

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 03.03.2015

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

S.A.No.1072 of 2006

1.B.K.Rangachari
2.P.N.Rajkumar
3.A.R.Yasodha
4.T.S.Prema
5.K.J.Padmini

...Appellants/Plaintiffs 1 & 2/
LRS of the 3rd Plaintiff

vs.

L.V.Mohan

...Respondent/Defendant

Second Appeal is filed against the judgment and decree dated 24.06.2005 made in A.S.No.53 of 1998 on the file of the Principal Subordinate Judge, Salem, confirming the judgment and decree dated 30.07.1998 in O.S.No.158 of 1996 on the file of the 1st Additional District Munsif, Salem.

For appellants : Mr.Ragavachari

For respondent : Mr.R.Bharanidhasan
for Mr.T.Shanmugam

JUDGMENT RESERVED ON : 11.12.2014

JUDGMENT

This Appeal has been filed by the plaintiffs against the concurrent findings of the courts below rejecting the claim of the plaintiffs.

2. The brief facts of the case are as follows:

The suit was filed by the plaintiffs contending that the suit property was originally purchased by the 3rd plaintiff in the name of his son, the defendant in 1976 to make a responsible person and to improve his marriage prospects. Subsequently, an irrevocable settlement deed dated 09.09.1981 was executed by the defendant in favour of the 3rd plaintiff. The 3rd plaintiff claimed to be in possession from the date of settlement and commenced the construction. Instigated by his wife and in-laws, the defendant has cancelled the settlement deed on 21.01.1982 without the consent and knowledge of the 3rd plaintiff. The fact of cancellation came to the knowledge of the 3rd plaintiff only through the notice dated 30.12.1992 sent by the defendants lawyer. Subsequently on 19.01.1996, the 3rd plaintiff has sold the suit property in favour of the 1st and 2nd plaintiffs and they were put in possession of the suit property. The plaintiffs also contended that the defendant and his henchmen tried to dispossess the plaintiffs from the suit property and hence the suit was filed for bare injunction.

3. The defendant resisted the suit contending that the property was purchased out of his own funds and was always under his possession. The settlement deed was only sham and was never acted upon. Subsequent to the cancellation, the defendant had executed a settlement deed in favour of his wife and put up construction in the suit property. The defendant also contending that the suit property along with other properties were purchased and enjoyed as joint family properties filed a suit for partition in O.S No 225/1993. The defendant also contended that the sale deed executed in favour of the plaintiffs 1 and 2 was sham as the property worth more than Rs 1,00,000/- was alienated for just Rs 15,000/- and the same has been impounded by the registration authorities for insufficient stamps and the same is hit by the doctrine of lis pendens and sought the dismissal of the suit.

4. Considering the oral as well as the documentary evidence, the suit was dismissed on 30.07.1998. As against the same, an appeal was filed by the plaintiffs before the Principal Subordinate court, Salem. Two interim applications for amending the plaint and letting in additional evidence were filed by the plaintiffs during the appeal. Both the applications were dismissed. As against the rejection of permission to amend the plaint, CRP No 2002/2001 was filed. The CRP was allowed by this Court without going into the

merits granting liberty to the defendant to raise all the defence. Subsequently, the 3rd plaintiff passed away during the pendency of the appeal and his daughters were impleaded as appellants/plaintiffs 4 to 6 in the appeal. Again another application seems to have been filed by the plaintiffs seeking permission to adduce oral as well as documentary evidence after amendment and it was also rejected. After hearing the parties, the first appeal was also dismissed. Aggrieved the same, the present second appeal has been filed.

5. At the time of admission of this second appeal, the following substantial questions of law have been framed:

"i) Whether the Courts below are right in upholding the cancellation of the settlement deed under Ex.B-3, when the power to revoke is not available to the defendant? and

ii) When the defendant had admitted the title of the plaintiff and had instituted a suit for partition, whether the Courts below are right in holding that plaintiff No.3 has not title to the property?"

6. The counsel for the appellants assailing the judgment and decrees of the courts below contended that it is well settled proposition that a settlement deed cannot be revoked except with the intervention of the court and relied upon the judgments in 2004 (3) CTC 9 (Govindaraju Vs. Rathinammal), 2009 (5) CTC 558 (S.Ganesan Vs. Bharathirajan), 2014 (3) CTC 113 (D.V.Loganathan Vs. The Sub-Registrar, Pallavaram Chennai), 2010 (2) CTC 379 (Kamalammal Vs. Girija) and section 126 of the Transfer of Property Act in support of his above contention. The counsel further relying upon the judgment reported in AIR 2004 SC 1257 (K.Balakrishnan Vs. K.Kamalam) contended that a gift would be valid even if possession is not handed over. The learned Counsel for the appellant also contended that in view of the revocation being void abinitio, the subsequent settlement by the defendant in favour of his wife is also void and not binding on the plaintiffs and therefore, the sale by the third plaintiff in favour of the 1st and 2nd plaintiffs are valid and since they have no doubt in their title, they need not seek any declaration to confirm their title. The counsel also contended that the defendant himself has accepted the right of the 3rd plaintiff in the suit filed by him for partition of the suit property and other properties claiming the suit property to be a part of joint family properties and therefore, both

the courts erred in holding that 3rd plaintiff had no right to alienate the suit property. The counsel further contended that both the courts failed to see that possession follows the title and the plaintiffs need not independently prove that they are in possession and hence sought that this appeal to be allowed.

7. Per contra, the learned counsel for the defendant would contend that there is no error apparent on the judgments of the courts below warranting interference under section 100 of C.P.C. The counsel further contended that despite the fact that the cancellation of the settlement deed was brought to the notice of the 3rd plaintiff in 1992 itself, the 3rd plaintiff has chosen not to seek a suit for declaration, to avoid the question of limitation and to harass the defendant executed a sham sale deed and then filed the suit. The learned counsel further contended that the defendant has proved beyond doubt that they are in possession of the property ever since the purchase and therefore the findings of the Courts below are perfectly right. The counsel for the defendant further contended that the sale deed in favour of the 1st and 2nd plaintiffs is hit by the doctrine of lis pendens and not binding on the defendant. The counsel also contended that the suit was originally filed only for bare injunction and only in the appellate stage, it was amended for recovery of possession. The relief of declaration being the appropriate relief was never sought by the plaintiffs and hence the courts below have rightly rejected the claim of the plaintiffs and dismissed the suit. Relying upon the judgments in 2014 (2) CTC 421 (Ratna Kounder Vs. Annamalai and others) and 2014 (3) CTC 820 (Subramanian Vs. Kosalai Ammal) the counsel for the defendant sought the dismissal of the appeal.

8. Heard both the counsels and perused the records.

9. Assailing the cancellation deed marked as Exhibit B3, the counsel for the plaintiffs has relied upon the following judgments:

(i) In the judgment reported in 2004 (3) CTC 9 (Govindaraju Vs. Rathinammal), the Division Bench of this court has held as follows:

"25. Applying the abovesaid principles of law dealt with in the decisions cited above, the averment in the plaint cannot be taken as denial of execution of the document or attestation therein. Only two facts have been set out in the written statement, namely, (1) the

said document is involuntary document which was extracted from Murugesh by the 2nd defendant; (2) the said document was executed in result of threat, intimidation, coercion and undue influence. Similar defence had been construed in the abovesaid decisions and found that the similar averment taken cannot be construed as "specific denial" so as to prevent the 2nd defendant to rely on Ex.B1 on the ground that she did not examine any one of the attestors. As stated already and also as found by the learned Judge, the execution of Ex.B1 by the 2nd defendant's father was proved otherwise as the executor had admitted the execution of Ex.B1 under Ex.A2, the cancellation deed. The 2nd defendant had proved the execution of Ex.B1 through other evidence, though not examined any one of the attestors. The learned Judge also found that the execution of Ex.B1 has been proved and has been acted upon. So the submission of the learned counsel for the appellants that the 2nd defendant cannot rely on Ex.B1 claiming right in the suit property and to resist the plaintiff's claim for specific performance cannot be countenanced. Since the suit property has been settled in favour of the 2nd defendant, the vendor has no right to cancel the same under Ex.A2 and so the said cancellation deed cannot be put against the 2nd defendant and consequently the 1st appellant/plaintiff did not derive any right under Ex.A6 agreement which is sought to be enforced in the suit. The learned Judge also safeguarded the interest of the 1st appellant/plaintiff to recover the amount paid to his vendor.

(ii) In the Judgment reported in 2009 (5) CTC 558 (S.Ganesan Vs Bharathirajan) this court has held as follows;

"7. I have heard the learned counsel for the appellant as well as the respondent. It is seen from the records that the settlement deed has been executed by mere appeal in favour of the vendors of the defendant under Ex.B3. The settlement deed being a registered settlement deed and irrevocable there is no power vested with the said Balu to reave the same under Ex.A57. Therefore, the Court below has rightly held that the unilateral cancellation of the settlement deed by the said Blau is void since he did not have the title to the

suit property. The Trial Court has also referred with the specific Clause in the settlement deed. In pursuant to the settlement deed the defendant has purchased the suit property under Ex.B5 dated 02.09.1992 which is registered sale deed. Therefore, it is clear notwithstanding the fact that the possession has not been handed over to donee under a settlement the same would not invalid the transaction. Similarly under Section 127 of the Transfer of Property Act, 1882 a minor is competent to accept a gift. As held earlier that the settlement itself makes it clear about the existence of the mortgage. It has been held in the Judgment reported in K.Balakrishnan V. K.Kamalam and others, 2004(1) CTC 146, that gift of title and ownership of property to the donee need not include actual possession and the minor is competent to accept the gift.

...

10. It is further seen that mere possession for any length of time would not lead to adverse possession. The duration or length of possession is not a factor for deciding adverse possession. In fact in the judgment referred above in K.Balakrishnan V. K.Kamalam and others, 2004(1) CTC 146, the Hon'ble Supreme Court has also held that apart from non-delivery of possession and non-exercising of any rights over the ownership of the property the fact that the donee has failed to make mutation in the records would not make the gift deed invalid. This Court feels that the said Judgment of the Supreme Court applies to the facts on hand as well. For the reason stated above, this Court finds that no interference is called for. Accordingly, the appeal is dismissed. Consequently, the C.M.P. Is closed. No costs."

(iii). In the judgment reported in 2014 (3) CTC 113 (D.V.Loganathan V. The Sub-Registrar, Pallavaram, Chennai) this court has held as follows:

"6. In fact the registration of cancellation of the Settlement Deed is against the Public Policy as it was not open to the Sub-Registrar to register the cancellation of the Deed, when the Settlement Deed is

unconditional and irrevocable. If at all the party who has executed the document is aggrieved by the Settlement Deed, he could have very well approached the Civil Court to set it aside, but certainly could not unilaterally cancel it, by getting the Deed of Cancellation registered with the Sub-Registrar. The Cancellation Deed and its registration, therefore, being without jurisdiction, is liable to be set aside. In fact in the above unreported judgment dated 01.03.2012 made in W.P.No.17983 of 2011 (cited supra), the learned Single Judge of this Court has held as follows:

"10. On consideration, I find that this Writ Petition deserves to succeed, as per Section 156 of Transfer of Property Act, except for the condition stipulated therein, the Gift Deed is irrevocable. It is not disputed that the none of the condition entitling revoking of Gift Deed exists in this case, as the Gift Deed was irrevocable and unconditional, it was not open to Respondent No.2 to register the Cancellation Deed being opposed to the public policy. The impugned order of registration, therefore, cannot be sustained in law, in view of the decision of the Hon'ble Full Bench of this Court and decision of the Hon'ble Kerala High Court in *Latif Estate Line India limited v. Hadeeja Ammal*".

For the reasons stated above the registration of impugned Deed of Cancellation therefore, cannot be sustained in law being against public policy."

iv). In the judgment reported in 2010 (2) CTC 379 (Kamalammal Vs. Girija), this court has held as follows:

"16 (xiv). In view of the above discussion and of the law holding the field, it is held that the cancellation by means of Ex.B-7 is not valid. There is no evidence with regard to fraud, misrepresentation, undue influence or coercion repeatedly perpetrated upon Vidhuthuvalli Thayar at the time of execution of Ex.A-3 Settlement deed. The competent persons connected to Ex.A-3 were not brought before the Court to show the alleged coercion and undue influence exerted upon the executant. In the absence of specific pleadings to prove, the contention that it was obtained through such devices could not be countenanced.

16 (xv). Since both the settlement deeds were duly accepted and it is indicated through documents that delivery of possession was also effected in favour of the first respondent, subsequent cancellation through Ex.B-7 by Vidhuthavalli Thayar is not legally valid."

v) In the judgment reported in AIR 2004 SC 1257 (K.Balakrishnan Vs. K.Kamalam& Others), the Apex Court has held as follows:

" 11.We have critically examined the contents of the gift deed. To us, it appears that the donor had very clearly transferred to the donees ownership and title in respect of her 1/8th share in properties. It was open to the donor to transfer by gift title and ownership in the property and at the same time reserve its possession and enjoyment to herself during her lifetime. There is no prohibition in law that ownership in property cannot be gifted without its possession and right of enjoyment. Under S.6 of the Transfer of Property Act " property of any kind may be transferred" except those mentioned in Cls. (a) to (i). Section 6 in relevant part reads thus:-

"6.What may be transferred._Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.-

(a)

(b) A mere right to re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c)

(d) All interest in property restricted in its enjoyment to the owner personally can not be transferred by him.

(e)A mere right to sue [***] cannot be transferred.

12. Clause (d) of S.6 is not attracted on the terms of the gift deed herein because it was not a property, the enjoyment of which was restricted to the owner personally. She was absolute owner of the property gifted and it was not restricted in its enjoyment to herself. She had inherited it from her maternal father as a full owner. The High Court was, therefore,

apparently wrong in coming to the conclusion that the gift deed was in effectual merely because the donor had reserved to herself the possession and enjoyment of the property gifted.

26. &.. we have examined the terms of the gift deed. Non-delivery of possession of the gifted property, non exercise of any rights of ownership over it, and failure by the donee, on attaining majority. In getting his name mutated in official records are not circumstances negating the presumption of acceptance by the minor during his minority or on his attaining majority."

10. From the above judgments, it is clear that the settlement deed cannot be cancelled unless either one of the elements of fraud, misrepresentation, undue influence or coercion is present. Such revocation is also possible only through a civil court. In S.Ganesans case (Supra), relying upon the judgment of the Apex Court reported in 2004 (1) CTC 146 SC (K.Balakrishnan case), this court has held that the settlement deed would not be invalidated on the ground that possession was not handed over to the donee or because donee failed to mutate the records. The judgment is squarely applicable to the present facts of the case. In the present case, though the plaintiffs could not establish that they were in possession, the fact that the revenue record was mutated in the name of the 3rd plaintiff vide exhibit A2, would only imply that the 3rd plaintiff had acted upon the settlement deed and was in possession till at least 1994. The documents produced by the defendant are of the year 1996. The defendant has only pleaded that the settlement document is a sham document. He has not pleaded that the document was obtained by fraud, misrepresentation, undue influence or coercion. No evidence was produced to that effect. Upon perusal of the settlement deed marked as Exhibit A1, it is clear that the settlement deed was irrevocable under any circumstances, voluntary and out of abundant love and affection the defendant had on his father. However, in the cancellation deed, the defendant had claimed that he had executed the settlement without any intention to enforce it. Such a plea does not fall within the ambit of section 126 of the Transfer of Property Act which reads as under:

"126. When gift may be suspended or revoked. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the

donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want of failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice."

Upon perusal of the sale deed marked as Exhibit B1, it is clear from the entry in the last page that the sale consideration was paid only by the 3rd plaintiff for the purchase of the property. The Entry reads as under:

"என் முன் ரூ.1,500/-. ரூபாய் ஆயிரத்து ஐநூறு மட்டும் எழுதி வாங்கும் மோகனக்காக வெங்கடாசலபதி அய்யரால் எழுதிக் கொடுப்பவருக்குச் செலுத்தப்பட்டது."

The defendant at the time of purchase of the property would have been only about 23 years in the year 1976 as per the age specified in the plaint in O.S No 225/1993. Therefore, when he executed the settlement deed in 1981, he was 28 years of age and was of sound mind. In the settlement deed, it has been categorically mentioned by the defendant that the 3rd plaintiff has made several contributions to him. Having executed the settlement deed voluntarily, the defendant cannot be permitted to plead that the settlement deed executed by him was without any intention and is only a sham document. Both the courts below have failed to look into the aspect. Similarly, the courts below have also ignored the settled proposition of law that the settlement deed cannot be revoked unilaterally and that too except with the intervention of the civil court. The courts have also failed to give any finding regarding the same warranting interference by this court.

11. The counsel for the defendant had relied upon the judgments in 2014 (3) CTC 820 (Subramanian Vs. Kosalai Ammal) and 2014 (2) CTC 421 (Ratna Kounder Vs. Annamalai and others) to contend that the plaintiffs should have sought for the relief of declaration as there was a clout in title. In 2014 (2) CTC 421, the dispute there in was

with regard to the validity of the sale deed executed by the plaintiffs predecessor in title in favour of the defendant and in the other case, it was claimed that the donee had no right to execute the settlement deed and therefore, the settlement deed is void abintio. Upon perusal of the judgments, this court is of the view that the above judgments are not applicable to the facts of the case.

12. The Honble Apex Court in the case of Anathula Sudhakar vs P. Buchi Reddy (Dead) By Lrs & Ors (2008 (4) SCC 594), has held as under:

21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for

injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

13. In view of the settled preposition that a settlement deed cannot be unilaterally revoked, there could be no cloud to the title of the 3rd plaintiff. In the present case, since the cancellation deed is void and not binding on him, the 3rd plaintiff has ignored the same and need not assert their title when they have no doubts about it. The suit though originally filed for injunction was subsequently amended by seeking recovery of possession. The case of the plaintiffs would therefore be covered by the ratio laid down in para 21 (a) of the above judgments. In the facts of the case and in view of the settled preposition of law, the failure of the plaintiffs to seek the relief of declaration would not be fatal. Rather, it is the defendant who should have challenged the sale deed in favour of the 1st and 2nd plaintiffs, by proving that the cancellation deed was valid and hit by any one of the conditions in Section 126 of Transfer of Property Act. Hence, holding that the courts below erred in upholding the cancellation of the settlement, the first substantial question of law is decided in favour of the plaintiffs.

14. Second substantial question of law:

Upon perusal of the plaint in O.S No 225/1993, it is clear that the suit property in O.S No 158 /1996 is not the subject matter in the partition suit. Only the other property mentioned in the settlement deed is the subject matter. It has also been admitted by DW1, the wife of the defendant that suit property in this case was not included in the suit for partition. Hence the plea of the defendant that the sale is hit by lispendens cannot be accepted. It is also pertinent to point out that only half share in the suit property was settled by the defendant in favour of his wife by Exhibit B4. Despite, the re-settlement, he has chosen to include one item of the property in the suit for partition. Be that as it may, the defendant himself has in the written statement in O.S. No 158 of 1996 and in the plaint in O.S No 225 of 1993 admitted that the settlement was executed by him as the 3rd plaintiff accepted to partition all the joint family properties later. But no such condition is mentioned in the settlement deed. No evidence to that effect was also produced before the courts below. As held above, the defendant has in neither of the suits pleaded that the settlement deed was executed under any one of the conditions specified in Section 126 of the Transfer of Property Act and therefore the title has passed on to the 3rd plaintiff. Therefore, in view of the decision of this court that the cancellation deed is void and not binding on the plaintiffs and the failure to deliver possession would not invalidate the settlement or validate the cancellation deed, the courts below erred in holding that the 3rd plaintiff had no valid title. The second substantial question of is answered accordingly.

15. In the result, the second appeal is allowed. The judgments of the courts below are set aside. The defendant is directed to render possession of the suit property to the plaintiffs within two months. No costs.

Sd/-

Deputy Registrar (J)

//True Copy//

Sub Assistant Registrar

vsm

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To

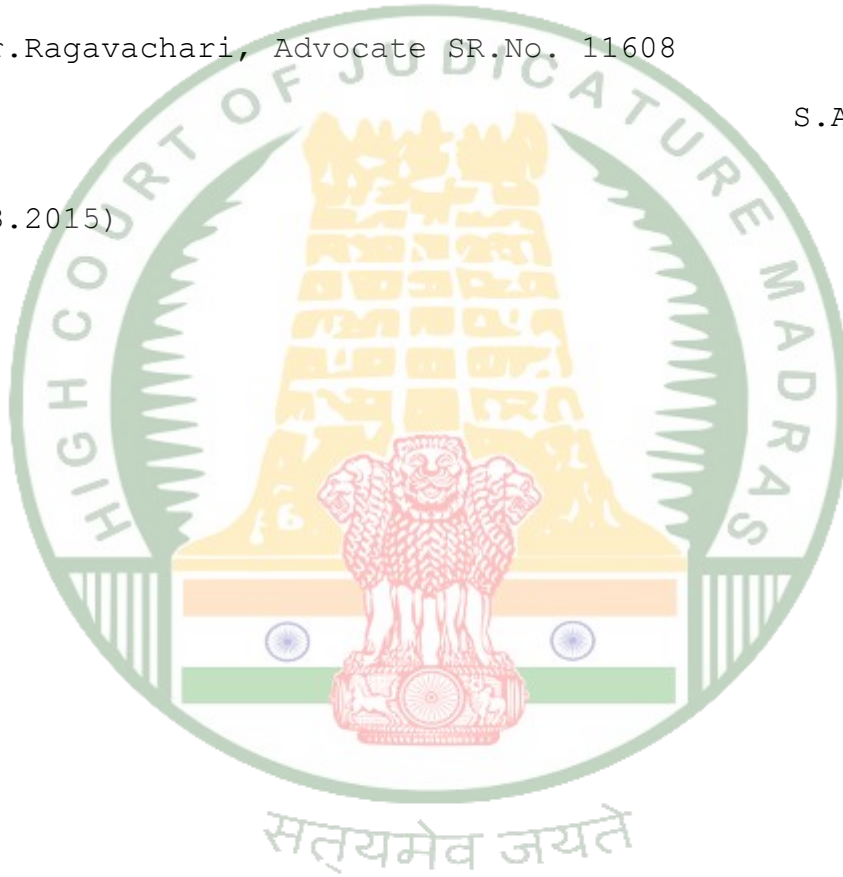
1. The Principal Subordinate Judge,
Salem.
2. The 1st Additional District Munsif,
Salem.

1 CC to Mr.T.Shanmugam, Advocate SR.No. 11960

1 CC to Mr.Ragavachari, Advocate SR.No. 11608

S.A.No.1072 of 2006

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