

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.04.2018

PRONOUNCED ON : 04.06.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.754 of 2004

Govindasamy Gounder (Karthu HUF)... Appellant

Murugaiyan Vs. Respondent
...

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 08.12.2003 passed in A.S.No.1 of 2003 on the file of the Principal Subordinate Court, Nagapattinam, confirming the Judgment and Decree dated 31.03.2003 passed in O.S.No.191 of 2000 on the file of the District Munsiff Court, Nagapattinam.

For Appellant : Mr.Srinath Sridevan

For Respondent : No representation/No appearance
set exparte (vide Or.20.04.2018)

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 08.12.2003 passed in A.S.No.1 of 2003 on the file of the Principal Subordinate Court, Nagapattinam, confirming the Judgment and Decree dated 31.03.2003 passed in O.S.No.191 of 2000 on the file of the District Munsiff Court, Nagapattinam.

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 belongs to the plaintiff ancestrally and the plaintiff and his brother Kuppusamy are the members of the Joint Hindu Family and the plaintiff has laid the suit as the Kartha of the aforesaid joint family and the plaintiff's father is Murugaiya Gounder and Paternal grandfather is Dharmaiya Gounder and as per the resettlement effected during 1923, the patta, for the suit property, had been granted in favour of the plaintiff's grandfather and father and accordingly, the plaintiff's father was in possession and enjoyment of the suit property and thereafter, the plaintiff is in possession and enjoyment of the same and the plaintiff's grandfather had three brothers viz., Nallappa Gounder, Narayana Gounder and Ayyasamy Gounder and of them, Nallappa Gounder is the eldest brother and even prior to 1923, they had become divided and partition had been effected amongst them and hence, the other brothers of Dharmaiya Gounder would not be entitled to lay any claim in respect of the suit property. Ayyasamy Gounder had two sons viz., Veerakathi Gounder and Palaniappa Gounder and Dharumaiyan and Kandasamy are the sons of

Veerakathi Gounder and inasmuch as they had claimed right in the suit property and the other properties belonging to the plaintiff and hence, the plaintiff instituted the suit against them in O.S.No.136 of 1985 on the file of the District Munsif Court, ThiruthuraiPoondi and in the said suit, the suit property and the other properties are held to be belonging to the plaintiff and the first appeal preferred was also dismissed and as against the same, the second appeal has been preferred and the same is pending. Nallappa Gounder had three sons viz., Murugaiyan, Kamalappan and Govindan and the abovesaid Murugaiyan had two sons viz., Gurusamy and Thangavel and the defendant is the son of Gurusamy and inasmuch as Nallappa Gounder and Dharmaiya Gounder had already effected partition prior to 1923, Nallappa Gounder had not been included in the patta effected during resettlement in 1923. Hence, the defendant, as the legal heir of Nallappa Gounder, is not entitled to lay any claim of right in respect of the suit property and in fact, the defendant's paternal uncle Thangavel had admitted the abovesaid facts in O.S.No.136/1985 and therefore, the defendant is a stranger to the suit property and the plaintiff has been in possession and enjoyment of the suit property by paying kist, obtaining patta, etc., and inasmuch as the defendant, without any entitlement, attempted to interfere with the plaintiff's possession and enjoyment of the suit property, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is false to state that the suit property belongs to the plaintiff ancestrally and it is false to state that the plaintiff and his brother Kuppusamy are the members of the undivided Joint Hindu Family and that, the plaintiff has laid the suit as the Kartha of the abovesaid joint family. On the other hand, the plaintiff and his brother Kuppusamy have become divided and separated and been enjoying their divided properties separately by obtaining patta and therefore, the claim of the plaintiff that he has laid the suit as the Kartha of the joint family consisting of himself and Kuppusamy is false and on that score alone, the suit laid by the plaintiff is liable to be dismissed. It is false to state that the patta had been effected in respect of the suit property during 1923 resettlement in the name of the plaintiff's grandfather and father and it is false to state that the patta had been effected in the name of the plaintiff's father, even during the life time of the plaintiff's grandfather. Plaintiff's father Murugaiya Gounder had two brothers viz., Velayutham and Chinnasamy and in such view of the matter, the claim of the plaintiff that the suit property had been effected in the name of his father alone is unsustainable and the defendant's ancestor Nallappa Gounder is the brother of the plaintiff's grandfather Dharma Gounder and Nallappa Gounder had three sons viz., Murugaiya Gounder, Kamalappa Gounder and Govinda Gounder and the abovesaid

Murugaiya Gounder is the grandfather of the defendant and as during resettlement effected in 1923, Nallappa Gounder was not alive, the patta had been granted in respect of the suit property in the name of the plaintiff's grandfather and the defendant's grandfather Murugaiya Gounder and Murugaiya Gounder referred to in the resettlement patta only relates to the defendant's grandfather and not to the plaintiff's father and taking advantage of the similarity of the names, the plaintiff lays a false claim in respect of the suit property on the basis of the abovesaid patta, thus in the total extent of 1.24 acres in survey No.176/15, the defendant's grandfather is entitled to half share and accordingly, the defendant's grandfather has been enjoying the same by obtaining patta, paying kist etc., and in the partition effected amongst the defendant's grandfather and his two brothers, half share in the suit survey number was allotted to the defendant's grandfather and in the subsequent partition effected amongst the sons of the defendant's grandfather viz., Gurusamy and Thangavel, the abovesaid half share in the suit survey number was allotted to the defendant's father Gurusamy and accordingly, it is only the defendant's father, who has been in possession and enjoyment of the same by paying kist, obtaining patta, etc., and after him, it is only the defendant, who has been enjoying the half share in the suit survey number and the plaintiff cannot take advantage of the decree obtained by him in O.S.No.136/1985 and the defendant is not a party to the abovesaid suit proceedings and the defendant's paternal uncle is not

competent to depose in favour of the plaintiff in the said suit and even, he has testified on the abovelines, the same is not binding upon the defendant. The plaintiff cannot lay any claim in respect of the entire suit property by virtue of the decree obtained by him in O.S.No.136/1985. Accordingly, the plaintiff's family is entitled to only northern 62 cents in the suit survey number and the same had also been reflected in the partition effected in the family of the plaintiff dated 30.06.1981 and suppressing the same, the plaintiff has come forward with the suit claiming exclusive title in respect of the entire suit property and hence, the plaintiff is not entitled to obtain the reliefs sought for and the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs1 to 3 were examined and Exs.A1 to A27 were marked. On the side of the defendants, DWs1 and 2 were examined and Exs.B1 to B19 were marked. Exs.X1 and X2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to dismiss the plaintiff's suit. Aggrieved over the same, the present second appeal has been laid.

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

"1. When the identity of a person in ancient documents is disputed, whether the burden of proof does not lie upon the person who raises the said dispute?"

2. When O.S. No.136 of 1985 was a suit involving a dispute between the two separate branches of the same family, whether the findings in that suit will not constitute resjudicata in a subsequent suit between different members of those branches?"

9. The suit property is described to be measuring an extent of 1.24 acres in R.S.No.176/15. Now, according to the plaintiff, he has title to the entire suit property and the plaintiff claims title to the suit property on the footing that the same is his ancestral property. Per contra, it is the case of the defendant that of 1.24 acres in the suit property, the plaintiff's family is entitled to 0.62 cents and the remaining 0.62 cents belongs to the defendant's family and hence, according to the defendant, the plaintiff is not entitled to obtain the reliefs sought for. The abovesaid contentions of the respective parties are the main issues projected by them respectively.

10. The plaintiff has come forward with the suit in his capacity as the Kartha of the joint family consisting of himself and his brother Kuppusamy. According to the plaintiff, he and his brother Kuppusamy are joint and not separated and inasmuch as the suit property belongs to the abovesaid joint family and inasmuch as the defendant attempted to interfere with his possession and enjoyment, it is the case of the plaintiff that he has been constrained to lay the suit against the defendant in his capacity as the Kartha of the Joint family. The abovesaid claim of the plaintiff that he has laid the suit in his capacity as the Kartha of the joint family is disputed by the defendant and in such view of the matter, at the foremost, the plaintiff has to establish that he and his brother Kuppusamy are undivided and constituting the members of the Joint Hindu Family and accordingly, in that capacity, the plaintiff has come forward with the suit as the Kartha of the joint family. However, the abovesaid contention put forth by the plaintiff has not been established. To establish that the plaintiff and his brother Kuppusamy are remaining joint and constituting the members of the undivided Joint Hindu Family, the plaintiff did not endeavour to fortify the abovesaid version by examining his brother Kuppusamy in support of his case. Further, the plaintiff examined as PW1, during the course of cross-examination, has admitted that he and his brother Kuppusamy are having separate ration cards and the plaintiff and his brother Kuppusamy are shown as family managers in their respective ration cards and they have set up separate residence and

living with their respective family members separately and having food, shelter etc., and also incurring independent expenses of their respective families. In such view of the matter, when even according to the plaintiff, he and his brother had set up separate residence and been living separately in all aspects, the claim of the plaintiff that still, he and his brother are remaining as members of the Joint Hindu Family as such cannot be accepted in any manner. The contention put forth that the plaintiff and his brother Kuppusamy are remaining joint in so far as the suit property is concerned is not fortified by placing acceptable materials. That apart, as rightly put forth by the defendant, considering the sale deed effected by Kuppusamy and his minor sons by way of the sale transaction dated 13.05.1996 marked as Ex.B17, when it is found that the recitals are made by Kuppusamy Gounder that the properties alienated by him by way of the said sale deed has come to be allotted to him as per the partition effected with his brother the plaintiff, it is found that the case of the plaintiff that he and his brother has not got divided falls to the ground and accordingly, it is found that despite the challenge thrown by the defendant, challenging the entitlement of the plaintiff to lay the suit in his capacity as the Kartha of the joint family, the plaintiff having not placed acceptable and reliable materials in support of the same and on the other hand, as above discussed, the materials available point out that the plaintiff and his brother had already become divided in all aspects and been living separately with their family members and also

alienating their separate properties as seen by way of Ex.B17, it is found that the claim of the plaintiff that he and his brother are still joint and the further claim of the plaintiff that he has laid the suit in his capacity as the Kartha of the joint family consisting of himself and his brother Kuppusamy as such cannot be believed and accordingly, on that basis alone, as rightly found by the Courts below, the suit laid by the plaintiff is found to be unacceptable and liable to be rejected.

11. According to the plaintiff, the suit property is his ancestral property and the plaintiff claims title to the suit properly mainly based on the patta granted during resettlement in the year 1923. Further, according to the plaintiff, his title to the suit property has been declared in O.S.No.136 of 1985 on the file of the District Munsif Court, Thiruthuraipoondi. The judgement and decree passed in the abovesaid suit and the judgment passed in the first appeal of the abovesaid suit, have come to be exhibited as Exs.A1 to A3 and the suit is found to be laid simplicitor for bare injunction against one Dharmaiyan and Kuppusamy by the plaintiff. Admittedly, the defendant is not a party to the abovesaid proceedings. The above suit laid simplicitor for bare injunction, the abovesaid suit cannot be stated to be declaring the title of the plaintiff's right in the suit property as put forth by the plaintiff. In such view of the matter, as rightly determined by the Courts below, the judgment and decree passed in the abovesaid suit would not in any manner be useful to

sustain the plaintiff's case in the present suit and the same would also not in any manner bind the defendant.

12. As rightly determined by the first appellate Court, in the above suit itself, the plaintiff has averred about the partition deed dated 30.06.1981, which document has come to be marked as Ex.B1 in the present suit and relying upon the abovesaid partition deed, the plaintiff, in the abovesaid suit, has averred that the suit property has been allotted to his family and though in the abovesaid partition deed only 0.62 cents are stated to be allotted to the plaintiff's family and the remaining extent had been stated to be allotted to Thangavel, according to the plaintiff, the remaining extent had been wrongly incorporated as allotted in the name of Thangavel and on the other hand, it is only the plaintiff's family, which has been enjoying the entire suit property and accordingly, it is the case of the plaintiff that Thangavel has not put forth any objection to the plaintiff's possession and enjoyment of the entire suit property. Thus, even as per the partition deed relied upon by the plaintiff in the abovesaid suit dated 30.06.1981 and marked as Ex.B1 in the present proceedings, as per the document, it is found that the plaintiff had been allotted only an extent of 0.62 cents by way of the said deed and such being the position, the plaintiff has to establish that the entire suit property i.e. 1.24 acres had been enjoyed by his family right from the days of his ancestors as put forth by him.

13. As above seen, only by way of the resettlement patta effected during 1923, the plaintiff's claim that the suit property belongs to his family. As rightly determined by the Courts below, it is found that on the materials placed, the plaintiff's grandfather Dharma Gounder had three brothers viz., Nallappa Gounder, Ayyasamy Gounder and Narayana Gounder and there is no dispute as regards the abovesaid position. It is found that Dharma Gounder had three sons viz., Velayutha Gounder, Murugaiya Gounder and Chinnasamy Gounder. The plaintiff and his brother Kuppusamy are the sons of the abovesaid Murugaiya Gounder. Nallappa Gounder, one of the brothers of Dharma Gounder, had three sons viz., Murugaiya Gounder, Kamalappa Gounder and Govindasamy Gounder. The abovesaid Murugaiya Gounder S/o. Nallappa Gounder had two sons viz., Thangavel and Gurusamy and the defendant Murugaiyan is the son of Gurusamy. It is thus found that one of the sons of Nallappa Gounder is named Murugaiya Gounder and similarly, one of the sons of Dharma Gounder is also named Murugaiya Gounder, accordingly, it is the contention of the defendant that taking advantage of the similarity in the name of Murugaiya Gounder as above pointed out, the plaintiff lays a false claim in respect of the entire suit property by way of the patta granted during 1923 resettlement survey. Materials placed on record go to show that at the time of the effecting resettlement survey, during 1923, Nallappa Gounder was not alive and accordingly, when it is seen

that according to the plaintiff's case, the patta effected during that point of time had been issued in favour of Dharma Gounder and Murugaiya Gounder and when Dharma Gounder was alive at that point of time, there would have been no necessity to issue the patta both in favour of Dharma Gounder and his son Murugaiya Gounder. On the other hand, as rightly put forth by the defendant, at that point of time, as Nallappa Gounder was not alive, it is found that the patta, which had been issued at that point of time, had come to be issued in favour of Dharma Gounder and Murugaiya Gounder, the eldest son of Nallappa Gounder and such being the position, as rightly put forth by the defendant, taking advantage of the similarity of the names of Murugaiya Gounder, the plaintiff seems to lay a false claim in respect of the entire suit property on the basis of the abovesaid patta effected during resettlement survey.

14. Materials placed on record go to show that as rightly determined by the Courts below, as per Ex.B2 resettlement register, it is found that the same had come to be issued in respect of the suit property in the name of Murugaiya Gounder and Dharma Gounder as above stated. The abovesaid Murugaiya Gounder referred to in Ex.B2 would not be pointing to the plaintiff's father as the plaintiff's family is being represented by his grandfather at that point time, accordingly, as at that point time, Nallappa Gounder was not alive, the patta had come to be issued for the family of Nallappa Gounder in the name of his son

Murugaiya Gounder and accordingly, it is seen that Ex.B2 register extract stands in the name of the plaintiff's grandfather and the defendant's grandfather Murugaiya Gounder and accordingly, the Courts below had rightly appreciated the abovesaid facts, on an analysis of Ex.B2 and the other materials placed on record in the matter.

15. Further, in the Chitta extract marked as Ex.B3, it is found that the same stands in the name of the defendant's father, the plaintiff and his brother and others and when it is found that the abovesaid chitta is in respect of the suit property and other properties, accordingly, it is seen that the entire suit property cannot be held to be belonging exclusive to the plaintiff's family. Furthermore, as per Ex.B4, patta, a very old document, it is stated to be standing in the name of N.Murugaiya Gounder and T.Murugaiya Gounder, thus, it is found that the abovesaid patta stands both in the names of the plaintiff's grandfather as well as the defendant's grandfather. Similarly, Ex.B5 Register extract also go to show that the defendant's father has share in the suit survey number, thus it is found that the documents placed on record go to show that both the plaintiff's family and the defendant's family had been granted patta in respect of the suit property and accordingly, it is seen that inasmuch as both had equal share in the suit property, accordingly, the patta had been jointly issued in the names of the members of two families and in such view of the matter, the claim of the plaintiff that he has exclusive title to

the entire suit property as belonged to him ancestrally cannot be countenanced.

16. In the plaint, the plaintiff would claim that the suit property belongs to him ancestrally. However, during the course of evidence, he would state that the suit property had been acquired by way of purchase and according to him, his father had informed him about the purchase of the suit property. If that be so, the plaintiff should have averred in the plaint that the suit property had been acquired by his family by way of purchase, but, other than deposing in the abovesaid fashion, the plaintiff has not come forward with any other particulars about the nature of the purchase, by way of which, his father had acquired the suit property. The abovesaid sale deed has not been marked and the particulars of the abovesaid sale transaction are not forthcoming. Therefore, it is found that the plaintiff is unable to project a clear source of title for claiming absolute right in respect of the suit property.

17. As above seen, the suit laid by the plaintiff in O.S.No.136 of 1985 would not bind the defendant. Further, the plaintiff has also not established by placing acceptable and reliable materials that he is in exclusive possession and enjoyment of the entire suit property and the documents produced by him, by itself would not be adequate and convincing to hold that the entire extent of the property in the suit survey

number is in the possession and enjoyment of the plaintiff as the absolute owner thereof. In so far as this suit is concerned, the plaintiff has not claimed any plea of adverse possession for claiming title to the suit property. Accordingly, it is found that based upon the revenue records placed by the respective parties, it is found that both the plaintiff's family as well as the defendant's family have equal share in the suit property as determined by the Courts below.

18. Some reliance seems to have been placed by the plaintiff upon the sale transactions marked as Exs.A7 to A9, whereunder, the boundary recitals show that the plaintiff owns land. As rightly determined by the Courts below, on the basis of the abovesaid boundary recitals alone, we cannot safely conclude that the entire extent of the suit property in the suit survey number belongs to the plaintiff. Further, the adangal extract placed by the plaintiff by itself would not be sufficient to hold safely that the entire extent of the suit property is in the possession and enjoyment of the plaintiff and not in the possession and enjoyment of the defendant.

19. In addition to that, as seen from the documents marked as Exs.X1 & X2 as well as the evidence of the revenue officials examined as PW3, it is found that the defendant has taken the initiative to correct the name of Murugaiya in the patta issued i.e. from M.Murugaiya to

G.Murugaiya and it is found that accepting the abovesaid request of the defendant, the name had been corrected in the patta and all these could be gathered from the patta marked as Ex.X1 coupled with the evidence of PW3, it is thus found that the Courts below had rightly placed reliance upon the abovesaid document for upholding the defendant's claim of tile to the half share in the suit property.

20. The oral evidence adduced by PW2, by itself would not be sufficient to uphold the plaintiff's claim of title, possession and enjoyment of the entire suit property. The Courts below had also given acceptable reasons for not placing reliance upon the evidence of PW2 as he is found to be an interested witness and more loyal than the king. The Courts below had also commented upon the failure of the plaintiff in not placing the document projected by him in O.S.No.136 of 1985 and with reference to the same, no proper explanation is forthcoming on the side of the plaintiff. As above seen, the evidence of Thangavel in the abovesaid suit, by itself, would not in any manner be sufficient to uphold the plaintiff's claim of title to the suit property, when it is found that Thangavel is not entitled to any share in the suit property as such, as according to the defendant, in the partition effected in his family, the half share in the suit survey has come to be allotted to his father Gurusamy.

21. No doubt, the defendant has not given consistent evidence with reference to the actual portion of the suit property, which is under his enjoyment and on that basis alone, we cannot conclude that the defendant has no title, possession and enjoyment of the suit property as put forth by them. As rightly determined by the Courts below, the plaintiff having come forward with the suit seeking specific reliefs and the same having been challenged by the defendant in all aspects and when the materials are placed by the defendant in the nature of the preponderance of probabilities and also to a higher decree that his family is also entitled to equal share in the suit property ancestrally and when there is no material placed by the plaintiff to disbelieve the same and the plaintiff has also failed to establish that he has exclusive title, possession and enjoyment to the entire suit property as claimed by him, it is found that the Courts below are justified in rejecting the plaintiff's case and no interference is called for with reference to the same.

22. In the light of the above discussions, it is found that it is only the plaintiff, who seeks to take advantage of the similarities in the name of the ancestors of the parties at issue and attempted to lay a false claim in respect of the entire suit property. Further, when the defendant is not a party in O.S.No.136 of 1985, it is found that the findings in the above said suit simplicitor for bare injunction would not in any manner be binding upon the defendant in the present suit and the judgment and

decree passed in the said suit would not constitute resjudicata, when it is seen that the defendant claims title to the suit property through his ancestors as putforth by him and in such view of the matter, it is seen that the findings rendered in O.S.No.136/1985 would not operate as resjudicata to the present suit. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendant.

In conclusion, the second appeal fails and accordingly, is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Index : Yes / No
Internet : Yes / No
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04.06.2018

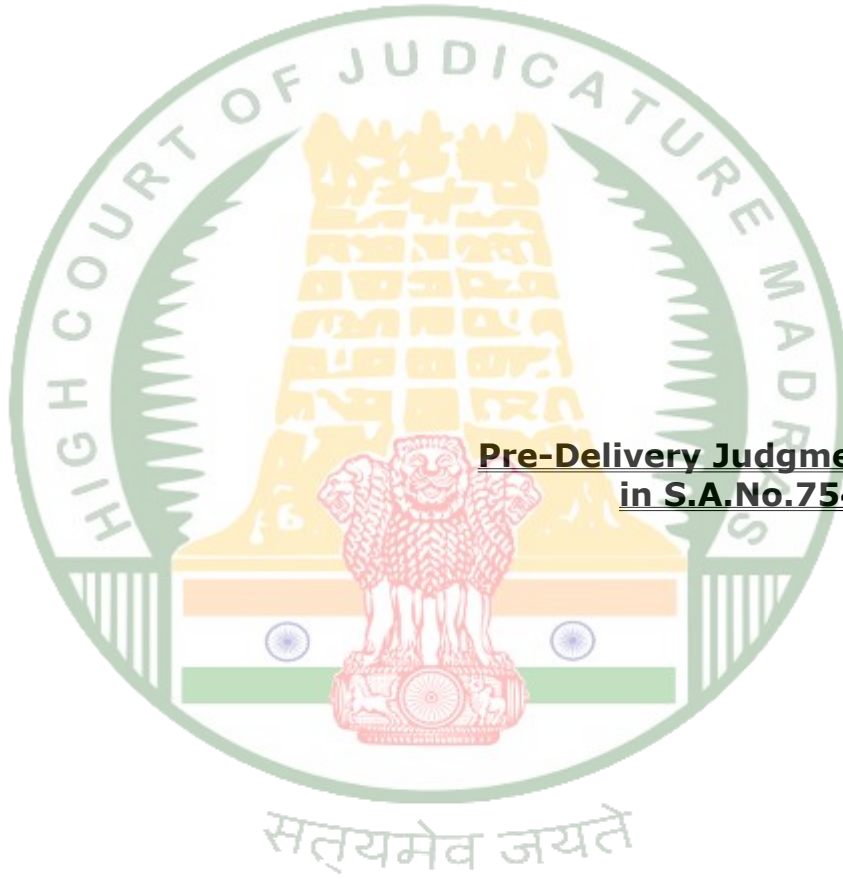
To

- 1.The Principal Subordinate Court, Nagapattinam.
- 2.The District Munsiff Court, Nagapattinam.
- 3.The Section Officer, V.R.Section, High Court, Madras.

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T.RAVINDRAN, J.

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**Pre-Delivery Judgment made
in S.A.No.754 of 2004**

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