

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.06.2018

PRONOUNCED ON : 03.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No. 2060 of 2004

1. Pattusamy Gounder (Died)
2. Lakshmanan
3. Mallika ... Appellants
(Appellants 2 & 3 brought on record
as LR's of the deceased sole appellant
vide order of Court dated 11.01.2013
made in CMP.Nos.239 to 241/2011)

Vs.

1. Elumalai Gounder
2. Arunachalam
3. Kandeepan
4. Kubendran
5. Vijayalakshmi
6. Dhanalakshmi
7. Baby
8. Venkatapathy ... Respondents
(RR2 to 8 brought on record as LR's
of deceased sole appellant vide order
of court dated 11.01.2013 made in
CMP Nos.239 to 241/2011 in S.A.
No.2060 of 2004)

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 13.06.2002 passed in A.S.No.41 of 2002 on the file of the Additional District Judge (Fast Track Court No.1), Tindivanam, confirming the Judgment and Decree dated 17.02.1998 passed in O.S.No.390 of 1993 on the file of the Additional District Munsif Court, Tindivanam.

For Appellants : Mr.A.K.Kumarasamy
Senior Counsel
for Mr.S.Kaithamalai Kumaran

For Respondent : Mr.P.B.Ramanujam
No.1

For Respondent : Mr.Babu Rangasamy
Nos. 2 to 8

JUDGMENT

In this second appeal, the Judgement and Decree dated 13.06.2002 passed in A.S.No.41 of 2002 on the file of the Additional District Judge (Fast Track Court No.1), Tindivanam, confirming the Judgment and Decree dated 17.02.1998 passed in O.S.No.390 of 1993 on the file of the Additional District Munsif Court, Tindivanam and thereby, dismissing the suit in entirety laid by the plaintiff, is impugned.

2. The second appeal has been admitted on the following substantial questions of law:

" (i). Whether the lower appellate Court is justified in dismissing the suit in entirety, overlooking that the respondent/defendant did not file any appeal or cross objections against the decree passed by the trial Court which has become final?

(ii). Is not the judgment and decree of the lower Appellate Court vitiated inasmuch as the oral evidence let in by the parties have not been adverted to or considered before rendering findings?"

3. Considering the short point urged by the learned senior counsel for the appellants, it is found unnecessary to dwell into the facts of the case in detail.

4. Suffice to state that the suit had been laid by the deceased plaintiff against the respondent for Declaration and Permanent Injunction in respect of the suit property situated in survey No.60/16 of Mandagapattu Village, Tindivanam Taluk, a vacant site measuring east-west 4 links, north-south 301 links within the specific boundaries. The respondents disputed the claim of title, possession and enjoyment of the suit property by the deceased plaintiff.

5. On the basis of the materials placed on record, both oral and documentary, it is found that the trial Court was pleased to hold that the deceased plaintiff is entitled to the vacant site situated to the east of his compound wall measuring 2 links and accordingly, granted the reliefs of declaration and permanent injunction in favour of the deceased plaintiff with reference to the abovesaid 2 links of the vacant space located to the

over the abovesaid determination of the suit in part, the deceased plaintiff is found to have preferred the first appeal insisting that he is entitled to the relief in respect of the entire suit property as put forth by him. Admittedly, it is found that the respondent has not preferred any appeal, challenging the judgement and decree of the trial Court granting the reliefs of declaration and permanent injunction, insofar as the extent of 2 links of vacant space situated to the east of the deceased plaintiff's wall as decreed by the trial Court. In addition to that, it is also noted that the respondent has not preferred any cross objection in the first appeal preferred by the deceased plaintiff.

6. The first appellate Court, on an appreciation of the materials placed on record, finally coming to the conclusion that the plaintiff, on the whole, is not entitled to the suit property as such and the same also not in his possession and enjoyment, resultantly, dismissed the first appeal preferred by the deceased plaintiff and also thereby, set aside the judgment and decree of the trial Court in entirety and consequently, dismissed the plaintiff's suit in toto. Impugning the same, the present second appeal has been laid by the deceased plaintiff.

7. Pending the second appeal, the plaintiff having died, his LR's have been brought on record.

8. The only point that has been urged by the learned senior counsel appearing for the appellants is that the trial Court having granted the judgement and decree in favour of the deceased plaintiff, as regards the 2 links of vacant space lying to the east of the deceased plaintiff's compound wall and inasmuch as the respondent has not preferred any challenge to the abovesaid judgment and decree of the trial Court either by way of a regular appeal or by way of any cross objection in the first appeal preferred by the deceased plaintiff, according to him, in so far as the judgment and decree of the trial Court to that extent, thereby, having come to stay, the first appellate Court, unmindful of the above set of facts, while disposing of the first appeal, on coming to the conclusion that the deceased plaintiff is not entitled to the remaining part of the suit property as determined by the trial Court, should have simpliciter dismissed the first appeal preferred by the deceased plaintiff and on the other hand, erred in dismissing the plaintiff's suit in entirety, when there is no challenge to the judgment and decree of the trial Court by the respondent, either by way of a regular appeal or cross objection, and accordingly, contended that to that extent, the second appeal should be entertained in favour of the appellants.

9. As above seen, when admittedly the respondent has not preferred any appeal, insofar as challenging the decree granted by the

trial Court in favour of the deceased plaintiff nor also filed any cross objection in the first appeal preferred by the deceased plaintiff, with reference to the same, it is found that insofar as the said decree of the trial Court having become final, the first appellate Court, while disposing of the first appeal, on noting the abovesaid failure of the respondent in not challenging the portion of the decree that went against him, should have only held that the deceased plaintiff is not entitled to obtain the reliefs as prayed for in the first appeal in respect of the reliefs declined by the trial Court and dismissed the first appeal only to that extent and on the other hand, is found to have erred in dismissing the plaintiff's suit in entirety, when the plaintiff had been already granted the decree in part by the trial Court, which remains unchallenged. Thus, it is found that to the abovesaid extent, the judgment and decree of the first appellate Court is liable to be set aside. The counsel appearing for the respondent also fairly conceded that the first appellate Court had erred in dismissing the plaintiff's suit in entirety in the absence of any challenge made to the same by the respondent by way of a regular appeal or cross objection and accordingly, left the matter to be determined by this Court as per law.

10. In the light of the above discussions, when the judgment and decree of the trial Court as far as the grant of relief in favour of the deceased plaintiff, with reference to the 2 links of the suit property, had

become final, it is found that the first appellate Court, while disposing of the first appeal, should not have disturbed the abovesaid judgment and decree of the trial Court and inasmuch as the first appellate Court, by way of dismissing the first appeal, preferred by the plaintiff, had come to dismiss the plaintiff's suit in entirety, it is seen that on the abovesaid point alone, the judgement and decree of the first appellate Court is liable to be set aside and accordingly, the first substantial question of law formulated in the second appeal is answered in favour of the appellants and against the respondent.

11. Insofar as the dismissal of the first appeal preferred by the plaintiff by the first appellate Court as regards the disallowed portion of the reliefs and thereby concurring with the trial Court, the learned senior counsel for the appellants did not put forth any point to deviate from the abovesaid determination of the first appellate Court and in such view of the matter, it is found that the first appellate Court is justified, insofar as dismissing the first appeal preferred by the deceased plaintiff as the said determination is found to be based on proper appreciation of the materials on record. In such view of the matter, the second substantial question of law is answered accordingly against the appellants.

In the light of the above discussions, the Judgement and Decree dated 13.06.2002 passed in A.S.No.41 of 2002 on the file of the

Additional District Judge (Fast Track Court No.1), Tindivanam are set aside, insofar as the dismissal of the plaintiff's suit in entirety and confirmed other respects and thereby, the Judgment and Decree dated 17.02.1998 passed in O.S.No.390 of 1993 on the file of the Additional District Munsif Court, Tindivanam are confirmed. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

03.07.2018

Index : Yes / No

Internet : Yes / No

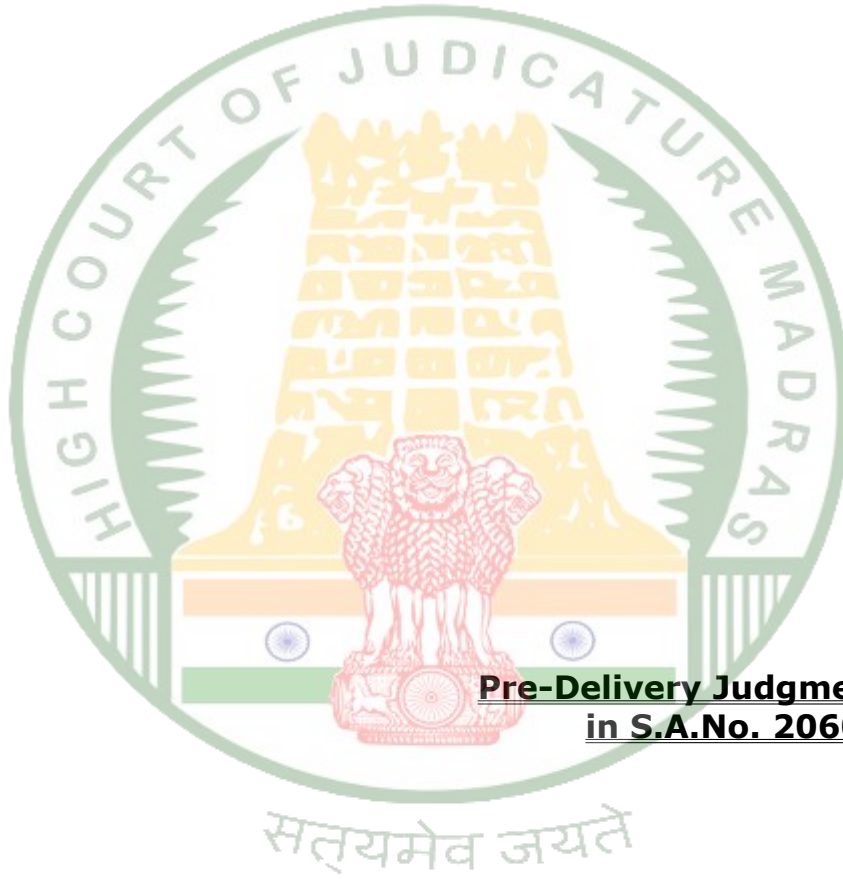
sms

To

1. The Additional District Judge,
(Fast Track Court No.1), Tindivanam.
2. The Additional District Munsif Court, Tindivanam.
3. The Section Officer, V.R.Section, High Court, Madras.

T.RAVINDRAN, J.

sms



**Pre-Delivery Judgment made
in S.A.No. 2060 of 2004**

WEB COPY

03.07.2018