

(1976) 10 MAD CK 0002
In the Madras High Court
Case No : A. No. 645 of 1972

Loganayaki

APPELLANT

Vs

Pullathal

RESPONDENT

Date of Decision : 27-10-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Hindu Succession Act, 1956 — Section 20, 21
Registration of Births and Deaths Act, 1969 — Section 10, 2(1)(d), 2(1)(e), 23

Citation : (1976) 10 MAD CK 0002

Hon'ble Judges : Ratnavel Pandian, J; Ramaprasada Rao, J

Bench : Division Bench

Advocate : S. Palaniswamy, for the Appellant; E. Padmanabhan, for the Respondent

Judgement

Ramaprasada Rao, J.—The partly successful defendant in O.S.No.504 of 1969 on the file of the Subordinate Judge's Court, Coimbatore,

is the appellant. Kuppuswami Gounder and the plaintiff, as husband and wife, were the ancestors of the family which figures in this litigation. They

had two sons, Munuswami and Karuppuswami, Under Ex.A-3 dated 17-12-1959, after the death of Kuppuswami Gounder, there was a partition

in the family between the plaintiff and her two sons, Muthuswami and Karuppuswami. The properties described in Schedules A and C in the plaint

were allotted to Muthuswami. Some other properties, with which we are not concerned, were allotted to Karuppaswami, and there was an

express recital in the partition deed, whereby the B Schedule properties in the plaint were earmarked for purposes of maintenance of the plaintiff,

which should revert to the sons after her death. But it transpires that both Muthuswami and Karuppaswami died on the spot in a scooter accident?

We are not concerned in this case with the estate of Karuppaswami. It is common ground that when Muthuswami died, his wife, the defendant herein, was enceinte and was bearing a child which was by then about three months old. Muthuswami died on 24-8-1968. After the death of Muthuswami, the plaintiff (mother-in-law) gave a notice Ex.A-1 dated 11-4-1969 calling upon the defendant to agree to a partition of the entire estate of Muthuswami into two shares, and herself being put in possession of one half of the same. In the first instance a reply was sent through Counsel by the defendant under Ex.A-2 dated 22-4-1969. There, the defendant as daughter-in-law through her counsel expressed the view that she had no objection to effect a family partition of the properties according to good and bad soil, and that the mother-in-law can have her due share therein to which she would be entitled in law. A supplemental reply notice Ex.B-6 dated 17-5-1969 was given by the same counsel, and this reply obviously was necessitated because the factual circumstance that on 22-4-1969 the defendant was enceinte with a child in her womb was not expressly referred to, and in consequence the necessary legal implications thereof were not adverted to. Having regard to the provisions of the Hindu Succession Act of 1956, and as a male child was born to the defendant on 5-4-1969 posthumously and as the child was alive on that date and as it died only an hour later, the defendant made the legal position clear under Ex.B6 that on the death of her husband and on the subsequent death of her male child, she would be entitled to the statutory share in accordance with law and that the plaintiff's claim for a half share in the estate was not sustainable. The plaintiff also claimed certain jewels as family jewels and hence she asked for a share therein also. On the foot that the defendant was in possession of the A and C Schedule properties after the death of Muthuswami, the plaintiff claimed mesne profits from the date of death of her son till delivery of possession of her half share at the rate of Rs.7,425 per annum. The legal action was necessitated because the parties could not agree inspite of the exchange of notice prior to the suit. In the written statement, the defendant, while repeating the material facts as set out in her reply notices and after enumerating the details regarding the birth and death of her male child in the Nursing Home of one Dr. K. Shanmughasundaram of Coimbatore evaluated her share in the Schedules A and C properties at 5/6th therein, and would contend that the plaintiff

would be entitled only to 1/6th share in the suit properties. She would explain the absence of the claim made by her in Ex.B-6 in her earlier reply

notice Ex.A-2 as due to inadvertence and that the legitimate share in the estate should not be denied to her because of the absence of enumeration,

of a fact. The defendant would also rely upon the circumstance that there was no rejoinder to Ex.B6 and that, therefore, her claim for 5/6th share

in the estate of Muthuswami has to be recognised. Regarding the claim for jewels, the defendant denied the existence of any such jewels, and it is

in this respect that the suit was resisted.

2. On the above material pleadings, the Lower Court framed the following issues: 1/2

1. Whether the plaintiff is entitled to only 1/6th share in the properties?
2. Whether the birth and death of male child to the defendant is true?
3. Whether the plaintiff's right to enjoy B Schedule property is extinguished?
4. Whether the plaintiff is entitled to mesne profits? If so, at what rate?
5. What are the movables available for partition?
6. Whether the defendant's jewels are with plaintiff as alleged in paragraph (12) of the written Statement?
7. Whether Muthuswami Gounder left any cash?
8. To what relief are the properties entitled?

3. On issues 1 and 2, the learned Judge would not place any reliance upon D.W.1, who was the doctor, who attended to the delivery, and came

to the conclusion that the child could not have been born alive. The learned Judge took, out of the context, certain statements made by D.W.2, and

no doubt would not place any reliance upon the defendant (D.W.3)'s evidence and came to the conclusion that the defendant was not entitled to

an increased share on the basis that she had a posthumous live child born and that in accordance with the provisions of the Hindu Succession Act,

she would be entitled to an increased share. He, therefore, accepted the plaintiff's case and granted her the relief for a half share in the properties

and directed partition of the estate.

4. One other question which arose for consideration in the lower Court, was whether the plaintiff's right to enjoy the B schedule properties, which

were earmarked as and towards her maintenance under Ex.A-3, can still be

available to her in view of the fact that she had obtained a share in the totality of the estate consequent upon the death of her son. The lower Court was of the view that the plaintiff had an independent right which flowed from Ex.A-3, and that right did never get extinguished by reason of the supervening event which was undoubtedly fortuitous, viz., death of her son, and the fact that she as the mother of her son and as Class I heir, would be entitled to a share in the estate of Muthuswami does not prevent her from enjoying the rights which by then were vested in her under Ex.A-3, which was a partition deed amongst the members of the family and to which deed Muthuswami himself was a party. The lower Court held that there were no jewels in the family, and directed the defendant to account to the plaintiff in so far as her relative share is concerned regarding the mesne profits thereon, but gave an option to the plaintiff to quantify such mesne profits in separate proceedings under O. 20, R. 12 C.P.C. In the result, he passed a preliminary decree directing division of the properties into two equal shares and for allotment of one share to the plaintiff and the other to the defendant, and declared that the plaintiff was also entitled to a share in the B Schedule properties absolutely. The defendant appeals.

5. The main contention before us by Mr. Palaniswami, the learned counsel for the appellant, is that the learned trial Judge, without any relevancy therefore, on a priori considerations, rejected the testimony of D.W.1, the doctor, who spoke about the birth and death of the male child in his Nursing Home. Almost contemporaneous and reliable documentary evidence is referred to by the learned counsel to further his contention that the plaintiff's claim for a half share in the suit properties is not sustainable, having regard to the supervening event of the birth of a live posthumous child, by which intervention the value of the shares of the daughter-in-law and mother-in-law are to a great extent varied. Ex.B-4 is a certified extract from the register of births in the Municipality of Coimbatore. This record discloses that a child was born on 5th April, 1969, to the defendant at D.W.1's Nursing Home. The date of registration of such a birth was 11-4-1969. Almost on its heels in Ex.B-5, which is a Register of Deaths in the Municipality of Coimbatore. On the same day i.e., on 5th April, 1969, the above child's death was reported by the very same

Medical Officer in charge of D.W.1's Nursing Home. The date of registration of such report is also 11-4-1969. The material recital in Ex.B-5 is

that the age of the child was one hour, meaning thereby that the child lived for an hour after birth.

6. The two other documents relied upon by the learned counsel for the appellant are Exts.B-1 and B-2. Ex.B-1 is a certificate issued by D.W.1 on

16-5-1969, which was to the effect that a live male child was born to the defendant on 5th April, 1969 and that the child was born at about 4-45

P.M., and expired at 6 P.M. Ex.B-2 in the Admission Register Book of the Nursing Home, and Ex.B-3 is the entry therein dated 4-4-1969

relating to the admission of the defendant into the Nursing Home and the birth of the child therein. In Ex.B-3, the necessary particulars regarding

the admission of the defendant in the Nursing Home are mentioned and the manner of pregnancy is also set out. Therein, we find the recital that the

child was born alive at 4-45 P.M. on 5-4-1969, and the baby expired at 6 P.M. The relevant particulars in Ex.B-3 are:

Forceps extracted an alive asphyxiated male child at 4-45 P.M. 12-5-4-69-Baby expired at 6 P.M.

It is common ground that this admission register was brought to Court by the doctor examined as D.W.1, but the parties thought that an extract of

the relevant entry could be substituted and the register taken back by the authorities without the original being made available any more for

purposes of reference or investigation. Relying upon the above documentary evidence and the oral evidence of D.W.1, which we shall presently

refer, the, appellant contends that the posthumous alive male child was born on 5-4-1969 and consequent upon the birth of such a male child, the

plaintiff would not be entitled to a half share in the estate of her son and that she would be entitled to only 1/6th share therein. The learned counsel

for the respondent does not dispute that if actually there was a birth of a male child as contended by the defendant, the plaintiff would be entitled

only to 1/6th share. But his case is that no such live male child was born, that the respondent did not have any information about the birth of the

child, that the first reply notice Ex.A-2 itself does not set out this particular and important event, and that the doctor's evidence did not conclusively

establish that at or about the time when the child was born, it was alive. No doubt, he refers to the public documents, Exts.B-4 and B-5, which in

point of time were anterior to the date when the suit notice Ex.A-1 could have reached the defendant, and he is unable to challenge them. But in

the light of the reasoning given by the learned trial Judge, the argument is pressed before us that the male child could not have been alive as

suggested by the defendant. The above is the primary contention. We shall of course refer to the second contention whether the plaintiff has lost

her right to enjoy the B Schedule properties in present at a later stage.

7. In order to establish whether the child was born alive or dead, either in a public hospital or in a Nursing Home. It is but necessary having regard

to the peculiar nature of the subject to depend upon the honesty and integrity of the attending Medical Practitioner. Contemporaneous records or

records in point of time very early to the said incident, which are public in nature and the genuineness of which have not been, and could not be

challenged also play a large part in establishing whether a child was born alive or not, Let us now take up the documentary evidence first before we

go into the relevant oral evidence which has also to be read in conjunction with the exhibits disclosed in the instant case.

8. We have already referred to the fact that there was a report of birth as well as of death of the child in question Though at first sight, it appears to

be very curious as to whether such a report of birth and death is necessary if the time of birth and the time of death is not far removed from one

another, yet it is a statutory obligation. Failure of the Medical Attendant to give such simultaneous reports is penal and would attract criminal

penalty as well. That this is the law is clear from the Registration of Births and Deaths Act (Act 18 of 1969). This Act, whose intention is to

regulate registration of births and deaths and for matters connected therewith, makes a distinction between foetal death and live birth. S.2(1)(e) of

the Act defines ""foetal death"" as meaning.

absence of all evidence of life prior to the complete expulsion or extraction from its mother of a product of conception irrespective of the duration

of pregnancy.

Live Birth"" is defined in S.2(1)(d) of the Act, and it means,

The complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such

expulsion or extraction, breathes or shows any other evidence of life, and each

product of such birth is considered live-born.

This distinction was borne in mind throughout the fabric of this legislation. Under Chapter III and S.10 thereof, it shall be the duty of the persons

specified in that section, viz., the midwife or any other medical or health attendant at a birth or death, to notify every birth or death or both at which

he or she attended or was present, or which occurred in such areas as may be prescribed, to the Registrar within such time and in such manner as

may be prescribed. If a person fails to give any information or if he gives or causes to be given any information which he knows or believes to be

false, he is liable for punishment, under S.23 of the Act. We have already referred to the fact that Ex.B-4 though dated 11-4-1969, should as a

matter of fact have preceded the date of receipt of the notice issued under Ex.A-1, which is also of that date. Ex.A-1 is the registered notice issued

by the plaintiff. Ordinarily, therefore, the notice should have been received on the 12th April, 1969. The registration of the birth as well as the death

of the child, which is compulsory in the eye of law, was made even on 11-4-1969. Therefore, the vague contention of the learned counsel for the

plaintiff that there could have been some manipulation at some end or other regarding the birth of a live male child on 5th April, 1969, is without

force.

9. There are other documents to sustain this view, Ex.B-2 is the admission register maintained by D.W.1. The very fact that the parties have

agreed that a certified extract of the said register could be valid substitute for the main exhibit, by itself raises the presumption that Ex.B-2 did not

provoke any suspicion and that on the face of it, it was a genuine and dependable register. Otherwise, in a litigation between the mother-in-law and

daughter-in-law, the mother-in-law would not easily have allowed the daughter-in-law's counsel to take away an important exhibit, which to some

extent; is being challenged now as not being a genuine one. The conduct of the parties in the course of the trial gives us the impression that Ex.B-2

was never questioned as a questionable document, nor did the plaintiff entertain any suspicion about the genuineness or credibility of the said

register maintained by D.W.1 in his Nursing Home. If, therefore, the register by necessary implication was consented to by all concerned as a

dependable exhibit, then it follows that Ex.B-3, which is only a certified extract of

one of the entries therein, is equally unquestionable and unchallenged. Ex.B-3 contains the entry that on 5-4-1969, the defendant gave birth to an alive asphyxiated male child at about 4-45 P.M. and that the child expired at 6 P.M. This corroborates the public information given under Exts.B-4 and B-5. The question is whether a Court of law could automatically rely upon this entry without invoking the public information given and the certified extracts granted by the Municipality under Exs.B-4 and B-5. This would depend upon the acceptance or otherwise of the evidence of D.W.1.

10. D.W.1 is a qualified Medical Practitioner. He is an M.B.B.S., of the Madras University and F.R.C.S., of Claire University. He was running a

Nursing Home at Coimbatore and was maintaining a register for the patients admitted in his Nursing Home. He speaks to Ex.B4 as well as the

certificate Ex.B-1 issued by him and to the entry Ex.B-3 in Ex.B-2. He could recollect in the witness box with reference to these documents that a

male child was born to the defendant on 5-4-1969 and that it was born at 4-45 P.M., and was alive till 6 P.M., on that day. In cross-examination,

his veracity was not questioned. Nothing was suggested to this witness, whether he was a party to any plot on the part of the defendant to develop

her case for the purpose of increasing her share in the estate by introducing an alive posthumous male child which is said to have been born to her

on 5-4-1969. In cross-examination, he was asked whether he had the assistance of any nurses. He would say that though he had such assistance,

the name of that nurse was not mentioned in any other register. He would of course refer to his general assistant, Dr. Mrs. Angappa for delivery

cases, but would say that he himself attended to the delivery, and not Mrs. Angappa. He would admit that he extracted the child by forceps and

that the child was asphyxiated at birth. No attempt was made in cross-examination for elucidation of the expression ""asphyxiation"". But we find that

the dictionary meaning of ""asphyxiation"" is "deprivation of oxygen for utilisation by the tissues"" The doctor, therefore, swears there was lack of

oxygen in the tissues of the child at the time of birth. But he is emphatic that the child was born alive and there was some trouble because of

asphyxiation. As an expert, he would say that ""forceps generally used when the remaining of the foetus in the mother's womb is dangerous"". He

would say that generally dead foetus is expelled, meaning thereby natural expulsion. It is this aspect of birth that was contemplated when Act 18 of 1969. (The Registration of Births and Deaths Act, 1969) was passed. The distinction was maintained in law, and even in medical jurisprudence, as between a live-birth and a foetal death. The expression "live-birth" is defined in S.2(1)(d) of the Act, and it means "the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction breathes or shows any other evidence of life, and each product of such birth is considered live born". Therefore, the only material that is required to find out whether a child was born alive or not is that at the time when the product of conception is thrown out, it should be seen whether it was a dead foetus or a foetus which was alive by breathing or showing any other signs or evidence of life. The best evidence possible on this aspect is the Medical Attendant at that point of time. When he was in the box, no suggestion was made to him that he was swearing falsely or was interested in the defendant. The doctor gave normal evidence and placed reliance upon public and domestic documents maintained by him and ultimately swore that in the course of his attendance, he extracted the child by forceps, and that the child was alive, though asphyxiated. The child, therefore, should be deemed to have been breathing or there were signs of life at the time of birth.

11. The learned Judge, after considering such evidence, which, in our view, is sufficiently enlightening, went into an irrational discussion as to the process of delivery and without adverting to the main point in issue, considered certain well known authorities and found that asphyxia will cause the death of a child within 5 to 8 minutes. Even on the authorities cited by the learned trial Judge, it cannot be said that the child was not born alive. Asphyxia is a means to an end and the presence of asphyxia by itself does not decide whether the child was born dead or alive. These two facts are different and should be considered separately. The learned Judge did not, as a matter of fact, say that the doctor's evidence ought not to be believed. He would only say that a leading doctor would not have failed to give treatment to the child if it has been extracted in asphyxiated condition. He would tear a sentence or two in the testimony of D.W.1 to criticise his attitude. What the doctor stated was that in his records, he

does not mention the treatment given. Obviously, he is right because Ex.B-2 is an Admission Register, which has certain definite column, which speaks of the time of the admission, name of the patient, address, time of discharge, disease, result and the accounts paid. There is no particular column in this register which obligates the doctor to enter therein the nature of the treatment given either to the patient or to the child. Therefore if there is nothing in the record to show what treatment was given, it would be highly uncharitable to assume that no treatment was given by the doctor. The inference made by the learned Judge, which was passed on a priori considerations irrational approaches that the child could not have been delivered in a live condition, is not acceptable.

12. The further conclusion of the learned trial Judge in the alternative is rather amusing. According to the learned Judge even if the doctor's evidence has to be accepted, the child should have died afflicted by intra uterine foetal asphyxia. This is based on assumption. There are cases where the foetus dies before birth and there are cases where the foetus is alive after birth. This distinction between two such things was borne in mind in enacting Act 18 of 1969, to which we have already referred. "Birth", even according to Act 18 of 1969 means "live-birth or stillbirth". Therefore, the distinction between a live-birth and still-birth has to be remembered and we have no hesitation in accepting the case of the defendant read in conjunction with the testimony of D.W.1 and in the light of the documentary evidence already referred to that this is a case of a live-birth and the child was born at about 4.45 P.M. on 5-4-1969 and died at 6 P.M. on that day.

13. Furthering his contention, the learned counsel for the respondent would say that if the child birth was true the defendant, while instructing her lawyer to give the reply notice under Ex. A-2, could have mentioned such a live-birth of a male child. Apart from the fact that this lacuna has been squarely gulfed and bridged by the issuance of a reply notice Ex.B-6, the mere non-mention of a positive true fact unchallenged at a later point of time, cannot go to the root of the subject so as to affect the propounder of an inchoate notice. It may be that the person who instructed the lawyer was not diligent or there was an inadvertent omission to advert to the correct provision of law at the time when the solicitor drew up the notice; but

all such laches on the part of the litigant or his counsel at or about the time when the notice was issued cannot effect the legal consequence of a

privilege which springs from certain true and proved facts and which in consequence flows from the interpretation of the appropriate statutory

provisions. S.20 of the Hindi Succession Act, 1956, runs as follows:

A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the

intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from

the date of the death of the intestate.

This specific provision which has created an express right in classified heirs under the statute law has a special significance. S.20 uses the significant

words "'a child who was in the womb'" and who is subsequently born alive". Therefore, if there is proof that such a child was born alive, then there

is an automatic operation of the provisions of the Hindu Succession Act, to wit, S.20, and the intestate succession in a given case has to be

worked out in accordance there with and with reference to the other provisions of the Act.

14. We have referred to the uncharitable remarks made by the learned trial Judge and the circuitous way in which he was compelled to conclude

that the child could not have been born alive. In fact, in one of the text books, which is an authoritative one viz., Taylor's Principles and Practice of

Medical Jurisprudence½Volume III (Eleventh Edition), page 130, the following passage occurs:

Some difficulty might arise in civil cases if the mere extrusion of a part of the body sufficed to all the legal purposes of complete birth. It might

become a casuistical question as to how much of a child's body should be extruded in order to constitute legal birth. If, further, it be said that the at

of breathing should be combined with extrusion of the body, this would be unjust because the child is alive½its heart is evidently pulsating, and its

blood circulating, as (sic) before breathing commences as afterwards, Moreover, a child may be wholly born-alive, and may live for some time

without breathing; and there is no reason in law why such a child should not be regarded as living separately.

15. Having regard to the facts of this case, and the evidence, we find that the

child was born alive and by reasons of S.20 of the Hindu Succession

Act, the share of the defendant would be increased to 5/6th and that the plaintiff would be entitled to only 1/6th.

16. As regards the claim for moveables, no further arguments have been addressed before us by the learned Counsel for the respondent, and we

accept, therefore, the findings on issues 5 to 7 that there is no evidence about the existence of the properties other than Schedules A and C for

purposes of division as between the plaintiff and the defendant.

17. The other question, which survives now, is whether the plaintiff's right to enjoy the B Schedule properties is extinguished. We have already

seen that the right to enjoy the properties comprised in Schedule B with the right of reversion to such properties to the sons of late Kuppuswami

Gounder after the death of the plaintiff was specifically provided for in Ex.A-3 dated 17-12-1950. This right has become vested in the plaintiff by

an agreement between the coparceners of the family. Such a deed of partition was acted upon, and it is also common ground that the properties

described in Schedule B are in the possession of the plaintiff. To divest a vested right, a right in the challenging party is necessary. The defendant

does not project any such right, but would vaguely contend that by reasons of S.22 of the Hindu Adoptions and Maintenance Act, 1956, the right

to enjoy the properties in Schedule B has become extinguished and that they are also to be brought to the hotchpot for purposes of division. S.22

of the Hindu Adoptions and Maintenance Act, 1956, is not applicable to the facts of this case at all. In so far as the wife is concerned, S.18

provides that a Hindu wife shall be entitled to be maintained by her husband during her life time. As regards a widowed daughter-in-law, she shall

be maintained, after the death of her husband, by her father-in-law, S.20 says that a Hindu is bound, during his or her lifetime, to maintain his or her

legitimate or illegitimate children and his or her aged or infirm parents. S.21 defines "dependants", and thereafter comes S.22. Sub-S. (1) of S.22

says that the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the

deceased. This, however, is subject to sub-S.(2) of S.22. Sub-S.(2) of S.22 provides that where a dependant has not obtained any share in the

estate of a Hindu dying after the commencement of this Act, the dependant shall

be entitled to maintenance from those who take the estate. The instant case is not a case where it should be stated that the plaintiff who can seek for maintenance from her husband can be said to be asking for maintenance from the daughter-in-law of hers. Though the word "dependant" in sub-S.(2) of S.22, includes father or mother, yet it has to be construed in the light of the facts and circumstances of each case. It cannot be said that the plaintiff has obtained a share in the estate, so as to deprive her of her maintenance, which she otherwise secured in a family settlement long prior to the date of death of her sons who could be equated to a Hindu dying after the commencement of this Act. It is not, however, necessary for us to express any view on this subject, because the invocation of S.22 of the Hindu Adoptions and Maintenance Act, 1956, is not quite necessary in the facts and circumstance of the case. This is so, because the plaintiff secured a vested right prior to the induction of this Act. This right or privilege secured by her cannot be lightly disturbed and certainly such a right cannot be divested. As a matter of fact, S.25 is a pointer to this view. That sections says that the amount of maintenance fixed by agreement even before the commencement of this Act may be altered if there is a material change in the circumstances justifying such alteration. This lends support to our view that if any agreement is made bona fide prior to the commencement of this Act, and that too, at a partition or at a family settlement entered into between the male and the female coparceners who could justifiably be called dependents under the above Act. then such agreement has full force and effect even after the commencement of this Act and has to be implemented. In this view, the appellant's case that the B Schedule properties should be brought to the hotchpot even now and be the subject matter of division in accordance with the entitlements of each of the parties to this litigation is a premature request, besides being far-fetched. The lower Court came to the same conclusion, but on different grounds. We are not inclined to disturb the findings of the Court below on this aspect.

18. We make it clear that in so far as the B Schedule properties are concerned, the plaintiff is deemed to be the owner for life of such properties, and as the succession could open only after her death, it is premature to consider the relief asked by her, viz., the half share therein, on the fact that

both her sons died even during her lifetime. The lower Court obviously mistook and misinterpreted the substance of the arrangement under Ex. A-

3. The relief granted to the plaintiff over B Schedule property cannot stand. The appeal is, therefore, partly allowed, and there will be a preliminary

decree declaring that the plaintiff would be entitled to 1/6th share in the plaint A and C Schedule properties, and the appellant would be entitled to

5/6th share therein, and the appellant shall not disturb for the present the possession and enjoyment of the B Schedule properties by the plaintiff. In

so far as the claim for mesne profits is concerned, the direction given by the Court below that it shall be relegated to independent proceedings

under O.20, R.12 C.P.C. is confirmed. The costs of this appeal also will come out of the estate.