



A.S.No.211 of 2022 & Cross Objection No.96 of 2022

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **20-02-2025**

CORAM

THE HONOURABLE MR JUSTICE N. SATHISH KUMAR

Appeal Suit No.211 of 2022

& C.M.P.No.7555 of 2022

and

Cross Objection No.96 of 2022

A.S.No.211 of 2022

Chinnapaiyan
S/o. Marimuthu

..... Appellant

-Versus-

1. Periyaponnu
W/o. Chinnapaiyan

2. Nithiya
W/o. Ramachandran &
D/o Chinnapaiyan

..... Respondents

Appeal under Section 96 of the Code of Civil Procedure, 1908 praying to set aside decree and judgement dated 16.10.2019 made in O.S.No.173 of 2015 on the file of the learned I Additional District Judge, Salem, Salem District.



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Cross Objection No.96 of 2022

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1.Periaponnu
W/o. Chinnapaiyan

2.Nithya
W/o. Ramachandran &
D/o Chinnapaiyan

..... Appellants

-Versus-

Chinnapaiyan
S/o.Marimuthu

..... Respondent

Appeal under Order LXI, Rule 22 of the Code of Civil Procedure, 1908, praying to set aside the decree and judgement dated 16.10.2019 made in O.S.No.173 of 2015 on the file of the learned I Additional District Judge, Salem, Salem District insofar as dismissal of the suit for the part of their claim for partition.

*For Appellant in : Mr.S.Rajesh Ramanathan
A.S.No.211 of 2022
and Respondent in
Cross.Obj.No.96 of
2022*

*For Respondent(s) : Mr.R.Meenal
in A.S.No.211 of
2022 and
Appellant(s) in
Cross Obj. No.96 of
2022*



A.S.No.211 of 2022 & Cross Objection No.96 of 2022

COMMON JUDGEMENT

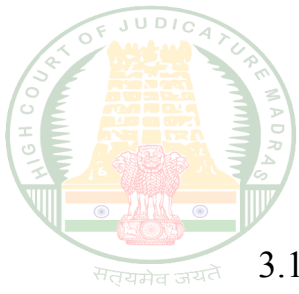
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A.S. No. 211 of 2022 has been filed by the defendant challenging the judgment and decree granting a preliminary decree for a partition of one-half share in respect of suit Item No. 3 in favour of the 2nd plaintiff and maintenance at the rate of Rs. 4,000/- per month from the date of plaint, while Cross Objection No. 96 of 2022 has been filed by the plaintiffs challenging the dismissal of the suit for the part of their claim for partition in respect of suit Item Nos. 1 and 2.

2.1 The appellant in A.S.No.211 of 2022 and the respondent in the Cross Objection No.96 of 2022 is the defendant, and the respondents in A.S.No.211 of 2022 and the appellants in Cross Objection No.96 of 2022 are the plaintiffs in the suit.

2.2 The parties in the appeal and cross objection will now be referred to according to their array in the litigation for convenience and to prevent misunderstandings.

3.0 The plaintiffs pleaded in their plaint as follows:-



3.1 The plaintiffs are the wife and daughter of the defendant. The 1st plaintiff married the defendant 32 years ago, and through their lawful wedlock, a male child named Chandrasekar, and a female child, the 2nd plaintiff named Nithya, were born. The plaintiffs and the defendant constitute a Hindu Undivided Joint Family.

3.2 The 1st plaintiff and the defendant were living happily as husband and wife for 6 years, and thereafter, the attitude of the defendant got changed like anything, and he had started to quarrel with the 1st plaintiff without any reason. The character of the defendant had become worse day by day.

3.3 While so, the 2nd plaintiff was given in marriage in a simple manner. The 2nd plaintiff was not given any sreedhan. The 1st plaintiff had tried her level best to reform the defendant for leading a happy married life with him, but all her sincere efforts went in vain.

3.4 While so in 2009, all of a sudden, the defendant quarrelled with the 1st plaintiff without any reason and had driven her out from the matrimonial home and retained her son, Chandrasekar, alone with him. Thereafter, the defendant was not amenable to any kind of settlement made by the relatives or



mediators. The defendant has been leading a wayward life all along with his son. The defendant neglected to maintain the 1st plaintiff. The marital bond between the 1st plaintiff and the defendant is still subsisting. While so, on 29.03.2015, their son died by committing suicide. Even after the death of their only son, there is no change in the attitude of the defendant.

3.5 The suit properties are undivided joint family properties of the plaintiffs and the defendant. The defendant was having ancestral properties covered under Patta Nos. 589, 185, and 321 of Selathampatty village in Salem Taluk. He was in common possession and enjoyment of the same with his father, Marimuthu; brother, Kandasamy; and sisters, Rajammal and Kamala. Out of the income from the ancestral properties and out of the joint family income, the suit Item No. 1 of the property was purchased in the name of the defendant through a registered sale deed dated 25.02.1993 vide Doc. No. 429 of 1993 on the file of the Sub Registrar, Suramangalam; the suit Item No. 2 of the property was gifted in favor of the defendant by his father, Marimuthu, through a registered settlement deed dated 16.04.2010 vide Doc. No. 2851 of 2010 on the file of the Sub Registrar, Suramangalam. While so, on 29.05.2012, the defendant, his father, brother, and sisters partitioned their ancestral properties through a registered partition deed vide doc. No. 3431 of 2012 on the file of the



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Sub Registrar, Suramangalam. The properties shown under B-Schedule in the said partition deed were allotted to the share of the defendant. By throwing all these properties into one hotchpotch, the defendant was in common possession and enjoyment of the properties along with the 2nd plaintiff and his son - Chandrasekar. However, the plaintiffs and the defendant have been in joint and constructive ownership and enjoyment of the properties since the aforementioned Chandrasekar passed away without being married, leaving the 1st plaintiff (mother) as his sole Class-I legal successor. There has been no partition by metes and bounds among them till today.

3.6 The defendant wantonly neglected the 1st plaintiff without providing any maintenance for her food, clothing, shelter, or essential expenses. After she was neglected by her husband, the 1st plaintiff has been suffering a lot for her livelihood. She has no permanent income. She has been mentally and physically suffering for her livelihood. She is in need of Rs.4,000/- per month for her maintenance. Whereas the defendant is leading a very wonderful and colourful life with his earnings and with his properties. The defendant is duty bound to maintain his wife (1st plaintiff). Hence, the suit for partition and maintenance.

4.1 The defendant filed his written statement admitting the marriage with



the 1st plaintiff 32 years ago and, *inter alia*, contending that when his son was 1½ years old, the 1st plaintiff had deserted him voluntarily and had been living separately without any sufficient cause. He had no connection with the 1st plaintiff ever since then, and he is not the biological father of the 2nd plaintiff. The plaintiffs and he never constituted a joint family as alleged by the plaintiffs. The 1st plaintiff and he never lived happily as husband and wife. The 1st plaintiff had left the matrimonial home about 28 years ago and has been living separately on her own.

4.2. He had nothing to do with the 2nd plaintiff. He was not aware of the birth and the marriage of the 2nd plaintiff, as the 2nd plaintiff is not his daughter. It is only the 1st plaintiff who has been living a wayward life. The 1st plaintiff never visited her son in the village, and the marriage between him and the 1st plaintiff was dissolved as per the custom of the community, and ever since then, there has been no contact with him. The suit properties are separate properties of the defendant. The property, which was gifted to the defendant by his father, is separate property of him, and neither the plaintiff nor anyone can claim any share in the same. No ancestral properties are available for partition.

4.3. The defendant was doing business in silver, and he had purchased the



properties and has been enjoying the same separately. There was no hotchpotch.

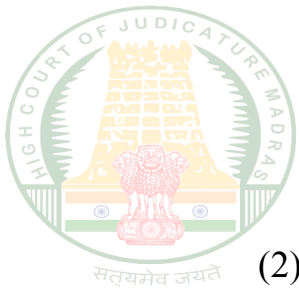
The properties are separate properties of the defendant, and he has been in possession and enjoyment of the same as absolute owner.

4.4 The 1st plaintiff has been residing at Kamalapuram, which is nearly 20 km away from the suit properties. The 1st plaintiff having left the family about 28 years ago on her own volition, she will not have any right to claim maintenance.

5. In reply, the plaintiffs pleaded that the mother of the defendant is none other than the paternal aunt of the 1st plaintiff. Whenever the defendant ill-treated the 1st plaintiff, the 1st plaintiff had to leave him and go to her parents' abode at Kamalapuram. Owing to the close relationship while the 1st plaintiff stayed in her parents' house, the defendant often used to visit the 1st plaintiff and her parents.

6. Based on the above pleadings, the following issues were framed by the trial court for trial:

(1) Whether the 1st plaintiff is entitled to maintenance as prayed for?



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(2) Whether the suit item of properties is joint family properties or separate properties of the defendant?

(3) Whether the 2nd plaintiff is entitled to 1/2 share in the suit properties?

7. During the trial, on the side of the plaintiffs, the 1st plaintiff, Periyaponnu, examined herself as P.W.1, and in support of her case, Govindaraj and Soundararajan were examined as P.W.2 and P.W.3, respectively, and Ex.A.1 to Ex.A.8 were marked. On the side of the defendant, the defendant, Chinnapaiyan, himself was examined as D.W.1, and in support of his defence, one Mariappan was examined as D.W.2, and Ex.B.1 to Ex.B.3 were marked.

8. Based on the oral and documentary evidence adduced on either side, the trial court decreed the suit, granting a preliminary decree in favour of the 2nd plaintiff for a half share in suit item No. 3 of the property alone and for maintenance of the 2nd plaintiff at the rate of Rs. 4,000/- per month and dismissed the suit for partition in respect of suit item Nos. 1 & 2. Challenging the preliminary decree in favour of the plaintiff for partition of ½ share in the suit item No. 3 and decree of maintenance, the defendant has come up with A.S. No. 211 of 2022, while the plaintiffs have come up with a cross objection in



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A.S. No. 96 of 2022, aggrieved by the dismissal part of the suit.

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9. Heard Mr.S.Rajesh Ramanathan, learned counsel for the defendant and Mrs.R.Meenal learned counsel for the plaintiffs.

10. The suit was filed for partition and maintenance until the division of the suit properties.

11. The plaintiff pleaded that the suit properties are ancestral properties. The trial court decreed the suit in part by granting a preliminary decree for partition of one-half share in the suit item No.3 alone and dismissed the suit in respect of suit item Nos.1 & 2, holding that they are individual properties of the defendant.

12. According to the plaintiffs, the suit item Nos. 1 and 2 are also joint family properties, and after the death of the only son of the 1st plaintiff and the defendant, who died unmarried, the 1st plaintiff is entitled to a share of the deceased unmarried son.

13. The defendant denied that he deserted the 1st plaintiff and that the suit properties are his separate properties and the plaintiffs are not entitled to claim any share in the same.

14.1 The learned counsel for the defendant would submit that when the



2nd plaintiff abstained from entering the witness box and failed to make a statement on oath in support of her pleading, the trial court should have drawn an adverse inference against her. Based only on the FIR (Ex.A.6), the trial court concluded that the second plaintiff was born to the first plaintiff through the defendant. Furthermore, the age of the 2nd plaintiff has not been established.

14.2 The learned counsel for the defendant would further submit that the suit Item No.1 is self-acquired property, but the suit Item Nos. 2 and 3 are individual/separate properties of the defendant. The trial court did not consider this properly. Hence, the decree and judgment of the trial court call for interference at the hands of this court.

15. Per contra, the learned counsel for the plaintiff would contend that the Ex.A.3 partition deed would make it clear that the joint family of the defendant had a sufficient nucleus and the suit item Nos. 1 and 2 were purchased only from and out of the income generated from the joint family properties, and therefore, the suit item Nos. 1 and 2 are also joint family properties. This aspect of the matter was not considered by the trial court.

16. The learned counsel for the plaintiff would further contend that since the 1st plaintiff's only son died unmarried, the 1st plaintiff, being the only Class-I legal heir of the deceased unmarried son, is entitled to his share. This



was also not considered by the trial court and the trial court granted preliminary decree only in respect of suit item No.3, that too, only in favour of the 2nd plaintiff. Hence, the cross objection.

17. In the light of the rival submissions, now, the points that arise for consideration are:

(1) Whether the defendant has proved non-access to his wife, the 1st plaintiff to deny paternity of the 2nd plaintiff-daughter?

(2) Whether suit Item Nos. 1 to 3 are joint family properties?

(3) Whether the trial court was right in granting maintenance to the plaintiff at the rate of Rs.4,000/- per month?

Point No.1:

18. The marriage solemnized between the 1st plaintiff and the defendant is not in dispute. It is the specific case of the plaintiff that marriage between herself and the defendant was solemnized some 32 years back, and through the above-said wedlock, a male child named Chandrasekar and a female child, the 2nd plaintiff were born. The said Chandrasekar died on 29.03.2015 by committing suicide. The 2nd plaintiff is none other than the daughter of the brother of the defendant's mother. In other words, the mother of the defendant is none other than the maternal aunt of the 1st plaintiff. This was also not disputed



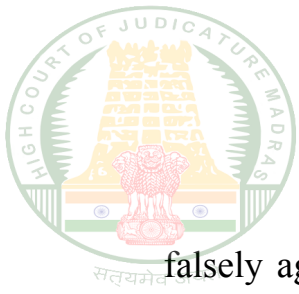
by the defendant.

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19. The 1st plaintiff claims that the defendant is the biological father of the 2nd plaintiff, whom she later gave birth to. She has needed money for her maintenance since the defendant abandoned her. She is entitled to maintenance. The plaintiffs further claim that since the suit properties are joint family properties, they are jointly entitled to a two-third share in the suit properties.

20. On the other hand, the defendant denied the paternity of the 2nd plaintiff. According to the defendant, when his son was about 1½ years old, the 1st plaintiff had deserted him, and ever since, she has been living separately. It is the specific case of the defendant that the suit properties are his separate properties. The 1st plaintiff, as P.W.1, in her evidence asserted that the 2nd plaintiff was born to the defendant and herself. She has further stated that only at the intervention of the defendant, the 2nd plaintiff was admitted in the school. To substantiate her claim, she has produced the school transfer certificate under Ex.A.7. A perusal of Ex.A.7 shows that the defendant's name was shown as the father of the 2nd plaintiff.

21. P.W.2 has categorically stated that the 2nd plaintiff is the daughter of the defendant, and she was born to the 1st plaintiff through the defendant. There was no motive whatsoever attributed to this witness to suggest that he deposed



falsely against the defendant. P.W.3 has also categorically stated that the 2nd plaintiff is the daughter of the 1st plaintiff born through the defendant. Nothing was elicited from this witness to show that he deposed falsely against the defendant. Though P.W.2 and P.W.3 were cross-examined at length, their evidence remains unshattered.

22. D.W.2, though, stated that the 1st plaintiff and the defendant have been living separately; in his chief examination, he never stated that the 2nd plaintiff was not born to the 1st plaintiff through the defendant. D.W.1 in his chief examination, though denied the parentage of the 2nd plaintiff, the evidence of P.W. 1 to 3 has not been shattered.

23. It is relevant to note that the marriage between the 1st plaintiff and the defendant was not dissolved by a decree of divorce under the Hindu Marriage Act. Though it is the admitted case that the 1st plaintiff and the defendant have been living separately due to some matrimonial disputes, the marriage between them still subsists.

24. Section 112 of the Indian Evidence Act, 1872, reads as follows:-



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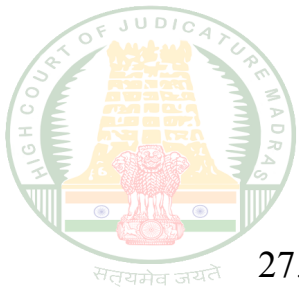


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112. Birth during marriage, conclusive proof of legitimacy - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

25. Therefore, unless the person denying paternity demonstrates that he had no access to his spouse at any point when the child could have been born, every person born during the continuation of a valid marriage between his mother and any man is the legitimate child of that man.

26. Admittedly, during the subsistence of the marriage between the 1st plaintiff and the defendant, the 2nd plaintiff was born. P.Ws. 1 to 3 have categorically spoken about the same. Though exact date on which the 2nd plaintiff was born has not been established, the fact remains that the 2nd plaintiff was born during the continuance of the marriage between the 1st plaintiff and the defendant. The defendant neither established non-access to his spouse (1st plaintiff) at any time when the 2nd plaintiff could have been begotten.



27. Further, admittedly, the defendant is a close relative of the 1st plaintiff and none other than her maternal aunt's son. Even though there may be a marital discord, the 1st plaintiff has clearly spoken about the fact that she used to visit his house due to the close relationship. Therefore, as long as non-access had not been established, it has to be held that the 2nd plaintiff is the legitimate daughter of the defendant. The trial court, upon considering the available oral and documentary evidence held the defendant is the father of the 2nd plaintiff.

28. In the light of the above discussion, the point No.1 is answered in favour of the plaintiffs and against the defendant.

Point No.2:

29. As far as the suit Item Nos. 1 to 3 of the properties are concerned, the plaintiffs pleaded that suit Item No. 1 of the property was though purchased in the name of the defendant in the year 1993 under Ex.A.1 sale deed that property was purchased from and out of the income generated from the joint family properties.

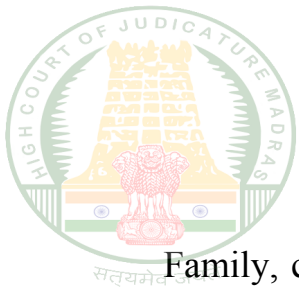
30. It is relevant to note that if any member of the family raises a plea that property purchased in the name of individual member was out of the joint family nucleus, it is for him to prove that the family had a sufficient joint family nucleus.

31. A careful perusal of Ex.A.1 sale deed dated 25.02.1993 shows that



the 1st item of the suit properties was purchased by the defendant. Ex.A.3-partition deed when carefully perused, this court found that there was a partition among the defendant, his father, brother, and sisters in respect of their joint family properties on 29.05.2012. The recitals under Ex.A.3 partition deed would go to show that the defendant was a member of the Hindu Joint Family (HUF); however, the fact remains that the property possessed by the joint family was small in extent. The suit 1st item of the property was purchased by the defendant in his name for a total consideration of Rs.55,000/- in 1993. The plaintiffs have not proved the nature of the income that was generated from the so-called joint family properties which are subject matter of the partition deed (Ex.A.3). Further, the joint family properties described under Ex.A.3-partition deed are small extent of lands. Therefore, ordinary presumption that joint family had sufficient income to purchase the suit item No.1 of the properties in the year 1993 cannot be drawn, particularly, taking note of the small extent properties partitioned under Ex.A.3.

32. Furthermore, when the defendant's father partitioned the joint family property in 2012, he did not recognize the 1st item of the suit properties as joint family property. The defendant ran a successful silver business and earned a comfortable living. Had the defendant's father, the kartha of the Hindu Joint



Family, considered the suit's first item of property to be joint family property, he would have included it in Ex.A.3 partition deed. This fact further strengthens the contention of the defendant that suit 1st item of the properties is his individual property and not forming part of the joint family properties.

33. As a result, unless it is proved that there was sufficient income from the joint family property and that the suit 1st item of the properties was purchased from the income generated from the joint family property, it cannot be concluded that the suit 1st item of the properties was not the defendant's separate property and was purchased from and out of the income generated from the joint family property.

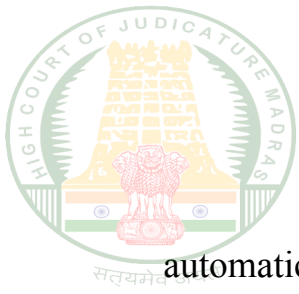
34. Insofar as the suit 2nd item of the properties is concerned, a careful perusal of Ex.A.2 settlement deed would make it clear that the same was gifted to the defendant by his father. The recitals under the said settlement deed would go to show that the same was purchased jointly by the defendant's father along with his other family members in 1949, and subsequently, by way of oral partition, the said property was allotted to the defendant's father, who in turn settled it on the defendant under the Ex.A.2 settlement deed. Therefore, when the property itself was purchased jointly by the father of the defendant along with his brothers and was subsequently allotted to the father of the defendant,



that property had become the absolute property of the father of the defendant, and the father of the defendant in turn settled it on the defendant. Therefore, it cannot be held that the suit 2nd item of the properties is ancestral property. It is not the case of the plaintiffs that the 2nd item of the suit properties has been blended with the joint family properties.

35. As far as suit 3rd item of the properties is concerned, admittedly, this is a joint family property, and the same was allotted to share of the defendant. Therefore, the trial court held that the plaintiff is entitled to a one-half share in the same; however, the fact remains that the 1st plaintiff's only son, died unmarried on 29.03.2015. This was not disputed by the defendant. In fact, the First Information Report marked under Ex.A.7 would go to show that the first information was recorded as to the suicidal death of the 1st plaintiff and defendant's son. The said first information as to the suicidal death of his son was given only by the defendant wherein he himself admitted that the 2nd plaintiff is his daughter.

36. Be that as it may, the death of the son of the 1st plaintiff and the defendant is not in dispute. He died unmarried. On the date of death, he was a coparcener along with the defendant and the 2nd plaintiff in respect of the suit 3rd item of properties. Therefore, on the date of his death, his share will



automatically go to the 1st plaintiff-mother, being the only Class-I legal heir.

This aspect of the matter has not been considered by the trial court. Thus, this court is of the view that the decree and judgement of the trial court in so far as granting a preliminary decree for partition of one-half share in the suit 3rd item of properties in favour of the 2nd plaintiff alone are liable to be set aside, and instead, the suit 3rd item of the properties has to be divided into three equal shares, and two such shares have to be allotted to plaintiffs 1 and 2 jointly, and the rest of the one-third share has to be allotted to the defendant.

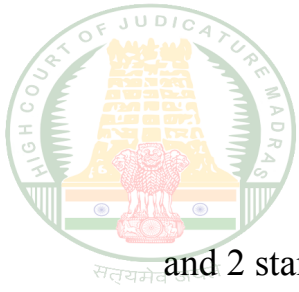
37. In light of the above discussions, it has to be held that the suit 1st and 2nd items of properties are not joint family properties of the defendant and the plaintiffs and that they are individual properties of the defendant, and as far as the suit's 3rd item of properties is concerned, it is joint family property of the defendant, his deceased son, and daughter (2nd plaintiff), and on the death of the son, the 1st plaintiff being the mother and the only Class-I legal heir, is entitled to the share of her deceased unmarried son. Therefore, the judgment and preliminary decree passed by the trial court by granting a half share in favour of the 2nd plaintiff alone are set aside, and it has to be declared that the plaintiffs 1 and 2 are entitled to a partition of a 2/3rd share jointly in the suit 3rd item of properties. This point is answered accordingly.



Point No.3:

38. Insofar as maintenance of the 1st plaintiff is concerned, the defendant has not established by any evidence that the 1st plaintiff has sufficient means to maintain herself. The defendant is duty bound as a husband to maintain his wife. The defendant has sufficient means. Therefore, this court is of the view that the decree in respect of maintenance does not require any interference at the hands of this court.

In the result, the appeal suit is dismissed and the cross-objection is allowed in part. The judgement and preliminary decree dated 16.10.2019 passed in O.S.No.173 of 2015 by the learned I Additional District Judge, Salem, for partition of one-half share in the suit 3rd item of properties in favour the 2nd plaintiff alone are set aside, and that preliminary decree is passed for partition of the suit 3rd item of properties into three equal shares and for allotment of two such shares to the plaintiffs 1 and 2 jointly. The judgement and decree for maintenance at the rate of Rs.4,000/- per month to the 1st plaintiff stands confirmed, however, the defendant shall pay such maintenance to the 1st plaintiff until the final decree is passed and the shares of the plaintiffs are allotted by metes and bounds. The judgement and decree insofar as the dismissal of the suit in respect of the claim for partition in the suit item Nos. 1



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and 2 stand confirmed.

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Considering the facts and circumstances of the case, the parties are directed to bear their respective costs incurred on this appeal suit. Consequently, the connected CMP is closed.

Index : yes / no
Neutral Citation : yes / no
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20-02-2025

To

1.The I Additional District Judge, Salem, Salem District.



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A.S.No.211 of 2022 & Cross Objection No.96 of 2022

N.SATHISH KUMAR.J.,

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