

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.07.2018

Pronounced on : 09.01.2019

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM
S.A.No.1068 of 2001

- 1.Jothy (deceased)
- 2.Banumathy
- 3.Radha
- 4.Sakthivel
- 5.Selvi
- 6.Jayanthi
- 7.Saravanan

(First appellant died. Memo is recorded.

Memo dated 18.06.2018. Appellants 2 to 7
are recorded as LR's of the deceased

1st appellant vide order of court dt 18.06.2018

... Appellants/defendants

Vs.

- 1.Sekar
- 2.Kamaraj
- 3.Shanthi
- 4.Sumathy

...Respondents/plaintiffs

Prayer:- Second Appeal is filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 26.09.2000 made in A.S.No.188 of 1998 on the file of the District Court, Villupuram, confirming the judgment and decree dated 24.12.1980, made in O.S.No.292 of 1977 on the file of the Sub-Court, Cuddalore.

For Appellants : Mr.R.Venkatasalapathy
for Mr.V. Radhakrishnan

For Respondents : Mr.N. Suresh

J U D G M E N T

This second appeal has been filed by the defendants against the judgment and decree passed by the Principal District Judge, Villupuram, in A.S.No.188 of 1998 dated 26.09.2000 confirming the judgment and decree passed by the First Additional Sub-Judge, Cuddalore, in O.S.No.292 of 1977 dated 24.12.1980.

2. The respondents had filed a suit in O.S.No.292 of 1977 as in-forma pauperis on the file of the First Additional Sub-Judge, Cuddalore, to declare that the sale of the suit property in favour of the defendant by the mother of the plaintiffs as null and void and for

recovery of possession of the suit property from the defendant or in the alternative for declaration of the title of the plaintiffs that the sale in favour of the defendant is not valid and binding on the plaintiffs beyond the life time of their mother and also for recovery of future mesne profits from the date of plaint till the date of delivery of possession. The learned Sub-Judge by the judgment dated 24.12.1980 had decreed the suit granting the relief of declaration that the sale of the suit property in favour of the defendant is null and void and not binding on the plaintiffs. He also granted decree for recovery of possession of the suit property and he ordered separate enquiry in respect of the mesne profits. Since the suit was filed in-forma pauperis, the defendant was directed to pay the court fees and also directed to pay the costs of the suit. Aggrieved by the same, the defendant has filed an appeal in A.S.No.188 of 1998 on the file of the Principal District Judge, Villupuram. During pendency of the said appeal, the sole appellant/defendant died and hence, his legal representatives have been impleaded as appellants 2 to 8. The learned Principal District Judge by the judgment dated 26.09.2000 had dismissed the said appeal with costs confirming the judgment and decree passed by the trial court. Feeling aggrieved, the legal representatives of the original defendants have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

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

a) The suit property is a house property which belonged to the plaintiffs' maternal grand father viz., Rathina Udayar. It was his self-acquired property, having been purchased by him from one Kuppusamy as a thatched house under a sale deed dated 12.03.1930 and subsequently demolished the thatched house and constructed a terraced house. The said Rathina Udayar had executed a registered settlement deed in favour of the plaintiff's mother. Simultaneously, he executed an usufructuary mortgage deed in favour of one Periyannayagam in respect of the same property on 19.06.1964. Under the said settlement deed, the mother of the plaintiffs viz., daughter of the said Rathina Udayar got life interest without any power of alienation. After her life time, the property has to devolve upon her children. The plaintiffs' mother had gone to visit her mother, hearing of her illness as she was living with her son at Kazhumaram village at the time of Pongal in 1971. During her stay there, she was made a victim of fraud by her brother and the defendant and made her to join in the execution of a sale deed in respect of the suit property by the deed dated 24.01.1971 in favour of the defendant on the representation that he was purchasing some lands of the father and unless she also

joined, the vendee will not get the title. The sale deed contains false recitals as though the property was a dilapidated building with mere walls and no roof and that the sale price of Rs.5000/- was to be utilised for the payment of Rs.1000/- towards the discharge of the usufructuary mortgage dated on 22.02.1964 referred to supra; for the marriage expenses of her brother Varadharaja Udayar and for purchase of other properties for the benefits of her children viz., the plaintiffs. No property was purchased for the benefit of the plaintiffs. Only Rs.300/- to be paid for the discharge of the usufructuary mortgage.

b) The plaintiffs' uncle, the said Varadharaja Udayar had absolutely no title to the suit property and could not have received any consideration for his benefit. The plaintiffs' mother also had no right to alienate the properties as per the conditions of the gift deed to the prejudice of the plaintiffs. The plaintiffs' mother was conveying her own and her children's property in favour of the defendant without knowing the real fact and the sale is, therefore, vitiated by fraud and misrepresentation. The first plaintiff came to know about the settlement deed executed by his grandfather and the sale in favour of the plaintiff only on his attaining majority recently. Hence on 04.10.1976, the plaintiffs issued a lawyer's notice to the defendant about void nature of the conveyance in his favour and demanding surrender of possession of the property to them. The defendant has replied through his counsel on 30.10.1976 with false averments. As plaintiffs should be entitled to possession only on expiry of life estate, the plaintiffs' mother relinquished her life interest in favour of the plaintiffs by means of a registered release deed dated 15.04.1977. The plaintiffs therefore have become owners of the property and entitled to file a suit. The sale in favour of the defendant is void and not binding on the plaintiff and their mother and hence, they constrained to file the suit for declaration and recovery of possession and for mesne profits.

4. The averments made in the written statement are, in brief, as follows:

a) The allegation that the suit property is the self-acquired property of the plaintiffs' grand father is false. The site which was sold to the defendant was a piece of joint family property. There was sufficient joint family nucleus to purchase the suit property. The allegation that the grandfather demolished the house and put up a fresh construction for Rs.7500/- is false. There was no terraced construction at all. At the time of sale to the defendant, there were dilapidated walls and vacant site. The settlement deed mentioned in the plaint is not true; execution and validity of the same are denied. The said settlement deed is not valid in law and

cannot affect the rights of the son. There can be no settlement in respect of the joint family property. Varadharaju S/o.Rathina Udayar and Poongavanam Ammal had executed a sale deed in favour of the defendant on 24.01.1971 for a valid consideration of Rs.5000/-. A sum of Rs.4000/- was paid for purchase of lands in Gingilivadi for minors' maintenance and Rs.300/- was paid to Periyamayagam towards the discharge of the usufructuary mortgage and Rs.700/- was paid for another oral mortgage which all parties admitted to be due to Periyamayagam.

b) The defendant, after purchase has built a terraced house at a cost of Rs.15,000/-. The plaintiffs are living with their mother as one family and it is only at her instigation the present suit has been filed. The allegation that the sale deed got executed by fraud exercised by the defendant and Varadharaju Udayar are all false. The plaintiffs' mother Poongavanam Ammal not only received the amount but also appeared before the Sub-Registrar and admitted the execution of the sale deed. The money was paid for the marriage of Varadharaju Udayar and for family expenses. It was also represented to the defendant that some other lands had to be purchased at Kingilivadi. The defendant believed their representation and gave money. The allegation that the said Varadharaju Udayar had no title over the suit property is false. The first plaintiff is a party to the sale deed and that being so, he cannot avoid the said sale deed. The allegation that the plaintiff's mother had relinquished her life interest in favour of the plaintiffs is also false. There can be no relinquishment after executing the sale deed in favour of the defendant. The suit is barred by limitation. The plaintiffs are estopped from claiming any right over the property and therefore, the defendant prayed to dismiss the suit.

5. Based on the aforesaid pleadings, the learned First Additional Sub-Judge, Cuddalore, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the plaintiffs examined their mother Poongavanam Ammal as PW1 and they also examined one C.Krishnamurthy Naidu as PW2. They marked Exs.A1 to A7 as exhibits. On the side of the defendant, the defendant examined himself as DW1. He also examined four more witnesses as D.W.2 to D.W.5. He had marked Ex.B1 to B12 as exhibits.

6. The learned First Additional Sub-Judge, Cuddalore, after considering the materials placed before him found that the suit property is not an ancestral property of the plaintiffs' grand father, Rathina Udayar. He further found that the Ex. B4 sale deed dated 24.01.1971 was obtained by the defendant by playing fraud and

misrepresentation on the plaintiffs' mother viz., Poongavanam Ammal and hence the said sale deed will not bind upon the plaintiffs. Accordingly, he decreed the suit as prayed for and directed the defendant to deliver vacant possession of the suit property within one month. In so far as the mesne profits is concerned, he ordered for separate enquiry under Order 20 Rule 12 CPC. He also directed the defendant to pay court fees because the suit was filed by the plaintiffs as indigent persons. Aggrieved by the same, the defendant had filed an appeal in A.S.No.188 of 1998 on the file of the Principal District Judge, Villupuram. The learned Principal District Judge had dismissed the said appeal with costs and confirmed the judgment and decree passed by the trial court. Feeling aggrieved, the defendant had filed the present second appeal.

7. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

"(i) Whether the sale deed dated 24.01.1971 was obtained by the petitioner/defendant by practising fraud and misrepresentation and hence void?

(ii) Whether the courts below are justified in law in holding that ancestral properties of the respondent's grand father Rathina Udayar?

(iii) Whether the suit is premature as the settlement deed confers only a vested remainder in favour of the respondents/plaintiffs?

(iv) Whether the courts below are justified in law in shifting the burden of proof on the defendant in regard to the question whether the suit property is ancestral property or separate property of Rathina Udayar?"

8. Heard Mr.R.Venkatasalapathy for M/s.V.Radhakrishnan, learned counsel for the appellants and Mr.N.Suresh, learned counsel for the respondents.

9. Question No.1

Learned counsel for the appellants/defendants has submitted that in the plaint, the plaintiffs have stated that their mother had gone to visit her mother hearing of her illness as she was living with her son in their house in Kazhumaram village for Pongal in 1971 and during her stay there, she was made victim of fraud by her brother and the defendant and got sale deed dated 24.01.1971 in respect of the suit property in favour of the defendant, but she has not filed any suit to set aside the said sale deed on the ground that the said sale deed was obtained

by playing fraud and therefore, the findings of the courts below that the said sale deed was obtained by the defendant by playing fraud and misrepresentation are not correct. He further submitted that the brother of the said Poongavanam Ammal viz., Varadharaju Udayar has not been added as a party in the present suit and on that ground also, the courts below ought not to have held that the said sale deed was obtained by playing fraud and misrepresentation.

10. Per contra, the learned counsel for the respondents has submitted that the recitals made in the sale deed would clearly show that the said sale deed was obtained by playing fraud. In the said sale deed, it is stated that only a vacant site has been sold, but in the mortgage deed dated 22.02.1964 and gift deed dated 22.02.1964, it is specifically stated that there was a terraced building. He further submitted that in the said sale deed, it is stated that only for purchasing property at Kingilivadi, the suit property was sold, but actually, no such property was purchased. He further submitted that as per the mortgage deed dated 22.02.1964, the mortgage was made only for Rs.300/-, but in the sale deed, it is stated that to discharge the mortgage a sum of Rs.1000/- was retained. He further submitted that as per the gift deed dated 22.02.1964, only life interest was given to the said Poongavanam Ammal and the absolute right was given to her children and since she was an illiterate lady, her brother Varadharaju Udayar and the defendants herein have played fraud and misrepresented that some property was being purchased and due to the said misrepresentation, she put her thumb impression and taking into consideration of the aforesaid facts, the courts below have rightly held that the said sale deed was obtained by playing fraud and misrepresentation.

11. Admittedly, Ex.B4 sale deed was executed by the plaintiffs' mother Poongavanam Ammal and her brother Varadharaju Udayar in favour of the defendant on 24.01.1971. According to the plaintiffs, the said sale deed was obtained from the said Poongavanam Ammal by playing fraud and misrepresentation by her brother Varadharaju Udayar and the defendants herein.

12. As per Section 19 of the Indian Contract Act, when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. So, if the sale deed was obtained by playing fraud or misrepresentation and it is only a voidable one and in such a case, the person aggrieved should have filed the suit to declare that the said sale deed was obtained by fraud or misrepresentation within three years from the date of the said sale deed or from the date he got

knowledge about the fraud or misrepresentation. In this case, the plaintiffs' mother viz. Poongavanam Ammal has not filed any suit to declare that the said sale deed was obtained by playing fraud or misrepresentation. Therefore, it is not open to the plaintiffs to take a plea that the said sale deed was obtained from her mother by playing fraud or misrepresentation.

13. It is also to be pointed out that in the plaint, the plaintiffs have stated that their mother's brother Varadharaju Udayar and the defendant played fraud and misrepresentation on their mother. In such a case, the said Varadharaju Udayar should have been impleaded as a party in the suit but he has not been impleaded as a party. So on that ground also, the findings of the courts below that the said sale deed was obtained by playing fraud and misrepresentation and hence the said sale deed is void cannot be accepted. Accordingly, this substantial questions of law is answered in favour of the appellant.

14. Question No.2:

The suit property is a terraced house with a vacant site measuring 19 feet East-West and 50 feet North-West. The plaintiffs are children of Poongavanam Ammal. According to the plaintiffs, the suit property originally belonged to their maternal grandfather Rathina Udayar and it was his self-acquired property and he purchased the same with a thatched house under the sale deed dated 12.03.1930 and subsequently, he constructed the terraced house. Their further case is that on 22.02.1964, the said Rathina Udayar had executed a gift settlement deed in respect of the suit property and wherein he gave a life interest to their mother Poongavanam Ammal and after her life time, her children (plaintiffs) are entitled to enjoy the said property as absolute owners. Their further case is that on 24.01.1971 when their mother Pooganvanam Ammal went to see her ailing mother, her brother Varadharaju Udayar and the defendant conspired and played fraud and misrepresented that the defendant is purchasing some property of her father and obtained thumb impression from her and hence the said sale deed is a void document. Their further case is that in the said sale deed, the first plaintiff alone has been shown as minor and their mother had executed the sale deed on behalf of the said minor also and only after attaining the age of majority the first plaintiff came to know with regard to the aforesaid sale deed and hence, he filed the suit for the aforesaid reliefs.

15. According to the defendant, the said Rathina Udayar got ancestral property. After selling those properties, he purchased the suit property and hence, the suit property is also ancestral property. In support of

the aforesaid contention, the defendant relied upon Exs.B1 to B3. Ex.B1 is the registration copy of the sale deed dated 17.05.1923 executed by the said Rathina Udayar in favour of one Kuppusamy Udayar in respect of the property measuring 2.89 acres situated in S.No.91 of Kingilivadi village. In the said document, it is stated that he sold the said property for Rs.65/- to discharge the debt which was obtained by him from one K.Kaluvappa Udayar. Ex.B2 is also a registration copy of the sale deed dated 31.05.1929 executed by the said Rathina Udayar in favour of Elumichai Udayar in respect of the thatched house situated in S.No.7.3.081 of V. Puthur village. In the said sale deed, it is stated that he sold the said property for Rs.100/- to discharge the mortgage debt which was obtained by him from one K.Kaluvappa Udayar. Ex.B3 is also a registration copy of the sale deed dated 09.09.1944 executed by the said Rathina Udayar in favour of one Kandasamy Udayar in respect of the property situated in S.No.35.2.0.18 of V.Puthur village. In the said document, it is stated that he had sold the property for Rs.100/- and that the said amount was adjusted as the purchaser undertook to discharge the mortgage which was made in favour of one Palanisamy Udayar. So, under the said document, no amount was paid to Rathina Udayar. Therefore, the contention of the defendant that the said Rathina Udayar had purchased the suit property by selling the ancestral properties cannot be accepted.

16. If really the suit property was an ancestral property, the son of the said Rathina Udayar viz, Varadharaja Udayar should have filed a suit questioning the validity of the gift settlement deed dated 22.02.1964 (EX.A3) but he has not filed any suit challenging Ex.A3. It is also to be pointed out that if really the suit property was an ancestral property after the death of Rathina Udayar, his legal heirs viz., said Varadharaju Udayar and Poongavanam Ammal alone had right over the property but the defendant has obtained the Ex.B4 sale deed including the first plaintiff as co-nominee party and that itself would show that the defendant has admitted that the said Poongavanam Ammal and her children acquired the suit property only under Ex.A3 settlement deed. Therefore, the contention of the defendant that the suit property was the ancestral property of Rathina Udayar, cannot be accepted. The courts below after taking into consideration of all the aforesaid facts, rightly came to the conclusion that the suit property was the self-acquired property of Rathina Udayar and as such, he is entitled to execute A3 settlement deed. Accordingly, this substantial question of law is answered against the appellants.

In Ex.A3 settlement deed, only life interest was given to the said Poongavanam Ammal and remainder was vested with her children. But she executed Ex.B4 sale deed in favour of the defendant on 24.01.1971 and therefore, the plaintiffs being the reversioners are entitled to file the suit even during the life time of their mother. Therefore, it cannot be said that the suit is a premature one. Accordingly, this substantial questions of law is also answered against the appellants.

18. Question No.4:

In Ex.A3 settlement deed, it is clearly stated that only life interest was given to the said Poongavanam Ammal and the remainder is vested with her children (plaintiffs). Under the said circumstances, the said Poongavanam Ammal had no right to sell the suit property. Even if she represented as guardian for one of the minor children, she cannot sell the property. So the Ex.B4 sale deed will not bind upon the plaintiffs.

19. Even assuming that the said Poongavanam Ammal is entitled to execute the said sale deed on behalf of the minor children as natural guardian, the said transaction is also a voidable at the instance of the minor or any person claiming under him as per Section 8 of the Hindu Minority and Guardianship Act, 1956. In this case, at the time of filing of the suit, the first plaintiff alone became major and the other plaintiffs were minors. In the plaint, the age of the first plaintiff has been mentioned as nineteen years. So, it is clear that he has filed the above suit within three years from the date of attaining majority. So, the suit is filed in time.

20. In Ex.B4 sale deed, it is stated that the suit property has been sold for Rs.5000/-. Further, it is stated that it is only a vacant site and stone walls are in existence in dilapidated condition. According to the defendant, he has purchased only a vacant site and that was the reason that the property was purchased for Rs.5000/-. His further case is that after the said purchase, he constructed the terraced house. It is seen from Ex.B5 (original usufructuary mortgage deed dated 22.02.1964 executed by the said Rathina Udayar in faovur of Periyamayagam) that even at that time of executing the said mortgage, the terraced house was in existence in the suit property. On the same day, the said Rathina Udayar executed Ex.A3 settlement deed dated 22.02.1964 by giving life interest to the plaintiffs' mother Poongavanam Ammal and absolute right to her children (plaintiffs). In the said document also, it is clearly stated that the terraced house was in existence in the suit property. Since the mortgagee viz., Periyamayagam took possession of the suit property along with the terraced house thereon, vide Ex.B5, it was his duty to

maintain the house properly till the mortgage is redeemed by the mortgager or his legal heirs.

21. The endorsement made in Ex.B5 would show that the defendant had discharged the said usufructuary mortgage only on 10.06.1972. So, only thereafter, he would have taken possession of the suit property from the mortgagee, but in Ex.B4 sale deed, it is stated that on the date of execution of the said sale deed itself, possession of the suit property was given to the defendant. Further, the defendant has not produce any documentary evidence to show that he constructed the terraced house in the suit property. In the absence of any such evidence, it has to be presumed that the terraced house which was shown in Ex.B5 mortgage deed and Ex.A3 settlement deed is still in existence and the contention of the defendant that he constructed the said building cannot be accepted.

22. In Ex.B5, it is clearly stated that the said Rathina Udayar had created usufructuary mortgage in respect of the suit property to one Periyannayagam for Rs.300/-. In lieu of interest for the said amount, the mortgagee enjoying the suit property. So, at the time of discharging the said mortgage, only the principal amount of Rs.300/- has to be paid. The endorsement made in Ex.B5 also would show that the defendant has paid only Rs.300/- to discharge the said mortgage. But in Ex.B4, it is stated that to discharge the mortgage which was executed in favour of Periyannayagam, a sum of Rs.1000/- was retained by the defendant. According to the defendant, apart from the aforesaid amount of Rs.300/-, the said Rathina Udayar had obtained a sum of Rs.700/- as debt from the said Periyannayagam and he had discharged the said debt also and obtained Ex.B6. In Ex.B6, it is stated that the defendant had discharged the mortgage loan of Rs.300/- and also another loan of Rs.700/-. The defendant has not produced any documentary evidence to show that the said Rathina Udayar had obtained any other loan from the said Periyannayagam apart from the aforesaid usufructuary mortgage. Therefore, the contention of the defendant that he has paid Rs.700/- towards the debt borrowed by the said Rathina Udayar apart from the usufructuary mortgage cannot be accepted.

23. In Ex.B4, it is stated that the said Poongavanam Ammal had received the amount for purchasing the property at Kingilivadi and also to meet out education expenses. There is no evidence to show that the said Poongavanam Ammal purchased any property in Kingilivadi village. Further the defendant failed to prove that the said Poongavanam Ammal had sold the property to meet out the legal necessities of the minors. Therefore, the contention of the defendant that the said sale deed will bind upon the plaintiffs, cannot be accepted.

24. It is seen from Ex.B5 that the said document was executed on 22.02.1964 as document No.518. A perusal of Ex.A3 shows that the said settlement deed was executed on the very same date and the same was registered as document No.519. So, it is clear that only after executing Ex.B5 usufructuary mortgage in favour of Periyannayagam, the said Rathina Udayar had executed Ex.A3 settlement deed in respect of the suit property. So the usufructuary mortgage created through Ex.B5 would bind upon the plaintiffs. Admittedly, the defendant had discharged the said mortgage by paying Rs.300/- on 10.06.1972 and only from that date onwards, he is in possession and enjoyment of the suit property. So, it can be presumed that he is in possession of the property as assignee of the mortgage and not as owner. Unless the plaintiffs paid the said amount, they cannot recover the possession of the suit property. Further, only as per the authorisation given by the plaintiffs' mother Poongavanam Ammal under Ex.B4 sale deed, the defendant had discharged the usufructuary mortgage. Therefore, the plaintiffs cannot contend that the defendant had voluntarily discharged the mortgage debt. Since the defendant is in possession of the suit property as assignee of the usufructuary mortgage, the plaintiffs are not entitled to ask for mesne profits. To that extent, the judgment and decrees passed by the trial court have to be modified. Accordingly, the substantial question of law is answered.

25. In the result, the second appeal is partly allowed. That the plaintiffs are entitled for the relief of delivery of possession of the suit property only on payment of mortgage debt of Rs.300/- as mention in Ex.B5. The plaintiffs should deposit the said amount before the trial court within two months from the date of receipt of copy of this judgment. On such deposit, the defendant has to receive the said amount and deliver possession of the suit property within two months thereafter. The plaintiffs are not entitled to the relief of mesne profits. In other aspects, the judgments and decrees passed by the courts below are confirmed. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar(CS iv)

//True Copy//

Sub Assistant Registrar

gv

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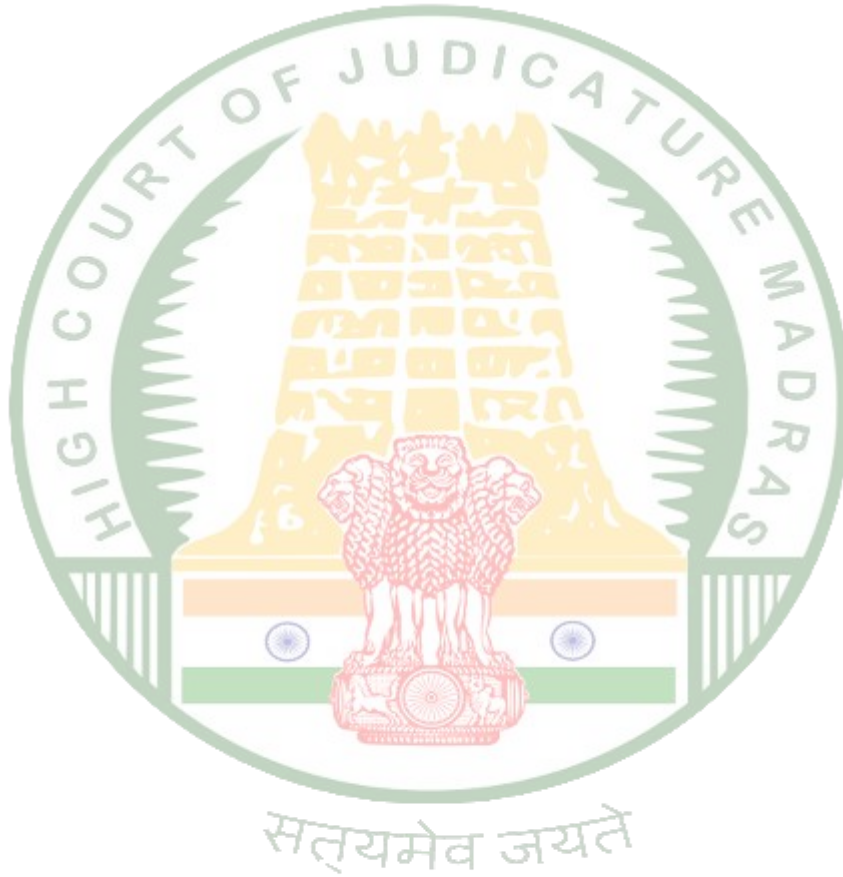
2. The Sub Judge, Cuddalore.

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

+1cc to Mr. , Advocate SR.No. 2838

S.A.No.1068 of 2001

A.SK(03/04/2019)



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