

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.06.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

S.A.No.1858 of 1998

Date of Reserving the Judgment 11.06.2015	Date of Pronouncing the Judgment 23.06.2015
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Lakshmiammal @ Misiriammal (Died)

2.G.K.Jayalakshmi

3.G.K.Bannumathi

4.G.K.Natarajan ...LRS of Deceased Appellant/
LRS of deceased 1st Defendant

(Appellants 2 to 4 are brought on record as LR's of the
deceased sole appellant vide order of Court dated
18.10.2006 made in CMP.Nos.4810 to 4812 of 2006)

Vs

1.Kausalya Devi
Rep. by Power Agent Nallamuthu

... 1st Respondent/Plaintiff

2.Alamelu Ammal

... 2nd Respondent/2nd Defendant

(2nd respondent is given up as unnecessary party)

Prayer: Second appeal filed under Section 100 of CPC against the
judgment and decree dated 07.09.1998 made in A.S.No.53/1998 on the
file of the II Additional District Court, Erode confirming the
judgment and decree dated 20.02.1998 made in O.S.No.44/1996 on the
file of the Subordinate Court, Gobichettipalayam.

For Appellant : Mr.T.Murugamanickam

For Respondent : Mr.R.T.Duraiswamy, for R1

R2 - Given up

J U D G M E N T

The second appeal arises out of the judgment and decree dated 07.09.1998 made in A.S.No.53/1998 on the file of the II Additional District Court, Erode confirming the judgment and decree dated 20.02.1998 made in O.S.No.44/1996 on the file of the Subordinate Court, Gobichettipalayam.

2. The averments made in the plaint are as follows:-

(a) The first respondent herein as plaintiff has filed the suit in O.S.No.44/1996 for declaration of title and for recovery of possession stating that the second defendant was the only heir to her parents and that she was married to one Maran Chettiar as his second wife. The said Maran Chettiar had two wives. The first wife is one Alamelu Ammal through whom he had two female children viz., Rangammal and Lakshmiammal @ Misiriammal/the first defendant. Since the first wife of Maran Chettiar passed away when the first defendant was two years old, the said Maran Chettiar married the second defendant/Alamelu Ammal. However, as there was dispute between the second defendant/Alamelu Ammal and the daughters born to Maran Chettiar through his first wife, the second defendant/Alamelu Ammal returned to her parental home and was engaged in business along with her father. Out of her own earnings, the second defendant/Alamelu Ammal purchased the suit property from one Valliammal under Ex.A.2/Sale deed, dated 27.04.1960 and from thereon, the second defendant was in possession and enjoyment of the suit property. Thereafter, on 23.09.1974, the second defendant had mortgaged the property with the Co-operative bank under Ex.A.3/Mortgage Deed and obtained loan for her business. While so, in the year 1984, the plaintiff came to know that the suit property is for sale and hence, after verifying the title to the property, she purchased the same from the second defendant under EX.A.1/Sale Deed, dated 10.05.1984 for a sale consideration of Rs.34,000/-. Thereafter, since her husband was working in Erode, the plaintiff left the possession of the suit property with the second defendant and in the year 1996, when the plaintiff demanded back the possession of the suit property, the first defendant informed the plaintiff that the second defendant had gifted the suit property to the first defendant and refused to hand over possession of the same. Hence, the plaintiff came forward with the suit for declaration of title and for recovery of possession.

3. The appellant herein who is the first defendant in the suit had filed the written statement wherein it was stated that there was no such sale of the suit property by the second defendant to the plaintiff under Ex.A.1/Sale Deed, dated 10.05.1984 and that the Ex.A.1 is a forged one. Even in the year 1977, the first defendant had already filed a suit in O.S.No.229 of 1977 on the file of the Subordinate Court, Erode and hence, the sale alleged to have taken place in the year 1984, after the filing of the suit is hit by

lispence. The first defendant is the daughter of one Maran Chettiar and the second defendant Alamelu Ammal and the first defendant is taking care of her mother after her father's death. The first defendant apprehending fear that the children born to her husband Kaali Chettiar through his second wife would demand right in the property had purchased the property in the name of her mother Alamelu Ammal, the second defendant. While so, since there arose a dispute between the second defendant/Alamelu Ammal and her daughter, the first defendant, the second defendant colluded with this plaintiff and created a forged document. In the earlier proceeding in O.S.No.229 of 1977 between the first and the second defendant, when an Advocate Commissioner visited the property for inspection on 15.07.1983, the property was in possession of the first defendant/appellant. So, it is false to say that on 10.05.1984, the plaintiff had purchased the property from the second defendant. Since, the plaintiff had purchased the property during the pendency of the proceedings, she cannot held to be a bonafide purchaser to value without notice of any encumbrance. Furthermore, since the property was in the open, continuous and uninterrupted possession of the the first defendant even when the Advocate Commissioner inspected the property on 15.07.1983, she also perfected title by adverse possession. Thus, she prayed for dismissal of the suit.

4. The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1 to P.W.3, D.W.1, D.W.2 and Exs.A.1 to A.11 and Exs.B.1 and B.132, decreed the suit. Aggrieved against the judgment and decree of the trial court, the first defendant preferred an appeal in A.S.No.53 of 1998 on the file of the II Additional District Court, Erode.

5. The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the first defendant.

6. At the time of admission, the following question of law has been framed.

"1. Whether the present suit O.S.No.44/96 is not barred by res judicata in view of the title to the suit property already having been declared in favour of the Appellant herein in O.S.No.104/80?

2. When an exparte decree has been passed in O.S.No.104/80, will it not operate as res judicata as a bar for the presentations of the subsequent suit O.S.No.44/96?"

7. Challenging the concurrent finding of both the Courts below, the first defendant as an appellant has preferred the present second appeal. The learned counsel appearing for the appellant would submit that the first respondent/plaintiff has filed the suit for declaration of title and for recovery of possession through her Power Agent. The suit properties originally belong to one Valliammal from whom the 1st defendant/1st appellant purchased the property in the name 2nd defendant/Alamelu Ammal under Ex.A.2/Sale deed, dated 27.06.1960, since the first defendant is none other than the daughter of the second defendant. In turn, the first respondent/plaintiff purchased the said property under Ex.A.1 on 10.05.1984. Further, the learned counsel would submit that the present suit is not maintainable without a prayer for declaration that the decree in O.S.No.104 of 1980 is void. The first defendant who is the daughter of Maran Chettiar has filed the suit in O.S.No.229 of 1977 on 08.07.1977 on the file of the Subordinate Court, Erode against the second defendant who is the second wife of Maran Chettiar for declaration and injunction with an alternative relief of partition and separate possession. Subsequently, the said suit was transferred and re-numbered as O.S.No.104 of 1980, wherein an exparte decree was granted on 15.10.1985. The Ex.B.7/Birth Certificate filed on behalf of the defendant would show that a female child was born to Maran Chettiar and his second wife Alamelu Ammal, who is the second defendant in the suit. It is the case of the plaintiff that Maran Chettiar had two wives. Rangammal and Lakshmiammal are the daughters born through his first wife Alamelu Ammal. However, the learned counsel for the appellant would submit that the 1st defendant/Lakshmiammal @ Misiriammal is the daughter born through his second wife Alamelu Ammal, the 2nd defendant/2nd respondent. However, the said factum was not considered by the Trial Court. The learned counsel would further submit that the plaintiff has not got into the witness box and only her power agent has deposed on her behalf and the same is fatal to the case of the prosecution. To substantiate his argument, the learned counsel for the appellant relied upon the decision reported in 1998 II MLJ 291, Govindasamy v. Kasthuri Ammal and others. The learned counsel would further submit that the suit is hit by res judicata in view of the judgment passed in O.S.No.104 of 1980 and and so, he prayed for allowing of the appeal.

8. Resisting the same, the learned counsel appearing for the respondent would submit that the plaintiff is the bona fide purchaser for value without notice. The decree in O.S.No.104 of 1980 has been obtained in collusion and so, the decree passed in O.S.No.104 of 1980 would not be hit by Section 11 of CPC (Res judicata). To substantiate his argument, the learned counsel for the respondent relied upon the following decisions and prayed for dismissal of the appeal.

1. AIR 1995 Supreme Court 1205, Mahboob Sahab v. Syed Ismail and others.

2. 1997-2-L.W.908, Parvathi Ammal v. Solai Ammal and Another.
3. (2013) 4 Supreme Court Cases 396, Shantilal Gulabchand Mutha v. Tata Engineering and Locomotive Company Limited and Another.
4. AIR 1999 Supreme Court 3381(1), Balraj Taneja and Another v. Sunil Madan and Another.
5. AIR 1993 Kerala 273, Keepattel Bappu alias Moidunni and other v. Mugharikutty's son Kizhakke Valappil Muhammad and another.

9. Considered the rival submissions made by both side and perused the material records, oral and documentary evidences.

10. The admitted facts are that one Valliammal is the original owner of the suit property from whom the second defendant/Alamelu Ammal purchased the same under Ex.A.2/Sale Deed, dated 27.04.1960. The first respondent/plaintiff purchased the same from the second defendant/Alamelu Ammal under Ex.A.1/Sale Deed, dated 10.05.1984. Further, the second defendant had not contested the suit and only the first defendant alone had contested the suit. It is not in dispute that Maran Chettiar had two wives and the name of both the wives is Alamelu Ammal. According to the appellant, the appellant/Lakshmiammal is the daughter of Alamelu Ammal, the 2nd defendant/2nd respondent, who is the second wife of Maran Chettiar. Whereas, it is the case of the 2nd defendant that Maran Chettiar through his first wife Alamelu Ammal was having two daughters viz., Rangammal and the first defendant/appellant, Lakshmiammal @ Misiriammal and there is no issues for the 2nd defendant/Alamelu Ammal and Maran Chettiar. The learned counsel for the appellant would submit that as per Ex.B.7/Birth Certificate, a female child was born to Maran Chettiar and his second wife Alamelu Ammal on 24.05.1933. Whether the said Alamelu Ammal mentioned in the Ex.B.7/Birth Certificate is the first wife or second wife of Maran Chettiar has not been proved. However, the second defendant/Alamelu Ammal in her written statement had stated that Lakshmiammal, the appellant herein was born to Maran Chettiar and his first wife Alamelu Ammal and it was further stated that she is the second wife of Maran Chettiar and she is not having any children. In the earlier proceedings, it was alleged that the suit property had been purchased by the appellant Lakshmiammal @ Misiriammal in the name of her mother Alamelu Ammal, but there is no evidence to show that the daughter had purchased the suit property in the name of her mother.

11. It is also pertinent to note that after purchasing the property under Ex.A.2/Sale Deed, dated 27.04.1960, the second defendant/Alamelu Ammal had mortgaged the property to the co-operative society in the year 1974 under Ex.A.3/Mortgage Deed. In such circumstances, the argument advanced by the learned counsel for the appellant that the property was purchased by the first defendant in the name of the second defendant does not merit acceptance. It is true that the first defendant/appellant herself had filed a suit in O.S.No.229 of 1977 on the file of the Subordinate Court, Erode for declaration that the suit property absolutely belong to the

plaintiff and the defendant therein is only a benamidhar and a name lender; granting a consequential perpetual injunction restraining the defendant from disturbing in any manner whatsoever with the peaceful possession and enjoyment of the suit property by the plaintiff; in the alternative, directing partition of the suit house into two equal shares allotting one such share to the plaintiff through a commissioner to be appointed in this behalf and put her in separate possession thereof. The said suit was subsequently transferred to the file of the Subordinate Court, Gobichettipalayam and re-numbered as O.S.No.104 of 1980.

12. In the said suit, the second defendant/second respondent herein had filed a detailed written statement wherein it was stated that the plaintiff's father Maran Chettiar had two wives and she is the second wife. The said Maran Chettiar had two daughters viz., Rangammal and Lakshmiammal, through his first wife Alamelu Ammal. It was further stated that out of her own earnings she had purchased the suit property. Even though she had filed a detailed written statement, the defendant therein viz., the second respondent herein/Alamelu Ammal was set exparte and an exparte decree came to be passed on 15.10.1985, which was evidence by Ex.A.7. Thereafter, the second respondent herein/Alamelu Ammal had filed an application in I.A.No.118/1990 in O.S.No.104/1980 to condone the delay of 1565 days in filing the application to set aside the exparte decree, which was evidence by Ex.A.8. At the time of filing the suit, the plaintiff therein viz., the 1st appellant herein had also filed an application in I.A.No.571 of 1977 in O.S.No.229 of 1977 for injunction. Since the suit itself was dismissed on 11.19.1981, the said petition also came to be dismissed, which was evidence by Ex.A.10. But, subsequently the suit in O.S.No.229 of 1977 was restored to file and transferred to the file of the Subordinate Court, Gobichettipalayam and it was decreed exparte.

13. At this juncture, it is appropriate to consider the decisions relied on by both the parties.

14. The learned counsel for the appellant relied upon the decision reported in 1998 II MLJ 291, Govindasamy v. Kasthuri Ammal and others, wherein it was held that the judgment given for default of appearance cannot operate as res judicata. There is no quarrel over the said proposition. It is appropriate to incorporate paragraph 9 of the said decision:

"9. The next case cited by the counsel for the appellants is Chenniappa Mudaliar v. C.I.T. Madras (1964) 2 M.L.J. 157 (F.B.). it was held by the Full Bench that there is a real distinction between the case of dismissal of a legal proceeding for default of appearance and one given on merits. In the former case, it is termination of the proceeding for non-prosecution. Such termination decides nothing as regards the matters in controversy; it merely gets rid of the pending proceeding. Unless there be

a statutory bar, the dismissal of a case for default, cannot prevent the party from commencing the same proceedings afresh but the institution of such fresh proceedings might become impossible on account of rules of limitation as to the filing of appeals or by reason of any specific provision in that regard under the Rules themselves. It will thus be apparent that the dismissal of a case for default can, in no sense, amount to an adjudication on its merits. This is quite unlike a case of an ex parte decision where there is an adjudication on the merits. A judgment given for default of appearance by the appellant cannot (unlike the case of an ex parte one) operate as res judicata."

But the above citation is not applicable to the facts of the present case because in the instant case the suit in O.S.No.104 of 1980 was decreed exparte.

15. The learned counsel for the respondent relied upon the following decisions:

15.1. In the decision reported in AIR 1995 Supreme Court 1205, Mahboob Sahab v. Syed Ismail and others, it was held that the doctrine of res judicata must be applied to the co-defendants with great care and caution, in view of the possibility of fraud and collusion. It is appropriate to incorporate paragraph 9 of the said decision:

"9. Where the above four conditions did not exist the decree does not operate as res judicata. It must, therefore., be that all the persons who have right title and interest are made parties to the suit and that they should have knowledge that the right, tide and interest would be in adjudication and the finding or the decree therein would operate as a res judicata to their right, title and interest in the subject-matter of the former suit. Even in their absence a decree could be passed and it may be used as an evidence of the plaintiffs title either accepted or negatived therein. The doctrine of res judicata would apply even though the party against whom it is sought to be enforced, was not eo-nomine made a party nor entered appearance nor did he contest the question. The doctrine of res judicata must, however, be applied to co- defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practicing fraud or collusion, he cannot be allowed to say that the matter is res judicata and cannot be re-opened. There can also be no question of res judicata in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record."

The above citation is squarely applicable to the facts of the present case because in the earlier suit in O.S.No.104 of 1980

between the defendants 1 and 2, the 1st respondent is not a party, even though she had purchased the property much before the suit was decreed exparte.

15.2. In the decision reported in 1997-2-L.W.908, Parvathi Ammal v. Solai Ammal and Another, wherein on the plea by daughter (plaintiff) that the purchase of property in the name of her mother, was benami for the father and that after the father's death, plaintiff will be entitled to a share therein, it was held that the intention of parties is the main consideration. It is appropriate to incorporate paragraph 11 and 14 of the said decision:

"11. In Nand Kishore v. Sushila it was held that the prohibition to raise the plea of benami is not applicable to the property purchased by a person in the name of his wife or unmarried daughter but at the same time, the persons so pleading must prove that the said property had not been purchased, for the benefit or welfare of such persons in order to succeed. In coming to such conclusion, their Lordships of the Apex Court adverted to Section 3(2) which provided that nothing in Sub-section (1) which in turn stipulated no person shall enter into any benami transaction, shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and that it shall be presumed, unless contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter."

In the instant case, in the previous suit, the second defendant herein had specifically averred that she had purchased the property out of her own earnings. So, it is irrelevant to decide whether the property has been purchased by the appellant in the name of the second defendant/Alamelu Ammal.

15.3. In the decision reported in (2013) 4 Supreme Court Cases 396, Shantilal Gulabchand Mutha v. Tata Engineering and Locomotive Company Limited and Another, it was held that the judgment as defined in Section 2(9) of CPC means the statement given by the Judge of the grounds for a decree or order.

But the above citation is not relevant to the facts of the present case on hand.

15.4. In the decision reported in AIR 1999 Supreme Court 3381 (1), Balraj Taneja and Another v. Sunil Madan and Another, it was held that the suit cannot be decreed merely because the defendant had not filed the written statement. But the above citation is also not relevant to the facts of the present case.

15.5. In the decision reported in AIR 1993 Kerala 273, Keepattel Bappu alias Moidunni and other v. Mugharikutty's son Kizhakke Valappil Muhammad and another, it was held that the question of res judicata is a mixed question of law and fact and

when the question of law depends upon certain facts recorded by the Courts below, the opposite party has got a right to say that the decision relied on for the purpose of res judicata is a decision obtained under fraud and if he can establish the fact, the decision cannot be used for the purpose of invoking the doctrine of res judicata. It is appropriate to incorporate paragraphs 15 and 16 of the said decision:

"15. We may at once say that the question of res judicata is a mixed question of law and fact. That question of law when depends upon certain facts and if there is a finding regarding those facts recorded by the courts below, we feel that we have to proceed to consider the decision on the question of res judicata on the basis that, that finding of fact which formed the foundation of the decision which has been held out for challenging the finding of the tribunal on the ground of res judicata is not to be interfered with by this court in second appeal.

16. There is no dispute that if a decision is put forth to canvass a plea of res judicata, the opposite party has got a right to say that the decision relied on for the purpose of res judicata is a decision obtained under fraud and if he can establish that fact, the decision cannot be used for the purpose of invoking the doctrine of res judicata. Counsel for the respondent submitted that the question of fraud vitiating the decision and the decision is the result of a collusion has to be considered separately."

16. Now the point that has to be decided is whether the second defendant/second respondent herein is the mother of the 1st defendant/appellant herein?

The second defendant/Alamelu Ammal who is the defendant in O.S.No.229 of 1977 had filed a written statement therein, wherein she had stated that Lakshmiammal is not her daughter and that she was born to her husband Maran Chettiar through his first wife Alamelu Ammal. So, the name Alamelu Ammal mentioned in the Ex.B.7/Birth Certificate is not the name of the second defendant herein but it is the name of the first wife of Maran Chettiar through whom the appellant herein was born. So, the appellant herein is not the daughter of the second defendant/Alamelu Ammal. As already stated, the exparte decree will not operate as res judicata, as the substantial issue has not been decided on merits. At this juncture, it would be appropriate to incorporate Section 11 of Code of Civil Procedure.

"11. Res Judicata.-

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same

title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. "

So, the decree in O.S.No.104 of 1980 is not a bar for the present suit.

17. It is true that the respondent herein who is the plaintiff in the suit was not examined before the Court and her Power Agent alone was examined. It is true that the Power Agent can only depose about his/her personal knowledge and not on behalf of the principle. However, in the instant case, P.W.1/Nallamuthu is none other than the husband of the plaintiff/Kausalya Devi, and he is aware of all the transactions and hence, he had spoken about the purchase. In such circumstances, I am of the view that the argument advanced by the learned counsel for the appellant that the non-examination of the plaintiff is fatal to the case of does not merit acceptance. So, I am of the view that the property had been purchased by the second defendant out of her own income and it was subsequently, sold to the plaintiff/respondent herein. So, the plaintiff/respondent is the owner of the property. Since the appellants are now in possession of the suit property, both the Court below had rightly decreed the suit for recovery of possession.

18. Considering the above facts and circumstances, I am of the view that both the Courts below has rightly held that the present suit in O.S.No.44 of 1996 is not barred by res judicata, in view of the judgment and decree passed in O.S.No.104 of 1980. The substantial question of law 1 and 2 is answered accordingly. In view of the answer given to the substantial question of law 1 and 2, the respondent/plaintiff who had purchased the property from the true owner viz., the second defendant is entitled for declaration of title and for recovery of possession. So, the decree and judgment passed by both the Courts below does not warrant interference by this Court and it is hereby confirmed.

19. In fine,

- (a) The Second Appeal is dismissed with costs.
- (b) The judgment and decree passed by the Trial Court as well as the first appellate Court is hereby confirmed.
- (c) The time granted for delivery is two months.

Sd/-

Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

To

- 1.The Subordinate Court, Gobichettipalayam.
- 2.The II Additional District Court, Erode.

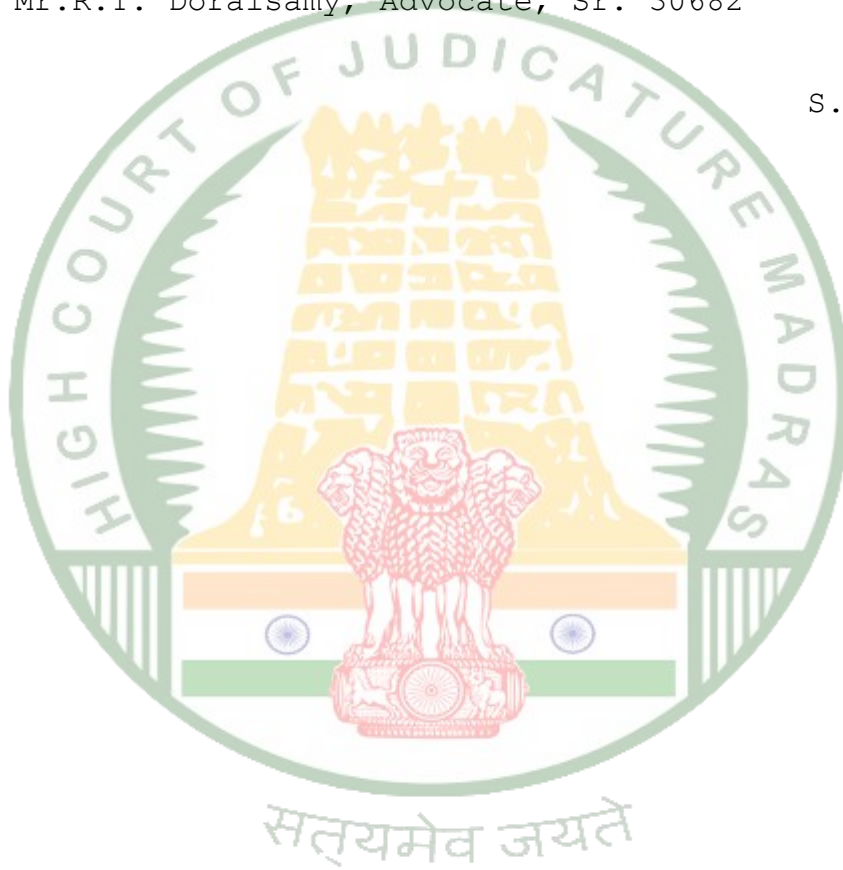
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The Section Officer
V.R.Section, High Court, Chennai.

- 1 cc to Mr.T. Murugamanickam, Advocate, sr. 30704
1 cc to Mr.R.T. Doraisamy, Advocate, Sr. 30682

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