

N THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14 .11.2016

PRONOUNCED ON : 18.11.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1600 of 1989
and
Cross.Objection No.28 of 1994

1.Thangamani
2.P.Rajeswari
3.Kalaichelvi

...Appellants in S.A.No.1600 of 1989

Baggiam (died) ...Cross objector in cross objection
No.28 of 1994

1.Sundararajan
2.Selvaraj
3.Rajeswari
(R1 to 3 brought on record as LRS
of deceased vide order dt.28.3.12
in CMP.394 to 396/02)

..Vs..

1.Baggiam(Deceased)
2.V.C.Thirunavukkarasu
3.Sundararajan
4.Selvarani
5.Rajeswari

(R3 to R5 brought on record as LRs
deceased R1 vide order of Court
dated 28.03.2012 made in C.M.P.No.513 to
515 of 2002 in S.A.No.1600 of 1989.... Respondents in
S.A.No.1600 of 1989

1.P.Thangamani
2.P.Rajeswari
3.P.Kalaiselvi
4.V.C.Thirunavukkarasu

...Respondents in
Cross.objection.28 of 1994

(R4 given up as not necessary party in cross objection)

Prayer in S.A.No.1600 of 1989:- Second Appeal has been filed
under Section 100 of C.P.C., against the judgment and decree of
the learned Additional District Judge, Periyar District at Erode
District, dated 07.11.1986 in A.S.No.112 of 1985 confirming the

judgment and decree of the learned I Additional Subordinate Judge, Erode, dated 29.02.1984 in O.S.No.388 of 1981.

Prayer in Cross.Objection No.28 of 1994:- Cross objectors filed this cross objection under Order 41 Rule 22 of Civil Procedure Code, 1908 against the judgment and decree of the District Court, Periyar District at Erode in A.S.No.112 of 1985 dated 07.11.1986.

For Appellants : Mr.K.K.Ramakrishnan
For Mr.P.T.Rama Dev

For R1 : Died
R2 : No appearance
R3 to R5 : Mr.T.Murugamanickam

JUDGMENT

This is the plaintiffs appeal preferred against the concurrent findings of the Courts below. The first defendant filed cross objection, the first defendant raised certain questions of law, pending appeal by way of memo, for consideration of this Court.

(a) Whether the finding of the Courts below, that, the first plaintiff is the wife of the deceased Ponnusamy is legally tenable, particularly in the light of the fact, that, the first plaintiff has not proved the factum of her marriage with the said Ponnusamy?

(b) When the oral and documentary evidence indicates, that, the first defendant [Cross Objector] has been living with Ponnusamy even prior to his alleged marriage with the first plaintiff, whether the Courts below ought to have raised the presumption, that, this cohabitation is in consequence of a valid marriage?

2. The brief facts leading to the appeal and the cross objection are as under:-

For convenient sake parties are described as per their status and ranking in the suit. According to the plaintiffs, Mrs.Thangamani, married Mr.Ponnusamy Gounder on 30.10.1963, as per Hindu rites and customs. Through him, Ms.P.Rajeswari and Ms.Kalaichelvi, the second and third plaintiffs were born. Mr.Ponnusamy Gounder deserted the first plaintiff, in the year 1967, and married one Ms.Ramayee as his second wife. Therefore, the first plaintiff initiated criminal proceedings against Mr.Ponnusamy Gounder for bigamous marriage. He was found guilty

under 494 I.P.C Convicted and sentenced to undergo rigorous imprisonment for one year and fine. In the Miscellaneous Petition in M.P.No.46 of 1977 filed for maintenance, the first plaintiff was awarded Rs.100/- second and third plaintiffs were awarded Rs.50/- per month each.

3. The said Mr.Ponnusamy died on 05.10.1977. There is no other legal heirs, except the plaintiffs. The suit schedule properties are the personal properties of Mr.Ponnusamy Gounder purchased through the sale deeds dated 27.07.1958 and 14.10.1958. Though, the sale deed dated 27.07.1958, stands in the name of the Mr.Ponnusamy and one Ms.Baggiam Ammal, it is the absolute property of Mr.Ponnusamy. Mr.Ponnusamy purchased the said property jointly along with Ms.Baggiam Ammal who is the concubine (aasai nayagi) of him and name lends to the sale deed dated 27.07.1958.

4. Though, in the sale deed Ms.Baggiam Ammal is shown as wife of Mr.Ponnusamy, in fact, she was only a kept mistress to Mr.Ponnusamy. While fact being so, after the death of Mr.Ponnusamy, the said Ms.Baggiam Ammal has forcibly evicted the plaintiffs. Therefore, being the widow and children of deceased Mr.Ponnusamy, the suit for declaration and title and recovery of possession with future profit or in alternative for partition and separate possession of plaintiffs ³⁴th share over the suit properties was filed by the plaintiffs.

5. The said plaint was opposed by the first defendant Ms.Baggiam Ammal, on the ground that, the alleged marriage between Mr.Ponnusamy and Mrs.Thangamani is false. The second and third plaintiffs are not the children of Mr.Ponnusamy. Contrarily, the first defendant has contested the suit that she and Mr.Ponnusamy Gounder were married and living together as husband and wife in the suit property along with her children, till the death of Mr.Ponnuswamy Gounder on 05.10.1979 and she continue to be in possession. The marriage alleged to have been held between the first plaintiff and Mr.Ponnusamy on 30.10.1963 is void, since, it had taken place after Ponnusamy married the first defendant, the plaintiffs have no right over the suit property.

6. The Trial Court, based on the pleadings framed as many as eight issues and after considering the evidence let in by the respective parties has held that the marriage between Mr.Ponnusamy and Ms.Baggiam/ first defendant is not proved. However, the fact that they lived together for long period as husband and wife is established through evidence.

7. Referring Exhibits B1 and B2, the sale deeds wherein more than one place the first defendant is shown as wife of Mr.Ponnusamy, the Trial Court has concluded that, there is no

evidence to prove the factum of marriage between Mr.Ponnusamy and Ms.aggiam, though, these two sale deeds mention the first defendant Ms.Baggiam as wife of Mr.Ponnusamy. In the absence of proof of marriage, it could be only held that Mr.ponnusamy and Ms.Bakkiam lived as Husband and wife and begotten children.

8. In respect of suit property, the Trial Court, has found that half share in the suit property was purchased by Mr.Ponnusamy and Ms.Baggiam jointly on 27.06.1958 and the remaining half share has been purchased by Mr.Ponnusamy on 14.10.1958. Referring the recital of Exhibit B2, where the sale consideration for the second half of the property was due to discharge of the mortgage loan amount of Rs.366 and 12 annas payable by the vendor to Ms.Baggiam, the Trial Court has held, as per Ex.B2, the sale consideration for the second half of the suit property Rs. 366 and 12 annas was to be paid to Ms.Baggiam in discharge of loan amount. Thus, the right of Ms.Baggiam as title holder of property has to be recognized.

9. In view of the above exhibits and evidence, the Trial Court has held that, the plaintiffs cannot claim exclusive right over the suit property as absolute property of Mr.Ponnusamy. Considering Exhibits B1 and B2, the trial Court held that, the first defendant Ms.Baggiam owned 1/4th share in the suit property and the remaining 3/4th share is owned by Mr.Ponnusamy.

10. Having held so, the Trial Court has dismissed the suit on the ground that, the plaintiffs are not entitled for declaration of the suit property in entirety and Pointing out inconsistency in the prayer to declare the entire property and in the alternative prayer of partition to $\frac{3}{4}$ share, the Trial Court, dismissed the suit.

11. Considering the evidence on record, the Trial Court has further observed that the first defendant and Mr.ponnusamy having lived together as husband and wife much prior to the marriage of the first plaintiff, the children born to the first defendant through Mr.Ponnusamy are entitled for share in the property of Mr.Ponnusamy. From the evidence of first defendant, the trial court has concluded that, out of five children born to Ms.Bakkiam, 2 died and one Mr.Sundararajan was not born to Mr.Ponnusamy and Ms.Rajeswari and Ms.Selvarani alone are the children of Mr.Ponnusamy born through Ms.Bakkiam.

12. The Trial Court, considering Ms.Rajeswari and Ms.Selvarani are also entitled for share in the suit property has held that the plaintiffs 1 to 3 and Ms.Rajeswari and Ms.Selvarani are entitled for 3/20 shares each and the first defendant is entitled for 5/20 shares in the suit property.

13. Having concluded so, the Trial Court has passed the preliminary decree in respect of the suit property with declaration that the plaintiffs 1 to 3 are entitled for declaration and possession for in respect of 9/20 shares in total in the suit schedule property.

14. Not satisfied with this decree and judgment, the plaintiffs have preferred a first appeal wherein, the defendants have also made cross objection. The First Appellate Court framed for the following points for determination.

1. Whether the entire suit house belonged to Ponnusamy gounder or to the first defendant as claimed?
2. Whether the first plaintiff is the legally wedded wife of Mr. Ponnusamy gounder?
3. Whether the first defendant is the legally wedded wife of Mr. Ponnusamy gounder?
4. To what share the plaintiffs are entitled to in the suit property?

15. After appreciating the evidence at length, independently, the First Appellate Court, held that the contention of the appellants that though, 1/4th of the suit property stands in the name of Ms. Baggiam, she did not pay the sale consideration. Therefore, the First Appellate Court held that Mr. Ponnusamy gounder is entitled for 3/4th share in the suit property and Ms. Baggiam Ammal holds the rest of the 1/4th share. In respect of the marital relationship between the first plaintiff Mrs. Thangamani and Mr. Ponnusamy, the First Appellate Court has taken note of the criminal proceedings initiated against Mr. Ponnusamy by Mrs. Thangamani and has held that since, the first defendant Ms. Baggiam had participated in the trial and deposed in that case in support of Mr. Ponnusamy that Mrs. Thangamani is not legally married wife of Mr. Ponnusamy. However, Court has disbelieved her evidence and has held Mr. Ponnusamy is the husband of Mrs. Thangamani.

16. The First Appellate Court dismissed the First appeal and cross objection holding that, the first defendant Ms. Baggiam and Mr. Ponnusamy were living together as husband and wife much before the valid marriage of Mr. Ponnusamy with first plaintiff Mrs. Thangamani. Since, the marriage between Mr. Ponnusamy and first defendant not proved, the earlier joint relationship, does not confer status to Ms. Baggiam as legally wedded wife of Mr. Ponnusamy. With this conclusion, the First Appellate Court concluded that it is appropriate to declare that the plaintiffs are entitled to the share in the 3/4th share of Mr. Ponnusamy Gounder's property in the suit property and the share to which, they are entitled to be decided in a separate partition suit by impleading all the necessary parties.

17. Aggrieved by this, the plaintiffs have preferred the present Second Appeal. Pending Second Appeal, Ms.Baggiam Ammal died in the year 1998. Application to bring the legal heirs of Ms.Baggiam Ammal was filed in C.M.P.No.513 to 515 of 2002. In which, Mr.Sundararajan 3rd respondent herein along with others has claimed that they are the legal heirs of deceased Ms. Baggiam.

18. Later, when the matter was taken up for final hearing, this Court found from the record that the deceased first defendant Ms.Baggiam claims that she married Mr. Ponnusamy Gounder in the year 1947. But, the age of Mr.Sundararajan who is one of the cross objector claiming to be the legal heirs of Ms.Baggiam is given as 60 years, then, he should have been born in the year 1942, much before the alleged marriage between the first defendant and Mr.Ponnusamy which makes the claim of Mr.Sundararajan that he was born to first defendant and Mr.Ponnusamy unlikely. Likewise, the age given to the other proposed legal heir Ms.Rajeswari, also found to be not certain. Hence, this Court directed the trial Court namely, the First Additional Subordinate Court to determine as to who are the legal heirs of deceased first defendant Ms.Baggiam and send a report.

19. Accordingly, the Additional Subordinate Court has conducted enquiry to find out who are the legal heirs of deceased Ms.Baggiam and after giving adequate opportunity to respective parties, it is found that Ms.Rajeswari and Ms.Selvarani alone are the legal heirs of deceased Ms.Baggiam and Mr.Sundararajan is not the legal heir of Ms.Baggiam. This finding is objected by the appellants herein. According to the appellants only Ms.Selvarani is the heir of deceased Ms.Baggiam born to Mr.Ponnusamy, but Ms.Rajeswari is not the daughter of Mr.Ponnusamy.

20. The Substantial question of law framed by this Court is "Whether the lower Appellate Court is right and holding that the first defendant children are entitled for a share in the suit property? After finding that the first defendant had not proved the marriage with Mr.Ponnusamy.

21. The learned counsel for the appellants contended that the Courts below have categorically held that no marriage was solemnized between Mr.Ponnusamy and Baggiam. When the factum of marriage is not proved, the children born to first defendant through Mr.Ponnusamy have no right over the property of Mr.Ponnusamy. Under Section 16(1) of the Hindu Marriage Act, only, if the factum of marriage is proved and that marriage is held to be void, in the light of Section 11 of Hindu Marriage Act, the children born through such void marriage are entitled for the share of the parents. Having held that the factum of marriage between Mr.Ponnusamy and Ms.Baggiam not proved, the

Courts below ought not to have come to the conclusion that the children born to Ms.Baggiam through Mr.Ponnusamy are entitled for share in the property.

22. Further, it is contended by the learned counsel appearing for the appellants that, as per the direction of this Court, the learned Additional Subordinate Judge has gone into the evidence let in by the respective parties to ascertain who are the legal heirs of deceased Ms.Baggiam Ammal and has found that Mr.Sundararajan is not the legal heir of Ms.Baggiam. At the same time, the First Additional Subordinate Judge, Erode, while ascertaining the legal representatives of Ms.Baggiam Ammal has not properly looked into the age difference of Ms.Rajeswari. If properly considered Ms.Selvarani alone will be the legal heir of Baggiam. Since, the parentage of Ms.Rajeswari is highly doubtful.

23. In support of this contention, the learned counsel for the appellants cited the following judgments.

- 1) Easwari Vs.Parvathi & others in 2014 (4) CTC 583,
- 2) Rajam and others Vs.Chidambaravadivu & 61 others in 2002-3-L.W.803,
- 3) K.Munuswami Gounder and another Vs.M.Govindaraju and others in 1996 DMC-25
- 4) Valliamman Vs. Kamalambal and Others in 1990-2-MLJ-307
- 5) Baby @ Rohini (Deceased) & others Vs.Kalam Kumerasan & others in 2015-4-LW.509

The learned counsel further contended that the recital in Exhibits B1 and B4 are not proof for marriage between the first defendant and Mr.Ponnusamy. There is no direct evidence to prove that the marriage between Mr.Ponnusamy and Ms.Baggiam Ammal was solemnized in the manner known to law. Being so, the children who were born to Ms.Baggiam allegedly, through Mr.Ponnusamy Gounder cannot claim any right as they are legitimate children of Mr.Ponnusamy Gounder under Section 16(3) of Hindu Marriage Act.

24. contrary to this, learned counsel for the respondents submitted that to the facts and circumstances of this case, the judgments relied on by the counsel for the appellants has no application. There are over whelming evidence to show that for considerable length of time Mr.Ponnusamy and Ms.Baggiam were living together as husband and wife. The marital relationship has been recognized by the relatives and children were born to them, in the course of such long cohabitation. Contemporaneous, documents such as birth certificates of the respondents 4 and 5 clearly goes to show that they are children of Mr.Ponnusamy and Ms.Baggiam Ammal born, through legally recognized marriage.

25. Relying upon the judgment of Supreme Court in Badri Prasad Vs.Dy.Director of Consolidation and others reported in 1973 3 SCC P.527 which has held,

For around 50 years, a man and a woman, as the facts in this case unfold, lived as husband and wife. An adventurist challenge to the factum of marriage between the two, by the petitioner in this special leave petition, has been negatived by the High Court. A strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy. In this view, the contention of Shri Garg, for the petitioner, that long after the alleged marriage, evidence has not been produced to sustain its ceremonial processes by examining the priest or other witnesses, deserves no consideration. If men and women who live as husband and wife in society are compelled to prove, half a century later, by eye-witness evidence that they were validly married, few will succeed. The contention deserves to be negatived and we do so without hesitation. The special leave petitions are dismissed.

26. Under Section 114 of the Indian Evidence Act, when a man and woman lived together for a long time and the man treats the woman and children born to her as his own children and the same is recognized by all persons concerned, there must be a presumption of marriage. To prove such marriage, evidence touching upon the conduct of the said man and woman is relevant. In some cases, it may be difficult to prove the marriage through marriage records. In such cases, if other evidences sufficiently proves long cohabitation and the same is accepted by relatives, it is imprudent to hold that such relationship is a non-est in law and bastardize the children born through such relationship. Such approach will be against the spirit of Sec.16(3) of Hindu Marriage Act introduced by way of amendment in 1976 with retrospective effect.

27. This suit is filed for a declaration and possession in respect of entire suit schedule property. The suit is based on

the averment that the plaintiffs alone are legal representatives of the deceased Mr.Ponnusamy and they alone are entitled for a declaration to the entire suit schedule property. However, on facts, both the Courts have held that Mr.Ponnusamy gounder holds only 3/4th title over the suit property. Further, the Courts below have also found that Mr.Ponnusamy gounder had lived with Ms.Baggiam but married Mrs.Thangamani. The first defendant and Mr.ponnusamy gounder were lived together as husband and wife even prior to the marriage of Ms.Thangamani with Mr.Ponnusamy gounder. The Court, in the previous matrimonial case, has concluded that Mr.Ponnusamy and Mrs.Thangamani married in 1963 and parted away in the year 1967. That finding though challenged by Mr.Ponnusamy in appeal, that was rejected. Therefore, the legality of the marriage between Mr.ponnusamy and Mrs.Thangamani cannot be assailed now.

28. The Courts below have also probed further into the fact whether the marriage between Ms.Baggiam and Mr.Ponnusamy was proved through witnesses and found in negative. However, due to long cohabitation, as husband and wife, the Court has recognized them as husband and wife for the purpose of legitimizing the children born to them, in the course of such long cohabitation. At the instance of this Court, exclusive enquiry has been conducted to find out who are at the children born to Ms.Baggiam and Mr.Ponnusamy. The Sub-court, Erode has reported that respondents 4 and 5 namely, Ms.Rajeswari and Ms.Selvarani are the children born to Mr.Ponnusamy Gounder and Ms.Baggiam. This finding is in line with the observation of the trial Court after assessing the testimony of Ms.Baggiam and the independent witness PW2.

29. Based on the facts and circumstances of this case, this Court is of the opinion that the judgments relied by the learned counsel for the appellants are applicable where no animus between the parties to live as husband and wife is pleaded or proved whereas, in this case, documentary evidence ever since 1958 describe Mr.ponnusamy Gounder and Ms.Baggiam as husband and wife. Birth certificates and school certificates of the children born to them show that they are parents. Ration card, voter ID show them as husband and wife, and parents of Ms.Selvarani and Ms.Rajeswari. Just because there is no proof for solemnization of their marriage, the Courts below have accepted the marriage of Mr.Ponnusamy held later with the first plaintiff Mrs.Thangamani in the year 1963 as a valid first marriage. This will not take away the right of the children born to Mr.Ponnusamy gounder who were born even prior to the marriage between him and Mrs.Thangamani. The Trial Court, after reconciling the evidence of first defendant examined as DW1 and the evidence of PW2 Rajamani @ Eswara Mudaliar has arrived at the conclusion that Ms.Rajeswari and Ms.Selvarani were two issues born to Ms.Baggiam through Mr.Ponnusamy.

30. In this case, it is well established that Ponnusamy Gounder and Ms.Baggiam Ammal were living together as husband and wife for a long period much longer than the period Mrs.Thangamani lived with Mr.Ponnusamy under her valid marriage. If one take the period of cohabitation, it is evident, Mr.Ponnusamy and Ms.Baggiam started living together much prior to the marriage of Mr.Ponnusamy with Mrs.Thangamani and it continued even after the separation of Mrs.Thangamani and Mr.Ponnusamy in the year 1967. Therefore, if one apply Section 16(3) Hindu Marriage Act, true to its spirit, the finding of courts below is perfectly legal and no need to interfere it.

31. It is evidently prove that Ms.Rajeswari and Ms.Selvarani who are the 4th and 5th respondents in the second appeal, impleaded as legal heirs of Ms.Baggiam Ammal were born to Mr.Ponnusamy. The cross objection regarding the validity of marriage between Mr.Ponnusamy and Mrs.Thangamani has not found favour in the light of the earlier proceedings wherein courts below have found that Mr.Ponnusamy gounder was legally married to Mrs.Thangamani and while that marriage subsisted he has married another lady and found guilty for offences under Section 494 I.P.C. Therefore, this Court holds that Mrs.Thangamani is the wedded wife of Mr.Ponnusamy, whereas due to long cohabitation between Mr.Ponnusamy Gounder and Ms.Baggiam, they are recognized as husband and wife. As a consequence, the plaintiffs and the children born to Ms.Baggiam through Mr.Ponnusamy Gounder are entitled to the property of Mr.Ponnusamy Gounder.

32. The First Appellate Court except declaring the right of plaintiffs 1,2,3 in respect of $\frac{3}{4}$ share of the suit property which stands in the name of Mr.Ponnusamy gounder, left open for the parties to work out their shares since, other legal heirs were not parties to the proceedings at that time. However, pending appeal, Ms.Baggiam died and this Court has taken steps to find out who are the legal heirs of the deceased Ms.Baggiam Ammal born through Mr.Ponnusamy gounder. Accordingly, the First Additional Sub Judge, Erode, have reported to this Court that Ms.Rajeswari and Ms.Selvarani are the legal heirs of deceased Ms.Baggiam Ammal. The plaintiffs as legal heirs of Mr.ponnusamy are entitled for share in the estate left by Mr.Ponnusamy along with the said Ms.Rajeswari and Ms.Selvarani. Since the plaintiffs has sought for partition as alternative relief and now, after the death of 1st defendant Ms.Baggiam her legal heirs born through Mr.ponnusamy are brought on record, the reason attributed by the First Appellate Court to interfere the trial court judgment no longer available. Therefore, instead of forcing the parties to go for a fresh suit for partition, comprehensive decree is need to be passed. In the suit schedule property $\frac{3}{4}$ th of the share stands in the name of Mr.Ponnusamy and $\frac{1}{4}$ in the name of Ms.Baggiam Ammal. On the death of Ms.Baggiam Ammal, this Court

has ascertaining through fresh enquiry who are the legal heirs of Ms.Baggiam Ammal. On her own right Ms.Baggiam Ammal have 1/4th title over the suit property as a joint owner of the property which shall be inherited by her legal heirs. For the remaining ¾ share, the plaintiffs 1 to 3 viz., Mrs.Thangamani, Rajeswari and Kalaiselvi and defendants 4 and 5 viz., Ms.Selvarani and Ms.Rajeswari shall share equally.

33. This Court therefore, modifying the judgment of the First Appellate Court and confirms the Trial Court judgment that the children born to Ms.Baggiam and Mr. Ponnusamy Gounder are entitled to share the ¾ share to late Mr.ponnusamy in the suit property along with plaintiffs 1 to 3.

34. Accordingly, this Court declares Appellants/plaintiffs 1 to 3 along with respondents 4 and 5 are entitled for equal share in the ¾ share of Mr.ponnusamy Gounder in the suit property. In the remaining ¼ share which stands in the name of Ms.Baggiam, if she had died intestate, all her children shall share it equally.

35. With this finding, preliminary decree of partition is passed as above. It is open to the parties to apportion their shares by filing application for final decree. Since the above finding covers the answer raised in the cross objection, no separate finding is recorded in respect of the cross objection.

36. In the result, Second Appeal is allowed and the judgment passed by the First Appellate Court is set aside and the preliminary decree passed by the trial Court is modified to the above effect. Cross objection is dismissed. However, there shall be no order as to costs.

Sd/-

Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

To

1. The Additional District Court, Periyar District at Erode District

2. The I Additional Subordinate Court, Erode.

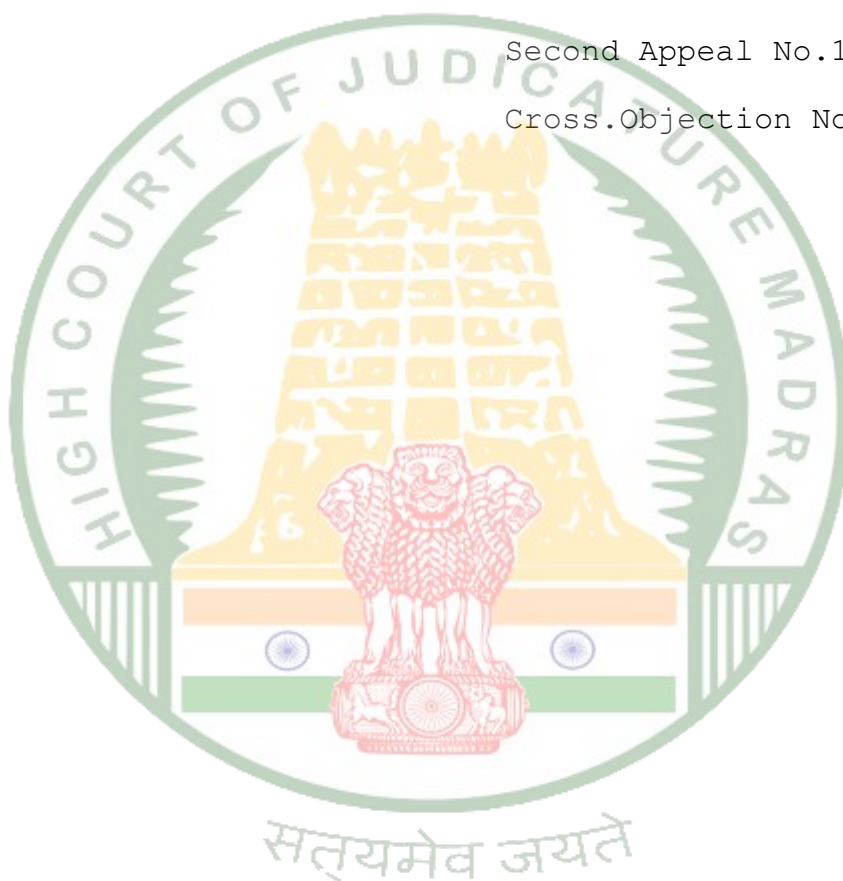
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V.R.Section,
High Court, Chennai.

+1 cc to M/s.P.T.Ramadevi, advocate, sr.67294

+1 cc to Mr.T.Murugamanickam, advocate, sr.66935.

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