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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 24.11.2016

Delivered on: 01.03.2017

CORAM :

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Second Appeal (MD) No.480 of 2011

Chandran : Appellant / Appellant / Plaintiff

-Vs-.

Ramu Pillai : Respondent/ Respondent / Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.92 of 2006 on the file of learned Additional Subordinate Judge, Dindigul, dated 04.06.2009 confirming the judgment and decree passed in O.S.No.143 of 2004 on the file of the District Munsif Court, Nilakottai, dated 21.08.2006.

For Appellant : Mr.M.P.Senthil
For Respondent : Mr.S.Nates Raja

JUDGMENT

The plaintiff in the suit in O.S.No.143 of 2004 on the file of the District Munsif Court, Nilakottai, is the appellant in this Second Appeal.

2.The appellant filed a suit in O.S.No.143 of 2004 for declaration of plaintiff's title to the suit property and for recovery of possession. The suit is also for mandatory injunction to remove the shrubs, planted in the boundary line and for permanent injunction restraining the defendant from interfering with the possession of the suit property. The suit property has been described as an extent of 50 cents of land out of the undivided 2 acres and 45 cents in the total extent of 4 acres and 90 cents in Survey No.314/3 and the present Survey No.314/3B in Sithargal Natham, Nilakkottai Sub Registration District, Dindigul Taluk.

3.The case of the appellant as per the plaint are as follows:

3.1.The suit property originally belonged to one Subramanian, son of Rangasamy Naidu. He got an extent of 2 acres and 45 cents in a partition. The said Subramanian created a othi in favour of one Duraisamy Thevar on 16.05.1978 for a period of five years. The said othi was later redeemed through the plaintiff and thereafter, Subramanian executed a sale deed dated 25.09.1994 in favour of the plaintiff for a sum of Rs.20,000/-. The plaintiff is



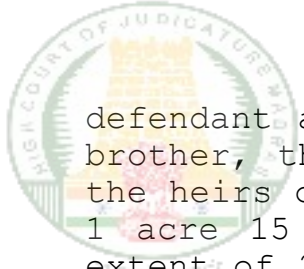
in possession and enjoyment of the suit property from the date of purchase. The suit property is the undivided $\frac{1}{2}$ share in the total extent of 4 acres and 90 cents in Survey No.314/3.

3.2.The plaintiff obtained patta for an extent of 2 acres 45 cents in Survey No.314/3B and dug a well. He has also constructed a pump set and obtained electricity service connection. He is doing cultivation in the said property. The plaintiff is also the owner of an extent of 2 acres 98 cents along with his brother in Survey No.315/5. The plaintiff is also drawing water from the well in Survey No.314/3B to his other land in Survey No.315/5.

3.3.The defendant is the owner and in enjoyment of an extent of 1 acre 15 cents in Survey No.314/2 and the said property lies on the western side of the suit property. The plaintiff is doing agriculture and has planted coconut trees, mango trees, jasmine flowers and cucumber in the suit property. After purchasing the suit property, the plaintiff was keeping an extent of 50 cents as vacant land for the purpose of construction of cattle shed and a house. This 50 cents is part of Survey No.314/3B. However, the defendant who is the owner of the adjoining property in Survey No.314/2 has made an attempt to interfere with the possession and enjoyment of the plaintiff over the suit property which is an extent of 50 cents. Since the suit property was improperly described in the sale deed obtained by him in 1994 and the description was given on the basis of the description found in the othi document of the year 1978, the defendant is taking advantage for the purpose of claiming a right in respect of the land measuring an extent of 50 cents in Survey No.314/3B.

3.4.Later the defendant encroached into 50 cents in Survey No.314 / 3B. When elders in the Village requested the defendant to remove the encroachment, he claimed title to the same and refused to remove the thorny shrubs. Since the defendant had no right in Survey No.314/3B, the plaintiff requested the Surveyor to measure the properties and to confirm that the suit properties lie within Survey No.314/3B. When the Surveyor issued notice, the defendant refused to receive the notice and prevented the Village Administrative Officer and the Surveyor from demarcating the suit property with reference to the survey plan. When the plaintiff approached the police, he was advised to approach the Civil Court and hence, the plaintiff is constrained to file the present suit.

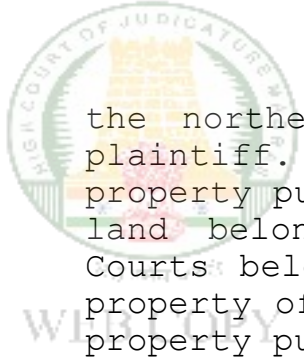
4.The suit was contested by the defendant by filing a detailed written statement. Sum and substance, the defendant claimed title in respect of an extent of 1 acre 59 cents on the northern side of Survey No.314 by stating that the said land belonged to one Ariyaputhiran Pillai. It was the further case of the defendant that the said Ariyaputhiran Pillai died leaving behind his only son Sundaram Pillai. The said Sundaram Pillai died in the year 1996 leaving behind the defendant, his brother and another sister. After the death of Sundaram Pillai, the property was enjoyed by the



defendant and his brother one Panangattan. After the death of his brother, the defendant was in enjoyment of the property along with the heirs of his brother. Though the defendant's case in respect of 1 acre 15 cents was by inheritance, he also claimed title to an extent of 22 cents by a sale deed dated 07.05.1951, executed by one Ocha Thevar who had purchased the said extent of land from Ariyaputhiran Pillai by an earlier sale deed dated 16.05.1947. The defendant further pleaded that a further extent of 22 cents belonged to them by virtue of a oral sale obtained from one Raya Muthu. The defendant also claimed title to the suit property by adverse possession.

5. Though the defendant did not dispute the sale deed dated 25.08.1994 by which the plaintiff had purchased the suit property, it was contended by the defendant that the plaintiff had purchased only the remaining extent on the southern side but not the suit property. The defendant had laid boundary with thorny shrubs and they are in enjoyment of the same from the date of Ariyaputhiran Pillai. They have also pleaded that the suit is not maintainable without impleading the other legal heirs of his brother.

6. The suit was dismissed after holding that the defendant has prescribed title to the suit property by adverse possession. The trial Court further held that the plaintiff though had purchased an extent of 2 acres 45 cents in Survey No.314/3B, the trial Court held that the plaintiff is not in enjoyment of the entire extent purchased by him in the year 1994. It is not in dispute that the plaintiff is in enjoyment of an extent of 1 acres 95 cents which is the southern portion of the entire extent of 2 acres 45 cents. The dispute is only in respect of the 50 cents in the same Survey Number namely 314/3B. However, from the documents filed by the plaintiff themselves, the trial Court, after holding that the plaintiff is not in enjoyment of the northern 50 cents, held that boundary prevails over the extent and that the plaintiff though has purchased an extent of 2 acres 45 cents is having only an extent of 1 acre 95 cents within the boundary description shown in the document. Since the suit was dismissed by the trial Court, the plaintiff filed an appeal in A.S.No.92 of 2006. The appellate Court also accepted the case of the plaintiff that he has purchased an extent of 2 acres and 45 cents under Ex.A3 dated 25.08.1994. After relying upon the previous othi deed dated 16.05.1978, under Ex.A2 and Ex.A3 wherein the suit property has been shown as the property on the south of Sundaram Pillai who is the defendant's predecessor-in-interest, the lower appellate Court came to the conclusion that the plaintiff has not purchased the entire extent of 2 acres and 45 cents but only the property on the south of Sundaram Pillai. Stating that the defendant's enjoyment of property on the northern side of the suit property is revealed from the plaintiff's document, the lower appellate Court further held that the plaintiff has not proved that the suit property namely an extent of 50 cents comes within the property namely 2 acres and 45 cents purchased by the plaintiff. From the revenue map, the Courts below accepted the position that



the northern side of the suit property is the property of the plaintiff. Since the document Ex.A2 and Ex.A3 describe the suit property purchased by the plaintiff as one lying on the south of the land belonged to the plaintiff's predecessor in interest, the Courts below believed the case of the defendant that between the property of plaintiff on the northern side of suit property and the property purchased by the plaintiff under Ex.A3, the defendant is in enjoyment of the property namely the suit property which is an extent of 50 cents. Aggrieved by the judgment and decree of the lower appellate Court in A.S.No.92 of 2006, the plaintiff has preferred the above Second Appeal.

7.The plaintiff has raised following substantial questions of law:

(1) Whether the Courts below are correct in law in dismissing the suit after having accepted that the appellant has proved his title by way of title document under Ex.A3 and the revenue document namely patta and other allied document under Ex.A8 to A11 and after having found respondent has not proved his title or possession?

(2) Whether the Courts below are correct in law in dismissing the suit is not considering that the appellant being the person who has proved his better title by the documents and the materials and the respondent has not produced any single scrap of paper either to correlate the right with the suit property or with regard to possession and the relief should have been granted to the appellant being the person who is having better title?

(3) Is it correct in law in dismissing the suit on the ground of non joinder of necessary parties namely for non impleadment of the brother and legal heirs of the brother of the respondent without considering the same that there is no relief sought for as against them and the suit is well within Order 1 Rule 9 of Civil Procedure Code since they are not necessary parties?

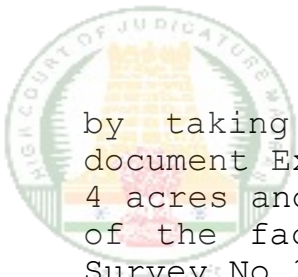
(4) Has not the judgment of the Courts below be termed as perverse for non application of mind with regard to the title document under Ex.A3 and the paucity evidence on the side of the respondent to prove his case?

(5) Whether the judgment of the lower appellate Court is vitiated for not framing points for determination as provided under Order 41 Rule 31 of Civil Procedure Code which is held to be mandatory?

8.The learned Counsel for the appellant submitted that the Courts below have not understood the scope of dispute and failed to consider the boundary description found in the documents Ex.A2 and Ex.A3 with reference to the Survey plan. He referred to the title deeds and the oral evidence of parties and submitted that the findings of the Courts below are perverse as they have misconstrued the document of title deeds.



9. It is to be seen that the plaintiff has claimed title on the basis of the sale deed under Ex.A3 dated 25.09.1994. The plaintiff also marked the previous mortgage deed dated 16.05.1978 as Ex.A2. From this document, it is evident that the plaintiff's predecessor-in-interest is entitled to an extent of 2 acres and 45 cents in Survey No.314/3B. Since the plaintiff's predecessor-in-interest got the undivided $\frac{1}{2}$ share in Survey No.314/3, the properties purchased under Ex.A3, is only an undivided extent of 2 acres and 45 cents out of 4 acres 90 cents in Survey No.314/3. However, from the documents Ex.A2 and Ex.A3, it can be seen that the boundary description for the land mortgaged under Ex.A2 and purchased by the plaintiff under Ex.A3 are given with reference to the entire extent of 4 acres and 90 cents in Survey No.314/3. The boundary description for the property in Ex.A2 gives an indication that the boundary description is for the entire extent of 4 acres and 90 cents in Survey No.314/3. It has been recited in the said document as follows: "314/3ல் ஏக்கர் 4 செண்டு 90க்கு மால்." Similar boundary description is also given in the document Ex.A3. The document Ex.A14 is the survey plan pertaining to Survey No.314. From the survey plan, it is demonstrated that the property in Survey No.314/3 is not a square plot. The northern boundary of Survey No.314/3 is Survey No.314/2 and Survey No.315. Thus, the entire properties of defendant's predecessor-in-interest in Survey No.314/2 and the property of plaintiff in Survey No.315 lie on the northern side of 4 acres and 90 cents. It is apparent that the plaintiff has acquired only half of Survey No.314/3. The property purchased by the plaintiff under Ex.A3 is only undivided $\frac{1}{2}$ share in Survey No.314/3. However, only after the purchase, the half of entire extent namely 2 acres and 45 cents came to the plaintiff. However, for plaintiff's 2 acres and 45 cents in Survey No.314/3, the northern boundary is Survey No.315. Similarly, a portion in Survey No.314/3 lies on the south of Survey No.314/2 which belong to the defendant. Without considering or taking note of the fact that the properties in Ex.A2 and Ex.A3 were described with reference to the entire extent of 4 acres and 90 cents, the Court below have come to the conclusion that the plaintiff has admitted the enjoyment of the defendant over the suit property which is the northern part of Survey No.314/3. It is not in dispute that the defendant is the owner of an extent of 1 acre 15 cents in Survey No.314/2. The defendant himself admitted that he has no document to show that he is entitled to the property in Survey No.314/3. Now, it is also not in dispute that the plaintiff alone has purchased the property in Survey No.314/3. Even though the properties purchased by the plaintiff was an undivided $\frac{1}{2}$ share, out of the total extent of 4 acres and 90 cents in Survey No.413/3, subsequently the plaintiff was given patta in respect of an extent of 2 acres and 45 cents in Survey No.314/3. This 2 acres and 45 cents has also been subdivided as Survey No.314/3B. Separate patta has been given to the plaintiff after sub-division and the defendant does not have any patta or revenue record to show that he has obtained patta or in enjoyment over any portion of land in Survey No.314 / 3. Strangely, the defendant has encroached into the northern part of Survey No.314/3



by taking advantage of the boundary description found in the document Ex.A2 and Ex.A3 wherein boundary description for the entire 4 acres and 90 cents is given. The Courts below failed to take note of the fact that Survey No.315 is also the northern boundary of Survey No.314/3.

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10.The defendant after knowing that he has no document to prove his title to any portion of the property in Survey No.314/3B has raised a plea of title by adverse possession without any material or any document to prove his continuous possession. The Courts below have accepted the case of the defendant only on the basis of the boundary description given in the documents Ex.A2 and Ex.A3. If the boundary description has been understood and considered, having regard to the Survey Plan pertaining to Survey No.314/3, 314/2 and 315, there is no difficulty in holding that the boundary description found in the documents Ex.A2 and Ex.A3 cannot be relied upon to show that the defendant's possession over the suit property is admitted in Ex.A2 and Ex.A3.

11.Despite the admission of the defendant that he has no document to prove his title in respect of Survey No.314/3, the Courts below have erroneously held that the defendant is in enjoyment of the suit property. The plaintiff has produced the patta under Ex.A5 and the Adangal Extract for the suit property. The fact that the revenue records in respect of the whole extent in Survey No.314/3 stand in the name of the plaintiff and his predecessor-in-interest is not disputed by the defendant. The case of the defendant is that the plaintiff has not purchased 2 acres and 45 cents under Ex.A3 by applying the principle "boundary prevails over extent". The defendant's further claim is that his possession which was acknowledged in the document Ex.A2 and Ex.A3 would enable the defendant to prescribe title by adverse possession. This stand of the respondent was also reiterated by the learned counsel for the respondent during his argument. The person who claims adverse possession has to prove the ingredients. A person to prove his title by adverse possession should plead and prove by clear and unambiguous evidence that his possession is hostile to the real owner amounting to denial of his title to property claimed. Animus of the person claiming right adverse to the real owner, is the most important factor to claim adverse possession. Therefore, Courts have held that a person having possession under lawful title cannot claim adverse possession.

12.In the case of **T.Anjanappa and others v. Somalingappa and another** reported in **2006 (5) CTC 378**, the Hon'ble Supreme Court has illustrated the principle as follows:

"12.The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person

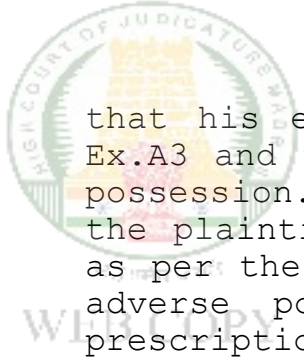


who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.

15."Adverse possession" means a hostile possession which is expressly or impliedly in denial of title of the true owner. Under Article 65 of the Limitation Act, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

13.The Hon'ble Supreme Court in the case of State of Haryana v. Mukesh Kumar and others reported in (2011) 10 SCC 404 has held that right of adverse possession is a negative right and that therefore, the person pleading adverse possession has to establish all facts necessary to establish adverse possession. It has also been reiterated by the Hon'ble Supreme Court that no equity would arise in favour of a person who claim title by adverse possession.

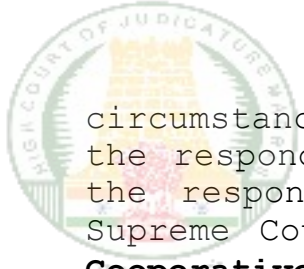
14.The learned counsel appearing for the appellant relied upon a judgment of this Court in the case of **Samayana Thevar vs. Abdul Razack** reported **2011 (1) MWN (Civil) 85** wherein it has been held that mere encroachment of the property for any length of time is not sufficient to prove adverse possession and that there must be animus possidenti. It is well settled law that to get title by prescription, it has to be proved that possession is with knowledge and adverse to the interest and title of real owner. As it has been pointed out above, in the precedent cited by the appellant, the respondent in this case has not proved that he has animus to hold the property adverse to the interest and title of real owner of the plaintiff. It is the case of defendant that he is in enjoyment of the lands in Survey No.314/2. He does not claim any title in respect of any portion of the land in Survey No.314/3. However, the defendant tries to prove his enjoyment in respect of the suit property which is the northern portion of Survey No.314/3 by stating



that his enjoyment was admitted by the plaintiff under Ex.A2 and Ex.A3 and that therefore, he is entitled to claim title by adverse possession. Having regard to the settled law, as discussed above, the plaintiff in the present case, by merely showing his enjoyment as per the recitals found in Ex.A2 and Ex.A3 cannot claim title by adverse possession, as the ingredients for claiming title by prescription are not made out.

15.The learned counsel for the respondent relied upon a judgment of the Hon'ble Supreme Court in the case of **L.N.Aswathama and another v. P.Prakash** reported in **2009 SAR (Civil) 684** wherein the Hon'ble Supreme Court held that it is open to a person to claim title and in the alternative to claim title by adverse possession and that the pleas are not inconsistent but alternative. This judgment has no application to the facts of this case, as the defendant's plea of title by adverse possession is not rejected on the ground that such plea is inconsistent. The plea of adverse possession is not established in this case having regard to the case of defendant and the evidence in this case where the defendant has presumed his title over the suit property merely by stating that his title and enjoyment is admitted by the plaintiff under Ex.A2 and Ex.A3. When the defendant himself has admitted that he has no other document to prove his enjoyment or title and the only source of title for the defendant is the boundary description in documents of title deed of plaintiff, the plea of adverse possession in the present situation cannot be held to be proper.

16.The learned counsel for the respondent further relied upon a judgment of this Court in the case of **S.Syed Abubakkar (died) and others v. Sardhar** reported in **(2011) 4 MLJ 744** to put forth an argument on the principle "boundary prevails over extent". It is true that boundary prevails over extent where the extent given in the document is approximate. The principle is meant for interpretation of documents. Since the extent and survey number given in the document are specific, this principle may not have an application. In the present case, the sale deed under Ex.A3 is in respect of an undivided share in the total extent of 4 acres and 90 cents in Survey No.314/3. Similarly, the boundary description was given only for the entire extent of 4 acres and 90 cents. In such circumstances, the suit property which is only an extent of 50 cents out of 4 acres and 90 cents in Survey No.314/3 cannot be identified with reference to the boundary description in Ex.A2 and Ex.A3. Finally, the learned counsel for the respondent relied upon a judgment of the Hon'ble Supreme Court in the case of **H.Lakshmaiah Reddy and others v. L.Venkatesh Reddy** reported in **2015 (2) MWN (Civil) 461** for the proposition that mutation in revenue records does not convey or extinguish any title and that entries in revenue records are relevant only for the purpose of collection of land revenue. In the present case, the defendant has not produced even a scrap of paper to prove his title. Further, the revenue records are not the only documents to prove the case of title pleaded by the plaintiff. The judgment of the Hon'ble Supreme Court in the



circumstances of this case does not lend any support to the case of the respondent. For the same proposition, the learned counsel for the respondent also relied upon another judgment of the Hon'ble Supreme Court in the case of **Union of India and others v. Vasavi Cooperative Housing Society Ltd., and others** reported in **2014 2 SCC 269**. For the same reasons stated above, the judgment of the Hon'ble Supreme Court is not relevant to support and substantiate the case of the respondent on merits.

17. In the case of **Rajeshwari v. Puran Indoria** reported in **2005 (4) CTC 567**, the Hon'ble Supreme Court has held as follows:

"3. Thus, it was accepted that a question of law would be a substantial question of law if it directly and substantially affects the rights of the parties and if it was not covered by a decision of the Supreme Court or of the Privy Council or of the Federal Court."

18. In the case of **Hero Vinoth (Minor) v. Seshammal** reported in **2006 (4) CTC 79**, the Hon'ble Supreme Court has dealt with the scope of Section 100 C.P.C. in the following lines:

"24. The principles relating to Section 100 CPC, relevant for this case, may be summarized thus:-

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence;



(ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

19. Surprisingly, the Courts below have accepted the plea of adverse possession in favour of the respondent / defendant despite the fact that the defendant has not produced even a scrap of paper, to prove that he was in possession. The suit property is a vacant land. It is specifically pleaded that the defendant encroached the suit property during the absence of plaintiff just before filing the suit. The plea of defendant that he was in possession and enjoyment of the suit property for a long time is not proved by any evidence. Whereas plaintiff has produced patta and other revenue records which can be relied upon to show possession. In the above circumstances, I have no hesitation to hold that the plaintiff has proved his title to the suit property and that the defendant has miserably failed to prove his plea of adverse possession. Having regard to the conclusions which are inevitable, I find that the findings of the Courts below are perverse and contrary to the pleadings and documentary evidence. Further, the judgment of Courts below are on an erroneous interpretation of the boundary description found in Ex.A2 and Ex.A3. In such circumstances, the questions of law raised by the plaintiff are answered in his favour and this Second Appeal is allowed. The judgment and decree of the lower appellate Court in A.S.No.92 of 2006 confirming the judgment and decree passed by the trial Court in O.S.No.143 of 2004 are set aside. The suit is O.S.No.143 of 2004 on the file of the District Munsif Court, Nilakkottai stands decreed. However, no order as to costs.

Sd/-

Assistant Registrar (CS-I)

/True copy/

Sub Assistant Registrar

To

1. The Additional Subordinate Judge,
Dindigul.
2. The District Munsif Court,
Nilakottai.

+1 CC to MR.M.P.SENTHIL, Advocate, SR No. 11449
+1 CC to MR.S.NATESH RAJA, Advocate, SR No. 11492
SRM
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