

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on: 16.07.2018

Judgment Pronounced on: 28.09.2018

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Tr. Civil Suit No.381 of 2012
and
Civil Suit No.960 of 2009

Tr.C.S.No.381 of 2012

T.S.Narayanan

... Plaintiff

-Versus-

1.T.R.Subbaraman

2.Bank of Baroda,
ARM Branch,
Rep. by its Branch Manager,
No.1, Club House Road,
Mount Road,
Chennai 600002.

3.K.Ravikumar

... Defendants

Tr.Civil Suit No.381 of 2012:- Suit filed under Order IV, Rule 1 of the Madras High Court [Original Side] Rules, 1956 r/w order VII Rule 1 of the Code of Civil Procedure, 1908 praying for a judgement and decree against the defendants for partition of the suit property by metes and bounds and allotment of one half share to the plaintiff;

for permanent injunction restraining the defendants, their men, agents and anybody and everybody claiming through or under them from in any manner interfering with the plaintiff's right, share, interest and possession over the suit property.

C.S.No.960 of 2009

- 1.K.Ravikumar
- 2.CH.Dhanumjaya Rao
- 3.CH.Lalithakumari

..... Plaintiffs

-versus-

- 1.T.S.Narayanan
- 2.T.R.Subbaraman
- 3.Bank of Baroda,
A.R.M. Branch,
Rep. by Branch Manager,
No.1, Club House Road,
Mount Road, Chennai 600 002.

..... Defendants

Civil Suit No.960 of 2009:- Suit filed under Order IV, Rule 1 of the Madras High Court [Original Side] Rules, 1956 r/w order VII Rule 1 of the Code of Civil Procedure, 1908 praying for a judgement and decree against the defendants (i) declaring that the plaintiffs 2 and 3 are the absolute owners of the suit property bearing Plot No.165, having old No.8, New No.15, Saraswathy Street, Mahalingapuram, Nungambakkam, Chennai 600035 ad measuring 2060 square feet more fully set out in the suit schedule; (ii) consequentially directing the defendants 1 and 2 to quit and deliver vacant possession of the

suit property to the plaintiffs 2 and 3; (iii) directing the defendants to pay to the plaintiffs a sum of Rs.9,00,000/- (Rupees Nine Lakhs only) towards past damages from 15.10.2006 upto 14.10.2009 at the rate of Rs.25,000/- per month and also pay future damages at the same rate from the date of plaint till date of delivery of vacant possession of the suit property in its entirety to the plaintiffs 2 and 3; and for costs of the suit.

*For Plaintiff in : Mr.P.L.Narayanan
Tr.C.S.No.381 of 2012
and 1st Defendant in
C.S.No.960 of 2009*

*For 3rd Defendant in : Mr.M.Balasubramanian
Tr.C.S.No.381 of 2012
and plaintiffs in
C.S.No.960 of 2009*

*1st Defendant in : Set ex parte
Tr.C.S.No.381 of 2012
and 2nd defendant in
C.S.No.960 of 2009*

*2nd defendant in : Set ex parte
Tr.C.S.No.381 of 2012
and 3rd defendant in
C.S.No.960 of 2009*

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COMMON JUDGEMENT**Tr.C.S.No.381 of 2012:**

This is a suit for partition and allotment of plaintiff half share in the suit property and for permanent injunction restraining the defendant from in any manner interfering with the peaceful possession of the plaintiff in the suit property and for costs.

2. The above said suit was originally filed before this court on 15.03.2004 and numbered as C.S.No.261 of 2004. Subsequently, on account of amendment regarding pecuniary jurisdiction the suit was transferred to City Civil Court, Chennai where it was renumbered as O.S.No.11920 of 2010 and was pending before the Additional District, Fast Track Court-II, Chennai. Thereafter, the suit was again transferred to this court and re-numbered as Tr.C.S.No.381 of 2012.

3. **The case of the plaintiff in brief is as follows:-** The plaintiff is the co-owner of the suit property. The suit property belongs to the Hindu Undivided Family (HUF) consisting of the plaintiff and his father, the 1st defendant. The suit property was

originally purchased by the plaintiff's paternal grand father late T.S.Ramanathan by utilizing the income derived from the agricultural operations in the lands belonged to the HUF by way of a registered sale deed dated 20.04.1961. The plaintiff's paternal grand father was a landlord in Thiruchenthurai and owned number of ancestral properties in the form a agricultural lands. Those agricultural properties were always treated as properties of HUF comprising of the plaintiff's grand father and the father of the plaintiff, the 1st defendant herein. The income derived through such agricultural lands were held by the plaintiff's grand father as Kartha of he HUF.

4. In the year 1961, the grand father of the plaintiff shifted his residence to Chennai and purchased the suit property from the income derived from the HUF agricultural properties at Thiruchendurai. For the shortfall, he took loans from his relatives. He had subsequently discharged the loans from out of the funds received by leasing out the agricultural properties in Thiruchendurai. The plaintiff was born on 13.07.1977 and he became a co-parcener of the HUF. Thus, the plaintiff acquired right in the property by

birth. The suit property has always been treated as HUF property which is a dwelling house of the family members.

5. While so, on 19.10.1977, the plaintiff's grand father died intestate and no partition of the HUF property was effected during the life time of his grand father. After the death of his grand father, the property has been owned, held and enjoyed by the HUF consisting of the plaintiff and his father, the 1st defendant. Subsequently, the plaintiff's grand mother-Mrs.Kalyani Ammal also died on 04.05.1987. At the time of the plaintiff's grand father's death, the plaintiff was an infant and was about three months old. As the plaintiff's father, the 1st defendant was leading extravagant life without caring about the family, the plaintiff's grand father wanted to give away his share in the HUF properties including his share in the suit property to the plaintiff. But, the grant father of the plaintiff died suddenly due to ailment and therefore, he could not make any arrangement to settle his share in favour of the plaintiff. This, the plaintiff came to know from the elders in the family. Subsequently, on attaining the majority, the plaintiff sought for partition in the suit property. Therefore, in the year 1997, there was a family

arrangement and a oral partition was effected in the presence of one Mr.V.Srinivsan and one Mr.V.Seshagiri, the eldest members of the plaintiff's family.

6. In the above oral partition, a portion in the first floor of the building measuring about 600 square feet and the right side portion in the ground floor of the suit property measuring about 400 square feet came to be allotted to the plaintiff towards his half share in the property and the 1st defendant was allotted the left side portion in the ground floor towards his half share. The 1st defendant was all along enjoying the plaintiff's share but was contributing nothing to the welfare of the plaintiff. Further the plaintiff's mother was given life interest in the left side portion in the ground floor allotted to the 1st defendant and it was also agreed that the 1st defendant and plaintiff's mother shall continue to be in the joint possession of the property. Ever since the oral partition, the plaintiff has been in possession and enjoyment of the portion allotted to him as the absolute owner. The suit property being the only dwelling house of the HUF, has been in the joint possession of the plaintiff, the 1st defendant and the mother of the plaintiff. The rental income from the

upstairs and from right side portion in the ground floor have been received and enjoyed by the plaintiff. However, the property tax assessment and the electricity service connection in respect of suit property till date stand in the name of the plaintiff's grand father.

7. In the month of September, 2003, the plaintiff came to know through a paper publication that the suit property was about to bring up for sale in public auction by the Debt Recovery Tribunal [DRT-II] Chennai . On verification, the plaintiff was informed of the fact that the property was brought for auction by the 2nd defendant claiming to be the mortgagee of the property and that the 1st defendant seems to have created mortgage in favour of the 2nd defendant over the suit property and also guaranteed the borrowings of a third party, later suffered a decree. Immediately, the plaintiff filed an objection before the Recovery Officer, DRT-II, Chennai seeking to set aside the order of attachment in respect of the plaintiff's half share in the suit property. In his objection, he had explained that he was entitled for half share in the suit property since the suit property is the ancestral property and an oral partition had already been effected. But, without considering the objection and without giving

an opportunity to the plaintiff to present his case, the Recovery Officer, rejected the objection petition filed by the plaintiff. Meanwhile, the property was auctioned. The 3rd defendant, who was one of the bidders at the public auction sale, had purchased the property in question. Now, the 3rd defendant, the auction purchaser of the suit property is trying to take possession of the entire property including the portion allotted to the plaintiff in the oral partition and the auction sale cannot bind the plaintiff's half share. The 3rd defendant cannot have better right or title than what the 1st defendant has in the suit property. The suit property is the only dwelling house of the plaintiff and his family. Therefore, the plaintiff has the right of pre-emption to buy the other half share of the 1st defendant in the dwelling house. He did not have an opportunity to exercise his right of pre-emption as the auction sale was conducted in respect of the entire suit property even when the objection filed by him was pending before the Recovery Officer. He is willing to exercise his right of pre-emption to buy the half share of the 1st defendant in the dwelling house. Therefore, reserving his right of pre-emption, the plaintiff has come up with this suit for partition and separate possession of plaintiff's half share in the suit property

and for permanent injunction.

8. The 1st defendant filed his written statement contending that the suit property was purchased by his father by utilizing the income derived from agricultural land and the suit property has always been treated as HUF property. He, however, denied the allegation that he was leading an extravagant way of life without caring for the family. He further contended that his father late T.S.Ramanathan was the Kartha of the HUF consisting of himself, his father and his son, the plaintiff herein. His father died on 19.10.1977 and until his death, no partition of HUF properties were effected. The plaintiff was born on 13.07.1977 and he became a co-parcener of HUF. After the death of his father, the suit properties have been owned and enjoyed by himself and the plaintiff as co-parceners. The further submitted that the plaintiff is entitled to half share in the suit property and due to difference of opinion between himself and the plaintiff, the suit has been filed for partition. He is always ready and willing for partition of the suit property.

9. The 2nd defendant filed his written statement contending

that the 1st defendant stood as surety for the loan availed by one Mrs.Sidwin Builders and had deposited the title deeds relating to the suit property and created equitable mortgage in favour of the 2nd defendant bank. The builders who availed the loan did not repay the loan amount regularly and therefore, the bank initiated proceedings in O.A.No.188 of 21997 before the Debt Recovery Tribunal, at Chennai and the same was decreed on 07.11.2000 against the 1st defendant and others for recovery of a sum of Rs.1,93,08,448.65 paise together with interest and cost. By the said decree, the defendants were permitted to sell the mortgage property to realize the decree amount. A Recovery Certificate was also issued by the DRT, Chennai on 09.12.2002 authorizing the Recovery Officer of DRT, Chennai to proceed against the mortgaged property and to sell the same in public auction for realization of the decree amount. The Recovery Officer of Debt Recovery Tribunal, on 30.01.2003, passed an order of attachment. On 14.09.2003, the authorized officer issued a publication in the news paper to the effect that the auction sale would be held on 22.10.2003. The 3rd defendant had purchased the property in auction. The Recovery Officer confirmed the same and had also issued sale certificate to the 3rd defendant. Subsequently,

the possession of the property was also delivered to the 3rd defendant. Now, the 3rd defendant has become the owner of the suit property.

10. The 2nd defendant further contended that the plaintiff and the 1st defendant ceased to be the owners of the property and they have no right, title or interest over the suit property. The suit as framed by the plaintiff itself is not maintainable and the same is liable to be dismissed in limine.

11. The 3rd defendant filed his written statement contending that he had participated in the public auction held on 22.10.2003 in execution of the decree dated 09.12.2002 in O.A.No.386 of 2002 before the Debt Recovery Tribunal, Chennai and became the successful bidder and the sale was confirmed by the Debt Recovery Tribunal on 24.11.2003. Thereafter, sale certificate was also issued to the 3rd defendant on 06.02.2004. In the said circumstances, the suit for partition is not at all maintainable in law and on facts. The present suit is a collusive action between the plaintiff and his father, the 1st defendant herein with an ulterior motive to defeat the decree

passed by the lawfully constituted Tribunal under the Recovery of Debts due to Banks and Financial Institution Act, 1993. Therefore, the suit for partition by the plaintiff is not at all maintainable. The oral partition as claimed by the plaintiff was not at all pleaded anywhere prior to the filing of the present suit and it was for the first time such a plea has been raised. Earlier, the plaintiff along with his mother filed an objection before the Recovery Officer, Debt Recovery Tribunal, Chennai, wherein they alleged that there was a family arrangement among them and further stated that the mother of the plaintiff was given a right of residence till her life time along with the share of the 1st defendant. No where in the objection the plaintiff made a reference about the alleged oral partition.

12. The 3rd defendant further contended that on 05.03.2004, the plaintiff had addressed a letter to him wherein, it has been mentioned by the plaintiff that he is the co-owner of the suit property and has been residing therein in his own capacity and that he cannot be evicted. In the said circumstances, the oral partition now pleaded by the plaintiff is only an after thought. The objection petition filed by the plaintiff and his mother before the Recovery Officer, Debt

Recovery Tribunal had been rejected and as against the same, the plaintiff has got right of appeal under Section 31 of the Act, but, he had not availed of such opportunity. Therefore, the plaintiff cannot maintain the present suit. That apart, according to the 3rd defendant, the plaintiff has given an undertaking letter to the 2nd defendant bank to settle the dues and therefore, now, it is not open to him to say that he has nothing to do with the borrowing of the 1st defendant and he is having separate half share in the suit property as per the oral partition. In the earlier proceedings, the plaintiff did not say anything about the alleged oral partition. He introduced such a plea for the first time before this court and the plaintiff is disentitled to claim for partition under Section 41(i) of the Specific Relief Act. There is no cause of action to maintain the present suit. It is only a collusive suit with false and frivolous allegations. If really any oral partition was effected, he should have filed a suit for declaration based on the oral partition allegedly effected in the year 1997 as valid and binding on the parties and he cannot maintain the suit for partition and separate possession of his half share in the suit property without seeking the relief for setting aside the partition. Therefore, the present suit is not maintainable. It is further

contended by the 3rd defendant that he was the successful bidder in the auction sale and he had invested a huge amount of Rs.23,30,000/- The sale was confirmed and subsequently, sale certificate was also issued in favour of the 3rd defendant. The auction was conducted properly after giving due publication. The court fee was not properly paid on the plaint. For all the above stated reasons, according to 3rd defendant, the suit is liable to be dismissed.

13. In this suit, though the 2nd defendant and the 3rd defendant entered appearance through their respective counsel and filed their written statements, they did not choose to prosecute further. The 2nd defendant and the 3rd defendant did not participate in the trial.

C.S.No.96 of 2009

14. This suit is for declaration that the plaintiffs are the absolute owners of the suit property and for a consequential direction to the defendants 1 and 2 to quit and deliver the vacant possession of the suit property to the plaintiffs 2 and 3; and for recovery of Rs.9,00,000/- towards past damages from 15.10.2006 to

14.10.2009 at the rate of Rs.25,000/- and future damages at the same rate from the date of plaint till date of handing over of vacant possession in its entirety and also for costs of the suit.

15. The case of the plaintiffs in brief is as follows: The suit property originally belonged to the 2nd defendant. He had created an equitable mortgage in favour of the 3rd defendant bank on behalf of one M/s.Sidwin Builders and others and had handed over the title deeds relating to the suit property to the bank. Due to non payment of loan amount, the 3rd defendant filed a recovery proceedings in O.A.No.188 of 1997 before the Debt Recovery Tribunal-II at Chennai for recovery of a sum of Rs.1,93,08,448.65. The 2nd defendant contested the above recovery proceedings contending that he inherited the mortgaged property from his father and he is having only half share in the suit property, however, executed the equitable mortgage in respect of the entire property in favour of the bank as absolute owner. After having rejected the contention of the 2nd defendant, the tribunal had passed a decree on 07.11.2000 against the 2nd defendant. As against the decree passed by the Tribunal, no appeal was preferred by the defendants and the decree had reached

a finality. Thereafter, the Tribunal issued a recovery certificate on 09.12.2002 to proceed against the suit property and sell the same in public auction. Thereafter, the Recovery Officer passed an order of attachment on 31.01.2003 and had also issued a public auction notice. At the time, the 1st defendant along with his mother as third party to the proceedings filed their objection before the Debt Recovery Tribunal claiming that the property in question is ancestral property and the 2nd defendant had no right to mortgage the entire property, as such the entire property could not be auctioned and they sought to raise the attachment. The Recovery Officer, however, dismissed the objection petition filed by the 1st defendant and his mother by order dated 21.11.2003. Neither the 1st defendant nor his mother had chosen to challenge the above said order, therefore, the said order has become final. Subsequently, the auction was conducted, in which, the 1st plaintiff became the successful bidder for Rs.23,30,000/-. Thereafter, a sale certificate was issued in his favour which got registered in the Office of the Sub Registrar, Thousand Lights, Chennai. In the month of March, 2004, one of the tenants filed an application before the Debt Recovery Tribunal-II, Chennai claiming that they were in possession of the suit property as

lessee in respect of the first floor of the suit property under the 2nd defendant. The Recovery Officer issued notice to the defendants 1 and 2 to handover the vacant possession of the suit property. Thereafter, the 1st defendant filed a collusive suit against his father , the 2nd defendant and the 1st plaintiff seeking partition and separate possession of his half share in the suit property and obtained an order of injunction.

16. The further case of the plaintiff is that, in the said suit, the 1st defendant has claimed that there was an oral partition in the family in the year 1997 and in the oral partition, he was allotted with 600 square feet in the first floor and 400 square feet in the right side portion in the ground floor and the possession of the same were also handed over to him. But, the 1st defendant had raised such an objection for the first time in the suit filed for partition. He had not stated anything about the oral partition at the earliest point of time. Since the 1st plaintiff was having some financial commitments, he sold the suit property in favour of the defendants 2 and 3 by way of a registered sale deed dated 15.10.2007. Being the present registered title holders, the plaintiffs 2 and 3 also joined in the suit to assert

their right, title and interest over the suit property.

17. The plaintiffs further stated that when a decree was passed by the legally constituted Tribunal and that decree had also reached its finality, without seeking a prayer for setting aside the decree or instrument of sale or preferring appeal as against the order of the Recovery Officer rejecting the objection petition of the 1st defendant and his mother, it is not open to the 1st defendant to institute the present suit for partition. As per Section 31 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 there is an appeal remedy available as against the order of the Recovery Officer rejecting the objection petition filed by the 1st respondent. The 1st defendant filed a suit and obtained an order of interim injunction. Even as per the pleadings of the 1st defendant, he is bound to hand over the possession of the remaining half share in the property but, both the son and the father, who are the defendants 1 and 2 have been squatting in the entire property and they have been enjoying the rental income. The plaintiffs estimate the rental income at the rate of Rs.30,000/- per month as the property is situated in posh locality at Mahalingapuram in Chennai. The plaintiffs, however,

confine their claim to three years from 15.10.2006 to 15.10.2009 which comes to Rs.10,08,000/- which the plaintiffs are entitled to recovery from the defendants. The plaintiffs are also entitled for future damages at the same rate till such time the possession of the suit property is handed over to them. The plaintiffs however claimed past damages at the rate of Rs.25,000/- for the period of three years prior to the date of plaint and future damages at the same rate and paid necessary court fees. Since the 1st defendant filed a suit for partition in collusion with the 2nd defendant, the plaintiffs are constrained to file the present suit for declaration that they are the absolute owners of the suit properties and for a consequential direction for possession and for damages.

18. The 1st defendant filed his detailed written statement and the contentions in the written statement are almost verbatim same as in the plaint in Tr.O.S.No.381 of 2012 and as such they need not be reiterated any further.

19. It is seen from the court records that the 3rd defendant neither appeared in person nor represented by a counsel despite

service of summons on 19.01.2010 and therefore, the 3rd defendant was set ex parte by this court on 04.11.2016. The 2nd defendant was served with the summons of the suit on 07.01.2010. The 2nd defendant though entered appearance in the other suit which was filed by his son, in this suit, he neither entered appearance nor did he choose to retain the counsel who appeared for him in the other suit. Therefore, by order dated 22.12.2016, the 2nd defendant was also set ex parte. Thus, the 1st defendant is the only contesting party in C.S.No.960 of 2009.

20. The plaintiff in Tr.C.S.No.381 of 2012 is the 1st defendant in C.S.No.960 of 2009. The suit in C.S.No.381 of 2012 has been filed for partition and separate possession and for permanent injunction. The father of the plaintiff in Tr.C.S.No.381 of 2012 is the 1st defendant in Tr.C.S.No.381 of 2012 and the 2nd defendant in C.S.No.96 of 2009; the Bank at the instance of whom the property was brought for auction is the 2nd defendant in Tr.C.S.No.381 of 2012 and the 3rd defendant in C.S.No.960 of 2009; the auction purchaser of the suit property is the 3rd defendant in Tr.C.S.No.381 of 2012. The 3rd defendant sold the property to the plaintiffs 2 and

3 in C.S.No.960 of 2009. Therefore, the 3rd defendant in C.S.No.960 of 2009 filed the suit for declaration, possession and for past and future damages along with the subsequent purchasers.

21. Upon considering the fact that the parties in the suit are almost common and the issues involved in both the suits are identical and related to each other, this court, by order dated 22.12.2016, directed for a joint trial and the evidence was directed to be recorded in Tr.C.S.No.381 of 2012.

22. This court upon perusing the pleadings of either party, framed the following issues for joint trial:

(1) Whether the plaintiff is entitled to partition of one half share in the suit property?

(2) Whether the suit is maintainable after the auction sale of the suit property by the 2nd defendant in Tr.C.S.No.381 of 2012?

(3) Whether the defendants are the absolute owners of the suit property?

(4) Whether the plaintiff has to vacate and

deliver vacant possession of the suit property?

(5) Whether the plaintiff is liable to pay a sum of Rs.9 lakhs towards past damages as sought in C.S.No.960 of 2009?

(6) To what other reliefs the parties are entitled to?

23. During trial, the plaintiff in Tr.C.S.No.381 of 2012 led evidence as P.W.1 and Ex.P.1 to Ex.P.27 were marked on his side and on the side of the defendants, 2nd plaintiff in C.S.No.960 of 2009 examined himself as D.W.1 and Ex.D1 to Ex.D.7 were marked.

24. For the sake of convenience, the parties in the suits will hereinafter be referred to as per their array in Tr.C.S.No.381 of 2012 and insofar as the plaintiffs 2 and 3 in C.S.No.960 of 2009 are concerned, as they are not parties in the other suit, they will be referred as plaintiffs 2 and 3.

25. The suit in Tr.C.S.No.381 of 2012 has been filed for partition and separate possession. The Issue No.2 relates to the

maintainability of the suit in Tr.C.S.No.381 of 2012. The defendants challenge the maintainability of the suit on the ground that already the auction sale process was over and the 3rd defendant who had succeeded in the bid was also issued with the sale certificate. If this question is answered against the plaintiff, nothing further survives in the suit in Tr.C.S.No.381 of 2012 for consideration and this court would be required to answer only the issues involved in the other suit in C.S.No.960 of 2012. Therefore, it would be appropriate for this court to take up the 2nd issue first.

Issue No.2:-

26. In order to deal with the question as to the maintainability of the suit, it has to be noted that the plaintiff has made a specific averment that the suit property was purchased by his grand father and the substantial amount for the purchase of the same was from and out of the agricultural income from the properties belonged to the HUF composed of by his grand father and his father, the 1st defendant. The short fall amount for the purchase of the suit property was mobilized by his grand father through loan by leasing out the agricultural property of the HUF. Therefore, according to the

plaintiff, the suit property is a HUF property. Admittedly, the 1st defendant created equitable mortgage over the entire suit property in favour of the 2nd defendant bank and lost the property to the mortgagee for the unpaid loan amount.

27. The 1st defendant who is the father of the plaintiff though filed his written statement sailing with the plaintiff, he did not take part in the trial and he remained ex parte. The 2nd defendant bank denied the allegation that the suit property belonged to the HUF originally comprised of by the grand father of the plaintiff and the father of the plaintiff, subsequently, the plaintiff and his father became the members of the HUF. The 2nd defendant bank, however, remained ex parte during trial. Thus, the only contesting party is the 3rd defendant who had purchased the property through auction sale held by the Debt Recovery Tribunal. The 3rd defendant specifically denied the averments in the plaint with regard to the character of the property.

28. This court do not want to venture into the character of the property under this issue at this stage and the same would be dealt

with later at the appropriate stage in this judgement. For a limited purpose of deciding the issue as to the maintainability of the suit, the pleadings of the respective party have been set out hereinabove.

29. The learned counsel for the 3rd defendant would submit that the 1st defendant created equitable mortgage in respect of the suit property in favour of the 2nd defendant and the property was brought for sale for recovery of the amount due on the mortgage. The 3rd defendant had participated in the auction sale and became the successful bidder for Rs.23,30,000/-. The objection filed by the plaintiff along with his mother claiming to be the co-owner of the suit property was considered and rejected by the Recovery Officer, Debt Recovery Tribunal, Chennai. The plaintiff did not file any appeal as against the order of the Recovery Officer of the DRT. According to the learned counsel, after the auction, the sale got completed and the sale was confirmed and a sale certificate was also issued in favour of the 3rd defendant. The 3rd defendant having lost the recourse to appeal against the order of the Recovery Officer has come up with this collusive suit for partition and the suit is therefore, not all maintainable.

30. Per contra, the learned counsel for the plaintiff would submit that the remedy by way of an appeal provided under Section 30 of the Act would not oust the jurisdiction of the Civil Court in entertaining a Civil Suit as provided under Rule 11 (6) of the Second Schedule to the Income Tax Act. The plaintiff has got right to file a suit to establish his right over the property in question and the plaintiff need not appeal against the order of the Recovery Officer. Therefore, according to the learned counsel, the suit is maintainable.

31. Before considering the rival submissions, it is useful to refer the relevant provision in the Income Tax Act. Rule 11(6) of the Second Schedule to The Income Tax Act reads as follows:

"(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

32. The learned counsel for the plaintiff to support his contention placed reliance on the judgement in **Rajaganapathy**

Ganesan v. Union of India, 2011(6) CTC 306 wherein this court has held that the order of the Recovery Officer shall be conclusive, however, subject to the result of the suit. In the same judgement, this court has further held that under Rule 11(6) of the Second Schedule to the Income Tax Act, the suit is maintainable. The relevant portion of the judgement is reproduced hereunder:-

"14. In the instant case, the appellant has not challenged the order of the Tax Recovery Officer made on his claim in respect of the property in question. As I have already stated, the said order of the Tax Recovery Officer shall be conclusive , however, subject to the result of the suit. The suit has been filed only to establish his right over the property. Such suit is certainly not barred by the Act. As a matter of fact, as I have already stated, such suit has been provided for under Rule 11(6) of Second Schedule of the Income Tax Act. Therefore, in my considered opinion, the suit filed by the appellant is certainly maintainable."

33. In **Hill Properties Limited v. Union of India, 2009 (111) BOML 4550 : Manu/MH/1221/2009**, the Bombay High Court has held that the remedy of appeal provided under Section 30

of the Act would not oust the jurisdiction of the Civil Court in entertaining a civil suit as provided under Rule 11(6) of the Second Schedule to The Income Tax Act. The relevant paragraphs of the judgement read as follows:-

"31. It will, therefore, not be possible to hold that inspite of the specific provision of Rule 11(6) of the Second Schedule to the Income Tax Act, the jurisdiction of the Civil Court is expressly or impliedly barred. That would be rendering the Rule 11 otiose. Such a construction is not possible. When the Act itself has provided a remedy, that remedy cannot be defeated by an interpretative process that renders the statutory remedy otiose.

32. In our opinion considering the discussion in none of the three Judgments which have been considered, this Court has taken the view that the jurisdiction of the Civil Court is impliedly or expressly barred. The judgments of the Courts are not to be interpreted like a statute. The ratio has to be culled out from the facts and what was in issue. What has to be considered is the ratio of the judgment. It is, therefore, not possible to accept the contention that on the consideration of the judgments this Court has taken a view that the jurisdiction of the Court is expressly or impliedly

barred.

33. In that context the question referred to for our consideration may now be answered.

(i) Question No.1 would have to be answered in the affirmative. The remedy of an Appeal provided under Section 30 would not oust the jurisdiction of the Civil Court in entertaining a Civil Suit as provided under Rule 11 (6) of the Second Schedule to the I.T. Act."

34. Admittedly when the property in question was brought for sale by the Recovery Officer, the plaintiff made an objection claiming right over the suit property based on an oral partition and the mother of the plaintiff also joined him. According to the plaintiff his mother was having a right of residence during her life time along with the share of the 1st defendant. The objection of the plaintiff was rejected by the Recovery Officer. Under Section 30 of the Act, there is an appeal remedy for the plaintiff, but, he did not avail such recourse and instead he has come up with the present suit. As per the provisions in the Income Tax Act, the order of the Recovery Officer shall be conclusive, however, subject to the result of the suit. In the light of the above said legal position, the plaintiff who has

been aggrieved by the order of the Recovery Officer will have a right to file a suit for establishment of his right over the suit property. The instant suit has been filed by the plaintiff only to establish his right over the property and therefore, the instant suit is certainly not barred. Therefore, the suit in Tr.C.S.No.381 of 2012 for partition and other reliefs is certainly maintainable. This issue is answered accordingly in favour of the plaintiff.

Issue Nos.1:

35. The case of the plaintiff is that the suit property belonged to the HUF which was comprised of his grand father-T.S.Ramanathan and his father, the 1st defendant and the same was purchased by the grand father of the plaintiff in his name on 20.04.1961. Ex.D.2 is the registered Sale Deed standing in the name of the grand father dated 20.04.1961. Ex.P.1 is the certified copy of the registered sale deed of Ex.D.2. According to the plaintiff, his grand father was having ancestral properties at Thiruchendurai. Those agricultural properties were treated as properties of HUF consisting of his grand father and his father, the 1st defendant. The income derived through the agricultural operations in the ancestral properties were held by his

grand father as Kartha of HUF. It is the further case of the plaintiff that subsequently his grand father had shifted his residence to Chennai and purchased the suit property from out of the income derived from the HUF agricultural properties at Thiruchendurai. His grand father had also obtained loan for the short fall which was subsequently discharged by him by leasing out the agricultural properties of HUF at Tiruchendurai.

36. It is the further case of the plaintiff that he was born on 13.07.1977 and he has become the coparcener of HUF and he has acquired right in the property by birth. Subsequent to the birth of the plaintiff, the grand father of the plaintiff died intestate on 19.10.1977. Ex.P.13 is the death certificate of the grand father of the plaintiff. The grand mother of the plaintiff also died on 04.05.1987 and Ex.P.14 is her death certificate. The plaintiff pleaded in the plaint that after the death of his grand father, his father, the 1st defendant and the plaintiff enjoyed the HUF property. At the time of death of the grand father of the plaintiff, the plaintiff was a minor and was aged about 3 months and after attaining majority in the year 1997, according to the plaintiff, there was a family arrangement and

an oral partition was effected. In the oral partition, the first floor of the building measuring about 600 square feet and the ground floor of the suit property measuring 400 square feet came to be allotted to his half share and the 1st defendant was allotted the left side portion in the ground floor towards his half share. Further, according to the plaintiff, ever since the oral partition, the plaintiff is in possession and enjoyment of the property allotted to him. Thus, by virtue of the said oral partition, he became absolute owner of half share in the suit property.

37. The learned counsel appearing for the plaintiff submitted that the plaintiff has specifically pleading in the plaint that the suit property was purchased form out of the joint family nucleus and that it has the character of joint family property. Further, according to the learned counsel, the plaintiff, being a coparcener, inherits a share in the joint family property the moment he is born and since the plaintiff in this case was born during the life time of his grandfather, he has become the coparcener and is entitled to one half share in the suit property.

38. The learned counsel for the plaintiff submitted that when the plaintiff has specifically pleaded in the plaint that the suit property was purchased by the grand father of the plaintiff from out of the income of the joint family nucleus, therefore, it was was the joint family property and the same have not been specifically denied by the 3rd respondent which amounts to admission on the part of the 3rd defendant. The above contention of the learned counsel for the plaintiff cannot be countenanced for the simple reason that initial burden is upon the plaintiff to prove that the suit suit property was purchased from out of the joint family nucleus and it is a joint family property and if the plaintiff was able to raise such initial burden with substantial evidence, the burden would shift to the defendants to establish that the suit property was the self acquired property of the grand father of the plaintiff. The Hon'ble Supreme court in **Appalaswami v. Suryanarayanamurti, 1947 (2) MLJ 138**, the Privy Council has held as follows-

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"The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone

asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

39. In the instant case, the plaintiff exhibited Ex.P.2 to Ex.P.5 and Ex.P.7 to Ex.P.12 Lease Notes. They were in favour of the grand father of the plaintiff executed by different individuals on various dates. Ex.P.6 is the Bond dated 25.06.1972 allegedly executed by one M.Pitchai in favour of the grand father of the plaintiff. They were all unregistered and the signature of the grand father was not found in some of the lease notes and no one witnessed the execution of some of the lease notes. Further, it is the settled law that mere marking of document is no proof of its contents and the person marking the same is required to prove the truth, validity and the contents of the documents and also its genuineness. When it was suggested to P.W.1, the plaintiff, during cross examination that they

were all unregistered and were created for the purpose of this suit, he simply denied the suggestion. It is the settled law that a person who claims that the property was purchased from out of joint family nucleus has to establish not only the existence of the ancestral nucleus, but the joint family has sufficient means to purchase the property as well. But, in the instant case, the plaintiff failed to prove that HUF had any joint family property at Tiruchendurai and the documents exhibited by him did not conclusively establish the same. The plaintiff has failed to establish that his grand father owned ancestral properties at Tiruchendurai and there were income derived from the same through agricultural operations and the grand father during his life time treated the suit property as belonged to the HUF. Except the oral evidence of the plaintiff as P.W.1, he did not produce any other material to establish his claim. It is trite law that pleading is no evidence, far less proof. Therefore, the plea of the plaintiff that the suit property was the property of HUF and thus, he acquired right over the same by birth cannot be countenanced. Worse all, the plaintiff himself pleaded in the plaint that his father was leading an extravagant life when the grandfather of the plaintiff was alive. Admittedly, the suit property was standing in the name of the grand

father of the plaintiff and he was working in Railways and got retired in the late 1960's. Hence, it could be construed that he was the absolute owner of the property and after his demise, the 1st defendant (his son) became the absolute owner of the suit property and, therefore, it cannot be said it is the joint family property of Hindu Family consisting of the plaintiff and his father, the 1st defendant herein as alleged by the plaintiff. Thus, this court is of the view that the plaintiff has miserably failed to raise the initial burden and therefore, he cannot take umbrage on account of non denial in the written statement filed by the 3rd defendant.

40. When this court found that the suit property was the absolute property of the 1st defendant, it is not necessary for this court to consider the question as to whether there was any oral partition as alleged by the plaintiff. Thus, this court is of the view that the suit property was the self acquired property of the father of the 1st defendant and the grand father of the plaintiff and after the demise of the father, the 1st defendant became the absolute owner of the same and the suit property is not available for partition as claimed by the plaintiff. The entire averments regarding the

character of the suit property and the oral partition have all been invented by the plaintiff for the first time only for the purpose of the instant suit. The contention of the learned counsel for the 3rd defendant that this is a collusive suit between the plaintiff and the 1st defendant cannot be simply brushed aside. Therefore, this court holds that plaintiff is not entitled for partition in the suit property and this issue is answered accordingly against the plaintiff.

Issue No.3:

41. As already discussed above, the suit property was the absolute property of the father of the 1st defendant and the grandfather of the plaintiff and after his demise, the 1st defendant became the absolute owner of the same by inheritance. It is not disputed either by the plaintiff or the 1st defendant that the property was mortgaged by the 1st defendant with the 2nd defendant bank in a loan transaction. The loan was not repaid and therefore, the 2nd defendant bank initiated recovery proceedings in O.A.No.188 of 1997 before the Debt Recovery Tribunal-II, Chennai. The Debt Recovery Tribunal passed a decree on 07.11.2000 against the 1st defendant and others. Ex.P.20 is the Order passed by the Debt

Recovery Tribunal in O.A.No.188 of 1997. Pursuant to the decree, the property was attached by the Recovery Officer. Ex.P.21 is the copy of the order of attachment passed by the recover officer on 30.01.2003. Thereafter, as per Ex.P.22 Auction Notice, the Recovery Officer had brought suit property for sale and the same was sold in public auction to satisfy the decree against the 1st defendant and others. Therefore, the 1st defendant lost his property to the bank.

42. Admittedly, the 3rd defendant had participated in the public auction and became the successful bidder for Rs.23,30,000/- and the sale was confirmed in his favour. Ex.P.1 is the sale certificate issued in the name of the 3rd defendant. Subsequently, the 3rd defendant in Tr.C.S.No.381 of 2012, sold the property to the plaintiffs 2 and 3 in C.S.No.960 of 2009 for valuable considerations under Ex.D.6 Registered Sale Deed vide Doc.No.25 of 2007 dated 15.10.2007. As already held under Issue No.1 the The objection filed by the plaintiff claiming right over the suit property was considered and rejected by the Recovery Officer under Ex.D.4. Admittedly, the plaintiff did not challenge the order under Ex.D.4 and instead, he has come up with the instant suit asserting his right over the suit property. Under

Issue No.1 this court held that the plaintiff is not entitled for partition and in the above circumstances, the order of the Recovery Officer rejecting the objection of the plaintiff has become final. Therefore, the 1st defendant in Tr.C.S.No.381 of 2012 sold the property to the plaintiffs 2 and 3 in C.S.No.960 of 2009. Therefore, now, the plaintiffs 2 and 3 in C.S.No.960 of 2009 are the absolute owners of the suit property and they are entitled for a declaratory relief as prayed. This issue is answered accordingly in favour of the plaintiffs in C.S.No.960 of 2009.

Issue No.4:

43. As already concluded, the property was purchased by the 1st defendant in the auction sale conducted by the Debt Recovery Tribunal. Ex.25 is the certified copy of the order of the DRT requiring the 1st defendant to vacate the property. Admittedly, the physical possession of the suit property is with the plaintiff and the 1st defendant and they have been arrayed as defendants 1 and 2 respective in Civil Suit No.960 of 2009 and pursuant to the orders of the Debt Recovery Tribunal, the 1st defendant and the plaintiff in Tr.C.S.No.381 of 2012 were bound to handover the possession of the

suit property. In the mean time, the plaintiff filed his objection claiming right over the suit property which was considered and rejected by the Recovery Officer. Thereafter, the Recovery Officer, DRT-II, Chennai, under Ex.P.25 order dated 17.02.2014 required the 1st defendant to hand over the possession by 05.03.2004 to the 3rd defendant. But, the 1st defendant did not do so. The plaintiff was were aware of the proceedings before the Debt Recovery Tribunal. In fact, the plaintiff on 05.03.2004 addressed a letter to the 3rd respondent requesting him to desist himself from taking possession of the property and has come up with the suit for partition. He has also sent a letter to the Recovery Officer-I, DRT-II, Chennai, requesting him not to take any action for taking possession and expressing his willingness to appear for enquiry as required by the tribunal. Till date they are in possession and enjoyment of the suit property. By virtue of sale certificate and the subsequent orders passed by the Debt Recovery Tribunal, the plaintiff and the 1st defendant in Tr.C.S.No.380 of 2012 are liable to handover the vacant possession of the suit property to the plaintiffs in C.S.No.960 of 2009. This issue is also answered accordingly against the plaintiff in Tr.C.S.No.381 of 2012.

Issue No.5:

44. In view of the findings given against the plaintiff under Issue Nos.1, 3 and 4, the plaintiff and the 1st defendant are in unlawful occupation in the suit property after the eviction notice under Ex.P.25. For the use and occupation of the suit property, the plaintiff and the 1st defendant are liable to pay damages from 15.10.2006 till date of handing over of vacant possession as the plaintiffs in C.S.NO.960 of 2009 have claimed damages only from 15.10.2006.

45. Coming to the quantum of damages, the plaintiffs in C.S.No.960 of 2009 claimed damages at the rate of Rs.25,000/- per month. D.W.1 in his chief examination by way of proof affidavit has stated that for the unlawful use and occupation, the defendant 1 and 2 are liable to pay damages. Except their oral evidence, there is no other evidence available and the plaintiffs failed prove the market value and the annual rental value for the suit property by adducing appropriate oral and documentary evidence. The plaintiffs did not explain as to how they quantified the damages @ Rs.25,000/- per month. In the absence of any such evidence, the plaintiffs 2 and 3

are not entitled for damages as claimed by them. However, it is not in dispute that the suit property is situate at a posh locality of Chennai City and the constructions in the suit property were put up way back in 1961 or 1962. Considering the age of the building and the other facts and circumstances of the case, this court is of the view that the plaintiffs 2 and 3 would be entitled to damages at the rate of Rs.5,000/- per month from each of the defendants namely, defendants 1 and 2 in C.S.No.960 of 2009 for three years prior to the filing of the suit and future damages at the same rate from the date of plaint till date of handing over possession to the plaintiffs 2 and 3.

Issue No.6:

46. In view of the foregoing discussions, the plaintiff in Tr.C.S.NO.381 of 2012 is not entitled for any relief and the suit filed by him is liable to be dismissed with costs. Insofar as the suit in C.S.No.960 of 2009 is concerned, the plaintiffs therein are entitled for a declaratory decree and for a consequential direction for possession. They are also entitled for past and future damages as indicated under Issue No.5 and also for costs of the suit.

47. **In the result, (i)** The suit in Tr.C.S.NO.381 of 2012 is dismissed with cost.

(ii) The suit in C.S.NO.960 of 2009 is decreed in part with costs. The plaintiffs 2 and 3 are hereby declared as absolute owners of the suit property and the defendants 1 and 2 are directed to handover the vacant possession to the plaintiffs 2 and 3. The defendants 1 and 2 are further directed to pay a sum of Rs.5,000/- each per month as past damages from 15.10.2006 till 14.10.2009 and future damages at the rate of Rs.5,000/- each per month from 15.10.2009 to till date of handing over vacant possession of the suit property. Time for possession six months.

28.09.2018

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Witnesses on the side of the plaintiff:

P.W.1 - Thiru.T.S.Narayan (Plaintiff)

Witnesses on the side of the defendants:

D.W.1 Thiru.CH. Dhanum Jaya Rao (2nd defendant)

Documents on the side of the plaintiff:

- | | | |
|---------|------------|--|
| Ex.P.1 | 20.04.1961 | Certified copy of the sale deed in favour of T.S.Ramanathan |
| Ex.P.2 | 03.07.1963 | Original Lease Note by Marimuthu in favour of T.S.Ramanathan |
| Ex.P.3 | 07.06.1970 | Original Lease Note by Perumal in favour of T.S.Ramanathan (series) |
| Ex.P.4 | 07.06.1970 | Original Lease Note by M.Pitchaiah in favour of T.S.Ramanathan |
| Ex.P.5 | 25.06.1972 | Original Lease Note by Perumal in favour of T.S.Ramanathan |
| Ex.P.6 | 25.06.1972 | Original Bond by M.Pitchaiah in favour of T.S.Ramanathan |
| Ex.P.7 | 06.06.1973 | Original Lease Note by Perumal in favour of T.S.Ramanathan |
| Ex.P.8 | 06.06.1973 | Original Lease Note by M.Pitchaiah in favour of T.S.Ramanathan |
| Ex.P.9 | 06.06.1974 | Original Lease Note by Perumal in favour of T.S.Ramanathan |
| Ex.P.10 | 06.06.1974 | Original Lease Note by Pitchaiah in favour of T.S.Ramanathan |
| Ex.P.11 | 04.06.1975 | Original Lease Note by Perumal in favour of T.S.Ramanathan |
| Ex.P.12 | 29.01.1978 | Original Lease Note by Perumal and Pitchaiah in favour of T.S.Ramanathan |

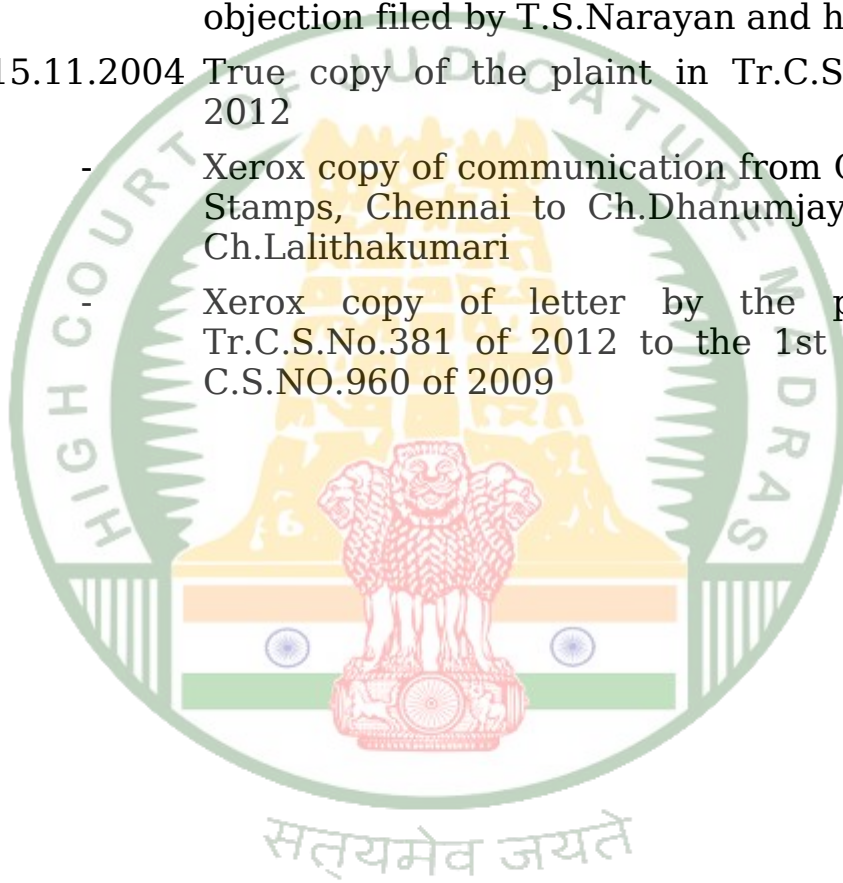
- Ex.P.13 28.10.1977 Copy of the death certificate of T.S.Ramanathan
- Ex.P.14 29.05.1987 Copy of death certificate of Mrs.Kalyani Ammal
- Ex.P.15 03.07.2002 Original Tenancy Agreement
- Ex.P.16 04.02.2004 Original Bank Statement for the period from 01.07.2002 to 04.02.2004
- Ex.P.17 - Original TNEB card
- Ex.P.18 01.10.2003 Copy of property tax demand card
- Ex.P.19 01.10.2003 Original property tax receipt
- Ex.P.20 07.11.2000 Coy of the order passed by the Debt Recovery Tribunal-II, Chennai in O.A.NO.188 of 1997
- Ex.P.21 30.01.2003 Copy of the order of attachment passed by the Recovery Officer, DRT-II, Chennai.
- Ex.P.22 14.09.2003 Original Auction Notice published in daily news paper
- Ex.P.23 - Copy of the objection petition filed by the plaintiff along with his mother before the Recovery Officer, DRT-II, Chennai
- Ex.P.24 21.01.2003 Certified copy of the order passed by the Debt Recovery Tribunal-II, Chennai on the objection made by the plaintiff and his mother
- Ex.P.25 17.02.2004 Certified copy of the order issued by the Recovery Officer, DRT-II, Chennai requiring the father of the plaintiff to vacate the property in question
- Ex.P.26 05.03.2004 Copy of the Letter addressed to K.Ravikumar by the plaintiff
- Ex.P.27 05.03.2004 Copy of the Letter addressed to The REcovery Officer, DRT-II, Chennai

Documents on the side of the defendants:

- Ex.D.1 06.02.2004 Original Sale Certificate issued in favour of K.Ravikumar by DRT

- Ex.D.2 20.04.1961 Original Sale Deed in favour of
T.S.Ramanathan by M.L.M.Mahalingam
Chettiar
- Ex.D.3 09.02.1982 Original Patta in the name of Kalyaniammal
dated 09.02.1982
- Ex.D.4 21.01.2003 Xerox copy of the order passed by the
Recovery Officer, DRT-II, Chennai and the
objection filed by T.S.Narayan and his mother
- Ex.D.5 15.11.2004 True copy of the plaint in Tr.C.S.No.381 of
2012
- Ex.D.6 - Xerox copy of communication from Collector of
Stamps, Chennai to Ch.Dhanumjaya Rao and
Ch.Lalithakumari
- Ex.D.7 - Xerox copy of letter by the plaintiff in
Tr.C.S.No.381 of 2012 to the 1st plaintiff in
C.S.NO.960 of 2009

V.B.D.J.
28.09.2018



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V.BHARATHIDASAN.J.,

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Pre delivery
Common Judgment
in
Tr. Civil Suit No.381 of 2012
and
Civil Suit No.960 of 2009

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