

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 06.11.2017****PRONOUNCED ON : 20.11.2017****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.1305 of 2001**

Lakshminarayana Padayachi .. Appellant
 Vs
 1. Subramaniam (deceased)
 2. Kasthuri
 3. Mohan Raj
 4. Rajasekar
 5. Shanthi .. Respondents

(RR2 to 5 brought on record as
 Lrs of the deceased sold respondent
 vide order of Court dated 18.12.2014
 made in CMP.No.373/2014 in
 S.A.No.1305/2001)

Second Appeal is filed under Section 100 of Civil Procedure Code,
 against the Judgment and Decree dated 24.04.2001 made in
 A.S.No.77 of 1997 on the file of the II Additional Subordinate Court,
 Villupuram, reversing the Judgment and Decree dated 31.03.1997
 made in O.S.No.311 of 1995 on the file of the Principal District Munsif,
 Ulundurpet.

For Appellant : Mr.V.Raghavachari

For Respondents : No appearance
 (set ex-parte)

JUDGMENT

This second appeal is directed against the Judgment and Decree dated 24.04.2001 made in A.S.No.77 of 1997 on the file of the II Additional Subordinate Court, Villupuram, reversing the Judgment and Decree dated 31.03.1997 made in O.S.No.311 of 1995 on the file of the Principal District Munsif, Ulundurpet.

2. The parties are referred to as per their rankings in the trial Court.

3. Suit for declaration, possession and mesne profits.

4. The case of the plaintiff, in brief, is that the suit property and the other extent in suit survey as well as the other properties were purchased by his father Muthu Narayanareddiar in the Court auction sale on 08.03.1928 pursuant to the decree passed in O.S.No.242 of 1926 in E.P.No.1427 of 1927 and pursuant to the same, the possession of the suit property was entrusted to him through Court process on 09.06.1928 and thereafter, he had been enjoying the same by paying kist etc., and subsequent to the same, on partition of the properties belonging to the family by way of a registered partition deed

dated 25.11.1959 amongst the sons of Muthu Narayanareddiar, the suit property was allotted to the plaintiff and accordingly, the plaintiff by obtaining patta, paying kist, has been enjoying the suit property as full owner thereof. The land of the defendant is situated to the western side of the suit property and as the defendant commanded water facility, accordingly, took the suit property on lease from the plaintiff during April, 1982 agreeing to pay an annual lease of Rs.600/- and accordingly, the suit property was entrusted to the defendant on the above said lease arrangement. However, it is found that the defendant had effected change of patta in respect of the suit property in his favour and on coming to know of the same, the plaintiff had directed the defendant to hand over the possession of the suit property and the defendant, accordingly, also handed over the suit property to the plaintiff during April, 1989 and thereafter, it is only the plaintiff, who is in possession and enjoyment of the suit property. The plaintiff, thereafter, also took steps to effect the change of patta in his name and on coming to know of the same, the defendant attempted to interfere with the possession and enjoyment of the plaintiff in respect of the suit property and in such view of the matter, the plaintiff sent a notice dated 31.10.1990 and to the same, the defendant sent a reply dated 19.11.1990 containing false allegations. It is false to state that

the defendant's grandfather Nagamuthu Padayachi had purchased the suit property under an unregistered sale deed dated 11.07.1917 and thereafter, by way of a partition deed dated 10.02.1937 effected amongst his sons, the suit property had been allotted to the defendant's father Chinnasamy and it is false to state that Chinnasamy had subsequently settled the suit property in favour of the defendant by way of a registered settlement deed dated 19.08.1960 and the above said documents are not true, invalid and not binding upon the plaintiff. It is only the plaintiff, who has been all along in possession and enjoyment of the suit property as absolute owner and accordingly, the plaintiff has also prescribed his title to the suit property by way of adverse possession and while so, the defendant, without any authority, unlawfully encroached into the suit property on 05.12.1990 and hence, the plaintiff, left with no other alternative, has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit is not maintainable either in law or on facts. It is false to state that the plaintiff's father has title to the suit property by way of Court auction sale said to have taken place on 08.03.1928 and on the other hand, on the relevant date, the judgment debtor himself had no title or

possession to the suit property and hence, the Court auction sale above referred to will not confer any title to the suit property on the plaintiff's father. It is false to state that the plaintiff's father had taken possession of the suit property through Court process on 09.06.1928 and it could only be a paper delivery and the plaintiff's father has no title or possession to the suit property legally and it is false to state that the defendant owned property on the western side of the suit property and on commanding water facility thereof, took lease of the suit property from the plaintiff agreeing to pay an annual lease of a sum of Rs.600/- from April, 1982. The defendant had no point of time enjoyed the suit property in the above said capacity. Patta, for the suit property, was not changed in the name of the defendant for the reasons stated in the plaint and the defendant did not surrender possession of the suit property during April, 1989 as pleaded. The patta was changed in the name of the plaintiff in respect of the suit property without the knowledge of the defendant and on coming to know of the same, the defendant has sent representation to various authorities. It is false to state that the plaintiff has prescribed title to the suit property by way of adverse possession. The defendant's grandfather Nagamuthu Padayachi had purchased the suit property by way of an unregistered sale deed dated 11.07.1917 from Ramasami

Gounder and been enjoying the same. Thereafter, his four sons had effected partition in 1937 by way of an unregistered partition deed and by way of the same, the suit property and the other properties were allotted to the share of Chinnasamy, the father of the defendant, thereafter, Chinnasamy settled the suit property in favour of the defendant by way of a registered settlement deed dated 19.08.1960 and the same was duly accepted by the defendant and accordingly, it is only the defendant, who has been in possession and enjoyment of the suit property as full and absolute owner thereof by obtaining patta, paying kist etc., and hence, the plaintiff is not entitled to claim any title to the suit property or possession thereof. In any event, the defendant and his predecessor in title have prescribed title to the suit by way of adverse possession. Hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs1 & 2 were examined and Exs.A1 to 28 were marked. On the side of the defendant, DWs1 to 3 were examined and Exs.B1 to 25 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to dismiss the suit. Aggrieved over the same, the plaintiff preferred the

first appeal and the first appellate Court, on a consideration of the materials placed, was pleased to accept the case of the plaintiff and accordingly, by allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Aggrieved over the same, the present second appeal has been preferred by the defendant.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration in this second appeal:

" (i) Whether the lower appellate court was right in decreeing the suit?

(ii) Whether the plaintiff has proved title as well as permissive occupation of the defendant?

(iii) Whether the lower appellate Court has overlooked Ex.B3?

(iv) Whether the documents Ex.B1 and B2 are not admissible in evidence?"

9. The suit has been laid by the plaintiff for declaration, possession and mesne profits. The plaintiff claims title to the suit

property through his father Muthu Narayanareddiar. According to the plaintiff, his father had purchased the suit property by way of a Court auction sale on 08.03.1928 and took possession of the suit property through Court process on 09.06.1928 and further, according to the plaintiff, on partition of the family properties between the plaintiff and his brother during 1969, the suit property was allotted to the plaintiff and thus, according to the plaintiff, he has title to the suit property. As regards the above case of the plaintiff, serious resistance has been put forth by the defendant contending that the plaintiff's father did not derive any title to the suit property by way of Court auction sale as put forth in the plaint nor obtained actual delivery of physical possession of the suit property as claimed by the plaintiff. In such view of the defence put forth by the defendant, it is for the plaintiff to establish that as pleaded, his father had obtained a valid title to the suit property by way of Court auction sale on 08.03.1928 and that, he had taken physical possession of the suit property through Court process on 09.06.1928. In this connection, the plaintiff has filed the sale certificate dated 08.03.1928 as Ex.A1 and the delivery receipt dated 09.06.1928 as Ex.A2. It is the specific case of the defendant that the suit property did not belong to the judgment debtor on the date of the Court auction sale and hence, the plaintiff's father could not have

acquired any valid title to the suit property by way of Court auction sale on 08.03.1928. In this connection, the plaintiff examined as PW1, during the course of cross examination has admitted that he does not know, to whom, the suit property originally belonged to, he does not know, to whom, the suit property belonged to prior to the Court auction sale and does not remember, against whom, his father had laid the suit and he knew about the suit property only through records and as heard from his father and does not have any direct knowledge about the same and does not know about the delivery receipt of the suit property through the Court process and does not know whether the suit property originally belonged to Ramasami Gounder. It is thus seen that the plaintiff has no knowledge whatsoever as to whether at all the suit property originally belonged to Ramasami Gounder, the judgment debtor, through whom the suit property is said to have been acquired by the plaintiff's father through Court auction sale on 08.03.1928. There is no material placed on record to evidence that the suit property originally belonged to the judgment debtor Ramasami Gounder on the date of the Court auction sale. In such view of the matter, as rightly put forth by the defendant's counsel, the Court auction sale by itself would not guarantee a perfect sale. When in this matter, the plea of the Court auction sale put forth by the plaintiff has

been stoutly contested by the defendant and when the defendant has also raised the plea that the judgment debtor has no valid title to the suit property prior to the Court auction sale or on the date of Court auction sale, it is for the plaintiff to establish that the judgment debtor had valid title to convey the suit property to the Court auction purchaser on the date of Court auction sale and the above said fact being completely absent in this case and as seen from the evidence of the plaintiff, he having no knowledge about the same and in addition to that, the plaintiff having also miserably failed to establish that the judgment debtor had a perfect title to the suit property on the date of Court auction sale, it is seen that merely on the basis of Ex.A1, it cannot be construed that the plaintiff's father had acquired a valid title to the suit property under the same. It is the further plea of the plaintiff that his father had taken possession of the suit property under Ex.A2, the delivery receipt, however, the same is also disputed by the defendant. According to the defendant, even if Ex.A2 is admitted to a true document, there is no material to hold that the plaintiff's father had taken physical possession of the suit property pursuant to the same. As rightly contended by the defendant's counsel, there is no material to hold that the plaintiff's father had obtained physical possession of the suit property pursuant to Ex.A2. It is further seen

that no material has been placed by the plaintiff to hold that his father had thereafter been in possession and enjoyment of the suit property and enjoying the same as full owner thereof by paying necessary kist etc., in such view of the matter, it cannot be safely concluded that the plaintiff's father had taken physical possession of the suit property based upon Ex.A2. Therefore, it has to be concluded that the plaintiff's father had not obtained the possession of the suit property as required under law physically based on Ex.A2.

10. According to the plaintiff, inasmuch as the property of the defendant was situated on the western side of the suit property and as the defendant had commanded water facility in the same, he had taken the suit property on lease from the plaintiff during 1982 and been paying the lease amount and subsequently, during 1989, surrendered possession of the suit property back to the plaintiff. However, the above case of the plaintiff has been vehemently controverted by the defendant and contended that he had at no point of time been in possession and enjoyment of the suit property as a lessee under the plaintiff and on the other hand, he has been in possession and enjoyment of the suit property in his own right independently right from 1917 onwards i.e. from the date of his

predecessor in interest and therefore, there is no question of surrendering back his possession of the suit property as pleaded and hence, the above case of the plaintiff should not be accepted.

11. As regards the above case of the plaintiff, it is found that the same is a false theory as seen from the evidence of the plaintiff examined as PW1. PW1, during the course of cross examination, has admitted that the defendant does not own any property to the west of the suit property and that the defendant does not own any bore Well or Well in the said property. Therefore, it is found that the case of the plaintiff that the defendant had taken the lease of the suit property from the plaintiff during 1982 on the premise that he owns the property on the western side and commanding water facility in the same as such falls to the ground. Now, according to the plaintiff, the defendant had taken the suit property on lease paying an annual lease amount of Rs.600/-. However, even as per the admission of the plaintiff during the course of cross examination, there is no lease document entered into between the plaintiff and the defendant as pleaded. Similarly, it is also found that there is no material placed on the part of the plaintiff to hold that the defendant had surrendered the possession of the suit property back to the plaintiff during the year

1989. PW2 examined on behalf of the plaintiff has also admitted that he does not have direct knowledge about the lease arrangement put forth by the plaintiff. Further, PW2 has also admitted that the defendant owns various properties but does not cultivate the same and also stated that the suit property and the other properties were cultivated by Subramaniam. It is therefore found that the defendant, on his own, does not engage in cultivation even as regards his own properties. In such view of the matter, to say that the defendant had taken the suit property on lease from the plaintiff cannot be believed and accepted, particularly, when there is no material to buttress the same. The plea of lease as projected by the plaintiff is thus found to be a false case and cannot be relied upon in any manner.

12. It is found that even as per the case of the plaintiff, the patta for the suit property at one point of time stood in the name of the defendant. Now, according to the plaintiff, the defendant had stealthily obtained patta in respect of the suit property taking advantage of the lease arrangement in respect of the suit property, However, when the lease arrangement projected by the plaintiff is found to be a false theory, the further case of the plaintiff that the defendant had obtained patta clandestinely from the revenue

authorities taking advantage of the above said lease arrangement as such cannot be accepted in any manner. In any event, it is now seen that the defendant had been granted patta in respect of the suit property. No doubt, as per the case of the plaintiff, he has obtained change of patta in his name from the revenue authorities, and according to the defendant, no notice has been sent to him before the conversion of the patta from his name to the name of the plaintiff and the same had been obtained by the plaintiff without giving notice to him. Despite the above plea of the defendant, there is no material projected on behalf of the plaintiff to hold that the patta had been mutated in his favour from the name of the defendant only after due notice to the defendant and after conducting due enquiry. In this connection, no revenue authority has been examined on behalf of the plaintiff to explain the above said facts.

13. As adverted above, the plaintiff has not established that the judgment debtor through whom the plaintiff's father had obtained the Court auction sale owns the property at the relevant point of time. In this connection, PW2 also in his evidence has admitted that he does not know as to whom the suit property originally belonged to. Further, PW2 has also admitted that he visited the suit property during the year

1981-1982 and thereafter, he is not aware as to for the past 14 years, who had been in possession and enjoyment of the suit property. Therefore, it is found that there is no material on record to hold that the judgment debtor of O.S.No.242 of 1926 had a valid title on the date of the Court auction sale and that, the plaintiff's father had obtained physical possession of the suit property through Court process following the Court sale. It is thus found that the plaintiff has failed to establish that his predecessors in interest viz., his father and the judgment debtor of O.S.No.242 of 1926 on the file of the Cuddalore District Munsif Court had a valid title in respect of the suit property.

14. No doubt, the defendant claims title to the suit property on the basis of the three documents, of them, the sale deed dated 11.07.1917 and the partition deed dated 10.02.1937 cannot be, as such, relied upon as they being unregistered documents. Now, according to the defendant, following the settlement deed dated 19.08.1960 executed by his father Chinnasamy, he had derived title to the suit property and therefrom, it is only he, who is in possession and enjoyment of the suit property. However, it has not been properly explained and also established by the defendant that his father

Chinnasamy had a valid title to the suit property to settle the same in his favour under the above mentioned settlement deed. Be that as it may, now, the defendant claims exclusive title to the suit property based upon the above said settlement deed and also the possession of the suit property in his individual capacity right from the above said settlement deed and also the possession of his predecessors in interest right from 1917 onwards. As adverted above, at one point of time, it is only the defendant, who had been granted patta in respect of the suit property. Now, as seen above, the case of the plaintiff that the defendant had been in permissive possession or was in possession of the suit property as a lessee has not been established. It is thus found that when the defendant's possession of the suit property had been admitted by the plaintiff and when the plaintiff has failed to establish that the defendant took the property on lease during 1982 from him as a lessee and also further failed to establish that he has surrendered back the possession of the suit property to him during 1989 and when according to the defendant, he and his predecessors in interest have been in possession and enjoyment of the suit property right from 1917 onwards and when it is clearly admitted by the plaintiff that the defendant was in possession and enjoyment of the suit property from 1982 onwards and when it is further seen that even prior to the same,

it is only the defendant, who had been in possession and enjoyment of the suit property based upon the settlement deed dated 19.08.1960 and when there is no material to hold that the plaintiff had been in possession and enjoyment of the suit property from 1960 onwards, it is seen that it is only the defendant, who has been in possession and enjoyment of the suit property for a very long period of time, in his own right and not under the permissive occupation of the plaintiff either as a lessee or otherwise as put forth by the plaintiff. The plea of the plaintiff that the defendant had surrendered the possession of the suit property to him during 1989 cannot be accepted, on the mere bold statement without any material to substantiate the same. Now, according to the plaintiff, after he had obtained patta converted in his name, aggrieved over the same, the defendant interfered with his possession and enjoyment and subsequently, encroached into the suit property illegally and had been occupying the same and hence, he had been necessitated to lay the suit for appropriate reliefs.

15. However, in the light of the above said facts, when it is found that it is only the defendant, who had been in possession and enjoyment of the suit property for a long period of time as above narrated and when the permissive occupation or otherwise of the suit

property by the defendant as pleaded is not established by the plaintiff, as rightly argued by the counsel appearing for the defendant, it is only for the plaintiff to establish that permissive possession of the defendant is within 12 years prior to the filing of the suit and in the event of the failure of the plaintiff to establish the same, it is unnecessary for the defendant to establish adverse possession for the statutory period and on the other hand, it is for the plaintiff to prove his possession within 12 years and in this connection, the decision reported in **2010-1-L.W.439 (Deivanai Ammal (Died) & others Vs. Periasamy @ Sambagounder & others)** is relied upon and the decision reported in **2012 (3) MWN (Civil) 536 (Pappannan and 4 others Vs. Kolandasamy)** is also relied upon for the contention that the burden of proof shifts on the plaintiff to prove the plea of permissive possession and on the failure of the plaintiff to establish the same, the plaintiff cannot be allowed to pick holes in the case of the defendant and thereby succeed in his case without establishing his title to the suit property as pleaded by him.

16. Considering the principles enunciated in the above said decisions and applying the same to the facts and circumstances of the present case as discussed above, it is found that the plaintiff has failed

to establish the encroachment of the suit property by the defendant as pleaded in the plaint. The plaintiff has failed to establish the plea of lease projected in the matter and the plea of surrender of possession of the suit property. On the other hand, it is seen that right from 1960 onwards under the settlement deed, it is only the defendant who has been in possession of the suit property and there is no material on the part of the plaintiff to hold otherwise. In such view of the matter, it is found that the defendant has been enjoying the property in his own right and as the plaintiff has failed to establish that he has levied the lis within 12 years from the adverse title set up by the defendant and when that apart, the plaintiff has failed to establish that he has valid title to the suit property, it is seen that the plaintiff cannot be granted the reliefs sought for in the plaint.

17. The first appellate Court, based on the unregistered deeds projected by the defendant holding that they are not admissible in evidence as such disbelieved the case of the defendant and accordingly, proceeded to hold that the plaintiff has title to the suit property and thereby, entitled to recovery of possession of the same from the defendant. No doubt, the two documents relied upon by the defendant may be inadmissible in evidence on account of their non-

registration as required under law but that would not automatically lead to the conclusion that the plaintiff is entitled to succeed in his case, when the defendant has disputed the title of the plaintiff to the suit property and also his other pleas projected in the plaint and when it is found that it is only the defendant, who had been in possession and enjoyment of the suit property for a very long period of time and the defendant having also taken the plea of adverse possession, it is seen that the plaintiff has failed to institute the suit within 12 years from the date on which the defendant's possession had become adverse to him and further, the plaintiff having failed to establish that he has valid title to the suit property, it is seen that the first appellate Court has erred in accepting the plaintiff's case merely on the basis of the above said defects in the defendant's case forgetting for a moment that it is only the party, who has come forward with the case, who is wholly burdened with the responsibility of establishing his case with acceptable proof and material, particularly when the opponent party throws a stout challenge to his case wholly.

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18. That apart, as rightly put forth by the defendant's counsel, in so far as this case is concerned, inasmuch as the plaintiff has no valid title to the suit property as such under the Court auction purchase

relied upon by him, it is found that he has also taken the plea of adverse possession for claiming title to the property in his plaint. This attitude of the plaintiff itself would go to show that the plaintiff himself is not sure as to how he derived title to the suit property. Accordingly, it is found that the plaintiff is unable to substantiate his case with acceptable materials and on the other hand, the case projected by the plaintiff in the plaint and the evidence adduced in the matter on his side go diametrically opposite to each other. It is found that as rightly put forth by the defendant's counsel, inasmuch the plaintiff has no valid title to the suit property, it is seen that the plaintiff is unable to place any material worthwhile acceptance to substantiate the same.

19. In the light of the above discussions, I hold that the first appellate Court has erred in accepting the plaintiff's case and decreeing the suit. I further hold that the plaintiff has miserably failed to establish the permissive occupation of the defendant as put forth in the plaint. I further hold that no doubt, though the first appellate Court is right in holding that Exs.B1 & 2 are inadmissible in evidence failed to overlook the fact that the defendant having claimed to be in possession and enjoyment of the suit property pursuant to Ex.B3 and when his possession and enjoyment of the suit property right from

Ex.B3 has not been shown to be dislodged by the plaintiff in any manner as per the legal procedure and in the light of the above, it is found that the first appellate Court has failed to consider the defence of the defendant qua the possession and enjoyment of the suit property pursuant to Ex.B3 in the right perspective. Accordingly, the substantial questions of law formulated for consideration in this second appeal are answered.

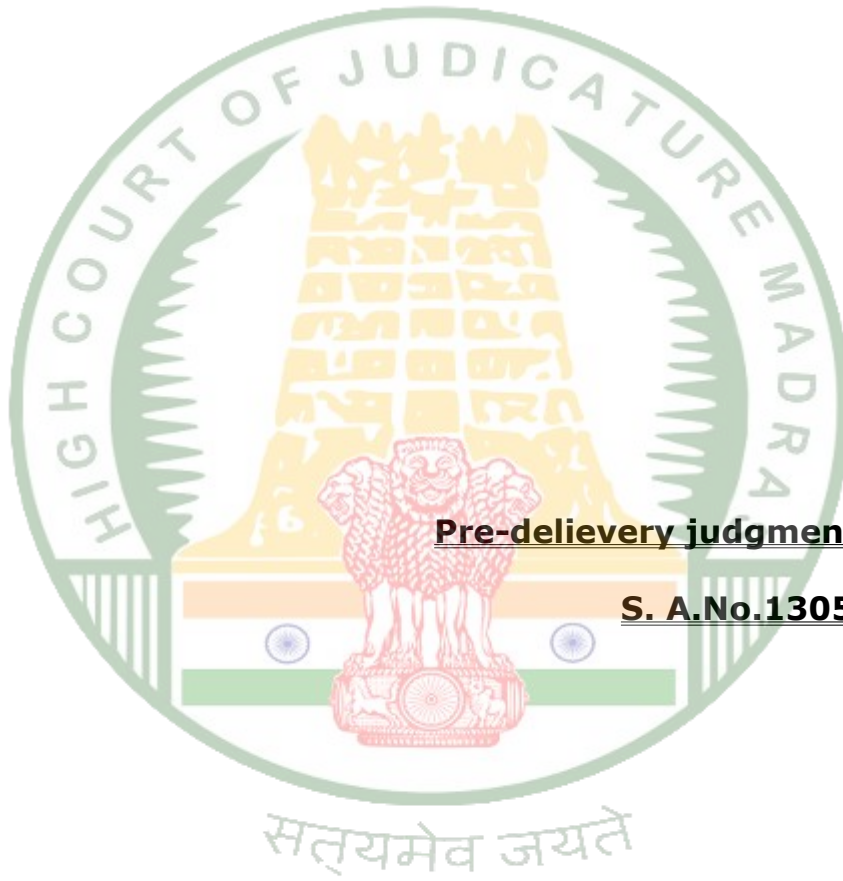
20. In conclusion, the Judgment and Decree dated 24.04.2001 made in A.S.No.77 of 1997 on the file of the II Additional Subordinate Court, Villupuram are set aside and the Judgment and Decree dated 31.03.1997 made in O.S.No.311 of 1995 on the file of the Principal District Munsif, Ulundurpet are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

20.11.2017

Index : Yes/No
Internet :Yes/No
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To

1. The II Additional Subordinate Court, Villupuram.
2. The Principal District Munsif, Ulundurpet.

T.RAVINDRAN,J.
sms



Pre-delivery judgment made in

S. A.No.1305 of 2001

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