



S.A.No.163 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23..10..2024

PRONOUNCED ON : 13..12..2024

CORAM:

THE HONOURABLE MR.JUSTICE K.RAJASEKAR

Second Appeal No.163 of 2022
and
Civil Miscellaneous Petition No.3252 of 2022

T.M.Murugesan (Died)

1. Duraisamy
2. Lingammal
3. Anandan

... Appellants

Vs.

Kutty @ Munian

... Respondent

Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and the decree dated 24.08.2021 in A.S.No.39 of 2017 (CNR No.TNDPOF0004072017) on the file of the learned Subordinate Judge, Palacode, confirming the Judgment and decree dated 15.02.2017 in O.S.No.47 of 2006 on the file of the learned District Munsif, Palacode.



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For Appellant : Mr. R. Selvakumar
For Ms. S. Sri Devi

For Respondents : Mr. N. Manokaran

JUDGMENT

The defendants in the suit are the appellants herein. They have challenged the Judgment and decree dated 24.08.2021 in A.S.No.39 of 2017 (CNR No.TNDPOF0004072017) on the file of the learned Subordinate Judge, Palacode, confirming the Judgment and decree dated 15.02.2017 in O.S.No.47 of 2006 on the file of the learned District Munsif, Palacode, whereby, it was declared that the plaintiff was the absolute title over the B item of the suit property and entitled for possession of the same.

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

3. The case of the plaintiff is that the plaintiff had purchased 1.46



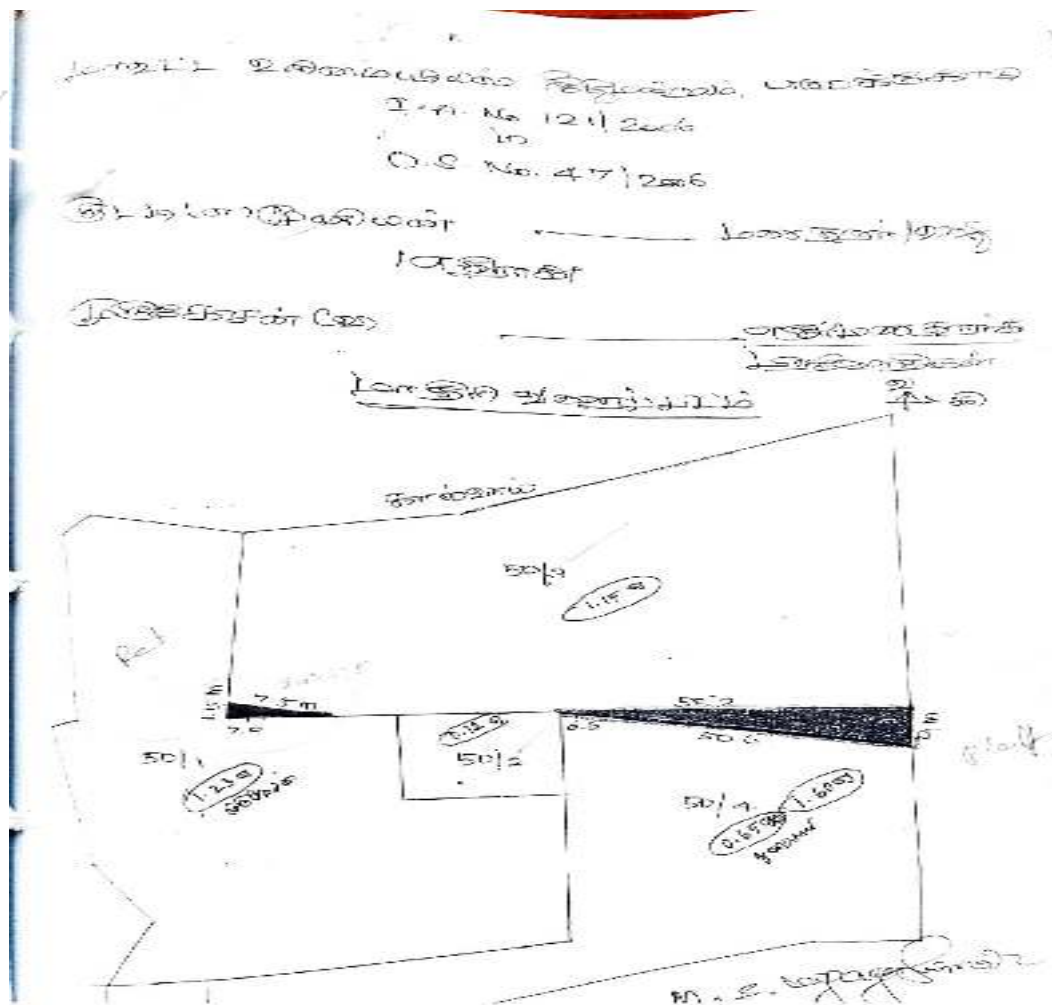
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acres of land from the total extent of 4.22 acres in Survey No.50 of Pachiganapalli Village, Palacode Taluk, Dharmapuri District as per Sale deed dated 11.03.1976. On 13.02.1988, the plaintiff had purchased 0.06 acres of the very same Survey Number along with half right in the portion of Well from defendants. Accordingly, he was in possession and enjoyment of the above properties. Subsequently, the defendants have encroached B Schedule property which has been described as D, C, E, F portion in the Rough Sketch and also the defendants have developed the same, after dumping some stones in the said portion. The plaintiff has title over the D,C,E,F land and the same has been encroached by the defendant hence, he has come forward with the suit for declaration and possession.

4. For the purpose of better appreciation, the Rough Plan filed along with this plaint has been given below:



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5. The defendants have contested the suit by filing written statement.

According to them, the second defendant purchased 2.82 acres out of 4.22 acres from the very same vendors of the plaintiff and from the very same Survey N0.50 of Pachiganapalli Village as per Sale deed dated 11.03.1976



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i.e., on the very same day. At the time of purchase, the lands were measured tentatively (தேர்நாயமாக) and possession was handed over to them. The second defendant was enjoying the suit property along with his brother -first defendant, as joint family properties. The lands handed over to the defendants is situated little higher than the plaintiff's portion of land i.e., 2 – 2 ½ feet above the lands of plaintiff. During the resettlement survey, the lands were measured and Pattas' were issued for the land which were in possession of the parties herein. The plaintiff was not in possession of B Schedule property for a very long period. On 13.12.1988, the defendants have also sold half portion of the Well as well as the land adjacent to the Well to the extent of 6 cents. For the purpose of avoiding flooding from the adjacent lake, they constructed stone fence on the East and Northern side boundaries. The defendants have not encroached any of the lands and thereby, they denied the claim of the plaintiffs.

6. The Trial Court, after considering the pleadings framed the following issues:

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“1) Whether the suit properties belongs to the plaintiff?

2) Whether the defendants have encroached the portion of the land comprised in C, D, E, F of Rough Plan?

3) Whether the plaintiff is entitled for the reliefs' as prayed for?

4) To what other relief, the plaintiff is entitled for?”

7. After recording the evidence and also after issuing Advocate Commission to note down the physical features of the property, the Trial Court has accepted the case of the plaintiff that the defendants have encroached B Schedule property and directed the defendants to handover the possession of the same to the plaintiff.

8. Aggrieved over the same, the defendants have preferred an appeal before the Sub Court at Palacode.

9. After hearing both sides, the Appellate Court has also confirmed the



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Judgment and Decree passed by the Trial Court.

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10. Aggrieved over the orders passed by both the Courts below, this Second Appeal has been filed.

11. My predecessor, while admitting this appeal framed the following substantial questions of law:

“1. Whether the plaintiff is entitled to a decree for possession on the basis of an alleged encroachment only based on the Commissioner's Report and Plan?

2. Whether the Courts below have not erred in not applying the principle: Boundaries would prevail over the extent, as either Ex.A1 or the suit schedule does not have linear/dimensional measurements of the suit property?”

12. The jurisdiction of this Court, while considering the Second Appeal, challenging the concurrent findings of the Courts below is very limited and the Apex Court in ***Hero Vinoth vs. Seshammal (2006 (5) SCC 545 : AIR 2006 SC 2234)*** it has been observed as follows:



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*“18. It has been noted time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the CPC. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section in several cases, the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of the powers under this section. Further, a substantial question of law has to be distinguished from a substantial question of fact. This Court in **Sir Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.***



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MANU/SC/0056/1962 : AIR1962SC1314 held that:

The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

13. In this case, both the Courts have relied on the Commissioner Report-Ex.C1, and accepted the case of the plaintiff that there is an encroachment. This area of encroachment have been disputed by the defendants on the ground that though the alleged encroachment has been



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described in the plaint Schedule as 'B' Schedule, the existence of such B Schedule referred as C, D, E, F in the Rough Plan has not been proved by the plaintiff. The Commissioner's Report reveals that there is an encroachment to the extent of 10,092 sq.ft i.e., 23 cents.

14. Both the Courts have accepted that there is encroachment to the extent of 10,092 sq.ft/23 cents after comparing the extent of land purchased by both sides. It is the admitted case of the parties that both the plaintiff and the defendants have purchased their respective lands from their vendors namely Lingammal and two others. Totally, both side purchased the land in Survey No.50, total extent of 4 acre 22 cents. Out of this total extent, by way of Ex.A1, the plaintiff purchased 1.40 acres, by Ex.B1 defendant No.2 purchased 2 acre 82 cents. In both the Sale deeds, specific boundaries were mentioned. In Ex.A1, the plaintiff land is having following boundaries: On the North and Eastern side - the land sold to Duraisamy (Defendant). On the Southern side - Pachiganapalli Eari Vaikal. On the Western side - the plaintiff land. In which, total extent is 1.40 acres/0.56.5 hectares.



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15. In Ex.B1 i.e., the Sale deeds executed in favour of the defendants it has following boundaries:

- (1) On North the lands sold to the plaintiff and Kodivaikal;
- (2) On East Munusamy Naidu Nagar land;
- (3) On South Road of Dhanabal Naidu's land;
- (4) On West plaintiff's land and the total extent of land purchased is 2.82 acres. Subsequently, the defendants have sold 6 cents of land in favour of the plaintiff by way of Ex.A2.

16. Both the Courts have accepted the case of the plaintiff that in the total extent of 4.22 acres of Survey No.50 was purchased by both the plaintiff and defendants i.e., 1.46 acres – 2.76 acres – 4.22 acres. After accepting these facts they proceeded on the basis of Commissioner's Report. The Commissioner has filed a report after inspection, and found that there is an encroachment on the Southern side of the plaintiff's land.

17. The defendants case is that in the year 1987 itself, there was a survey conducted and accordingly, Pattas' were also issued after dividing



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survey No.50 into 5 sub divisions. 'A' Register was marked along with the Commissioner Report, shows that original Survey No.50, sub divided in to 5 parts. Survey No.50/1 is an extent of 50 ares i.e., 1.24 acres. Survey No.50/2-0.5 ares i.e., 12.4 cents. Survey No.50/3-46.5 ares i.e., 1.15 acres. Survey No.50/4-65.5 ares i.e., 1.62 acres. Survey No.50/5-0.14 ares i.e., 10 cents. Based on this sub division, the Commissioner has conducted survey and noted down the physical features. He has noted down that Survey No.50/3 to the extent of 0.46.5 hectares i.e., 1.14 acres was in possession of the plaintiff and patta was also issued in his name. Survey No.50/2 to the extent of 0.5 ares, joint patta was issued in the name of plaintiff and defendants. It is a Well portion in which, the plaintiff has purchased 6 cents of land. For the remaining survey numbers patta was issued in the name of defendants. Thereby, patta was issued to the extent of 3.01 acres in favour of the defendants.

18. By relying on this patta, the defendants claimed that, from the date of purchase onwards, they were in possession of the property and only based on the possession, during survey settlement, the lands were sub divided and

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pattas were also issued. Accordingly, they further disputed that they had not encroached the lands in possession of the plaintiff from the date of purchase onwards, they are in possession of the property.

19. Admittedly, at the time of filing of the suit, lands were already subdivided. Plaintiff has not stated about the subdivision of the lands however, by relying on the total extent of land i.e., survey No.50 to the extent of 4.22 acres based on the title deeds i.e., Sale deeds executed in his favour and claimed 1.46 acres of land from survey No.50 and he claimed that portion of land which has been described as 'B' Schedule in the Rough Plan as C, D, E, F to the extent of 10,052 sq.ft has been encroached. The Commissioner also found that on the West and Southern side of the plaintiff's property, to the extent of 10,052 sq.ft, the defendants were in possession of the land, which is to be in possession of plaintiff as per Sale deeds.

20. Though the defendants pleaded that they were in possession of this land from the date of purchase, they have not claimed specifically that they are in adverse possession of the land's of plaintiff. According to them, the



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defendants were purchased only to the extent of 1.14 acres of land, though, in the Sale deed, it has been mentioned as 1.40 acres. After rejecting these claim, both the Courts have held that based on the title deeds, the plaintiff is entitled for declaration of title as well as recovery of possession. The reliance made on the Advocate Commissioner's Report which was marked as Ex.C1 and Ex.C2 as acceptable under the law under Rule 2(10) of Order XXVI reads that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record which reads as follows:

21. Section 9 and 10 which reads as follows:

“9. Commissions to make local investigations.-

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Procedure of Commissioner.-



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(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person.-The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

¹[Commissions for scientific investigation, performance of ministerial act and sale of movable property.]

22. In this case, the Advocate Commissioner was also examined as witness before the Court. His evidence was also recorded by both Courts and have held that based on his survey and measurement made by him it revealed that the defendants were in possession of 'B' Schedule property and their possession of this portion is excess land than the land purchased by them.

23. The Constitution Bench of Apex Court in ***M.Siddiq (Dead)***



through legal representatives vs. Mahant Suresh Das and Others (2020) 1

SCC 1 approving the principle that, the Commissioner's Report shall form part of evidence and in paragraph Nos. 657.1 to 658 as observed as follows:

“657.1. Rule 9 of Order 26 is a substantive power allowing the court to issue a commission for making a local investigation. Rule 10 is procedural in nature. Rule 10-A is substantive, empowering the court to issue a commission for making a scientific investigation.

657.2. Rule 10-A(2) which applies the provisions of Rule 10, in its application to a Commissioner appointed under Rule 9, to a commission for scientific investigation contains the expression “as far as may be”. These words comprehend the notion of that which is practicable, and to the extent feasible for the purpose of fulfilling the power which is conferred upon the court to issue or appoint a commission.

657.3. The second part of Rule 10(2) is enabling insofar as it confers a discretion on the court to either itself examine the Commissioner on matters pertaining to the report or investigation and for enabling parties to request the court to call the Commissioner for examination. Rule 10 does not abrogate the right to question the report of a Commissioner if the enabling power of calling the Commissioner for cross-examination is not exercised. A party may avail of that opportunity by seeking the examination of the Commissioner on matters bearing upon the report. A party may also lead evidence of its own witnesses who seek to controvert the methodology or the findings of the



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Commissioner appointed for conducting a scientific investigation. The right of a party to object to the report of the Commissioner is not abrogated merely because the Commissioner is not called for cross-examination. Much will depend on the nature of the objections which are sought to be urged by a party before the Court though the Commissioner was not called for examination.

658. *In the present case, the High Court was of the view that there was no requirement in law for the Commissioner to be called upon to give evidence as a condition precedent to the report being treated as evidence in the suit. The High Court is justified in this view since Rule 10(2) of Order 26 stipulates that the report of and the evidence taken by the Commissioner “shall be evidence in the suit and shall form part of the record”. Hence, the report was correctly treated as evidence in the suit and as the part of the record.”*

24. As stated in earlier paragraph in this case, the Advocate Commissioner was examined as Court witness No.1 and he was cross examined by the defendants. From the evidence of C.W.1, the defendants claimed that the lands in possession of the defendants more particularly, the alleged encroached area is 1 feet higher than the plaintiff's land. According to them, they constructed a small stone boundary to protect their land which was in their possession from the date of their purchase. Whereas, it is the



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case of the plaintiff that 2 years prior to the filing of the suit, he went out of the Village for taking treatment and by taking advantage of this absence in the Village, the defendants have encroached. The plaintiff has also stated in the cross examination that 6 months prior to the filing of the suit, disputed area was encroached by the defendants.

25. To deny the title of the plaintiff, the defendants relying their possession i.e., from the date of purchase whereas, before the Trial Court they have not proved their case that they were in possession from the date of purchase. The recitals in Ex.A1 and Ex.B1 reveals the extent of land sold to the plaintiff and defendants, the boundaries were also recorded in such manner to indicate that on the same day, the lands were sold to the parties herein. The names of the purchaser is also mentioned in boundaries. This shows that only on the date of purchase, purchasers entered into the possession There is no evidence placed on record to show that only lesser portion of land handed over to plaintiff though, he purchased 1.40 acres.

26. At the time of subdivision of the land, measurements recorded in



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the 'A' Register for the Survey No.50/3 is 1.14 acres. The plaintiff name was mentioned as Pattadars. Similarly, for land in survey No.50/2, the plaintiff and defendants name jointly recorded. In other remaining 3 sub divisions, the defendants name have been recorded. There is no evidence placed on record to show that these sub divisions were made based on the possession of the defendants. Both the Courts have held that the defendants have failed to establish the fact that they were in possession of 3 acres of land, though, they are entitled to 2.76 acres of land.

27. The plaintiff herein has filed the suit for declaration of his title. By marking Ex.A1 and Ex.A2, the plaintiff has established the fact that he has purchased 1.46 acres of land out of 4.22 acres of land. Similarly, he also proved the fact that the defendants have purchased only 2.82 acres of land and subsequently, they have sold 6 cents of land to plaintiff. Since the plaintiff able to prove that he has purchased the land and the boundaries mentioned in those documents, also supports the case of the plaintiff and remaining lands alone have been sold to the defendant (Duraisamy), defendant could not have any better title to more extent of land, which was



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sold to him based on Ex.B1.

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28. As stated in the earlier paragraphs, the evidence of the Advocate Commissioner has to be taken on evidence by the Court concerned and it reveals that the portion of land shown as C, D, E, F in the Rough Plan is in possession of the defendants, which were not purchased by them. Even though, the defendants claimed that they constructed the stone boundaries on the disputed area, the same shall not confer any right unless they able to prove that they were in possession of the particular portion of the land by invoking Section 65 of the Limitation Act, 1968, to deny the right of the plaintiff. In this case, the defendants have failed to establish that they were in adverse possession of the disputed area and in the absence of proof of the same, their possession would be considered as an encroachment.

29. It is well settled with the law that the person pleading adverse possession has no equity in his favour since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse possession. In this case, the defendants



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claimed in one point that though, in the Sale deed – Ex.A1 the plaintiff purchased 1.40 acres, he had given possession of 1.14 acres and remaining lands were purchased by the defendants. But there is no such evidence to support their case. As demonstrated by the plaintiff that the Sale deed executed in favour of the plaintiff is the first document registered as Document No.333/1976, in which, the South and West boundary has been stated as the land to be sold to Defendant No.2 (Duraismy) and Duraismy has purchased subsequently to the plaintiff and he has purchased the remaining land of the total extent of 4.22 acres. Accordingly this Court finds that there is no dispute regarding identification of the property. The identification of the property is very clear that the vendors in Ex.B1 clarifies that, what was purchased by the defendants to the extent of 2.82 acres, after deducting 1.40 acres of land from the total extent of 4.22 acres. Since there is no dispute regarding identification of the property, the substantial question of law that whether the boundary will prevail over the lands purchased by the parties does not arise at all.

30. Similarly, as per order 26 Rule 10 (2) declares that the Report of



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the Commissioner and evidence filed by him shall be evidence in the suit and shall form part of the record. Thereby, both the Courts have properly appreciated the evidence adduced by both sides and held that the plaintiff has probalilise his case and proved the encroachment as described by him in the Rough Plan shown as C, D, E, F. This Court finds no infirmity in the pleadings and the Substantial Questions of Law framed is also answered in the above terms.

31. In the result, the Second Appeal is dismissed. The Judgment and the decree dated 24.08.2021 in A.S.No.39 of 2017 (CNR No.TNDPOF0004072017) on the file of the learned Subordinate Judge, Palacode, confirming the Judgment and decree dated 15.02.2017 in O.S.No.47 of 2006 on the file of the learned District Munsif, Palacode is hereby confirmed. There shall be no order as to costs. Consequently, the connected miscellaneous petition stands closed.

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Index : Yes / No
Speaking Order : Yes/No
Neutral Citation Case : Yes/No

To

1. The Subordinate Judge, Palacode.
2. The District Munsif's Judge, Palacode.
3. The Section Officer,
VR Section,
High Court of Madras.



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K.RAJASEKAR,J.,

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Pre-delivery Judgment made in
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