

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :05.12.2017

PRONOUNCED ON: 11.12.2017

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.1127 of 2001

1. C.Rajendran
2. Lalitha

Vs.

1. Sankaran
2. Salammal

Appellants

Respondents

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 11.01.2001 made in A.S.No.98 of 1999 on the file of the Second Additional District cum Chief Judicial Magistrate, Krishnagiri reversing the Judgment and decree dated 06.10.1999 made in O.S.No.171 of 1993 on the file of the Subordinate Court, Krishnagiri.

For Appellants

: Mr.J.Hariharan
for M/s.V.Nicholas

For Respondents

: Mr.G.Surya Narayanan
for M/s.N.Isthiaq Ahmed

J U D G M E N T

This second appeal is directed against the judgment and Decree dated 11.01.2001 made in A.S.No.98 of 1999 on the file of the Second Additional District Judge cum Chief Judicial Magistrate, Krishnagiri reversing the Judgment and decree dated 06.10.1999 made in

O.S.No.171 of 1993 on the file of the Subordinate Court, Krishnagiri.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for declaration and Permanent injunction.

4. The case of the plaintiff, in brief, is that the suit property was purchased by his father Chinnasamy by way of a registered sale deed dated 09.08.1956 and enjoying the same as absolute owner thereof and the suit property is the self acquired property of his father and the suit property was not purchased out of income derived from the joint family property and the suit property had been purchased by Chinnasamy out of income derived by him from serving in the army and inasmuch as no income had been derived from the family property, Chinnasamy joined the army and on account of love and affection, the plaintiff's father, on his own volition and in a sound state of mind, bequeathed the suit property in favour of the plaintiff, when he was a minor represented by his guardian mother Salammal by way of a registered Will dated 15.10.1981 and Chinnasamy died on 07.06.1982 and accordingly, the plaintiff enjoyed the suit property through his mother and his uncle and the third defendant is an illiterate person and rustic lady and does not have vision in one eye and the first defendant, the brother of the plaintiff is working in the

army and taking advantage of the illiteracy of the plaintiff's mother, the third defendant, the first defendant through his wife has laid the suit in O.S.No.285 /1983 in respect of the suit property claiming that the same as the ancestral property of Chinnasamy and sought the relief of partition and despite the first defendant having knowledge about the Will executed by Chinnasamy in favour of the plaintiff in respect of the suit property, the above suit has come to be laid and inasmuch as the plaintiff's mother, the third defendant did not carefully and diligently prosecute the said suit, the said suit ended in a decree ex parte against the plaintiff on 23.11.1984 and pursuant to the same, the first defendant has also taken steps to obtain separate possession of the share allotted to him under the decree through Court process and the plaintiff's mother did not represent the plaintiff properly in the said suit proceedings and despite the plaintiff's efforts to set aside the ex parte decree passed against him through his another brother Munirathinam, the same did not fructify and hence, the decree obtained by the first defendant in O.S.No.285/1983 is liable to be cancelled and set aside and taking advantage of the decree passed in the said suit, the defendants 1 & 2 are not entitled to disturb the plaintiff's possession and enjoyment of the suit property. Hence, the suit for appropriate reliefs.

5. The case of the defendants 1 & 2, in brief, is that the suit is not maintainable and barred by limitation and the suit property is not the self acquired property of Chinnasamy and on the other hand, the suit property is the ancestral joint family property purchased in the name of Chinnasamy out of the income derived from the joint family property and the properties belonging to the joint family were alienated by the plaintiff's father and paternal uncle Munisamy and the alleged Will said to have been executed by Chinnasmy in favour of the plaintiff is not binding upon the defendants and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs 1 & 2 were examined and Exs.A1 to 4 were marked. On the side of the defendants, Dws 1 & 2 were examined and Exs.B1 to 11 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit. In the first appeal, on petition preferred by the plaintiff, additional evidence has been received and

marked as Exs.A5 & A6 on the side of the plaintiff. The first appellate Court, on a consideration of the materials placed on record, was pleased to set aside the judgment and decree of the trial Court and by allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Aggrieved over the same, the second appeal has come to be laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i) Whether it is established by the 1st defendant that the family of Chinnaswamy is a joint family and that it is owning properties even on the date when the suit property stands in the name of Chinnaswamy the presumption is that the said property is also joint family property whether the lower appellate Court is correct in holding that the suit property is the separate property of Chinnaswamy?

(ii) When the preliminary decree in O.S.No.285/1983 was challenged by Munirathinam the guardian of the plaintiff

but failed in setting aside the said decree and consequently it became final and binding on the plaintiff whether the Lower Appellate Court is correct in setting aside the said decree on the ground that the mother of the plaintiff failed to depend the suit property?

9. The plaintiff is the son of Chinnasamy born through the third defendant, Salammal. Salammal is the second wife of Chinnasamy. The plaintiff claims that the suit property is the self acquired property of his father Chinnasamy purchased by him by way of a sale deed dated 09.08.1956 marked as Ex.A1. According to the plaintiff, the suit property was purchased by Chinnasamy out of his self earned income and not with the aid of the joint family property and thus, according to the plaintiff, Chinnasamy on account of love and affection towards him, had bequeathed the suit property in his favour by way of a registered Will dated 15.10.1981 and thus, he has title to the suit property. On the other hand, according to the defendants 1 & 2, the suit property is the ancestral joint family property of Chinnsamy and his sons viz., the first defendant and the plaintiff and though the suit property had been acquired in the name of Chinnasamy under Ex.A1, Chinnsamy had purchased the suit property only out of the income derived from the

joint family property and hence, the suit property is the joint family property of the parties and on the basis of the same, the first defendant, through his wife as Power of Attorney agent, laid the suit in O.S.No.285 of 1983 against the third defendant Salammal and the minor plaintiff, represented by his mother, the third defendant for partition seeking $\frac{1}{2}$ share in the suit property. It is found that the said suit ended in an ex parte decree as the third defendant Salammal left the matter uncontested and it is further seen that pursuant to the decrees passed in the said suit, execution proceedings had been laid and the defendants 1 & 2 had taken possession of their respective share in the suit property.

10. Challenge the decree passed in O.S.No.285 of 1983 on the footing that the said suit had come to be laid by the first defendant through his wife, the second defendant on a false plea that the suit property is the ancestral joint family property of the parties and further, averring that the third defendant Salammal being an illiterate and rustic lady and not having vision in one eye and therefore, she did not properly represent the plaintiff in the said suit and left the suit uncontested and thereby, the plaintiff's right to the suit property has been defeated and during the above said suit proceedings, the plaintiff

was only a minor and not in the know of things except through his mother and therefore, it is contended that the ex parte decree is not binding upon the plaintiff and is liable to be set aside and inasmuch as the suit property is the self acquired property of Chinnasamy and he had bequeathed the suit property to the plaintiff by way of a Will dated 15.10.1981, it is only the plaintiff, who has title to the suit property and as the defendants 1 & 2 attempted to interfere with his possession and enjoyment of the suit property under the guise of the decree obtained in O.S.No.285 of 1983, according to the plaintiff, he has been necessitated to institute the suit for necessary reliefs.

11. It is found that the case of the plaintiff that his mother is an illiterate and rustic lady and not greenhorn and has no vision in one eye has not been contested by the defendants in the written statement. It is not the case of the defendants 1 & 2 that they had no knowledge about the Will executed by Chinnasamy in favour of the plaintiff in respect of the suit property. Even in the plaint averments of O.S.No.285 of 1983 marked as Ex.A5, it is found that the defendants 1 & 2 had averred about the said Will but would only contend that the said Will could not be a valid one as Chinnsamy had not competency to execute the will in respect of the joint family

properties. The suit in O.S.No.285 of 1983 has been laid mainly against the plaintiff and as at that point of time, he was only a minor, it is found that the plaintiff was shown to be represented by his mother the third defendant herein. The fact remains undisputed that the third defendant is a rustic lady, illiterate and an inexperienced woman and therefore, it is found that she had not properly represented the plaintiff in the above said suit proceedings and left the suit go unchallenged. Accordingly, the resultant position is that the plaintiff has been made to suffer an ex parte decree in the said suit. If really, the third defendant had true knowledge about the reliefs sought for by the defendants 1 & 2 in the above said suit and the basis, on which, they had claimed share in the above said suit in respect of the suit property, definitely, the third defendant, if she had been in the know of things and a literate lady, would have properly defended the suit proceedings as the plaintiff being her only son and the suit property having been bequeathed to the plaintiff by Chinnasamy, her husband by way of a Will dated 15.10.1981. However, as she is not a capable woman and did not understand the proceedings, it is seen that she had left the suit go ex parte. Be that as it may, in the present suit proceedings, certain correspondences between the defendants 1 & 2 had come to be marked and from them, it can be seen that none is

made aware about the suit laid by the defendants 1 & 2 against the plaintiff in O.S.No.285 of 1983, this has been claimed by the second defendant in her communication addressed to the first defendant marked as Ex.B5. If really, the plaintiff and the third defendant had been properly served and had knowledge about the suit proceedings, in all aspects, definitely, as the plaintiff was a minor at that point of time and represented by his illiterate mother, his illiterate mother would have only resorted and taken advice from her relatives as to how to defend the suit and go further. However, inasmuch as the third defendant was not that much diligent and careful and unaware about how to proceed further in the suit in O.S.No.285 of 1983, she had not properly protected the interest of the plaintiff in the said suit and thereby, the plaintiff has been made to suffer an ex parte decree. No doubt, very belatedly, a relative representing the plaintiff, seems to have taken a belated step to set aside the ex parte decree but the same ended in vain and left with no other alternative, the plaintiff on coming to know of the true state of facts on his nearly attaining majority has come to lay the present suit for a declaration that the decree passed in O.S.No.285 of 1983 is not binding upon him and liable to be set aside. It is found that the plaintiff, immediately on coming to know about the suit in O.S.No.285 of 1983 at the time of

attaining majority, laid the present suit as a Pauper O.P and during the pendency of the present suit, he has also attained majority. It is further found that the plaintiff has laid the suit within the time allowed by law to set aside the decree passed in O.S.No.285 of 1983, when it is found that the preliminary decree had come to be passed in O.S.No.285 of 1983 on 23.11.1984, the final decree on 29.10.1986 and the possession delivered only on 29.04.1988, the present lis laid by the plaintiff on 24.03.1988 is well within the time and therefore, the contention put forth by the defendants 1 & 2 that the present suit laid by the plaintiff is hit by limitation as such cannot be accepted. The said plea had been rightly negatived by the first appellate Court by invoking Article 59 of the Limitation Act, 1963.

12. The main issue involved in this case is whether the suit property is the self acquired property of Chinnasamy or his ancestral joint family property.

13. It is admitted by all that the suit property had been purchased only in the name of Chinnasamy under Ex.A1. Ex.A1 is dated 09.08.1956. From the materials placed, it is also found that the family of Chinnasamy owned ancestral property. However, there is no

material placed on the part of the defendants 1 & 2 that the ancestral property was yielding any income to the joint family, particularly, at or about the time of purchase of the suit property under Ex.A1. There is no material at all placed on the part of the defendants that the ancestral property in the hands of joint family was yielding income at the time of Ex.A1. Therefore, the mere existence of ancestral property by itself would not be sufficient to hold that the property acquired by a joint family member in his own individual name had been acquired only out of income of the joint family property. Unless, it is established that the joint family property was capable of yielding income and the said income had been utilised for the acquisition of the property by a joint family member in his own name, only then, the burden would be shifted to the concerned member to establish that he had acquired the property in question out of his own self acquisition and not based on the income of the joint family property. In so far as this case is concerned, there is no material on the part of the defendants 1 & 2 that the so called joint family property of the family was capable of yielding income during the time of Ex.A1 and in such circumstances, it is found that the suit property cannot be held to be acquired by Chinnasamy out of the aid of the joint family property. If really, the joint family property was capable of yielding adequate

income for the support of joint family as such, as rightly argued, there is no need for Chinnasamy to join the military service for earning income. Inasmuch as no income as such had been derived from the joint family property, it is found that, left with no other option, Chinnasamy had joined the military and thereby, it is found that out and from the military service, he had been earning separate income of his own and thus, it is seen that out of such income, he had acquired the suit property in his individual name by way of Ex.A1. Therefore, there is material on record to hold that Chinnasamy was earning separate income out of his avocation in the military service and there is no material to hold that the joint family property in the hands of the family was providing income during the relevant point of time. Therefore, following the decision reported in **2004 (4) CTC 424 (K.S.Ananthanarayanan Vs. S.Vaidy and others)**, it is seen that the plea of the defendants 1 & 2 that the suit property had been derived from the income of the joint family property as such cannot be accepted and resultantly, it has to be held that the suit property is only the self acquired property of Chinnasamy.

14. However, it is contended by the defendants' counsel that by way of Exs.B1 to 3, it has been brought out that the joint family

property was capable of providing income, Under Exs.B1 & 2, it is found, which had come into existence on 13.12.1961 and 10.10.1972, that Chinnasamy and his brother had sold certain portion of the joint family property in order to meet their urgent needs and family expenses and by way of Ex.B3, dated 01.10.1975, Chinnasamy and another person had secured a loan of Rs.680/- by way of executing the promissory note. Therefore, the above said transactions had been effected only for securing certain amount for meeting the family expenses and other urgent needs. In addition to that when the above said transaction had come to be effected very much later to Ex.A1 transaction, it cannot be said that the income derived by way of Exs.B1 to 3 transactions, were made use of for acquiring the suit property under Ex.A1. Accordingly, it is found that there is no material at all to hold that at the time of execution of Ex.A1, the joint family property was capable of yielding income. In such view of the matter, Exs.B1 to 3 are not in any manner useful to sustain the defence version and hence, on the basis of Exs.B1 to 3, we cannot hold that the suit property is the joint family property of Chinnasamy.

15. There is no material placed on record by the defendants 1 & 2 that Chinnasamy had ever treated the suit property as the joint

family property consisting of himself and his sons viz., the plaintiff and the first defendant and there is no material placed to show that during the life time of Chinnasamy, either the first defendant or the plaintiff as such had dealt with the suit property in their capacity as the members of the joint family. On the other hand, it is found that it is only Chinnasamy, who had been dealing with the suit property as his own and accordingly, it is further seen that inasmuch as the suit property is his self acquired property, he, on his own volition, in a fit state of mind, had bequeathed the suit property in favour of the plaintiff by way of the Will marked as Ex.A2. In Ex.A2 also, it has been specifically mentioned by Chinnasamy that the suit property is his self acquired property. Similarly, by way of Ex.A1 also, the recitals contained therein would only go to point out that the suit property had been acquired by Chinnasamy only out of his self acquisition and income. Such being the position, it is found that by no stretch of imagination sans proof could it be held the suit property is the joint family property of Chinnasamy acquired with the aid and assistance of the ancestral nucleus. Therefore, the basis for the suit laid by the defendants 1 & 2 in O.S.No.285 of 1983 goes out. As adverted above, the above suit has been laid by them against the plaintiff on the footing that inasmuch as the suit property is the ancestral joint family

property of Chinnasamy, he is not entitled to bequeath the suit property in favour of the plaintiff by way of a Will. However, when the said projected case of the defendants 1 & 2 is found to be false and unsubstantiated in any manner, it is seen that the defendants 1 & 2 cannot be allowed to claim title to the suit property based on the ex parte decree obtained by them in the said suit. When it is seen that the said suit had not been properly defended on behalf of the plaintiff by his mother due to the circumstances discussed above and in such view of the matter, it is found that the very basis of the suit in O.S.No.285 of 1983 being found to be untenable and unacceptable in the eyes of law, it has to be held that the suit property is the self acquired property of Chinnasamy and not the joint family property as pleaded by the defendants 1 & 2.

16. The defendants 1 & 2 have not contested the validity of the Will as such executed by Chinnasamy in favour of the plaintiff marked as Ex.A2. As seen supra, the defendants 1 & 2 are aware of the said Will and had made reference about the same in their plaint in O.S.No.285 of 1983, all that they would contend in the said suit was that inasmuch as the suit property is the joint family property of Chinnasamy, he is not entitled to, as per law, bequeath the same in

favour of the plaintiff by way of a Will. However, when it is found that the suit property is the self acquired property of Chinnasamy obtained from his own acquisition, it is found that he is entitled to dispose of the same as he likes and accordingly, it is found that he had chosen to bequeath the same in favour of the plaintiff by way of Ex.A2 Will.

17. As above seen, the defendants 1 & 2 have not disputed the validity of Ex.A2 Will, as such, even otherwise to establish the genuineness of the Will Ex.A2 as per the requirements of Law, the plaintiff has examined one of the attestors to the document as PW2 and the scribe of the Will as PW3. Both PWs2 and PW3 have clearly tendered evidence regarding the due execution of the said Will by Chinnasamy in the presence of the Witnesses and also the attestation of the witnesses in the said Will in the presence of Chinnasamy and accordingly, the first appellate Court has rightly accepted their evidence intoto and thereby held that the plaintiff has established the veracity of the Will through the evidence of PW2 & PW3. Equally, it is also noted that the trial Court has also found that the Will Ex.A2 is true and validly executed by Chinnasamy in favour of the plaintiff on the basis of the materials placed on record through the testimony of PW2 & 3, however on the footing that the suit property is the joint family

property, has concluded that Chinnasamy is not competent to execute the Will in respect of the suit property and thus it is found that the plaintiff has also established the genuineness of Ex.A2 Will as per requirements of law. Therefore, it is found that the plaintiff has absolute title to the suit property by way of Ex.A2 Will.

18. It is contended by the defendants' counsel that the plaintiff has not sought for the relief of declaration that he has title to the suit property in the suit. However, in the light of the above discussions, when it is not the case of the defendants that Chinnasamy had not executed the Will Ex.A2 in favour of the plaintiff in respect of the suit property, as such, their case being only that Chinnasamy is not competent to execute the Will in respect of the suit property as the suit property is the joint family property, however, when the materials disclose that the suit property is the self acquired property of Chinnasamy and further, when the plaintiff has also satisfied the legal requirements and pleaded proof for upholding the genuineness of the Will Ex.A2 in all aspects, it is found that there is no need for any separate relief of declaration to be sought for by the plaintiff for upholding his title to the suit property. He has already sought for the relief of declaration that the ex parte decree obtained by the

defendants 1 & 2 in O.S.No.285 of 1983 is not binding upon him and liable to be set aside. The very basis of the suit in O.S.No.285 of 1983 being that the suit property is the joint family property and when that case projected by the defendants is found to be false, it is seen that on the facts and circumstances of the present case, there is no necessity on the part of the plaintiff to seek for any specific relief of declaration regarding the title to the suit property as such. In such view of the matter, the decisions reported in **(2008) 4 Supreme Court Cases 594 (Anathula Sudhakar Vs. P.Buchi Reddy (Dead) By LRS. And others) and 2015 (5) CTC 730 (M.Ramamoorthy and another Vs. R.Thirunavukkarasu)** relied upon by the defendants' counsel as such, in my considered opinion, are not squarely applicable to the facts at hand. However, the principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case. Similarly, when it is found that the defendants 1 & 2 have not disputed the execution and the validity of the Will Ex.A2 by Chinnasamy and when the plaintiff has also established the genuineness of Ex.A2 Will as per the requirements of law through the evidence of PWs2 & 3 and other circumstances, there is no need for the plaintiff to examine the other attester also to substantiate his case. In such view of the matter, it is found that the

decision relied upon by the defendants' counsel reported in **2003 (1) CTC 271 (Rathinam Pillai and Jayaraman \$ Chellammal Vs. Chellammal and others)** on facts and circumstances is not applicable to the present case.

19. In view of the above said position, the suit property is held to be the self acquired property of Chinnasamy and not the joint family property of Chinnasamy and his sons. It is further held that the defendants 1 & 2 have miserably failed to establish that the joint family property was yielding income during the relevant period and the same constituted the basis for the acquisition of the property by Chinnasamy by way of Ex.A1. It is further held that the plaintiff is entitled to set aside the decree passed against him in O.S.No.285 of 1983 as the said decree had been obtained behind his back, when he being not properly represented by his mother in the said suit proceedings as per law and also not properly represented by the other guardian Munirathinam in taking adequate steps to set aside the decree passed against the plaintiff in the said suit. Accordingly, the substantial questions of law formulated in this second appeal are answered in favour of the plaintiff and against the defendants 1 & 2.

In conclusion, the second appeal fails and is, accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, closed.

11.12.2017

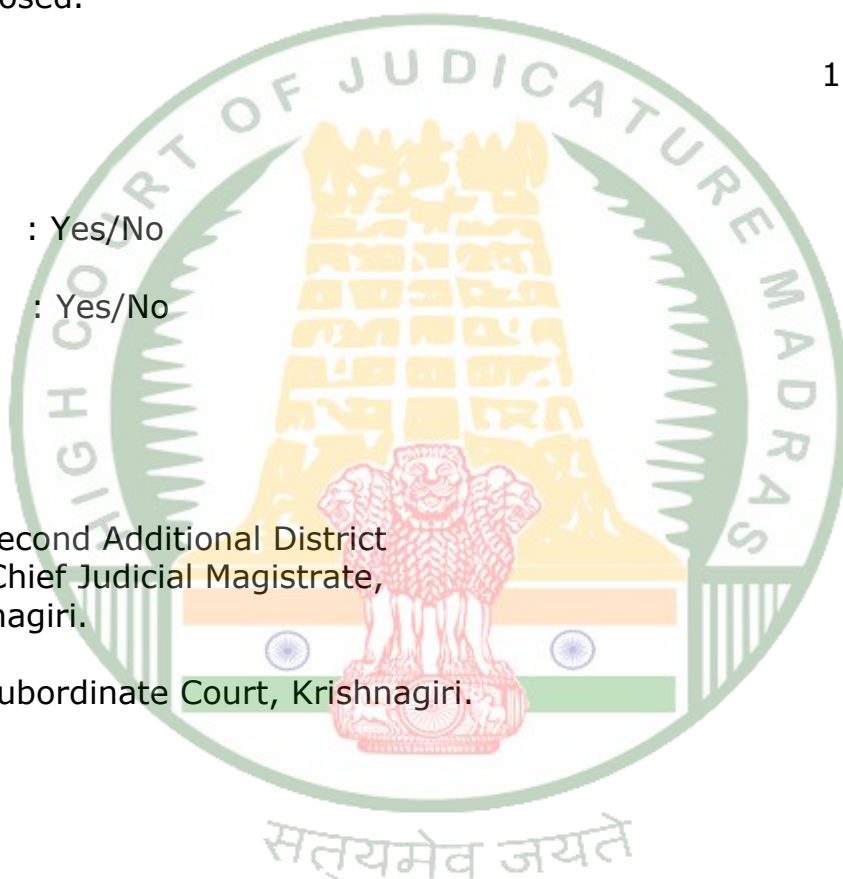
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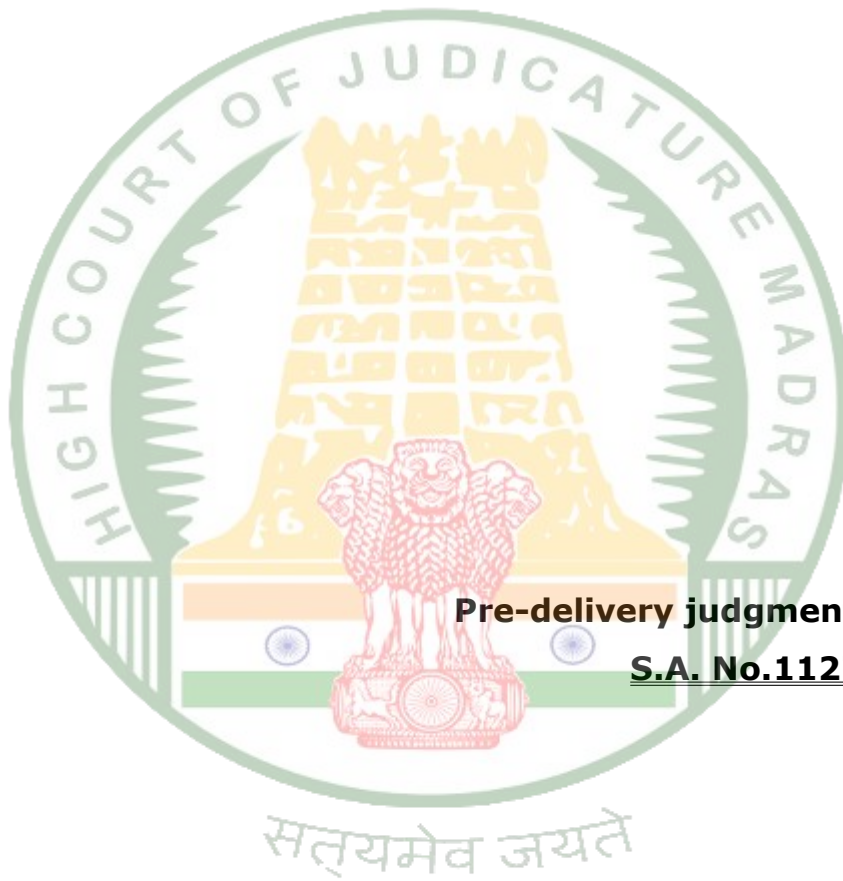
1. The Second Additional District cum Chief Judicial Magistrate, Krishnagiri.
2. The Subordinate Court, Krishnagiri.



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T.RAVINDRAN, J.

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**Pre-delivery judgment made in
S.A. No.1127 of 2001**

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