

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.09.2019

PRONOUNCED ON : 14.10.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.No.42 of 2012
and
Cros.Obj.No.36 of 2012

A.S.No.42 of 2012

Dr.R.M.Rajagopal ... Appellant/2nd Defendant

Vs.

1.R.M.Vijayakumar ...1st Respondent/Plaintiff
2.R.M.Chandrasekaran ...2nd Respondent/1st Defendant

Cros.Obj.No.36 of 2012

R.M.Vijayakumar ...Cross Objector/1st Respondent

Vs.

1.Dr.R.M.Rajagopal ...1st Respondent/Appellant
2.R.M.Chandrasekaran ...2nd Respondent/2nd Respondent

Prayer in A.S.No.42 of 2012:- First Appeal has been filed under Section 96 of Civil Procedure Code r/w Order 41 Rule 1 & 2 C.P.C against the Judgement and Decree dated 11.06.2010 passed in O.S.No.128 of 2008 on the file of the Additional District Judge, Fast Track No.2, Salem.

Prayer in Cros.Obj.No. 36 of 2012:- Cross Objection has been filed under Section Order XLI, Rule 22 of Civil Procedure Code to set aside the Judgement and Decree dated 11.06.2010 passed in O.S.No.128 of 2008 on the file of the Additional District Judge, Fast Track No.2, Salem.

For Appellant in A.S & : Mr.V.Raghavachari
Respondent No.1 in
Cross Objection.

For Respondent No.1 : Mr.S.Devanathan
in A.S. and Cross objector
in Cross Objection.

Respondent No.2 in both :No appearance
A.S and Cross Objection Set exparte vide order
dt.16.09.2019

COMMON JUDGMENT

Aggrieved over the Judgement and Decree dated 11.06.2010 passed in O.S.No.128 of 2008 on the file of the Additional District Judge, Fast Track No.2, Salem, the second defendant has preferred the first appeal.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.Suit for Partition and Future Mesne Profits.

4.The case of the plaintiff in brief is that the plaintiff and the defendants are brothers and the plaintiff is the younger brother of the defendants. The family of the plaintiff and the defendants belongs to the business community and the father along with the plaintiff and the first defendant were looking after the textile business and the second defendant was pursuing his studies and the income from the business was given for the studies of the second defendant and after the second defendant became a doctor, the family took care of him till his practice developed and the plaintiff and the first defendant from their business earnings along with the equal contribution of the second defendant purchased the vacant land of the suit property with an old building thereon jointly by way of the registered sale deed dated 26.05.1993 and out of the joint investment and from the bank loan, the hospital building was constructed and the loan was discharged from and out of the income from the hospital rental value. Thus, the plaintiff and the defendants are each entitled to 1/3 share in the suit property.

5.While so, the plaintiff's father died on 22.03.2007 and after his demise, misunderstanding arose between the plaintiff on one side and the defendants, mother and sister on the other side and as there were quarrels and misunderstanding between the plaintiff's wife and the plaintiff's mother, the mother left the

house and went to the first defendant's house and as she required medical assistance on account of her old age, she wanted to be with the second defendant, who is a doctor and in that regard, misunderstanding and quarrel arose between the plaintiff and the defendants and the defendants had instigated the mother to give a false complaint and also to file a suit in O.S.No.118/2008 before the District Munsif Court, Salem, in respect of the residential house, where the plaintiff is residing. On account of the misunderstanding, the plaintiff felt that he cannot enjoy the suit property in common and accordingly, had issued a notice on 07.02.2008 calling upon the defendants to effect amicable partition and allot the share due to the plaintiff with reference to the same. However, though both the defendants had received the notice, the second defendant alone issued a reply dated 27.02.2008 containing false allegations as if there was an oral agreement on 15.01.2008 to sell the shares of the plaintiff and the first defendant to the second defendant for a sum of Rs.2,00,000/- and that the said sum was paid in the presence of the mother and sister and the abovesaid facts are all false and particularly, when the mother had already lodged a complaint against the plaintiff and also a civil action against the plaintiff, the alleged mediation by the mother and sister are unbelievable and untrue and the plaintiff sent a re-joinder on 01.03.2008 and inasmuch as the defendants had not come forward to effect partition and allot the share to which the plaintiff is entitled to, according to the plaintiff, the need for the suit for appropriate reliefs.

6.The second defendant filed the written statement and put forth the case contending that the suit laid by the plaintiff is not maintainable either in law or on facts and admitted the relationship between the parties and also admitted that the family of the parties belongs to the business community and denied that the father, the plaintiff and the first defendant were looking after the textile business and on the other hand, according to the second defendant, the plaintiff and the first defendant were simply whiling away the time and the entire burden of the business was shouldered only by the father and admitted that he was pursuing his studies and denied that the income from the business was given for the studies of the second defendant and according to the second defendant, some of the relatives and well wishers were helping him in pursuing his studies. It is stated that the case of the plaintiff that the family took care of the second defendant till he became a doctor is false and further, according to the second defendant, he was proficient in his career and enough to take care of not only himself and also the entire family including the plaintiff. The second defendant also denied that the plaintiff and the first defendant equally contributed for the purchase of the suit property with an old building by way of the registered sale deed

dated 26.05.1993 and also denied that the hospital building was constructed from and out of the joint investment. According to the second defendant, the entire sale consideration of Rs.1,58,500/- was paid only by the second defendant and as the parents suggested that the property should be jointly purchased in the name of three brothers, accordingly, the second defendant accepted to the same and the sale deed had come to be executed in favour of all the brothers, though the second defendant alone paid the sale consideration in entirety for the construction of the hospital, the second defendant raised a loan from the Indian Overseas Bank, Shevapet, Salem, and also invested his earnings through medical profession for the same and the plaintiff and the first defendant put forth no objection to the bank at the time of the obtainment of the loan by the second defendant. It is only the second defendant, who has been discharging the responsibilities and duties of the entire family as the eldest son and in fact, he had given a sum of Rs.1,00,000/- to the plaintiff and the first defendant each for investing in the fixed deposit in the name of the daughters, so that the same be helpful for their studies and marriage in future. After the death of their father, the plaintiff and the first defendant never took care of their mother and it is only the second defendant, who had been taking care of the mother and the plaintiff and the first defendant represented that they would be ready to part with their share in favour of the second defendant, if some amount is paid towards the share and the same was accepted by the second defendant and accordingly, the plaintiff and the first defendant agreed to execute a sale deed in favour of the second defendant in respect of 2/3 share for a consideration of Rs.2,00,000/- each on 15.01.2008 in the presence of their mother and sister Lakshmi and agreed to execute the sale deed in favour of the second defendant, after receiving the abovesaid sum and accordingly, the entire cash consideration was paid by the second defendant as agreed to, however, on account of the close relationship between the parties, the agreement was not reducing into writing and taking advantage of the same, the plaintiff has laid a false claim that he is entitled to a share in the suit property. The exchange of notice had been admitted and according to the second defendant, neither the plaintiff nor the first defendant are entitled to claim any share in the suit property and the second defendant had already issued a notice for the specific performance of the contract but not filed the suit, since he felt that good senses would prevail upon his brothers and hence, according to the second defendant, there is no cause of action for the plaintiff's suit and the suit is liable to be dismissed.

7. On the basis of the abovesaid pleas put forth by the respective parties, the following issues were framed by the trial Court for consideration:

" (i).Whether the plaintiff is entitled to obtain partition and separate possession of 1/3rd share in the suit property as claimed in the plaint.

(ii).To what relief the plaintiff is entitled to?"

8.In support of the plaintiff's case, PW1 was examined and Exs.A1 to A9 were marked. On the side of the defendants, DWs1 & 2 were examined and no document has been marked.

9.On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to declare that the plaintiff is entitled to obtain 1/3 share in the suit property and accordingly, granted the preliminary decree in favour of the plaintiff and held that the question of mesne profits would have to be decided by way of an application under Order 20 Rule 12 of CPC and accordingly, disposed of the plaintiff's suit without costs.

10.Aggrieved over the judgment and decree of the trial Court, the second defendant has preferred the first appeal.

11.The trial Court, in the course of the judgment, had held that the claim of the second defendant that he has purchased the share of the plaintiff and the first defendant in respect of the suit property by paying a sum of Rs.2,00,000/- each to them cannot be decided in this suit and further proceeded to hold that it is up to the second defendant to take separate legal proceedings for the specific performance based on the alleged oral agreement put forth by the second defendant. Furthermore, the trial Court in the course of judgment holding that the second defendant had spent lakhs of rupees for the construction of the hospital and made vast improvements with reference to the same, further held that on the principles of equity, the amount spent by the second defendant for the improvement made in the suit property shall be taken into consideration at the time of the final decree proceedings. Challenging the abovesaid findings rendered by the trial Court in favour of the second defendant, the plaintiff has preferred the Cross Objection No.36 of 2012.

12.The following points arose for determination in this first appeal and Cross Objection:

"(i).Whether the plaintiff is entitled to obtain partition and separate

possession of 1/3 share in the suit property as claimed in the plaint.?

(ii).Whether the plaintiff is entitled to seek the setting aside the findings of the trial Court that the second defendant is entitled to file a suit for specific performance based on the oral agreement projected by him and that the amount spent by the second defendant for the improvement made in the suit property shall be taken into consideration at the time of the final decree proceedings as put forth in the Cross Objection?

(iii).To what relief the second defendant/appellant is entitled to?

(iv).To what relief the plaintiff/Cross Objector is entitled to?.

13.Point Nos.1 & 2

The plaintiff and the defendants are brothers. The relationship between the parties is not in dispute. Now, according to the plaintiff, the suit property had been acquired jointly by the plaintiff and the defendants by way of a sale deed dated 26.05.1993 and the copy of the registered sale deed has been marked as Ex.A1. According to the plaintiff, the family of the parties belongs to the business community and engaged in textile business and the plaintiff and the first defendant were engaged in the family business along with their father and the second defendant was pursuing the medical profession and it is further put forth by the plaintiff that the income from the business was provided for the medical education of the second defendant and also the family provided the necessary support to the second defendant till he developed his practice and accordingly, it is put forth by the plaintiff that out of the contribution made by the plaintiff and the first defendant as well as the second defendant, the suit property had come to be acquired jointly by the brothers by way of the registered sale deed dated 26.05.1993. It is further put forth by the plaintiff that out of the joint investment and the bank loan, the hospital building was put up in the suit property and the loan was discharged out of the income from the hospital rental value. According to the plaintiff, after the demise of their father, misunderstanding arose between the plaintiff and the other family members including the mother and sister and it is put forth that at the instigation of the defendants, the mother had also lodged a police complaint and a civil action

against the plaintiff and accordingly, it is the case of the plaintiff that as he was unable to enjoy the suit property in common with the defendants, demanding partition and separate possession of his share in the suit property, the plaintiff had issued a notice and the same had been refuted by the second defendant by issuing a reply notice and hence, according to the plaintiff, he has been necessitated to institute the suit against the defendants for appropriate reliefs.

14.The second defendant resisted the plaintiff's suit contending that it is he, who had paid the consideration for the acquisition of the suit property under the sale deed dated 26.05.1993 and as per the wish and desire of the parents, according to him, the abovesaid sale deed had been particularly taken in the name of the three brothers and therefore, it is the case of the second defendant that it is he, who is the owner of the suit property under the sale deed dated 26.05.1993. Further, it is the case of the second defendant that he had put up the hospital building out of the professional income as well as the loan obtained from the bank and denied the case of the plaintiff that the plaintiff and the first defendant also made joint investment for the raising of the hospital building and the loan was discharged out of the income from the hospital rental value. Further, it is the case of the second defendant that the plaintiff and the first defendant had agreed to convey their share in the suit property for a sum of Rs.2,00,000/- each and accordingly, it is stated that following the oral agreement between the parties, with reference to the same, on 15.01.2008, the second defendant had paid a sum of Rs.2,00,000/- each to the plaintiff and the first defendant in the presence of their mother and sister Lakshmi and therefore, according to the second defendant, the plaintiff is not entitled to claim any share in the suit property and it is also put forth by the second defendant that he has already issued the notice against his brothers for enforcing the abovesaid oral agreement. Further, according to the second defendant, it is he, who had put up the construction in the suit property and made improvement in the same by spending several lakhs of rupees and accordingly, contended that it is only he, who has title to the suit property in entirety and therefore, the plaintiff is not entitled to claim any share in the suit property as projected in the plaint.

15.Considering the sale deed dated 26.05.1993 marked as Ex.A1, it is found that the suit property had been jointly acquired by the plaintiff and the defendants and though the second defendant would put forth the case that it is he, who had paid the sale consideration recited therein in entirety and the plaintiff and the first defendant had not contributed any amount towards the same, however, there is nothing contained in Ex.A1 to indicate that the entire sale consideration had been paid by

the second defendant alone as claimed by him. Furthermore, there is no proof worth acceptance on the part of the second defendant to hold that it is he, who had paid the consideration exclusively for the sale deed dated 26.05.1993. If really the entire sale consideration had been paid by the second defendant, he would have endeavoured to obtain the said sale deed in his name exclusively. On the other hand, his case that as per the wish and desire of the parents, the abovesaid sale deed had come to be mutated in the name of the three brothers, as such, cannot be believed and accepted. particularly, when there is no reliable proof pointing to the same on the part of the second defendant. Therefore, it is found that as held by the trial Court that when the sale deed Ex.A1 points that the sale transaction had been obtained in the name of the three brothers and the said factor has also been admitted by the second defendant and when there is no proof worth acceptance adduced on the part of the second defendant that it is he, who had paid the entire sale consideration on his own and when it is found that the family of the parties was engaged in the textile business, in such view of the matter, the second defendant cannot be allowed to plead contrary to the terms of the sale agreement Ex.A1, after having admitted the execution of the same jointly in the names of the brothers and more so, when there is no proof on the part of the second respondent to hold that it is he, who had paid the entire sale consideration exclusively. Therefore, the trial Court is justified in upholding the plaintiff's case based on Ex.A1 sale deed.

16.The falsity of the second defendant's case could also be gathered on the pleas put forth by him. According to the second defendant, it is he, who had paid the entire sale consideration for Ex.A1 sale deed and the plaintiff and the first defendant had not contributed anything for the acquisition of the suit property. If that be so, there is no need on the part of the second defendant to purchase the share of the plaintiff and the first defendant in respect of the suit property for a sum of Rs.2,00,000/- each as per law. In the written statement, the second defendant would project an agreement between the parties effected orally on 15.01.2008, where under according to the second defendant, the plaintiff and the first defendant had agreed to convey their respective shares in the suit property to the second defendant for a sum of Rs.2,00,000/- each and according to the second defendant, he had paid the said sum to the plaintiff and the first defendant and however, had not obtained the written agreement with reference to the same from them on account of the close relationship between the parties and therefore, the abovesaid case of the second defendant is based only upon the alleged oral agreement put forth by him. It is put forth by the second defendant that the abovesaid transaction had been witnessed by the mother and the sister by

name Lakshmi. The mother had been examined by the second defendant as DW2.

17. The plaintiff, in particular, had disputed the abovesaid oral agreement said to have been entered into between the parties and also disputed the passing of the consideration of Rs.2,00,000/- to him by the second defendant for the acquisition of his share in the suit property. The materials placed on record go to show that all is not well between the plaintiff and the mother. It is found that the relationship between the plaintiff and the mother had become strained and the materials placed on record go to show that the mother had instituted a police complaint against the plaintiff and also laid a civil action against the plaintiff. The abovesaid facts are not controverted. Therefore, when the relationship between the plaintiff and the mother is found to be not cordial and on the other hand, found to be strained, to say that the mother had been a witness to the alleged oral agreement projected by the second defendant and also a witness to the passing of the consideration of Rs.2,00,000/- by the second defendant cannot be accepted in any manner. If really the abovesaid oral agreement projected by the second defendant has any element of truth, nothing prevented the second defendant from enforcing the alleged oral agreement against the plaintiff and the first defendant. Though the first defendant would claim that he had issued the notice for enforcing the oral agreement put forth by him, till date there is no material on the part of the second defendant that he had taken steps to enforce the alleged oral agreement. If really the oral agreement has any semblance of truth and enforceability, legally, the second defendant would have endeavoured to project a counter claim in the present suit itself against the plaintiff and the first defendant and sought for the appropriate relief with reference to the alleged oral agreement. However, the second defendant has not projected any such counter claim based on the alleged oral agreement. He would only, for the abovesaid version put forth on his part, rely upon the oral evidence of his mother examined as DW2. On a perusal of the evidence of DW2, as put forth by the plaintiff, it is found that DW2 had tendered evidence in such a manner that a written agreement had been entered into between the plaintiff and the defendants with reference to the sale and that, she had attested the said agreement as well as her daughter had attested the same. However, when according to the second defendant only an oral agreement had been effected with reference to the same and no instrument was written pointing to the same, in such view of the matter, the evidence tendered by DW2 that a written instrument had been effected with reference to the same and she and her daughter had attested the said transaction cannot at all be believed and accepted and therefore, as contended by the plaintiff, the trial Court had failed to consider the abovesaid

aspects of the matter and on the other hand, without any basis proceeded to hold that it is open to the second defendant to take separate legal proceedings for the specific performance based on the alleged oral agreement. However, when as above pointed out, the second defendant has failed to establish even prima facie the alleged oral agreement projected by him and not at all proceeded to enforce the same and also not endeavoured to seek any counter claim with reference to the same in the present suit and also failed to establish that he had advanced Rs.2,00,000/- each to the plaintiff and the first defendant towards their share in the suit property on the basis of the oral agreement and particularly, when the abovesaid case of the second defendant has been totally denied by the plaintiff and when the evidence of the mother relied upon by the second defendant does not advance his case and on the other hand, as above pointed out, when the mother has pleaded a written arrangement between the parties with reference to the abovesaid transaction and that she and her daughter had attested the same, however when there is no convincing material on the part of the second defendant pointing to the same, on a perusal of the available materials, it is found that absolutely there is no proof on the part of the second defendant with reference to the alleged oral agreement said to have been entered into between him and the plaintiff and the first defendant on 15.01.2008 and also the payment of the consideration of Rs.2,00,000/- each by him to the plaintiff and the first defendant and when the evidence of the mother as DW2 does not inspire acceptability and reliability in any manner and particularly, when the mother is found to be not maintaining a smooth and cordial relationship with the plaintiff at the relevant point of time, in all, it is found that the trial Court has totally committed an error in holding that the second defendant is entitled to take appropriate proceeding for the specific performance based on the alleged oral agreement and the abovesaid finding of the trial Court, in my considered opinion, is liable to be set aside as the same has been rendered without any basis whatsoever.

18.The trial Court has also proceeded to hold that the second defendant had exclusively paid the amount for the improvement of the suit property and accordingly, proceeded to hold that the same should be taken into consideration at the time of the final decree proceedings. Per contra, according to the plaintiff, he and the first defendant had also contributed for the improvement of the suit property in putting up the hospital building and accordingly, the bank loan had also been obtained and he and the first defendant had also put forth no objection for the obtainment of the loan by the second defendant from the bank and also put forth the plea that the loan had been discharged out of the rental value of the hospital building and denied the case of the second defendant that it is he, who had

exclusively made the improvement in the suit property. Despite the abovesaid case of the plaintiff, when the suit property is found to have been jointly acquired by the parties under Ex.A1 sale deed and the second defendant has failed to establish his exclusive claim of title to the same as above pointed out and discussed and when there is no proof worth acceptance on the part of the second defendant that he had exclusively invested for improving the suit property and when the materials placed on record go to show that the second defendant had also obtained no objection certificate from the plaintiff and the first defendant for raising the loan from the bank and when there is no proof also on the part of the second defendant that it is he, who had exclusively discharged the loan and as above pointed out, the second defendant has not placed any material or documentary proof to hold that the improvement made in the suit property had been exclusively borne by him out of his own investments and on the other hand, when the suit property is found to be jointly acquired in the name of the plaintiff and the defendants, in all, it is found that the trial Court had committed a serious error in holding that the second defendant had made improvements in the suit property on his own and the same should be taken into consideration at the time of the final decree proceedings, particularly, when with reference to the abovesaid case of the second defendant, there is no material whatsoever on his part and if really the abovesaid case of the second defendant has any semblance of truth, the second defendant would have placed proof to evidence his alleged income from the profession as well as that he alone discharged the loan in entirety on his part without making recourse with reference to the same with the plaintiff and the first defendant and when with reference to the abovesaid version of the second defendant, there is no material whatsoever placed for consideration, in such view of the matter, the trial Court is found to have erred in holding that the alleged improvements made by the second defendant in the suit property should be taken into consideration at the time of the final proceedings. As the abovesaid finding of the trial Court is found to have been made without any basis and materials on record and accordingly, the same is liable to be set aside as contended by the plaintiff in his cross objection.

19. In the light of the abovesaid discussions, it is found that the suit property jointly belongs to the plaintiff and the defendants by way of Ex.A1 sale deed and accordingly, the plaintiff, as such, is entitled to claim and obtain 1/3 share in the suit property and accordingly, the determination of the trial Court that the plaintiff is entitled to obtain the partition and separate possession of 1/3 share in the suit property is found to be correct and not liable to be reversed as put forth by the second defendant in the appeal.

20. In support of his contention, the plaintiff's counsel placed reliance upon the decision reported in 2010 (2) CTC 705 (E. Yesodammal Vs. E. Govindan) and (2009) 8 MLJ 337 (Rajeswari Ammal Vs. Arunachalam and others). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

21. For the reasons aforesaid, the plaintiff is held entitled to obtain the partition and separate possession of 1/3 share in the suit property as determined by the trial Court and the plaintiff is also entitled to seek the setting aside the findings of the trial Court that the second defendant is entitled to file a suit for specific performance based on the oral agreement projected by him and that the amount spent by the second defendant for the improvements made in the suit property shall be taken into consideration at the time of the final decree proceedings as put forth in the Cross Objection. Accordingly, the point Nos. 1 & 2 are answered.

22. Point Nos. 3 & 4

The determination of the trial Court that the plaintiff is entitled to obtain the partition and separate possession of 1/3 share in the suit property by metes and bounds and the grant of preliminary decree by the trial Court in favour of the plaintiff with reference to the same is upheld and the findings of the trial Court that the second defendant is entitled to file a suit for specific performance based on the oral agreement projected by him and that the amount spent by the second defendant for the improvements made in the suit property shall be taken into consideration at the time of the final decree proceedings are set aside as put forth in the cross objection laid by the plaintiff and accordingly, the first appeal is dismissed and the cross objection laid by the plaintiff is allowed. Considering the relationship between the parties, there is no order as to costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CCC)

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Sub Assistant Registrar

sms

To

The Additional District Judge,
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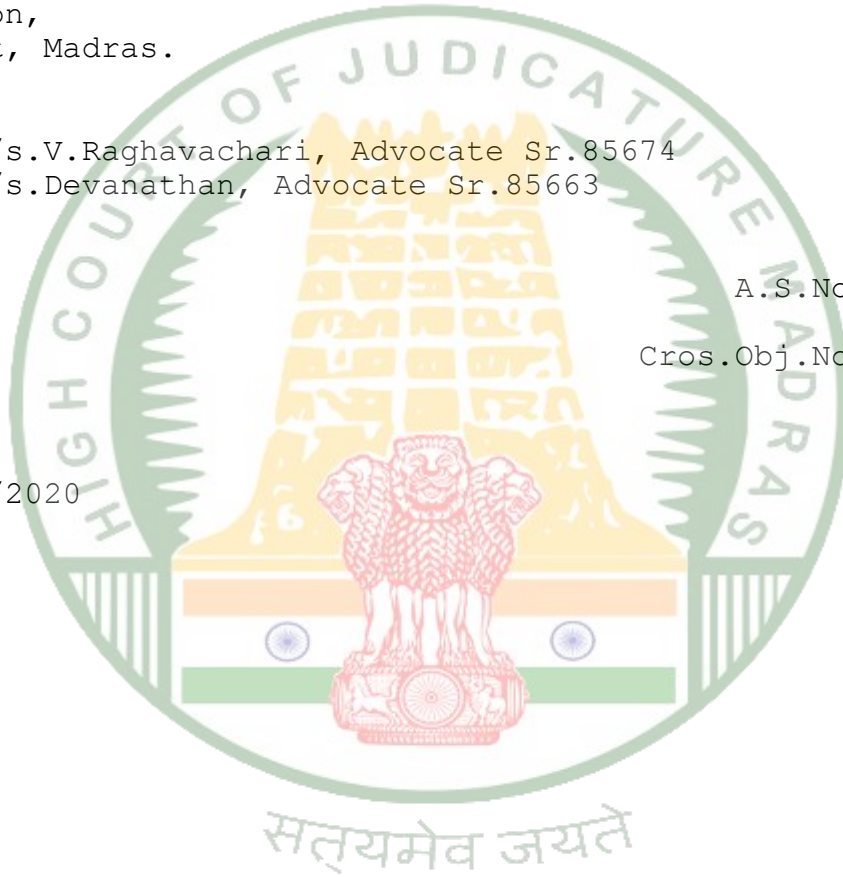
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+lcc to M/s.V.Raghavachari, Advocate Sr.85674
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