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O.S.A. No.144 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.01.2025

CORAM:

THE HONOURABLE MR.JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR.JUSTICE P.DHANABAL

O.S.A. No.144 of 2019

T.S. Prakash Chand Gong
S/o. Late C. Tharachand ... Petitioner

Vs.

Hansraj (deceased by represented by the
Respondents 1 to 8)

1.Madi Bai
2.H. Leela Kumari
3.H. Rameshchand
4.H. Nirmalchand
5.V. Saroja Chordia
6.K. Shobha Chordia
7.P. Ashwin
8.Deepak Respondents.

PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of
Original Side Rules read with Clause 15 of Letters Patent praying to
modify the judgment and decree dated 09.01.2018 passed in C.S. No.781
of 2005 and allow the appeal as prayed for.

For Appellant : Mr. P. Sunil for Mr. T. Viswanatha Rao



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WEB COPY For Respondent : R1 – No more
Mr. M. Sunil Kumar
[For R2, R4, R5 and R7]
R3 and R6 – No appearance
R8 – No such person.

JUDGMENT

(Judgment of the Court was made by P.DHANABAL,J.)

This Original Side Appeal has been preferred as against the decree and judgment passed by this Court in C.S. No.781 of 2005 dated 09.01.2018, wherein the appellant herein has filed a Suit for the relief of partition and separate possession of the half share in the Suit property. The learned single Judge of this Court decreed the Suit declaring that the Plaintiff is entitled to preliminary decree for partition of his 46% share in the land alone of the Suit property and the Plaintiff has not contributed towards cost of construction of the building and that he is not entitled to share in the building and he is not entitled to any mesne profits also. Aggrieved by the said decree and judgment, the present appeal is filed by the Plaintiff.

2. The *case of the appellant / plaintiff* is that the respondent /



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defendant is his cousin brother. The father of the appellant / Plaintiff and the father of the respondent / defendant are brothers. The appellant / plaintiff and the respondent / defendant have jointly purchased the Suit property as vacant site in R.S. No.44/A1, 45/A1 and 46, T.S. No.31, Block No.34 with an extent of 6 grounds 1512 sq. ft. through a registered Sale Deed dated 25.11.1968. After purchase of the property, the appellant / plaintiff and the respondent / defendant are in joint possession of the property. At the time of purchase of the property, it was vacant land. Subsequently, they jointly developed the property by putting up construction in one portion thereof and the rest of the property is still vacant. The appellant / plaintiff and the respondent / defendant each are entitled to $\frac{1}{2}$ share over the Suit property. The joint patta was issued in the name of the appellant / plaintiff and the respondent / defendant. When the appellant / plaintiff demanded for partition over his half share of the suit property along with the building, the respondent / defendant refused for amicable partition. Therefore, he filed the Suit for partition.

3. The *case of the respondent / defendant* is that the property was



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jointly purchased, but the respondent / defendant only had paid the major portion of the sale consideration, but the sale deed was registered in joint names. The father of the appellant / plaintiff and the respondent / defendant are the sons of one late Chandmalji Gong and he was the Kartha of Hindu Undivided Joint family. The Hindu Undivided Joint family possessed three items of properties and the father of the Plaintiff as 'Karthā' of a Hindu Undivided Joint family, after the demise of said Chandmalji Gong, purchased the above said three immovable properties in his name. While so, the father of the appellant / plaintiff died on 27.05.1979 leaving behind T.S. Prakashchand, father of the appellant / plaintiff and one Leelabhai as his legal heirs. The brother of appellant / plaintiff's father namely Manakchand died on 08.04.1989 leaving behind his wife Meena Bai. During the life time of the father of the appellant / plaintiff, a partial partition was effected between the father of the appellant / plaintiff, his brother Manakchand and the respondent / defendant and his mother Madi Bai through a declaration deed dated 01.11.1970. As per the above said declaration, the 3 immovable properties, referred above, kept as Joint Family properties and other joint family property assets relating to the business were partitioned. After the above said declaration deed dated



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01.11.1970, the parties run their businesses independently and acquired the properties in their individual names from and out of their self earned income.

3.1. After the demise of the father of the respondent / defendant, due to the misunderstanding between the members of Hindu Undivided Joint family, a Memorandum of Understanding dated 19.04.1990 was entered into between the appellant / plaintiff and the respondent / defendant. As per the said Memorandum of Understanding, the Suit property was purchased in the joint names of the appellant / plaintiff and the respondent / defendant, shall be taken by the respondent / defendant absolutely in consideration of the respondent / defendant giving up his right and interest in the three immovable properties belonging to the Hindu Undivided family. The terms contained in the Memorandum of Understanding were immediately given effect to and on the basis of the said terms, the appellant / plaintiff was put in possession and enjoyment of the three properties as the absolute owner and the respondent / defendant continued his possession and enjoyment of the suit property. The appellant / plaintiff has also effected mutation in the Revenue records relating to the said three



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properties based on the said Memorandum of Understanding. In the said Memorandum of Understanding, the appellant / plaintiff has also agreed to execute the Exchange Deed for the suit property in favour of the respondent / defendant. Since the appellant / plaintiff and the respondent / defendant were enjoying the properties exclusively, the Exchange Deed was not insisted upon. The respondent / defendant, from and out of his self-earnings through his business, constructed super structure on the suit property. The appellant / plaintiff did not contribute any amount towards construction of superstructure. Therefore, the appellant / plaintiff cannot claim share in the superstructure. By virtue of Memorandum of Understanding dated 19.04.1990, the respondent / defendant has become the absolute owner of the suit property in exclusion of the plaintiff. Therefore, the appellant / plaintiff cannot claim any right over the suit property. The appellant / plaintiff deliberately suppressed the Memorandum of Understanding dated 19.04.1990. Therefore, the suit is liable to be dismissed.

4. The trial Court, based on the pleadings and after hearing both



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sides, framed the following issues:

4(i) *whether the plaintiff and the defendant are in joint possession and enjoyment of the suit property as claimed by the plaintiff?*

4(ii) *Whether the constructions were made jointly by the plaintiff and the defendant.*

4(iii) *Whether a partial partition was effected on 01.11.1970 causing a division in status among the members for the Hindu Undivided Family consisting of Tarachand Gong (father of the plaintiff), Manakchand Gong and Hansraj (defendant) leaving the properties at (a) Old Door No.16, New No.68, Bazar Road, Saidapet, (b) Old Door No.53, New No.94, Bazar Road, Saidapet and (c) Old Door No.10, New Door No.11, Dharmaraja Koil Lane, Saidapet, Chennai as the undivided joint family properties?*

4(iv) *Whether the Memorandum of Understanding dated 19.04.1990 is true, valid and binding on the plaintiff?*

4(v) *Whether the plaintiff has given up his right in the suit property in lieu of the defendant's giving up his right and interest in the joint family properties bearing new Door Nos.68 and 94, Bazar Road, Saidapet and New Door No.11, Dharmaraja Koil Lane, Saidapet?*



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4(vi) Whether the plaintiff has got an undivided half share in the suit property?

4(vii) Whether the plaintiff is entitled to the relief of partition as prayed for?

4(viii) To what relief the plaintiff is entitled?

After filing of the additional written statement, the following additional issues were framed:

Whether the 9th defendant is a necessary party to the suit?

On perusing the evidence and after hearing the learned counsel appearing on either side, the following additional issue was also framed for consideration:

Whether the 1st defendant has perfected title by Ouster?

5. Before the trial Court, on the side of the appellant / plaintiff, PW1 was examined and Ex.P.1 to Ex.P.13 were marked. On the side of the respondent / defendant, DW1 was examined and Ex.D.1 to Ex.D.25 were marked. After hearing both sides and perusing the records, the trial Court



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has decreed the Suit by declaring that the appellant / plaintiff is entitled to the preliminary decree for partition of his 46% share in the land alone of the suit property, sans the dealing around and the appellant / plaintiff has not contributed towards the cost of construction of the building and that he is not entitled to share in the building and the appellant / plaintiff is not entitled any mesne profits also. Aggrieved by the said decree and judgment, the present appeal is filed by the plaintiff.

6. The learned counsel appearing for the appellant / plaintiff would submit that the appellant / plaintiff and the respondent / defendant have jointly purchased the suit property through a Sale Deed dated 25.11.1968 and thereafter, they jointly constructed a building in the suit property and the appellant / plaintiff and the respondent / defendant are in joint possession of the property and joint patta was also issued in the name of both the appellant / plaintiff and respondent / defendant. Therefore, appellant / plaintiff is entitled to half share over the suit property. But the trial Court, without considering the joint purchase of the property by both the parties, decreed the suit for partition only in respect of 46% of share to the appellant / plaintiff and 54% of the share to the respondent / defendant.



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Further, the trial Court without any prayer by the appellant / plaintiff rendered findings that the appellant / plaintiff is not entitled to any mesne profit. Moreover, the trial Court failed to consider that the building was constructed jointly by the appellant / plaintiff and the respondent / defendant. The respondent / defendant has taken a plea that as per the Memorandum of Understanding dated 19.04.1990, the defendant himself admitted his half share over the suit property. Therefore, as per the admission made by the respondent / defendant, the appellant / plaintiff is entitled to half share over the property. Further the trial Court has rendered findings that the appellant / plaintiff is not entitled to mesne profits. But the appellant / plaintiff is entitled to mesne profits even at the time of final decree proceedings. But the trial Court without any prayer rendered findings in respect of mesne profits. Therefore, the decree and judgment passed by the trial Court are liable to be set aside.

7. The learned counsel appearing for the respondent / defendant would submit that the property was jointly purchased by the appellant / plaintiff and the respondent / defendant. However, major portion of the sale consideration was paid only by the respondent / defendant. Already



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there was a Memorandum of Understanding between the appellant / plaintiff and the respondent / defendant in respect of the Hindu Undivided Joint Family properties. As per the Memorandum of Understanding dated 19.04.1990, the appellant / plaintiff is entitled to 3 items of Hindu Undivided Joint family properties and this respondent / defendant is entitled to this suit property. Therefore, the appellant / plaintiff has no any right over the suit property. The trial Court after referring the terms made in the Sale deed, has correctly decreed the Suit by passing a final decree for 46% share of the appellant / plaintiff and 54% share of the respondent / defendant. As far as the construction is concerned, the respondent / defendant alone constructed the building in the property with the consent of the appellant / plaintiff, through his own earnings and the appellant / plaintiff never contributed any amount to the construction of the building. Therefore, the trial Court has correctly ordered that the appellant / plaintiff is not entitled to share over the construction of the building and he is not entitled for any mesne profits. Therefore, the present appeal is liable to be dismissed.



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8. This Court heard both sides and perused all the materials available on record.

During pendency of the proceedings respondent / defendant died and his legal heirs were impleaded as 1 to 8 respondents in this appeal.

9. Upon hearing both sides and perusing the records including the judgment and decree, the *points for determination* in this appeal are as follows:-

(i) *Whether the respondent / defendant contributed the major portion of the sale price for the purchase of the suit property.*

(ii) *Whether the appellant / plaintiff and the respondent / defendant are in the joint possession and enjoyment of the property.*

(iii) *Whether the construction was made jointly by the appellant / plaintiff and the respondent / defendant.*

(iv) *Whether the Memorandum of Understanding dated 19.04.1990 is true, valid and binding on the appellant / plaintiff.*

(v) *Whether the appellant / plaintiff is entitled to half share over the property.*

(vi) *Whether the appeal is to be allowed or not.*

10. Point No.1:- *Whether the respondent / defendant contributed*



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the major portion of the sale price for the purchase of the suit property.

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In this case, there is no dispute with respect to the relationship between the parties and also both the parties admitted that the property was purchased in the name of the appellant / plaintiff as well as the respondent / defendant through a Sale Deed dated 25.11.1968. According to the respondent / defendant, he contributed major portion of the sale price and therefore, the appellant / plaintiff is not entitled to the half share over the property. The copy of the Sale Deed dated 25.11.1968 was marked as Ex.P.1. On careful perusal of the above said Ex.P.1, it reveals that on 19.10.1968, both the purchasers paid a sum of Rs.5,000/- to the vendor on the date of agreement of sale. On 28.10.1968, Hansraj, the respondent / defendant herein, paid a sum of Rs.3,270/- by discharging the mortgage money and also the respondent / defendant paid a sum of Rs.230/- on the same day. A sum of Rs.1,500/- was paid on 04.11.1968 by one T.S. Prakashchand Gong and the remaining amount of Rs.16,500/- has to be paid by the purchasers i.e., by the appellant / plaintiff and the respondent / defendant. Therefore, there is no whisper about the entire money paid by the appellant / plaintiff and the respondent / defendant.



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10.1. Even according to the pleadings, the respondent / defendant has not specifically mentioned about the money paid by him and vaguely stated that major portion of the sale price was paid by him. There is no recitals in the sale deed as about the exact amount paid by each party. Even according to the recitals of the sale deed, the amount of Rs.16,500/- has to be paid by the purchasers to the vendor at the time of registration of the sale deed before the Sub-Registrar. While so, there is no evidence that what amount was paid by the appellant / plaintiff and the respondent / defendant. In the absence of any specific particulars, this Court cannot decide the quantum of money paid by each one and apportioned the share to each party. Once the sale deed is registered in the names of both the appellant / plaintiff and the respondent / defendant, in the absence of any recitals in respect of apportionment of shares, it is to be presumed that both the parties have equal right over the property.

10.2. In this context, the learned counsel appearing for the appellant / plaintiff has relied upon the following judgment of Hon'ble Supreme



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Court in *Tile Devi and others vs. State of Bihar and others* reported in 1988 (Supp.) SCC 574, wherein the Hon'ble Supreme Court held that “*the registered sale deed under which the land was purchased, revealed that the two petitioners and the 5th respondent had purchased this land in their joint names. Of course, their respective shares are not specified in the sale deed. But then in as much as this purchase has been effected jointly by the three, the only reasonable inference is that each of them had an equal share*”.

10.3. Further, the learned counsel for the appellant has relied upon the judgment of Hon'ble High Court of *Karnataka in B. Narayana Murthy and others vs. B. Venkateshalu and others*, wherein the Karnataka High Court has held that “*the document is on record and that document clearly and undisputedly indicates that the property was purchased and that it stood in joint names...It is a registered sale deed and even if one of the parties has contributed the whole or a portion or whatever part of it or even if deceased Balakrishna had paid the whole of the consideration, the fact that it is purchased in the names of both husband and wife would give each of the parties as co-owners a one-half*



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share in law".

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10.4. Therefore, in view of the above judgments, this Court, without any hesitation, would come to a conclusion that in the absence of any recitals in the document in respect of the apportionment of the shares, it is to be inferred that the appellant / plaintiff and the respondent / defendant are having equal share over the property irrespective of the amount contributed by the parties. But the trial Court without considering the same, merely based on the one portion of the recitals of the document, fixed the apportionment of share as 46% to the appellant / plaintiff and 54% to the respondent / defendant. Therefore, the order passed by the trial Court in respect of apportionment of share is unsustainable and the same is liable to be set aside. Thus, the point is answered.

11. Point No.4: *Whether the Memorandum of Understanding dated 19.04.1990 is true, valid and binding on the appellant / plaintiff.*

Before answering to the other points, the 4th point that *whether the Memorandum of Understanding dated 19.04.1990 is true, valid and binding on the appellant / plaintiff* is to be decided, since it is in respect of



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the validity of the Memorandum of Understanding.

11.1. According to the respondent / defendant, there was a Memorandum of Understanding between the parties and the same was reduced in to writing and as per the Memorandum of Understanding, the appellant / plaintiff is entitled to the entire three properties of Hindu Undivided Joint family and the respondent / defendant is entitled to the Suit property. The said Memorandum of Understanding has been marked as Ex.D.15. Before relying Ex.D.15, this Court has to see the validity of the Ex.D.15 in respect of the exchange of properties between the parties. Ex.D.15 is nothing but a paper, by which they agreed to exchange the properties and thereafter, no exchange of properties had been taken place in accordance with law and no deeds have been executed between the parties. Therefore, this Court need not go further about the alleged agreement between the parties and they exchanged the properties through Ex.D.15. Therefore, Ex.D.15 cannot be looked into for any purpose, since it is unstamped and not executed in accordance with law. Therefore, the claim of the respondent / defendant that the suit property was allotted to him, through the Memorandum of Understanding between the appellant /



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plaintiff and the respondent / defendant dated 19.04.1990, cannot be accepted. Thus the point is answered.

12. **Point No.2:** *Whether the appellant / plaintiff and the respondent / defendant are in the joint possession and enjoyment of the property.*

The respondent / defendant claimed that he is entitled to the suit property through Memorandum of Understanding dated 19.04.1990 and he has been in exclusive possession of the suit property. But, the respondent / defendant has not produced any document to show his exclusive possession. Once he admitted the joint purchase of the property through Ex.P.1 Sale deed, it is the duty of the respondent / defendant to prove that the property has been allotted to him and he is in exclusive possession of the suit property. Already this Court, in the previous points, decided that the Memorandum of Understanding has not been proved and no properties have been exchanged as per the agreement dated 19.04.1990. Further the respondent / defendant also failed to examine any other witnesses to prove his exclusive possession of the suit property. Per contra, Ex.P1 Sale deed



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shows that the property was purchased jointly. The appellant / plaintiff also in his plaint pleaded that he is in joint possession along with the respondent / defendant and thereby, paid Court fee under Section 37(2) of the Tamil Nadu Court-Fees and Suits Valuation Act. Therefore, the respondent / defendant failed to prove his exclusive possession of the suit property and once the sale deed is executed in favour of joint owners, it is deemed to be a joint possession, unless the contrary is proved. In this case, the respondent / defendant failed to prove that he is in exclusive possession of the suit property and therefore, this Court safely can come to conclusion that the appellant / plaintiff and the respondent / defendant are in joint possession of the suit property. It is well settled law that the possession of the co-owner on behalf of the other co-owner is deemed to be in joint possession of the property. Thus the point is answered.

13. **Point No.3:** *Whether the construction was made jointly by the appellant / plaintiff and the respondent / defendant.*



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According to the appellant / plaintiff, he along with the respondent / defendant constructed a building in one portion of the property and the same has been denied by the respondent / defendant by alleging that the above said building was constructed by him through his own earnings. Already this Court decided that the property is in joint possession, while so, it is for the respondent / defendant to prove that he only constructed the building exclusively. In this context, the respondent / defendant, in his pleadings and evidence, has categorically stated that he only constructed the building in the property. The Plaintiff also in the pleadings stated that building was constructed jointly. Moreover, in the description of the property, the appellant / plaintiff has not stated about the construction put up in the property and also not valued the construction. Even according to the pleadings, there is no any mention about the particulars of the building, what is the area of the building and what was the amount contributed by the appellant / plaintiff. The appellant / plaintiff has failed to produce any piece of evidence to prove that he contributed for the building put up in the suit property. Per contra, the respondent / defendant also categorically stated in his evidence that he constructed the superstructure on the suit property from and out of his earnings from his business and the appellant /



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plaintiff did not contribute any amount for the construction of the superstructure and he alone paid tax for the suit property including the water tax, sewerage tax from the date of assessment by the municipality and also paid electricity consumption charges. He also produced receipts to that effect. Therefore, the respondent / defendant proved that the construction was put up by the respondent / defendant on his own funds. The learned counsel for the appellant also during arguments fairly admitted that the appellant consented for putting up the construction. Therefore, it is clear that the construction was put up only by the respondent / defendant. Thus the point is answered.

14. **Point No.5: *Whether the appellant / plaintiff is entitled to half share over the property.***

The suit is filed by the appellant / plaintiff for the relief of partition and separate possession of his half share over the suit property. It is an admitted fact that the sale deed stands in the joint name of the appellant / plaintiff and the respondent / defendant. Already this Court decided in the previous points that the respondent / defendant failed to prove his plea that



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he contributed major portion of the sale price and also there are no any recitals as about the apportionment of the share between the appellant / plaintiff and the respondent / defendant. Therefore, the appellant / plaintiff is entitled to half share over the suit property. But the trial Court failed to consider that the respondent / defendant failed to prove that what was the contribution made by him and there is no any recitals in the document as to the apportionment of shares between the parties. Therefore, the appellant / plaintiff is entitled to 50% share over the suit property.

15. **Point No.6:** *Whether the appeal is to be allowed or not.*

The appellant / plaintiff has filed a Suit for partition and for separate possession over the suit property and the suit property was jointly purchased in joint names vide sale deed and the same is also admitted by both the parties. Already this Court also, in the previous points, decided that in the absence of specific share mentioned in the sale deed, it has to be inferred that both the parties are entitled for equal share. But the trial Court failed to consider above said aspects and based on the recitals that too without taking into consideration the entire recitals, decided that the



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appellant / plaintiff is entitled to 46% of the suit property and the remaining 54% is for the respondent / defendant. Therefore, the judgment and decree passed by the trial Court in respect of apportionment of shares is to be modified to the effect that the appellant / plaintiff is entitled to $\frac{1}{2}$ share over the suit property. In respect of other aspects, the decree and judgment are liable to be confirmed.

16. The learned counsel appearing for the appellant / plaintiff would submit that the trial Court has rendered findings that the appellant / plaintiff is not entitled to mesne profits. But the appellant / plaintiff is entitled to mesne profits even at the time of final decree proceedings. Therefore, the findings rendered by the trial Court is liable to be set aside.

17. In this context, it is an admitted fact that there is no prayer in the plaint, in respect of mesne profits. However, in the case on hand, this Court came to the conclusion that building was constructed by the respondent / defendant and no contributions were made by the appellant / plaintiff, thereby the appellant / plaintiff is not entitled to any mesne profits. Even according to Section 2(12) of the Code of Civil Procedure,



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‘mesne profits’ of property means:

“those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession”.

18. In this case on hand, there is no wrongful possession by the respondent / defendant and the construction was made only by the respondent / defendant. Therefore, the improvements made by the respondent / defendant will not come under the purview of ‘mesne profits’. The learned counsel appearing for the appellant / plaintiff also relied so many judgments stating that he is entitled to ‘mesne profits’ through final decree proceedings. It is true that the appellant / plaintiff can claim ‘mesne profits’ through final decree proceedings. However, in this case, the appellant / plaintiff himself admitted the joint possession of the property, thereby paid the Court fee under Section 37(2) of the Tamil Nadu Court Fee and Suits Valuation Act. Once he admitted that he is in joint possession of the property, no question of wrongful possession and also as per the explanation of Section 2(12) of the Code of Civil Procedure, the improvement made by the party, will not include ‘mesne profits’. Therefore, the appellant / plaintiff is not entitled to any mesne profit and



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the arguments advanced by the learned counsel appearing for the appellant / plaintiff cannot be accepted.

19. In view of the above said discussions, this Court is of the opinion that the decree and judgment passed by the trial Court are liable to be modified to the effect that the appellant / plaintiff is entitled to 50% equal share over the suit property. With respect to other aspects, the decree and the judgment of the trial Court are confirmed. Thus the point is answered.

20. In the result, the **Original Side Appeal is partly allowed** and the decree and the judgment passed by the trial Court in C.S. No.781 of 2005 dated 09.01.2018 is modified in respect of the entitlement of share to the effect that the appellant / plaintiff is entitled to 50% share in the suit land and the respondent / defendant is at liberty to work out his remedy in respect of the allotment of his share with the building at the time of final decree proceedings. With respect to other aspects, the judgment and decree of the trial Court are confirmed. Considering the nature of Suit and the relationship between the parties, there shall be no order as to costs.



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(S.S.S.R.J) & (P.D.B.J)

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S.S. SUNDAR, J.,
and
P.DHANABAL,J

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