

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:09.01.2017

DATE OF DECISION:01.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.105 of 2007

K.M.Subramaniam

.... Appellant/2nd Plaintiff

Vs

1.Parvathiammal (died)
2.Rukkuammal
3.Revathi
4.Sugunammal
5.K.Maniammal
6.K.Brinda
7.Thambu Dhanabal Shetty (Deceased)
8.D.Rajendran
9.Rani

RR 7 to 9 brought on record as Lrs
of deceased R1 vide order of Court
dated 03.08.2009 made in
M.P.No.1 of 2008

..... Respondents/Defendants 2 to 7

RR 8 & 9 recorded as Lrs of deceased
R7 vide order of the Court dated
24.11.2015 made in M.P.No.1/2011

This appeal is filed under Section 96 of C.P.C. against the judgement and decree dated 09.10.2006 made in O.S.No.19 of 2004 on the file of Principal District Court, Vellore District, Vellore.

For Appellant : Mr.T.Dhanyakumar

For Respondents :Mr.K.P.Arul for RR 2 & 4
Mrs.K.Velankannu for RR3,5 &6
Mr.V.Perumal for RR 8 & 9

J U D G E M E N T

The 2nd plaintiff in OS No 19 of 2004 on the file of Principal District Court, Vellore, a suit for partition, or for an alternative relief of declaration that the 2nd plaintiff is the owner of the suit property and for a permanent injunction restraining the defendants from interfering with the possession and enjoyment of the 2nd plaintiff, is the appellant.

2. According to the plaintiffs the suit properties belonged to 1st plaintiff and first defendant who are brothers. The 2nd plaintiff happens to be the son of the 1st defendant. The defendants 2 to 7 are daughters and 8th defendant, the wife of the first defendant. The first plaintiff and second defendant claimed that the suit properties belonged to the joint family consisting of the 1st plaintiff and 1st defendant and there had been no partition. While so the 1st defendant had executed certain settlement deeds in favour of his daughters settling the specific portion of the undivided property in favour of his daughters, which compelled the plaintiffs to issue notice on 22.06.1990 demanding partition and file the above suit.

3. The suit was originally filed in the year 1991 before the Sub-Court, Vellore and upon transfer, the suit came to be numbered as O.S.No.19 of 2004 on the file of the Principal District Judge, Vellore. During the pendency of the suit, the 1st plaintiff died. Upon his death, the 2nd plaintiff claimed the property as per the Will executed by the 1st plaintiff in his favour on 03.07.1989.

4. The 1st defendant also died and the 2nd plaintiff claimed that the 1st defendant executed a Will bequeathing his share to the 2nd plaintiff under a Will dated 22.07.1991. The 2nd plaintiff therefore, on the strength of the two Wills claims to be the absolute owner of the entire property. Thus the suit was filed for partition and separate possession of $\frac{3}{4}$ share of the plaintiffs or in alternative for declaration of title and permanent injunction.

5. The 1st defendant filed his written statement contending that the nature of the property as claimed in the plaint is true. However, the 1st defendant would contend that since the 1st plaintiff had no issues, the 2nd plaintiff was given adoption by 1st defendant and his wife namely 8th defendant to the 1st plaintiff during the month of Avani 1960. Therefore, the 1st defendant is the absolute owner of the $\frac{1}{2}$ share and the 2nd plaintiff has no right to question the settlement

deeds executed by him in favour of his daughters namely defendants 2,4,5,6 and 7.

6. The 5th defendant filed a written statement, which was adopted by defendants 2 to 4, 6 and 7. The stand of the defendants 2 to 4,5,6,7 is also same as that of the 1st defendant. They would also claim that their mother namely, 8th defendant Lakshmiammal had executed a Will bequeathing her share in the property in favour of her daughters on 28.09.1992. Therefore, according to them as per the said Will, the daughters would get the share that devolved on Lakshmiammal. The execution of the Will by the 1st defendant in favour of the 2nd plaintiff was specifically denied.

7. Upon the above pleadings, the learned Principal District Judge, Vellore framed the following issues:

1. Whether the claim of adoption of the 2nd plaintiff by the 1st plaintiff is proved?
2. Whether the second plaintiff is entitled to share in the family properties?
2. Whether the Settlement deeds dated 20.6.1989, 21.6.1989 are valid and acted upon?
3. Whether the Will dated 3.07.1989 executed by the 1st plaintiff in favour of the 2nd plaintiff is valid?
4. Whether the Will dated 22.07.1991 said to have been executed by 1st defendant in favour of the 2nd plaintiff is valid.
5. Whether the properties has been valued properly?
6. Whether 2nd plaintiff is entitled to preliminary decree as prayed for in the suit?
7. Whether the 2nd plaintiff is entitled to the alternative relief of declaration of title?
8. To what other reliefs, are the plaintiffs entitled to?

8. On the side of the plaintiffs PW1 to 4 were examined and Exs.A1 to A64 were marked. On the side of the defendants DW1 to DW6 were examined and Exs.B1 to B14 were marked.

9. Upon a consideration of oral and documentary evidence the learned Principal District Judge, Vellore accepted the plea of adoption. It was also found that the Will dated 03.7.1989 executed by the 1st plaintiff in favour of the 2nd plaintiff is true and valid. The Will alleged to have been executed by the 1st defendant in favour of the 2nd plaintiff was found to be not true. The Will executed by Lakshmiammal, the 8th defendant in favour of defendants 2 to 7 was also upheld.

10. On the aforesaid findings, the learned Principal District Judge, Vellore passed a preliminary decree granting half share in the property to the 2nd plaintiff as heir of the deceased 1st plaintiff. The settlement deeds were also upheld.

11. As regards the properties that belonged to the 1st defendant on the date of the suit, the learned Trial Judge held that they have to be taken by the defendants 2 to 7 equally and a preliminary decree would be passed, if they pay the court fee. Pending appeal 1st respondent died. Her legal representatives were brought on record as respondents 7, 8 & 9. The 7th respondent also died and respondents 8 and 9 were declared as legal representatives of 7th respondent.

12. Aggrieved by the said judgement and decree, the 2nd plaintiff has come forward with this appeal.

13. I have heard Mr.T.Dhanyakumar, learned counsel appearing for the appellant and Mr.K.P.Arul, learned counsel appearing for the respondents 2 & 4, Mrs.K.Velankanni for RR 3, 5 & 6 and Mr.V.Perumal for RR 8 and 9.

14. It appears that respondents 3, 5, 6, 8 and 9 have entered into a compromise with the appellant and the said compromise has also been recorded by this Court on 24.11.2015. Therefore, the appeal survives only as against the respondents 2 and 4.

15. The following points arise for determination in the appeal:

"1. Whether the adoption of the 2nd plaintiff by the 1st plaintiff is true and valid?

2. Whether the settlement deeds dated 20.06.1989 and 21.06.1989 marked as Exs.B12 and Ex.B5 in favour of defendants 3, 5 (respondents 2 and 4) are true, valid and acted upon?

3. Whether the Will said to have been executed by the 1st defendant in favour of the 2nd plaintiff dated 22.07.1991 has been proved in accordance with law.

4. Whether the Will said to have been executed by Lakshmiammal, namely 8th defendant dated 28.09.1992 has been proved in accordance with law.

5. What is the share that the 2nd plaintiff would be entitled to in the suit?

6. Whether the 1st defendant had the power to execute the settlement deeds dated 20.06.1989 and 21.06.1989 marked as Ex.B12 and Ex.B5 in favour of defendants 3 and 5 (respondents 2 and 4)."

16. The appellant has filed M.P.No.2 of 2011 seeking to produce the marriage invitation of the 1st plaintiff; Secondary School Leaving Certificate of the 2nd plaintiff; Registered copy of the sale deed dated 11.06.1962; the marriage invitation of the 2nd plaintiff and registration copy of the sale deed dated 29.01.1986 as additional documents. He has also filed M.P.No.1 of 2015 again under Order 41 and Rule 27 seeking to produce the following documents:

- 1.the original death ceremony copy issued on the death of the 1st plaintiff Doraisamy Naidu.
- 2.Registration copy of the sale deed dated 11.01.1960.
- 3.The registration copy of the sale deed dated 22.05.1971.

In both miscellaneous petitions the 2nd plaintiff is the applicant, he claims that the documents were traced by him only after the disposal of the suit and therefore, he was unable to produce these documents before the Trial Court. He would submit that the documents being public documents which will have a bearing on the subject matter in the above appeal, they will have to be looked into for the purpose of determining the rights of the parties conclusively. Though the respondents resisted the said applications on the ground of delay and laches they do not seriously dispute the correctness of the documents

17. A perusal of the contents of the documents also show that they will definitely have a bearing on the core issue of adoption raised in this appeal. Particularly the Secondary School Leaving Certificate of the 2nd plaintiff and four sale deeds wherein the 2nd plaintiff has been described as son of the 1st defendant, which would materially affect the decision on the issue of adoption. I am therefore of the opinion that in the interest of justice, the documents sought to be produced as additional evidence should be received as evidence and considered in this appeal. I do not find any necessity for oral evidence on these documents. The contents of the documents have not been seriously disputed by the contesting respondents. Therefore, the documents which are sought to be produced along with M.P.No.2 of 2011 and M.P.No.1/2015 are received in evidence and they are marked as Exhibits A65 to A72.
Point No.1

18. Mr.T.Dhanyakumar, learned counsel appearing for the appellant would vehemently contend that the Trial Court was not right in upholding the adoption. He would point out the following important facts overlooked by the Trial Court that would militate the claim of adoption:

- 1)The 2nd plaintiff was admittedly 20 years old at the time of

alleged adoption.

2) He was the only son of the (it is claimed that they had another son). 1st defendant. Though it is claimed that the 1st defendant had another son by name Srinivasulu who died subsequently there was no plea to that effect in the written statement filed by the 1st defendant or the 5th defendant.

3) PW2 would claim that 2nd plaintiff was 3 years old at the time of adoption.

4) In none of the documents prior to the suit, the 2nd plaintiff has been described as adopted son of the 1st plaintiff.

5) Even in the school records the 2nd plaintiff is shown as son of the 1st defendant.

6) None of the four settlement deeds namely, Exs.B5, B9, B12 and B14 executed by the 1st defendant on 20.06.1989 and 21.06.1989 refer to the adoption.

7) The letters Exs.A4, Ex.A6, A7, A8 written by Munusami Naidu (1st defendant) to the 1st plaintiff and his neighbour would belie the case of adoption.

8) The description of the 2nd plaintiff as the son of Munusamy Naidu in the sale deed executed by 1st plaintiff and the 1st defendant.

9) Marriage invitation of 2nd plaintiff described him as son of Munusamy Naidu.

19. Relying upon the aforesaid circumstances, learned counsel would contend that the Trial Court grievously erred in accepting the adoption solely on the basis of the statement the Will said to have been executed by the 8th defendant. Admittedly, the Will came into existence pending the above litigation. Per contra, Mr.K.B. Arul, learned counsel appearing for respondents 2 and 4 would contend that the Will executed by Lakshmi Ammal, namely, mother of the 2nd plaintiff dated 28.09.1992 marked as Ex.B6 has been proved in accordance with law and as such if the Will is accepted and its content has also been taken to be true. The learned counsel would further submit that adoption having taken place long time ago, one cannot expect direct evidence. Adoption is to be proved like any other fact and the court will definitely insist upon a stronger degree of proof in respect of adoption, since it would displace the natural succession to the properties. While considering the degree of proof required for adoption, the Hon'ble Supreme Court in A.Ragawamma and another v. A.Chenchamma and another reported in AIR 1964 SC 136 has observed as follows:

"It is well settled that a person, who seeks to displace the natural succession of the properties by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity"

20. On the facts of the said case, the Hon'ble Supreme Court found that parties therein relied upon the conduct of the parties subsequent to the alleged adoption and filed a number of documents to support their respective cases. After analyzing the documents that were produced, the Hon'ble Supreme Court found that they contained contradictory description. In fact, the Hon'ble Supreme Court found that while the alleged adopted son is namely Venkayya, had described himself as son of his natural father, whenever third parties executed the documents, he was described as adopted son of Pichaiya. He had also filed suits some times as adopted son of Pichayya and some time as the son of Chimpirayya.

21. Considering the evidence where there had been documents containing contradictory descriptions regarding the status of the alleged adopted son, the Hon'ble Supreme Court came to the conclusion that it would not be appropriate for the Courts to infer an adoption when there are conflicting descriptions.

22. The Hon'ble Supreme Court had again reiterated in Daulatrao Jairamji vs. Harishchandra and others reported in AIR 1972 SC 2446, the burden of proof of adoption is on the person, who claims adoption.

23. If we analyse the evidence on record, in light of the observations of the Hon'ble Supreme Court referred to above, we find that the case of adoption put forth by the respondent should not have been accepted by the Trial Court. The reasons are not far to seek. The case of the 1st defendant in his written statement is that the adoption took place during the month of Avani 1960. Admittedly the 2nd plaintiff was born in the year 1940. Therefore, he was nearly 20 years old on the date of the alleged adoption. After coming into force of Hindu Adoption and Maintenance Act, a child above the age of 15 cannot be adopted, unless such adoption is shown to be according to the custom or usage of community to which the parties belonged to, in view of prohibition contained under Section 10(iv) of the Hindu Adoptions and Maintenance Act 1956. In the case on hand, custom or usage in the community to which the parties belong to has neither been pleaded nor proved.

24. The learned counsel for the respondents is unable to place any material to show that such custom of adopting a child above the age of 15 existed in the community to which the parties belong to. As rightly contended by the learned counsel for the appellant, his father namely 1st defendant had executed four registered settlement deeds in favour of his daughters in 1989. In none of the settlement deeds is there any recital about the adoption. The 2nd plaintiff/appellant has produced his school

leaving certificate and registration copy of the sale deeds dated 11.01.1960, 22.02.1971 and 11.06.1962, 29.01.1986. In the Secondary School leaving certificate, the date of birth of the 2nd plaintiff is given as 01.07.1940 and he has been described as son of the 1st defendant. The sale deeds referred to above have been executed by the plaintiffs and the 1st defendant. In some sale deeds the children of the 2nd plaintiff have also been made parties.

25. In all the above sale deeds in which the 1st defendant is also a party, the 2nd plaintiff is described only as son of 1st defendant and not as the adopted son of the 1st plaintiff. The oral evidence is also conflicting. One of the daughters who has been examined as PW4 has deposed against the adoption. The 5th defendant who has been examined as DW1 would depose that when adoption took place the 2nd defendant was three years old, this evidence is contrary to the pleadings of the 1st defendant. No documentary evidence has been produced to show that the 1st defendant had any son by name Srinivasulu who died after the alleged adoption. The 1st defendant when he was alive had filed written statement. He has not pleaded that he had one more son. Similarly in none of the document executed by the 2nd plaintiff along with the 1st defendant and the 1st defendant separately, there is no reference to other son by name Srinivasalu.

26. I am therefore of the considered view that existence of Srinivasalu has been introduced in the evidence, only with a view to get over the general presumption that only son is not given in adoption. Even with reference to the performance of the rites by the 1st defendant and his wife, the evidence is contradictory and it does not support the case of adoption.

27. For all the above reasons, I am unable to agree with the Trial Court on the finding that adoption has been established. The Trial Court based its conclusion only on the recitals found in the Will said to have been executed by the 8th defendant overlooking the fact that the Will came into being after the suit and the recitals in the said Will cannot be considered for deciding the important issue of adoption.

28. The learned Judge has not adverted the statutory prohibition under Section 10(iv) of the Hindu Adoption and maintenance Act as well as the total lack of evidence with reference to the custom contemplated under the said provision. The defendants/respondents cannot also invite the Court to draw a presumption as to the adoption, since it is sought to be challenged after a long time, in view of the fact that even in the year 1986, the 1st defendant had chosen to describe the plaintiff as his son. The contents of Exhibits A4, A6, A7 and A8, which are letters written by the 1st defendant to the 1st

plaintiff and his neighbour during the year 1989 would dispel the claim of adoption made by the contesting respondents. I find that in the said letters, the 1st defendant Munusamy has described the 2nd plaintiff as his son.

29. In the light of the above, I am constrained to hold that the defendants have miserably failed to prove the theory of adoption. Point No.1 is answered against the defendants.

Point No.2

30. Mr.T.Dhanyakumar, learned counsel appearing for the appellant would contend that the settlement deeds dated 20.06.1989 and 21.06.1989 said to have been executed by the 1st defendant in favour of defendants 3 and 5 are invalid, since 1st defendant had no power to settle the undivided joint family property in favour of his daughters. The learned counsel would further contend that the settlement deeds being documents which are required to be attested ought to have been proved in accordance with law under Section 68 of the Evidence Act. As regards the 1st contention, once adoption is held not proved, the 2nd plaintiff becomes coparcener and the 1st plaintiff had no right to execute the settlement deeds with reference to undivided joint family properties. No doubt true the power of father to execute the settlement deeds in favour of daughters of a reasonable portion of the joint family properties, either at the time or after the marriage has been recognized by the Courts what will be the reasonable portion will depend on the facts of each case.

31. In the case on hand, the total extent of the joint family property is about 19 acres, of which the 1st defendant would be entitled to $\frac{1}{4}$ share i.e. about 4.75 acres. The settlement deeds executed by the 1st defendant in favour of the defendants 3 and 5. (other documents are not taken into account as settlees under the said documents have entered into a compromise with the appellant namely Exs.B5 and B12, deal with an extent of 2 acres and 82 cents i.e. nearly more than $\frac{1}{2}$ of the property. Apart from the above, if the extent of land settled by the 1st defendant under the other two documents namely, Ex.B9 and B14, is also taken into account, the extent settled by the 1st defendant, would in fact exceed his share. Therefore, I am constrained to hold that the settlement deeds executed by the 1st defendant in favour of the defendants 3 and 5 (Respondents 2 and 4) are not valid and binding on the second plaintiff.

Point No.3.

32. The second plaintiff had claimed that his father had executed a Will in his favour on 22.07.1991. The said Will has been marked as Ex.A9. PW3 one Chinnaiah Naidu has been examined as an attester of the said document. Ex.A4 the letter written by the 1st defendant to the 2nd plaintiff on 20.10.1991, belies execution of the Will. Though he has claimed that he has not been allowed to visit the second plaintiff, there is no reference to the Will in the said letter. The 1st defendant had filed a written statement in the suit on 22.08.1991. Whereas the alleged Will is dated 20.07.1991. This by itself creates suspicion regarding execution of the alleged Will by the 1st defendant in favour of the 2nd plaintiff. The evidence of attesting witnesses in cross-examination also creates a suspicion regarding the valid execution of the Will and proper attestation. Therefore, I find that the 2nd plaintiff has not proved the execution of the Will dated 22.07.1991 by the 1st defendant.

Point No.4.

33. It is claimed that 8th defendant namely, Lakshmiammal, mother of the 2nd plaintiff and defendants 2 to 7 had executed a Registered Will in favour of her daughters namely defendants 2 to 7. Recitals in the said document appear to be more intended to save the adoption and the settlement deeds, than to bequeath the share of the testator to the legatees. The 8th defendant is admittedly an illiterate person, who had affixed her thump impression in the said Will. The Will does not contain any recitals to the effect that it was read over and explained to her and she affixed her thumb impression after understanding the contents of the document. As already stated the contents of the Will reveals that the same has been created only to sustain the defence in the suit. The Will also recites that the second plaintiff was given adoption when he was 3 years old on the day of Vijayadhasami. This is contrary to the stand taken by the 1st defendant in his written statement. PW5 who claimed to be the attester of the Will of Lakshmiammal would depose that Munusamy Naidu was residing with his daughter Suguna namely, 5th defendant in the suit, and he was taken to Doctor at Chithoor by his daughter and he died two days thereafter. This evidence is contrary to the contents of the Will. He seems to be more acquainted with the 5th defendant. The Will is written in Tamil. As already stated it does not contain recitals that it was translated to the testator, whose mother tongue is admittedly Telugu. The execution of the Will is therefore shrouded in misery. The evidence in cross-examination of the attesting witness namely DW5, shows that the Will has been created by 5th defendant Suguna with connivance of the witnesses. The learned

Trial Judge has not framed any issue with reference to the Will executed by Lakshmiammal. I do not find any document relating to the said Will and therefore, I find that the Will alleged to have executed by the Lakshmi Ammal dated 28.09.1992 marked as Ex.B6 is not true and valid and has not been proved in accordance with law.

34. As regards the Will said to have been executed by the 1st plaintiff in favour of the 2nd plaintiff dated 03.07.1989, the same has been admitted by the parties and they have also stated that they do not have objection for the 2nd plaintiff taking the share of the 1st plaintiff absolutely as per the said Will. The Trial Court has also come to the conclusion that the Will executed by the 1st plaintiff is true and valid.

35. In the light of the above discussion, the following are the conclusions:

1. The 2nd plaintiff will be entitled to half share of the 1st plaintiff.
2. The 2nd plaintiff will also be entitled to $\frac{1}{4}$ share as the son of the 1st defendant, $\frac{1}{4}$ share of the 1st defendant will again devolve on his wife and his children namely, 2nd plaintiff and defendants 2 to 8.
3. Therefore, the 2nd plaintiff and defendants 2 to 8 would each get $\frac{1}{32}$ shares in the suit properties. On the demise of the 8th defendant, since I have held that the Will dated 28.09.1992 executed by the 8th defendant is invalid, her $\frac{1}{32}$ share will again devolve on her children namely 2nd plaintiff and defendants 2 to 6 and each of them would get $\frac{1}{224}$ share.

36. In fine, the 2nd plaintiff would be entitled to half + $\frac{1}{4}$ + $\frac{1}{32}$ + $\frac{1}{224}$ shares equivalent to $\frac{176}{224}$ share. The defendants 2 to 7 namely, the daughters of 1st defendant would be entitled to $\frac{8}{224}$ share in the suit properties.

37. In the result, the judgement and decree of the Trial Court requires modification and therefore, it is modified as follows:

There shall be a preliminary decree declaring that the 2nd plaintiff is entitled to $\frac{176}{224}$ shares in the suit properties. The suit stands dismissed in so far as the relief of declaration and injunction are concerned.

38. The parties are directed to bear their own costs both in the suit as well as in appeal. The appeal is partly allowed modifying the judgement and decree of the Trial Court as explained above. Consequently the connected M.P.No.1 of 2007 and

M.P.No.2 of 2015 are closed.

39. M.P.No.2 of 2011 and M.P.No.1 of 2015 will stand allowed. There will be no order as to cost in the appeal. consequently it is made clear that the above decision in the appeal shall not affect the compromise entered into between the appellant and the respondents 3,5,6,8 and 9.

List of Exhibits fixed in the High Court:

For Plaintiff:

EXP 65-04/03/1937	Marriage Invitation of the 1 st Plaintiff K. Duraisamy Naidu
EXP 66-01/04/1940	Secondary School Leaving Certificate of 2 nd Plaintiff
EXP 67-11/06/1962	Sale deed bearing document of 3409 of 1962 S.R.O. Gudiyattam
EXP 68-10/03/1968	Marriage Invitation of the 2 nd Plaintiff death ceremony card.
EXP 70-29/01/1986	Sale deed bearing document No 370 of 1986 S.R.O. Gudiyattam
EXP 71-01/01/1960	Sale deed in document No 1413 of 1960, S.R.O. Gudiyattam
EXP 72-22/02/1971	Scheduled in document No 536 of 1971, S.R.O. Gudiyattam

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

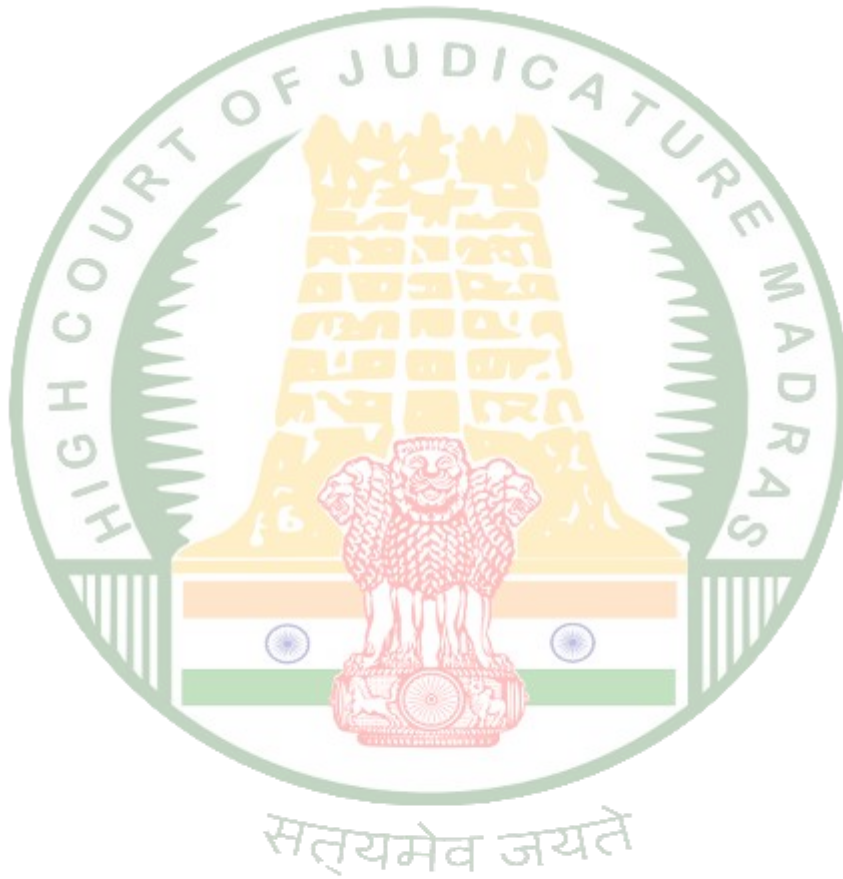
1.The Principal District Judge
Vellore District
Vellore

2. The Section Officer
VR Section
High Court, Madras

+2 Ccs to Mr.T. Dhanya Kumar, Advocate sr 6344,5988

A.S.No.105 of 2007

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