



IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Judgment Reserved on : 08.12.2021

Judgment Pronounced on : **12.01.2022**

CORAM :

**THE HON'BLE MR. JUSTICE T.RAJA
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY**

A.S.No.95 of 2018

Venkateswarane Sivadjy

... Appellant

Versus

Alice Viala
Respondent

...

Prayer : First Appeal filed under Section 96 of C.P.C r/w under Order 41 R 1 of C.P.C to set aside the preliminary judgment and decree dated 30.01.2017 made in O.S.No.4 of 2013, on the file of the learned Family Court Judge, Puducherry.

For Appellant : Mr.J.Kumaran

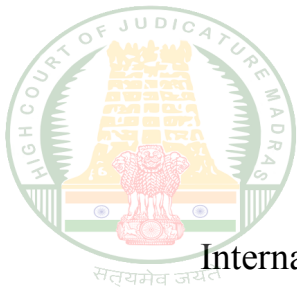
For Respondent : Mr.T.Ramachandran

JUDGMENT

(The Judgment was made by Mr.Justice.D.Bharatha Chakravarthi)

A. The Question:

We are called upon to resolve a conundrum under Private



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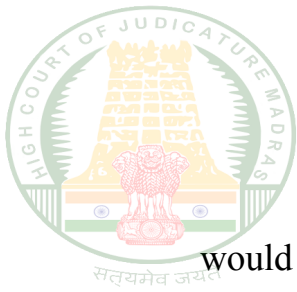
International Law/Conflict of Laws, involving French Law, as to, “Whether or not a wife, who has suffered a decree of divorce in the *Court of Superior Instance* at France with further orders of liquidation of property, can maintain a suit for partition and separate possession of her half share in the community properties before the Family Court at Puducherry, without applying to the *Notaires* with the respective *Chamber of Notaires at France*, within a period of three months, in view of Article 1444 of *French Civil Code*?”

B. The Foreign Element :

2. In this case, the Appellant/Defendant, was the Husband and the Respondent/Plaintiff was the wife, since divorced. For the sake of convenience, they are referred as Husband and Wife, in this judgment. Both parties to the suit, are admittedly French Nationals and their claims and contentions relate to the rights and liabilities arising out of the divorce granted and hence the foreign element.

C. The French Law :

3. Under the French law, the marital relationship of a husband and wife is under two different regimes. They can have a contract regime, which



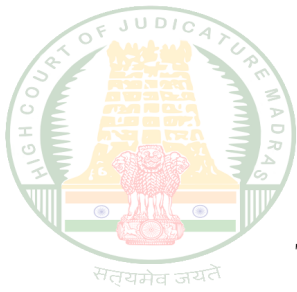
would mean that terms of their prenuptial contract would govern their *inter-se* relationship, whereby they can mutually agree as to whether their properties would remain separate property or common property, their financial relationship etc. In the absence of a contract, they would be under community regime (*communauté légale*). Articles 1401 to 1495 of the *French Civil Code* deal with the community regime. The english translation of the relevant Articles 1401 and 1402 reads as follows :

'Art. 1401 - The assets of the community comprise acquisitions made by the spouses together or separately during the marriage, and coming both from their personal activity and from savings made on the fruits and incomes of their personal property.

Art. 1402 - Any property, movable or immovable, shall be deemed an acquisition of the community where it is not proved that it is a separate property of one of the spouses in accordance with a provision of law.

Where a property is one of those which do not display proof or mark of their origin, personal ownership of a spouse, if disputed, shall be established in writing. Failing an inventory or other contemporaneously constituted proof, the judge may take into consideration all writings, in particular family instruments of title, registers and papers, as well as bank documents and invoices. He may even admit testimonial or presumptive evidence, where he observes that it was materially or morally impossible for one spouse to obtain a writing.¹

¹ <https://www.mhc.tn.gov.in/judis> <https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code->



Thus, the husband and wife, subject to other limitations and liabilities, are entitled to equal share of the community estate.

4. Article 1441, reads as follows :

'Art. 1441 - A community is dissolved:

- 1° By the death of one of the spouses;*
- 2° "By declared absence" (Act no 77-1447 of 28 Dec. 1977);*
- 3° By divorce;*
- 4° By judicial separation;*
- 5° By separation of property;*
- 6° By change of matrimonial regime.²*

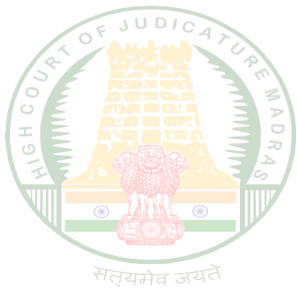
Thus, upon divorce, the community is dissolved and subject to other rights and liabilities, the husband and wife are entitled to 50% each of the community estate.

5. To understand the process of separation, it is useful to read, Articles 1443-1444 together :

'Art. 1443- Where through the disorder of the affairs, misadministration or misconduct of one spouse, it appears that the upholding of the community imperils the interest of the other spouse, the latter may sue in court for separation of property. Any voluntary separation is void.

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<https://www.mhc.tn.gov.in/judis> ² *Vide I supra*



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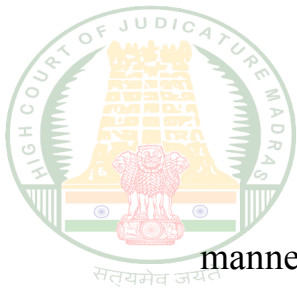
Art. 1444 - Separation of property, although ordered in court, is void where the proceedings tending to liquidate the rights of the parties have not be initiated within three months after the judgment has become res judicata or where the final settlement has not occurred within the year of the opening of the process of liquidation. The period of one year may be extended by the president of the court in the form of interim relief proceedings.³ '

Therefore, the community property even if ordered to be separated, shall become void, unless the liquidation proceedings are initiated within three months from the judgment and the final settlement should be completed within one year of the Judgment.

6. The *Notaires* (Notaries) of France are covered by ordinance of November 2, 1945 and Article 1 of the same provides that "*Notaries are public officers, established to receive all acts and contracts to which the parties must or wish to make these authentic, attached to the acts of public authority, and ensure the date, retain the deposit, deliver a Grosse and Expedition⁴*". Their role in this *lis* is to liquidate the assets as per the agreement, if any, between the parties and if parties failed to arrive at any consensus, they can pass an order enforcing liquidation in a particular

³ *Vide I supra*

⁴ <https://www.notaires.fr/en/notaire/role-notaire-and-his-principal-activities/role-notaire>
<https://www.mhc.tn.gov.in/judis>



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manner⁵. The above text of the law, legal position and the role of the notaries under French Law are agreed by both sides.

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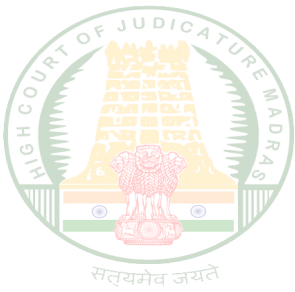
D. The admitted facts :

7. The appellant and the respondent are French nationals. Their marriage was solemnised on 22.01.1982 at *Sarcelles, France*. They established their marital abode at *De Creteil, France*. From the lawful wedlock, two children *Julie Jayanthi Marie* and *Sriram Jean-Marie Govindh* were born to them at France on 09.03.1984 and 21.12.1990.

8. The properties morefully described under Schedule-A, being three immovable properties situate at Puducherry, were purchased during the subsistence of their marriage, on 01.08.1988, 01.10.1992 and on 24.06.1999 under sale deeds, registered as Document Nos.2433/1988, 1589/1992 and 2746/1999 respectively, at Puducherry. On 08.03.2005, the marriage between the parties was dissolved by a decree of divorce by the *Court of Superior Instance at Cretiel* and the english translation of relevant portion of the decree reads thus:

“DECISION
THEREFORE:

⁵ <https://www.mhc.tn.gov.in/judis> <https://www.notaires.fr/en/notaire/role-notaire-and-his-principal-activities/role-notaire>



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The Family Judge sitting in open court, after discussions outside the presence of the public, by judgment pronounced in the presence of the parites subject to appeal.

Considering the order of 14 June 2004 authorizing the spouses to live separately.

Pronounces the divorce for the wrong of the wife.

*Mr.Venkateswarane SIVADJY
born on 12th June, 1956 at Pondicherry (India)
And
Mrs.Alice VIALA
born on 30th January, 1982 at MADRAS (INDIA)
married on 22nd January, 1982 at SARCELLES
(95).*

Holds that this judgment will be published in accordance with the provisions of the Article 1082 of the New Code of Civil Procedure.

Orders of the liquidation of property interests of spouses.

If the liquidation of the matrimonial system is necessary by notary, in default of agreement, to commit the parties on the choice of the latter, the President of the Interdepartmental Chamber of Notaries of Paris or his delegate to perform this operation and the President of the respective chamber of the Court of Superior Instance or any Judge of Creteil by his care to supervise it and to monitor the course and report in case of difficulties.'

(Emphasis Supplied)



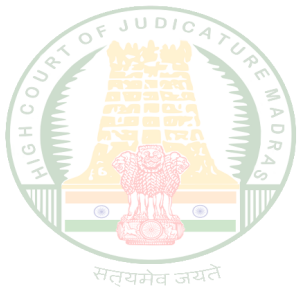
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9. Thereafter, on 13.08.2012, the respondent/wife filed the present O.S.No.4 of 2013 on the file of the learned Family Judge, Puducherry, praying for partition of these three immovable properties mentioned in the schedule-A and movables mentioned in the schedule-B into two halves and allot one half share in the said properties to the plaintiff and by appointing an Advocate Commissioner to measure schedule-A property by metes and bounds and to take inventory of the schedule-B property and put the plaintiff in the separate possession of her share.

10. The husband, duly contesting the suit, filed a written statement claiming that the present suit is not maintainable as the wife had failed and neglected to resort to the liquidation proceedings within three months from the date of divorce coming into force before the Notaries in France and therefore, the present suit which is filed eight years after the divorce before the Indian Court is not maintainable.

E. The Issues & The Trial :

11. With the above pleadings, the Family Court at Puducherry framed following five issues:-



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“(i) Whether the plaintiff is entitled to file the suit for partition against the defendant claiming half share in the suit properties?”

(ii) Whether it is true that the suit properties were purchased out of the savings of the plaintiff?

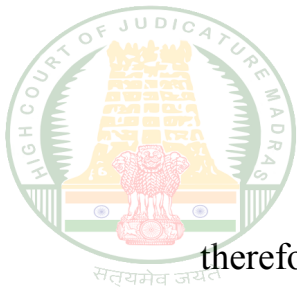
(iii) Whether it is true that the first item of “A” schedule property was built with the hard earned money of the plaintiff?

(iv) Whether the plaintiff is entitled to claim half share in the suit properties?

(v) To what relief, the plaintiff is entitled?”

12. The plaintiff examined herself as P.W.1 and examined one Vidya as P.W.2 and on behalf of the plaintiff, Exs.A1 to A16 were marked. The defendant examined himself as D.W.1 and on behalf of the defendant, Exs.B1 to B6 were marked.

13. After considering evidence on record and contention of the parties, the Family Court ruled that, (i) the matter pertains to family and even though it is among the divorced couples, the Family Court had jurisdiction; (ii) As per the community regime under the French Code Civil, which is the law applicable to the parties, the properties, being purchased during the subsistence of the marriage, form part of the community and



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therefore, the husband and wife were entitled to 50% share of the community property; (iii) Upon being granted divorce, as per Article 1441, the community got dissolved and therefore, the wife is entitled to seek for partition and separate possession of her share of the property; (iv) that the Article 1444 does not apply to the instant case because, the respondent's husband, even though is taking the defence, he has also not filed any liquidation petition before the Notaire and since both the parties failed to move the Notaire, the present suit is maintainable and passed a preliminary decree by its judgment and decree dated 30.01.2017 granting $\frac{1}{2}$ share to the respondent/wife, as against which the present appeal is laid before this Court.

F. The submissions made in the Appeal Suit:

14. *Mr.J. Kumaran*, learned Counsel for the appellant submitted that in this case, almost all the facts are admitted. There is no quarrel over the fact that the properites originally formed as community as they were purchased during subsistence of their marriage. There is no quarrel for proposition that the wife is entitled to 50% of the community property and that the community got dissolved upon the pronounciation of the divorce decree. But, however, as per the learned Counsel, on perusal of the French

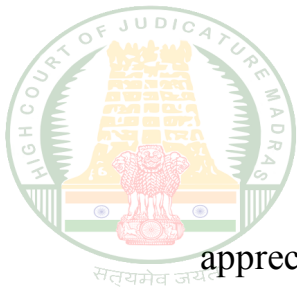


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Court's judgment, dated 08.05.2005 granting divorce, it would be clear that it not only ordered divorce, but also ordered that the assets to be liquidated and directed the President of the Chamber of Notary or his delegate to take up the matter of liquidation of the matrimonial system either by recording the agreement of the parties or in default to commit the parties to the choice of the notary and to supervise and monitor the course and represent the case of difficulties.

15. According to the learned Counsel for the appellant, this amounts to ordering of separation of property and therefore, as per Article 1444, within a period of three months from the date of judgment, the spouses had to file proceedings before the Notary and the respondent/wife, having failed to approach the Notary, is not entitled to file the present suit, since, Article 1444 renders the separation of the property as void. In substance, his contention is that for all purposes, the French Civil Code should be applied and therefore, the Trial Court ought to have dismissed the suit as not maintainable.

16. Per contra, *Mr.T.Ramachandran*, learned Counsel appearing for the respondent/wife would submit that the Family Court, has correctly



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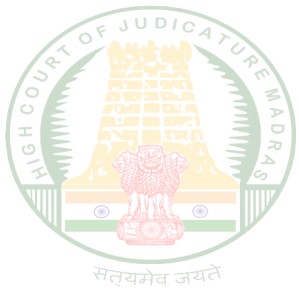
appreciated the position under the French Civil Code. D.W.1, the husband had categorically admitted that the properties are part of the community and that the wife will be entitled to 50% of the same and therefore, submitted that Article 1444 is not applicable to the facts of the case and wife is entitled to sue separately for partition of her share, since the properties are located in Puducherry. Thus , the question as framed by us above in the paragraph No.1 of this judgment arises.

G. The discussion & Findings :

17. The parties are French Nationals and hence the rules of Private International Law/Conflict of laws come into operation. As the Indian Courts have broadly followed the English Rules of Private International Law, with modifications and departure wherever necessary, the Hon'ble Supreme Court of India, in *Technip SA -Vs- SMS Holding (P) Ltd*⁶ has quoted the principles with approval, as contained in *Cheshire & North's Private International Law*⁷. According to *G.C. Cheshire*, the object of these rules are three fold and they are (i) Jurisdiction of the Court; (ii) to make the choice of law (*lex causae*) (iii) recognition and enforcement of foreign decrees.

⁶ (2005) 5 SCC 465

⁷ *Cheshire & North's Private International Law*, by Peter North & JJ Fawcett – Butterworths , 12th Edn.



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18. In this case, there is no difficulty with regard to the Jurisdiction of Indian Courts(*sic* Family Court, Puducherry) as admittedly both parties were ordinarily residing at Puducherry and the Schedule properties are situate within the territorial jurisdiction of Puducherry. The only dispute which was raised was that whether the wife should have moved the Civil Court instead of the Family Court as the prayer was for partition of the schedule properties. As per Section 7(1) of the Family Courts Act, 1984, a Family Court shall- (a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation. As per Explanation (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them would fall within the Jurisdiction of the Family Court and the Trial Court has also rightly answered the same.

19. The next step is to classify /characterize the cause of action and select the law applicable(*lex causae*). As far the claim $\frac{1}{2}$ share in the Schedule properties by the Wife is concerned the same is claimed arising out of the the rights and obligations flowing from the Marriage and Divorce,



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and therefore, is in the realm of Personal Law. The personal law applicable to them is the French Code Civil, being the *lex patriae*, that is, the law of the nationality of the persons. They would carry their personal law wherever they are domiciled. The establishment of 'community' and dissolution thereof are part of their marital rights and obligations and as such are to be characterized as their personal law rights. A reading of the decree of divorce granted by the French Court and the pleadings of the parties in the instant suit, would be clear that the parties did not have a contract regime and as such they were in the community regime. The suit schedule properties were purchased during the marriage was in subsistence and therefore form part of the community property. The marriage between the plaintiff and the defendant was dissolved by the competent French Court by a decree of divorce, dated 08.03.2005 and therefore, by virtue of Article 1441, upon dissolution of the marriage, the community got dissolved and the parties are entitled to separation of properties, in accordance with the rules contained in Articles 1401 to 1492 of the French Civil Code. Therefore, the plaintiff herein is entitled for partition and separate possession in the schedule mentioned properties. There is no any contention or dispute, which is raised before us on these aspects. Hence, we hold that French Code Civil, shall be the *lex causae* in determining the rights of the parties and under the same,



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the Wife is entitled to $\frac{1}{2}$ share in the Suit Schedule properties as prayed by her.

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20. However, the contention is in respect of second question, as to how to effect the said separation. The contention of the Husband is that even in respect of the same, the *lex causae* should only be the French Civil Code and as per Article 1444, the wife ought to have approached the Notary for liquidation within a period of three months and she, having failed to do so, the present suit is not maintainable.

21. Moreover, when it comes to the manner of effecting partition, we hold that the Indian Law would be *lex causae* and not the French Code Civil, more specifically Article 1444 would not apply for the following reasons :

(a) The manner of effecting partition is a rule of procedure and therefore in matters of rules of procedure, the law of the forum, namely, *lex fori*, will be applicable. As per Indian Law, only a suit for partition has to be filed and finally an Advocate Commissioner appointed by the Court in the final decree would effect the partition of the property. There is no Notaire system under *lex fori*. Unlike Indian Law, where there are separate enactments dealing



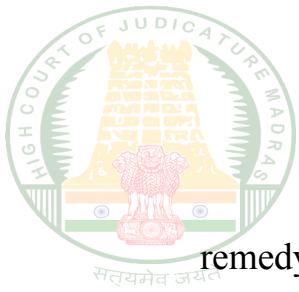
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with Substantive Law and Procedural Law, French Code Civil is a compendium of their entire Civil Law, including substantive law, procedural law, the rules of evidence, limitation etc. Article 1444 is a procedural provision and therefore would not apply.

(b) Looking at this second limb of effecting partition of the dissolved community property by considering the Schedule-A properties, it also touches upon effecting physical division of the immovable properties by metes and bounds and therefore, *lex situs*, that is, the law of land where the property is situate, would apply. A Coordinate Division Bench of this Court has also in the matter of *Sandana Rene Lucien Joseph -Vs- Sandana Vincent Maria Anthony*⁸, has held that *lex situs*, namely, the law of the land would apply when it comes to immovable properties and therefore the suit for partition is maintainable.

(c) Further, the Notaires of France, also do not possess territorial jurisdiction to carry out the partition of the properties situate in India. Since all the properties were located only in Puducherry, neither party filed any proceeding before the Notaire, and rightly so. Even under French law, if the Community properties are located in other Jurisdictions, the parties will have to approach the concerned Courts as per local law and obtain property

⁸ (2018) 1 CTC 481
<https://www.mhc.tn.gov.in/judis>



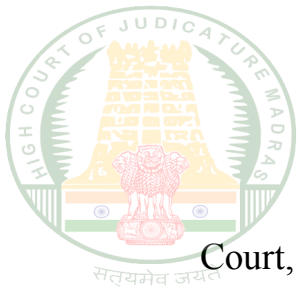
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remedy(partition). Thus, the suit for partition is maintainable by the principle of *renvoi* also. To quote Mr. *A.M. Setalvad*⁹, is also of the view that Indian Courts are likely to apply the rules of *renvoi*.

22. There is yet another reason why the argument of the Husband is without any substance, because a proper reading of Article 1443 and 1444 would make it clear that upon dissolution of the community, any voluntary separation of property is void and it should be through Court. Even the order of separation of property that is ordered by court should be carried out within the time stipulated, that is, by initiating proceedings within 3 months and concluding the same within one year. To quote Justice David Annoussamy¹⁰, *“In all cases in which the matter is not settled amicably with the help of a notaire and the parties go to court, the respective advocate would seek the strict application of rules with all their complexity, which will be a ruinous process”*. Thus, it may be seen that even in France, the parties have still an option to go to the Court, if they do not agree with the Notaire's decision. Finally, a proper reading of Article 1444 only says that if there is an order of separation, which is made by the

⁹ A.M. Setalvad, Conflict of Laws, Lexis Nexis, 3rd Edn, Page 373

¹⁰ Justice David Annoussamy, French Legal System, Dr. Ambedkar Govt. Law Collge, Puducherry & National Law Schol of India University, Bangalore, 2nd Edn – page 292



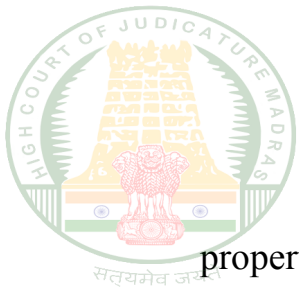
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Court, and if the parties do not carry out the liquidation by approaching Notary within the period of three months, it is that order of separation of property, which will be void. Therefore, once again, the parties are entitled to approach for separation and the properties in the instant case, having been located in India, the respondent has rightly approached the Court of law, for partition and separate possession, as Article 1444 does not in any manner override the effect of Article 1441, resulting the ending of the community status.

23. For all the reasons stated above, the question is answered in favour of the respondent/plaintiff that the present suit filed by the respondent/plaintiff, wife, for partition and separate possession of the property, as per Indian laws is maintainable and will not be barred by virtue of not approaching French Notary for liquidation under Article 1444 of the French Civil Code.

H. Findings on the Issues :

24. For the conclusions reached by us as above, in respect of issue No. 1, we confirm the finding of the trial court that the plaintiff is entitled to file the suit for partition as against the defendant claiming half share in the suit



properties; in respect of issue No. 2 & 3 we find that the schedule properties formed part of the *communate legale* of both parties; In respect of issue No. 4 that the plaintiff is entitled to claim half share in the suit properties and in respect of issue No. 5 that the plaintiff wife will be entitled to a preliminary decree for partition and we answer the issue accordingly.

I. Result :

25. In the result, the present Appeal Suit is dismissed. The decree and judgment dated 30.01.2017 made in O.S.No.4 of 2013, on the file of the learned Family Court Judge, Puducherry is confirmed. However, the parties shall bear their own costs.

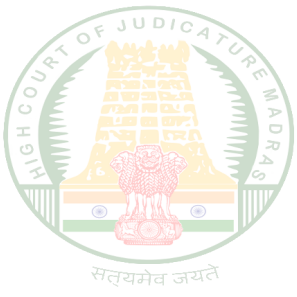
(T.R., J.) (D.B.C., J.)
12.01.2022

Index : yes
Internet : yes
Speaking order

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To

The Family Court Judge, Puducherry.



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**T.RAJA, J.,
and**

D.BHARATHA CHAKRAVARTHY, J.,

grs

Pre-Delivery Judgment in

A.S.No.95 of 2018

12.01.2022