

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.08.2017

Pronounced on : 07-12-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA

Appeal Suit No. 41 of 2013

--

1. Sandana Rene Lucien Joseph
2. Sandana John Britto
3. Felix Raj
4. V.S. Rekha

.. Appellants

Versus

1. Sandana Vincent Maria Anthony
2. Charles Sandana
3. Sandana Joseph Dominique
4. Sandana Gilbert Francisque Angelo
5. Dass Margaret Antoinette

.. Respondents

Appeal filed under Section 96 of Code of Civil Procedure against the Judgment and Decree dated 24.04.2012 passed in O.S. No. 118 of 2008 on the file of the II Additional District Judge, Puducherry.

For Appellants : Mr. T.P. Manoharan, Senior Advocate
for Mr. K.P. Jotheeswaran

For Respondents : Mr. G. Mohan Keerthi Kumar

JUDGMENT

R. SUBBIAH, J

The first respondent herein namely Mr. Sandana Vincent Maria Antony is the plaintiff in O.S. No. 118 of 2008 on the file of II Additional District Judge, Puducherry. He has filed the said suit as against the defendants 1 to 8 therein for

the following relief (s):-

(i) To pass a Judgment and decree declaring the sale deed dated 29.08.2007 executed by the third defendant in favour of the 8th defendant as null and void and to direct the 8th defendant to deliver vacant possession of the suit property to the third defendant as a consequential relief

(ii) To pass an order of permanent injunction restraining the defendant No.8 from alienating the suit property in any manner to any other person

(iii) To direct the third defendant to offer the suit property for sale to the plaintiff for the plaintiff to exercise his pre-emptive right over the suit property

(iv) To order costs to be paid by the defendants to the plaintiff.

2. The trial court, after conclusion of trial and on appreciation of the oral and documentary evidence, has passed a Judgment and decree dated 24.04.2012 holding that (i) the plaintiff/first respondent herein is entitled to exercise his pre-emptive right over the suit property (ii) that the sale deed dated 29.08.2007 is legally not enforceable and is void (iii) that the eighth defendant be and is hereby directed to handover the vacant possession of the suit property to the third defendant, who in turn has to offer the suit property for sale to the plaintiff (iv) that the sale has to be concluded within three months from the date of offer by the plaintiff (v) that the defendants do pay to the plaintiff costs of the suit. It is as against the aforesaid Judgment and Decree dated 24.04.2012 passed by the trial Court in O.S. No. 118 of 2008, the present appeal is filed by the defendants 1, 3, 7 and 8 in the suit.

3. The first respondent in this appeal, as plaintiff, has instituted the suit as against the defendants 1 to 8. The first appellant in this appeal was arrayed as first defendant in the suit and he is the father of plaintiff and defendants 2, 3, 4, 5 and 6. The second appellant in this appeal was the third defendant in the suit.

The third appellant in this appeal was arrayed as seventh defendant in the suit and power of attorney of defendants 1 to 6 in the suit. The fourth appellant in this appeal was arrayed as eighth defendant in the suit and who is the subsequent purchaser of the suit property. The respondents 2 to 5 in this appeal were arrayed as defendants 2, 4, 5 and 6 in the suit. Thus, for the sake of convenience, the parties shall be referred to as per the litigative status in the suit as Plaintiff and defendants.

4.(i) The case of the Plaintiff, as could be unfolded from the plaint averments is that the first defendant is the father of the plaintiff, the defendants 2, 3, 4 and 5 are his brothers and the sixth defendant is his sister. The seventh defendant in the suit is the power agent of the defendants 1 to 6. The eighth defendant is the subsequent purchaser, who purchased the suit property by way of a registered sale deed dated 29.08.2007.

(ii) According to the plaintiff/first respondent herein, he and the defendants 1 to 6 are French Nationals and as per Article 3 of the French Code Civil, they are governed by French Law.

(iii) It is contended by the Plaintiff that the marriage between the first defendant and Mrs. Maria Francisca was solemnised on 29.01.1969 under the regime of legal community as prescribed under the French Code Civil. After such marriage, the first defendant purchased the suit property, a vacant plot bearing Plot No.31 from Rev. Father Peyrouetet by a sale deed dated 17.09.1969 registered as document No. 1711 of 1969. Thereafter, the first defendant had constructed a storeyed house bearing New No.28, Ambedkar Salai, Colas Nagar, Puducherry.

Due to the marriage between the first defendant and Mrs. Maria Francisca, six

children were born. The first defendant, his wife and children resided together in the storeyed house constructed by the first defendant as a joint family. On 04.05.1988, the wife of the first defendant – Maria Francisca died and after her death, the first defendant and his six children namely plaintiff and defendants 2 to 6 have entered into a registered partition deed dated 28.12.1990. The recitals in the partition deed dated 28.12.1990 would prove that the first defendant had given half share in the suit property to his wife on the principle of the regime common legal family. As the wife died intestate, the succession had opened in respect of her half share in the suit property. In fact, the first defendant, after mutual discussion, had given up, waived and released all his right and interest of his half share in the suit property to his six children, therefore, the plaintiff and defendants 2 to 6 had acquired the entire half share of their mother equally i.e., 1/6 undivided share and the share given up by the first defendant/father in the other half share of the suit property to each of his children in the region of 1/6 share. Therefore, the plaintiff and defendants 2 to 6 have become entitled to 1/6 share in the entire suit property. Accordingly, a registered partition deed dated 28.12.1990 came to be executed among the plaintiff and defendants 1 to 6.

(iv) According to the plaintiff, as early as in the year 1987 itself, on the request made by his brother, the second defendant, he agreed to sell his entire 1/6th undivided half share in the suit property and received Rs.25,000/- for such sale on 08.08.1987 and executed a registered power of attorney deed dated 12.08.1987 authorising his elder brother namely the fifth defendant to sell his 1/6th undivided share in the suit property to the second defendant. Subsequently, after the death of the mother on 04.05.1988 and after execution of the partition deed dated 28.12.1990, under Ex.A3, sale deed dated 03.01.1991, the plaintiff, through

his power of attorney agent viz., fifth defendant had sold his entire 1/6th undivided share in the suit property to the second defendant for a valuable sale consideration. Thus, on and from 03.01.1991, the defendants 2 to 6 are the owner of the undivided share in the suit property. While so, the third defendant requested the other defendants namely defendants 2, 4, 5 and 6 to transfer their undivided share in the suit property and they also accordingly executed settlement deeds in favour of the third defendant for consideration, which are dealt with in para Nos. 9 to 12 of the plaint. By virtue of such documents the nature of the suit property and the character of the suit property was converted as an absolute property of the third defendant. Further, on and from 17.07.1992, being the last date of execution of the settlement/release deeds, the third defendant become the absolute owner of the suit property. While facts are so as stated above, by a sale deed dated 29.08.2007, the third defendant sold the suit property to the 8th defendant for a valuable sale consideration and also handed over the possession of the suit property to her and thereby the 8th defendant became the absolute owner of the suit property. On such purchase, the 8th defendant demolished the then existing super structure and put up a building thereon. While so, the plaintiff sent an e-mail dated 22.08.2007, just prior to the sale of the suit property in favour of the eighth defendant and made a claim that he is interested in purchasing the suit property from the third defendant. The Plaintiff also issued a notice dated 29.12.2007 questioning the transfer of the suit property in favour of the third defendant by the defendants 2 to 6 and called upon the third defendant not to alienate the suit property to any one. However, without considering such pre-emptive right of the plaintiff, the suit property was sold to the eighth defendant. It was further contended that as per Article 815 Section 14 of the French Law, when a co-sharer

sells the joint family property to third parties, he has to offer the sale of the same to each of the co-sharers and only on refusal of the co-sharers to purchase the property, the sale can be effected in favour of third parties. In this case, the plaintiff has made an offer to buy the suit property to which Ms. Sheela, wife of the third defendant, has replied in the month of August 2007 that they had no intention of selling the suit property and that they want to retain it and to reside there after retirement. In spite of such statement, the suit property was sold to the eighth defendant without considering the pre-emptive right of the plaintiff and therefore, the sale deed dated 29.08.2007 in favour of the eighth defendant is hit by the principles of pre-emptive right in favour of the plaintiff, hence, the plaintiff has filed the suit.

5.(i) Resisting the plaintiff's averments, the first defendant/father filed his written statement contending *inter alia* that French Law is not applicable to the plaintiff and defendants 2 to 6 herein. As per the Private International Law, the law which is in force, where the property is situated, alone can be made applicable to the parties to the transaction and therefore, in the present case, Indian Succession Act alone will be applicable. The concept of joint family is unknown to Christian Law much less to French citizens. Further, for declaratory relief prayed for in the suit, court fee is payable as per Section 30 and 40 of The Pondicherry Court Fees and Suit Valuation Act, however the plaint was valued only as per Section 25 (d) and 27 (c) of Schedule I of the said Act and therefore, the plaint is liable to be rejected.

(ii) It is further stated by the first defendant that right of pre-emption is unknown among Christians much less French Citizens. The suit property having been sold in favour of the eighth defendant, the plaintiff cannot make a claim for

alleged right of pre-emption against the eighth defendant. Even otherwise, the plaintiff never informed the defendants 1 to 6 about his desire to purchase the shares of the other co-sharers in the suit property at any point of time. The eighth defendant purchased the suit property for a valuable sale consideration by means of a registered sale deed dated 29.08.2007 and the right of the third defendant to effect such sale is also not disputed by the plaintiff. Therefore, the plaintiff, who had earlier relinquished his share in the suit property by a document dated 03.01.1991, is estopped from making a claim for pre-emptive right over the suit property and the New French Code Civil has no application to the transaction in question especially for making a claim for pre-emptive right. Above all, the plaintiff is an estranged son of the first defendant and he had neither taken care of the parents nor did he attend the funeral of his mother inspite of due intimation to him. The claim of pre-emptive right was made by the plaintiff only to cause unnecessary problems to the defendants.

(iii) It is further stated that the plaintiff had executed a power of attorney deed dated 12.08.1987 in favour of the fifth defendant authorising him to sell his share in the suit property in favour of the second defendant and also received a sum of Rs.25,000/- before executing such document on 08.08.1987. Even the plaintiff has admitted he has received the amount after executing such a document, while so, it is futile on the part of the plaintiff to contend that he was not called upon to express his pre-emptive right before selling the suit property in favour of the eighth defendant. The plaintiff is intimidating the defendants to extort money from them. The defendants 2 to 5 are presently living in France and the sixth defendant is residing in America and they are not in a position to file independent written statements. The first defendant, being the father of the plaintiff and defendants 2

to 6 has personal knowledge about the transactions related to which the plaintiff has filed the suit. The suit has been filed by the plaintiff with an ulterior motive and it is not borne out of any bonafides. Therefore, the first defendant prayed for dismissal of the suit as devoid of merits.

6. The eighth defendant, who is the subsequent purchaser of the suit property, has filed her written statement contending that she is the absolute owner of the suit property having purchased the same for a valuable sale consideration by way of a registered sale deed dated 29.08.2007 executed by the third defendant. According to the eighth defendant, the right of pre-emption is unknown to Christians much less the French Citizens. The eighth defendant, being the absolute owner of the suit property, cannot be restrained from alienating the suit property in favour of any one as she may wish. The eighth defendant is a bonafide purchaser of the suit property without notice of any of the allegations contained in the plaint. Before purchasing the suit property, the eighth defendant had scrutinised all the title deeds pertaining to the suit property including the release deeds executed by the plaintiff, 2nd, 4th, 5th and 6th defendants on various dates in favour of the third defendant and after being satisfied with the title and saleable right on the part of the third defendant, she proceeded to purchase the suit property. Having been satisfied that there is no defect in the title to the suit property, the eighth defendant proceeded to purchase the suit property. From the date of purchase, the eighth defendant is in possession of the suit property. After purchase, she has demolished a major portion of the suit property, obtained planning permission and put up a new building construction in the suit property. The claim of the plaintiff that he is entitled to purchase the share of other sharers by way of pre-emption is misconceived. The

plaintiff never made any offer to purchase the suit property. The claim of the plaintiff that he is entitled to right of pre-emption is false and frivolous and such a claim was made only to extort money from the eighth defendant taking note of the escalation in the cost of the land and building in the locality. The eighth defendant therefore prayed for dismissal of the suit with costs.

7. On the basis of the above pleadings, the trial Court has framed as many as six issues for determination. During the course of trial, on behalf of the plaintiff, his power of attorney agent Mr. Nachimuthu Shanmugam was examined as PW1 and Exs. A1 to A36 were marked. On behalf of the defendants, Mr. Saravanan, husband of the eighth defendant, examined himself as DW1 but no document was marked. The trial Court, on appreciation of the oral and documentary evidence, has concluded that since the French Establishment (Administration) Order 1954 is still in force, the French Law is applicable to the parties to the suit inasmuch as they are all French Nationals. Therefore, it was held that the suit is maintainable under French Law. The trial Court further concluded that the third defendant has no saleable right of the suit property to the eighth defendant inasmuch as he is entitled only for 7/8 share in the suit property and the remaining 1/8 share of the suit property vests with the plaintiff and in such view of the matter, the trial court held that the plaintiff has proved that he has got 1/8 share in the suit property. By referring to Article 815-14 of the French Code Civil, the trial Court concluded that the sale made by the third defendant in favour of the eighth defendant is not valid and therefore, directed the eighth defendant to handover the possession of the suit property to the third defendant, who, in turn, has to offer the suit property for sale to the plaintiff. Out of the sale proceeds, the third respondent

has to pay back the sale consideration paid by the eighth defendant. In effect, the trial court decreed the suit with costs holding that the plaintiff is entitled to exercise his pre-emptive right over the suit property and that the sale made in favour of the eighth defendant is void.

8. The learned counsel appearing for the defendants 1, 3, 7 and 8/appellants would contend that the marriage between the first defendant with Maria Francisca was solemnised on 22.01.1969 and after the marriage, the first defendant purchased the suit property on 16.09.1969. Due to the wedlock, six children were born and they are the plaintiff and defendants 2 to 6. On 12.08.1987, the plaintiff relinquished his 1/6th right in the entire suit property in favour of second defendant and thereby authorised the fifth defendant to sell the entire 1/6th undivided share to the second defendant and received a sum of Rs.25,000/-. On 04.03.1988, the wife of the first defendant died intestate. Thereafter, with the consent of all his children, the plaintiff and defendants 2 to 6 have entered into a registered partition deed dated 28.12.1990 and as per the recitals contained therein and as per the principles of regime in the common legal family, half of the share in the suit property that belonged to his wife devolved on the plaintiff and defendants 2 to 6 equally. However, the first defendant had given up, waived and released all his rights, interest in his entire half share and thereby the plaintiff and defendants became entitled to undivided 1/6 share in the entire suit property. The partition deed was not questioned by any one, including the plaintiff, in a manner known to law and it had attained finality. Further, pursuant to the power of attorney deed dated 12.08.1987, the plaintiff also executed a sale deed dated 03.01.1991, selling his 1/6th share in the entire suit property to the second defendant through his power

agent, fifth defendant. The plaintiff also did not dispute these facts. The grievance of the plaintiff is that before resorting to sell the suit property in favour of the eighth defendant, he ought to have been put on notice especially when he was desirous of purchasing the suit property in exercise of his preemptive rights. Such a claim made by the plaintiff is untenable. The plaintiff has made the claim for right of pre-emption after 20 years of receipt of the sum of Rs.25,000/- on 08.08.1987 and after execution of the sale deed dated 03.01.1991, Ex.A3 in favour of the second defendant through his power of attorney agent, the fifth defendant. Further, such a claim was made after 17 years of execution of the registered partition deed dated 28.12.1990. According to the learned counsel for the defendants 1, 3, 7 and 8/appellants, the sale made in favour of the eighth defendant is valid and proper and on such purchase, the eighth defendant had also demolished the existing super structure and put up a new building thereon. The plaintiff, knowing fully well about the sale in favour of the eighth defendant, has filed the present suit to intimidate the defendants to gain unlawfully.

9. It is contended by the learned counsel for the defendants 1, 3, 7 and 8/appellants that the plaintiff and defendants 2 to 6 are Christians. All the rights, including succession in the suit property are governed only by the Laws of India, including the Indian Succession Act, 1925. Therefore, the claim of the plaintiff that the plaintiff and defendants 1 to 6 are French Nationals and therefore French Law alone would apply is legally not sustainable. The dispute in the present case is with respect to the pre-emptive right over the suit property, which is situated within the territorial jurisdiction of Union Territory of Pondicherry and therefore, in a dispute of this nature, French Law will have no application. Even though the plaintiff has

pleaded in the plaint that French Law would apply and referred to various Articles of the French Code Civil, he did not examine himself as a witness to prove that the defendants 1 to 6 are French Nationals, but only his power of attorney agent was examined as PW1 who has no knowledge about the suit transactions. In this context, the learned counsel for the defendants 1, 3, 7 and 8/appellants relied on Section 114 (g) of The Indian Evidence Act to contend that when the plaintiff did not step into the witness box and affirm his own pleading on oath and offer himself to be cross-examined, a presumption can be raised that the case pleaded by him is not sustainable. For this purpose, the learned counsel for the defendants 1, 3, 7 and 8/appellants also relied on the decisions of the Honourable Supreme Court in the case of (i) (**Vidhyadhar vs. Mankikrao**) reported in **AIR 1999 SC 144 (1)** (ii) (**Man Kaur vs. Hartar Singh Sangha**) reported in **(2010) 10 Supreme Court Cases 512** and (iii) (**Eraga Lakshmamma vs. Vennopuse Chinna Malla Reddy**) to contend that where a party to the suit does not appear in the witness box and states his own case on oath or he did not subject himself to cross-examination by the other side, the presumption is that the case pleaded by him is not correct. By placing reliance on the above decisions, the learned counsel for the defendants 1, 3, 7 and 8/appellants would contend that the non-examination of the plaintiff on oath with respect to material issue arising in the case and not subjecting him for being cross-examined is fatal to the case set up by the plaintiff. The plaintiff has examined a stranger who hails from Karur as the only witness examined on his side and the said witness has no personal knowledge about the transactions that took place among the plaintiff and the defendants 2 to 6 from the year 1987 to 1992. Even in his evidence, PW1 has admitted that he was not personally aware of the events that had taken place between the plaintiff and his family members. He has

also further admitted that he was not personally aware of the documents marked by the plaintiff and he can only read the said documents. Therefore, according to the learned counsel for the defendants 1, 3, 7 and 8/appellants, such evidence of PW1 will not in any manner lend support to the plaintiff to prove the case pleaded by him in the plaint.

10. Above all, it is contended by the learned counsel for the defendants 1, 3, 7 and 8/appellants that the eighth defendant, who is the subsequent purchaser, is an Indian National and she had purchased the suit property under a sale deed dated 29.08.2007 from the third defendant. Admittedly, by virtue of such sale, the eighth defendant became the owner of the suit property and therefore also, French Civil Law has no application to this case and only the laws of the land where the suit property is situate alone will apply to the present case. The learned counsel for the defendants 1, 3, 7 and 8/appellants would further contend that Article 815-14 of the French Code Civil will not apply to the present case.

11. The learned counsel for the defendants 1, 3, 7 and 8/appellants would further contend that the plaintiff has only sought to declare the sale deed dated 29.08.2007 as null and void. However, the plaintiff did not seek for declaring the documents namely Exs. A4 to A8 such as (i) Registered Settlement/Gift Deed dated 10.05.1991 (ii) Registered release deed dated 17.05.1991 (iii) Registered Release deed dated 13.12.1991 (iv) Registered Release Deed dated 05.06.1992 and (v) Registered Release Deed dated 17.07.1992. In view of the provisions contained in the Limitation Act, the plaintiff cannot seek for the relief of declaration of those documents and therefore, getting a declaratory relief only in so far as it

relates to the sale deed dated 29.08.2007 will not entitle the plaintiff to get the right of pre-emption to purchase the suit property when Exs. A1 to A8 has become final. In support of this contention, the learned counsel for the plaintiff relied on the decision rendered by the Honourable Supreme Court in the case of (**Ramti Devi vs. Union of India**) reported in **1995 1 Supreme Court Cases 198** wherein it was held that to cancel or set aside an instrument or decree or for the rescission of a contract, the limitation is three years and it begins to run when the plaintiff is entitled to have the instrument or the decree cancelled or set aside or the contract rescinded first become known to him. By placing reliance on the above decision, the counsel for the plaintiff would contend that the power of attorney deed dated 12.08.1987 executed by the plaintiff, the registered partition deed dated 28.12.1990 under Ex.A2, the registered sale deed dated 03.01.1991 executed by the plaintiff under Ex.A3 and the settlement deed dated 10.05.1991 executed by the first defendant in favour of the third defendant and Exs. A4 to A8 were not subjected to challenge by the plaintiff in the plaint and in the absence of the same, the plaintiff cannot seek to challenge only the sale deed dated 29.08.2007 executed by the third defendant in favour of the eighth defendant on the ground that he is having a right of pre-emption. The plaintiff had lost and had no right to claim pre-emptive right. The trial Court, without considering the aforesaid facts, has erroneously decreed the suit with costs. Therefore, the learned counsel for the defendants 1, 3, 7 and 8/appellants prayed for setting aside the decree and judgment passed by the trial Court.

12. Per contra, the learned counsel for the first respondent/plaintiff would

contend that the law of inheritance is a personal law and not property law. The first

defendant was a renoncant who later opted for French nationality and consequently the six children born to the first defendant automatically became French Nationals. The French Establishments (Administration) Order 1954 is a bilateral International Treaty entered between the French Government and Indian government. This order prescribes that All Laws in force in French Establishment, shall continue to be in force until repealed or amended by competent authority. The Indian Succession Act has declared that the provisions of this Act shall not apply to renoncants of the Union Territory of Pondicherry based on the Gazzette Notification published in the month of September 1980. The trial Court, on appreciation of these facts, has rightly held that French Law is applicable to the facts of the case.

13. As regards the contention that only the sale deed dated 29.08.2007 executed in favour of the eighth defendant alone was sought to be declared as null and void and the documents covered under Exs. A1 to A8 were not challenged in the plaint, the learned counsel for the first respondent/plaintiff would contend that the said documents were executed in violation of the French Law and therefore, the first respondent/plaintiff need not challenge the same. Further, the power of attorney deed dated 12.08.1987 was executed by the plaintiff on receipt of Rs.25,000/- only with an intention of giving donation on the anticipated partition to be made by the first defendant . The said document was executed by the first respondent/plaintiff only on condition that the first defendant/father and mother should have life estate over the entire suit property. Even this document, Ex.A1 is void since the first respondent/plaintiff was forced to sign it against the provisions of the French Code Civil. In any event, as per the provisions of French Code Civil, the first respondent/plaintiff cannot renounce his share on the succession that has not

opened. Further, Ex.A1 was executed by the first respondent/plaintiff prior to the death of the mother and it is on the death of the mother on 04.03.1988 the succession opened and therefore also, the power of attorney deed dated 12.08.1987, executed by the first respondent/plaintiff is unenforceable. In any event, one cannot renounce the share of the property to be secured by succession even before opening of the succession by inheritance. Even at the time of executing the partition deed dated 28.12.1990, under Ex.A2, the first defendant/father himself has applied French Law for effecting partition of the properties, therefore, the parties are governed only by French Law and it was rightly considered by the trial Court to decree the suit in favour of the first respondent/plaintiff.

14. As regards the pre-emptive right made by the first respondent/plaintiff, the learned counsel would submit that even though the defendants raised a defence that French Law is not applicable, Indian Succession alone has to be applied to the present case and the concept of pre-emptive right is unknown to Christians residing in Puducherry or to the French Law, they did not file any document to prove such defence. When it is the defence that the French Law is not applicable to the case, the burden is on the defendants to prove it to the satisfaction of the Court by producing acceptable evidence. However, in the present case, no document was filed by the defendants, except a mere denial of the plaint averments by filing a written statement. The eighth defendant, before purchasing the suit property, ought to have sought the opinion of a legal practitioner who is acquainted with French Law inasmuch as she has purchased the suit property from French Nationals. Furthermore, just prior to the sale made in favour

of the eighth defendant, the plaintiff had sent e-mail dated 22.08.2007, Ex.A-32 and A-33 to the third defendant and expressed his intention to purchase the suit property and also requested him not to alienate the suit property. In spite of receipt of communication from the plaintiff, the third defendant proceeded to sell the suit property to the eighth defendant and thereby deprived the pre-emptive right of the plaintiff to purchase the suit property.

15. In so far as the plea with regard to non-examination of the plaintiff before the trial Court, the learned counsel would contend that the power agent of the plaintiff was given permission for being examined by the trial court as PW1. The defendants did not raise any objection for examining the power agent of the plaintiff or insisted on the personal appearance of the first respondent/plaintiff. The entire plaint averments made in the plaint is duly supported by documentary evidence, based on which the plaintiff has proved his case and not on the strength of the examination of PW1 as a witness. When the defendants raised a plea that the plaintiff did not examine himself as a witness, the eighth defendant, who is the subsequent purchaser also did not examine herself and only her husband gave evidence on her behalf. In such circumstances, the learned counsel for the first respondent/plaintiff prayed for dismissal of the appeal.

16. We have heard the learned counsel appearing for the defendants 1, 3, 7 and 8/appellants as well as the learned counsel for the first respondent/plaintiff and perused the materials placed on record. On appreciation of the rival contentions made in this appeal, the following points emerges for consideration and they are

1. Whether the French Code Civil is applicable to the present case?
2. Whether the decree granted by the trial Court by applying French Code Civil is legally sustainable?
3. Whether the plaintiff is having a pre-emptive right to purchase the suit property?
4. Whether the suit, as filed by the plaintiff, is maintainable without challenging Exs. A1 to A8, as pleaded by the defendants? and
5. Whether PW1, power of attorney agent of the plaintiff, is competent to depose on behalf of the plaintiff in this case.

Point Nos.1 and 2

17. It is the case of the first respondent/plaintiff that the plaintiff and defendants 1 and 6 are French Nationals as per Article 3 of the French Code Civil and therefore French Law will apply to the present case. It is his further submission that the first defendant married Maria Francisca on 22.01.1969 and after the marriage, he purchased the suit property on 16.09.1969. Therefore, as per French Code Civil, the wife is also entitled to half share in the suit property, even though the property was purchased by the first defendant prior to his marriage. Admittedly, due to the wedlock between the first defendant and Mrs. Maria Francisca, six children were born and they are the plaintiff and defendants 2 to 6. On the death of the Mrs. Maria Francisca, Mother, her share in the suit property devolved on her husband/first defendant and her six children namely plaintiff and defendants 2 to 6. The first defendant has admittedly given up his share in the suit property and also agreed for effecting partition of the suit property among the children namely plaintiff and defendants 2 to 6. It is also an admitted fact that the plaintiff himself has executed a registered power of attorney deed dated 12.08.1987, authorising the fifth defendant to sell his 1/6th undivided share in the suit property and also received a sum of Rs.25,000/- from the second defendant through his father/first defendant. The first defendant/father also, after mutual discussion, had given up, released and waived his right and interest of his half share in the suit property in favour of his six children and accordingly, at the instance of the first defendant/father, a partition

deed was executed on 28.12.1990 by which the plaintiff and defendants 2 to 6 became entitled to 1/6 share in the entire suit property. It is contended by the plaintiff that the recitals in the partition deed are silent with respect to the share of the plaintiff and defendants 2 to 6. Notwithstanding the covenants contained in the partition deed dated 28.12.1990, even prior to the said partition deed dated 28.12.1990, by virtue of the registered power of attorney deed dated 12.08.1987 executed by the plaintiff, the power agent, fifth defendant, sold the 1/6th share of the plaintiff in favour of the second defendant in and by the sale deed dated 03.01.1991 (Ex.A-3). The 1/6th share of the plaintiff includes undivided share in the entire suit property which he had acquired on the death of his mother and upon the release of the share of his father/first defendant in the suit property in favour of his children. Similarly, the second defendant executed a Gift/Settlement deed dated 10.05.1991 (Ex.A-4) and release deed dated 05.06.1992 (Ex.A-7) releasing his 2/6th share (i.e., 1/6th undivided share acquired by him from his father and mother and 1/6th undivided share purchased by him from the plaintiff) in the suit property to the third defendant. The fourth defendant also executed similar release deed on 17.05.1991, Ex.A5 releasing his 1/6th share to the third defendant. Likewise, the fifth defendant also executed a release deed dated 13.12.1991, Ex.A6 releasing his 1/6th undivided share in the suit property to the third defendant. Thereafter, the sixth defendant relinquished his share in the suit property by executing a registered release deed dated 17.07.1992, Ex.A8 in favour of the third defendant. It is the specific contention of the plaintiff that though all the co-sharers have executed release deed releasing their undivided share in the suit property, as per French Civil Code, barring the release deeds, the plaintiff and other co-sharers are entitled to 1/6th share in the suit property and the release deed executed by them will not have

any force of law. Thus, it is the submission of the counsel for the first respondent/ plaintiff that he and defendants 2 to 6 being French Nationals, so far as Succession and Marriage laws are concerned, French Law alone will be applicable to them.

18. Per contra, it is the submission of the defendants 1, 3, 7 and 8/appellants that French Civil Code cannot be pressed into service in the present case at all. The suit property is situate within the territorial jurisdiction of Union Territory of Pondicherry and therefore, the law governing the land where the suit property is situate alone will be applicable. Further, the eighth defendant is an Indian National who has subsequently purchased the suit property and therefore also, French Civil Code has no application to this case. In order to buttress this submission, reliance was placed by the learned counsel for the defendants 1, 3, 7 and 8/appellants to the book titled "Law of Succession" authored by N.D. Basu which dealt with the Law of succession with regard to rights over immovable properties and in para No.73, it was stated as follows:-

"All rights over immovable property are governed by the law of the country where the property is situate. This principle being unilaterally recognised."

19. Further, the learned counsel appearing for the defendants 1, 3, 7 and 8/appellants also placed reliance on the decision of the Division Bench of the Kerala High Court in the case of (**Sankaran Govindan vs. Lakshmi Bharathi and others**) reported in **AIR 1964 Kerala 244** wherein it was held in para No.34 and 35 as follows:-

"34. This position will be clear if reference is made to the case in *Re. Berchtold* 1923-1 Ch 192. In that case a domiciled Hungarian died intestate having been entitled to an interest in English freehold subject to a trust for sale but not yet sold. On the

basis of the English doctrine of conversion it was argued by his next of kin by Hungarian law that they were entitled to the interest. The English court rejected this plea and held that the interest left by the deceased was an immovable and therefore the next of Kin by English law were entitled to it. *Russel, J* observed in that case that what the doctrine of conversion said was that real estate had to be treated as personal estate or personal estate as real estate; and not that immovables were turned into movables or movables into immovables. According to English law, the interest left by the deceased in this case, for the purpose of Conflict of Laws, was an interest in an immovable and since the land, though held on trust for sale, was not sold at the time of the death, it was immovable for the purpose of Conflict of Laws and the English law applied to the cost.

35. According to us, the principle that should apply to the house left by Dr. Krishnan in England in the present case is the same. On the finding that Dr. Krishnan had lost his domicile of origin, his immovable properties in India and all his movables, whether in India or England, should be divided according to the law of succession in India. And succession to the house in England being immovable property according to the law of the situs as applied to Conflict of Laws, should be decided under the English law of Succession. The subsequent conversion of that immovable property into money does not also alter this position. Hence, we are of the opinion that the lower Court was in error in treating the sale proceeds of the house as movable property and applying the law of succession applicable in Ezhavas in Trivancore.”

20. It is submitted by the learned counsel for the defendants 1, 3, 7 and 8/appellants that the said decision rendered by the Kerala High Court was confirmed by the Honourable Supreme Court in the case of **(Sankaran Govindan vs. Lakshmi Bharathi and others)** reported in **(1975) 3 Supreme Court Cases 351** wherein in para-13, it was held as follows:-

“13. There is dispute between the parties that the sale proceeds of the immovable property, namely, the house in Sheffield, should be distributed among the next of kin of Krishnan on succession to them should be governed by the English Law, whether or not Krishnan had acquired domicile in England. Therefore, the only question for consideration in this appeal is as regards the law which governs the succession to movable properties and the moneys left by Krishnan. If Krishnan had acquired a domicile of choice in England, there can be no doubt that English law would govern the succession to them.

49. We think that the High Court was right in its conclusion that the sale proceeds of the house in Sheffield has to be distributed according to the English Law. To this extent we uphold the judgment of the High Court but set aside in other respects.”

21. Before examining the rival contention, it would be appropriate to mention that the plaintiff and defendants 2 to 6 are Christians. Therefore, it would be appropriate to look into Section 1 (2) of the Indian Succession Act, 1925. Section 1 (2) of the Indian Succession Act states that the said Act shall come into force in the Union Territory of Pondicherry on such date as the administrator of the Union Territory may, by notification in the official gazette, appoints. As per the said provision, by notification bearing G.O. Ms. No.26/82, LLD dated 29.03.1982, which was also published in the Gazette of Puducherry No.34 dated 01.04.1982, the Lt. Governor of the U.T. of Pondicherry has appointed “01.04.1982” as the date on which the Act 1925 shall come into force in the whole of the Union Territory of Pondicherry. Further, Section 5 of the Indian Succession Act, provides as under:-

“5. Law regulating succession to deceased person's immovable and movable property respectively:- (1) Succession to the immovable property in India of a person deceased shall be regulated by the law of India, wherever such person may have had his domicile at the time of his death.

(2) Succession to the immovable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.”

22. Thus, as per Section 5 of the Indian Succession Act, all the immovable properties within the territory of India shall be regulated by the law of India irrespective of the domicile of the person who own such immovable property, whether he or she is alive or dead. In this case, admittedly, the immovable property purchased by the first defendant is situate within the Union Territory of Pondicherry.

Even though the plaintiff and defendants 2 to 6 are French Nationals, in transactions relating to immovable property such as sale, mortgage or Will, they are governed by the local laws prevailing in the place where such property is situate. This position is very clear from the decision rendered by the Honourable Supreme Court in the decision cited supra in *Sankaran Govindan case*. Further, in the decision of the Division Bench of this Court rendered in **(M. Kadirvelu and others vs. G. Santhanalakshmi and others)** reported in **2016 3 Law Weekly 385** it was held that as per Section 3 read with First Schedule to the Pondicherry (Laws) Regulation, 1963, the provisions of the Hindu Succession Act, 1956 were extended to the inhabitants of the Union Territory of Pondicherry, subject to one restriction namely in so far as renouncants are concerned, the Hindu Succession Act would not have any application. In the present case, admittedly, there is no evidence to show that the father/first defendant is a renouncant so as to disentitle him to come within the purview of the Indian Succession Act. Even if it is the case of the plaintiff that the plaintiff and defendants 1 to 6 are renouncants and they have renounced their personal laws and got assimilated into the French System, it must be specifically pleaded and proved. In the present case, there was no pleading made by the plaintiff in the plaint to that effect. Further, we are also fortified by the decision rendered by the Division Bench of this Court in A.S. No. 589 of 2010 dated 06.09.2017 in the case of *(Mathaiyan vs. Poongothai and others)* wherein it was held in para No.25 as follows:-

“27.Therefore, we are of the view that those Hindus, who are domiciled at Pondicherry will be governed by [Hindu Succession Act](#) after 01.10.1963, unless they accrue any right under the Customary Hindu law before 01.10.1963. In so far as French Nationals, who are renoscants, the [Hindu Succession Act](#) will not apply. So far as all others are concerned, only [Hindu Succession Act](#) will apply. In the instant case, the plaintiff neither got any accrued

right under the Customary Law before 01.10.1963 nor claimed any right as renoscant and hence [Hindu Succession Act](#) alone will apply to the plaintiff in this case. The parties to the appeal are governed only by [Hindu Succession Act](#) and customary Hindu Law will have no application to their case.”

23. Furthermore, we wish to observe that in the present case, the suit property was sold in favour of the eighth defendant by means of a registered sale deed on 29.08.2007, Ex.A9. Admittedly, the eighth defendant is the owner of the suit property and she is an Indian residing in Union Territory of Pondicherry. As on the date of filing the suit namely 18.06.2008, the eighth defendant was the absolute owner of the suit property. The eighth defendant is not governed by French Civil Code. Therefore, even for consideration of the prayer sought for by the plaintiff seeking a preemptive right, when the suit property vests with the eighth defendant, at the time of instituting the suit, the French Civil Code will not have any application and therefore, the trial Court was in error in holding that the parties are governed by French Civil Code. We therefore answer this issue accordingly.

Point No.3

24. The plaintiff, for claiming preemptive right over the suit property, placed strong reliance was placed on Article 814-15 of the French Code. Article 815-14 of the French Code is extracted below for ready reference:-

“An undivided owner who intends to transfer, for value, to a person outside the undivided ownership, all or part of his rights in the undivided property or in one or several articles of that property shall give notice by extra-judicial act to the other undivided owners of the price and terms of the planned transfer as well as of the name, domicile occupation of the person who intends to acquire it.

Any undivided owner may, within the period of one month following their notice, make known to the transferor, by extra-judicial act, that he exercises a right of pre-emption at the price and terms of when he was notified.

In case of pre-emption, the person who is exercising it shall have an instrument of sale drafted within a period of two months, counting from the date of sending his reply to the seller. After that period, his declaration of pre-emption is void by operation of law, fifteen days after a notice of default remained ineffective, and without prejudice to damages which may be claimed of him by the seller.

Where several undivided owners exercise their rights of pre-emption, unless otherwise agreed, they are deemed to acquire together the portion put up for sale in proportion of their respective share in the undivided ownership.

Where terms of payment have been granted by the transferor, Article 833-1 shall apply."

25. First of all, as we have already held, French Civil Law will not apply to the facts of the present case. Notwithstanding the same, for the purpose of examining the claim of the plaintiff as to whether he can assert a preemptive right to purchase the suit property, we have referred to Article 815-14 of the French Code Civil. Even as per Article 815-14, such a preemptive right can be claimed only by an undivided owner of an undivided property as against another undivided owner who intends to transfer his part of the rights, either in whole or in part to a third party. Such a preemptive right is intended to enable an undivided owner of a piece of land to purchase the remaining value of the land so as to enable him to assert an exclusive right over the entire property which forms part of the undivided share of the property which vests with him. First of all, in this case, the plaintiff is not an undivided owner of the suit property inasmuch as he had relinquished his right upon receipt of a sum of Rs.25,000/- by executing a sale deed on 03.01.1991, Ex.A3 through his power of attorney agent, the fifth defendant, in favour of the second defendant. Therefore, even for the purpose of application of Article 815-14 of the French Code Civil, the plaintiff has no right to seek for a right of preemption after 17 years of alienation of his share in the suit property in favour of the second defendant. As mentioned above, by virtue of the sale deed dated 03.01.1991

executed by the plaintiff, he lost his right as an undivided share holder and thereby he is not entitled to press into service Article 815-14 of the French Civil Code. Even though the plaintiff claims that he had sent an e-mail 22.08.2007, Ex.A32 and A33, claiming preemptive right in the suit property, it was contended on behalf of the defendants that such an e-mail was sent by the plaintiff only on 09.04.2008 I.e., after eight months from the date of sale deed dated 29.08.2007 made in favour of the eighth defendant besides that Exs. A32 and 33 were marked subject to objection. Therefore, it is evident that only on coming to know about the sale deed dated 29.08.2007, did the plaintiff send the e-mail on 09.04.2008, but however, falsely claimed that such an e-mail was sent on 22.08.2007 prior to the sale made in favour of the eighth defendant on 29.08.2007. Therefore, we are of the view that the plaintiff, who had released his right in the suit property even on 03.01.1991, cannot claim preemptive right over the suit property after 17 years. In this context, reference can be made to the decision of the Honourable Supreme Court in the case of **Shyam Sunder and Others Vs. Ram Kumar And Another** on 30 July, 2001 in Appeal (Civil) No. 4680 of 1993 wherein the Honourable Supreme Court had an occasion to deal with right of pre-emption of a person and held as follows:-

1. The pre-emptor must have the right to pre-empt on the date of sale, on the date of filing of the suit and on the date of passing of the decree by the Court of the first instance only.
2. The pre-emptor who claims the right to pre-empt the sale on the date of the sale must prove that such right continued to subsist till the passing of the decree of the first court. If the claimant loses that right or a vendee improves his right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail.
3. A pre-emptor who has a right to preempt a sale on the date of institution of the suit and on the date of passing of decree, the loss of such right subsequent to the decree of the first court would not affect his right or maintainability of the suit for pre-emption.

4. A pre-emptor who after proving his right on the date of sale, on the date of filing the suit and on the date of passing of the decree by the first court, has obtained a decree for preemption by the Court of first instance, such right cannot be taken away by subsequent legislation during pendency of the appeal filed against the decree unless such legislation has retrospective operation.

26. As mentioned above, in the present case, at the time when the plaintiff instituted the suit seeking pre-emptive right, he was not holding any right in the suit property, either as an undivided owner or the whole of the suit property. The plaintiff has no right of pre-emption to be sought when he seizes to be a owner of the suit property. A right to seek preemption will arise only if the person who makes such claim has a semblance of interest to seek preemptive right. It is a privilege to take priority over others and for claiming such privilege, the person who makes a preemptive right should show some semblance of right in the property. In other words, a person who is no way connected with the property either as a tenant or a lessee cannot seek a right of preemption. The person who makes a claim for pre-emptive right must show some pre-existing right in his favour to make such a claim within a reasonable time after losing such pre-existing right before alienation of the property to others. Further, such a right of preemption cannot be asserted as a matter of right. In the present case, none of the above ingredients have been satisfied by the plaintiff warranting consideration of his claim to seek for pre-emptive right over the suit property which was already sold in favour of the eighth defendant. The trial Court, without properly considering the above issue has erroneously held that the plaintiff is having a pre-emptive right and therefore declared the sale deed dated 29.08.2007 executed in favour of the eighth defendant as void. Even PW1, power of attorney agent examined on behalf of the plaintiff had deposed that the plaintiff, only after coming to know about the sale

made by the third defendant in favour of the eighth defendant had taken steps to assert a pre-emptive right by instituting the suit. In such view of the matter, we hold that the plaintiff cannot assert a right of pre-emption in this case and we answer point No.3 against the plaintiff.

Point No.4:

27. The Plaintiff has sought for a declaratory relief to declare the sale deed dated 29.08.2007 executed in favour of the eighth defendant and to direct the eighth defendant to deliver vacant possession of the suit property to the third defendant, who executed such sale deed dated 29.08.2007 in her favour, so as to enable the plaintiff to seek for a pre-emptive right to purchase the suit property. The factual matrix which we have elaborated in the preceding paragraph would indicate that the first defendant/father was the owner of the suit property and after the death of the wife of the first defendant, he relinquished his right over the suit property in favour of his six children, including the plaintiff. At the instance of the first defendant, a partition deed dated 28.12.1990, Ex.A-2 whereby all the children have got 1/6th share in the suit property. Even before the execution of the partition deed dated 28.12.1990, the plaintiff had executed a registered power of attorney deed dated 12.08.1987, based on which the the power agent, fifth defendant, sold the 1/6th share of the plaintiff in favour of the second defendant. Similarly, the other children of the first defendant have executed release deed dated 10.05.1991, Ex.A7, release deed on 17.05.1991, Ex.A5, release deed dated 13.12.1991, Ex.A6 and release deed dated 17.07.1992, Ex.A8 all in favour of the third defendant. On the basis of the above documents, the suit property was in possession and

enjoyment of the third defendant for a considerable length of time for fifteen years. In other words, third defendant became the absolute owner of the suit property in its entirety by virtue of the release deeds mentioned above. Thus, the third defendant had a conveyable and saleable right to alienate the suit property. Accordingly, the third defendant had executed the sale deed dated 29.08.2007 in favour of the eighth defendant and it is the said sale deed dated 29.08.2007 which is challenged by the plaintiff in the suit on the ground that he was not given right of preemption before selling the property in favour of the eighth defendant. When the third defendant had acquired title to the suit property by virtue of the documents mentioned above, having been executed by the plaintiff and his brothers and sisters in his favour even during the year 1991, it is not sufficient for the plaintiff to only challenge the sale deed dated 29.08.2007 in favour of the eighth defendant alone and he ought to have questioned the execution of the release deeds mentioned supra in favour of the third defendant under Exs. A4 to A8 by which the third defendant acquired title over the entire suit property. Even though the plaintiff has claimed that the release deeds have been executed in favour of the third defendant by fraud and misrepresentation, it is not known as to why the plaintiff has to remain silent for more than a decade without questioning those release deeds executed in favour of the third defendant under Exs. A4 to A8 when he has alleged that those release deeds were executed by fraud and misrepresentation. In any event, the plaintiff, without questioning the correctness or validity of Exs.A4-A8, is estopped from challenging the sale deed dated 29.08.2007 alone and therefore, this point is also answered against the first respondent/plaintiff herein.

28. The plaintiff, in order to substantiate the various averments made in the plaint with respect to the manner in which the suit property was acquired by the first defendant/father and the consequent partition deed and release deeds executed under Exs. A4 to A8 ought to have stepped into the witness box. For the reasons best known, the plaintiff had chosen to examine his power of attorney agent as PW1 during the course of trial. On appreciation of the evidence of PW1, we are of the view that he is not a competent person to be examined as a witness in this case. PW1 has only stated that he is not personally aware of the events that had taken place between the family members of the plaintiff. Therefore, we are of the view that the plaintiff ought to have stepped into the witness box to substantiate the plaint averments, but for the reasons best known, he failed to do so. This is more so that the first defendant/father, in his written statement, has stated that the plaintiff is an estranged son and he did not even attend the funeral of his own mother. It was further stated in the written statement that the plaintiff has filed the suit only to harass the first defendant and other family members. When such averments have been made by the first defendant in the written statement, it would be justified and proper for the plaintiff to examine himself to lend support to his own case. On the contrary, the plaintiff had chosen to examine his power of attorney agent as PW1 who cannot have any personal knowledge with respect to the decisions taken by the first defendant/father in consultation with his sons for more effectively enjoying the suit property purchased by him. In such view of the matter, we are of the opinion that non-examination of the plaintiff is fatal to the case projected by him and accordingly, we decide this issue also against the plaintiff.

29. In the result, we set aside the Judgment and Decree dated

24.04.2012 passed in O.S. No. 118 of 2008 on the file of the II Additional District Judge, Puducherry. The Appeal Suit is allowed as prayed for and consequently, the suit in O.S. No. 118 of 2008 filed by the plaintiff shall stand dismissed. However, there shall not be any order as to costs.

(R.P.S.J.,) (A.D.J.C.J.,)

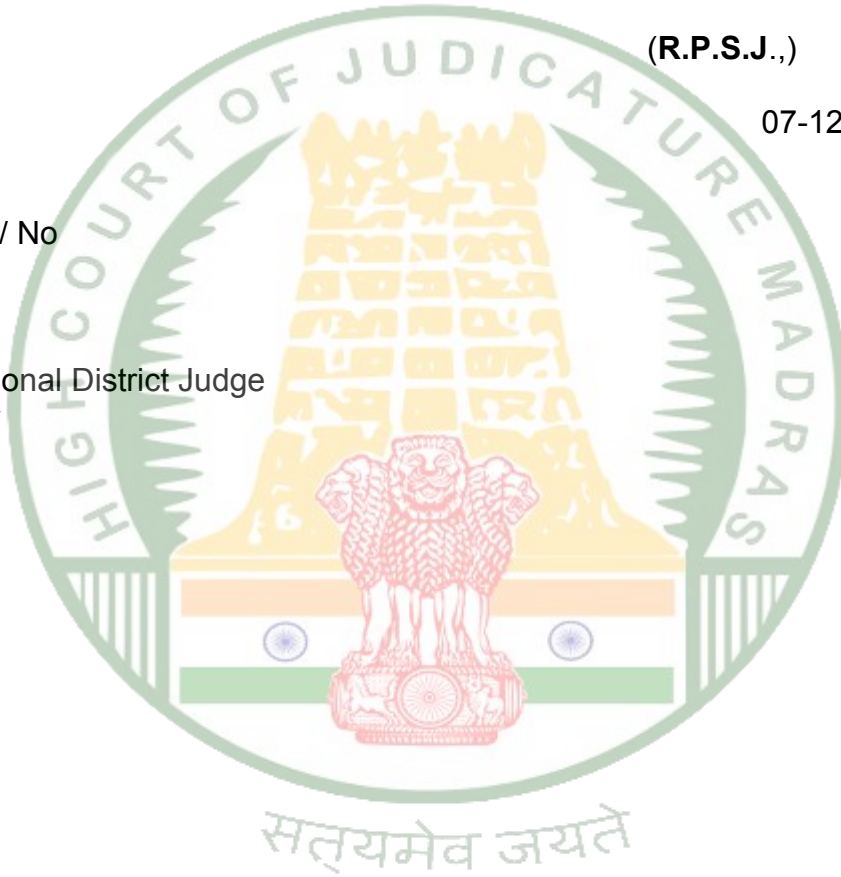
07-12-2017

rsh

Index : Yes / No

To

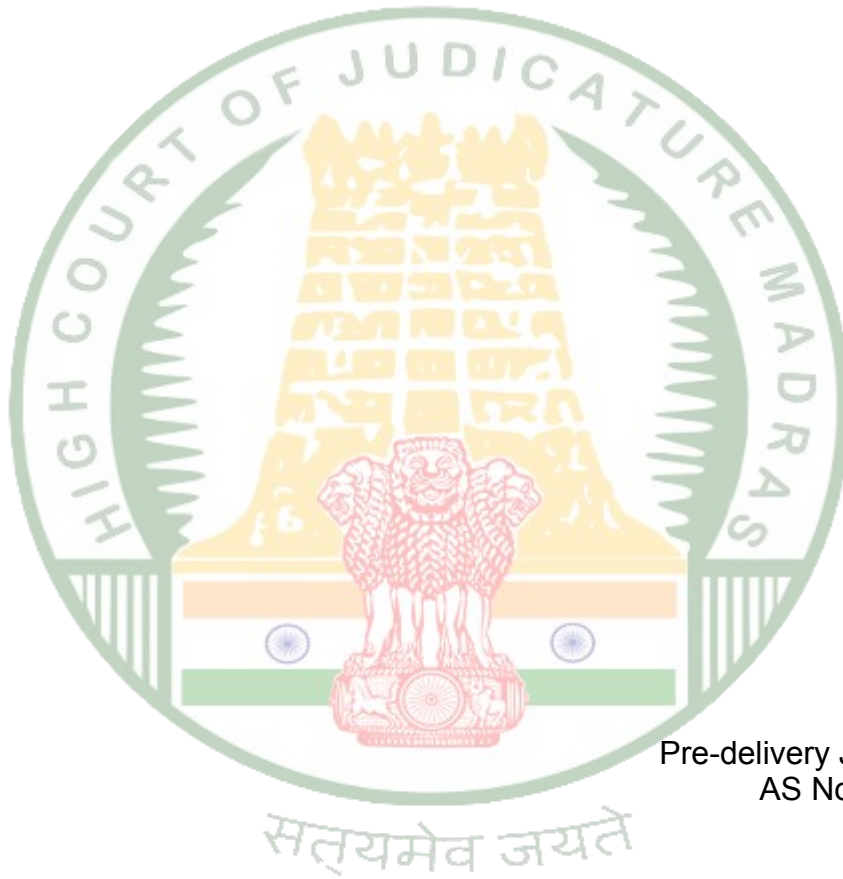
The II Additional District Judge
Pondicherry



WEB COPY

R. SUBBIAH, J
and
A.D. JAGADISH CHANDIRA, J

rsh



Pre-delivery Judgment in
AS No. 41 of 2013

07-12-2017

WEB COPY