition deed, the plaintiff and the first defendant have given specific undertaking that they will not claim any right or share over the property allotted to the other. It is pertinent to note that the trial Court has given a specific finding that the suit properties were allotted to the first defendant in the partition effected between the plaintiff and the first defendant and on that basis rejected the claim of the plaintiff with respect to the items 10 and 11 of I schedule and the schedules II to V of the suit properties. Admittedly, the plaintiff has not preferred any cross-appeal or cross-objection with respect to the same.

51. According to the tenth defendant, the first defendant has executed one Will in 1977, second Will in 1978 and the third and last Will in 1979. Admittedly, the tenth defendant has not produced the first Will alleged to have been executed in the year 1977, but produced the other two Wills under Exs.B.15 and B.16, dated 22.11.1978 and 17.08.1979 respectively.

52. Before entering into further discussion with regard to the Wills,



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it is necessary to refer the judgment of the Hon'ble Supreme Court in ***M.R.Ramesh (Dead) by L.Rs Vs. K.M.Veeraje Urs (Dead) by L.Rs and others*** reported in **2013(7) SCC 490**, wherein it has been held as follows:

“1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the ease of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since [section 63](#) of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by [section 63](#) of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky



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signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by



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him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

53. Generally, a Will has to be proved in terms of Section 63 of the Indian Succession Act r/w Section 68 of the Indian Evidence Act. Any person who claims any benefit under the Will, has to prove and the onus is on the propounder of the Will to satisfy the conscience of the Court that it is the last Will of a free and capable testator and that he has to remove the suspicious circumstances surrounding the Will. Moreover a Will shall not be used as an evidence until one attesting witness atleast has been called for, for the purpose of proving its execution. This is the mandate of Section 68 of the Indian Evidence Act and the said position remains the same even in a case where the opposite party does not specifically deny the execution of the Will.

54. In the case on hand, admittedly, the tenth defendant has not chosen to examine any one of the attestors to Ex.B.16 Will. But on the other hand, he has examined the scribe of the Will as D.W.3. It is not the



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case of the tenth defendant that D.W.3 is the attestor cum scribe of Ex.B.16-Will. Since the tenth defendant has failed to examine any one of the attesting witnesses, which is mandatorily required under Section 68 of the Indian Evidence Act, the trial Court has rightly held that Ex.B.16 Will was not proved. No doubt, the tenth defendant has taken a specific stand in his written statement that his father – first defendant has executed Ex.B.16 Will, dated 17.08.1979 by superseding / cancelling the earlier Will under Ex.B.15. Taking note of the above stand of the tenth defendant, the learned trial Judge, by observing that since Ex.B.15 was not the last Will of the testator and the same was allegedly cancelled by Ex.B.16, has decided not to consider the Will under Ex.B.15. The learned trial Judge has specifically observed that Ex.B.15 Will was proved, but on that basis, it cannot be taken that Ex.B.16 Will stood proved.

55. Regarding Ex.B.15 Will, one of the attestors Vellaichamy has been examined as D.W.2. D.W.2 would say that himself and other witness had seen the first defendant signing the Will, that the first defendant and other witness had seen the other witness subscribing their signature as attesting witness and that the other witness Subbiah was in



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abroad. In cross-examination, the plaintiff's side has elicited aspects touching to the execution of the Will. D.W.2 in his cross-examination would say that the Will was registered on the date of execution, that the Will was registered in Ettaiyapuram Register office, that the Will was executed in the morning and registered in the evening, that the Will was written after his arrival to that place, that the first defendant alone had given money for purchasing the stamp papers, that the tenth defendant was not available in that place, that the first defendant had subscribed his signatures before the witnesses, that the first defendant alone had directed him to subscribe the signature and that the first defendant had also directed him to go through the Will and accordingly, after going through the Will, he had subscribed his signature. During the cross-examination, one suggestion was made that the Will was not a genuine one and that the same was denied by the witness – D.W.2. Except the above suggestion, nothing was elicited during the cross-examination, shaking the evidence of D.W.2 with regard to the execution of Will.

56. It is pertinent to note that the plaintiff has nowhere disputed or denied the Wills under Exs.B.15 and B.16. The plaintiff in his cross-examination would say that he does not aware about the Will dated



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16.08.1979 executed by his father and subsequently would say that he does not know whether his father has executed a Will in 1978 and got it registered and that he does not know about the Will executed in 1979. The plaintiff has nowhere taken a stand that his father was not physically and mentally fit enough to execute the Will and that the signatures found in the Wills were not that of his father. It is also not the case of the plaintiff that the Wills were shrouded with suspicious circumstances. It is not in dispute that after the lapse of 7 months since the execution of Ex.B.15 Will, the first defendant has entered into a partition deed with the plaintiff under Ex.A.1. Moreover, as already pointed out, the first defendant along with the tenth defendant has filed the suit in O.S.No.117 of 1978 against the plaintiff and others claiming partition in the year 1978. Even according to the plaintiff, the first defendant along with the tenth defendant has executed two sale deeds in favour of the defendants 2 and 3 vide deeds dated 20.04.1998. It is pertinent to mention that even after the execution of Ex.B.15 – Will, the first defendant has entered into some property transaction, which will go to show that the first defendant was having sound and disposing state of mind. Considering the above, this Court has no hesitation to hold that Ex.B.16 Will has been proved.



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57. The learned Counsel for the first respondent/plaintiff would submit that no amount of evidence can be looked into upon the plea which was never put forth in the pleadings and the Court should confine to the question raised in the pleadings and that therefore, in the absence of pleading, the relief cannot be granted. The learned Counsel has relied on the decision of the Hon'ble Supreme Court in ***Bachhaj Nahar Vs. Nilima Mandal and Others*** reported in ***(2009)4 MLJ 900 (SC)***, wherein it has been held that where neither party puts-forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto and that the factual issue cannot be raised or considered for the first time in the appeal and no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings.

58. There is absolutely no dispute about the above legal position. In the case on hand, as already pointed out, the tenth defendant had taken a stand that Ex.B.16 is the last Will and that Ex.B.15 Will has already been cancelled by Ex.B.16.

59. The learned Senior Counsel for the appellants would submit that since the second Will was held to be not proved, the appellants can



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very well fall back on the previous Will under Ex.B.15. It is pertinent to note that the will and wish of the testator alone is to be taken into consideration and not the pleadings or the stand of the parties to the lis. That is why, before considering the Will, the Court should place itself in the Armchair of the testator, at the time he executed the Will.

60. As rightly pointed out by the learned Senior Counsel for the appellants, since Ex.B.16 was held to be not proved, the clause in the Will that earlier Will under Ex.B.15 was cancelled, cannot be looked into. It is pertinent to mention that the plaintiff has nowhere whispered that the Wills under Exs.B.15 and B.16 are forged and fabricated documents. Moreover, the trial Court has not given any finding that Ex.B.16 Will was proved to be a false and fabricated document. Since the subsequent Will under Ex.B.16 was already held to be not proved, there is no bar or prohibition for the propounder to fall back on the earlier Will.

61. Considering the above, this Court is of the view that the finding of the trial Court with regard to Ex.B.15 – Will is not proper and



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is not in accordance with law. Hence, this Court has no hesitation to hold that the tenth defendant has proved the Will under Ex.B.15. Consequently, this Court has to necessarily conclude that after the death of the first defendant, Ex.B.15 has come into force and on that basis, the defendants 9 and 10 have become the owner of the suit properties.

62. The learned Counsel for the first respondent/plaintiff has taken a technical objection that in view of the common judgment passed in O.S.No.196 of 1989 and O.S.No.225 of 1989, the present appeal filed with regard to the suit in O.S.No.196 of 1989 is not maintainable on the ground of constructive res judicata and relied on the decision of the Hon'ble Supreme Court in ***Sri Gangai Vinayagar Temple and another Vs. Meenakshi Ammal and others*** reported in ***2015-1-L.W.1***, wherein it has been held as follows:

“ Suits in which common issues have been framed and a common trial conducted, losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments – Decree not assailed thereupon metamorphoses into the character of a 'former suit' – Where a common judgment has been



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delivered in cases in which consolidation orders have specifically been passed, filing of a single appeal leads to the entire dispute becoming subjudice once again consolidation orders are passed by virtue of inherent powers on courts by Section 151 C.P.C. Having avoided filing appeals against the decrees in 2 suits the cause of the respondents was permanently sealed and foreclosed since res judicata applied against them.”

63. In the case on hand, the suit in O.S.No.225 of 1989 was filed by the defendants 7 and 8 against the plaintiff and other defendants claiming partition in respect of the property allegedly belonging to the first defendant. The defendants 10 to 13 have filed the written statement stating that they have no objection to effect partition and that the plaintiff and his other sisters have also filed written statement admitting the claim of the defendants 7 and 8 and on the basis of the stand taken by the defendants therein, the preliminary decree was passed as prayed for, by the defendants 7 and 8.

64. Considering the above, it is clearly evident that the parties to the suit in O.S.No.225 of 1989 are not in issue and hence, the decree was



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granted as prayed for. Moreover, the issues and the properties involved in the present suit in O.S.No.196 of 1989 are entirely different from the claim made and the properties involved in the suit in O.S.No.225 of 1989. Though a joint trial was ordered, there were no common issues and as such, the doctrine of constructive res judicata has no application to the case on hand. Hence, this Court concludes that the plaintiff and the defendants 4 to 8 are not entitled to claim any share in the suit properties and as such, the suit is liable to be dismissed. Considering the other facts and circumstances, this Court further decides that the parties are to be directed to bear their own costs.

65. In the result, the Appeal Suit is allowed and the judgment and decree passed in O.S.No.196 of 1989, dated 04.03.1996 on the file of the Subordinate Court, Tuticorin, is set aside. The suit in O.S.No.196 of 1989 is dismissed. The parties are directed to bear their own costs.

07.08.2023

NCC : Yes : No
Index : Yes : No
Internet : Yes : No



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To

1. The Subordinate Court, Tuticorin.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

A.S.No.335 of 1998

07.08.2023