

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Delivered On: 21.03.2018

Reserved On: 13.03.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.203 of 2001

E.N.Durai

...Appellant

Vs.

1.Ponnammal (Deceased)

2.Karpagam

(R2 Brought on record as LR of the deceased R1 vide order of Court dated 15.11.2017 made in CMP1258 to 1260/10 in SA 203/2001)

...Respondents

Prayer:

Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree of the learned Principal District Judge, Coimbatore dated 30.09.1999 in A.S.No.140/99 reversing the judgment and decree of the learned II Additional District Munsif, Coimbatore, dated 23.02.1999 in O.S.No.2231 of 1994.

Appellant : Mr.J.Hariharan
for Mr.V.Nicholas

Respondents : Mr.D.Manimaran
for Mr.M.Praveenkumar

J U D G M E N T

The plaintiff in the suit is the appellant herein and the defendant in the suit is the first respondent herein. During the pendency of the second appeal the first respondent died and the legal heir of the first respondent was impleaded as the second respondent herein. For the sake of convenience, the appellant and the respondents will be hereinafter referred to as per their rank in the suit.

2.The plaintiff filed a suit in O.S.No.2231 of 1994 seeking ejection of the defendant from the suit property and to deliver vacant possession thereof to the plaintiff and for direction to the defendant to pay a sum of Rs.3,000/- towards arrears of rent.

3.The sum and substance of the plaint averments are as follows: The suit schedule property was originally purchased by one Nataraja Chettiar/ plaintiff's father as per the sale deed dated 08.03.1961. During his lifetime, in the year 1974, the defendant took the property on lease for residential purpose on an oral agreement for a monthly rent of Rs.25/- without any advance. The tenancy was as per the English Calendar month, rent payable on the first of every succeeding

English Calendar month. The rent was gradually raised and lastly the defendant was paying Rs.150/- per month. The electricity charges was paid directly by the defendant along with house tax for prompt and convenient payment.

4.The plaintiff further aver that the plaintiff's father Nataraja Chettiar died on 07.01.1977, after which, the tenancy continued under the plaintiff and the defendant paid rent to him till the year 1992 and since 1993, the defendant has become irregular in payment of rent and committed default in payment of rent from 01.02.1993 till the date of plaint and the arrears of rent works out to Rs.3,000/-. The plaintiff caused a registered Lawyer's notice dated 18.02.1994 and it was not received by the defendant. Hence the plaintiff once again caused a notice dated 12.03.1994 calling upon the defendant to pay the arrears of rent. The defendant received the same and caused a belated reply dated 05.05.1994 with false and unbelievable averments. Hence, the suit has been filed.

5.The sum and substance of the written statement filed by the defendant is as follows: The defendant denied the averments contained in the plaint and contended the suit as false, frivolous and

un-sustainable in law and on facts. The defendant further contended that the suit property originally belonged to this defendant and she had sold the same to her husband one Natchimuthu Gounder during the year 1951. Thereafter, the said Natchimuthu Gounder died and as a rightful legal heir, the defendant is in occupation and actual possession and enjoyment of the suit properties. The property tax assessment and electricity service connection stands in the name of the defendant's husband and the defendant is paying the electricity consumption charges and property tax.

6.The defendant further contended that in the legal notice

dated 18.02.1994, there was no mention as to how the plaintiff's father was entitled to the suit properties and only in the plaint pleadings, the plaintiff has referred to the sale deed dated 08.03.1961. The defendant disputed the genuineness of the said document since after the execution of sale deed by this defendant during the year 1951, in favour of her husband, no transaction had taken place with regard to the suit properties.

7.The defendant further contended that there is no landlord tenant relationship between the plaintiff and the defendant and hence there is no question of demand. Though the plaintiff had mentioned about the receipt of reply from the defendant, the same has not been produced before the Court. As such, the suit is not maintainable and not sustainable.

8.The sum and substance of the additional written statement filed by the defendant is as follows: The defendant contends that after selling of the suit property to her husband Natchimuthu Gounder, she continued to be in possession, occupation and enjoyment of the suit properties. Hence, she perfected her title to the suit property by adverse possession. Further, the defendant made improvements to the suit properties by putting up additional construction and let portions of the suit property to tenants and also paid electricity consumption charges and property tax.

9.The defendant further contended that the first legal notice issued by the plaintiff was only during March, 1994 and it was suitably replied. Hence, the suit for recovery of possession by ejectment of a person who is in actual possession and uninterrupted occupation to the alleged owner during October, 1994, after the stipulated time is barred

by limitation and hence, the suit is liable to be dismissed on technical ground also. The defendant further contended that she had perfected her title to the suit property by adverse possession.

10.On the side of the plaintiff, seven documents were marked as exhibits and one witness was examined. On the side of the defendant, forty seven documents were marked as exhibits and two witnesses were examined.

11.After elaborate discussions and after framing the issues, the lower Court decreed the suit with respect to the relief of delivery of vacant possession and rejected the suit with respect to the relief of arrears of rent. As against the same, the defendant filed appeal before the lower Appellate Court. The lower Appellate Court set aside the judgment and

decree of the lower Court with respect to the relief of delivery of vacant possession on the ground that lease was not terminated by issuing notice under Section 106 of the Transfer of Property Act. Hence, the plaintiff did not establish as to on what manner, possession was handed over to the defendant. The plaintiff is claiming arrears of rent without terminating the lease but the oral

tenancy inbetween the plaintiff and the defendant was not properly established. The lower Appellate Court confirmed the judgment and decree of the lower Court with respect to the relief of arrears of rent. Accordingly, the lower Appellate Court dismissed the suit in O.S.No.2231 of 1994. As against the same, the plaintiff has filed the present second appeal.

12.At the time of admission, the following substantial questions of law were framed for consideration:

"(i)Where in a suit filed on the basis of the tenancy which is not properly proved and the defendant denied the title of the plaintiff and claimed adverse possession and evidence was taken fully on the question of title whether the Lower Appellate Court is correct in directing the plaintiff to file a separate suit instead of granting a decree for possession based on the title of the plaintiff?

(ii)Whether the Lower Appellate Court is right in directing the plaintiff to file a fresh suit when it is the case of the plaintiff for ejectment and when the defendant sets up the title in herself by adverse possession in view of KASTURI DEVI v. SHRIPAL SINGH (A.I.R.1954 Patna 128)?"

13.The learned counsel appearing for the appellant would submit that during the pendency of the second appeal, the first respondent/ defendant died. However, the appellant based on the information, he filed a petition for bringing the legal heir of the deceased first respondent/ defendant on record and impleaded the second respondent/ Karpagam as legal heir of the deceased first respondent.

14.The learned counsel appearing for the appellant would further submit that originally the suit schedule property was purchased by the plaintiff's father on 08.03.1961 from one Natchimuthu Gounder. After the purchase, the said Natchimuthu Gounder handed over the title and possession in favour of the plaintiff's father/ Nataraja Chettiyar. The said Nataraja

Chettiar died on 07.01.1977. Prior to his death, the defendant was put in possession of the property as a tenant by way of oral agreement.

15.The learned counsel appearing for the appellant would further

submit that after the death of Nataraja Chettiya/ plaintiff's father, the defendant continued as a tenant under the management of the plaintiff. However, from the year 1993, the defendant had not paid the rent to the plaintiff. Hence, the plaintiff issued a legal notice. Thereafter, he filed the suit for recovery of possession and also claimed the rental dues. The plaintiff established his title by marking Ex.A1 - title deed before the lower Court. When the title deed stands in the name of the plaintiff's father, as a legal heir, the plaintiff possessed the title with the consent of the other legal heirs. When the plaintiff is entitled to title over the suit schedule property, the plaintiff is entitled to file a suit for ejection against the defendant.

16.The learned counsel appearing for the appellant would further submit that perusal of Ex.A1 would disclose that the said Natchimuthu Gounder had conveyed the property with possession in favour of the plaintiff's father. Admittedly, the defendant has no title over the property. She is only an occupant. No document stands in the name of the defendant. In the absence of any document, the plaintiff is entitled to recover the possession from the defendant. Though the lower Court granted decree based on the title, however on appeal, the

lower Appellate Court reversed its findings on the ground that lease was not terminated by the plaintiff and the plaintiff did not establish the landlord tenancy relationship with the defendant.

17.The learned counsel appearing for the appellant would further submit that in the written statement, the defendant claimed her husband as Natchimuthu Gounder who is the vendor of the plaintiff's father. However, on verification, it is known that the defendant's husband is one Manickam.

18.In support of his contentions, the learned counsel appearing for the appellant relied upon the following decisions:

(i)The decision reported in AIR 1954 Patna 128 (Smt.Kasturi Devi and others Vs. Shripal Singh and others), the relevant portion of which reads as follows:

"4. Another contention before us raised the question of valuation namely, that the valuation for the purpose of jurisdiction in

a title suit to evict a trespasser would be different from that to evict a tenant from the same premises and that, therefore, prejudice is likely to be caused by the case being dealt with by a Court which would not have jurisdiction to try an ordinary title suit for the eviction of a trespasser. That there is some substance in the objection regarding valuation is borne out by the record which shows that about the year 1929, a sum of Rs. 1,500 was spent merely in repairs of the building in question. It is also indicated by the rent claimed which is Rs. 20 per month. This rent on the basis of twenty times of the annual rental would give a valuation of Rs.4,800. The situation of the house alone, namely that it is a double-storied house within the Patna City Municipality, is sufficient to indicate that such a suit would be outside the pecuniary jurisdiction of the Munsif who tried the case, whose powers were limited to suits of the valuation of Rs. 1,000.

The provision as to the entertainment of objections on the ground of over-valuation or under valuation affecting the jurisdiction of the Court below are contained in Section 11, Suits Valuation Act. Under Clause (a) of Sub-section (1) of that section, such an objection would not be entertained by an appellate Court unless the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded or in the lower appellate Court in the memorandum of appeal to that Court. On the facts of the case, the objection could not have been taken in the Court of first instance. It could, however, have been taken in the memorandum of appeal in the lower appellate Court. This was not done."

(ii) The decision reported in A.I.R.(33) 1946 Patna 103 (Saral Sonar v. Sudama Singh), the relevant portion of which reads as follows:

"The plaintiff-respondent brought a suit to eject the appellant from a certain house alleging that he had been a monthly tenant since 1937 but the tenancy had been

determined by notice. The lower appellate Court found that the tenancy had not been proved but that the plaintiff had established his title and that the defendants came into possession with the plaintiff's permission and he, therefore, gave a decree for recovery of possession. It is urged that when the plaintiff's case about the tenancy had failed the suit should have been dismissed. A number of cases were cited before me and somewhat different views seem to have been taken on similar questions in the High Courts in India in different cases but the only two cases where the facts seem to have raised the question in a form very similar to the one now before me are a Full Bench decision reported in 25 ALL.256 and a decision of a Judge of this Court reported in 1936 P.W.N.129. The Full Bench decision of the Allahabad High Court was almost exactly similar to the facts of the present case. The plaintiff came into Court alleging that the defendant had hired a house from him at a monthly rent and the plaintiff had given her notice to quit. The findings of the Court of first appeal after remand of issues by the High Court were that the plaintiff was the owner of the house, that the defendant occupied the house as a friend with the permission of the plaintiff and that the defendant had never before asserted her title to the house and that her possession was permissive. It was held that the plaintiff was entitled, upon the facts found, to a decree for possession notwithstanding that his case had been that the defendant was his tenant.

In 1936 P.W.N. 129 again the plaintiff claimed to have been the landlord and to have served a notice on the defendants to quit. The defendants pleaded title by adverse possession. The plaintiff proved title and possession within 12 years but failed to prove that the defendants were tenants. It was held that on the facts found the plaintiff was entitled to eject the defendants. In 1936 P.W.N.129 there was a finding that the plaintiff had been in possession within 12 years whereas in the

present case, as in the case which came before the Full Bench in 25 ALL 256, it was found that the defendants' possession was permissive. Either finding will be sufficient to overrule a plea of limitation in a suit for declaration of title and recovery of possession and I, therefore, do not think that this difference in any way distinguishes the present case from the principle of the case decided in 1936 P.W.N.129. For these reasons, I hold that this appeal must fail and it is, therefore, dismissed but in view of the fact that the plaintiff-respondent did not put forward a correct case in the trial Court there will be no order for costs in this Court. Leave to appeal under the Letters Patent is refused."

(iii) A decision of this Court reported in 2010-1-L.W.37 (M.Manickam and another Vs. R.Rukmini and another), the relevant portion of which reads as follows:

"13. Once the plaintiff establish his title to the suit property, the burden shifts on the defendant to establish that he perfected title by adverse possession. In the instant case, it is found that the plaintiffs have established their title to the suit properties. The defendants miserably failed to establish that they perfected title by adverse possession. Though the plaintiffs have not established that the defendants are only the tenants of the suit property, they are still entitled to declaration of title and also for recovery of possession as it has been established that the husband of the first defendant was only put in possession of the suit property on permission."

(iv) A decision of the Hon'ble Apex Court reported in 2017 (6) CTC 195 (Dagadabai (Dead) by LRs. vs. Abbas @ Gulab Rustum Pinjari), the relevant portion of which reads as follows:

"21) In our considered opinion, these observations of the High Court are against the law of adverse possession. It is a settled principle of law of adverse possession that the person, who claims title over the property on the strength of adverse possession and thereby wants the Court to divest the true owner of his ownership rights over such property, is required to prove his

case only against the true owner of the property. It is equally well-settled that such person must necessarily first admit the ownership of the true owner over the property to the knowledge of the true owner and secondly, the true owner has to be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants.

22) It is only thereafter and subject to proving other material conditions with the aid of adequate evidence on the issue of actual, peaceful, and uninterrupted continuous possession of the person over the suit property for more than 12 years to the exclusion of true owner with the element of hostility in asserting the rights of ownership to the knowledge of the true owner, a case of adverse possession can be held to be made out which, in turn, results in depriving the true owner of his ownership rights in the property and vests ownership rights of the property in the person who claims it.

23) In this case, we find that the defendant did not admit the plaintiff's ownership over the suit land and, therefore, the issue of adverse possession, in our opinion, could not have been tried successfully at the instance of the defendant as against the plaintiff. That apart, the defendant having claimed the ownership over the suit land by inheritance as an adopted son of Rustum and having failed to prove this ground, he was not entitled to claim the title by adverse possession against the plaintiff."

19. Per contra, the learned counsel appearing for the respondents would submit that admittedly, the defendant purchased the property from one Kumarasamy Gounder by registered sale deed dated 27.03.1946 and the same was marked under Ex.B42. Thereafter, the defendant sold the property in favour of her husband on 12.03.1951 and the same was marked as Ex.B43. However, the sale deed in favour of Natchimuthu Gounder is only sham and nominal. Though the defendant in the written statement claim one Natchimuthu Gounder as her husband, the said

Natchimuthu Gounder is only a boy friend of the defendant and her original husband is one Manickam and the second respondent is representing her estate as legal heir.

20.The learned counsel appearing for the respondents would further submit that the defendant purchased the property from one Kumarasamy Gounder during the year 1946 and after the purchase, the defendant is in possession and enjoyment of the suit property along with her boy friend Natchimuthu Gounder. The said Natchimuthu Gounder died on 10.04.1996. Even after the death of the said Natchimuthu Gounder, the defendant is in continuous possession

and enjoyment of the suit property. Accordingly, she prescribed title by adverse possession.

21.The learned counsel appearing for the respondents would further submit that the plaintiff was not aware of the alleged sale deed executed by Natchimuthu Gounder in favour of the plaintiff's father and she came to know about the same only after the receipt of the legal notice issued by the plaintiff. The said Natchimuthu Gounder had executed the said sale deed behind her back and the same is not binding on the defendant since she prescribed title by adverse possession as she was in possession of the suit property from the year 1946 till the date of filing of the suit.

22.The learned counsel appearing for the respondents would further submit that the suit has been filed by paying Court fees under Section 43 (2) of the Tamil Nadu Court Fees and Suits Valuation Act. The lower Court as well as the lower Appellate Court arrived at a conclusion that the landlord tenancy relationship has not been proved by the plaintiff. In view of the above, the suit has to be filed by the plaintiff after paying the necessary Court fee for the value of the suit

property as required under Section 5 of the Specific Relief Act. The appropriate Court fee is under Section 29 of the Court Fees and Suits Valuation Act and paying Court fees under Section 43 (2) of the Court Fees and Suits Valuation Act is not proper and further the lower Appellate Court perfectly held that without terminating the lease, filing of the suit is not sustainable one. On the above grounds, the defendant is entitled to succeed. Accordingly, he prayed for dismissal of the appeal.

23.I have considered the rival submissions made on either side and also perused the entire materials available on record.

24.Perusal of the material records discloses that originally, the suit properties belonged to one Kumarasamy

Gounder and the said Kumarasamy Gounder executed sale deed dated 27.03.1946 in favour of the defendant Ponnammal. After purchasing the suit schedule property, the defendant enjoyed the property. On 12.03.1951, the defendant executed a sale deed in favour of one Natchimuthu Gounder. The said sale deed is marked as Ex.B43. Perusal of Ex.B43 discloses that the defendant conveyed the title along with possession

in favour of Natchimuthu Gounder. The said Natchimuthu Gounder executed sale deed dated 04.03.1961 to the plaintiff's father Nataraja Chettiar. The said sale deed is marked as Ex.A1. Perusal of Ex.A1 discloses that the said Natchimuthu Gounder conveyed the title as well as possession (Swatheenam) in favour of Nataraja Chettiar.

25.The fact remains that the said Natchimuthu Gounder died on 10.04.1996 and Nataraja Chettiar died on 07.01.1977. The defendant Ponnammal died on 04.01.2010 and her legal heir is impleaded as the second respondent. The genealogy filed by the learned counsel appearing for the respondents would show that the defendant/ Ponnammal is the wife of one Manickam and the defendant had one son namely, S.M.Rajan and the said S.M.Rajan have two daughters namely, Karpagam and Mahalakshmi. However, the said fact is contrary to the facts in the written statement.

26.In the written statement, the defendant claim one Natchimuthu Gounder as her husband and on the contrary, the learned counsel appearing for the respondents claim the second respondent as the legal heir of the deceased Ponnammal. Though the defendant filed

a written statement claiming Natchimuthu Gounder as her husband and through him, she claims possession, however, the learned counsel appearing for the defendant claims that Natchimuthu Gounder is only her boy friend. Such a contrary plea cannot be entertained in the second appeal. Be that as it may. After the defendant purchased the suit schedule property in the year 1946, she was in possession of the property till the date of her death on 04.01.2010. For the long standing possession, the defendant has prescribed title by way of adverse possession.

27.Even though the plaintiff's father purchased the property in the year 1961, the defendant came to know about the same only after receipt of the legal notice issued by the plaintiff. It is the admitted fact that after the purchase of the property, neither the plaintiff nor the plaintiff's father took any step for mutation of revenue records in their name. However, the sale deed stands in the name of the plaintiff's father.

28.It is also the admitted fact that the defendant sold the property in favour of one Natchimuthu Gounder. In order to prove her

possession in the suit schedule property, the defendant marked Ex.B1 to Ex.B41 and all those exhibits are electricity cards, receipts for payment of electricity charges and house tax receipts. All these exhibits stand in the name of Natchimuthu Gounder. Except these exhibits, no other documents are available for establishing the adverse possession of the defendant. Admittedly, these are all self serving documents which stand in the name of Natchimuthu Gounder and not in the name of the defendant and it will not confer any title over the suit schedule property to the defendant.

29.Once title is established, the plaintiff is entitled to recover the possession. Though the defendant was in possession of the property for a long time, the defendant did not establish the title to the suit property. The burden shifts on the defendant to establish her title. Though the defendant claim that she had perfected the title by way of adverse possession, however she did not produce any document or adequate evidence on the issue of actual, peaceful and un-interrupted continuous possession of the suit property for more than 12 years in asserting the rights of the ownership to the knowledge of the true

owner. In the absence of any material, the ownership rights in the property vest with the person who possess the title over the property.

30.With regard to the other issue raised by the learned counsel for the respondents, it is true that as per Section 5 of the Specific Relief Act, if a person is entitled to possession of specific immovable property, the person may recover it as provided by the Code of Civil Procedure. Admittedly, the plaintiff filed a suit after paying the Court fees under Section 43 (2) of the Tamil Nadu Court Fees and Suits Valuation Act. However, the appropriate Court fee is only under Section 29 of the Tamil Nadu Court Fees and Suits Valuation Act. However, the defendant did not raise any objection either before the lower Court or the before the lower Appellate Court.

31.In this regard, it is useful to extract hereunder the relevant portion of the decision reported in AIR 1954 Patna 128 (Smt.Kasturi Devi and others Vs. Shripal Singh and others):

"The provision as to the entertainment of objections on the ground of over-valuation or under valuation affecting the jurisdiction of the

Court below are contained in Section 11, Suits Valuation Act. Under Clause (a) of Sub-section (1) of that section, such an objection would not be entertained by an appellate Court unless the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded or in the lower appellate Court in the memorandum of appeal to that Court."

In view of the above decision, since the defendant did not raise any objection as per Section 12 (2) of the Tamil Nadu Court Fees and Suits Valuation Act, with regard to the valuation of the suit before the lower Court or before the lower Appellate Court, raising of such plea before this Court at the stage of second appeal is not permissible.

32. Further, as per Section 54 of the Tamil Nadu Court Fees and Suits Valuation Act, 1956, where a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice and technical grounds not open to consideration by an appellate Court, unless there has been a prejudice on the merits.

33. On a perusal of the entire records, the plaintiff established his title through Ex.A1 sale deed executed in favour of the plaintiff's father by Natchimuthu Gounder and all the exhibits marked by the defendant stand in the name of the said Natchimuthu Gounder. Hence, the plaintiff established his title. Accordingly, he is entitled to recover the possession of the property from the defendant.

34. In view of the above discussions and the decisions cited supra, the order of the lower Appellate Court is liable to be interfered with. Accordingly, the substantial questions of law are answered in favour of the appellant.

35. In the result, the second appeal is allowed. The judgment and decree of the learned Principal District Judge, Coimbatore, dated 30.09.1999 passed in A.S.No.140 of 1999, is set aside. The judgment and decree of the learned II Additional District Munsif, Coimbatore, dated 23.02.1999 passed in O.S.No.2231 of 1994, is restored. No costs.

sd/-

Assistant Registrar(CS VII)

//True copy//

Sub Assistant Registrar

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To

1.The Principal District Judge,
Coimbatore.

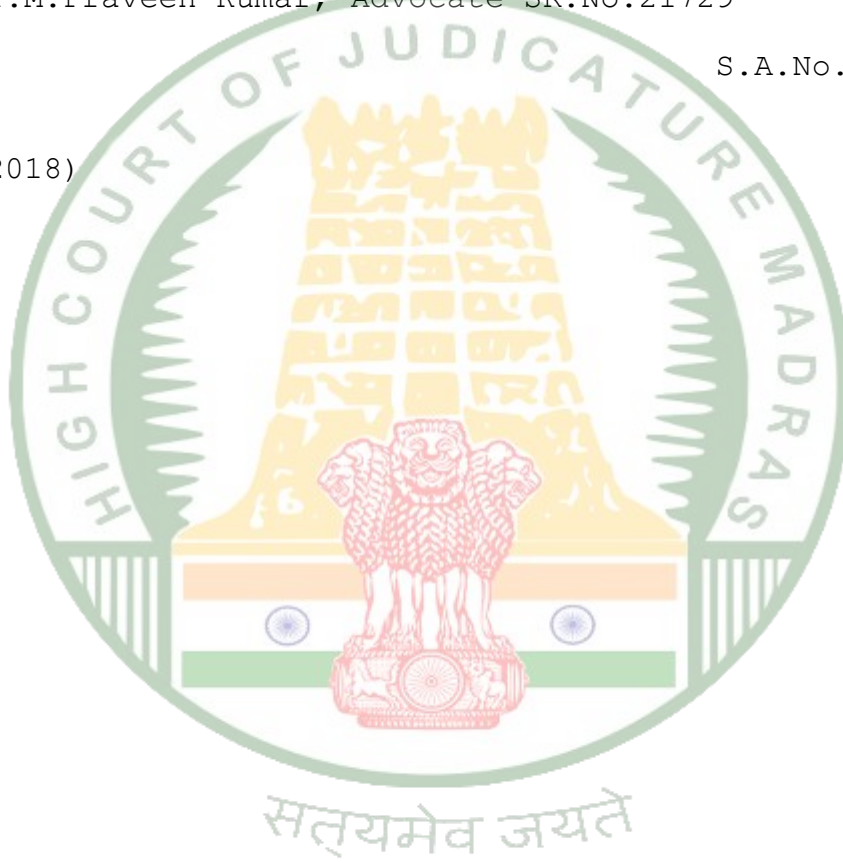
2.The II Additional District Munsif,
Coimbatore.

+lcc to Mr.V.Nicholas, Advocate SR.No.21370

+lcc to Mr.M.Praveen Kumar, Advocate SR.No.21729

S.A.No.203 of 2001

CNR(CO)
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