

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.03.2015

Delivered on : 09 .06.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

A.S.No.830 of 2009

and

M.P.No.1 of 2009

The Purasawakum Permanent Fund Ltd.
rep. by its Managing Director
No.173, Vellala Street
Purasawalkam
Chennai - 600 084. ...Appellant/4th Defendant

-Vs-

1.R.Kalaiselvi
2.Kalaivani ...Plaintiffs
3.K.Rangaramanujam
4.R.Jothiraman
5.K.R.Punithavalli
6.M/s.Balajee & Company
No.160, Thambu Chetty Street
2nd Floor
Chennai - 600 001 ...Respondents/Defendants 1 to 3 & 5

Appeal filed under Section 96 of the Civil Procedure Code against the judgment and decree of the VII Additional Judge, City Civil Court, Chennai dated 06.08.2008 made in O.S.No.963 of 2005.

For Appellant : Mr.K.Sridhar for
M/s.K.Sridhar Associates

For Respondent : Mr.G.Jeremiah for
Mr.M.S.Sudarsan for R1 and R2

JUDGMENT

This appeal has been filed against the decree of the trial court (VII Additional Judge, City Civil Court, Chennai) dated

06.08.2008 made in O.S.No.963 of 2005 granting the relief of partition and permanent injunction in favour of the plaintiffs, therein who are the respondents 1 and 2 herein. The 4th defendant in the above said suit is the appellant in the appeal.

2. For the sake of convenience, the parties shall be referred to in accordance with their ranks in the Original Suit and at appropriate places their ranks in the appeal shall also be given.

3. The respondents 1 and 2 herein/plaintiffs filed the plaint in above said suit, containing the following averments:-

The plaintiffs Kalaiselvi and Kalaivani are the daughters of the first defendant Rangaramanujam. Defendants 2 and 3, namely Jothiraman and Punithavalli are the brother and sister of the plaintiffs. The plaintiffs are twins born on 04.12.1975. An extent of 2 grounds and 159 sq.ft. comprised in R.S.No.421 at Melpathi Muthu Naicken Street, Nungambakkam, Chennai-34 originally belonged to Kanakasabhai Naicker, the grandfather of the plaintiffs, as he had purchased the said property out of his self-earning. Subsequently, in a family arrangement dated 05.06.1974 among the legal heirs of Kanakasabhai Naicker, namely (1) Nagarathinammal, (2) K.Lakshminarayanan, (3) K.Rangaramanujam, (4) Radhakrishnan, (5) K.Elumalai and (6) C.K.Sudarsanam, the suit property, namely the land and building at Old Door No.32/1, New No.75, Melpathi Muthu Naicken Street, Nungambakkam, Chennai-34 was allotted to Rangaramanujam, the first defendant. By virtue of Section 29 of the Hindu Succession (Amendment) Act, 1989 (Tamil Nadu Act 1 of 1990), the plaintiffs became entitled to get shares in the said property as coparceners. The plaintiffs were brought up by their aunt Santhalakshmi. Except spending some amount for the livelihood of the plaintiffs, defendants 1 and 2 did not disclose any of the family matters to the plaintiffs. While so, the plaintiffs came to know that the defendants 1 and 2 have obtained a loan of Rs.3,40,000/- in 1995 by mortgaging the suit property to Purasawalkam Permanent Fund Limited, the 4th defendant and that they could not pay the instalments and thereby the loan amount got accumulated to the tune of Rs.14,14,759/-. Since the mortgage was created without getting the consent of the plaintiffs it will not bind the share of the plaintiffs. When the said fact was informed to the 4th defendant, without giving proper reply, the 4th defendant instructed the auctioneer, namely M/s.Balaji & Company (5th defendant) to bring the suit property for sale in public auction on 01.07.2004 at 11.00 a.m. The attempt made by the plaintiffs to stop the auction by approaching the 5th defendant also proved to be ineffective. Hence the plaintiffs were constrained to file the suit in O.S.No.4121/2004 on the file of the VII Assistant Judge, City Civil Court, claiming their share in respect of the suit property. In spite of the pendency of the said proceedings, the 4th and 5th defendants have chosen to issue public notice for conducting the

auction at 11.00 a.m on 15.02.2005. Hence the plaintiffs were constrained to file the suit for a declaration that they are entitled to 2/5th share in the suit property and a direction to divide the same by metes and bounds into 5 equal shares and allot two shares to the plaintiffs, for permanent injunction restraining the defendants 4 and 5 from bringing the plaintiffs' share in the suit property for sale in public auction and for cost.

4. The defendants 1 to 3 did not contest the suit and they remained ex-parte. Defendants 4 and 5 contested the suit based on the written statement of the 4th defendant adopted by the 5th defendant. The contents of the statement of the 4th defendant adopted by the 5th defendant are, in brief, as follows:

The entire extent of 2 grounds and 159 sq.ft. comprised in Old Survey No.260 and R.S.No.421 of Nungambakkam village was purchased by Kanagasabhai Naicker, the father of the first defendant from one N.S.Venkatrama Iyer. The same is the self-acquired property of Kanakasabhai Naicker. He died leaving behind him, his wife Nagarathinammal, his sons C.K.Lakshminarayanan, K.Rangaramanujam, C.K.Radhakrishnan and C.K.Sundaresan as his surviving legal heirs. After the death of Kanakasabai Naicker, his legal heirs effected a partition in the presence of panchayatdards on 05.06.1974 whereby the land with an extent 887 sq.ft. together with building thereon was allotted to the first defendant Rangaramanujam. The said property was not the ancestral property of Kanakasabai Naicker and hence the suit property, which came to the share of the first defendant under the rule of succession is the separate property of the first defendant Rangaramanujam. At the time of partition, a loan of Rs.15,000/- obtained by Kanakasabai Naicker from Nungambakkam Saswatha Dhana Ratsaga Nidhi Ltd remained undischarged. In the partition it was agreed that the first defendant Rangaramanujam would discharge the said debt due to the said Nidhi. In order to discharge the said loan due to Nungambakkam Saswatha Dhana Ratsaga Nidhi Ltd and for raising funds for the marriage of his daughter, the first defendant Rangaramanujam availed a loan of Rs.25,000/- by executing a mortgage deed on 20.12.1986 in favour of the Nidhi. For clearing the said loan, the suit property was mortgaged on 09.03.1991 and a sum of Rs.80,000/- was borrowed from Purasawalkam Santhatha Sanga Nidhi Ltd. From the said amount a sum of Rs.20,000/- was paid to Nungambakkam Saswatha Dhana Ratsaga Nidhi Ltd and the balance amount of Rs.60,000/- was paid to Rangaramanujam. The said mortgage loan availed from Purasawalkam Santhatha Sanga Nidhi Ltd. remained undischarged. The first defendant and his son applied to the 4th defendant Fund for a loan of Rs.3,40,000/- to discharge the mortgage debt due to Purasawalkam Santhatha Sanga Nidhi Ltd and to improve their business. The loan was sanctioned as a mortgage loan and out of the loan amount of Rs.3,40,000/-, Rs.1,29,668/- was paid to Purasawalkam Santhatha Sanga Nidhi Ltd and the balance amount of

Rs.2,10,332/- was paid to the first defendant Rangaramanujam. The second defendant was added as a party to the mortgage deed by way of abundant caution. The said mortgage debt was not discharged. Hence as per the authority given to the mortgagee under the mortgage deed, the 4th defendant brought the suit property for sale in public auction on 01.07.2004. At that point of time, the plaintiffs filed a suit for permanent injunction in O.S.No.2864/2004. Though they filed an interlocutory application in I.A.No.10668/2004 in the suit for an interim injunction, they could not get any ad-interim order. As there was no injunction, the property was again brought for sale in public auction on 24.08.2004. At that point of time, the third defendant Punithavalli filed O.S.No.4131/2004 on the file of the VII Assistant Judge, City Civil Court, Chennai. She also filed an interlocutory application in I.A.No.13731/2004 for interim injunction. The learned VII Assistant Judge, City Civil Court, Chennai passed a conditional order directing the plaintiff therein (Punithavalli) to pay a sum of Rs.25,000/- before the auction date. But the said condition was not complied with resulting in non-extension of the interim order granted in I.A.No.13731/2004. Again the suit property was brought for sale in public auction to be held on 15.02.2005 at 11.00 a.m. One Mariappan emerged as the highest bidder having offered Rs.10,50,000/-. Since the amount was not even sufficient to meet the amount due to the 4th defendant, the sale was not confirmed by the Board of Directors of the 4th defendant. The first and second defendants have conferred right on the mortgagee (4th defendant) to bring the property for sale in public auction under Section 69 of the Transfer of Property Act, 1882. The plaintiffs do not have any share or title in respect of the property and they are not entitled to prevent the 4th defendant from exercising its right to bring the mortgaged property for sale. Since the property was not the ancestral property of Kanakasabhai Naicker, Tamil Nadu Act 1 of 1990 is not applicable and the plaintiffs and third defendant are not entitled to any share in the suit property. The suit has been filed as a vexatious one and also as an abuse of process of court in an attempt to prevent the 4th defendant from recovering the mortgage debt by bringing the suit property for sale in public auction under Section 69 of the Transfer of Property Act.

5. Based on the above said pleadings, the following issues were framed by the trial court:

1. Whether the plaintiffs are entitled to the relief of partition on the basis of their claim that they are entitled to 2/5th share in the suit property?

2. Whether the plaintiffs are entitled to get the relief of permanent injunction as prayed for?
3. Is the public auction dated 15.02.2005 valid or invalid?
4. To what other reliefs?

6. One witness was examined as PW1 and eight documents were marked as Exs.A1 to A8 on the side of the plaintiffs, whereas one witness was examined as DW1 and one document was marked as Ex.B1 on the side of the contesting defendants.

7. The learned trial judge, at the conclusion of trial, considered the evidence in the light of the arguments advanced on both sides and upon such a consideration accepted the case of the plaintiffs in all respects and granted the relief of partition and permanent injunction as prayed for in the plaint by a judgment and decree dated 06.08.2008. The said decree of the trial court is challenged as erroneous in the present appeal on various grounds set out in the memorandum of grounds of appeal.

8. The points that arise for consideration in this appeal are:

1. Whether the suit property in the hands of the 3rd respondent/first defendant Rangaramanujam is the coparcenary property in which his son and daughters have acquired a right to share by birth?
2. Whether the respondents 1 and 2/plaintiffs are entitled to 2/5th share in the suit property and whether they are entitled to the relief of partition?
3. Whether the respondents 1 and 2/plaintiffs are entitled to the relief of permanent injunction as sought for?
4. To what other relief the parties are entitled?

9. The arguments advanced by Mr.K.Sridhar for M/s.K.Sridhar Associates, learned counsel for the appellant and by Mr.G.Jeremiah for M.S.Sudarsan, learned counsel for the respondents 1 and 2 were heard. The materials available on record were also perused.

Point Nos.1 and 2:

10. The 4th defendant in the original suit is the appellant in the appeal. Admittedly, the 4th defendant is the mortgagee of the suit property and under the mortgage, a right of sale under Section 69 of the Transfer of Property Act, 1882 has also been granted in favour of the appellant/4th defendant. An extent of 2 grounds and 159 sq.ft. of land comprised in old survey No.260 and Re-survey

No.421 of Nungambakkam village came to be purchased by Kanakasabhai Naicker, the father of the first defendant Rangaramanujam under a registered sale deed dated 22.07.1929 bearing Document No.1283/1929. A certified copy of the said sale deed has been marked as Ex.A4. The plaintiffs themselves have chosen to admit the fact that the said property was the self-acquisition of Kanakasabhai Naicker having purchased the same out of his self-earning. After the said purchase, constructions came to be made and a part of the said property, namely the property described in the plaint schedule came to be allotted to the share of the first defendant Rangaramanujam in a partition that took place among the legal heirs of Kanakasabhai Naicker on 05.06.1974. Though the plaintiffs have stated that the said partition was effected by a deed of family arrangement, the said document has not been produced. The defendants 1 to 3 are none other than the father, brother and sister of the plaintiffs. They have not contested the suit and they remained ex-parte. Only the 4th and 5th defendants were the contesting defendants. They also admit the fact that the property purchased under the original of Ex.A4 was the self-acquisition of Kanakasabhai Naicker and hence it was his absolute property.

11. From the said pleadings and the evidence adduced through PW1, it is quite obvious that there is consensus regarding the fact that Kanakasabhai Naicker was not holding the property as a coparcenary property and on the other hand, it was his self-acquired absolute property. Though the plaintiffs would have stated that the legal heirs of Kanakasabhai Naicker effected a partition on 05.06.1974, they have not chosen to furnish the date of death of Kanakasabhai Naicker; Nor did they produce the death certificate of Kanakasabhai Naicker. A reference to the same has also been made in Ex.A5-mortgage deed. There is absence of pleading and absence of evidence as to the date of death of Kanakasabhai Naicker. In fact the plaintiffs themselves have admitted that all the legal heirs of Kanakasabhai Naicker, namely his wife Nagarathinammal and his four sons have effected partition. Though the plaintiffs in paragraph 2 of the plaint have stated that the above said partition was made by a registered document, the said registered document or its certified copy has not been produced. On the other hand, the first plaintiff, while deposing as PW1, during cross examination, admitted that the said partition deed was not registered. Ex.A5-mortgage deed also contains a recital referring to the partition effected on 05.06.1974 and it is said to be an unregistered document.

12. Be that as it may, since the plaintiffs themselves have admitted that the partition of the properties left by Kanakasabhai Naicker took place on 05.06.1974 among his widow and five sons, the necessary inference shall be that Kanakasabhai Naicker should have died few years prior to the date of partition and in any event

after the Hindu Succession Act, 1956 came into force. The non-production of the death certificate and the admission of PW1 that she did not know when her grandfather Kanakasabhai Naicker died, coupled with the fact that the property was divided among his sons and his widow, will give rise to an adverse inference against the plaintiffs that they have deliberately failed to give the date of death of Kanakasabhai Naicker and refrained from producing documents relating to the death of Kanakasabhai Naicker, on the fear that the same would demolish their own case that they became coparceners with their father in respect of the suit property. It is not the case of the plaintiffs that Nagarathinammal, widow of Kanakasabhai Naicker was given only a life estate and the same got enlarged into an absolute estate on the advent of Hindu Succession Act, 1956 to give rise to an inference that the death of Kanakasabhai Naicker could have taken place prior to Hindu Succession Act, 1956 coming into force. For the above said reasons, this court comes to the conclusion that Kanakasabhai Naicker should have died only after the Hindu Succession Act, 1956 came into force.

13. It is an admitted fact that the property purchased under the original of Ex.A4 was the self-acquisition and absolute property of Kanakasabhai Naicker. We have held that Kanakasabhai Naicker should have died only after the advent of Hindu Succession Act, 1956. On 05.06.1974 his wife and sons have partitioned the property left by Kanakasabhai Naicker and in that partition, the suit property came to be allotted to the share of the first defendant Rangaramanujam. The first defendant Rangaramanujam, having got the suit property as a legal heir of Kanakasabhai Naicker under the rule of succession provided in the Hindu Succession Act, 1956 and not as a coparcener, the same shall be his separate property in which, his son would not have got a right to share by birth under the provisions of Hindu Succession Act, 1956 that stood before the amendment made by Tamil Nadu Act 1 of 1990. The daughters of the first defendant Rangaramanujam, who remained unmarried on 23.12.1989 also would not have become coparcener having a right to share by birth in the said property by virtue of the amendment introducing Section 29-A to the Hindu Succession Act, 1956. Even after the amendment of Section 6 of the Hindu Succession Act by Act 39 of 2005 (Central Act) the character of the property remained the same and the plaintiffs have not become coparceners with their father, namely the first defendant. Therefore, the claim of the plaintiffs that the suit property is the coparcenary property in which each one of the plaintiffs, second and third defendants got a share equal to that of their father, namely the first defendant Rangaramanujam, cannot be countenanced and the same deserves to be rejected as untenable. Accordingly, this court holds that the respondents 1 and 2/plaintiffs are not entitled to 2/5th share in the suit property and in fact they are not entitled to any share in the suit property. The contrary finding rendered by

the trial court is discrepant and erroneous and the same is liable to be interfered with and set aside. Accordingly, Point Nos.1 and 2 are decided holding that the respondents 1 and 2/plaintiffs are not entitled to any share in the suit property much less 2/5th share in the suit property as claimed by them. Accordingly, they are also not entitled to the relief of partition as prayed by them.

14. The 4th defendant, namely Purasawalkam Permanent Fund Limited has made a clear averment regarding the loans obtained from Kanakasabhai Naicker by Nungambakkam Saswatha Dhana Ratsaga Nidhi Ltd and that in the partition dated 05.06.1974 the liability to discharge the said loan was tagged with the suit property allotted to the first defendant Rangaramanujam. It has also been established by clear evidence that for discharging the said loan and for meeting the marriage expenses of the third defendant, a sum of Rs.80,000/- was borrowed from Purasawalkam Santhatha Sanga Nidhi Ltd creating a mortgage dated 09.03.1991 in favour of the said Nidhi. Again for discharging the said mortgage loan due to the Purasawalkam Santhatha Sanga Nidhi Ltd. a mortgage was created under the original of Ex.A4 and the first and second defendants availed a loan of Rs.3,40,000/- from the 4th defendant, namely Purasawalkam Permanent Fund Limited by executing a registered mortgage deed dated 27.07.1995 bearing document No.168/1995. The creation of the said mortgages and the borrowals have not been disputed by the plaintiffs and in fact they have been specifically admitted by them. A question may arise as to why the second defendant was made a party to the mortgage deeds, if the first defendant is the absolute owner of the suit property? The answer is provided by the 4th defendant (DW1) that the same was done only by way of abundant caution. Ex.A5 is the certified copy of the above said mortgage deed executed in favour of the 4th defendant. Condition No.8(iv) of the mortgage deed specifically confers a right of sale under Section 69 of the Transfer of Property Act, 1882 without the intervention of court, on the mortgagee, namely the 4th defendant. It reads as follows:

"(iv) That on the Fund calling in the monies as provided in sub-clause (iii) above and on the Mortgagors failing to pay the same within three months of the date of service of the aforesaid notice, the Fund, notwithstanding any part payment made by the Mortgagors shall have, as provided in Section 69 of the Transfer of Property Act, the power to sell the property described in the Schedule hereto in private sale with the consent of the Mortgagors or by public auction, without the consent of the mortgagors. On such sale the Mortgagors shall execute and register the necessary sale deed and in default of doing so, within a week of the completion of the sale, the Fund is hereby authorised to execute it and register the same."

15. Section 69 of the Transfer of Property Act, 1882 reads as follows:

"69. Power of sale when valid

(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases and in no others, namely,-

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

(b) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the government;

(c) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until-

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise

improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into court under section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882. "

Sub section (1) sub clause (c) stands attracted.

16. There is no dispute regarding the fact that the property was brought for sale in public auction at the first instance on 01.07.2004 after complying with the conditions provided in the above said provision. When notice for the public auction to be held on 01.07.2004 was issued and publication was made, the third defendant Punithavalli filed a suit in O.S.No.4131 of 2004 along with an interlocutory application in I.A.No.13731/2004 seeking interim injunction. It has also been established by the evidence of DW1, which has not been disputed by PW1, that in the said case, a conditional order of ad-interim injunction came to be passed directing payment of Rs.25,000/- before the auction date and that since such condition was not complied with, the interim order was not extended. It is also obvious from the evidence of DW1, which has not been denied by PW1, that the plaintiffs themselves filed another suit in O.S.No.2864/2004 for permanent injunction along with an application in I.A.No.10668/2004 for interim injunction but they were not able to get any order of interim injunction. The present suit happened to be the third suit filed by the plaintiffs, at this time for the relief of partition and permanent injunction. The very fact that hectic attempts were made not only by the plaintiffs but also by their sister, namely third defendant, by filing two earlier suits with a view to get interim injunction restraining the fourth defendant from bringing the suit property for sale in public auction in accordance with the terms of Ex.A5-

mortgage deed, in which they were unable to obtain an order of interim injunction and the fact that the present suit came to be filed without even making any payment towards the discharge of the mortgage debt due to the 4th defendant, can even be viewed as an abuse of process of court. Besides, the plaintiffs have come forward with a false claim that they are entitled to a share in the suit property. The said claim is made obviously with the collusion of the defendants 1 to 3. The plaintiffs have come to the court with unclean hands and with a malafide intention to prevent the 4th defendant from exercising its lawful right of bringing the suit property for sale for the recovery of the amount due under Ex.A5-mortgage deed. Hence the plaintiffs shall not be entitled to the relief of partition. Moreover they shall not be entitled to the relief of injunction against the 4th defendant as prayed for.

17. The learned trial judge, without properly advertng to the principles of law governing inheritance of coparcenary properties and succession to the property of a male Hindu under the provisions of the Hindu Succession Act, 1956, has rendered an erroneous finding which led to the grant of the relief of partition and permanent injunction as sought for by the plaintiffs. This court, without any hesitation, terms the judgment and decree of the trial court to be erroneous, discrepant and liable to be interfered with and set aside in exercise of the appellate powers of this court. For all the reasons stated above, this court comes to the conclusion that the appeal shall succeed and the decree of the trial court deserves to be set aside and the suit filed by the plaintiffs is liable to be dismissed with cost.

In the result, the appeal is allowed. The decree of the trial court (VII Additional Judge, City Civil Court, Chennai) dated 06.08.2008 made in O.S.No.963 of 2005 is set aside. O.S.No.963 of 2005 on the file of the trial court is dismissed. The plaintiffs shall pay the cost of the 4th defendant in both the courts. Consequently, the connected miscellaneous petition is closed.

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sd/-

Assistant Registrar (CS-III)

True Copy
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Sub Assistant Registrar

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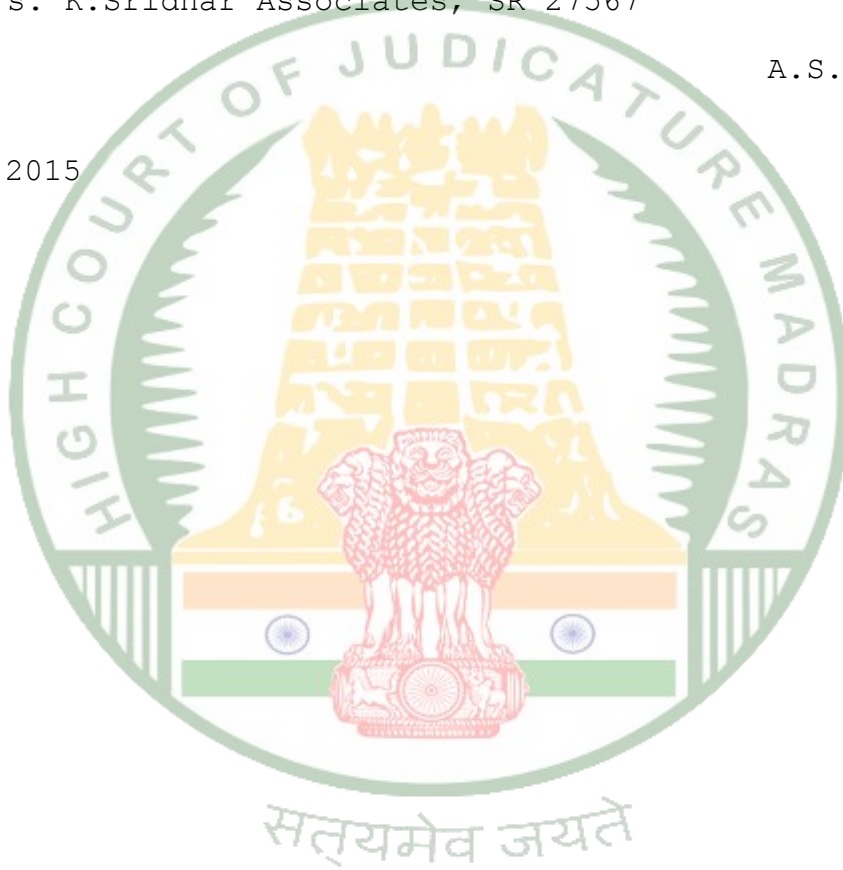
1.The VII Additional Judge,
City Civil Court, Chennai

2.The Section Officer,
V.R.Section, High Court,
Madras.

2CCs to M/s. K.Sridhar Associates, SR 27567

A.S.No.830 of 2009

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