



O.S.A. No.333 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.09.2024

PRONOUNCED ON : 06.01.2025

CORAM :

THE HON'BLE MR. JUSTICE S.S. SUNDAR

AND

THE HON'BLE MR. JUSTICE K. RAJASEKAR

O.S.A. No. 333 OF 2021

and

C.M.P. Nos.20428 of 2021 and 13347 of 2024

G. Kaliasundaram

1. K. Poomani
2. Bhavani
3. Mythili
4. K. Udayakumar
5. Mathavan

... Appellants

Vs.

1. R. Krishnamurthy
2. The Madras Purasawalkam Hindu Janopakara
Saswatha Nidhi or The Permanent General
Benefit Fund Ltd.,
No.168, Vellala Street,
Purasawalkam,
Chennai - 600 084.

... Respondents



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Original Side Appeal filed Under Order XXXVI Rule 9 of Original Side Rules R/w. Clause 15 of the Letters Patent against the judgment and decree dated 22.11.2019 in the ordinary Original Civil Jurisdiction of this Court in C.S.No.1122 of 2007.

For Appellants : Mr. T.V. Krishnamachari
(Senior Counsel)
(For Mr. S.R. Varun Karthick)

For Respondent 1 : Mr. K. Surendar

For Respondent 2 : No Appearance

JUDGMENT

(made by K.Rajasekar,J.)

This original side appeal is filed challenging the judgment and decree passed in C.S.No.122 of 2007, dated 12.02.2007, wherein the learned Single Judge has ordered delivery of possession and payment of mesne profits.

2. The case of the plaintiff is as follows:

2.1 The suit properties belongs to the first defendant as per the sale



deed dated 16.10.1970. The defendants 2 and 3 are sons of the first defendant, who jointly borrowed loan from the defendant 4 and as a security for the loan repayment, the suit property was mortgaged by the defendants 1 to 3 and executed two registered mortgaged deeds dated 02.07.1996 and 17.06.1997. Since the defendants 1 to 3 failed to redeem the mortgage loan, the 4th defendant by exercising the powers under Section 69 of Transfer of Properties Act, sold the property in favour of the plaintiff by public auction, taken place by engaging M/s. Alwin and Co as per auction sale dated 02.12.2006, in which the plaintiffs have paid Rs.1,53,00,000/- as sale consideration.

2.2 After completion of the sale, the plaintiff informed the same to the defendants 1 to 3. In the mean time, defendants 1 to 3 have also filed suit for permanent injunction in O.S. No.1040 of 2005 before the IV Additional City Civil Court, Chennai, seeking injunction against the plaintiff, subsequently, the same was dismissed as infructuous. Since defendants 1 to 3 continued their possession and have not come forward to hand over the properties, the plaintiff has come forward to file a suit for delivery of possession and also for payment of Rs.30,000/- per month as rent for illegal action of staying and



possession of suit property by the defendants 1 to 3.

WEB COPY 3. The first defendant filed a written statement and admitted borrowal of loan from the fourth defendant by deposit of title deeds. The first defendant was regularly repaying the monthly installments, but that was not properly accounted by the fourth defendant. The auction sale was conducted without proper procedure or giving proper opportunity to the first defendant. The sale consideration also not properly fixed, the fourth defendant and the plaintiff were aware about the pendency of the suit before the City Civil court and with a view to snatch the properties, the sale deed has been executed in favour of the plaintiff by illegal means by the fourth defendant. The auction has not been properly conducted, thereby the sale is not valid and prays to dismiss the suit.

4. Based on the pleadings, the following issues were framed by the learned Single Judge.

"1. Whether the plaintiff is entitled for the recovery of possession of the suit property from the defendants 1 to 3?

2. Whether the sale deed executed by the 4th defendant in favour of the plaintiff pursuant to the auction conducted by its agent M/s.Alwin & Company is in any manner affected by the



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alleged suit in O.S.No.1440 of 2000 on the file of the IV Assistant Civil Court, which is no longer pending?

3. *Whether the plaintiff is entitled to the relief of mesne profits calculated at Rs.30,000 p.m. in view of the unlawful enjoyment of the suit property by the defendants 1 to 3?*

4. *Whether the plaintiff is entitled for the costs of this suit?*

5. *To what reliefs is the plaintiff entitled to?"*

5. On the side of the plaintiff, P.W.1 was examined and Exs.P.1 to P.7 were marked. On the side of the defendants, first defendant filed proof affidavit and no oral and documentary evidence was produced. The learned Single Judge after considering the evidence placed on record and after hearing arguments of both sides, decreed the suit and directed the defendants 1 to 3 to vacate and surrender the possession of the suit property to the plaintiff and to pay a sum of Rs.25,000/- per month towards mesne profits to the plaintiff w.e.f. 01.04.2007 to the plaintiff.

6. Aggrieved over the Judgment and decree of the learned Single Judge, the defendants 1 to 3 have come forward with this appeal.



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7. The learned counsel appearing for the appellants/ defendants 1 to 3, submits that the first defendant borrowed a loan of Rs.34,00,000/- from the fourth defendant, by depositing title deeds. Without effecting proper public auction, the properties being sold by the Auctioneer/ M/s. Alwin and Company. He further submitted that no property was transferred in the name of the fourth defendant, hence the plaintiff is not entitled to seek delivery of the property and the Trial Court has not properly appreciated the procedure followed for private sale under Section 69 of the Transfer of Property Act, hence prays to set aside the order of the learned Single Judge.

8. The learned counsel appearing for the plaintiff submits that, as per Section 69 of the Transfer of Property Act, the fourth defendant has come forward to make private sale of the property by way of public auction, by engaging a public auctioneer namely M/s. Alwin and Company. Based on the public auction, as the highest bidder for a sum of Rs.1,53,00,000/-, the plaintiff has come forward to purchase the suit property on 02.12.2006 and on the same day, he had also paid Rs.38,25,000/-. The balance sale consideration was also



subsequently paid by the plaintiff, thereby the fourth defendant had executed a sale deed dated 28.03.2007, in favour of the plaintiff. The defendants 1 to 3 have filed a suit in O.S.No.1440 of 2005, for preventing the sale of mortgaged property and thereby, they were continuously in possession of the property. Since they refused to hand over the possession, the plaintiff has filed this suit and the Trial Court after appreciating the evidence placed on record, rightly decreed the suit, prays to confirm the same and dismiss this appeal.

9. We have considered the submissions made on both sides, perused the materials available on record and the points for consideration arise in this appeal are as follows:

"1. Whether the fourth defendant is entitled to sell the mortgaged property by invoking Power under Section 69 of the Transfer of Property Act, 1882?

2. Whether execution of the sale deed in favour of the plaintiff, based on the public auction and also the procedures followed are valid in law and binding on defendants 1 to 3?

3. Whether the Trial Judge has erred in, by not considering the evidence adduced by the first defendant in this case?

4. Whether the plaintiff is entitled for possession of the suit



property as claimed by him?

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5. *Whether the decree of the Trial Court, directing the defendants 1 to 3 to pay a sum of Rs.25,000/- per month as mesne profit to the plaintiff is sustainable or not?*

6. *Whether the Judgment and Decree of the learned Single Judge is liable to be set aside and the appeal is to be allowed?*

10. The plaintiff has exhibited the mortgage deeds dated 12.07.1996 and 17.07.1997 executed by the defendants 1 to 3, which are marked as Exs.P.1 and P.3 respectively and defendants 1 to 3 have disputed the power of the mortgagee to sell the suit property without intervention of the Court, as per the Section 69 of the Transfer of Property Act. The Clause 8(ii) of the mortgage deeds, empowers the mortgagee to sell the property mortgaged in private sale with the consent of the mortgagor or by public auction, without consulting with the mortgagor or intervention of the Court. The Clause 8(ii) of the mortgage deed reads as follows:

"8. The Mortgagors do further agree:

(ii). That if the debt or interest or default interest in excess of Rs.500/- remains undischarged for three months after the date of service of notice by the Nidhi requiring payment of Principal and interest due, the Nidhi notwithstanding any part payment made by the mortgagors shall have the power to sell the



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property described in the Schedule hereto in Private Sale with the consent of the Mortgagor/s or in public auction without the consent of the mortgagors and without the intervention of the Court as provided in Section 69 of the Transfer of Property Act IV of 1882."

11. Section 69 of the Transfer of Property Act, empowers the sale made by the mortgagee under certain condition without intervention of the Court in certain cases. The Section 69 of the Transfer of Property Act reads as follows:

"69. Power of sale when valid.—

[1] A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or, concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the



mortgage-deed and] the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf. "

12. Before exercising the power under Section 69 of the Transfer of Property Act, Section 69(2) mandates two conditions to be fulfilled. They are as follows:

"(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or, one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due."

13. Admittedly, the case of the defendants 1 to 3 herein is that, they have paid installments upto 15.03.2005 and thereafter, they have not come forward to pay the installments. After they were intimated about the sale of their property as per Section 69 of the Transfer of Property Act, they have not



come forward to challenge the validity of the sale. Only as a defence, in the suit for possession, they contend that the sale is not valid.

14. In the written statement, even though defendants claim that the last payment made by the first defendant was on 15.03.2005 and the statement of the account was not submitted to him, in spite of his request. To substantiate the same, no evidence was produced. After borrowing loan in the year 1996 and 1997, having agreed to repay the loan amount in 100 installments, in the year 2005, the defendant filed O.S.No.1440 of 2005, challenging the notice issued by the fourth defendant/ mortgagee for effecting public auction, and consequently to injunct the mortgagee from invoking power under Section 69 of the Transfer of Property Act. These statements of the defendants 1 to 3 shows that the defendants 1 to 3, at one point of time, stopped the payment of installments and this default has been taken into account by the fourth defendant and they have invoked Clause 8(ii) of the mortgage deeds.

15. After receiving notice under Section 69(2) of the Transfer of



Property Act, the defendants have challenged the proceeding in O.S.No.1440 of 2005 and they were aware that, the mortgagee would invoke his power to sell the mortgaged property by public auction. Subsequently, the suit was dismissed due to non-prosecution. Having come forward to challenge the notice of publication and failed in making repayment of loan, they cannot contend that, no proper notice was served on them. Subsequently, by effecting paper publication in an English daily "The Hindu", notice of public auction is published and the plaintiff herein as a successful bidder, paid the entire sale transactions, after confirmation of the sale. Section 69(3) of the Transfer of Property Act, prohibits the mortgagor by questioning the title of the purchaser, who purchased the property from the mortgagee, and the remedies available for the mortgagor is to seek damages from the mortgagee or against the person exercising the power. The Section 69(3) of the Transfer of Property Act reads as follows:

"(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power."



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16. The scope of Section 69(3) was considered recently by a Single Judge of this Court in **G.Kalki Rajan vs. V. Sreenivasan [2019 Mad 1212]** and observed in paragraph nos. 43, 44 and 45 as follows:

43.1. If the issue is approached from the non-compliance of serving notice as per Sec. 69(2), or the failure to spare reasonable efforts or to show diligence in fixing the upset price, then each of them can be dismissed as one falling under Sec. 69(3) of the TP Act. But if the same issue is approached from understanding who the successful bidder was, and who the auction purchasers were, and the procedural violations are appreciated backwards, then the design to misuse one's position as the director of the mortgagee company emerges as the dominant factor influencing the course of auction. The fidelity to fairness that the mortgagee is expected to exhibit when he sells the mortgaged property sans court's intervention, cannot however, have a single view-point, but must stand the scrutiny from every angle of viewer's choice.

43.2. The judgment of the Division Bench of this Court in K. Mohanakrishnan Vs. Seetha Natarajan & 9 others [MANU/TN/1012/1991 : 1991-2-LW 592] is apposite in the context: Facts therein bear a striking resemblance to the present case. That was a case where property was brought to auction in exercise of powers under Sec. 69 of the TP Act, and it was bid for half its market value, and the sale deed too was executed not in favour of the highest bidder but in favour of a Trust of which the second defendant was the Trustee. While holding that the auction-sale was mala fide the Division Bench wrote:

"9. A rule which has received universal recognition and needs no reiteration, however, seems to have been over stretched by the mortgagee in the sense that a mortgagee with a power of sale is not a trustee of the power of sale; it is a power given to him for his own benefit to enable him the better, to realise his mortgage debt. If he



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exercises it bona fide for that purpose, without corruption or collusion with the purchaser, court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as itself be evidence by fraud. This statement of law on the subject in the early English decisions has been often repeated by the courts in India including the Supreme Court. In Pitchai Mohideen v. C.D.K. Das & Sons, the dictum approved by the Judicial Committee in Haddington Island Quarry Co. Ltd., v. A.W. Huson has been quoted, a dictum which was stated by Kay J. In Warner v. Jacob

"A Mortgagee, is strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefits, to enable him the better to realise his mortgage debt. If he exercises it bona fide for that purpose without corruption or collusion with the purchaser, the Court will not interfere, even though the sale is very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."

Is there not a patent manipulation of the procedures just to benefit the director of the first defendant-company, or his relatives? This is the procedure-part of carrying out the unfair intent. Does it not indicate that each of the innocent-looking procedural violation which may merit a place within the protective ambit of Sec. 69(3) are but steps for translating the hidden theme into a reality? When the statutory procedure is manipulated in exercise of a statutory power to derive an unfair personal advantage, it amounts to fraud on statute. Here the first-defendant fails as fair, reasonably neutral, and as one who the statute trusted when it granted it the power of sale. The auction is a plain fraud on the statute. And it is held in P.R. Govindaswami Naicker Vs. Pukhraj Sowcvar & another [MANU/TN/0312/1939 : (1940) 52 LW 324 : AIR 1940 Madras 903], that fraud is an exception to Sec. 69(3) of the TP Act.

44. *It is now required to be stated that Sec. 69(3) of the TP Act is not a shield to hide the unfairness of a mortgagee who was seen to have developed an interest larger than its just right over the mortgaged property. Nor Sec. 69(3) a 'Shikandi' (a la*



Mahabharata) on the front to keep away the Court from probing into the allegations of fraud. Nor can Sec. 69(3) be understood as a manipulative tool in the hands of some that believe in manipulation. Otherwise, there will be a premium on plain fraud on statute.

45. The decision is to state the obvious: This Court holds that the procedural lapses in the conduct of the auction are not mere irregularities, but a fraud on the statute, and the auction sale is liable to be set aside and the conclusion of the trial Court deserves to be confirmed."

17. In this case, the defendants in their written statement, challenged the power of mortgagor exercising the power under Section 69 of the Transfer of Property Act, the first defendant claims that, he would have made arrangements for selling the property by giving advertisements in newspapers and no notice was served on him before execution of sale deed. No pleadings regarding any fraudulent act is made and no evidence of collusion or fraudulent act between the plaintiff and the mortgagee is established. Thereby, Section 69(3) of the Transfer of Property Act is applied to this present case and defendants are not entitled to challenge the title or ownership of the plaintiff.

18. In this case, the Trial Judge had appreciated the evidence of the



plaintiff based on the mortgage deed and the manner in which the public auction was conducted and after fully satisfied with the procedures followed under Section 69 of the Transfer of Property Act, the Trial Judge has held that the sale deed executed in favour of the plaintiff is valid.

19. We have also gone through the public notice calling upon the parties to participate in the public auction of suit property, which is situated at Chennai. The plaintiff has participated, became successful bidder, also remitted the entire sale transactions within the stipulated time fixed by the public auctioneer and thereafter, the sale deed has been registered in favour of the plaintiff. There is no irregularity established in the manner in which the public auction was taken place. Even though, the defendants 1 to 3 disputed that no proper procedures has been followed in the public auction, but they were not able to pinpoint any grievance in regarding procedures followed in the auction. We are of the view that in terms of Clause 8(2) of the mortgage deed, the fourth defendant is entitled to sell the mortgaged property by way of public auction, which is conducted by the M/s.Alwin and Company and the plaintiff has come forward to purchase the suit property for a sum of



Rs.1,53,00,000/- and after confirmation of the sale, the entire sale consideration was also paid and thereafter, the sale deed was registered in favour of the plaintiff, as stated in the earlier paragraph. The defendants 1 to 3 have not come forward to adduce any contra evidence to show that the sale transaction is invalid and the plaintiff is not entitled for possession of property.

20. Records of Trial court shows that the first defendant had filed his evidence in the form of proof affidavit, but never come forward to subject himself for cross examination. Taking note of the same, the Trial Court has rightly not considered the proof affidavit filed by the first defendant as oral evidence and this Court finds no infirmity in this. It is not the defendant's case that the Trial Court *Suo-mottu* closed the defendant side evidence. The docket entries recorded before the Trial Court shows that in the year 2011, the defendant have not come forward to adduce his side evidence even after availing sufficient opportunities. Hence the matter was listed before the Court for arguments. At that stage, the contesting defendants, once again had obtained the permission from the Court to adduce their evidence. Based on the opportunity given, the contesting defendants had once again filed additional



proof affidavit of the first defendant in the year 2015 and thereafter, by stating various reasons, the first defendant have never come forward to subject himself for cross-examination. In the year 2016, the matter was again taken up for arguments and after hearing the arguments of both sides, the judgment has been delivered, thereby non consideration of the proof affidavit filed on the side of defendants is proper, hence this Court finds no infirmity in this regard.

21. In the light of above discussions, we are of the considered view that the Trial Judge has properly considered and appreciated the evidences placed on record and rightly decreed the suit for possession. This Court finds no reason to interfere in decree of the learned Single Judge, directing the defendants 1 to 3 to hand over the possession of the suit property to the plaintiff. Accordingly, the point Nos. 1 to 4 are answered.

22. With regard to awarding mesne profit is concerned, the Trial Court considered the same as issue No.3. The plaintiff has claimed Rs.30,000/- per month as mesne profit, liable to be paid by the defendants 1 to 3 for their illegal possession of the suit property. The learned Single Judge



after considering the submissions and evidences placed on record, awarded Rs.25,000/- per month as mesne profit from 01.04.2007 till the property is being vacated by the defendants 1 to 3.

23. The test set by the statutory definition of mesne profit prescribed under Section 2(12) of the Civil Procedure Code is, the profits which the person in wrongful possession actually received or might with the ordinary diligence have received from the property together with interest. The Division Bench of this Court in ***R.P. David vs. M. Thiagarajan [1996 AIHC 1194; 1197 (Mad) (DB)]***, has held that the test set by the statutory definition of "mesne profits" is not what the plaintiff has lost by his exclusion, but what the defendant has or might reasonable have made by his wrongful possession.

24. Admittedly, after the execution of the sale deed in favour of the plaintiff, the same was properly intimated by the plaintiff to the contesting defendants, to hand over the property, however, the contesting defendants have not handed over the property, hence the plaintiff has come forward with the suit for possession. The nature of the property in this case is a house property



to the extent of 4800 square feet of land with a built up area of about 2435 square feet, situated in Anna Nagar (East), Chennai, which is a prime location.

The Court is empowered to consider the nature of the property, age, location and condition of the suit schedule properties for determining the rate of quantum for awarding mesne profit. Since, the suit property is situated in prime location and considering the nature, age and location, the Trial Court after framing the issue and conducted enquiry, passed the decree in terms of Order XX Rule 12 of Civil Procedure Code.

25. This Court finds no infirmity and reason to interfere in the order passed by the Trial Court in directing the contesting defendants to pay a mesne profit of Rs.25,000/- per month from 01.04.2007 till the property is being vacated by the defendants. Accordingly, the point No.5 is answered.

26. In the result, this original side appeal is dismissed and the order of the learned Single Judge in C.S. No1122 of 2007 dated 22.11.2019, is hereby confirmed. Consequently, connected civil miscellaneous petitions stand closed. No costs.



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O.S.A. No.333 of 2021

(S.S.S.R.,J.) (K.R.S.,J.)
06.01.2024

stn

Index:Yes/No

Speaking Order : Yes/No

Neutral Citation Case : Yes/No

To:

1. The Section Officer,
VR Section,
High Court,
Madras.



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O.S.A. No.333 of 2021

S.S. SUNDAR, J.,
and
K. RAJASEKAR, J.,
stn

O.S.A. No. 333 of 2021



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O.S.A. No.333 of 2021

06.01.2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20-03-2025

CORAM

**THE HONOURABLE MR JUSTICE S. S. SUNDAR
AND
THE HONOURABLE MR.JUSTICE K.RAJASEKAR**

OSA No. 333 of 2021

AND

CMP NO. 20428 OF 2021,CMP NO. 13347 OF 2024

G. Kaliasundaram (deceased)

1. K. Poomani, W/o. G.

Kaliasundaram, Plot No.3490, J 75, J

Block Anna Nagar East, Chennai 102.

Appellant(s)

Vs

R . Krishnamurthy

S/o. Ramasamy Gounder, No.69,

Karumarampalayam, Uthukuli Main

Road, Tirupur 641 607.

Respondent(s)

CMP No. 20428 of 2021

G. Kaliasundaram (deceased)



O.S.A. No.333 of 2021

1. K. Poomani, W/o. G.
Kaliasundaram, Plot No.3490, J 75, J
Block Anna Nagar East, Chennai 102.

Appellant(s)

Vs

R . Krishnamurthy
S/o. Ramasamy Gounder, No.69,
Karumarampalayam, Uthukuli Main
Road, Tirupur 641 607.

Respondent(s)

CMP No. 13347 of 2024

G. Kaliasundaram (deceased) 1.
K.Poomani
W/o.G.Kaliasundaram, Plot No.3490,
J75, J Block Anna Nagar East,
Chennai-600102

Appellant(s)

Vs

R . Krishnamurthy
S/o.Ramasamy Gounder, NO.69,
Karumarampalayam, Uthukuli Main
Road, Tirupur-641607

Respondent(s)

OSA No. 333 of 2021

For Appellant(s): Mr.S.R. Varun Karthik

ORDER

(Order of the Court was made by S.S.Sundar J.)

Today, the matter is listed under the caption “for being mentioned”.



O.S.A. No.333 of 2021

2.It is brought to our notice that the name of Senior Counsel who appeared for the appellant has been wrongly shown in the judgment dated 06.01.2025 in O.S.A.No.333 of 2021 as “Mr.T.V.Krishnamachari”, instead of Senior Counsel Mr.T.V.Ramanujun, who appeared and argued for the appellant.

3.Therefore, Registry is directed to carry out the necessary correction in the judgment dated 06.01.2025 in O.S.A.No.333 of 2021 and issue fresh copy of the order to the parties concerned.

(S.S.SUNDAR J.) (K.RAJASEKAR J.)
20-03-2025

Index:Yes/No
Speaking/Non-speaking order
Internet:Yes
Neutral Citation:Yes/No



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O.S.A. No.333 of 2021

**S.S.SUNDAR J.
AND
K.RAJASEKAR J.**

**OSA No. 333 of 2021
AND CMP NO. 20428
OF 2021,CMP NO.
13347 OF 2024**

20-03-2025