



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.06.2022

Pronounced on : 15.07.2022

Coram

The Hon'ble Mr. Justice **C.V.KARTHIKEYAN**

S.A.No.1409 of 2001
and
C.M.P.No.27424 of 2019

1.Pachamuthu

...Defendant/Appellant/Appellant

Vs.

1.E.Rajbi (died)

2.Salima Bi (died)

3.Shehana (died)

4.Nizaar

5.Absar

6.Minor Aktar

rep.by natural friend and mother

Salima Bi

7.M.P.Sengottaiyan

...Plaintiffs/Respondents/Respondents

RR1 to 3 died and sold the properties to the 7th respondent in now representing estate recorded as per memo dated 20.11.2019 are recorded vide order of the Court dated 20.11.2019.



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The Second Appeal filed under Section 100 of CPC, against the judgment and decree made in A.S.No.98 of 1998 dated 30.06.2000 on the file of the Sub Court, Namakkal confirming the judgment and decree made in O.S.No.589 of 1992 dated 24.09.1998 on the file of the Principal District Munsif Court, Namakkal.

For Appellant : Mr.K.Krishnan for Mr.A.Sivaji

For R7 : Mr.P.M.Duraisamy

R1 to R3 : Died

R4 to R6 : No appearance

JUDGMENT

The defendant in O.S.No.589 of 1992 on the file of the District Munsif Court, Namakkal, is the appellant herein. The said suit was originally filed by seven plaintiffs and later the 8th plaintiff had been impleaded on application filed and being allowed. The suit had been filed seeking a declaration that the 1st to 7th plaintiffs are entitled for a declaration



with respect to A schedule property and that the 8th plaintiff is entitled for a declaration with respect to B schedule property and for recovery of possession with respect to item Nos.1 and 2 of B schedule property and to handover such possession to the 8th plaintiff and also for costs of the suit. The suit was decreed by judgment dated 24.09.1998. The defendant then filed A.S.No.98 of 1998 before the Sub Court, Namakkal. The appeal suit was also dismissed by judgment dated 30.06.2000. The defendant then filed the present Second Appeal.

2.The Second Appeal had been admitted on the following three substantial questions of law:

“1.Have not the courts below committed error in law in decreeing the suit especially in respect of item Nos.1 and 2 of 'b' schedule in favour of the 8th plaintiff when the sale effected in his favour is hit by the doctrine of lis pendens?

2.Are the Courts below justified in law in holding that the defendant has trespassed and encroached upon the suit property only on 14.11.1992 when the commissioner's report



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filed as early as 24.02.1987 supports the case of the defendant that he is in possession and enjoyment of the aforesaid items long prior to the institution of the suit and not on 14.11.1992 as alleged by the plaintiffs?

3.Have not the courts below misdirected itself by not framing the issue regarding adverse possession and not advertng to and deciding the same in a manner known to law?"

3.The appellant also filed CMP.No.27424 of 2019 under Order 41 Rule 27 CPC., to receive additional documents, namely, copy of assignment issued by the Tashildar and other revenue documents.

4.Pending the appeal the 1st to 3rd respondent died, but they had been set exparte even during the first appeal hearing. This Second Appeal was contested by the 7th respondent.



O.S.No.589 of 1992 (District Munsif Court, Namakkal):-

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5. In the plaint it had been stated that the suit properties originally belonged to the father of the 1st and 2nd plaintiffs, by name Syed Ismail. The father, Syed Ismail died on 23.08.1971. Thereafter, the properties devolved to the 1st and 2nd plaintiffs and to their sisters. It was further stated that a registered partition deed was entered into among the 1st to 7th plaintiffs on 10.03.1982. According to the said partition deed, the A schedule property was allotted to the 1st plaintiff and the B schedule property was allotted to the 2nd plaintiff. They were enjoying the said properties to the exclusion of everybody else.

6. It was further stated that the defendant had his property on the West side at Kumarachetti Street. He had offered to purchase the property belonging to the plaintiffs, but the offer was rejected. Thereafter, he tried to encroach into the property. The plaintiffs had conveyed the 1st and 2nd items in B schedule property to the 8th plaintiff. However, the defendant had encroached into the said item Nos.1 and 2 of B schedule property. It was therefore stated that a declaratory relief should be granted with respect to A and B schedule properties and recovery of possession with respect to item Nos.1 and 2 of B schedule property.



7.A written statement was filed by the defendant. He denied the assertions of the plaintiffs. It was stated that he was entitled for A and B schedule properties. The defendant claimed to be in possession of the B schedule property. It was stated that he was doing business in the said property. An additional written statement was also filed claiming that the Court had no jurisdiction to examine the issues raised in the suit. It was again reiterated that the suit should be dismissed.

8.The properties which were the subject matter of the suit were situated in S.No.177/2 at Rasipuram in Salem District. Originally, it was an Inam property. Later after the Tamil Nadu Minor Inams (Abolition and Conversion Into Ryotwari) Act, 1963, it was converted to ryotwari patta land. Thereafter, patta was granted to the father of the 1st and 2nd plaintiffs.

9.On the basis of the aforementioned pleadings, the following issues were framed:-

“1.Whether the 1st to 7th plaintiffs were entitled for declaration with respect to A schedule property and whether the 8th plaintiff was entitled for declaration with respect to B schedule property?



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2. Whether the claim of the plaintiffs that the defendant had encroached into the 1st and 2nd items of B schedule property is true and whether the 8th plaintiff is entitled for recovery of those properties?

3. Whether the contention that 1st to 7th plaintiffs have no title over the property and consequently, that their sale in favour of the 8th plaintiff on 19.10.1989 is not valid is correct?

4. Whether the suit is maintainable without seeking relief of declaration and recovery of possession with respect to item Nos.1 and 2 of B schedule properties?

5. Whether there is cause of action for instituting the suit?

6. To what other reliefs are the plaintiffs entitled to?"

10. During trial, the 2nd plaintiff was examined as PW-1 and the plaintiffs also examined four other witnesses as PW-2 to PW-5. The defendant examined himself as DW-1 and also examined seven other witnesses as DW2 to DW-8.



11.The plaintiffs marked Exs.A1 to A29. Ex.A1 was the order of the Settlement Tashildar, Salem dated 15.06.1969. Ex.A2 was the partition deed among the 1st to 7th plaintiffs dated 10.03.1982. Ex.A3 was the sale deed in favour of the 8th plaintiff dated 19.10.1989. The other documents were tax receipts and documents relating to an earlier suit in O.S.No.418 of 1991 on the file of the Sub Court Namakkal. Ex.A29 was the certified copy of A-Register.

12.On the side of the defendant, Exs.B1 to B23 were marked. Ex.B4 dated 27.07.1982 was the letter from the Town Municipality with respect to the business run by the defendant in S.No.177/2. The other documents filed by the defendant were to establish his possession. The property tax letters were marked as Exs.C1 and C4. The Advocate Commissioner's report and sketch were marked as Exs.C2 and C3.

13.The learned District Munsif, Namakkal, took up for consideration issue nos.1 to 5 together and found as a fact that the defendant had contended that he was having a small factory in door No.5E1, Zaheer Hussain Street, Rasipuram and had also constructed his house and was in



possession from 1959. However, it was found that the documents filed by him reflected that he was actually residing in door No.7 and that he had only applied for grant of patta in Exs.B6 and B7. He had not obtained patta till the trial. He had also filed O.S.No.418 of 1991 before the Sub Court Namakkal and though he had contended that he is residing at door No. 5E1, he had not disclosed whether the said property was patta land or Government poromboke land. Comparing this with the documents produced by the plaintiffs, the learned District Munsif found that as early as 1969, the Settlement Tashildar, Salem had passed an order in favour of the plaintiffs in Ex.A1. It was found that the plaintiffs were in continuous possession of the suit schedule properties. It was also found that the 8th plaintiff had purchased the property by Ex.A3 in the year 1989, but that the defendant had encroached into a portion of the property. It was also observed that though the defendant contended that he was entitled for the property, he had not substantiated such claim. It was also found that in the earlier suit which the defendant had filed, he had not impleaded the Government as a party defendant. It was therefore held that the defendant had no manner of right, title or interest over the suit schedule properties.



14. Thereafter, the documents produced by the plaintiffs were again re-examined and it was found that owing to the order of the Settlement Tashildar, the plaintiffs were entitled for the property. It was also stated that they had conveyed the B schedule property to the 8th plaintiff by Ex.B3. In view of the above findings, it was stated that the plaintiffs had established their case and therefore, the suit was decreed.

A.S.No.98 of 1998 (Sub Court Namakkal):-

15. The defendant then filed A.S.No.98 of 1998 before the Sub Court Namakkal. This came up for consideration before the learned Sub Judge Namakkal and by judgment dated 30.06.2000, the Appeal Suit was dismissed and the judgment and decree of the Trial Court was confirmed.

16. The learned Sub Judge had framed the following points for consideration under Order 41 Rule 31 CPC:-

“1. Whether the 1st to 7th plaintiffs were entitled for declaration with respect to A schedule property and whether the 8th plaintiff was entitled for declaration with



respect to B schedule property?

2. Whether the 8th plaintiff was entitled for recovery of possession with respect to item Nos.1 and 2 of B-schedule property?

3. Whether the suit had been properly valued and whether proper court fees had been paid?

4. Whether the appeal has to be allowed?

5. To what other reliefs are the parties entitled to?"

17. The learned Sub Judge again reappraised the evidence. It was observed that the suit property was situated at S.No.177/2. The 8th plaintiff had been examined as PW-2. He claimed that he had purchased B schedule property by Ex.B3. Ex.B1 was the order of the Settlement Tashildar. Thereafter, the plaintiffs 1 to 7 had entered into a partition among themselves. It was also found that the 8th plaintiff had had paying tax in his own name and documents in this regard had been produced and marked as exhibits.



18.It was also observed that the defendant had originally filed O.S.No.418 of 1991 before the Sub court Namakkal against the 8th plaintiff and three others and thereafter, the said suit was withdrawn. The plaint in the said suit was marked as Ex.A25 and the judgment and decree in the said suit were marked as Exs.A26 & A27.

19.The evidence of the defendant, DW-1 was also considered. It was stated that he claimed that he resided at door No. 5E1, Zaheer Hussain Street and he had stated that he was also running a factory and that his property was in S.No.177/2. At the time of cross examination that the admission of the defendant that he was actually residing in Government Poramboke land was also noted by the First Appellate Court. It was also observed that he had applied for patta, but it had not been granted. The contention of the defendant that he had prescribed title by adverse possession was also considered by the learned First Appellate Court Judge. It was however found that his possession was not hostile and was not to the prescribed period. It was finally held that the appeal had no merits and therefore the learned Sub Judge Namakkal, dismissed the said appeal and confirmed the judgment and decree of the Trial Court.



CMP.No.27424 of 2019 and S.A.No.149 of 2001:-

20.Heard arguments advanced by Mr.K.Krishnan, learned counsel for the appellant and Mr.P.M.Duraisamy learned counsel for the 7th respondent.

21.It is to be noted that a memo had been filed by the learned counsel for the appellant that the respondents 1 to 3 had unfortunately died, but they had already been set exparte before the First Appellate Court.

22.Even before examining the substantial questions of law, the application filed by the appellant / defendant in CMP.No.27424 of 2019 will have to be considered. The said civil miscellaneous petition had been filed under Order 41 Rule 27 CPC, to receive additional documents namely, a copy of the assignment issued by the Tashildar in the name of the appellant / defendant on 20.11.2011, a copy of the A-Register dated 18.03.1996, a copy of chitta issued by the Village Administrative Officer in favour of the appellant / defendant and copies of electricity bills.



23. In the affidavit filed in support of the said petition, it had been stated that pending the Second Appeal, the Tashildar had granted an assignment order to the appellant/defendant on 20.11.2011 to the land to an extent of 0.0191.0 sq.mts. in Town Survey No.121/23. It had therefore been stated that this documents establishes continuous possession by the appellant / defendant. It was therefore urged that the additional documents should be taken on record.

24. The 7th respondent who was the 8th plaintiff in the suit filed a counter affidavit wherein, he claimed that the revenue authorities have no right to issue such assignment. He stated that the patta had not been issued with respect to the suit property. He also stated that no authority can issue any certificate or document pending the Second Appeal without issuing notice to him / the said 7th respondent / 8th plaintiff. It was therefore stated that the application should be dismissed.

25. Order 41 Rule 27 of CPC is as follows:-

“Rule 27. Production of additional evidence in Appellate Court.-

1). The parties to an appeal shall not be entitled to



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produce additional evidence, whether oral or documentary, in the Appellate Court. But if,

(a)The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa)The party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b)The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2)Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the



reason for its admission.”

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26. It is clear that the documents now produced, had been generated pending the Second Appeal. They are documents issued by the revenue authorities a decade after the suit had been instituted by the respondents herein seeking declaration of title and recovery of possession.

27. In ***(1998) 3 SCC 751, Sankaranarayanan Potti (Dead) By Lrs. Vs. K.Sreedevi and others***, a larger bench of the Hon'ble Supreme Court was called upon to examine the issue of the Kerala Land Tribunal passing orders recognizing rights and granting assignment to a party to a litigation, when the parties were already interlocked in a civil dispute. The Hon'ble Supreme Court held as follows:

“10. It is obvious that in all types of civil disputes civil courts have inherent jurisdiction as per Section 9 of the Code of Civil Procedure unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or



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authority. On a conjoint reading of proviso to Section 125(1) of the principal Act and Section 108(3) of the Amending Act it must, therefore, be held that the question of status of Defendant 2 under the Amending Act 35 of 1969 could have been decided only by the civil court in the pending suit and not by the Land Tribunal under the Amending Act. Consequently, the direct approach made by him to the Land Tribunal under the Amending Act must be held to be premature and incompetent and it must also be further held that consequently the orders obtained by him from the Land Tribunal were rendered by a Tribunal which had no jurisdiction to pass such orders and they were nullities.”

28. It is thus seen that any grant or assignment passed by the revenue authorities pending a civil suit and without reference to either the civil suit or to the parties to the civil litigation must be held to be premature and incompetent. The Hon'ble Supreme Court had held it must also be further held that the orders so obtained were rendered by an authority which had no



jurisdiction to pass such orders and they were nullities.

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29. The same issue came up for consideration before a Full Bench of this Court in **1998 (I) CTC 630 : (1998) IIMLJ 722, Srinivasan and six others V. Sri Madhyarjuneswaraswami, Pattaviathalai, Tiruchirapally District and five others**, where on a reference made by a learned Single Judge with respect to orders passed by the Tribunal or the revenue authorities in that particular case under Tamil Nadu Minor Inams (Abolition and conversion into Ryotwari) Act, 1963, the Full Bench held as follows:

“15. Further, the mere fact that the orders passed or decisions rendered under these Acts were given finality for the purposes of those Acts or that the issues, which they are obliged or required to be decided, when so decided are ordained to bind the parties to the proceedings or their privies and successors-in-interest applying the principles of res judicata, does not have the effect of ousting the jurisdiction of the Civil Court once and for all. It is by now well settled that even in cases where finality is accorded to any decision or



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order, there are certain well settled exceptions and proved and existence of such exceptional factors, the Civil Court is entitled to nullify any or all such decisions. Similarly, even in cases where the principles of res judicata are rendered applicable, the jurisdiction of the competent Civil Court to go into the question and find out whether the necessary ingredients to apply the principles of res judicata exist in a given case or not cannot be denied to the Civil Courts and from the mere fact of according finality to the orders or decisions rendered under the Act or the application of the principles of res judicata, a total or complete bar or ouster of the jurisdiction of the Civil Courts for all and any purpose cannot be automatically inferred or implied. Before a plea of res judicata can be given effect to, it must be sufficiently pleaded and established that the litigating parties must be the same, that the subject matter of the suit and the other proceedings



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also are identical, that the questions arising in the suit and the other proceedings were directly and substantially in issue and the same was finally decided and that too by an authority or Court of competent jurisdiction.”

30. It is thus seen that even if an assignment had been granted like the additional documents produced by the appellant / defendant, the said assignment will not act as a res-judicata for the civil Court to grant relief on the basis of the evidence adduced and it can be held that such assignment obtained in back of the parties is a nullity. Thus, viewed from this particular angle, I would hold that the production of the additional documents by the appellant / defendant will not further his cause. As a matter of fact, this Court can straight away declare that the said documents are a nullity and the assignment particularly had been granted by the Tashildar without any authority, since he had passed it without reference to the civil litigation pending and without issuing notice to the contesting respondents.

31. The Civil Miscellaneous Petition is dismissed.



32.The Second Appeal had been admitted on the following substantial questions of law:-

“1.Have not the courts below committed error in law in decreeing the suit especially in respect of item Nos.1 and 2 of 'b' schedule in favour of the 8th plaintiff when the sale effected in his favour is hit by the doctrine of lis pendens?

2.Are the Courts below justified in law in holding that the defendant has trespassed and encroached upon the suit property only on 14.11.1992 when the commissioner's report filed as early as 24.02.1987 supports the case of the defendant that he is in possession and enjoyment of the aforesaid items long prior to the institution of the suit and not on 14.11.1992 as alleged by the plaintiffs?



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3. Have not the courts below misdirected itself by not framing the issue regarding adverse possession and not adverting to and deciding the same in a manner known to law?”

33. The first substantial question of law was whether the sale in favour of the 8th defendant was hit by the doctrine of lis pendens. The doctrine of lis pendens is enunciated in Section 52 of the Transfer of Property Act, 1882. The said provision is as follows:-

“52. Transfer of property pending suit relating thereto.—During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or



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order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.”

34.A careful interpretation of the said provision would indicate that where the plaintiff had instituted a suit over immovable property and complains that pending the suit the defendant cannot create encumbrances without obtaining the leave of the Court.



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35. In the instant case, the plaintiffs had filed the suit for declaration of title and for recovery of possession. Pending the suit they had sold a portion namely, B schedule property to the 8th plaintiff. The 8th plaintiff only steps into the shoes of the plaintiffs 1 to 7 to that extent of B schedule property. The principle would directly apply, if a plaintiff claimed declaration of title over a suit property and the defendant also claimed declaration of title and put up a rival title and to defeat the claim to the plaintiffs encumbered the suit property to the disadvantage of the plaintiffs.

36. I hold that the doctrine of lis pendens has no application to the facts of this case. It must be mentioned that the defendant had actually filed a suit for declaration of title in O.S.No.418 of 1991 before the Sub Court, Namakkal. The documents relating to the said suit had been produced as Exs.A25, A26 and A27. The defendant had voluntarily withdrawn the said suit. If that suit had been pending and the plaintiffs herein who were the defendants therein had dealt with the property, then the defendant can claim that such transactions would be affected by the doctrine of lis pendens. But that is not the situation in the present case. Therefore, I hold with respect to



the first substantial question of law that the sale in favour of the 8th plaintiff is not hit by the doctrine of lis pendens.

37. The second substantial question of law, revolves around the report of the Advocate Commissioner which had been marked as Ex.C2, wherein, the Commissioner had filed a report on 24.02.1987 stating that the defendant was in possession. The report of an Advocate Commissioner relating to possession should be straight away rejected by any Court. The Commissioner is only an extended arm of the Court to flush out facts. But the fact of possession has to be proved by the person, who asserts that he is in possession. He cannot rely on the report of an Advocate Commissioner. If that is to be taken into consideration, then it would mean that the Commissioner had gathered evidence on behalf of that plaintiffs. The warrant of Advocate Commissioner does not extend or authorize him to do so. He has to report only facts. The issue of possession, particularly when it is disputed will have to be adjudicated on the basis of evidence adduced by the party to asserting possession and balancing that evidence with the evidence adduced by the party disputing such possession. The documents filed by either side with respect to their respective stands can also be



examined. But a Commissioner's report can never be the basis or foundation to determine possession. The second substantial question of law is therefore, answered that the report of the Advocate Commissioner cannot be the basis for establishing possession of the appellant / defendant.

38. The third substantial question of law relates to adverse possession. In ***Kurella Naga Druva Vudaya Bhaskara Rao v. Galla Jani Kamma, (2008) 15 SCC 150***, it was held that payment of tax and mere possession for some years were insufficient to claim adverse possession. It was held as follows:

“19. The defendant claimed that he had perfected his title by adverse possession by being in open, continuous and hostile possession of the suit property from 1957. He also produced some tax receipts showing that he has paid the taxes in regard to the suit land. Some tax receipts also showed that he paid the tax on behalf of someone else. After considering the oral and documentary evidence, both the courts have entered a concurrent finding that the defendant did not establish adverse possession, and that mere possession for some years was not sufficient to claim adverse possession, unless such possession was hostile



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possession, denying the title of the true owner. The courts have pointed out that if according to the defendant, the plaintiff was not the true owner, his possession hostile to the plaintiff's title will not be sufficient and he had to show that his possession was also hostile to the title and possession of the true owner. After detailed analysis of the oral and documentary evidence, the trial court and the High Court also held that the appellant was only managing the properties on behalf of the plaintiff and his occupation was not hostile possession.

20. We find that both the courts have considered these two issues of fact in detail with reference to the evidence and recorded concurrent findings against the defendant. This Court will not convert itself into a third court of facts and re-examine the facts or disturb concurrent findings of facts. Neither any perversity nor omission to consider evidence nor any error of law has been pointed out with reference to consideration and appreciation of evidence by the trial court and the High Court. We do not therefore find any reason to re-examine the facts.”

39. It is thus seen the issue of adverse possession requires substantial proof to be adduced by the defendant. If he is to claim adverse possession, he should admit the title of the plaintiffs. He must then establish that he is in



possession hostile to the plaintiffs, far beyond the prescribed period of 12 years. Production of tax receipts or such documents are not sufficient. I hold that the issue of adverse possession does not arise in this case and I also hold that the Courts below had not committed any error by not framing any issue on adverse possession.

40. In view of the above reasons, I hold that the appellant / defendant had not made out any case for reversing the well considered judgments of both the Courts below. In the result,

- i). The Second Appeal is dismissed against the 7th respondent with costs right throughout.
- ii). The judgment and decree dated 30.06.2000 in A.S.No.98 of 1998 on the file of the Sub Court Namakkal is confirmed.
- iii). The judgment and decree dated 24.09.1998 in O.S.No.589 of 1992 on the file of the Principal District Court, Namakkal, is confirmed.
- iv). The Second Appeal is dismissed as abated against 1st, 2nd and 3rd respondents.
- v). The Second Appeal is dismissed against the 4th, 5th and 6th respondents.



vi).CMP.No.27424 of 2019 stands dismissed as discussed above.

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15.07.2022

Index:Yes/No
Internet:Yes/No
Speaking / Non speaking order
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To

- 1.The Principal District Court, Namakkal.
- 2.The Sub Court, Namakkal.
- 3.The Section Officer, VR Section, Madras High Court.



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C.V.KARTHIKEYAN,J.

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Pre-delivery Judgment made
in
S.A.No.1409 of 2001
and
CMP.No.27424 of 2019



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15.07.2022