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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 21.01.2022

JUDGMENT PRONOUNCED ON : 31.01.2022

CORAM :

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

S.A.No.1093 of 2006

MP.No.1 of 2006, MP.1 of 2008,

MP.Nos.1 & 2 of 2012 and MP.No.1 of 2015

P.Rajasekaran ...Appellant/1st Respondent/ 1st Defendant

Vs

1.Sampoornam
2.Bhuvaneswari ...Respondents 1&2/Appellants/Plaintiffs 1&2
3.R.Manickam
4.S.Nallasivam
5.K.Sundaram (Deceased)
6.K.Duraisamy
7.Chinnammal
8.Lakshmiammal
9.Ramasamy
10.Arjunan
11.Navathal
12.Poosappan (Deceased)
13.Pongiammal
14.Indirani
15.Sabapathy ...Respondents/Respds2-14/Defendants 2 to 14
16.Kuppammal
17.Palaniammal
18.S.Dhanavel
19.Dhanalakshmi
20.Selvambigai
21.B.Parimala Devi
22.Nallasivam ...Respondents
(Respondents 16 to 22 are brought on record as L.Rs
of the deceased RR5 and R12 Vide Order of the Court
dated 22.09.2015 made in MP.Nos.1 to 6 of 2014
in S.A.No.1093 of 2006)

Prayer:- Second Appeal filed under Section 100 of CPC, against the decree and judgment dated 01.04.2005 in A.S.No.119 of 2004 on the file of the Principal District Judge of Erode at Erode, modifying the decree and judgment dated 30.01.2004 in O.S.No.377 of 1991 on the file of the Principal Subordinate Judge, Erode.



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For Appellant : Mr.Haja Zazirudeen, Senior Advocate
Assisted by Mr.V.S.Kesavan &
Mr.P.Hari Babu

For Respondents: Mr.G.Thiyagarajan for R1 & R2
Mr.A.K.Kumaraswamy, Senior Counsel
Assisted by Mr.S.Kaithaimalai Kumaran
for RR3, 4, 6 16 to 22
No appearance - RR7,8,9,10,11,12,13,14,15

JUDGMENT

The first defendant in O.S.No.377 of 1991, has his suit laid for partition in O.S.No.660 of 1994 before the Principal Sub Court, Erode, is the appellant herein. The suit was partially decreed and the plaintiffs therein were granted a decree for partition in suit A-schedule Item No.1, B-schedule Item No.1 to 5 and 7, and the suit was dismissed as regards suit A-schedule Item No.2 and B-schedule Item No.6. Challenging the said decree, the plaintiffs preferred A.S.No.119 of 2004 before the Principal District Court, Erode. The first Appellate Court modified the decree of trial Court Vide its decree dated 01.04.2005. While it confirmed the decree of the trial Court dismissing the suit regarding B-schedule Item No.6, it proceeded to grant decree for A-schedule Item No.2. It also modified the shares declared by the decree of the trial Court. Aggrieved by the same, the first defendant has preferred this second appeal. Parties would be referred to by their rank before the trial Court.

1.2 Before outlining the pleadings in this case, it may be stated that during the pendency of the suit, the trial Court amended the plaint to implead few legal heirs. This was the result of a contention taken out by the first defendant that there are few others (who according to him were interested in B-schedule item 6), who ought to be impleaded and that the suit is bad for non-joinder of necessary parties.

2.1 The facts:

- There are two schedules of properties in the suit and its sole owner is one Poornasamy. In A-schedule, there are two items of properties, both of which are house-sites. B-schedule property comprises of 7 items of properties, of which item No.6 is not in consideration. Of the remaining items, item Nos.1,2 and 5 are vacant house sites, and Item Nos.3, 4 & 7 are agricultural lands.
- Of the two items in A-schedule, item 1 property was purchased under Ext.A-8 sale deed dated 05-07-1979 by a certain Poornasamy. (He is the husband of the first



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plaintiff and father of the second plaintiff and also of the first defendant, who is his son through his first wife). Item 2 was purchased in the name of his first wife Arukkanni Ammal and the first defendant (Poornasamy's son born through Arukkanni Ammal) Vide Exts.A-6 and A.7 sale deeds, both dated 22-08-1974.

- Poornasamy obtained the properties described in items 2,3,4,5, and 7 of the 'B' schedule to the plaint under Ext.A-5 partition deed dated 30-04-1971, to which Poornasamy and his brothers Sengoda Gounder, Duraisamy Gounder and Poosappan were parties. In the partition, these properties were allotted to Poornasamy in E-schedule.
- B schedule item No.1 was purchased by Poornasamy and his brothers Sengoda Gounder and Poosappan Vide Ext.A-4 sale deed dated 06-06-1968.
- B Schedule item 6 remained undivided between Poornasamy and his brothers plus Poornasamy's step mother.
- Of the four brothers including Poornasamy, all except Poosappan had passed away. Poornasamy died in 1985, leaving behind the first defendant and the plaintiffs as his heirs.
- As stated earlier both Sengoda Gounder and Duraisami Gounder had passed away. Defendants 7 to 10 are the heirs of Sengoda Gounder, whereas defendants 12 to 14 are the heirs of Duraisamy Gounder. Poosappan, the lone surviving brother of Poornasamy is arrayed as the 11th defendant. Besides, Poornasamy's step mother is arrayed as the 6th defendant. Pending this appeal, Poosappan died and his legal heirs are impleaded as respondents 21 & 22 herein.

Pleadings:

2.2 The plaintiffs contentions in their pleadings are:

- They are entitled to 1/3 share each in A schedule items 1 and 2 with the first defendant taking the other 1/3.
- In B-schedule item 1 which Poornasamy had purchased along with two of his brothers, plaintiffs along with the 1st defendant are jointly entitled to 1/3 share (with each taking 1/9 share), Defendants 7 to 10 are entitled to 1/3 share, being the share of Sengoda Gounder, and the 11th defendant is entitled to 1/3 share.
- In B schedule item 6, plaintiffs, the first defendant and defendants 6 to 14 are entitled to a share. (As indicated earlier, this item is not the subject matter of



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this appeal.

- The properties described in the A-schedule to the plaint belonged to Poornasamy and they are yielding income. Till March 1991, this income was shared between the plaintiffs and the first defendant. Sometime in April, 1991 misunderstanding arose between the parties, following which, the plaintiffs demanded partition. The first defendant however, was delaying it.
- While so, the first plaintiff came to know that the first defendant had sold 'B' schedule Item No.3 & 4 to defendants 2 to 5 on 30.04.1990 (Ext.A9), without the consent and knowledge of the plaintiffs.

Hence the suit for partition is laid, claiming the shares in the suit properties in the manner indicated as above.

3. The defendants 6 to 10 and 12 to 14 remain exparte. The suit was essentially contested by the defendants 1, 2 to 5 and 11. To repeat, the first defendant is the son of Poornasamy, and he is concerned with all the items of properties now under consideration in this appeal. Defendants 2 to 5 are purchasers of items 3 and 4 of the B schedule properties. And, the 11th defendant, (brother of Poornasamy) is the paternal uncle of the second plaintiff and the first defendant and he is interested in item 1 of B schedule.

4.1 The first defendant had filed a written statement and two additional written statements. Barring A schedule item 2, and B schedule item 1, his contention with regard to plaintiffs' claim of partition of other items are

- The properties allotted to Poornasamy under the partition deed dated 30.04.1971 were not treated as separate property of Poornasamy, but were treated by him as joint family ancestral property. Since Item Nos. 2, 3, 4, 5 and 7 in B-schedule are ancestral properties, the plaintiffs are merely entitled to 1/6th share each, being 1/3 share in the 1/2 share of Poornasami in them, whereas this defendant is entitled to the remaining 4/6 share. In other words the plaintiffs would be jointly entitled to 1/3 share and the balance 2/3 share will go to the first defendant.
- Suit A-schedule Item No.1 was purchased by Poornasamy on 05.7.1979 under Ext.A8. This is also purchased out of the joint income so even in this item, the plaintiffs are jointly entitled to 1/3 share and the remaining 2/3 share belongs to this defendant.
- B-schedule Item No.6 is the ancestral property, and it is



yet to be divided between Poornasamy and his brothers.

4.2 First defendant's defense as concerning A schedule, item 2 and B schedule, item 1 is as follows:

- So far as A-schedule Item No.2 is concerned, two alternate pleas were made, one in the written statement and another in the additional written statement. They are:

(a) that this item is covered under two sale deeds both dated 22.08.1974, one in the name of Arukkanni Ammal, Poornasamy's first wife, under Ext.A6, and the other in favour of the first defendant, who was then a minor, under Ext.A7. So far as the residential buildings in Door Nos.38 to 45 in A-schedule Item No.2 are concerned, they are dwelling houses, the plaintiffs are not entitled to any share in the same;

(b) that A-schedule Item No.2 are concerned, this property was purchased in the name of his mother Arukkani Ammal and this defendant with the sale consideration passing exclusive from Arukkani Ammal, from and out of her savings and gives a sale of jewellery. No joint family fund was utilised for the purpose. And to save the income tax clearance, one of the sale deeds was executed in the name of this defendant. Neither his father Poornasamy nor any of the plaintiffs have exercised any right over this property. The suit A-schedule Item No.2 is therefore, the exclusive property of the second defendant.

- Turning to B-schedule, Item No.1 is concerned, two different pleas were taken, first in the written statement, and the inconsistent to that plea in the second additional written statement. Its details are as below:
 - Firstly, in the written statement it is alleged that on 06.06.1968, B-schedule item 1 was purchased by Poornasamy, his brothers Poosappan and Sengoda Gounder, as karta of the joint family, out of the income from the joint family estate, and hence even in this property, this defendant is entitled to 2/3 share whereas the plaintiffs would be jointly entitled to 1/3 share.
 - In the second written statement (dated in 29-10-2003), it is alleged that in B-schedule item 1, Poornasamy had 1/3 share

4.3 In the I-Additional written statement filed by the first defendant, he further pleads that the second plaintiff is not entitled to any benefit under under Hindu Succession Amendment (T.N Act No.1 of 1990), since Poornasamy died in 1985, a few



years prior to the coming into force of the said amendment Act.

5. In the written statement filed by the second defendant and adopted by the defendants 3 to 5, it is contended :

- These defendants are the purchasers of B-schedule Item Nos.3 and 4. In these properties, the plaintiffs are entitled to 1/6th share each. Therefore the claim for 1/3 share of each of the plaintiffs is not sustainable.
- These defendants have purchased B-schedule Item Nos.3 & 4, and it was represented to them by the first defendant that he is the sole heir of Poornasamy. Since these defendants have purchased the property allotted to the share of the first defendant, it is for them to establish their title over the properties which these defendants had purchased.

6. In the written statement of the 11th defendant, it is contended that he is the brother of Poornasamy. His father was one Nallappa Gounder. He was married twice and through his first wife, he had four sons, of who Poornasamy is one. Nallappa Gounder's second wife is the 6th defendant, and through who he had a daughter namely the 10th defendant. This defendant does not have any share in A-schedule properties. So far as B-schedule Item Nos.1 and 6 are concerned, they have not been partitioned and continued to remain joint among them. B-schedule Item No.1 was purchased by Poornasamy and his brothers namely Sengoda Gounder and the 11th defendant under a registered sale deed dated 06.6.1968 [Ext.P4]. It has a total extent of 1.50 acres. In this property, the other brother namely Duraisamy had no shares, and it is in the common enjoyment of all the co-sharers. The description of the property given to this item is not correct. 'B' schedule Item No.6, is a dwelling house in which only the male heirs of Nallappa Gounder are entitled to a share, and the women are not entitled to seek partition in the dwelling house, and if at all any, the women are entitled to right of residence.

7.1 On framing issues, the suit went to trial. During trial, for the plaintiffs, the first plaintiff examined herself as P.W.1. and produced Exts.A-1 to A-11. For the defendants, the first defendant and the third defendant examined themselves respectively as D.W.1 and D.W.3. Besides, two other witnesses were examined. They produced Exts. B-1 to B-17.

7.2 The trial Court partially decreed the suit. It treated A schedule item 2 as the personal property of the first defendant and dismissed the suit. It dismissed the suit as concerning B schedule item 6 as well. It treated A schedule Item 1, B schedule items 1 to 5 and 7 as ancestral property in the hands of Poornasamy, and recognised half share of the first



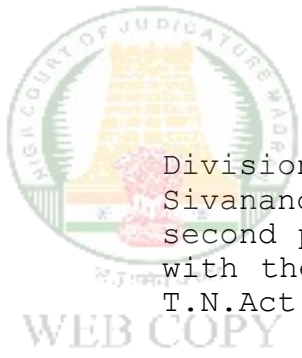
defendant therein by birth.

7.3 It was argued before the trial Court that the second plaintiff was entitled to the benefit of Sec.29-A of the Hindu Succession Act as introduced by the T.N.Amendment to the said Act, and that the second plaintiff being an unmarried daughter enjoys equal right as a male coparcener, and hence she is entitled to the same share that the first defendant is entitled to. Relying on the ratio in Sundarambal Vs Deivanayagam [1991-1-LW 97], the trial Court dismissed this contention solely on the ground that on the date of coming into force of Sec.29-A on 25.03.1989, Poornasamy had died, and hence the second plaintiff was not entitled to the benefit of the said provision. It then proceeded to declare the shares of the plaintiffs and the first defendant as below:

Schedule of the property	Item No. in the schedule	Apportionment of shares	Allottees
'A' Schedule	Item No.1	1/6 share	Plaintiffs
'A' Schedule	Item No.1	4/6 share	1 st Defendant
'B' Schedule	Item No.1	1/18 share	Plaintiffs
'B' Schedule	Item No.1	4/18 share	1 st Defendant
'B' Schedule	Item Nos.2,3,4,5,7	1/6 share	Plaintiffs
'B' Schedule	Item Nos.2,3,4,5,7	4/6 share	1 st Defendant
No shares to plaintiffs in Item No.2 of 'A' schedule and Item No.6 in 'B' schedule and the suit was dismissed as regards these items.			

8.1Aggrieved by the said decree, the plaintiffs had preferred A.S.119 of 2004 before the District Court. The first appellate court raised three points for consideration, of which the first point pertains to the application of T.N.Act 1/1990 to the second plaintiff, and the second point relates to the character of A schedule item 2 and also the entitlement of the plaintiffs to a share in B schedule item 6.

8.2On the first point the learned District Judge had held that inasmuch as the ratio in Sundarambal case relied on by the trial court was over ruled by the Hon'ble Supreme Court in Sai Reddy Vs Narayana Reddy [(1991)3 SCC 647] and followed by the



Division Bench of this court in M. Shanmugha Udayar Vs Sivanandam & others [1993-2-LW 72 : AIR 1994 Madras 123], the second plaintiff is entitled to be treated as a coparcener along with the first defendant, their father Poornasami dying prior to T.N.Act 1/1990 notwithstanding.

8.3 So far as A schedule item 2 is concerned, the first appellate Court relied on the testimony of the first defendant as D.W.1 where he had conceded that his mother Arukkani did not possess any properties in 1974 when half share in A schedule item 2 was purchased under Ext.A-6, and that he himself was of tender age then when the other half share was purchased on the same date under Ext.A-7. Relying on the ratio in P.S.Sairam & another Vs P.S.Rama Rao & another [2004(1)CTC 619], which is to the effect that when properties stand in the name of the individual member of the joint family, there is a presumption that it belongs to the joint family, and treated A schedule item 2 as a joint family property and granted the plaintiffs a share in the same. So far as B schedule item 6 is concerned, it confirmed the decree of the trial court, and proceeded to modify the decree of the trial court as follows:

Decree of the first Appellate Court
● Item No.1 & 2 in A-schedule is divided into 9 equal shares and one share allotted to the 1st appellant / 1st plaintiff and 4 such shares allotted to 2nd appellant / 2nd plaintiff. ● Item No.1 in B-schedule is divided into 27 equal shares and one such share allotted to 1st Appellant / 1st plaintiff and 4 such shares allotted to 2nd appellant / 2nd plaintiff. ● Item Nos.2 to 5 & 7 in B-schedule divided into 9 equal shares, and one such share allotted to 1st appellant / 1st plaintiff and 4 such shares allotted to 2nd appellant / 2nd plaintiff. ● As concerning the Item No.6 in B-schedule, the decree of the trial Court stands confirmed. ● Since Respondents 2 to 4 / Defendants 2 to 4 are the purchasers of certain properties of the first defendant, they can claim equity at the time of allotment of shares to the first respondent and they are not entitled to anything more than that.

9. Challenging the said decree of the first appellate court, the first defendant had preferred this appeal. It was admitted



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for considering the following substantial questions of law:

- i. Whether it is justifiable on the part of the First Appellate Court in reversing the judgment of the trial Court on the assumption that the right of the daughter to inherit the property on par with the brother after the demise of the father on 05.06.1985 prior to insertion of Section 29(A) which came into force on 25.03.1989?
- ii. Whether it is justifiable on the part of the First Appellate Court to hold on the basis of reasonings that the property was a joint family property, when the pleadings in the plaint are otherwise claiming that the property was treated as self-acquired property prior to the death of the Appellant's father?
- iii. Whether it is justifiable on the part of the First Appellate Court in having proceeded with the issue contrary to the averments set out in the plaint vis-a-vis the scope of Section 6 of the Hindu Succession Act, 1956 which purports in relation to the notional partition theory?

10. Points 1 and 3 are essentially on the law which is applicable to the facts of the case. The trial Court applied the dictum in Sundarambal case [1991-1-LW 97] case, as that was the law when it delivered the judgement, and the first appellate court reversed it based on the law as declared by the Hon'ble Supreme Court in Sai Reddy Vs Narayana Reddy [(1991)3 SCC 647] and followed by the Division Bench of this court in M. Shanmugha Udayar Vs Sivanandam & others [1993-2-LW 72 : AIR 1994 Madras 123]. It may be stated that in Shanmugha Udayar case, the Division Bench comprised of the learned Single judge who penned the judgement earlier in Sundarambal case. Today, the appellant is in a less advantageous position as the statute itself had changed. Sec.6 of the Hindu Succession Act has now assumed a new avatar by an amending Act of the Parliament in Act 39/2005 which granted the daughters a status at par with that of the sons and equal rights as a male coparcener viz a viz their share in the ancestral estate, no matter whether they are married or unmarried. Whatever interpretational rough edges that were there too have been judicially trimmed and softened in Vineeta Sharma Vs Rakesh Sharma & Others [(2020) 9 SCC 1]. The Supreme Court had declared:

"137.1. The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after the amendment in the same manner as son with same rights and liabilities.



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137.2. The rights can be claimed by the daughter born earlier with effect from 9-9-2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before the 20th day of December 2004."

Thus, where the properties are ancestral, and where the coparcenery comprises also of daughters, necessarily they have to be granted their share at part with that of a male coparcener. This is inevitable, if not an inescapable consequence in these changed circumstances, thanks to the Central Act 39/2005 and Vineeta Sharma ratio.

11. It is not in controversy that barring A schedule item 2, and B schedule item 1 properties, others are ancestral properties as these were allotted to Poornasamy under Ext.A-5 partition deed. Accordingly the second plaintiff and the first defendant constitute the coparcenery as concerning B schedule items 2 to 5 and 7, and the decision of the first appellate court cannot be faulted.

12.1 Turning to B schedule Item 1 is concerned, this was purchased on 06.06.1968 by Poornasamy and his brothers Sengoda Gounder, and Poosappan. Poornasamy has another brother Duraisamy and he is not a party to the same. While in the written statement, the first defendant contend that this property is also ancestral property, in his second additional written statement the first defendant concedes that in this property his father Poornasamy had only 1/3 share. This stands to reason, for if only this property were to be considered as an ancestral property because it was purchased out of the income from the undivided ancestral properties (Ext.A-5 partition was only on 30.04.1971, and subsequent to Ext.P-4 under which B schedule item 1 was purchased), then it would necessarily imply that Duraisamy, the one who had not joined Ext.P-4 sale deed would also be entitled to a share in it. The heirs of Duraisamy, though are parties to the suit, did not choose to claim a share in it. Secondly, by conceding in his second written statement that Poornasamy had only 1/3 share in it, the first defendant has reconciled to the position that it is his personal property. This would now imply Poornasamy had 1/3 share in it, and hence each of the plaintiffs and the first defendant would be entitled to 1/9 share each, being 1/3 of Poornasamy's 1/3 share in B-Schedule item 1 property.

12.2 The first appellate Court has treated this item of property as an ancestral property and granted 4/27 share each to the second plaintiff and 1/27 share to the first plaintiff whereas the trial court also treated this as an ancestral property but allotted 4/18 share to the second plaintiff, since



it did not consider that the second plaintiff was entitled any benefit equal to the coparcener with the first defendant. But both the Court had missed a point that in the second additional written statement the first defendant had admitted that item I of the B-schedule, Poornasamy was entitled to 1/3 share, which is possible only if this property is the personal property of Poornasamy along with his two of his brothers. However, the real effect of this change, from treating 'B'schedule item 1 from ancestral property to personal property of Poornasamy, is a microscopic shift from 4/27 (0.148) to 1/9 (0.111). This Court, therefore, does not intend to interfere with the decree of the first appellate court as concerning B schedule item 1.

13.1 So far as 'A' schedule Item 2 is concerned, this property was purchased in the names of the first defendant and Arukkani Ammal under Ext-A6 and Ext.A7, both dated 22.8.1974. On that day, the first defendant was admittedly a minor. The contention of the plaintiffs are that inasmuch as the first defendant as D.W.1 had conceded that Arukkanni Ammal did not have any independent source of income, and the property should be considered as one purchased by Poornasamy in the name of Arukkani Ammal. The Courts below also have accepted it.

13.2 What however, the Courts below did not consider is: The plaintiffs are the second wife and her daughter born through Poornasamy, and that when the property was purchased by Poornasami in the name of his first wife Arukkani Ammal, it would be least in his contemplation that Arukkanni Ammal would die and that he would marry the first plaintiff. Therefore, it is absolutely possible to hold from the circumstances that emerge from the facts of the case, that even if Poornasamy had purchased the property under Ext.A-6 in the name of Arukkanni Ammal, it could well be for the benefit of Arukkanni Ammal. So far as the purchase in the name of the first defendant under Ext.A-7 is concerned, since he was a minor at the time of the purchase in his favour, it could well be contended that it should enure to the benefit of the other heirs of Poornasamy as well. However, on the date when the suit was laid in 1991, the Benami Transactions (Prohibition) Act, 1988 had already come into force. Section 3 of the Act provides that where the property was purchased inter alia in the name of the wife of a person, it shall be presumed that it is purchased for the benefit of his wife, and any plea of benami contrary to what is therein stated was exposed to penal consequences. Section 4 of the Act provides that no plea of benami should be pleaded, except to the extent provided in the exceptions to the said section. There is no specific plea in the plaint bringing Ext.A-7 within any of the exceptions to Sec.4. Necessarily any argument founded to the contra vis-a-vis 'A' schedule Item 2 may have to go. Indeed, both the Courts below have omitted to



consider the impact on Benami Transactions (Prohibition) Act, 1988. Therefore, A schedule item 2 must held to be the property of the first defendant.

14. In conclusion, this appeal is partially allowed, and 'A' schedule Item 2 is declared as the property of Arukkani Ammal and the first defendant and since Arukkani Ammal had died, the entire 'A' schedule Item 2 property would go to the first defendant/appellant. The suit is therefore dismissed as regards plaintiffs claim of partition of A schedule item 2. As to the rest the judgement and decree of the first appellate Court stands confirmed.No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-II)

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Sub Assistant Registrar

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To:

1. The Principal District Judge,
The Principal District Court
Erode.
2. The Principal Sub Judge,
The Principal Sub Court
Erode.

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The Section Officer
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Madras.

+1cc to Mr.P.Haribabu, Advocate, S.R.No.5559

+1cc to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No.5581

S.A.No.1093 of 2006

SPD(CO)
RGA(21/02/2022)