

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.02.2020

Date of Verdict : 19.02.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1388 of 1998
and C.M.P.No.11453 of 1999

Nagore PichaiAppellant/Plaintiff

Vs.

1.Ramalingam (Died)
2.Krishnan
3.Babu ...Respondents 1 to 3/Defendants 1 to 3
4.Karpagam
5.Radhika
6.Pushpavalli
7.Sundari (Died)
8.Usharani
9.Jayanthi
10.Chitra
11.Jayalakshmi
12.Indumathi
13.Vannamathi
14.charumathi ...Respondents 4 to 14
[Respondents 4 to 14 are brought on
record as legal heirs of the
deceased R1 viz., Ramalingam Vide
Court Order Dated 20.11.2018 made in
CMP.No.1051 of 2010 in S.A.No.1388
of 1998]

[Respondents 4 and 5 are brought on
record as legal heirs of the
deceased R2 viz., Krishnan Vide
Court Order Dated 20.11.2018 made in
CMP.No.1054 of 2010 in S.A.No.1388
of 1998]

15.Natarajan
16.Saravanan
17.Jayalakshmi ...Respondents 15 to 17
[Respondents 15 to 17 are brought on
record as legal heirs of the
deceased R7 viz., Sundari Vide Court
Order Dated 03.01.2020 made in
CMP.Nos.6619 and 6620 of 2018 in
S.A.No.1388 of 1998] ...Respondents

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and Decree Dated 18.02.1997 in O.S.No.72 of 1991 on the file of the Additional Sub Court, Mayiladuthurai confirmed in A.S.No.110 of 1997 dated 31.12.1997 on the file of the Principal District Judge, Nagapattinam.

For Appellant : Mr.B.Kumar, Senior Counsel for
Mr.S.Ramachandran

For R1, R2, R14 : Died

For R3 to R5,
R7 and R8 : Mr.A.Muthu Kumar

For R6, R9 to R13 : Mr.S.Sounthar

For R15 to R17 : Notice served

J U D G M E N T

This second appeal is directed as against the Judgment and Decree dated 31.12.1997 passed in A.S.No.110 of 1997 on the file of the Principal District Court, Nagapattinam, confirming the Judgment and Decree dated 18..02.1997 passed in O.S.No.72 of 1991 on the file of the Additional Sub Court, Mayiladuthurai.

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

3.The suit is filed for specific performance. The plaintiff also filed an application in C.M.P.No.11453 of 1999 to receive additional documents.

4.The case of the plaintiff in brief is as follows:-

4.1The suit property originally belonged to the father of the first and second defendants and grand father of the third defendant. The parents of the first and second defendants died and thereafter the first defendant is the kartha of the family. The defendants entered into an agreement for sale with the plaintiff on 30.03.1988 for the total sale consideration of Rs.78,000/-. On the date of agreement a sum of Rs.10,000/- was paid as advance amount. The balance sale consideration to be paid within the period of six months before the Sub-Registrar at the time of registration of Sale Deed. Thereafter, the second defendant also received a sum of Rs.10,000/- on 22.02.1990 from the plaintiff and agreed to execute the Sale Deed in favour of the plaintiff. Though the time was fixed as six months to execute the Sale Deed, the same was not treated as essence of the contract, since the second defendant received a sum of

Rs.10,000/- on 22.02.1990. Thereafter, when the plaintiff is always ready and willing to perform his part of contract. The defendants are postponing the execution of Sale Deed. Therefore, the plaintiff caused notice on 25.09.1988, when the defendants attempted to convey the suit property to one Subramaniam. Against which the plaintiff caused notice on 21.07.1990, informing him that there is a subsisting agreement for sale and as such the sale was stopped. In fact, the plaintiff also filed a suit in O.S.No.292 of 1988 on the file of the District Munsif Court, Sirkali for permanent injunction restraining the defendants from alienating the suit properties. Though the defendants are living as joint family and agreement for sale executed on behalf of the defendants, in which the third defendant represented on behalf of himself, brother and sisters. If at all the sale agreement was not binding on the third defendant, the Sale Deed has to be executed in so far as the 2/3rd share of the first and second defendants. Hence the suit.

5. Resisting the same the first defendant filed a separate written statement and stating that it is true that the first defendant entered into an agreement for sale on 30.03.1988 and agreed to sell the property for sale consideration of Rs.1,78,000/-, since to avoid stamp duty they mentioned the sale consideration as Rs.78,000/- and the balance of Rs.1,00,000/- has to be paid by the plaintiff to the first defendant. Though the sum of Rs.10,000/- was received as an advance, the plaintiff paid a sum of Rs.3,000/- alone and the balance of Rs.7,000/- has to be paid in next day. When the first defendant demanded to pay the balance advance amount of Rs.7,000/-, the plaintiff demanded the signatures of the second and third defendants in the agreement. Therefore, the entire agreement for the sale has been stopped and prayed for dismissal of the suit.

6. The second defendant filed a written statement and stating that the suit property belonged to the defendants. All the averments made in the plaint are false and frivolous. The agreement dated 30.03.1988 itself is a disputed one and it would not binding upon the second defendant. The first defendant is neither the kartha of the family, nor he is an authorized by the second defendant to enter into any Sale agreement. Therefore, the second defendant does not know about the alleged agreement for sale and receipt of Rs.10,000/-. In fact, the second defendant never intended to sell the suit property to the plaintiff and prayed for dismissal of the suit.

7. The third defendant filed a written statement stating that the first defendant is not at all the kartha of the family and he cannot execute any sale agreement on behalf of the third defendant. There is no love lost between the third defendant and the defendant Nos.1 and 2 herein. The father of the third defendant even while he was alive there was no cordial relationship between the brothers, defendant

Nos.1 and 2. The agreement for sale itself is a concocted one, created by the plaintiff with the active assistance of the defendant Nos.1 and 2. The said agreement is neither proved nor valid and binding on the third defendant. Further the plaintiff instituted a suit in O.S.No.292 of 1998 on the file of the District Munsif's Court, Sirkali for permanent injunction. In the said suit, the third defendant filed a detailed written statement.

8.The third defendant is the son of one S.N.Krishnamurthy, who died on 31.01.1987 and he is survived by his wife Savithri, his daughter Amutha and his only son being the third defendant. They are the sole and nearest heirs of the deceased Krishnamurthy. The defendant Nos.1 and 2 and Krishnamurthy Padayachi are the sons of one Natesa Padayachi and Ponnammal. The said Ponnammal died on 03.11.1987. The father of the third defendant while he was alive instituted a suit for partition and separate allotment of his 1/3 share in the suit property in O.S.No.211 of 1982 on the file of the District Munsif Court, Sirkali. In the said suit preliminary decree was passed on 11.11.1983 granting $\frac{1}{4}$ th share in favour of the said Krishnamurthy, the father of the third defendant herein. Aggrieved by the same, the defendant Nos.1 and 2 preferred an appeal suit in A.S.No.11 of 1986 and the same was dismissed by this Court on 26.08.1986 and an Advocate Commissioner was appointed to execute the preliminary decree. Therefore, the present suit and the other suit in O.S.No.292 of 1988 on the file of the District Munsif Court, Sirkali have been filed only to stall the final decree proceedings in O.S.No.211 of 1982 on the file of the District Munsif Court, Sirkali. The suit itself is barred by limitation even assuming that the sale is proved and in any event cannot relate back to the date of the suit and prayed for dismissal of the suit.

9.On the side of the plaintiff PW1 and PW2 were examined and eight documents were marked as Ex.A1 to Ex.A8. On the side of the defendants DW1 and DW2 were examined and five documents were marked as Ex.B1 to Ex.B5. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit. Aggrieved over the Judgment and Decree of the trial Court, the defendants preferred an appeal suit in A.S.No.110 of 1997 before the Principal District Court, Nagapattinam. The first appellate Court on appreciating the materials placed on records dismissed the appeal, by confirming the Judgment and the Decree passed by the Additional Sub Court, Mayiladuthurai. Challenging the same, the plaintiff has come forward with the present second appeal.

10.At the time of admission of the second appeal on 25.09.1998 the following substantial questions of law was framed :-

(i) "Whether the Court below having come to the conclusion that Ex.A1 agreement would not bind the third defendant is right in holding that it was entered into to delay the decree in O.S.No.211 of 1982, District Munisf, Sirkali, especially when no material or evidence is placed to prove the said fact?"

11.The learned senior counsel appearing for the plaintiff submitted that the first defendant categorically admitted the execution of the sale agreement i.e. Ex.A1 and as such the suit is liable to be decreed. Though, the trial court failed to frame any issue on the readiness and willingness, the plaintiff proved his readiness and willingness to perform his part of contract under Ex.A1. In fact along with the second appeal, the plaintiff filed an application to receive the additional documents in C.M.P.No.11453 of 1999 to prove his readiness and willingness to perform his part of contract. He mainly relied upon the documents such as stamp papers purchased in the year 1988 to execute the sale deed and also the statement of Savings Bank Account to show that on the date of execution of sale deed the plaintiff had sufficient money, in his account to pay the balance sale consideration.

12.Further he submitted that the first appellate court without even framing any point for consideration, it is being the final Court for appreciating evidence, simply framed the points whether the appeal is liable to be allowed or not and dismissed the appeal. He also contended that the time is not an essence of contract and as such the suit is very much maintainable and never barred by limitation.

13.In support of his contention the learned counsel for the plaintiff relied upon the following Judgments:

- (i) B.V.Nagesh and Another Vs. H.V.Sreenivasa Murthy reported in (2010) 13 Supreme Court Cases 530;
- (ii) Union of India Vs. K.V.Lakshman and others reported in (2016) 13 Supreme Court Cases 124;
- (iii) Uttaradi Mutt Vs. Raghavendra Swamy Mutt reported in (2018) 10 Supreme Court Cases 484; and
- (iv) R.Lakshmikantham Vs. Devaraji reported in (2019) 8 Supreme Court Cases 62.

14.Per contra, the learned counsel appearing for the respondent Nos.3, 4, 5, 7 and 8 submitted that the original alleged sale agreement is not filed before the trial Court. Since the stamp papers purchased even after the date of alleged agreement of sale. Therefore, the sale agreement is not a valid one and the defendants never executed the same in favour of the plaintiff. He further submitted that though the

points for determination was not specifically framed by the First Appellate Court, the First Appellate Court considered the entire evidence on record and discussed the same in detail and come to a conclusion that the plaintiff failed to prove his case and confirmed the Judgment and Decree passed by the Trial Court. In this regard, in support of his contention he also cited the Judgment reported in 2009 (5) CTC 798 in the case of Satvithri Padmanabhan and others Vs. M.Rajendran.

15.The learned counsel appearing for the respondent Nos.6, 9 to 13 contended that the plaintiff never proved his readiness and willingness to perform his part of contract. The alleged agreement for sale was executed on 30.03.1988 and the time fixed for completing the transaction was six months, whereas the suit has been filed on 25.02.1991. Therefore, it is clearly barred by limitation and the suit itself is not maintainable. In fact, the plaintiff already filed a suit for permanent injunction in O.S.No.292 of 1998 on the file of the District Munsif's Court, Sirkali and even then the plaintiff failed to file any suit for specific performance within the time. Further, the plaintiff did not even prove the genuineness of the agreement before the trial Court. The third defendant's father already filed a suit for partition in O.S.No.211 of 1982 on the file of the District Munsif Court, Sirkali and it was decreed. During the pendency of the final decree application, the present suit is filed only to stop the proceedings of the partition. The application to receive the additional documents filed by the plaintiff only to fill up the lacuna after the dismissal of the suit by the Courts below and there is absolutely no reason stated that the production of those documents in a belated stage that too in the Second Appeal. When the trial Court dismissed the suit also on the ground that the plaintiff failed to prove the readiness and willingness to perform his part of contract, the plaintiff ought to have filed the application to receive the additional documents at least before the first appellate court. Therefore, the application is liable to be dismissed. In support of his contention, he relied upon the Judgment reported in (2006) 3 Supreme Court Cases 224 in the case of G.Amalorpavam and others Vs. R.C.Diocese of Madurai and others.

16.Heard Mr.B.Kumar, learned Senior Counsel for the appellant, Mr.A.Muthu Kumar, learned counsel for the respondent Nos.3 to 5, 7 and 8 and Mr.S.Sounthar, learned counsel for the respondent Nos.6, 9 to 13.

17.The suit for specific performance is filed on the strength of the sale agreement dated 30.03.1988. According to the plaintiff, the first defendant is being the kartha of the family for himself and on behalf of the defendant Nos.2 and 3 executed the said agreement in favour of the plaintiff for the total sale consideration of Rs.78,000/-, in which they received a sum of Rs.10,000/- as an advance. Initially, six

months time was fixed for completing the entire transaction. Subsequently, on 22.02.1990 another sum of Rs.10,000/- was received by the second defendant. Even then the defendants did not come forward to execute the sale deed and caused notice on 21.07.1990. In the mean while, the defendants were attempted to execute the sale deed in favour of the third person viz., Subramaniam and therefore, the plaintiff filed a suit immediately in O.S.No.292 of 1988 on the file of the District Munsif Court, Sirkali against the defendants, only thereafter filed the present suit for specific performance. Though, the first defendant admitted the execution of the sale agreement in favour of the plaintiff and he received only a sum of Rs.3,000/- instead of Rs.10,000/- as advance, when he demanded to pay the balance advance amount, the plaintiff insisted him to get an acknowledgment from the defendant Nos.2 and 3. Therefore, the agreement itself is invalid one.

18.The second defendant also stated that he never executed any agreement for sale, since the first defendant is not being the kartha of the family. Therefore, the agreement is not binding the second defendant. In so far as the third defendant is concerned he never executed any agreement for sale and also contended that the first defendant is not at all the kartha of the family. While his father was alive, he instituted a suit for partition and separate allotment of his 1/3 share in the suit property in O.S.No.211 of 1982 on the file of the District Munsif Court, Sirkali and preliminary decree was passed in respect of their share. While pending final decree proceedings, the present suit has been filed only to prevent the partition. The sale agreement was marked as Ex.A1.

19.On perusal of Ex.A1, the signature of the first defendant alone found and there is no mentioning about the defendant Nos.2 and 3. Further, the first defendant did not execute the said agreement on behalf of the second and third defendants. The first defendant categorically stated that he received only a sum of Rs.3,000/- and the remaining balance amount of Rs.7,000/- was never paid by the plaintiff to proceed with the sale agreement. When he asked for the remaining balance advance amount, the plaintiff insisted him to get the signatures of defendant Nos.2 and 3. It is crystal clear that the second and third defendants never executed any sale agreement in favour of the plaintiff. Further the plaintiff also failed to prove his readiness and willingness to perform his part of contract. Though, the trial Court and the first appellate Court dismissed the suit on that ground, the plaintiff did not take any steps to file the additional documents before the first appellate court and filed application in C.M.P.No.11453 of 1999 before this Court along with the Second Appeal.

20.On perusal of those documents, it is found that the stamp papers are not sufficient to execute the sale deed.

The previous date of the stamp paper can be purchased at any point of time. Therefore, it cannot be considered that the plaintiff was ready and willing to perform his part of contract, even before expiry of time fixed in the sale agreement. Further the Statement of the Savings Bank Account shows that in the month of September and October 1988 only a sum of Rs.1,296/- and Rs.569/- was only available in the account of the plaintiff. Therefore, those documents are not at all helpful for the case of the plaintiff. Hence, the application filed before this Court in C.M.P.No.11453 of 1999 to receive the additional documents is dismissed.

21.The learned Senior Counsel contended that the first appellate court without even framing any point for consideration and simply framed the point whether the plaintiff is entitled for any relief as prayed for and without even discussing anything simply dismissed the appeal. Therefore, it is clear violation of Order 41 Rule 31 CPC.

22.In this regard, the learned counsel appearing for the respondent Nos.3, 4, 5, 7 and 8 relied upon the Judgment reported in 2009 (5) CTC 798 in the case of Satvithri Padmanabhan and others Vs. M.Rajendran. The relevant portion of the Judgment is extracted as under:

"36.Countering the submission made by the learned senior counsel appearing for the appellants, learned senior counsel appearing for the respondent submitted that even though no points have been framed by the lower appellate court, there is substantial compliance with the requirement of Order 41 Rule 31 C.P.C. by lower appellant court. In support of his contention, learned senior counsel relied on the following judgments:

(i) S.M. Ponnaiah Nadar & Sons v. R.C. Diocese, 2004 (4) CTC 30:

"Framing of points for determination in first appeal - Second appeal against concurrent judgment in suit for recovery of possession and claim for arrears of rent - Trial court decreed suit in favour of plaintiff and lower appellate court independently considered evidence and rendered different findings on issues framed by trial court - Lower appellate court did not frame points for determination - Substantial compliance of provisions of Order 41, Rule 31 is sufficient and when lower appellate court has independently considered all issues, omission to frame points for determination will not render decree of lower appellate court invalid."

(ii) G. Amalorpavam and Ors. v. R.C. Diocese of Madurai and Ors. 2006(3) SCC 224:

9. The question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the points has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisal of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is found with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100 CPC."

23.The learned counsel appearing for the respondent Nos.6, 9 to 13 relied upon the Judgment reported in (2006) 3 Supreme Court Cases 224 in the case of G.Amalorpavam and others Vs. R.C.Diocese of Madurai and others. The relevant portion of the Judgment is extracted as under:

"9.The question whether in a particular case there has been a substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisal of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the Rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the Court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered

appropriate and so advised to avail the remedy of Second Appeal conferred by Section 100 CPC.

10. At this juncture it would be relevant to note what this Court said in *Girija Nandini Devi and Ors. v. Bijendra Narain Choudhary*. In AIR para 12 it was noted as follows: (SCR p. 101 F-G)

"It is not the duty of the appellate court when it agrees with the view of the Trial Court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the Trial Court. Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice."

24. The Hon'ble Supreme Court of India and this Court held that the question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. In the case on hand though the first appellate court did not frame any point for determination, there is compliance of substantial requirements with the provision of Order 41 Rule 31 CPC. The first appellate court has considered the entire evidence on record and discussed the same in detail and its finding is supported by reasoning. Therefore, the Judgment and the Decree of the first appellate Court in any manner vitiated the absence of the point for determination. Hence, the Judgment and Decree dated 31.12.1997 passed by the first appellate court is well considered and a valid one.

25. The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the case on hand.

26. In view of the above discussion, this Court does not find any valid reason to interfere with the findings by the Courts below for upholding the case of the defendants and as such the Courts below have analyzed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons, concluded rightly and dismissed the suit filed by the plaintiff. Accordingly, this Court is of the considered opinion that no substantial question of law involved in this appeal. Be that as it may. The substantial question of law, formulated by this Court in this Second Appeal, is answered in favour of the defendants and as against the plaintiff.

27. Accordingly, this Second Appeal stands dismissed.
No order as to costs. Consequently, the connected
Miscellaneous Petition in C.M.P.No.11453 of 1999 is dismissed.

Sd/-
Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Nagapattinam.

2. The Additional Sub Court,
Mayiladuthurai.

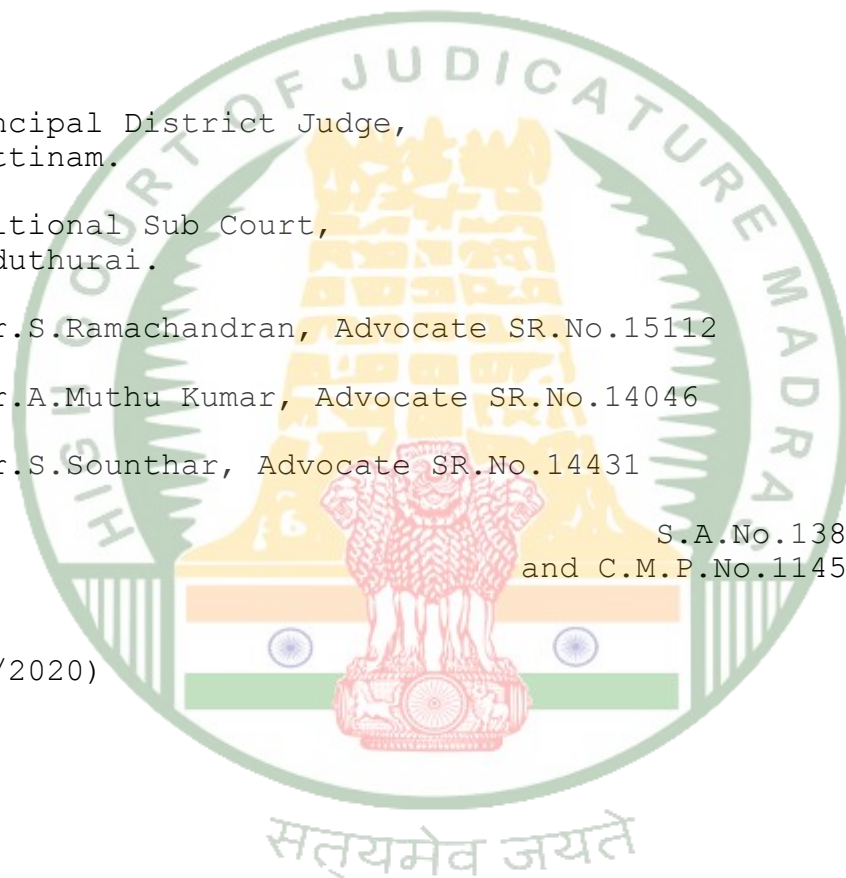
+2cc to Mr.S.Ramachandran, Advocate SR.No.15112

+1cc to Mr.A.Muthu Kumar, Advocate SR.No.14046

+1cc to Mr.S.Sounthar, Advocate SR.No.14431

S.A.No.1388 of 1998
and C.M.P.No.11453 of 1999

VD(CO)
GMY (27/08/2020)



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