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S.A.No.280 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.11.2025

CORAM:

THE HON'BLE Mr.JUSTICE **P.DHANABAL**

**S.A.No.280 of 2016 &
C.M.P.No.5327 of 2016**

1. Komarathal (died)

(1st appellant died, legal representatives of the deceased 1st appellant are already parties to the appeal. Memo dated 18.11.2025 is recorded, vide Order dated 18.11.2025 in S.A.No.280 of 2016 by PDBJ)

2. K.S.Palanisamy

... Appellant

Vs.

Valarmathi

... Respondent

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, 1908 to set aside the Judgment and Decree dated 21.07.2014 made in A.S.No.1 of 2014 on the file of the learned Principal District Judge, Erode, confirming the Judgment and Decree dated 22.10.2013 made in O.S.No.17 of 2010 on the file of the learned Subordinate Judge, Gobichettipalayam.

For Appellant : Mr.C.Munusamy

For Respondent : Mr. M. Roshan Asiq



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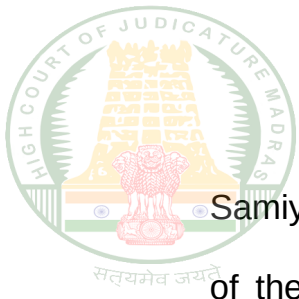
JUDGMENT

WEB COPY This Second Appeal has been preferred as against the Decree and Judgment passed by the First Appellate Court in A.S.No.1 of 2014 on the file of learned Principal District Judge, Erode dated 21.07.2014. The respondent herein, being the plaintiff, filed the suit in O.S.No.17 of 2010 on the file of the learned Subordinate Judge, Gobichettipalayam for the relief of partition and the same was decreed. As against the said Judgment and Decree, the appellants, being defendants have preferred the First Appeal in A.S.No.1 of 2014 and the plaintiff also preferred A.S.No.3 of 2014. The First Appellate Court dismissed both the appeals. However, modified quantum of shares from 1/6 to 4/9. Aggrieved by the said decree and judgment, the appellants / defendants in A.S.No.1 of 2014 have preferred this Second Appeal.

2. For the sake of convenience and brevity, the parties are referred to as per their ranks before the trial court.

3. The brief averment of the plaint are as follows:-

(I) The plaintiff has filed the suit as against the defendants for the relief of partition and separate possession. The schedule Item Nos.1 and 2 of the properties belonged to the father of the plaintiff, namely,
2/21



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Samiyappan through Partition Deed dated 16.06.1964. The Item No.3

of the suit property was purchased by the said Samiyappan through Sale deed dated 02.05.1974 through the income derived from the Item Nos.1 and 2 of the suit properties. The Item No.4 was also purchased by the said Samiyappan through the income derived by the Item Nos.1 and 2 of the suit properties. The Item No.5 of the property belonged to the father of the plaintiff through Partition deed dated 02.05.1974 between the father of the plaintiff, viz., Samiyappan and his brother. The Item No.6 of the property also purchased by the father of the plaintiff through the income derived from the joint family properties on 21.06.1972.

(ii) All the properties were treated as joint family properties. The 1st defendant is the mother of the 2nd defendant and the 2nd defendant is the son of late Samiyappan, who died on 10.09.2006. Since the properties are ancestral properties, the plaintiff, being daughter of the said Samiyappan is entitled to share over the property. The plaintiff is entitled to 4/9th share over the property. While so, on 28.05.2009, the plaintiff sent a notice to the defendants and the defendants sent a reply dated 08.06.2009 with a false allegations that the deceased father of the plaintiff executed a Will dated 11.07.1997 and the said Will is not a genuine one. Therefore, the 1st defendant is entitled to 1/9th share and



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the plaintiff and the 2nd defendant each are entitled to 4/9th shares, therefore, filed the suit.

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4. The brief averments of the Written Statement filed by the defendants are as follows:-

(I) The suit is false, frivolous, vexatious and not maintainable.

(ii) The relationship between the parties are admitted. The 1st defendant's husband, namely, Samiyappan, died on 10.09.2006. While the 1st defendant's husband was alive, he executed a Will dated 11.07.1997 bequeathing the properties in favour of the defendants. The 1st defendant was given life estate and thereafter, the 2nd defendant is entitled to the properties. The suit properties are not joint family properties and the plaintiff has no any right over the property. The plaintiff never been in joint possession with the defendants, therefore, the payment of court fee paid by the plaintiff is not correct.

(iii) The averments that the properties Schedule Item Nos.3 to 6 were purchased through the income derived from the joint family properties are false. There was no any income derived from the said Item Nos.1 and 2 of the properties. The deceased, Samiyappan was a money lender and through the money lending business, he purchased the properties in his name, thereby Item Nos.3 to 6 properties are self



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acquired properties of the said Samiyappan. The said Samiyappan, executed a Will, therefore, the plaintiff is not entitled to partition. The Item Nos.1 and 2 properties are common properties and the suit is bad for non-joinder of necessary parties, therefore, the suit is liable to be dismissed.

5. Based on the above said pleadings, the trial court framed the following issues:-

1. Whether the plaintiff is entitled for the relief of partition and separate possession as prayed for?

2. To what other relief the plaintiff is entitled to?

Before the trial court, on the side of the plaintiff, P.Ws.1 and 2 were examined and marked Exs.A.1 to A.9. On the side of the defendants, D.W.1 to D.W.4 were examined and marked Exhibits Exs.B.1 to B.8. Before the trial court, joint trial was conducted along with another suit filed by the respondent in O.S.No.6 of 2011 for the relief of permanent injunction and common judgment was passed and both the suits were decreed. The suits filed by the respondent / plaintiff were decreed by granting the relief of partition and the relief of permanent injunction for 1/6th share over the properties. Aggrieved by the said decrees and common judgment, the defendants, who are appellants herein have



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preferred First Appeals before the Appellate Court in A.S.Nos.1 and 3 of 2014. The Appellate Court framed the following points for determination:-

1) *Whether the suit properties are ancestral properties of Samiappan or self-acquired properties of Samiappan as pleaded by the defendant is true?*

2) *Whether the Will dated 11.07.1997 projected by the defendants is true and valid?*

3) *Whether the plaintiff is entitled to the relief of partition as prayed for in O.S.No.17 of 2010?*

4) *Whether the plaintiff is entitled to the relief of permanent injunction as prayed for in O.S.No.6 of 2011?*

5. *Whether the quantum of share arrived at by the trial court is proper and correct?*

6. *Whether the order of the trial court is sustainable in law?*

7. *To what other relief?*

6. After hearing both sides and perusing the records including the Judgment of the trial court, the First Appellate Court dismissed both the appeals, however, in A.S.No.1 of 2014, the quantum of share was modified as 4/9th share instead of 1/6th share. Aggrieved by the said Judgment and Decree, this Second Appeal has been filed by the



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defendants. This Court, while admitting the present Second Appeal, framed the following Substantial Questions of Law, for further consideration, on 25.11.2016:

i) Whether the Courts below have correctly applied the principles laid down in the Hindu Succession (Amendment) Act 39 of 2005, which came into force on 09.09.2005 while allotting share to the plaintiff in the suit properties?

(ii) Whether the first appellate Court is correct in allotting 4/9th share to the plaintiff while the trial court allotted 1/6th share to the plaintiff especially when the plaintiff has not filed any appeal challenging the quantum of share allotted by the trial court?

7. The learned counsel for the appellants would submit as follows:-

(I) The appellants are the defendants in the suit filed by the respondent in O.S.No.17 of 2010 for the relief of partition in respect of the suit properties. In fact, Item Nos.1 and 2 of the suit properties are ancestral properties and other properties are self acquired properties of deceased Samiyappan, who is the father of the 2nd appellant and the respondent.



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(ii) The plaintiff, who filed the suit for partition has to prove that

the properties are ancestral properties and available for partition and the plaintiff failed to prove the nature of the properties, whereas, the defendants have proved that the Item Nos.3 to 6 are self acquired properties of the father of the 2nd appellant and he executed a Will on 11.07.1997 and the father of the defendant died on 10.09.2006. Therefore, immediately after the demise of the father of the 2nd appellant, the said Will came into effect. In order to prove the Will, the defendants have examined attesting witnesses and the attesting Witness, D.W.2 has categorically deposed about the execution and attestation of the Will by the deceased Samiyappan. Further, the defendants also examined the scribe of the Will as D.W.3 and he also deposed about execution of the Will and thereby the defendants established their case. However, the courts below failed to consider the evidences in a proper perspective and decreed the suit.

(iii) The trial court, decreed the suit by declaring that the plaintiff is entitled to 1/6th share and the plaintiff has not filed any appeal as against the quantum of share. Per contra, the defendants preferred the First Appeal, in the appeal preferred by the defendants, the First Appellate Court modified the quantum of share by increasing the share



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from 1/6th to 4/9. In the absence of appeal or cross objection filed by the plaintiff, the First Appellate Court granted relief by enhancing the quantum of share, therefore, the First Appellate Court committed an error by enhancing the quantum of share and the plaintiff is not entitled to share over the properties and this appeal is liable to be allowed.

(iv) The learned counsel for the appellants relied on the following Judgments:-

(i) *Judgment of Hon'ble Supreme Court reported in 2003 Supreme (SC) 31 [Banarsi & Ors., Vs. Ram Phal]*

(ii) *Judgment of Hon'ble Supreme Court reported in 2018 Supreme (SC) 546 [Mangammal Vs. Raju]*

(iii) *Judgment of this Court reported in 2021 Supreme (Mad) 186 [Sumathi & Another Vs. Chinnamal @ Ponnayal]*

8. The learned counsel appearing for the respondent would submit as follows:-

(a) The plaintiff is the daughter of Samiyappan and the 1st defendant is the mother and 2nd defendant is the brother of the plaintiff. The said Samiyappan acquired Item Nos.1 and 2 of the property through partition deed dated 16.06.1964 and thereafter, he purchased other items of the properties through the income derived from the Item Nos.1 and 2 of the properties and the said properties were enjoyed by

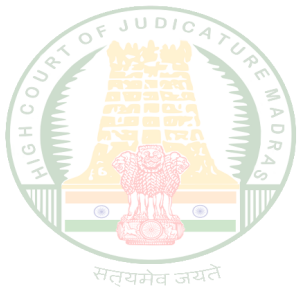


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the said Samiyappan by treating those properties as joint family properties along with plaintiff and the defendants. Therefore, the properties are joint family properties and the plaintiff is entitled to $\frac{4}{9}$ th shares and the 1st defendant is entitled to $\frac{1}{9}$ th shares and the 2nd defendant is entitled to $\frac{4}{9}$ th shares.

(b) Therefore, the plaintiff filed the suit for partition and the trial court decreed the suit, however, at the time of arriving quantum of share wrongly arrived as $\frac{1}{6}$ th share instead of $\frac{4}{9}$ share. The defendants have preferred First Appeal before the First Appellate court and the First Appellate Court after considering the evidences, dismissed the appeals. However, quantum of share arrived by the trial court was corrected and modified the decree by declaring that the plaintiff is entitled to $\frac{4}{9}$ th share over the properties. Merely a wrong calculation made by the trial court in quantifying the shares does not dis-entitle the plaintiff to get correct share through Appellate court.

(ii) The First Appellate Court has power to mould the relief under Order 41 Rule 33 of the Civil Procedure Code, therefore, the First appellate court has rightly exercised the power and modified the quantum of share, therefore, the Second Appeal is liable to be dismissed.



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9. This Court heard both sides and perused the materials placed on record.

10. In this case, there is no dispute in respect of the relationship between the parties and the plaintiff is the daughter and 2nd defendant is the son and the 1st defendant is the wife of deceased Samiyappan. According to the plaintiff, the suit properties are joint family properties. The father of the plaintiff is entitled to Item Nos.1 and 2 of properties through partition deed dated 16.06.1964 and thereafter, he purchased other items of the properties on various dates, through the income derived from Item Nos.1 and 2 of the properties. During the life time of the father of the plaintiff, he treated all the properties as joint family properties, therefore, the plaintiff is entitled to 4/9th shares over the properties.

11. The defendants also admitted the relationship between the parties and also admitted the partition deed dated 16.06.1964, through which, the father of the plaintiff is entitled to Item Nos.1 and 2 of the properties. However, they denied that the other properties Item Nos.3 to 6 were purchased from the income of the joint family properties.



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According to the defendants, Item Nos.3 to 6 properties are self acquired properties of the deceased, Samiyappan and during his lifetime, he executed a Will dated 11.07.1997 and the said Samiyappan died on 10.09.2006. Therefore, as per the Will, the 1st defendant was given life estate and after her demise, the entire properties were bequeathed in favour of the 2nd defendant.

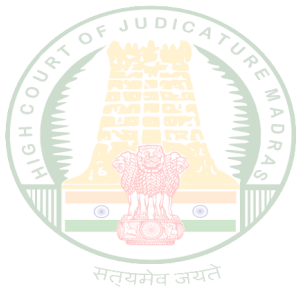
12. The plaintiff denied the said Will, in order to prove the Will on the side of the defendants, they examined D.W.2, who is the attesting witness and scribe was also examined as D.W.3 and both the Courts have disbelieved the evidence adduced on the defendants' side and the defendant being the proprietor of the Will failed to dispute the suspicious circumstances.

13. The trial court rendered findings that the properties are ancestral properties of Samiyappan and he does not have a right to execute the Will in respect of the entire suit properties. There are contradictions between the evidences of D.W.1 to D.W.3 in respect of the execution of the Will, therefore, the defendants failed to prove the execution of the Will and decided that the properties are ancestral properties of Samiyappan and the plaintiff is the coparcener and become entitled to share. However, the trial court while arriving



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quantum wrongly arrived as Samiyappan and 2nd defendant alone as coparceners are entitled to equal shares and the share of the Samiyappan have to be divided into two parts and thereby allotted 1/6th share to the plaintiff. The trial court came to the conclusion that the plaintiff proved that the properties are ancestral properties of Samiyappan and the alleged Will is not true and valid. Per contra, by relying upon the Tamilnadu Act, 1/1990, Hindu Succession (Amendment) Act, 39 of 2005. As per **Judgment of Hon'ble Supreme Court of India in Vineeta Sharma Vs. Rakesh Sharma & Ors. In Civil Appeal Diary No.32601 of 2018 in Special Leave Petition © Nos.684 of 2016 etc., batch dated 11.08.2020** since, there is no any partition between the parties after the amendment of the year 2005, the plaintiff along with the 2nd defendant are equally entitled to share over the properties. But the trial court failed to consider the above said aspect. However, the First Appellate Court also confirmed a Decree and Judgment and only modified the quantum of share. The First Appellate Court also rendered a finding that the Will has not been proved and the properties are the ancestral joint family properties of Samiyappan. As per admissions made by the witnesses, the First Appellate Court came to the conclusion that the properties in Item Nos.3 to 6 were purchased by the said Samiyappan through the income derived from the Item Nos.1 and 2 of the properties.



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14. As far as the Will is concerned, there are material contradictions and vital factors leading to disprove the execution of the Will and attestation and therefore, the defendants failed to prove the Will in accordance with law. Further, the First Appellate Court after referring the amendment of Hindu Succession (Amendment) Act, 39 of 2005 and relying upon Judgment of **K.M.Thangavel and Others Vs. K.T.Udayakumar and another reported in 2014-2-LW 113** held that the plaintiff is entitled to share of the property and the properties of the Samiyappan have to be divided into three equal parts. The plaintiff is entitled to 1/3rd share and the 2nd defendant is entitled to 1/3rd share. After demise of Samiyappan, the share of Samiyappan has to be divided into three parts, the 1st defendant, wife of the deceased is entitled to 1/9th share. The plaintiff and the 2nd defendant each are entitled to 4/9th share over the suit properties.

15. The main arguments advanced by the learned counsel for the appellant is that the First Appellate Court without any specific appeal preferred by the plaintiff enhanced the quantum of share without any jurisdiction. It is well settled Law that under Order 41 Rule 33 of Civil Procedure Code, the appellate court has power to mould the relief and can pass any order even though no appeal and cross objection was



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filed by the parties. Therefore, the First Appellate Court has correctly arrived at fair conclusion and modified the share. The learned counsel for the appellants has relied on the (I) Judgment of Hon'ble Supreme Court reported in 2003 Supreme (SC) 31 [Banarsi & Ors., Vs. Ram Phal] (ii) Judgment of Hon'ble Supreme Court reported in 2018 Supreme (SC) 546 [Mangammal Vs. Raju] (iii) Judgment of this Court reported in 2021 Supreme (Mad) 186 [Sumathi & Another Vs. Chinnamal @ Ponnayal]

(i) On perusal of those judgments, it is clear that the same are not applicable to the present facts of the case, as the facts are distinguishable.

16. As far as the Substantial Question of Law No.(i) Whether the Courts below have correctly applied the principles laid down in the Hindu Succession (Amendment) Act,39 of 2005, which came into force on 09.09.2005 while allotting share to the plaintiff in the suit properties is concerned:

(i) The plaintiff has filed the suit for the relief of partition and already the courts below have rendered a concurrent findings that all the properties are joint family properties of the plaintiff and the



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defendants. There is no dispute that the said Samiyappan died on 10.09.2006 leaving behind the plaintiff and the defendants as his legal heirs. The available evidences shows that the properties are ancestral and joint family properties, the plaintiff being daughter of Samiyappan , after amendment Act, 39/2005, is entitled to equal share as that of 2nd defendant, who is son of Samiyappan, therefore, the First Appellate Court has correctly applied the Law and allotted the shares to the plaintiff.

(ii) According to the defendants, the said Samiyappan executed a Will in favour of the defendants and both the courts have rendered a findings on factual aspects that the Will has not been proved, therefore, this Court need not go into that factual aspect and in the absence of the Will, the properties have to be divided into three parts and the plaintiff is entitled to 1/3 share. The 2nd defendant is entitled to 1/3rd share and the share of Samiyappan has to be divided into three parts, viz., 1st defendant is entitled 1/9th share, 2nd defendant is entitled 4/9th share and the plaintiff is entitled 4/9th share. However, the trial court wrongly quantified the share that the properties have to be divided into two parts and Samiyappan is entitled to 1/2 share and the 2nd defendant is entitled to 1/2 share. The share of Samiyappan has to be divided into three parts, thereby the plaintiff is entitled to 1/6th share. The said allotment



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of share is not correct and after 2005, Amendment Act in Section 6 of

Hindu Succession Act, the plaintiff being the daughter of Samiyappan

also equally entitled to the property along with Samiyappan and the 2nd

defendant. Therefore, the First Appellate Court has correctly applied the

principles while allotting shares to the suit properties, thus the

Substantial Question of Law No.(i) is answered.

17. As far as the Substantial Question of Law No.(ii) Whether the First Appellate Court is correct in allotting 4/9th share to the plaintiff while the trial court allotted 1/6th share to the plaintiff especially when the plaintiff has not filed any appeal challenging the quantum of share allotted by the trial court.? is concerned,

(i) In this case, the trial court came to the conclusion that the suit properties are joint family properties and the plaintiff got married in the year 1985 prior to the commencement of Hindu Succession Amendment Act, 39 of 2005 and therefore, the plaintiff is entitled to share of Samiyappan and the properties have to be divided into two parts, Samiyappan is entitled to 1/2 share and the 2nd defendant is entitled to 1/2 share, after demise of Samiyappan, the plaintiff is entitled to 1/6th share, 1st defendant is entitled to 1/6th share and 2nd defendant is entitled to 4/6th share. Once the trial court decided that the properties



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are ancestral and joint family properties of the plaintiff and the defendants after amendment of Hindu Succession (Amended) Act, 39 of 2005, plaintiff has also become coparcener and entitled to share over the properties irrespective of the date of marriage.

(ii) Further, Hindu Succession (Amended) Act, 39 of 2005 has no role to play and admittedly, the said Samiyappan died in the year 2006 after commencement of amendment Act of Hindu succession Act, 39 of 2005, therefore, the trial court committed an error in arriving quantum of share. However, the First Appellate Court allotted correct shares that the properties have to be divided into three shares, viz., 1/3 part to the plaintiff, 1/3rd to the 2nd defendant and 1/3 part to Samiyappan. After the demise of Samiyappan, the 1st defendant is entitled to 1/9 share and the plaintiff is entitled to 4/9th share and the 2nd defendant is entitled to 4/9th share.

(iii) It is true that the plaintiff has not filed any appeal as against the quantum of share arrived by the trial court, but without any appeal, the First Appellate Court moulded the relief by enhancing the quantum of shares. There is no dispute that the findings in respect of the nature of properties and the execution of Will are decided in favour of the plaintiff and the suit is also decreed in favour of the plaintiff, the trial



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court not applied the correct law. Therefore, the First Appellate Court has corrected the quantum of share.

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(iv) At this juncture, it is relevant to refer the provision of Order 41 Rule 33 of Civil Procedure Code:-

“ 33 . Power of Court of Appeal— The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees].”

(v) As per the above said provision, the appellate court can mould the relief and grant the relief depending upon the facts and circumstances of the case and the First Appellate Court also after relying upon the above said provision of Order 41 Rule 33 of CPC moulded the relief. Further, the First Appellate Court also relied upon the Judgment of Hon'ble Division Bench of this Court in **Sundaramoni Venkatesan Vs. T.Karthikeyan and others** reported in 2008 (2) CTC 654, wherein the **Hon'ble Divison Bench of this Court** held that 'in the



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interest of justice, the appellate court can mould the relief and can pass

an order even though no appeal or cross objection filed by him' by

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exercising powers under Order 41 Rules 33 and 22, therefore, the First Appellate Court has correctly applied the law and exercised the powers and enhanced the quantum of share, therefore, the First Appellate Court is correct in allotting 4/9th share to the plaintiff, while the trial court allotted 1/6th share to the plaintiff, even without filing any appeal, by the plaintiff. Thus the Substantial Question of law No.(ii) is answered.

In view of the above said discussions and answers to the substantial questions of law, this Court is of the opinion that the Second Appeal has no merits and deserves to be dismissed. In the result, the Second Appeal is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

26.11.2025

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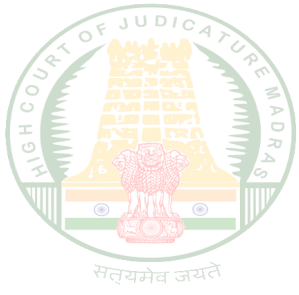
Internet:Yes/No

Speaking / Nonspeaking order

ssd

To

1. The Principal District Judge,
Erode
2. The learned Subordinate Judge,
Gobichettipalayam.



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P.DHANABAL, J.

ssd

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