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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.12.2022

DELIVERED ON : 10.01.2023

CORAM

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

S.A.Nos.1417 and 1418 of 2000

S.A.No.1417 of 2000:-

Senthilkumar .. Appellant

Vs.

1. Nallammal (Died)
2. Sengoda Gounder (Deceased)
3. Sakunthala
4. Chellappan @ P.Ramasamy
5. Sellammal
6. Kandappa Gounder (Deceased)
7. Ramayee
8. Sagunthala
9. S.Sakthivel
10. S.Rathnavel
11. S.Saravanan
    (RR7 to 11 Brought on record as LRs of the deceased
    R2 vide order of Court dated 13.02.2018
    made in CMP.No.11987 to 11989 of 2016
    in S.A.No.1417 of 2000)
12. K.Pavayee
13. K.Ganesan
    (RR12 and 13 brought on record as LRs of the deceased
    R6 vide order of Court dated 13.02.2018
    made in CMP.No.11990 to 11992 of 2016
    in S.A.No.1417 of 2000)
14. S.Balagopal
15. Saraswathi

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16. Suganeswari
17. Senthilkumar
(RR14 to 17 brought on record as LRs of the deceased
R1 vide order of Court dated 08.10.2018
made in CMP.No.17204 to 17206 of 2018
in S.A.No.1417 of 2000) .. Respondents

S.A.No.1418 of 2000:-

Senthilkumar .. Appellant

Vs.

1. Sengoda Gounder (Deceased)
2. Sakunthala
3. Chellappan @ P.Ramasamy
4. Sellammal
5. Kandappa Gounder (Deceased)
6. Nallammal (Deceased)
7. Ramayee
8. Sagunthala
9. S.Sakthivel
10. S.Rathnavel
11. S.Saravanan
(RR7 to 11 Brought on record as LRs of the deceased
R2 vide order of Court dated 13.02.2018
made in CMP.No.11993 to 11995 of 2016
in S.A.No.1418 of 2000)
12. K.Pavayee
13. K.Ganesan
(RR12 and 13 brought on record as LRs of the deceased
R6 vide order of Court dated 13.02.2018
made in CMP.No.11996 to 11998 of 2016
in S.A.No.1417 of 2000)
14. S.Balagopal

15. Saraswathi

16. Suganeswari

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17. Senthilkumar
(RR14 to 17 brought on record as LRs of the deceased
R6 vide order of Court dated 08.10.2018
made in CMP.No.17207 to 17209 of 2018
in S.A.No.1418 of 2000) .. Respondents

Prayer in S.A.No.1417 of 2000:- Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 29.10.1998 made in A.S.No.113 of 1997 on the file of the Second Additional District Judge, Salem setting aside the Judgment and Decree in O.S.No.338 of 1985 dated 10.04.1997 on the file of the Additional Sub-Ordinate Judge of Salem.

Prayer in S.A.No.1418 of 2000:- Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 29.10.1998 made in A.S.No.93 of 1997 on the file of the Second Additional District Judge, Salem setting aside the Judgment and Decree in O.S.No.338 of 1985 dated 10.04.1997 on the file of the Additional Sub-Ordinate Judge of Salem.

In S.A.No.1417 of 2000

For Appellant	: Mr.G.K.Muthukumar for M/s.V.P.K.Gowtham
For Respondents	
RR1, R2, R6 and R8	: Died
R3	: No appearance
R4	: M/s.N.Chinnaraj
RR5, 7, 9, 10 and 11	: No appearance
RR12 and 13	: Mr.T.Meganathan for Mr.Suryanarayanan
RR14 to 17	: Mr.P.Dinesh Ram
For Contesting Respondents	: Ms.J.Prithvi Amicus Curiae

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In S.A.No.1418 of 2000

For Appellant : Mr.G.K.Muthukumar
for M/s.V.P.K.Gowtham

For Respondents
RR1, R5, R6 and R8 : Died (Steps taken)
R2 : No appearance
R3 : M/s.N.Chinnaraj
RR4, 7, 9, 10, 11
14 to 17 : No appearance
RR12 and 13 : Mr.T.Meganathan
For Contesting
Respondents : Ms.J.Prithvi
Amicus Curiae

COMMON JUDGMENT

Feeling aggrieved and dissatisfied over the common Judgment and Decree passed by the learned Second Additional Judge, Salem, in A.S.No.93 of 1997 and A.S.No.113 of 1997 dated 29.10.1998, thereby reversing the Judgment and Decree rendered in O.S.No.338 of 1985 dated 10.04.1997 passed by the learned Additional Subordinate Judge, Salem, the appellant preferred these appeals before this Court.

2. The appellant in both the appeals is the third defendant in the suit. The appellants 1 and 2 in A.S.No.93 of 1997 and the respondents 1 and 2 in A.S.No.113 of 1997 are the plaintiffs in the suit.

3. For the purpose of convenience, the parties are referred to herein

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after as per the ranking in the suit.

4. The brief case of the plaintiffs are as follows,

(i) The suit was filed by the plaintiffs stating that ¼th share in the suit schedule property have been purchased from the first defendant. D1 is entitled for B schedule property. He sold the property by virtue of a sale deed executed to and in favour of the plaintiffs dated 29.04.1985. Before the execution of the sale deed with the first defendant, they executed a sale agreement dated 26.12.1983. While executing the sale deed in favour of the plaintiffs, in the recitals, it has been clearly stated that the first defendant already executed a sale deed for ¼th share in the B schedule property by virtue of the sale deed dated 05.10.1984 to and in favour of 4th defendant. Further, in the recitals it is stated that the said sale deed was cancelled on 29.04.1985. Therefore, plaintiffs contended that subsequent to the cancellation only, D1 executed a sale deed dated 29.04.1985 in favour of the plaintiffs. Further, the first defendant stated that the sale deed executed by the first defendant in favour of the 4th defendant is a nominal sale deed.

(ii) Subsequent to the execution of the sale deeds, the plaintiffs came

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to understand that the defendants 1 and 2 have colluded together and are trying to cheat the plaintiffs of their right. In order to set up a claim that the third defendant is also entitled to some right in the suit schedule property, the third defendant filed a caveat application before the Civil Court. Subsequently, when the plaintiffs men entered into the suit property, they were being obstructed from going near the land by defendants 1 and 2. Under these circumstances, the plaintiffs filed the present suit for the relief sought therein.

5. The case of the defendants 2 and 3 are that one Palani Gounder had ancestral property. By a virtue of a sale deed dated 05.08.1971, he sold the property to one Muthu Gounder. Subsequent to the sale of the said property, the said Palani Gounder purchased the suit schedule property by virtue of sale deeds dated 23.08.1971 and 29.03.1972. Thereafter, a settlement deed was executed by the said Palani Gounder on 19.08.1973 to and in favour of D1 and D2. Under these circumstances, the third defendant filed a suit in O.S.No.572 of 1983 to grant relief of partition against D1 and D2, wherein he had claimed that he is entitled for ¼th share in the "B" schedule property. Therefore, according to D3, the present suit is hit by the principles of *res judicata*. At present only D2 and D3 are in possession of the suit properties. Therefore, the

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defendants 2 and 3 submitted that the execution of the sale agreement and sale deeds to and in favour of the plaintiffs 1 and 2 by D1 are fraudulent and similarly the execution in favour of Nallammal dated 29.05.1985 is also not a valid one. All these sale deeds were executed when the suit for partition in O.S.No.572 of 1983 was pending. Therefore, the present suit was hit by *lis pendens*. The third defendant issued a legal notice to the second plaintiff on 29.01.1984 and the same was received on 31.01.1984 wherein D3 had categorically stated that there is pendency of O.S.No.572 of 1983.

6. Further, he had stated that he is entitled for ¼th share in the B schedule property. As D1 had already sold his ¼th share to D4, he has no other properties to sell to anybody else. Since he came to understand that D1 is going to alienate the "B" schedule property, as he has no right to do so, a legal notice was sent. However, no reply was sent by the plaintiffs. In this regard, publication was also effected by the third defendant, on 27.12.1983. Thereafter, a preliminary decree was passed in O.S.No.572 of 1983, whereby it was held that D3 is entitled ¼th share in the "B" schedule property. Therefore, they contended that the plaintiffs are not entitled for the relief as sought for in the suit.

7. D1 was set exparte. The case of D4 is that he had purchased the suit

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schedule property by virtue of a sale deed dated 05.10.1984. Before, the said sale deed, D1 entered into a sale agreement with D4, on 15.02.1982. As on date, as far as ¼th share of the B schedule property is concerned, D4 is in possession of the property. After execution of the present sale deed by D1 to D4, D1 once again executed a sale deed in favour of the plaintiffs on 29.04.1985 stating that the sale deed executed in favour of D4 was cancelled on 29.04.1985. However, the said recitals in the sale deed is not correct as no such cancellation was made by D1. Therefore, he contended that by cancelling the sale deed executed in favour of D4 by D1, for his ¼th entitlement in "B" schedule property and thereafter executing a sale deed in favour of the plaintiffs by D1 on 29.04.1985 are not valid as there is no truth on this aspect and the same is fraudulent one. Therefore, the plaintiffs are not entitled for the relief as prayed for in the suit.

8. On behalf on the plaintiffs, Ex.A1 to A11 were marked and P.W.1 and P.W.2 were examined. On behalf of the defendants Ex.B1 to B29 were marked. The second defendant was examined as D.W.2, fifth defendant was examined as D.W.1, fourth defendant was examined as D.W.4 and one Krishnamurthy was examined as D.W.3. The Trial Court, after hearing both the parties, held

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that the cancellation deed said to have been executed by D1 to D4 dated 29.04.1985 cancelling Ex.B25 is concerned, has not been marked. The suit in O.S.No.572 of 1985 was filed much prior to the execution of Exs.A3 and A4. Therefore, the Trial Court had not agreed with the plaintiffs' contention that the said suit was filed only to defeat the claim of the plaintiffs. Further, the Trial Court held that in terms of O.S.No.572 of 1983, D1 is entitled ¼th share and D3 is entitled ¼th share independently. The Trial Court also had taken into consideration the execution of the sale deed by virtue of Exs.A3 and A4, which are subsequent to the execution of Ex.B25. Therefore, the Trial Court dismissed the suit stating that the plaintiffs are not entitled for the relief as they claimed in the suit.

9. Aggrieved over the said Judgment and Decree, the plaintiffs and the fifth defendant in the suit filed appeals challenging the decree passed by the Trial Court. The first Appellate Court after hearing both the parties held that in O.S.No.572 of 1983, an exparte decree was passed. Subsequent to the preliminary decree passed by the Trial Court in the above suit, no final decree proceedings was initiated by the third defendant. Therefore, the first Appellate Court held that the third defendant relinquished his rights, in the result, he is

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not entitled for ¼th share as per the preliminary decree passed by the Trial Court in O.S.No.572 of 1983. Since the parties to the proceedings in O.S.No.572 of 1983 failed to file the final decree applications in time, the first Appellate Court considered that the third defendant abandoned his rights as determined by the Court in O.S.No.572 of 1983. Therefore the first Appellate Court held that the first defendant is entitled to ½ share in the "B" schedule property, since the third defendant abandoned his rights and only the first defendant is entitled for the said ¼th share. Therefore, the first Appellate Court held that the plaintiffs are entitled for the relief as prayed for therein and accordingly, reversed the common Judgment and Decree passed by the Trial Court.

10. Feeling aggrieved over the said Judgment and Decree, the 3rd defendant/appellant preferred the present appeals. This Court on 28.09.2000 admitted the second appeals on the following substantial question of law:-

" What would be the impact of the preliminary decree in O.S.No.572 of 1983 on the file of the learned Subordinate Judge, Salem marked in this case as Ex.B1 on the rights of the plaintiffs as well as D5 in having a decree as prayed for in the present suit?"

11. Mr.G.K.Muthukumar, who is appearing for the appellants would

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submit that O.S.No.572 of 1983 was filed much prior to the execution of a sale deed by D1 to the plaintiffs. The said suit was filed by the third defendant in the suit, for the purpose of partition. Only the second defendant in the present suit was set exparte, due to non appearance. The first defendant in the present suit, who is none other than the father of the third defendant, who is the plaintiff in O.S.No.572 of 1983 contested when the Judgment and decree was passed. The Court after taking into consideration the submissions of both the parties passed a preliminary decree in O.S.No.572 of 1983 stating that the plaintiff in the suit, who is the son, is entitled for ¼th share in the suit schedule property and the first defendant, who is the father of the plaintiff in the above said suit is entitled for ¼th share and the mother is entitled to the remaining ½ share, who is the second defendant in the above said suit. The first appellate Court, upheld all the findings of the Trial Court. However, it had reversed the Judgment of the Trial Court on the ground that subsequent to the preliminary decree passed in O.S.No.572 of 1983, the third defendant in the present suit had failed to file the final decree application in time and the time for filing the said final decree proceedings was also barred by limitation. Therefore, the first appellate Court held that D3 had abandoned his rights and consequently, he is not entitled to claim ¼th share in the B schedule property. He also submitted that the findings

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of the first appellate Court is erroneous as for filing the final decree proceedings, the question of applicability of limitation does not arise. It is only the Court, while passing the preliminary decree is supposed to pass the final decree as well in continuance to the preliminary decree. If at all there is an application, it is just the remainder for the Court only to pass final decree subsequent to the preliminary decree and for this purpose, the Limitation Act will not be applicable.

12. In this regard, he had referred to the Judgments of the Hon'ble Supreme Court of India rendered in ***Venu Vs Ponnusamy Reddiar (died) their Lrs and others*** reported in ***AIR 2017 SC 2447,*** in ***Shub Karan Bubna Vs Sita Saran Bubna and others*** reported in ***2009 8 MLJ 921(SC)*** and in ***Bikoba Deora Gaikwad and others Vs Hirabai Marutirao Gorgare and others*** reported in ***2008 8 SCC 198 (SC).*** Therefore, he contended that the findings of the first Appellate Court is erroneous and the same is liable to be set aside. The counsel appearing for D2 and D4 also re-iterated the submission made by the learned counsel appearing for the appellant. As far as D5 is concerned, the learned counsel submits that already she has entered into compromise with the appellant and she had purchased her share by paying the consideration. The

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contesting parties are the only plaintiffs and their legal heirs. No one appeared on behalf of the contesting parties. Therefore, this Court appointed Ms.J.Prithvi as Amicus Curiae to make submission to protect the interest of the contesting respondents, to the substantial question of law as framed by this Court.

13. According to Amicus Curiae, both the Courts had concurrently held that the suit properties are separate properties of the said Palani Gounder. The third defendant, who is the appellant in both the appeals, claims title based on the Judgment and Decree passed in O.S.No.572 of 1983. But the said Judgment was obtained by suppression of material facts as to the shares devolved upon the plaintiffs therein. The first appellate Court's reasoning for holding the Judgment passed in earlier suit is not binding on the plaintiffs, is based on proper appraisal of facts. Further she contended that the third defendant has not established as to how he is entitled for ¼th share in the suit properties. Further, the third defendant has taken a contradictory stand with respect to nature of properties in two different suits. Therefore, she contended that he cannot probate the settlement deed i.e. Ex.B10 to the extent of mother share and approbate to the extent of father share in respect of same documents. When the third defendant was very well aware about the Ex.A1 sale agreement,

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he had not chosen to implead the plaintiffs in the suit. The third defendant being dominus litis ought to have impleaded the plaintiffs.

14. She referred to the Judgment of the Hon'ble Supreme Court of India reported in ***AIR 1994 SC 853*** in the case of ***S.P.Chengalvaraya Naidu(dead) by L.Rs Vs Jagannath(dead) by L.Rs and others*** and contended that the decree obtained by suppression of facts is liable to be thrown out at any stage even in collateral proceedings. Therefore, she contended that the first appellate Court was right in decreeing the suit for partition after holding that D1 had valid title to execute Exs.A3 and A4 sale deeds. Therefore, she prayed for dismissal of the appeals.

15. Heard the learned counsel appearing for the appellant and the respondents and the Amicus Curiae appearing for the contesting respondents.

16. Originally, one Palani Gounder settled the “B” schedule property to and in favour of the first and second defendants. Subsequently, the third defendant, who is the son of the first and second defendants, filed a suit in O.S.No.572 of 1983 for partition of the properties. In the said suit, a

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preliminary decree was passed by the Trial Court on 03.07.1984, which was marked as Ex.B1. As per the said preliminary decree, D1 is entitled of ¼th share in the suit schedule property, D3 is entitled for ¼th share and D2 is entitled for ½ share, in the "B" schedule property. Under these circumstances, the first defendant entered into a sale agreement by a virtue of Ex.B24 dated 15.02.1982 to sell his ¼th share in the "B" schedule property. On 05.10.1984, D1 executed a sale deed to and in favour of D4 by virtue of Ex.B25. The preliminary decree was passed in O.S.No.572 of 1983 on 03.07.1984. The first defendant also executed a sale agreement Ex.A1 to and in favour of the first plaintiff on 26.12.1983. The said sale agreement was executed subsequent to Ex.B24 sale agreement. After execution of the sale agreement, a sale deed in Ex.B25 was executed for ¼th share of D1 in favour of D4, on 05.10.1984. D1 once again executed a sale deed to the plaintiffs through Exs.A3 and A4, on 29.04.1985. At the time of execution of Exs.A3 and A4, D1 was well aware of the fact about his right in terms of Ex.B1 decree, dated 03.07.1984. In terms of the decree, D1 is entitled only ¼th share in the "B" schedule property. At the time of the execution of the sale deed, already he had executed a sale deed by virtue of B25 in favour of D4 of his ¼th share. However, in the said Exs.A3 and A4 sale deeds, in the recitals it has been stated as if D1 had cancelled the execution of

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Ex.B25 sale deed, on 29.04.1985. However, both the Trial Court and the first Appellate Court had categorically held that the said cancellation deed was not placed before the Court and the same has not been proved in the manner known to law. The right of D1 was decided in the B schedule property as ¼th share. When the plaintiff had not proved about the cancellation of Ex.B25, said to have been made on 29.04.1985, the execution of Exs.A3 and A4 are not valid one and it was executed without any right in the B schedule property.

17. However, the first appellate Court held that the preliminary decree passed by the Trial Court in O.S.No.572 of 1983 on 03.07.1984 has not been given effect to against which no final decree proceedings has been filed by D3 and for filing the said final decree proceedings, the same was barred by limitation. Hence, the first appellate Court held that D3 had relinquished his right and in the event of relinquishment in terms of Ex.B10, settlement deed, D1 is entitled for ½ share and D3 is not entitled for ¼th share and the said ¼th share is made available to D1. Hence, the first Appellate Court had validated the sale deed executed in favour of the plaintiffs by D1 through Exs.A3 and A4.

18. However, this Court is not in agreement with the said findings given by the first Appellate Court for the reasons that an application for

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drawing up final decree in the partition suit is in no way an application contemplated under the Limitation Act. It is nothing but reminder to the Court that something which Court has obliged to do has not been done and so, such an application, is not governed by any provision of the Limitation Act. Once the rights of the parties have been finally determined in preliminary decree, an application by a party thereto or the legal representatives, for effecting the actual partition in accordance with the directions contained in the preliminary decree can never be considered to be an application within the meaning of the Limitation Act. On the other hand, it shall be taken to be an application in the pending suit and therefore, the question of limitation does not arise. Therefore, the first Appellate Court committed serious error in deciding this issue.

19. Therefore, this Court is not in a position to accept the findings of the first Appellate Court that D3 had relinquished his right due to the failure of him to file a final decree proceedings, within the period of limitation as contemplated under the Limitation Act. In this regard, it would be worthwhile to extract the law laid down by the Hon'ble Supreme Court of India in ***Shub Karan Bubna Vs Sita Saran Bubna and others*** reported in ***2009 8 MLJ 921(SC)*** which is as follows:-

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> *"15. In so far final decree proceedings are concerned, we see no reason for even legislative intervention. As the provisions of the Code stand at present, initiation of final decree proceedings does not depend upon an application for final decree for initiation (unless the local amendments require the same). As noticed above, the Code does not contemplate filing an application for final decree. Therefore, when a preliminary decree is passed in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed. It is the duty and function of the court. Performance of such function does not require a reminder or nudge from the litigant. The mindset should be to expedite the process of dispute resolution.*
>
> *16. In view of the foregoing, we are of the view that the application filed by the plaintiff in this case for drawing up of a final decree, was rightly held to be not subject to any period of limitation. We therefore dismiss this special leave petition as having no merit, with a request to expedite the final decree proceedings."*

20. Further, the Hon'ble Supreme Court of India held in ***Hasham Abbas Sayyad Vs Usman Abbas Sayyad and others*** rendered in ***2007 2 SCC 355,*** wherein it was held as follows,

> *" A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree "*

21. The final decree proceedings may be initiated at any point of time. No limitation is provided. However, what can be executed is a final decree and not a preliminary decree, unless and until final decree is part of the preliminary decree. Therefore, the findings of the first Appellate Court is not

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sustainable and the same is liable to be set aside, since D1 is entitled in terms of the preliminary decree passed in O.S.No.572 of 1983 only ¼th share in the "B" schedule property as the said share was already sold by virtue of Ex.B25 to and in favour of D4. Though, D1 claim that the same was cancelled on 29.04.1985, both the Courts found that the said cancellation was not proved in the manner known to law and no such deed was also produced before both the Courts below to prove the case of the plaintiff as well as D1. This Court hold that D1 is entitled only ¼th share in the B schedule property and the same was also already transferred to D4 and nothing is available to transfer anything further by virtue of Exs.A3 and A4 to and in favour of plaintiffs. Accordingly, the plaintiffs and D5 are not entitled for any of the relief as sought for in the suit. However, it was informed that the issue with D5 was already settled among the parties and subsequent to the suit the execution of any document in favour of D5 will hold good. As far as the plaintiff is concerned, he is entitled for relief sought therein. Accordingly, the substantial questions of law is answered in favour of the appellant.

22. In view of the above, the common Judgment and Decree dated

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29.10.1998, made in A.S.No.93 of 1997 and A.S.No.113 of 1997, on the file of the Second Additional District Judge, Salem, is hereby set aside. The Judgment and Decree passed in O.S.No.338 of 1985 dated 10.04.1997, on the file of the Additional Sub-Ordinate Judge of Salem, stands restored.

23. This Court records its appreciation to Ms.J.Prithvi, who was appointed as Amicus Curiae to protect the interest of the contesting respondents/legal representatives of the plaintiffs, for the valuable assistance rendered to this Court.

24. In the result, these second appeals are allowed. No costs.

10.01.2023

Speaking order/Non-speaking order
Index :Yes/No
Internet :Yes/No
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KRISHNAN RAMASAMY, J.

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1. The Second Additional Judge, Salem.
2. The Additional Subordinate Judge, Salem

S.A.Nos.1417 and 1418 of 2000

10.01.2023