



A.S.(MD) No.38 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.09.2024

WEB COPY

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN
and
THE HON'BLE MR.JUSTICE JUSTICE K.K.RAMAKRISHNAN

A.S.(MD) No.38 of 2014

T.Rajmohan

... Appellant/Plaintiff

Vs.

T.Jayaraman

... Respondent/Defendant

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code, to set aside the Judgment and Decree dated 15.03.2013 passed in O.S.No.21 of 2007 on the file of the II Additional District Court, Tiruchirappali and pass a preliminary Decree in O.S.No.21 of 2007 as prayed for.

For Appellant : Mr.K.S.Sankhar Murali

For Respondent : M/s J.Maria Roseline



A.S.(MD) No.38 of 2014

WEB COPY

J U D G M E N T

P.VELMURUGAN, J.

The plaintiff is the appellant in the appeal. The appellant filed a suit for partition and separate possession of half share in the suit properties. The suit was dismissed. Aggrieved against the same, he has filed the present appeal.

2. The case of the appellant/plaintiff as set out in the plaint before the Trial Court is as follows:-

The appellant and the respondent are the brothers and owners of the suit properties. The suit properties originally belonged to one Ammani Ammal, who obtained title through settlement deed, dated 24.10.1972 and the said Ammani Ammal constructed a Cinema Theatre and while she was in a sound and disposing state of mind, executed her last Will in favour of the appellant and the respondent on 03.01.1975. Thereafter, the said Ammani Ammal died on 19.03.1992. After her demise, her Will came into force. Thereafter, the appellant and the respondent were managing the property jointly and for their convenience “C” Form licence under the



A.S.(MD) No.38 of 2014

Tamil Nadu Cinema Regulations Act was obtained in favour of the appellant's wife and the respondent's son Nandhakumar. The appellant and the respondent have already entered into a partnership deed with their respective family members. The said Partnership Firm was not registered and the suit property was not at all transferred as the assets of the said Partnership Firm. The said Partnership Firm was allowed to continue without infringing the rights of the appellant in the suit property. The appellant and his family members have already sent representations and notice to the respondent and the family members of the respondent and the District Collector and the Commercial Tax Officer, informing them their intention to dissolve the Firm and their objections to the renewal of the "C" Form licence. The appellant has also reserved his rights to file the suit against the members of the respondent's family for rendition of accounts of the dissolved Partnership Firm separately. Now, the respondent is attempting to lease out the suit property and also attempting to encumber the suit property. Since the appellant is in joint possession and enjoyment of the suit property, he filed the suit for partition.



A.S.(MD) No.38 of 2014

3. The case of the respondent/defendant as set out in the written

statement before the Trial Court is as follows:-

(i) The vacant site of the suit property belonged to Ammani Ammal and she acquired the title by virtue of a settlement deed dated 24.10.1972 and the said Ammani Ammal also executed a registered Will, dated 03.01.1975. The father of the respondent, Thangaraj Pillai was employee of Southern Railways and he is the eldest son of Ammani Ammal. A Touring Theatre was run at Vaiyampatti in the name and style of M/s Ram Mohan Touring Talkies. Similarly, few other Touring Talkies were also run at various places like Viralimalai, Puthanatham, Manapparai. All those Touring Talkies were established and run only out of the investment by Thangaraj Pillai. Since he was an employee of Southern Railways, the licences were obtained in the name of Ammani Ammal and Rathinathammal. Since the said Thangaraj Pillai wanted to establish a permanent Cinema Theatre, he decided to construct a pucca Cinema Theatre over the suit property and run the business as a Partnership Firm. A Partnership Firm was constituted in the name and style of M/s Theatre Thangaraja on 11.06.1975. Thangaraj Pillai had constructed a Theatre out of his own resources and borrowings. The Partnership Firm had availed



A.S.(MD) No.38 of 2014

loan from Tamil Nadu Film Development Corporation Ltd. The licence was obtained in the name of the mother of the appellant and the respondent. Thangaraj Pillai was looking after the management and running of the business with effective assistance of the respondent. After his retirement, the father of the appellant and the respondent devoted his full time in the said business till his death. The vacant site of the property alone belonged to Ammani Ammal and the superstructures existing thereon belongs to the Partnership Firm. At the time of the death of the father of the respondent in the year 1993, the respondent was working in Aranthangi as Assistant Divisional Engineer. Since no one was to take care of the business and the management, the Theatre was leased out to one Nagaraj, who was running the Theatre for one year. Thereafter, it was leased out to one Mohan. Since no one has come forward to run the Theatre, the Theatre remained closed for some time. Thereafter, one Gowri offered to run the Theatre on lease. Despite the expiry of lease period, the said Gowri did not surrender possession. After several mediations, she surrendered the possession after receiving a sum of Rs. 9,00,000/-. Thereafter, the respondent and his mother decided not to lease out the property.

5/29



A.S.(MD) No.38 of 2014

(ii) The Partnership Firm was reconstituted on 03.10.2005. The respondent and his wife paid a sum of Rs.49,351/- to the Corporation and thereby, the entire loan liability was discharged. The respondent and his wife had spent Rs.13,90,351/- to release all the liabilities and encumbrance. The respondent also paid Rs.9,00,000/- to the tenant Gowri for recovering possession of the premises. The appellant accepted the liability to the tune of Rs.7,00,000/- only. Therefore, when the Firm was reconstituted, the appellant and his family members agreed to reimburse half of the amount incurred by the respondent and his wife. The appellant and other partners of his family agreed to pay the aforesaid amount of Rs.6,00,000/- with interest. The appellant also received Rs. 5,000/- every month periodically from the account of the Firm. The appellant had insisted the respondent to make arrangement for selling the Cinema Theatre and divide the sale proceeds amongst the family members. It has been specifically mentioned in the Partnership deed that in the event of any dispute, the partners should resort to their remedies through Arbitration by invoking clause. The appellant created all kinds of troubles and hardships for running the Theatre. The appellant has no right to claim partition in respect of superstructures which were



A.S.(MD) No.38 of 2014

constructed by the Partnership Firm and it belongs to the Firm only. The suit is bad for non-joinder of necessary parties. The respondent is always ready and willing to settle the claim of the appellant in terms of money. The suit for partition is not maintainable.

4. Based on the pleadings, the Trial Court has framed the following issues:

- (1) Whether the vacant site of the property alone belonged to Ammani Ammal as alleged by the defendant?
- (2) Whether the superstructures were constructed by the Partnership Firm as alleged by the defendant?
- (3) Whether the plaintiff is entitled for *mesne* profits?
- (4) To what relief, the plaintiff is entitled to?

5. During trial, on the side of the appellant, the appellant was examined as P.W.1 and 19 documents were marked as Exs.A1 to A19. On the side of the respondent, the respondent was examined as D.W.1 and 18 documents were marked as Exs.B1 to B18.



A.S.(MD) No.38 of 2014

6. After trial, the Trial Court, on hearing the arguments on either side, considering the pleadings and oral and documentary evidence, dismissed the suit. Aggrieved by the Judgment and Decree, the appellant has filed the present appeal.

7. The learned counsel for the appellant would submit that the suit property was originally vacant site which belonged to one Ammani Ammal, who is none other than the paternal grandmother of the appellant and the respondent, who derived the property by way of a settlement deed, dated 24.10.1972. Subsequently, her son constructed a Cinema Theatre. While so, she was in sound and disposing state of mind, she executed a Will, dated 03.01.1975 in favour of the appellant and the respondent and she died on 19.03.1992. Thereafter, the appellant and the respondent alone are entitled to the suit property, the appellant demanded for partition and separate possession. Since the respondent denied, the appellant filed the suit for partition. He would further submit that the respondent himself has admitted in his written statement that though the vacant site stands in the name of Ammani Ammal, the son of Ammani Ammal and the father of the appellant and the respondent viz, Thangaraj



A.S.(MD) No.38 of 2014

Pillai, who was working in the Southern Railways, obtained licence in the name of his mother Ammani Ammal and wife Rathinathammal and also he decided to construct a pucca Cinema Theatre over the suit property and run the business. The said Thangaraj Pillai had constructed the Theatre out of his own resources and borrowings. The vacant site of the suit property alone belonged to Ammani Ammal and hence, the superstructures belonged to the Partnership Firm, is denied. However, the respondent has not produced any material to show that the property belongs to the Partnership Firm.

8. The learned counsel would further submit that even in the recital of the Will executed by Ammani Ammal itself, it is stated that the site belongs to her and she derived title from the settlement deed, dated 24.10.1972, in which, the superstructures were constructed by his son Thangaraj and she has not spent any money for the same. After her demise, both the land and superstructures would go to the appellant and the respondent and both are entitled to half share in the suit property. Except these two persons, no one is having any right in the suit property. He would further submit that in recital of the reconstitution of the

9/29



A.S.(MD) No.38 of 2014

partnership deed, dated 03.10.2005, which is an unregistered Partnership

Firm, it is admitted that the vacant site belonged to Ammani Ammal.

Though it is stated in one place that out of the funds of the Partnership Firm, the Theatre was constructed, and also stated about the letting out the Theatre and also the payment made to the lessee, even in the recital, it is stated that both the appellant and the respondent are having equal right in that vacant site and also superstructures. Even the family members of the appellant and the respondent are equally entitled to that. Therefore, except the appellant and the respondent, no other persons are entitled to. Even though the said Thangaraj Pillai got female legal heirs, they have not claimed any right over the suit properties. Since the properties are treated as a partnership property and the partnership deed also is unregistered and the property was never thrown into hotchpot of the Partnership Firm, the defence taken by the respondent is not acceptable. Once, it is admitted that Ammani Ammal is the owner of the vacant site and her son constructed the building out of his own sources, it became a property of Ammani Ammal and under the Will, the appellant and the respondent are entitled to. Therefore, the appellant is entitled to half share in the suit property. Unfortunately, the Trial Court failed to

10/29



A.S.(MD) No.38 of 2014

consider the pleadings and also recitals in the Will and the partnership deed and also the oral evidence, dismissed the suit. Therefore, the appellant is before this Court. In support of his contention, the learned counsel has produced the following Judgments:

- (i) **Arjun Kanoji Tankar vs. Santaram Kanoji Tankar** reported in (1969)3 SCC 555;
- (ii) **M/s Gudiyattam Lungi Company vs. G.Vasantha & others** reported in 2021(2) LW 717; and
- (iii) **Bachhaj Nahar vs. Nilima Mandal & another** reported in 2009(2) LW 485 (SC).

9. The learned counsel for the respondent would submit that once the property of the individual was thrown into the hotchpot of the Partnership Firm, it is property of the Partnership Firm and except the Partnership Firm, no one has got any right in the suit property. Since it is the property of the Partnership Firm, the appellant, at the best, can file the suit for dissolution of Partnership Firm and then, whatever the rights and liabilities, he has to bear the same. Even in the previous occasion, on the date of death of the father of the appellant and the respondent, the Theatre was let out to the third party, namely, one Gowri. Therefore, there is a

11/29



A.S.(MD) No.38 of 2014

dispute. In order to settle her, the respondent and his wife spent huge money and settled the lessee and took the possession and they have decided not to let in the Theatre and therefore, the appellant also agreed to share the said expenses and he had not repaid the same. The property belongs to the Partnership Firm. Hence, the suit for partition is not maintainable. The learned counsel would further submit that even in the partnership deed, it is mentioned that if any dispute arises, it has to be referred to the Arbitrator and the matter has to be settled through the Arbitration proceedings. Therefore, the suit itself is not maintainable. The Trial Court rightly appreciated the oral and documentary evidence and dismissed the suit. There is no merit in the appeal. In support of her contention, the learned counsel has produced the following Judgements:

- (i) **Sunil vs. Commissioner of Income Tax** reported in **AIR 1986 SC 368**; and
- (ii) **Ravi Prakash Goel vs. Chandra Prakash Goel & another** reported in **CDJ 2007 SC 346**.

10. Heard both sides and perused materials available on records.



A.S.(MD) No.38 of 2014

11. The specific case of the appellant is that the suit property originally belonged to his paternal grandmother, one Ammani Ammal. Though she obtained the said property under registered settlement deed, dated 24.10.1972, and enjoyed as a vacant site and subsequently, the Theatre building was constructed out of the fund of the father of the appellant and the respondent, who is none other than the son of the said Ammani Ammal. During the life time of Ammani Ammal, she bequeathed the suit property to the appellant and the respondent. As per the Will, both are entitled to half share. It is only an individual property of Ammani Ammal and the property stands in the name of the female, though it was constructed by the father, it is the property of Ammani Ammal. Therefore, as per the Will, the appellant and the respondent are entitled to half share. Though the respondent has taken the defence that the suit property is the Partnership Firm, there is no material and the respondent himself admitted that the suit property was the vacant site, which belonged to Ammani Ammal and the construction was made by their father Thangaraj Pillai out of his own source and borrowings. There is no material produced to show that the property belongs to the Partnership Firm and the construction was made out of the fund of the

13/29



A.S.(MD) No.38 of 2014

Partnership Firm and the suit property was thrown into the hotchpot of the Partnership Firm.

12. The specific case of the respondent is that though the vacant site belonged to Ammani Ammal, the said Ammani Ammal executed a Will, however, the suit property was thrown into hotchpot of the Partnership Firm. When the property was mortgaged with the Finance Company, they settled the amount through the Partnership Firm. Therefore, it is the property of the Partnership Firm. Subsequently, the Partnership Firm was reconstituted after the death of Ammani Ammal and the father of the appellant and the respondent, Thangaraj Pillai. As per the partnership deed, the suit property belongs to the Partnership Firm and therefore, as such, the suit framed for partition is not maintainable.

13. Since the first Appellate Court is the fact finding Court, this Court has to re-appreciate the entire evidence and give independent finding, for which, this Court has taken the following points for determination:

14/29



A.S.(MD) No.38 of 2014

- (1) Whether the suit property is the individual property or the Partnership Firm?
- (2) Whether the appellant is entitled to get a preliminary decree as prayed for?
- (3) Whether the finding of the Trial Court is perverse?

Point No.1:

14. Insofar as Point No.1 is concerned, it is the case of the appellant that the vacant site of the suit property originally belonged to the paternal grandmother of the appellant and the respondent one Ammani Ammal, who got the property by virtue of the settlement deed, dated 24.10.1972. During her life time, while she was in sound and disposing state of mind, she executed Will in favour of the appellant and the respondent under registered Will, dated 03.01.1975. During her life time, the said Ammani Ammal had constructed a Touring Talkies in the said vacant site. After the death of the said Ammani Ammal, on 19.03.1992, the said Will came into force. Therefore, the appellant is entitled to half share.



A.S.(MD) No.38 of 2014

15. According to the respondent, though the vacant site belonged to Ammani Ammal, subsequently, it becomes the property of the Partnership Firm and the building was constructed out of the source of the Partnership Firm and the suit property was thrown into hotchpot of the Partnership Firm. Therefore, the property belongs to the Partnership Firm. Hence, the suit for partition is not maintainable.

16. In order to substantiate the case of the appellant before the Trial Court, the appellant was examined as P.W.1 and marked 19 documents as Exs.A1 to A19. The appellant has reiterated the averments made in the plaint in his proof affidavit, which was filed for the chief examination. A copy of the settlement deed, dated 24.10.1972 executed by Rathinathammal in favour of Ammani Ammal was marked as Ex.A1. From Ex.A1, it is seen that the said Ammani Ammal got the vacant site by way of the registered settlement deed, dated 24.10.1972, and the respondent has not denied the same. A copy of the Will, dated 03.01.1975, executed by Ammani Ammal in favour of the appellant and the respondent was marked as Ex.A2, which shows that Ammani Ammal bequeathed the suit property to the appellant and the respondent by way



A.S.(MD) No.38 of 2014

of the Will during her life time. Ammani Ammal died on 19.03.1992. A copy of the death certificate was also marked as Ex.A3, which clearly shows that Ammani Ammal is the owner of the vacant site of the suit property and she is the Testator and the appellant and the respondent are the beneficiaries.

17. The respondent has also admitted that Ammani Ammal is the owner of the vacant site and she has also executed registered Will. The only case of the respondent is that the property became a Partnership Firm and once, it becomes property of partnership, the suit for partition based on the Will is not maintainable. Once Exs.A1, A2 and A3 are not denied by the respondent and even Ex.A2, which is not disputed by the respondent and admitted that Ammani Ammal has stated in the Will that the property was obtained under the registered settlement deed, dated 24.10.1972. The building was constructed by Thangaraj Pillai and she has stated that she has not spent any money, however, during the life time of Thangaraj Pillai, he has not claimed any right in the building. Therefore, she bequeathed her property to the appellant and the respondent being the male legal heirs of the said Thangaraj Pillai. From

17/29



A.S.(MD) No.38 of 2014

the recitals, it is further seen that except the appellant and the respondent,

no other legal heirs of the said Thangaraj Pillai are entitled to. Since this

Ex.A2 was not denied or disputed by the respondent, he cannot let

evidence contra to recitals of the Will. Even otherwise, in the written

statement filed by the respondent, the respondent himself admitted that

Ammani Ammal derived the property through the settlement deed, dated

24.10.1972. Further, the respondent has also admitted in the written

statement that the father of the appellant and the respondent was working

in Southern Railways and he is the eldest son of Ammani Ammal.

Further, from the recitals in the Will executed by Ammani Ammal, it is

seen that Touring Talkies were run at Vaiyampatti in the name and style of

Ram Mohan Touring Talkies. Similarly, four more Touring Talkies were

run at various places, like, Viralimaial, Puthanatham, Manapparai, etc.

All the Touring Talkies were established and run only out of the

investment by Thangaraj Pillai. Since he was an employee of the

Southern Railways, licences were obtained in the name of Ammani

Ammal and Rathinathammal. Thangaraj Pillai was carrying on these

business since 1964 onwards. Further, he has also admitted in the written

statement that Thangaraj Pillai decided to construct a permanent Cinema

18/29



A.S.(MD) No.38 of 2014

Theatre and he has also constructed a pucca Cinema Theatre over the suit property and run the business of the Partnership Firm. He has also admitted that Thangaraj Pillai has constructed a Theatre out of his own sources and borrowings. After his retirement, Thangaraj Pillai devoted his full time in the said business till his death. However, the respondent has not stated in his written statement that out of the funds of the Partnership Firm or the profits raised in the name of the Partnership Firm, his father constructed the Theatre. Further, there is no material to show that the original owner Ammani Ammal thrown the suit property into hotchpot of the Partnership Firm.

18. Further, the respondent has filed another suit for recovery of the amount which was said to have paid to one Gowri for getting the possession of the Theatre from her, who was lessee/tenant. Even in that plaint, he has averred that the first plaintiff's father, viz., the respondent's father Thangaraj Pillai had invested a huge amount out of his own sources. The Theatre was constructed out of the borrowings as well as the loan availed from the Tamil Nadu Films Development Corporation Limited. Further, he has stated that in fact, the father of the appellant and



A.S.(MD) No.38 of 2014

the respondent Thangaraj Pillai had invested a huge amount out of his own sources. The licence was originally obtained in the name of Ammani Ammal and after her demise, the licence was issued in the name of the respondent's mother Rathinathammal. The appellant's and the respondent's father Thangaraj Pillai alone was looking after the management and business till his demise. After his demise, the Theatre was let out to the third parties. In order to evict and get the person, they spent money. Both the suits were tried jointly and also both the suits were dismissed. The respondent has not filed any appeal against the said dismissal of the other suit in O.S.No.176 of 2008. Even he has not filed the suit against the Partnership Firm. If at all the Theatre belongs to the Partnership Firm and if he spent any money from the profit of the Partnership Firm or the properties of the Partnership Firm, he could have filed the suit against the Partnership Firm for recovery of his money spent for. Instead of filing suit against Partnership Firm, he has filed the suit against the individual person. Therefore, the contention of the respondent that the property of Ammani Ammal was thrown into hotchpot of the Partnership Firm; the suit property has become the property of the Partnership Firm and therefore, the suit is not maintainable, is not

20/29



A.S.(MD) No.38 of 2014

acceptable. Since Exs.A1 to A3 are not denied and from the oral and documentary evidence, while re-appreciating the evidence, this Court finds that Ammani Ammal got the property by way of registered settlement deed under Ex.A1 and subsequently, his son Thangaraj Pillai had constructed the building in the said property stood in the name of his mother out of his own source. During the life time of Thangaraj, he has not stated that it is the property of the Partnership Firm and also not claimed any right in the property. Once the respondent himself admitted that the vacant site belonged to Ammani Ammal, in which, her son constructed the building out of his own source and Ex.A2, Will, which was admitted by the respondent, shows that Ammani Ammal bequeathed her property in favour of the appellant and the respondent, the appellant has established his case that he is entitled to share as per the Will. When the appellant has proved the initial burden, then the onus has been shifted to the respondent. Therefore, it is for the respondent to discharge his onus that the property is not an individual property and it is only a property of Partnership Firm.



A.S.(MD) No.38 of 2014

19. Admittedly, the Partnership Firm is not registered one and even according to the respondent, after death of his father, they let out the building to the third party including one Gowri and for evicting them, they also settled the amount. According to them, if it is Partnership property, all the debts will bind the Partnership Firm and not the individual and their liability to the extent of only their shares. But instead of claiming that amount from the Partnership Firm, the respondent was claiming from the individual. Since it is an unregistered document, the respondent cannot claim as property of the Partnership Firm in the absence of any specific proof. Admittedly, in this case, the respondent has taken inconsistent pleadings and from the written statement and also the averments made in the plaint in the other suit, though it is settled proposition that any numbers of inconsistent defence can be taken but at the same time, which should not contradict to each other. In this case, one thing is clear and admitted by the parties that Ammani Ammal is the original owner of the vacant site and the father Thangaraj Pillai constructed the building and there is no material to prove that from the fund and source of the Partnership Firm, it was constructed and subsequently, the property was treated as Partnership property. In the

22/29



A.S.(MD) No.38 of 2014

reconstitution of the partnership deed, it is also admitted that the property belonged to Ammani Ammal and the appellant and the respondent are equally entitled to the share. Therefore, under these circumstances, Point No.1 is answered accordingly in favour of the appellant.

Point Nos.2 and 3:

20. Once it is held that it is the property of the individual and the appellant has proved his initial burden, this Court finds that the respondent has not discharged his onus and established that it is the property of the Partnership Firm and under these circumstances, the appellant is entitled to get preliminary decree for his half share in the suit property as sought for in the plaint.

21. As already stated, the claim of the appellant is that the property belonged to the grandmother and she executed a registered Will and after her death, the said Will came into force and after the death of the grandmother Ammani Ammal and also their father Thangaraj, the appellant has filed the suit. The respondent has not denied the fact. The respondent has also admitted that the vacant site belonged to Ammani



A.S.(MD) No.38 of 2014

Ammal and also the superstructures were constructed by their father out of his own source. Except an averment made in the written statement, there is no proof to show that the suit property was thrown into the hotchpot of the Partnership Firm and the property was treated as a property of the Partnership Firm or the building was constructed out of the source of the Partnership Firm. Even there is no material to show that either Thangaraj or the wife of Thangaraj or even by Ammani Ammal anywhere have stated that the superstructure was constructed from the source of Partnership Firm. No document has been produced by the respondent to show that the superstructure was constructed out of the fund of the Partnership Firm. Admittedly, the Partnership Firm is also not registered. It is admitted that it is the property of Ammani Ammal and the superstructure was constructed by her son out of his own fund. During his life time, the said Thangaraj Pillai has not claimed right in the superstructure. During the life time of the said Thangaraj Pillai, Ammani Ammal has executed a registered Will. Thangaraj Pillai was also aware of that Will and in the said Will, it is not stated that it is the property of the Partnership Firm or Thangaraj Pillai constructed the building out of funds of the Partnership Firm or the property is treated as the property of

24/29



A.S.(MD) No.38 of 2014

the Partnership Firm. Once the respondent has admitted the Will or otherwise, he has not disputed the Will and he has not challenged the Will and recitals mentioned in the Will, he cannot take any contrary stand against the recital in the Will. Therefore, from the facts and circumstances of the case, the citations referred to by the learned counsel appearing for the respondent are not applicable to the present case on hand, in the absence of any material to show that the suit property is treated as a partnership property.

22. It is settled proposition of law that under Section 14 of the Partnership Act, 1932, in the absence of an agreement to the contrary, the property exclusively belonging to a person, on his entering into the partnership with others, does not become a property of the partnership, merely because, it is used for the business of the said Partnership Firm. Such property will become the property of the partnership only if there an agreement, express or implied that the property was under the agreement of the partnership, to be treated as property of the Partnership. The said ratio was held in the decision in the case of **Arm Group Enterprises Ltd vs Waldorf Restaurant & Ors** reported in **2003 (6) SCC 423**.

25/29



A.S.(MD) No.38 of 2014

WEB COPY

23. The burden of proof by the plaintiff in the civil suit is not as that of the prosecution in the criminal case to prove beyond all the reasonable doubt, if the plaintiff is able to prove the case with preponderance of probabilities then the plaintiff is entitled to get the relief as sought for. The Trial Court failed to appreciate the pleadings and also contradictory stand taken by the respondent. Though the respondent can take any number of inconsistent pleadings, however, which cannot be mutually contradictory to each other.

24. In this case, the case of the appellant is that the suit property is an individual property of the appellant and the respondent and as per the Will, he is entitled to half share. Though the respondent states that it is a Partnership Firm, but Exs.A1 to A3 would clearly show otherwise. Then, it is for the respondent to discharge the onus and to prove that it is the Partnership property. Therefore, once it is established that originally, the property was the individual property then a person, who claims that it becomes a Partnership property or change the characters of the property, has to prove. It is well settled proposition that once onus has been shifted

26/29



A.S.(MD) No.38 of 2014

to the respondent and he has not discharged his onus, the appellant is entitled to get decree, whereas the Trial Court has failed to appreciate the same. This Court being the appellate Court, while re-appreciating the evidence, finds that the finding of the trial Court is perverse. Accordingly, Point Nos.2 and 3 are answered in favour of the appellant.

25. In the result, this Appeal Suit is allowed. The appellant is entitled to half share in the suit property and the preliminary decree is passed to that extent. In respect of *mesne* profits, the appellant is at liberty to workout the remedy under Order 20 Rule 18 of C.P.C. Considering the facts and circumstances of the case and relationship of the parties, there is no order as to costs.

[P.V., J.] [K.K.R.K., J.]
06.09.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes
skn



A.S.(MD) No.38 of 2014

To:

WEB COPY

1. The II Additional District Judge, Tiruchirappalli.
2. The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



A.S.(MD) No.38 of 2014

P.VELMURUGAN, J.
and
K.K.RAMAKRISHNAN, J.

skn

A.S.(MD) No.38 of 2014

06.09.2024