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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.03.2018
PRONOUNCED ON : 12.04.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.48 of 2004

N.Ramachandra Naidu ... Appellant/Respondent/
Plaintiff
Vs.
E.Bakthavatchala Naidu ... Respondent/Appellant/
Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 31.07.2002 passed in A.S.No.48 of 2000 on the file of the Principal District Judge, Chengalpattu reversing the judgment and decree dated 31.01.2000 passed in O.S.No.492 of 1993 on the file of Subordinate Judge, Poonamallee.

For Appellant : Mr.R.Venkata Varadhan
for M/s. L.S.M.Hasan Fizal
For Respondent : Mr.Srinath Sridevan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 31.07.2002, passed in A.S.No.48 of 2000, on the file of the Principal District Court, Chengalpattu, reversing the judgment and decree dated 31.01.2000, passed in O.S.No.492 of 1993, on the file of Subordinate Court, Poonamallee.

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

3. Suit has been laid by the plaintiff to pass a decree and judgment directing the defendant to pay Rs.46,000/- and to have the sale deed which the plaintiff is always ready and willing to execute in his favour or in the alternative, direct the defendant to receive Rs.3,000/- from the plaintiff and to execute and register the sale deed in favour of the plaintiff in respect of the site of the suit property set out in the plaint schedule.

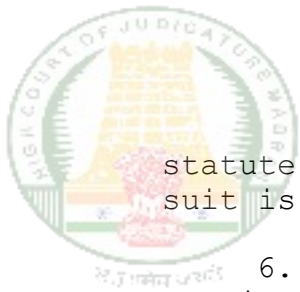
4. The case of the plaintiff, in brief, is that he is the absolute owner of the house and house site described in the plaint schedule and in the year 1984, the defendant negotiated to purchase the suit property for a sum of Rs.24,500/- and the defendant requested the plaintiff to execute the sale deed only



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in respect of the site for Rs.1,500/- and orally agreed to pay the value of the superstructure at a later stage and to have a separate sale deed for the same and believing the words of the defendant, the plaintiff also executed a sale deed in his favour in respect of the site only for Rs.1,500/- on 03.12.1984 and thereafter, the plaintiff had been requesting the defendant on several occasions to pay the balance sale consideration of Rs.23,000/- and to have a sale deed for the superstructure, but the defendant was evading the same on one pretext or the other and further, according to the plaintiff, the defendant with the aid of the police secured by coercion, compulsion and other third degree methods, a promissory note as if the same was executed by the plaintiff in his favour for a sum of Rs.15,000/- and the plaintiff also repudiated the execution of the abovesaid promissory note by sending a notice and to the same, the defendant sent a reply containing false allegations and even thereafter, the defendant chose to prefer a suit against the plaintiff in O.S.No.110/90, on the file of the Sub Court, Poonamallee, for the recovery of money on the basis of the alleged promissory note and the said suit, after contest, came to be dismissed and as the defendant agreed to purchase the superstructure for Rs.23,000/- and however, had not come forward to do so and as the price of the properties had increased manifold, the plaintiff demanded the defendant to pay a reasonable amount of Rs.46,000/- for the superstructure, or else, the plaintiff expressed his willing to pay Rs.3,000/- to the defendant, being the value of the site and in this connection, issued notice on 25.12.92 and to the same, the defendant sent a reply containing false allegations and the allegation that there was no building on the site on the date of the sale is false and there was a building in the site and the same cannot be disputed by the defendant and the defendant has also made a false claim as if the building was put up by him subsequently by giving a low value of the building purposefully and as the defendant had refused to accede to the demands made by the plaintiff in the notice, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts and the plaintiff is not the owner of the superstructure standing on the suit site on the date of the suit and the superstructure on the suit site is owned by the defendant and it is only the defendant, who had constructed the superstructure and on the date of the sale by the plaintiff to the defendant, the present superstructure was not in existence and the defendant denies that he had entered into a contract to purchase the superstructure now available in the suit property and the defendant never agreed to pay Rs.46,000/- as the price for the superstructure and in any event, the suit claim is barred by limitation and the plaintiff is not entitled either to the main relief or to the alternative relief sought for and the claim made by the plaintiff are neither based on contract nor on



statute and there is no cause of action for the suit and the suit is liable to be dismissed.

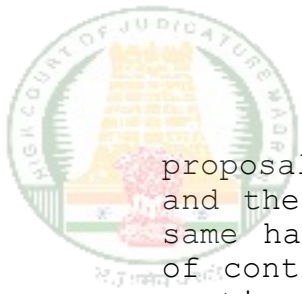
6. In support of the plaintiff's case PWS1 to 5 were examined, Exs.A1 to A13 were marked. On the side of the defendant DW1 was examined, Exs.B1 to B6 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to accept the plaintiff's case and accordingly granted the decree in favour of the plaintiff. The first appellate Court, on an appreciation of the materials placed on record, was pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendant, dismissed the suit laid by the plaintiff. Aggrieved over the same, the present second appeal has been preferred.

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

1. Whether an oral contract can be proved by surrounding circumstances and the statement of witnesses?
2. Whether in all cases there must be a post facto written reference to the existence of an oral agreement in order to prove its existence?
3. Whether the transfer or a site will necessarily transfer the superstructure built over it even when there is a contract to the contrary?
4. Whether the non reply to a legal notice amounts to estoppel by acquiescence?
5. Can there not be an oral agreement with reference to sale of a superstructure?
6. Whether tax receipts and receipts for payment of electricity tariff do not raise a presumption in favour of the occupant?
7. Whether non-production of vital evidence raise a presumption of adverse inference against the person bound to adduce such evidence?

9. The plaintiff has pleaded that the defendant negotiated with him to purchase the house and the house site set out in the plaint schedule property for a sum of Rs.24,500/-in the year 1984 and the same has been repudiated by the defendant. The plaintiff has not whispered as to on which date the



proposal/offer was made by the defendant to purchase the site and the superstructure for a sum of Rs.24,500/- and whether the same had been accepted by the plaintiff and what are the terms of contract with reference to the same as agreed to between the parties and with reference to the above said details of the agreement/contract, no materials are forth coming on the part of the plaintiff either in the plaint or during the course of evidence. Very vaguely the plaintiff has come forward with the case that the defendant negotiated with him for the purchase of the plaint schedule property consisting of the superstructure as well as the site for a sum of Rs.24,500/- in the year 1984. As above seen, the same has been strongly disputed by the defendant. Even PW4, who has been examined on behalf of the plaintiff, though would claim that he was present when the plaintiff and the defendant negotiated for the purchase of the suit property for a sum of Rs.24,500/- however, would admit that at the time of the sale transaction, he was not available. Further, he would also admit that he is not aware that whether they had endeavoured to record their agreement in writing and further, according to him, he had not seen any document in connection with the same. It is thus found that on the basis of the abovesaid vague and unclear evidence of PW4, we cannot safely come to the conclusion that the plaintiff and the defendant had negotiated as regards the sale of the suit property in the year 1984 for a sum of Rs.24,500/- as putforth by the plaintiff. In this connection, the evidence of the plaintiff, with reference to the same is far from satisfactory and not appealing. The plaintiff examined as PW1 would only state very vaguely that the defendant agreed to purchase the suit property for a sum of Rs.24,500/- in the year 1984, however, did not come forward to complete the sale. PW1 has not tendered evidence as to on what date the defendant came forward to negotiate with him for the sale of the suit property and apart from the sale consideration, what were the other terms of the negotiation agreed to between the parties concerned, particularly, when the same should be completed, the mode of payment, as to whether any advance sum has been paid or whether the parties had agreed to exchange the price amount within a particular date or time and as to the other terms of the contract agreed to between the parties in connection with the same etc., It is found that neither in the pleadings nor during the course of evidence, details had been putforth by the plaintiff and particularly, when the above said basic case of the plaintiff is repudiated by the defendant in toto, still the plaintiff has not chosen to come forward with a clear case as regards the same. In such view of the matter, the very foundation of the plaintiff's case that the defendant had negotiated with him for the purchase of the suit property comprising of both the site and superstructure for a sum of Rs.24,500/- cannot be readily countenanced.

10. Materials placed on record would go to show that the defendant purchased the site from the plaintiff for a sum of



Rs.1,500/- and in this connection, it is found that the sale deed has come to be executed by the plaintiff in favour of the defendant on 03.12.84 and the copy of the same has been marked as Ex.A1. The plaintiff has admitted the execution of Ex.A1 as regards the site comprised in the suit property. Now, according to the plaintiff, at the time of the execution of Ex.A1, the defendant orally agreed to purchase the superstructure later and accordingly, the plaintiff had executed a sale deed only for the site and thereafter, it is stated by the plaintiff that the defendant had not come forward to purchase the superstructure for the agreed sum of Rs.23,000/- despite several requests of the plaintiff and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs. The abovesaid case of the plaintiff is disputed by the defendant tooth and nail. If really, the parties had agreed to come for the sale of the superstructure as well as the site for a sum of Rs.24,500/- as put forth by the plaintiff, it does not stand to reason as to how come the plaintiff had agreed to execute the sale deed only for the site without the superstructure in favour of the plaintiff. Now, it is the specific case of the defendant, on the date of Ex.A1 sale transaction, the property was only remaining a vacant site and there was no superstructure available on the vacant site at that point of time and accordingly, the plaintiff had conveyed only the vacant site by way of Ex.A1 sale transaction and therefore, it is the specific case of the defendant that the superstructure now available in the said site is not owned by the plaintiff and the same was put up by him and therefore, it is the case of the defendant that the plaintiff's case that the defendant had agreed to purchase both the site as well as the superstructure for a sum of Rs.24,500/- in the year 1984 is false and hence, the suit should fail.

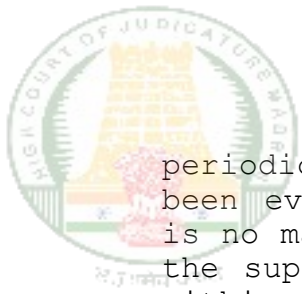
11. The abovesaid defence projected by the defendant seems acceptable. A perusal of Ex.A1 deed would go to show that the same is conveyed only for the vacant site. If really any superstructure had been built up thereto or existed at that point of time, definitely the plaintiff would have only endeavoured to convey both the site as well as the superstructure put up thereto. But when it is found that as per the recitals contained in Ex.A1, particularly, the description of the property comprised therein, only the vacant site is available at that point of time and there is no indication whatsoever in the said document about existence of any superstructure thereto, it is found that accordingly, the plaintiff had conveyed only the vacant site by way of Ex.A1 and in such view of the matter, the case of the plaintiff that the superstructure was available even at that point of time and the defendant agreed to purchase the same later for a sum of Rs.23,000/- as such cannot be accepted when there is no material pointing with reference to the same. As above seen, with reference to the above said case of the plaintiff, as per the plaintiff's case, the agreement between the parties is only oral



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and as above seen, PW4 has admitted that he was not available at the time of when the parties entered into the sale transaction marked as Ex.A1. It is thus found that we have only the interested and ipse dixit testimony of the plaintiff PW1 for sustaining the abovesaid case of the plaintiff.

12. No doubt, the parties are entitled to enter into an oral agreement. That point is not disputed. However, when the plaintiff has come forward with the case on the basis of the oral agreement and the when the said case of the plaintiff is stoutly resisted by the defendant, it is for the plaintiff to establish his case atleast by prima facie materials that there was a superstructure available in the site on the date of Ex.A1 and that the parties had negotiated also for the sale of the superstructure in the year 1984 for a sum of Rs.23,000/- and thereafter, at the time of the execution of Ex.A1, the defendant had orally agreed to purchase the superstructure later for a sum of Rs.23,000/- etc., However, with reference to the abovesaid case of the plaintiff, there is nil material. In this connection, PW1, during the course of cross examination, has deposed that the defendant agreed to purchase the superstructure later and he had informed that he would purchase the superstructure within one week or ten days after the execution of Ex.A1 and there is no written agreement with reference to the purchase of the superstructure between the parties and also no agreement entered into between the parties for fixing the value of the superstructure and further, according to PW1, the parties had agreed to part with the sale consideration on the date of the sale and the parties had not entered into any agreement as to how go ahead with the agreement, in case of the failure of the defendant to come forward to purchase the superstructure within one week or ten days after Ex.A1 and further, according to PW1, as the defendant had failed to come forward to purchase the superstructure within ten days and thereafter though the defendant promised to pay the amount and come for registration without informing any specific date, it is the case of PW1, thereafter, the defendant had been evading the transaction on some pretext or the other and this is the evidence of PW1 as regards his case. If really, the defendant had agreed to purchase the superstructure later orally within 10 days after the execution of Ex.A1 and if the parties had entered into a concluded contract in connection with the same, the parties would have endeavoured a solution as to what should be done in case the defendant fails to come forward with the sale transaction with one week or ten days after the execution of Ex.A1. According to PW1, they had not entered into any written agreement as regards the repurchase of the site by the plaintiff given to the defendant in case of the failure of the defendant to purchase the superstructure after Ex.A1. No plea has been raised in the plaint as regards the same. Further, according to PW1, there is no agreement for the fixation of the price of the superstructure between the parties as such. Further, PW1, would state that though he had been approaching the defendant



periodically, the defendant, for one reason or the other, had been evading to complete the transaction. However, when there is no material to hold that the defendant had agreed to purchase the superstructure later for a sum of Rs.23,000/- particularly, within 10 days from Ex.A1 and when there is no material to hold that the superstructure was available on the site concerned on the date of Ex.A1 and when there is no plea with reference to the reconveyance of the site in the plaint sans proof with reference to the same, it is found that if really there had been such an agreement between the parties concerned, at least on the failure of the defendant to come forward with the said transaction and if really the superstructure was available and had been promised by him, as a prudent person, the plaintiff would have taken all the necessary steps in the manner known to law to proceed against the defendant in connection with the same. However, it is found that no steps thereafter seem to have been taken immediately by the plaintiff for completing the sale transaction by calling upon the defendant by the issuance of legal notice etc., for completing the sale transaction.

13. In this connection, the materials placed on record would go to show that for the first time the plaintiff has whispered about the alleged agreement between the parties to the suit superstructure under Ex.B5, which is a reply sent by the plaintiff to the legal notice issued by the defendant as regards his claim for the amount on the basis of the promissory note above adverted to. In the said reply notice, for the first time the plaintiff has come forward with the case that the defendant promised to pay the value of the superstructure in the suit property by purchasing the same for a sum of Rs.24,500/- inclusive of the site and that he, at the time of Ex.A1, promised to pay the value of the superstructure later and take the sale deed for the same and thereby informed that despite remainders, had resisted the demand of the plaintiff and taken an indifferent attitude and not come forward with the sale transaction. It is found that when Ex.A1 is dated 03.12.1984, nearly five years thereafter by way of the reply notice marked as Ex.B5, for the first time the plaintiff has come forward with the case of the defendant promising to purchase the superstructure also for a sum of Rs.24,500/- and when according to the plaintiff, the defendant had agreed to complete the said sale transaction as regards the superstructure within ten days from the date of Ex.A1 and when further according to the plaintiff, the defendant had not come forward in connection with the same, the plaintiff as a prudent person would have come to the determination at the earliest point of time as regards the defendant's repudiation of the alleged contract and accordingly evinced due interest to complete the sale transaction. In such view of the matter, the plaintiff thereafter, at least immediately after approaching the defendant, on the expiry of the ten days from the date of Ex.A1, noticing his disinclination to complete the sale transaction, should have resorted to the legal remedies in connection with the same and instituted the



necessary lis within the time allowed by law. On the other hand, it is found that the plaintiff has projected the case as regards the same only by way of Ex.B5 and thereafter, sent a legal notice dated 25.12.92 marked as Ex.A2 and the same having been repudiated by the defendant by sending a reply notice marked as Ex.A3, it is found that only subsequent thereafter, the plaintiff has come forward with the present case. It is thus found that even assuming for the sake of arguments, such an agreement had been entered into between the parties concerned, in the light of the total absence of the readiness and willingness on the part of the plaintiff in completing the sale transaction by resorting to the necessary legal redressal, the plaintiff cannot be granted the equitable relief of specific performance sought for in the plaint. That apart, when the plaintiff has been put on notice completely about the refusal of the defendant to come forward with the alleged sale transaction which even the prudent person would have inferred by the refusal of the defendant as regards the same from the inception, as rightly put forth by the defendant, the present suit laid by the plaintiff is found to be barred by time and in such view of the matter, the claim of the plaintiff that he has come to know about the repudiation of the alleged contract by the defendant only during the course of his evidence tendered in O.S.No.110/90 as such cannot be countenanced. When from the conduct of the defendant, any prudent person would have understood his disinclination to go ahead with the alleged sale agreement, it is found that the plaintiff having knowledge about the refusal of the defendant in coming forward to complete the sale transaction, should have laid the suit within the time allowed by law thereafter and inasmuch as the plaintiff has levied the suit very belatedly after the expiry of the time allowed for the same as per law, it is seen that the plaintiff's suit is clearly hit by the law of limitation.

14. As above seen, the defendant has repudiated the claim of the plaintiff that there was a superstructure available on the site at the time of Ex.A1. If really, the superstructure had been available, some reference about the same would have been available in Ex.A1 sale transaction. However, the said sale transaction is found to have been made only with reference to the vacant site. No material worth acceptance has been placed by the plaintiff to show that the superstructure was there in the site on the date of Ex.A1. As rightly determined by the first appellate Court, the documents projected by the plaintiff marked as Exs.A5 to A13 are not shown to be related to the alleged superstructure available in the suit site and in such view matter, no safe reliance could be attached to the same for holding that the superstructure was available on the site at the time of the execution of Ex.A1. Similarly, the oral evidence adduced by the plaintiff's witness as if the superstructure was available for several years in the site by itself cannot be accepted when there is no acceptable and reliable material placed by the plaintiff to sustain the same.



15. Thus, it is seen that the first appellate Court has for valid reasons did not place acceptance upon the documents marked as Exs.A5 to 13 projected for holding that the superstructure was available on the site as alleged by the plaintiff and no interference is called for with reference to the same.

16. As regards the case of the plaintiff for the alternative relief sought for, the plaintiff has not averred in the plaint as to whether any such agreement had been entered into between the parties, whereby the defendant had agreed to reconvey the site back to the plaintiff in case he does not come forward to purchase the superstructure. When it is the testimony of the plaintiff examined as PW1 that the parties had not agreed to any such terms, particularly as to how to go about when the defendant fails to come forward with the purchase of the superstructure within ten days from Ex.A1, it is found that there is no agreement at all between the parties concerned as regards the reconveyance of the site back to the plaintiff in the event of the failure of the defendant to purchase the superstructure as alleged by the plaintiff. It is found that there is no consensus ad idem as regards the alternative relief projected by the plaintiff. Even as regards the main relief sought for, the plaintiff has miserably failed to establish that the parties had negotiated with reference to the same and the defendant had later agreed to purchase the superstructure separately for a sum of Rs.23,000/-.

17. In addition to that, according to the plaintiff, considering the manifold increase in the price of the property, the defendant should complete the purchase of the superstructure for Rs.46,000/- and that in the event of the failure of the same, the defendant should reconvey the site back to the plaintiff for a sum of Rs.3,000/-. However, the abovesaid case of the plaintiff has been put forth for the first time in the legal notice marked as Ex.A2. As regards the agreement between the parties for the abovesaid value of Rs.46,000/-, there is nil material and also there is no plea in the plaint that the defendant had agreed to purchase the superstructure for Rs.46,000/- and in the event of the failure, agreed to reconvey the site for Rs.3,000/-. It is thus found that without any plea or materials the plaintiff has been going on expatiating his case sans foundation with reference to the same. In such view of the matter, it is seen that the plaintiff is unable to place any worthy material to sustain the same. It is found that without any consensus ad idem between the parties for the completion of the main relief for Rs.46,000/- or the alternative relief of Rs.3,000/- as projected, on that score alone, the plaintiff's suit should fail.

18. As above seen, the plaintiff has miserably failed to establish that the superstructure was available on the suit site at the time of the execution of Ex.A1 sale transaction. Now,



according to the defendant, the superstructure available in the site was built up by him. No doubt, the defendant has no material to show that he has built the superstructure. Still, the weakness of the defendant's case cannot be the basis for upholding the plaintiff's lis. The plaintiff's lis having been challenged by the defendant in all aspects vehemently, it is for the plaintiff to sustain his case by putforthing acceptable and reliable materials and cannot be allowed to argue that he should be granted the reliefs on the failure of the defendant to establish his defence version. Now, the defendant has disputed the case of the plaintiff that the superstructure was available in the suit site on the date of Ex.A1. As regards the above case of the plaintiff, there is no acceptable and reliable materials. Ex.A1 sale transaction would go to show that it pertains only to the vacant site. In such view of the matter, it is found that as per Section 8 of the Transfer of Property Act, which deals with the operation of transfer, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof unless a different intention is expressed or necessarily implied. Further, the Section reads that such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer and all things attached to the earth and as to the definition of "attached to the earth" as per Section 3 of the Transfer of Property Act "attached to the earth" means:-

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth , as in the case of walls or buildings; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

19. On a reading of the above said provisions, it is found that even assuming for the sake of arguments that the superstructure was available in the site on the date of Ex.A1, on the execution of Ex.A1, by way of transferring the interest which the plaintiff had in the property, it is found that all that which had been available in the property inclusive of the superstructure if any would pass on to the defendant by way of Ex.A1 in the light of the position of law as adumbrated in the above said provisions contained in Sections 8 and 3 of the Transfer of Property Act. When by way of the transfer, the interest which the transferor had in the property includes all the things attached to the earth, particularly, when the property is pertaining to the land, when as per the definition of "attached to the earth" would also include the buildings or walls imbedded in the earth, even assuming that the plaintiff's case is true and any superstructure was available in the site on the date of Ex.A1, the said interest of the plaintiff had been transferred by way of Ex.A1 sale transaction, in view of the operation of the transfer as contemplated under Section 8 of the



Transfer of Property Act. However, it is contended by the plaintiff's counsel that operation of transfer as contemplated under section 8 of the Transfer of Property Act would apply only in the absence of a different intention expressed or necessarily implied. However, considering the facts and circumstances of the case as projected and the alleged oral agreement between the parties, in the light of the above discussions, it is found that when the plaintiff has failed to establish that an agreement had been really entered into between the parties as pleaded and when it is further noted that no consensus ad idem has been there at all between the parties, both for the main relief and alternative relief as sought for by the plaintiff and further, when there is no material to hold that the superstructure was really available on the date of Ex.A1, to cap it all, when it is further seen that the suit is barred by limitation and coupled with the fact that the plaintiff cannot be extended the discretionary relief of specific performance sans readiness and willingness on his part, it is seen that the first appellate Court, on a proper appreciation of the materials placed on record, both factually and legally, in the right perspective, rightly rejected the plaintiff's case by allowing the appeal preferred by the defendant, also by invoking Section 8 of the Transfer of Property Act. In the light of the abovesaid reasonings, it has to be held that the plaintiff has failed to establish that an oral agreement had been entered into between the parties concerned as regards the purchase of the alleged superstructure in the suit site and though they may not be required to enter into a written agreement as regards the purchase of the properties as such, the plaintiff having failed to establish his plea of oral agreement with reference to the superstructure as putforth and the plaintiff having failed to establish that there existed a superstructure on the date of Ex.A1 and particularly, when the documents projected by the plaintiff are not shown to be related to the alleged superstructure in the suit property, no presumption could be raised on the basis of the same in favour of the plaintiff's case and accordingly the substantial questions of law, though not found to be formulated in the proper manner, are answered against the plaintiff accordingly.

20. For the reasons aforesaid, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS II)

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Sub Assistant Registrar



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To

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1. The Principal District Judge, Chengalpattu.

2. The Subordinate Judge, Poonamallee.

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

+1cc to Mr.Srinath Sridevan, Advocate Sr.no.27944

+1cc to M/s.C.Uma, Advocate SR.No.27049

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S.A.No.48 of 2004