

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.11.2017

PRONOUNCED ON : 03.01.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.677 of 2001

1. Suguna (deceased)
2. E.P.Sampath
3. S.Saravanan
4. Sangeetha

...

Appellants

Vs.

Radha

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 16.10.2000 made in A.S.No.80 of 1999 on the file of the VI Additional City Civil Court, Madras confirming the judgment and decree dated 30.03.1998 made in O.S.No.5190 of 1993 on the file of the III Assistant City Civil Court, Madras.

For Appellants : Mr.V.Raghavachari

For Respondent : Mr.R.Ganeshkumar

JUDGMENT

The second appeal is directed against the Judgment and decree dated 16.10.2000 made in A.S.No.80 of 1999 on the file of the VI Additional Judge City Civil Court, Chennai confirming the judgment and decree dated 30.03.1998 made in O.S.No.5190 of 1993 on the file of the III Assistant Judge, City Civil Court, Chennai.

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

3. Suit for partition and separate possession.

4. The case of the plaintiff, in brief, is that her husband Sri Kannan died on 07.11.1990 and the deceased Kannan earlier married one Alamelu, who also died and subsequent to her death, Kannan had married the plaintiff illegally and the defendant was born to the deceased Kannan and Alamelu and the plaintiff married Kannan on 19.06.1994 at Tindivanam subsequent to the death of Alamelu and Kannan's father died in 1963 leaving the suit property and Kannan's father Pachai Pandithar purchased the suit property on 17.06.1959 and his two sons viz., Sri Kannan and Sri Kapali were put in possession of the suit property during his life time and Kannan was living with the plaintiff in the suit property and died on 11.09.1990 and subsequent to his death, the plaintiff continued to be in possession and enjoyment of the suit property and thus, the plaintiff is in joint possession of the suit property. Kannan and his brother Kapali entered into a partition along with their mother Unnamalai, who waived her interest, on 14.05.1980 and divided the suit property by metes and bounds and kannan was in absolute possession and enjoyment of the portion allotted to him under the partition with the plaintiff and the defendant was married to one Sampath and living separately in Vadapalani and Kannan died leaving the plaintiff and the defendant as his legal heirs to succeed to his property and as such, the plaintiff is entitled to $\frac{1}{2}$ share in the suit property and now, the plaintiff

understands that the defendant is attempting to sell the suit property as if the same belongs to her independently and hence, the plaintiff issued a legal notice on 16.02.1993 and to the same, the defendant sent a reply containing false allegations and hence, the plaintiff has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that she does not admit the relationship alleged between the plaintiff and her father. Her father did not marry the plaintiff at any point of time and he married only Alamelu and after her death, he lived with the defendant and at no point of time, her father and the plaintiff lived together and hence, the allegation that the plaintiff is the wife of Kannan is utter falsehood and the factum of marriage of the plaintiff with Kannan has been disputed in the reply notice itself and despite the same, relevant particulars are not furnished in the plaint about the marriage. The defendant's uncle Kapali was not in good terms with the defendant and even during the life time of Kannan, the relationship with Kapali was not smooth and only on account of the same, they partitioned the property on 14.05.1980 and Kapali, after the death of Kannan, approached the defendant for selling the property to one Natarajan, whom he had already sold the property and as the defendant declined to the same, Kapali and Natarajan have now set up the plaintiff alleging a false relationship between the plaintiff and her father and Kannan had entrusted all the documents to the defendant as

she is the only legal heir to the suit property and hence, the defendant is wholly entitled to the property and the plaintiff has no matter of right, title or interest in the same and hence, the plaintiff cannot claim partition of the suit property alleging that she is the wife of Kannan and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case PW1 has been examined and Exs. A1 to A6 were marked. On the side of the defendant, DW1 has been examined and no document has been marked. Ex.C1 has also been 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 grant the preliminary decree for partition in respect of the suit property as prayed for by the plaintiff. On appeal, the first appellate Court also confirmed the judgment and decree of the trial Court. Aggrieved over the same, the plaintiff has come forward with the present second appeal.

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

“ (i) Whether the Courts below had not erred in holding that affidavit amounts to evidence? And

(ii) Whether the lower appellate court was correct in drawing a presumption when no evidence had been placed before it?"

9. It is not in dispute that the defendant is the daughter of Kannan and Alamelu and it is also not in dispute that the suit property belonged to kannan. Hence, it is seen that after the demise of Alamelu and Kannan, the defendant, being their daughter, would be normally entitled to succeed the suit property as their sole heir. However, the plaintiff claiming to be the wife of Kannan has laid the suit seeking partition of the property on the footing that she is entitled to half share in the suit property as one of the legal heirs of the deceased Kannan. The defendant has disputed the status of the plaintiff as the legally wedded wife of the deceased Kannan and hence, according to the defendant, the plaintiff cannot make any claim of partition in the suit property and hence, the suit is liable to be dismissed. According to the defendant, as her relationship with their uncle Kabali was not smooth and as she did not accede to his request to sell the suit property to one Natarajan, whom he has already, sold his share, according to the defendant, her uncle Kabali had set up the plaintiff for making a false claim to the suit property as if she is the legally wedded wife of the deceased Kannan. Inasmuch as the defendant has disputed the relationship of the plaintiff with Kannan, i.e. had disputed that the plaintiff is not the legally wedded wife of the deceased Kannan, as rightly argued, it is for the plaintiff to establish that

she is the legally wedded wife of the deceased Kannan for sustaining her claim to partition in the suit property as put forth in the plaint.

10. It is found that prior to the institution of the suit, the parties had exchanged notices and even in the reply notice sent by the defendant as alleged in the written statement, she had disputed the claim of the plaintiff that the plaintiff is the legally wedded wife of Kannan, her father. Now, according to the plaintiff, she has only averred in the plaint that after the death of Alamelu, the mother of the defendant, Kannan married her on 19.06.1964 at Tindivanam and further according to the plaintiff, Kannan had been living with her in the suit property and thus, she has made the claim for partition to the suit property. However, to substantiate the above said claim of the plaintiff that she is the legally wedded wife of Kannan, it is found that apart from the ipsi dixit interested testimony of the plaintiff examined as PW1, no other independent witness has been examined in support of her case. In the plaint, she has averred that she married Kannan on 19.06.1964 at Tindivanam. However, during the course of the evidence of chief examination itself, according to PW1, the plaintiff, she and her husband got married in 1963 and during the course of cross examination, PW1 would state that even before her marriage to Kannan, he is related to her and their marriage took place at her residence at Tindivanam and further according to her, she and her husband had arranged the marriage of the defendant and accordingly,

the defendant had taken the possession of the documents of the suit property and subsequently, did not return the same to her. It is stated by her that during their marriage, on the side of her husband, 10 persons attended the marriage and further, according to her, her father is living and she has also admitted that no issue had been born to her and Kannan. Further, she has admitted during the course of cross examination that she does not remember the date and month of her marriage and according to her, the Thasildar enquired and issued the certificate in her favour and with reference to the same, the Thashildar examined only her and her brother-in-law and further, she has also admitted that her brother-in-law Kapali had accompanied her to the Court and also admitted that Kapali had sold his share in the property and she has also admitted that dispute between Kapali and the defendant had reached up to the level of the police station. This is the evidence of the plaintiff for sustaining her case that she is the legally wedded wife of kannan.

11. As above adverted to, in the plaint, according to the plaintiff, her marriage with Kannan took place on 19.06.1964 and during the course of evidence, she has stated that her marriage took place in the year 1963, the date and month of the marriage has not been mentioned in her evidence and according to the plaintiff, she does not remember the same. As regards the above said contradiction, there is no proper

explanation on the part of the plaintiff. Now, according to the plaintiff, her marriage took place at Tindivanam in her house and on behalf of Kannan's side 10 persons attended the marriage. However, she has not whispered in the plaint, as to who were present who performed the marriage between them and whether the marriage was celebrated as per Hindu Marriage Sastra and Customs and also not whispered anything about the particulars of the marriage and the plaintiff is conspicuously silent on the aspects of the conduct of the marriage between the plaintiff and Kannan. Now, the 10 persons who are stated to have been attended the marriage on behalf of kannan, has not been examined to support the plaintiff's case. It is found that Kapali is disposed of towards the plaintiff, the plaintiff had admitted that Kapali had accompanied her to the Court. If that be so, it is found that Kapali would have attended the marriage of the plaintiff with Kannan. At least to sustain her case, it does not stand to reason, as to why the plaintiff has not chosen to examine Kapali as a witness on her side. It is not the case of the plaintiff that Kapali was not well disposed of towards Kannan at the time of marriage. It is therefore found that if really, any such valid marriage had been performed between the plaintiff and Kannan, Kannan's brother Kapali would have definitely attended the marriage. If that be so, to sustain the said case, the plaintiff should have endeavoured to examine Kapali but for the reason best known, Kapali had not been examined. As already adverted to, the 10 persons, who are said to have attended the marriage on behalf of

kannan's side, has also not been examined. It is further seen that even according to the plaintiff, her father is still alive. When according to the plaintiff, her marriage was celebrated in her residence at Tindivanam, definitely her father would have attended the marriage, at least to sustain her case, the plaintiff should have endeavoured to examine her father in support of her case, but her father has also not been examined and no reason has been adduced for the same. That apart, the plaintiff has not stated how many persons have attended the marriage on her side. If any person had attended the marriage on her side, definitely the plaintiff would have mentioned their names in the plaint or during the course of evidence and endeavored to examine them to sustain her case. It is found that the plaintiff has not stated anything about the number of persons, who had attended the marriage on her side and not evinced interest to examine any of them to prove her case. It is therefore found that the case of the plaintiff that her marriage was celebrated with Kannan at Tindivanam in her residence is shrouded in mystery and raises a high suspicion in the genuineness of the plaintiff's case.

12. That apart, the plaintiff, in her plaint, has not stated whether the marriage was celebrated by any priest and what were the customs adopted while performing the marriage. In the evidence also, on the above aspects, the testimony of the plaintiff is silent. If really, the marriage of the plaintiff with Kannan had been celebrated as per Hindu

Sastra and Customs by the priest, the plaintiff would have taken appropriate steps to examine the priest, who had conducted the marriage or anyone who had associated himself with the marriage for sustaining her case. However, the pleadings as well as the evidence, as regards the factum of marriage put forth by the plaintiff are very nebulous and vague and therefore, it is seen that on the basis of the abovesaid sole testimony of PW1 the plaintiff, it would not be safe to hold that a valid marriage had been performed between the plaintiff and Kannan as put forth by the plaintiff.

13. As regards the documents produced by the plaintiff, it is seen that the documents marked as Exs.A1 to A3 as such would not in any manner be useful to sustain the plea of marriage put forth by the plaintiff. Therefore, Exs.A1 to A3 would not serve any purpose for the establishment of the factum of marriage. Ex.A4 is stated to be the legal heir certificate of the deceased P.Kannan issued by the Thasildar. No doubt, in the same, the plaintiff has been described as the second wife. It is also found that Unnamali has been shown as the mother of the deceased P.Kannan. If really, Kannan had married the plaintiff as his second wife, Kannan's mother Unnamalai should have been present and she would know about the factum of marriage. The plaintiff, for the reasons best known, had also not chosen to examine Unnamalai in support of her case. That apart, the suit being a partition suit, when

admittedly, it is pleaded that the suit property is the property belonging to the deceased P.Kannan, as rightly argued, Unnamalai also one of the legal heirs would be entitled to claim a share in the suit property. However, it is seen that the plaintiff, for the reasons best known to her, had not chosen to implead Unnamalai as a party to the proceedings. Be that as it may, it is found that the plaintiff has not whispered in her evidence as to how come the details of the legal heirs of Kannan had been ascertained by the concerned authority. In this connection, as adverted above, according to the plaintiff, the Thasildar enquired and issued the legal heir certificate and for the said purpose, the Thasildar examined the plaintiff and her brother-in-law kapali. It is therefore seen that other than the above said two persons, the Thasildar has not examined the defendant as well as the mother of the deceased Kannan to ascertain whether the plaintiff is the legally wedded second wife of the deceased Kannan, on the other hand, even as per the admission of the plaintiff, only her statement and the statement of Kapali, who is not well disposed of towards the defendant, had been examined as to the status of the plaintiff. Therefore, it is seen that they having given the particulars to the Thasildar and it is seen that the Thasildar, without conducting any further enquiry, particularly, with the defendant and Unnamalai, had chosen to issue the certificate Ex.A3. It is further found that on the foot of the certificate Ex.A3, it has been stated that the certificate is not issued under the provisions of the Succession Act and the Certificate

could not be produced in the Court of law under the Succession Act. It is therefore found that the certificate marked as Ex.A4 by itself cannot be accepted to be reflecting the correct position of the legal heirs of the deceased Kannan and it is seen that the certificate had come to be issued based on the one side enquiry by the Thasildar and in such view of the matter, when the plaintiff has not established that the Thashildar had issued Ex.A4 certificate based on a full-fledged enquiry with all the concerned persons and when the certificate itself points out that it could not be produced in a Court of law for effecting succession etc., it is seen that no safe credence could be attached to Ex.A4 for holding that the plaintiff had contracted a valid, legal marriage with the deceased Kannan as claimed by her and thereby, she has attained the status of the second wife as put forth by her.

14. As regards the document marked as Ex.A5, this is also a certificate found to be issued by the Thasildar stating that the plaintiff is the widow of the deceased P.Kannan. However, when the factum of a valid marriage between the plaintiff and the deceased Kannan has not been proved and when Ex.A4 certificate has also not been issued by the Thasildar after a full-fledged enquiry, it is seen that Ex.A5 certificate has also come to be issued by the Thasildar concerned, following Ex.A4 certificate and in such view of the matter, it is seen that based on Ex.A5certificate, the factum of marriage between the plaintiff and the deceased Kannan cannot be inferred in any manner. That apart, it has

not been explained and established by the plaintiff that the Thasildar is a competent official to issue Ex.A5 certificate in favour of the plaintiff. Further, when the certificates Exs.A4 & A5 are not accepted and the same are disputed by the defendant and when there is a serious cloud over the said documents as discussed above and to establish that the Thasildar is a competent person to issue the said certificates and to further establish that the Thasildar had issued the said certificates only based on a full-fledged enquiry with the concerned persons, the plaintiff has not endeavoured to examine the Thasildar, who had issued the said certificates or any one from his office to say about the validity of the said certificates for upholding the plaintiff's case. In such view of the matter, it is seen that no safe credence could be attached to Ex.A5 also for upholding the plaintiff's case.

15. The Courts below have placed reliance upon Ex.A6 Photograph and that the plaintiff being also available in the said photograph, which is stated to be the marriage photograph of the defendant and it has been thus determined by the Courts below that the plaintiff is the legally wedded wife of the deceased Kannan. As rightly put forth by the defendant's counsel, the factum of a valid marriage between the plaintiff and the deceased Kannan could not be performed based on the photograph Ex.A6 and Ex.A6 cannot at all be relied upon for the purpose of holding that a valid marriage had been celebrated between the

plaintiff and the deceased Kannan. As rightly argued, at the time of marriage, various persons known to the parties would be attending the marriage or various persons associated with the family would also be attending the marriage. Merely their presence is also seen in the photographs taken at the time of marriage function, it can not be determined that the relationship between the parties exist as put forth by the particular party and particularly, when the said relationship is repudiated by the other contesting party, it is seen that it would not be safe to place acceptance on such a photograph for upholding the alleged relationship. Therefore, it is found that the Courts below have wrongly placed reliance upon Ex.A6 for upholding the plaintiff's case.

16. The last document relied upon by the Courts below for accepting the plaintiff's case is Ex.C1. It is found that as against the deceased Kannan, Rent Control Proceedings was initiated by his erstwhile landlord and in such view of the matter, an exparte decree had come to be passed in the said rent control proceedings. To set aside the exparte decree, it is found that the defendant has filed an affidavit in the proceedings, where under, she has stated that her father died on 11.09.1990 leaving her and her step mother as his legal heirs and this portion of the affidavit filed by the defendant has been marked as Ex.C1 and by way of the same, it is contended that the defendant has admitted the status of the plaintiff as her step mother and therefore, the plaintiff should be determined as the

legally wedded wife of the deceased Kannan. The above argument found acceptance with the Courts below and accordingly, they have accepted the plaintiff's case. However, as rightly put forth by the defendant's counsel, the affidavit marked as Ex.C1 by itself would not constitute evidence within the meaning of Section 3 of the Evidence Act. However, it is found that the affidavit could be used as piece of evidence, where, the deponent of the affidavit is subjected to cross examine with reference to the contents found in the affidavit and this position of law has been adumbrated in the decision of the Apex Court reported in **(2013) 4 SCC page 465** (Ayaubkhan Noorkhan Pathan v. State of Maharashtra). As regards Ex.C1, it is found that the defendant examined as DW1 was cross examined by the plaintiff and no doubt, the defendant has admitted, having filed Ex.C1 affidavit in the Rent Control Proceedings in an Interlocutory application. However, on being contradicted with the above said statement found in Ex.C1, the defendant has denied having made such a statement and also has stated that she does not know to read English. Therefore, it is seen that as regards Ex.C1 though the defendant had described the plaintiff as her step mother in the Rent Control proceedings, it is seen that the issue whether the plaintiff was the legally wedded wife of the deceased Kannan was not a point for consideration in the Rent Control proceedings. That apart, the defendant has also explained as to the so called admission made by her in Ex.C1 stating that she is not aware of such a statement as she does not know to read

English. Be that as it may, it is found that a statement has been made by the defendant in Ex.C1 informing that the plaintiff is her step mother. However, as rightly put forth by the defendant's counsel, when no further cross examination has been made to the defendant under what circumstances, she had described the plaintiff as her step mother in the Rent Control proceedings and when further in the Rent Control Proceedings, the issue of the factum of marriage between the plaintiff and the deceased Kannan was not a point for consideration and further, when it has not been elucidated from the defendant as to whether she had referred to the plaintiff as her step mother because of her association with the family as seen from her participation in the marriage etc., it is found that on the failure of the the plaintiff to establish a valid and legal marriage between her and the deceased Kanna by placing acceptable and reliable evidence and that apart, with reference to her above case, the plaintiff has not placed any acceptable and reliable proof whatsoever as discussed above, it is seen that merely on the basis of the so called admission found in Ex.C1 and particularly, when the defendant has also given an explanation to the so called admission in her evidence, in my considered opinion, it would not be safe to place reliance upon such an admission for upholding the plaintiff's case, particularly, when the plaintiff has not placed any material at all to sustain her case. In this connection, the appellate Court seems to have relied upon Ex.C1 as an admission on the part of the defendant and hence, the plaintiff need not further

establish her case for claiming the reliefs sought for. However, it is found from Section 58 of the Indian Evidence Act, that even though the facts admitted need not be proved, however, the proviso appended to the said section states that the Court may in its discretion, require the facts admitted to be proved otherwise than by such admissions and considering the above said proviso and applying the same to the facts and circumstances of the present case, it is found that when the onus is heavy upon the plaintiff to establish the factum of a valid marriage between her and the deceased Kannan and when the same has been stoutly resisted by the defendant from the inception i.e. from the stage of the exchange of the notices between the parties and despite the same, when the plaintiff has not endeavoured or cared to place any acceptable proof in support of her case and when even as per evidence of the plaintiff, there are witnesses to sustain her plea but despite the same, the plaintiff having not cared to examine them in support of her case or show any acceptable document in proof of her case, it is found that merely on the basis of the so called admission contained in Ex.C1 of the defendant, it would not be proper and prudent to accept the case of the plaintiff and in such view of the matter, it is found that the proviso to Section 58 of the Indian Evidence Act should have been applied and on that score, the plaintiff should have been directed to place further relevant and acceptable evidence to establish her plea of marriage for obtaining the reliefs claimed in the plaint. On the other hand, it is found that the

Courts below have relied upon so called admission found in Ex.C1 for upholding the plaintiff's case without any material whatsoever as regards the same, either oral and documentary evidence, to hold that a valid and legal marriage had been performed between the plaintiff and Kannan. In such view of the matter, in my considered opinion, on the facts and circumstances of the case, no reliance could be placed upon Ex.C1 for upholding the plaintiff's case.

17. It is found that the Courts below, particularly, the first appellate Court has shifted the burden on the defendant as if the defendant has failed to place any material to show that the marriage between the plaintiff and the deceased Kannan would not have taken place. However, as rightly put forth by the defendant's counsel, the above approach of the first appellate Court, shifting the burden on the part of the defendant for establishing the plaintiff's case, is found to be against the cannons of well-established law and the plaintiff having come forward with the specific case for seeking the reliefs claimed in the plaint and when the same is stoutly resisted by the defendant, it is for the plaintiff to establish her plea with acceptable and reliable evidence, the plaintiff having failed to establish the same, it is seen that the Courts below have erred in their approach in seeking proof from the defendant for proving the negative case, which cannot be upheld in the eyes of law.

18. In this connection, the counsel for the plaintiff placed reliance upon the decision reported in **2007 (5) CTC 287 (Thimmappa Rai Vs. Ramanna Rai and Ors)** for the proposition that admission made by one party in earlier proceedings is admissible in any suit as against him. No doubt, in the facts of the case pertaining to the said decision, it has been held that the admission made by a party in an earlier proceedings is admissible in a suit against him. 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 at hand.

19. In the light of the above discussions, it is found that though the affidavit marked as Ex.C1 could be relied upon as a piece of evidence, when with reference to the same, the defendant had explained in the cross examination, considering the explanation offered by the defendant to the same and also the failure of the plaintiff for establishing her plea of marriage as averred in the plaint, it is found that Ex.C1 cannot be the basis or solely relied upon for accepting the plaintiff's case. Accordingly, it is seen that the first appellate Court has erred in drawing the presumption of a valid marriage between the plaintiff and the deceased Kannan, despite the absence of any evidence pointing for the same on the part of the plaintiff and also erred in relying upon the unreliable and acceptable evidence placed by the plaintiff marked as Exs.A4 to 6 and

C1. In the light of the above discussions, it is found that no safe reliance

and credence could be attached to the above said documents for upholding the plaintiff's case and accordingly, it is seen that the first appellate Court has erred in drawing the presumption of a valid marriage between the plaintiff and the deceased Kannan despite the absence of any evidence produced by the plaintiff in support of the same. Accordingly, the substantial questions of law framed in the second appeal are answered against the plaintiff and in favour of the defendant.

In conclusion, the Judgments and decrees of the Courts below are hereby set aside. Resultantly, the suit laid by the plaintiff is dismissed with costs. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

03.01.2018

Index : Yes/No

Internet : Yes/No

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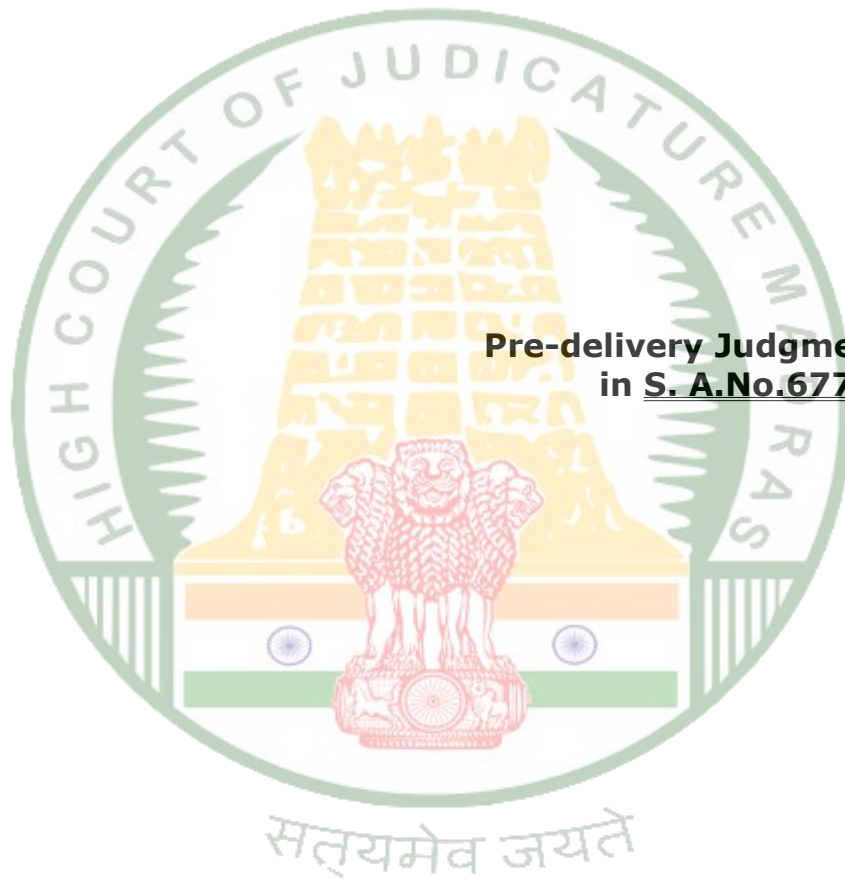
1. The VI Additional City Civil Court,
Madras.

2. The III Assistant City Civil Court, Madras.

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T.RAVINDRAN,J.

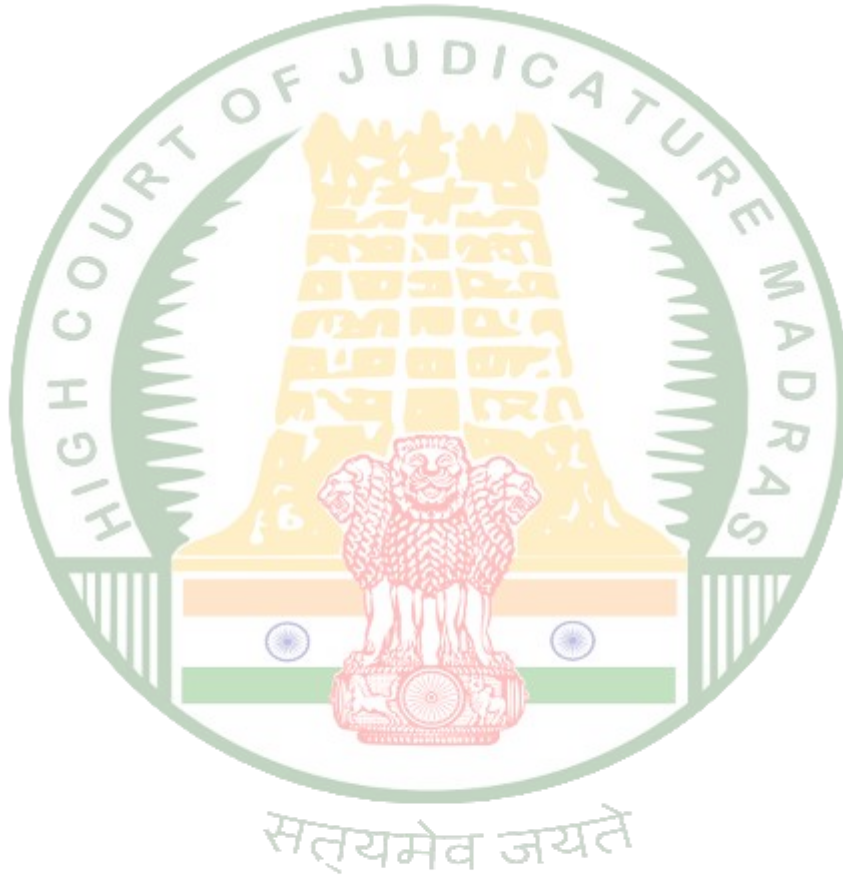
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**Pre-delivery Judgment made
in S. A.No.677 of 2001**

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