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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 01.08.2018

Pronounced on: 20.08.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM
S.A.No.181 of 1999
and
CMP.No.2702 of 1999

1. The Government of Tamil Nadu,
Rep. By the Collector of Nilgiris,
Ootacamund.
 2. The District Forest Officer,
Nilgiris North Division,
Uthagamandalam.
- ... Appellants

Vs.

1. Manickammal (Deceased)
 2. Parvathi Nanjan (Deceased)
 3. K.N.Singh
 4. N.Moorthy
 5. N.Prithivi raj
 6. Saroja sokkan
- ... Respondents

[RR3,4 & 6 brought on record as LR's of the deceased R1 viz. Manickammal vide Court order dated 24.07.2018 made in CMP.Nos.10866 to 10869 of 2018 in SA.No.181 of 1999]

[RR3 to 6 brought on record as LR's of the deceased R2 viz. Parvathi Nanjan vide Court order dated 24.07.2018 made in CMP.Nos.350 and 351 of 2015 in SA.No.181 of 1999]

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the judgment and decree passed in A.S.No.50 of 1996, dated 27.03.1998 on the file of Sub-Court, Uthagamandalam confirming the judgment and decree passed in O.S.No.105 of 1986, dated 01.12.1995 on the file of District Munsif, Uthagamandalam.

For Appellants : Mr.M.Santhanaraman
Additional Government Pleader (Forest)

For Respondents 4 and 5 : Mr.K.A.Ramakrishnan

For Respondents 3 and 6 : Set Exparte



J U D G M E N T

This second appeal has been filed by the defendants against the judgment and decree passed by the Sub-Judge, Uthagamandalam in A.S.No.50 of 1996 dated 27.03.1998 confirming the judgment and decree passed by the District Munsif, Uthagamandalam in O.S.No.105 of 1986 dated 01.12.1995.

2. One N.K.Kariamala maistry had filed a suit in O.S.No.105 of 1986 on the file of the District Munsif, Uthagamandalam for declaration of his title to the suit property and for consequential injunction to restrain the defendants from interfering with his peaceful possession and enjoyment of the suit property. During pendency of the said suit, the said N.K.Kariamala maistry died and hence, his legal representatives have been impleaded as plaintiff Nos.2 to 4.

3. The learned District Munsif, Uthagamandalam by the judgment dated 01.12.1995 has decreed the said suit as prayed for with costs. Aggrieved by the same, the defendants have preferred an appeal in A.S.No.50 of 1996 on the file of the Sub-Judge, Uthagamandalam. The learned Sub-Judge by the judgment dated 27.03.1998, has dismissed the said appeal with costs confirming the judgment and decree of the trial Court. Feeling aggrieved, the defendants have preferred the present second appeal.

4. For the sake of convenience, the parties are referred to as described before the trial Court.

5. The averments made in the plaint are, in brief, as follows:

a) The first plaintiff N.K.Kariamala maistry had purchased a land measuring about 2.39 acres of property situated in R.S.No.312/7 of Sholur Village under a registered sale deed dated 02.04.1947. Ever since the said sale, the said N.K.Kariamala maistry had been in exclusive possession and enjoyment of the extent purchased by him under the sale deed till his death on 04.04.1986 and thereafter, the plaintiffs 2 to 4 are in possession and enjoyment of the said properties. On the southern and eastern side of the property situated in R.S.No.312/7, the land belongs to the Government is situated in R.S.No.315/1. The deceased N.K.kariamala maistry, at the time of purchasing the property situated in R.S.No.312/7, also got into possession of two plots of lands measuring 11.5 cents and 21.5 cents respectively in R.S.No.315/1 adjoining the public road on the eastern side of the aforesaid patta land.

b) Ever since the year 1947, the said N.K.Karimala maistry had been in exclusive possession and enjoyment of the said two plots of land which are situated in R.S.No.315/1 in his own



right. In the plot measuring about 11.05 cents, the said N.K.Kariamala maistry put up a car shed in the year 1948 itself. Further, he had planted seven bluegum trees and the said trees are now over 35 years old. In the other plot measuring about 21.05 cents, the said N.K.Kariamala maistry had been enjoying the same by dumping the waste from his eucalyptus distillery and that portion was also used by him as his kitchen garden. There are clear marks of enjoyment of the said N.K.Kariamala maistry on the ground which will be clear even from a casual inspection of the two plots of lands. There is also fencing erected by the said N.K.Kariamala maistry. The said possession and enjoyment has all along been open, exclusive, and to the full knowledge of the Government Authorities and the public. Thus, by such continuous and uninterrupted, open, exclusive and hostile possession for over 38 years, the said N.K.Kariamala maistry acquired the said two plots of land by prescription and by adverse possession and enjoyment. As a matter of fact, the possession of the said N.K.Kariamala maistry has also been accepted by the officials of the State Government by issuing a certificate on 01.03.1985.

c). That being so, of late, the Forest Range officer, North Range Division, Uthagamandalam, working under the second defendant was threatening that the said N.K.Kariamala maistry has encroached the Government land and he should vacate the same immediately. Hence, the said N.K.Kariamala maistry had sent a lawyer's notice dated 19.10.1985 under Section 80 of C.P.C to the defendants. The first defendant has received the said notice on 24.10.1985 and second defendant received the same on 22.10.1985. After receipt of the said notice, the defendants did not send any reply. Hence, the said N.K.Kariamala maistry was constrained to file the above suit for the aforesaid reliefs. During pendency of the above suit, the said N.K.Kariamala maistry died and hence, his legal representatives have been impleaded as plaintiffs 2 to 4.

6. The averments made in the written statement filed by the second defendant and adopted by the first defendant are in brief as follows:-

a) The suit property is a reserved forest. The allegation that the deceased N.K.Kariamala maistry got into possession of the suit property in the year 1947 is false. The said N.K.Kariamala maistry had encroached the suit property only about three years back. The same was detected in the surprise inspection. The alleged car shed was not constructed in the year 1948. The bluegum trees belong to the State of Tamil Nadu. The defendants are not admitting the correctness of the age of the trees. The eucalyptus distillery is only three years old.

b) The contention of the plaintiffs that they have been in open and exclusive possession of suit property and have acquired



title by prescription and adverse possession are all denied. The defendants suspected that the certificate issued by the Government Officer is not a genuine one. The plaintiffs have not acquired any title whatsoever. The notice which was sent under Section 80 C.P.C. has been suitably replied. The plaintiffs are bent upon grabbing the property putting into deliberate misrepresentations and therefore, they prayed to dismiss the suit.

7. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the fourth plaintiff was examined as PW1. They have marked Exs.A1 to A4 as exhibits. On the side of the defendants, one witness was examined as DW1. They have not marked any exhibits on their side. Advocate Commissioner's report has been marked as Ex.C1.

8. The learned District Munsif, after considering the materials placed before him found that the plaintiffs have proved that they have perfected title by adverse possession over the suit property. Accordingly, he decreed the suit as prayed for with costs.

9. Aggrieved by the same, the defendants have filed an appeal in A.S.No.50 of 1996 on the file of the Sub-Judge, Uthagamandalam. The learned Sub-Judge has dismissed the said appeal with costs confirming the judgment and decree passed by the trial Court. As against the same, the defendants have filed the present second appeal.

10. This Court, at that time of admitting the second appeal has formulated the following substantial questions of law :-

(a) Whether the lower appellate Court is correct in finding that Section -5 of Tamil Nadu Forest Act will not apply to the present case?

(b) Whether the lower appellate Court is correct in not applying Section 101 of Indian Evidence Act, 1872 ?

(c) Whether the lower appellate Court is correct in not applying the provisions of Forest (Conservation) Act, 1980 in a perspective manner ?

11. Heard Mr.M.Santhanaraman, learned Additional Government Pleader (Forest) for the appellants and Mr.K.A.Ramakrishnan, the learned counsel for the respondents 4 and 5. Respondents 3 and 6 were set ex-parte.

12. The Substantial question of law (a):-

The learned Additional Government Pleader has submitted that in view of the Section 5 of the TamilNadu Forest



Act, 1882, (herein after referred to as the Act) Civil Court is not having jurisdiction to entertain the above suit.

13. Section 5 of the TamilNadu Forest Act, 1882, reads thus:-

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'5 Suits barred:- Except as hereinafter provided no Civil Court shall, between the dates of the publication of the notification under Section 4 and the notification to be issued under Section 16, entertain any suit to establish any right in or over any land or to the forest produce of any land, included in the notification published under Section 4.'

14. As per Section 4 of the Act, whenever it is proposed to constitute any land a reserved forest, the Government shall publish a notification in the Official Gazette specifying such land and declaring that it is proposed to constitute such land a reserved forest. As per Section 16 of the Act, the Government has to publish a final notifications declaring Forest reserved. In between the dates of the aforesaid notification, as per Section 5 of the Act, no Civil Court shall entertain any suit to establish any right in or over any land which are included in the Section 4 notification. But in this case there is no such situation. Hence, Section 5 of the Act will have no relevance to the facts of this case. Accordingly this substantial question of law is answered.

15. The Substantial question of law (c):-

The learned Additional Government Pleader has submitted that as per Section 2 of the Forest (Conservation) Act, 1980, no forest land can be used for any non-forest purpose.

16. Section 2 of the Forest (Conservation) Act, 1980 reads as follows:-

'2. Restriction on the reservation of forests or use of forest land for non-forest purpose:- Notwithstanding anything contained in any other law for the time being in force in a state, no state Government or other authority shall make except with the prior approval of the Central Government, any order directing.

(i) that any reserved forest (within the meaning of the expression, 'reserved forest' in any law for the time being in force in that state) or any portion thereof, shall cease to be reserved.

(ii) that any forest land or any portion



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thereof may be used for any non-forest purpose.

(iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to authority, corporation, agency or any other organization not owned, managed or controlled by Government;

(iv) that any forest land or any person thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for deforestation.'

Explanation:- For the purpose of this Section 'non-forest' purpose means breaking up or clearing of any forest land or portion thereof for-

(a) the cultivation of tea, coffee, spices, rubber, palms, oil rearing plants, horticultural crops or medicinal plants;

(b) any purpose other than re afforestation but does not include any work relating to or ancillary to conservation, development and management of forests and wild life, namely, the establishment of check posts, fire lines, wireless, communications and construction of fencing, bridges and culverts, dams, water holds, trench marks, boundary marks, pipelines or other like purposes.'

17. A plain reading of the aforesaid provision clearly shows that no state Government or other authority shall make any order, except with the prior approval of the Central Government, directing that any forest land or any portion thereof may be used for any non-forest purpose. In this case, the state Government or the Forest Department has not passed any order directing that any forest land or any portion thereof be used for any non-forest purpose. Therefore, the aforesaid provision also will have no relevance to the facts of this case. Accordingly, this Substantial question of law is answered.

18. The Substantial question of law (b):-

The learned Additional Government Pleader has submitted that the Courts below failed to consider that the plaintiffs have not proved that they have perfected title over the suit property by adverse possession. He further submitted that the Courts below shifted the burden on the defendants that they have failed to prove their case. He further submitted that since the plaintiffs claimed title over the suit property by adverse possession, the burden is upon them to prove their case, but the Courts below erred in holding that the defendants have not



proved their case. He further submitted that the Courts below erred in holding that since the defendants failed to send reply to Section 80 C.P.C. notice an adverse inference has to be drawn. He further submitted that merely because the defendants had failed to send reply to the Section 80 C.P.C. notice, it cannot be presumed that the defendants have admitted the plaintiff's case and therefore, he prayed to allow the second appeal and dismiss the plaintiff's suit.

19. Per contra, the learned counsel for the respondents 4 and 5 has submitted that the trial court, after considering the materials placed before it found that the plaintiffs have been in possession and enjoyment of the suit property for more than 38 years with the knowledge of the defendants and thereby plaintiffs have perfected title over the suit property and the same has been confirmed by the first appellate Court and in the said factual concurrent findings, this Court cannot be interfere. He further submitted that the Advocate Commissioner's report clearly shows that the car shed was aged about more than 40 years and blue gum trees which are grown in the suit property are aged about more than 35 years. The aforesaid facts would show that the deceased N.K.Kariamala maistry and other plaintiffs have been in exclusive possession, openly and continuously over the statutory period with the knowledge of the defendants. He further submitted that the defendants admittedly did not send any reply to Section 80 C.P.C. notice and hence, the Trial Court has rightly drawn adverse inference against the defendants and accordingly, decreed the suit as prayed for and the first appellate Court has confirmed the same and therefore he prayed to dismiss the second appeal.

20. The case of the plaintiffs is that the first plaintiff viz., Mr.N.K.Kariamala maistry had purchased a property measuring about in 2.39 acres situated in (Ex.A1) R.S.No.312/7 of Sholur Village under the registered sale deed dated 02.04.1947 and at the time of purchasing the said property, he also got possession of the suit properties and from that date onwards, he had been in possession and enjoyment of the suit properties as his own properties and thereby perfected title over the suit properties by adverse possession.

21. The defendants have not denied the fact that the first plaintiff Mr.N.K.Kariamala maistry had purchased the land measuring about 2.39 acres situated in R.S.No.312/7 of Sholur Village under the Ex.A1 sale deed dated 02.04.1947. They also not disputed the fact that the said Mr.N.K.Kariamala maistry had been in possession of the suit properties. However, they denied the allegation that the said Mr.N.K.Kariamala maistry got possession of the suit properties in the year 1947 itself and also denied the allegation that the said N.K.Kariamala maistry had perfected title over the said property by adverse possession.



22. At this juncture, it would be relevant to refer to the decision in Ramachandran vs. Valliammal, 1992 - I MLJ 1888 wherein, this Court has held in paragraph No.22 as follows:-

"The Burden is clearly on the portion who set up adverse possession, after the advent of Limitation Act, 1963. Under Art. 65 of the said Limitation Act, the burden is on the persons who set up adverse possession to prove that they have prescribed title by adverse possession"

23. Since in this case, the plaintiffs claimed adverse possession, in view of the aforesaid decision, the burden is upon them to prove that they have perfected title by adverse possession. In this case, the plaintiffs have not produced any documentary evidence to show that they have been in possession of the suit properties from the year 1947. Ex.A1 is the sale deed dated 02.04.1947 and that document is relating to the plaintiffs' patta land which is situated in R.S.No.312/7. From the said document, it cannot be presumed that the first plaintiff got possession of the suit properties also along with the properties purchased by him under the said sale deed. Ex.A2 is the copy of the Section 80 C.P.C. notice dated 19.10.1985. Exs.A3 and A4, are the postal acknowledgments. From these documents also, it cannot be presumed that the first plaintiff got possession of the suit properties in the year 1947 itself.

24. Apart from these documents, the plaintiffs have relied upon the Advocate Commissioner's report. The Advocate Commissioner has stated in his report that he has inspected the suit properties on 04.03.1995 and that he found an old car shed, aged about 40 years, in the suit property. He also stated that he has found blue gum trees in the suit properties aged about 45 years. It is not known on what basis the Advocate Commissioner has fixed the age of the car shed and blue gum trees. He is not a scientific expert to say about the age of the car shed and trees. He has not stated that he has availed services of any scientific expert to ascertain the age of the car shed and blue gum trees. Under the said circumstances, his opinion with regard to the age of the car shed and blue gum trees cannot be accepted.

25. This Court, after referring to various decisions of the Hon'ble Supreme Court and of this Court in K.Gopalan (died) and others Vs. Muthulakshmi, 2011(6) CTC 21 has held as follows:-

"Therefore, as per the law laid down by the Hon'ble Supreme Court and our High Court that long possession will not become adverse possession and a duty is cast upon the person, who claims adverse possession to prove that his possession became adverse to the knowledge of the true



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owner and the person was enjoying the property with the knowledge that he was not owner and others were the owners and he was enjoying the property to the knowledge of such other person.''

26. From the aforesaid decision, it is clear that mere long possession will not become adverse possession. A duty is cast upon the person, who claims adverse possession to prove that his possession became adverse to the knowledge of the true owner. In this case, absolutely there is no evidence that the first plaintiff was in possession of the suit property with the knowledge of the defendants over the statutory period. So, in view of the aforesaid decision, it has to be held that the plaintiffs have failed to establish their plea of adverse possession.

27. The Courts below found that the DW1 has stated in his evidence that in their office records, it has been mentioned that only in the year 1984 the said N.K.Kariamala maistry had occupied the suit property, but in order to prove the same, the defendants failed to produce the said records and hence an adverse inference has to be drawn against them.

28. In this context, it would be relevant to refer to the decision in Union of India Vs Ibrahim Uddin & Anr (Civil Appeal No.1374 of 2008 dated 17.07.2002) wherein the Hon'ble Supreme Court in para 16 has observed as follows:-

"16. Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot lose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of



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Section 114 under which admission can be presumed." In AIR 1955 NUC (Mad.) 3939, it was held as under:

"The law in the Republic of India will not oblige the man who receives an absurd and vexatious notice to reply to it, and will not conclude from the mere fact of non-reply an admission of the truth of the allegation that he had by instructing his advocate to put questions to a witness defaming the sender of the notice."

In it was held at para 7 as under:

"It was pointed out that the plaintiff given notice to the defendant claiming rent at the rate of Rs. 4/- per ton per month and there was no protest on behalf of the defendant and, therefore, it must be taken that there was an implied agreement between the parties that rent would be paid at that rate i.e., at the rate of Rs. 2,400/- p.m. We do not think there is any warrant for this submission. Merely because the plaintiff had claimed storage charges at the rate of Rs. 4/-per ton per month and there was silence on the part of defendant, it cannot be deemed that there was acquiescence on the part of the defendant and there was an implied undertaking on his part to pay godown rent at that rate."

10. Even the Queen Bench of England in 1891 (2) Q.B. 534 between Wiedemann v. Walpole held at 537 as under:

"The question for us is whether, according to law, the fact of the defendant not answering the letters could be taken as any evidence of corroborating required by the statute."

At page 538 it was held as under:

"A man might day by day write such letter, which, if they are not answered would be brought forward as evidence of the truth of the charges made in them. The ordinary and wise practice is not to answer them to take no notice of them. Unless it is made out to be ordinary practice of mankind to answer. I cannot see that not answering is any evidence that the person who receives such letters admits the truth of the statements contained in them. I have, therefore, no doubt that the mere fact of not answering a letter stating that the person to whom it is written has made a promise of marriage is no evidence whatever of any admission and that he did make the promise and therefore no evidence in corroboration



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of the promises."

Then again at page 539 it was held as under:

"It would be a monstrous thing if the mere fact of not answering a letter which charges a man with some misconduct was held to be evidence of an admission by him that he had been guilty of it."

11. From the above discussion, it makes clear that the admission has to be spelled out only from the positive acts on the part of the party, but cannot be culled out or cannot be based on any presumptions. The exchange of notices would only at the most constitute a demand and refusal in writing, but the absence thereof would not either way constitute an admission. Even failure to issue a notice cannot be said to be an absence of demand nor the failure to reply to such notice would amount to an admission of the claim made in the notice. Such omission would not amount to a tacit consent in respect of the demanded liability...''

33. From the aforesaid decision, it is clear that the silence or non - issuance of the reply notice cannot be termed to be admission under Section.17 of the Evidence Act. Further it is clear that the exchange of notices would only at the most constitute a demand and refusal in writing, but, the absence there of would not either way constitute an admission.

34. It may also be relevant to refer to the decision in Salem Advocate Bar Association, Tamil nadu Vs. Union of India, AIR 2005 SC 3353 wherein, a three Judges Bench of the Hon'ble Supreme Court has observed in paragraph Nos.40 and 41 as follows:

"40.Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two months period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the governments or departments or



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other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

41. These provisions cast an implied duty on all concerned governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him."

35. In the aforesaid decision, the Hon'ble Supreme Court has observed the object of issuing notice under Section 80 CPC. Further it insisted that the Government or Department or other statutory bodies are bound to send reply to the Section 80 CPC



notice. It also observed that the replies shall be sent after due application of mind and if the court finds that either notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the court shall ordinarily award heavy costs against the Government and directed it to take appropriate action against the concerned officer which includes recovery of cost from him. The said directions are prospective in nature. But, even in the said decision, the Hon'ble Supreme Court has not held that merely because reply was not sent to the notice u/s.80 CPC, an adverse inference can be drawn against the Government. So, merely because the Government Officials have not sent reply to the Section 80 CPC notice, no adverse inference can be drawn against the Government and it cannot be presumed that it has admitted the plaintiff's case. Therefore, the findings of the Courts below are against the settled position of law and they are liable to be set aside.

36. It is also to be pointed out that admittedly, the plaintiffs are in settled possession of the suit property. In such a case, they can be evicted only by due process of law. The defendants can evict the plaintiffs by following the procedure prescribed under the law. Till then the plaintiffs are entitled for the relief of injunction. Accordingly, this substantial question of law is answered.

37. In the result, the second appeal is partly allowed. Consequently, connected miscellaneous petition is closed. The judgment and decree passed by the Courts below are modified as follows:-

(i) That the defendants are restrained by means of permanent injunction from dispossessing the plaintiffs from the suit property except under due process of law;

(ii) and that the parties are directed to bear their own costs.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

msrm

To

1. The Sub Court, Uthagamandalam.
2. The District Munsif Court,
Uthagamandalam.



3. The Collector of Nilgiris,
The Government of Tamil Nadu,
Ootacamund.

4. The District Forest Officer,
Nilgiris North Division,
Uthagamandalam.

5. The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to Mr.K.A.Ramakrishnan, Advocate, S.R.No. 56689

+1cc to the Special Government Pleader(Forest), S.R.No.56538

S.A. No.181of 1999
and
CMP.No.2702 of 1999

RJI (CO)
GN(20/11/2018)