

Mariathodi Vs. Appu

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Court : Chennai

Decided On : Jan-06-1892

Reported in : (1892)ILR15Mad296

Judge : Arthur J.h. Collins, Kt., C.J. and ;Handley, J.

Appellant : Mariathodi

Respondent : Appu

Judgement :

1. We think the lower Courts were right in holding that the suit was not barred in any part by Section 43 of the Civil Procedure Code. The former suit by plaintiff was for a general partition of the family property and in that suit he obtained a declaration that he was entitled to 1/4 of the debts due to the family. In the present suit he sues for some of the debts which, he alleges, were collected by the managing member, first defendant, without his knowledge. It is clear that plaintiff's omission to claim from 1st defendant in that suit a share of debts, which he did not know had been recovered, cannot be a bar to his now suing for that purpose. The words ' omit to sue ' in Section 43 must refer to an omission which might have been avoided, not to an omission to claim that which a party could not know he was entitled to.

2. As to the items 1 to 4, 9, 10, 12, 13, and 14, the Subordinate Judge finds that they are clearly proved, and that decision cannot be questioned in second appeal.

As to items 5 and 11 we think the decision of the Subordinate Judge is correct.

3. The memorandum of objections relates to items on which the Subordinate Judge has given decisions upon the evidence and we must refuse to discuss them.

4. The appeal and memorandum of objections are dismissed with costs.

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