

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.12.2017

PRONOUNCED ON : 30.07.2020

CORAM :

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

C.S.No.952 of 1990

Mrs.Hemalatha Mohan

Vs

.. plaintiff

1. Ramachandra Naidu
2. Sushila Bai
3. M.R.Murali
4. M.R.Krishna Kumari
5. Navaratan
6. Subramanian
7. Andhra Patrika Press
by its partner
8. Indira Foundations Private Limited
19, Govindan Street, Ayyavoo Colony,
Chennai – 600 029.

.. defendants

8th defendant was impleaded as per order dated 30.08.2004 passed in A.No.4163 of 2003.

PRAYER : Civil suit is filed under Order VII Rule 1 CPC and Order IV Rule 1 of OS Rules :-

(a)Preliminary Decree for administration and partition of the suit items A, B, C schedule into 4 equal shares and for allotment of one such share to her and she be put in separate possession thereof.

(b)directing the division to be effected by the appointment of a Commissioner or otherwise.

(c) to pass a decree for accounting to be made by the

defendants 1 to 4 and on accounting to be made by the defendants 1 to 4 and on ascertainment of the accounts, the plaintiff be given her 1/4th share.

(d)directing the 1st defendant to deliver Schedule D properties or its ascertained value to the plaintiff (and)

(e)awarding costs of the suit.

For Plaintiff : M/s.R.Thiagarajan

For Respondents : M/s.M.R.Murali - D2
party in person.
M/s.M.R.Krishnakumari – D3
party in person.

J U D G M E N T

The civil suit is filed by the plaintiff for partition and separate possession.

2. The 1st defendant is the father and the 2nd defendant is the wife of the 1st defendant, defendants 3 and 4 are brother and sister of the plaintiff. The 5th defendant is the lessee under "A" schedule property. The 7th defendant is the tenant under the first defendant in portion of the "D" Schedule property. The 6th defendant is the alienee of the "B" schedule property, having been purchased from the 1st defendant in or about the year 1973.

3. The suit schedule properties originally belongs to one S.T.M.

Bashyam Naidu in pursuance of a partition between him and his brother. The said S.T.M. Bashyam Naidu was prosperous business man who died on 19.12.1935. While he was in sound disposing state of mind, he executed a Will on 30.01.1935, which was followed by a codicil dated 19.12.1935. Under the terms of the Will referred to above, the first defendant and his brother Kamalanabhan are not to alienate or encumber the properties and they were given only a life interest. The first defendant and his brother entered into a partition deed on 12.10.1950 under which the first defendant was allotted the plaint ABC schedule properties, they were described as "B" schedule properties in the partition deed. Kamalanabhan was allotted "A" schedule properties in the partition deed and they are not the subject matter in the present suit.

4. The plaintiff submits that she has been totally neglected by the defendants 1 to 4. The first defendant along with the defendants 2 to 4 have been dealing with the suit properties to the detriment of the plaintiff and without her consent and knowledge. The first defendant without any right alienated the "B" schedule property to the 6th defendant. The plaintiff is not bound by the said action and she is therefore ignoring the alienations and including the said item for the purpose of division.

5. As per the Will, the grand children of the testator are absolutely entitled to the ABC Schedule mentioned immovable properties. The Will specifically mentions that the grand sons together to take half in the schedule mentioned immovable properties, thereby the testator had intended that the remaining half should be taken absolutely by the grand daughter i.e., the plaintiff and the 4th defendant. Thus the plaintiff is entitled to 1/4th share and preferred a claim for partition under her notice dated 22.04.1985 and 14.05.1987. The first defendant has not given any reply to the notices. Hence, the plaintiff has come forward with the present suit for partition of her 1/4th share and separate possession thereof.

6. The plaintiff submits that the first defendant as an executor of the Will is liable to render accounts to the legatees under the Will. The first defendant has also taken into his custody and held in Trust on behalf of the plaintiff, the jewels described in "D" schedule hereunder which belongs to his mother/Dhanalakshmi after her death in the year 1952 and which were bequeathed to plaintiff under her Will of the year 1951. The 1st defendant is liable to render the accounts for the jewels held in Trust and handover the jewels or their value in terms of money to the plaintiff mentioned

under "D" Schedule which exclusively belongs to her. As the 1st defendant is collecting rent from the defendants 5 and 7, the 1st defendant is liable to render true and proper accounts for the income derived by him from the suit properties. It is no longer possible to keep the properties in common, if so it will be detriment to the plaintiff. Hence, the suit for partition and separate possession of the immovables in the Schedule ABC and for delivery of schedule "D" movables.

7. The first defendant filed written statement, admitting the jural relationship between the parties. Among other things the plaintiff has no share or right over the suit schedule properties. The claim of the plaintiff is unsustainable in view of the language and the intention of the testator who executed the Will. The properties set out in the schedule A, B and C originally belongs to father of the first defendant viz., STM.Bashiam, during his lifetime he executed a Will and died on 19.12.1935 and the said Will was probated.

8. One Kamalanathan and the first defendant are sons, Thayarammal and Jeevaratnam Ammal are daughters of the deceased STM.Bashiam. The STM.Bashiam scribed the last Will bequeathing his properties in the manner as shown in the said Will

taking his sons, daughters and his widow wife as beneficiaries. The content of the Will indicates that two sons were entitled to appropriate the properties in two equal shares with no power of alienation. The plaintiff is the younger and second daughter of this defendant and he has only son by name Murali who was arrayed as 3rd defendant in this suit. During the presence and existence of the 3rd defendant, the plaintiff has no locus standi to claim any share in the suit properties of late STM.Bashiam Naidu. It is improper to say that the contents of the Will stated that the grand sons together are to take half in the scheduled immovable properties, thereby the testator had intended that the remaining half should be taken absolutely by the grand daughter viz., the plaintiff and the 4th defendant. On a perusal of the terms of the Will, such interpretation is quite unfounded on a closer scrutiny. Hence, the plaintiff is not entitled either to 1/4th share or to any fractions of share in the plaint schedule properties.

9. The first defendant denied that the plaintiff is totally neglected and he dealt with the suit properties to the detriment of the plaintiff. Such grievance does not at all arises, in view of the fact that the plaintiff herself is not reckoned as one of the legatees to take her share in the presence of the male issues of this

defendant.

10. The movables viz., jewels referred to by the plaintiff in Schedule "D" are not in existence. According to plaintiff they belong to her grand mother and they came to be invested on her by reasons of a Will of the year 1951 are false. The first defendant know that there has been no Will or Testament said to have been executed by late Dhanalakshmi Ammal. The first defendant extended her hand to the plaintiff in wedlock to one Mohan, who is a Doctor with greater affluence. The first defendant conducted the wedlock of the plaintiff in pomp and grand manner, this defendant was constrained to hypothecate the "A" schedule property and the said debt so incurred for her as his necessity later this defendant discharged by a sale of the said property with the express consent of his son/3rd defendant who was major at that time, such discharge of debt by means of a sale of the very hypothecated property this defendant was constrained to have with his prudence as the purpose for which he dealt with the said property was a family necessity viz., the marriage of the plaintiff, to execute a sale in favour of the 6th defendant for the above said reasons and no infirmity could be attributed by her very stance for share is truly unacceptable by virtue of the Will.

11. The 5th defendant is admittedly a tenant in respect of "C" Schedule property referred to in the plaint. The defendant herein possessed the right to enjoy and appropriate the rentals, the plaintiff could have no grumbling whatsoever in respect of the enjoyment by this defendant. Hence, the learned counsel prays for dismissal of the suit.

12. Based on the pleadings and documents filed by both parties and submission made by both the Counsel the following issues have been framed by this Court on 11.02.2010 :-

1. Whether the plaintiff is entitled for partition and separate possession of his 1/4th share in the suit properties comprised in A, B and C schedule properties?

2. Whether the plaintiff is entitled for delivery of "D" Schedule properties or its ascertaining value from the first defendant as prayed for in the plaint?

3. Whether the plaintiff as a female heir is not legally entitled to inherit the property in

view of the Will executed by STM.Bashyam, who died on 19.12.1935?

4. Whether the plaintiff is entitled for accounting from defendants 1 to 4 as prayed for in the plaint?

5. Whether the first defendant is entitled for exemplary cost?

6. To what relief the plaintiff is entitled to?

13. After completion of pleadings, during trial, on the side of the plaintiffs PW1 was examined and marked Exs.P1 to P7. On the side of the defendants, 1st defendant was examined as DW1 and marked Exs.D1 to D13. सत्यमेव जयते

14. Heard the rival submissions made on both sides and perused the materials available on record.

15.The case of the Plaintiff is that the Plaintiff, defendant nos.3 and 4 are the children of the first defendant. The second defendant is the wife of the first defendant. The 5th defendant is the lessee of the plaint 'A' schedule property. The 7th defendant is the tenant under the first defendant in portion of the 'C' Schedule property. The 6th defendant is the alienee of the 'B' schedule property, having been purchased from the 1st defendant in the year 1973.

(ii) The suit schedule properties among other properties originally belonged to one S.T.M. Bashyam Naidu in pursuance of a partition between him and his brother. The said S.T.M. Bashyam Naidu was a business man who died on 19.12.1935. While he was in a sound disposing state of mind, he executed a Will on 30.01.1935, which was followed up by a codicil dated 19.12.1935. Under the terms of the Will, the first defendant and his brother Kamalanabhan should not alienate or encumber the properties and they were given only a life interest. However, the first defendant and his brother entered into a partition deed on 12.10.1950 under which, the first defendant was allotted the plaint ABC schedule properties. They are described as 'B' schedule properties in the partition deed. Kamalanabhan was allotted 'A' schedule properties,

comprised in the partition deed and they are not the subject matter of the properties in the present suit.

(iii) The Plaintiff has been totally neglected by the defendants 1 to 4. The first defendant along with the defendants 2 to 4 have been dealing with the suit properties to the detriment of the plaintiff and without her consent and knowledge. The first defendant who has no rights of alienation has alienated the 'B' schedule property to the 6th defendant. As per the Will, the grand children of the testator are absolutely entitled to the ABC Schedule mentioned immovable properties. The Will specifically mentions that the grand sons together are entitled to the half of the schedule mentioned immovable properties, thereby the testator had intended that the remaining half share should be taken absolutely by the grand daughter viz., the plaintiff and the 4th defendant. Thus the plaintiff who is entitled to 1/4th share had preferred a claim for partition under her notice dated 22.04.1985 and 14.05.1987. The first defendant has not given any reply to the notices. Hence, the plaintiff has approached this Court by way of filing suit for partition of her 1/4th share and separate possession thereof.

16. The case of the defendants are that the relationship are admitted and the schedule mentioned properties and other properties originally belonged to father of the first defendant viz., S.T.M.Bashyam Naidu. While he was in sound disposing state of mind, he executed a Will dated 30.01.1935 which was followed up by a codicil dated 19.12.1935 and the said Will was probated . As per the Will, the wife of the S.T.M.Bashyam Naidu should enjoy the schedule mentioned properties in her life time and the sons of the S.T.M.Bashyam Naidu, the first defendant and his brother Kamalanabhan were having life interest. They do not have any right to alienate or encumber the property and each of them are entitled to enjoy the property during their life time. After their life time, their sons are having absolute right over the property. In case if there are no male heirs for the sons of the said S.T.M. Bashyam Naidu, their female heirs are entitled to the same. If any of the sons has no male heirs, then the other's son is entitled to have right over the property. Since, the first defendant has got a son who is the third defendant, he is entitled to property and the plaintiff herein is not entitled to any property as per the will. Therefore, the suit should be dismissed in limine with costs.

17. The learned counsel for the Plaintiff would submit that as per the Will, the first defendant has no right to alienate the property, but he alienated the 'B' schedule property to the sixth defendant which itself proves that he has violated the Will. He would further submit that the male heirs of S.T.M. Bashyam Naidu are entitled for half share in the property and the remaining half share will be given to the female heirs. But the first defendant and his brother Kamalanabhan entered into partition deed for the Will mentioned property and the 'B' Schedule property was allotted to the first defendant which is the subject matter of the suit properties herein. The first defendant's brother was allotted 'A' Schedule property. As per the Will, the male heirs of the first defendant is entitled to only half share of the suit schedule property and the female heirs viz., the plaintiff and the fourth defendant are entitled to remaining half i.e, $\frac{1}{4}$ each. Therefore, the preliminary decree should be passed for $\frac{1}{4}$ share in the suit schedule property.

18. The learned counsel for the Defendants would submit that there is no dispute with reference to the relationship of the parties and the properties belonging to the S.T.M. Bashyam Naidu. The said S.T.M. Bashyam Naidu while in sound disposing state of mind had executed a Will dated 30.01.1935 which was followed by codicil

dated 19.12.1935. The Will clearly shows that the wife of S.T.M. Bashyam Naidu is entitled to enjoy the property during her life time. Though the first defendant and his brother Kamalanabhan each are entitled to the property they are having only life interest to their respective half share. After the life time of the first defendant and his brother Kamalanabhan if they are having male heirs, they are absolutely entitled to the same. In default of such male heirs, the female heirs shall likewise have the absolute right over the property. In this case, after the life time of S.T.M. Bashyam Naidu, the first defendant and his brother Kamalanabhan were enjoying the property as per the Will and partitioned the Will mentioned property and the 'B' Schedule property was allotted to the first defendant. The plaintiff and the fourth defendant are the daughters of the first defendant. The third defendant is the son of the first defendant. Therefore, as per the Will the male heir after the life time of the first defendant viz., the third defendant is having absolute right over the suit properties. Therefore, in the presence of the third defendant, the plaintiff and the fourth defendant are not entitled to any share in the properties. Therefore, the suit has to be dismissed. The learned counsel for the defendants has relied upon the following Judgments of the Hon'ble Supreme Court and this Court in support of his contentions.

(i) *J.J. Lal Pvt. Ltd and others Vs. M.R.Murali and Another* reported in (2002) 3 SCC 98.

(ii) *Venkataramana and others Vs. N.Munuswamy and others* reported in (2010) 6 MLJ 351.

19. In this case, the issue involved is the interpretation of the Will. There is no quarrel with the proposition of law relied on by the Hon'ble Supreme Court. However, in this case no right has been given to the female issues of the first defendant.

20. Issue No.3:-

As far as this issue is concerned, the relationship of the parties and the properties owned by S.T.M. Bashyam Naidu were not in dispute and the fact that while he was in sound disposing state of mind, he had executed Will on 31.01.1935 and subsequently executed Codicil dated 19.12.1935 was also not disputed. Further, the first defendant and his brother Kamalanabhan have partitioned the Will mentioned property was also not disputed. The only dispute is that according to the plaintiff, the first defendant has got only life interest and has no right to alienate or encumber the

properties and ½ share was given to the male heirs and female heirs are also entitled to half share. According to the defendants, as per the Will, the first defendant and his brother along with their mother are entitled to life interest and after their life time, only male heirs are having absolute right over the property. In case if there is no male issues then the female issues are entitled to have the right over the property. If one of the son does not have any male issue then the other son has male issue he is entitled to absolute right in the properties. There is no mention that the female heirs are entitled to the property. In this case admittedly during the life time of the first defendant and his brother Kamalanabhan, entered into partition and 'B' Schedule properties were allotted to the first defendant. 'A' schedule properties were allotted to Kamalanabhan. Since the third defendant is the male heir of the first defendant, as per the Will, he is having absolute right over the properties. Neither the Plaintiff nor the fourth defendant as a female heirs of the first defendant are entitled to property.

(ii) In order to prove the case of the Plaintiff, on the side of the Plaintiff, the Plaintiff was examined as P.W.1. She filed the Proof Affidavit reiterating the plaint averments and also marked Exs.P1 to P7. The copy of the Will executed by S.T.M. Bashyam Naidu has

been marked as Ex.P1. Copy of the Codicil has been marked as Ex.P2. The partition deed entered into between the first defendant and his brother Kamalanabhan has been marked as Ex.P3. Notice sent by the Plaintiff's counsel to the defendants 1 and 2 has been marked as Ex.P4 and notice sent to the learned counsel for the Plaintiff by D5 has been marked as Ex.P5. Notice sent by the Plaintiff's counsel to the first and the second defendants has been marked as Ex.P6. Notice sent by Plaintiff's counsel to the defendants 1, 4 and 6 has been marked as Ex.P7. The copy of the probate of the Will and the testament in O.P.No.175/1936 dated 30.01.1935 has been marked as Ex.P8. Certified copy of the Codicial dated 19.12.1935 has been marked as Ex.P9, certified copy of the settlement deed dated 08.04.1976 has been Ex.P10, Certified copy of the settlement deed dated 08.04.1976 has been marked as Ex.P10. Certified copy of the settlement deed dated 12.05.1995 has been marked as Ex.P11. Certified copy of the sale deed dated 29.09.1997 has been marked as Ex.P12 and certified copy of the sale deed dated 16.06.2003 has been marked as Ex.P13. Since the will is admitted by both the parties, it need not be proved under Section 68 of the Evidence Act. Since both the parties are claiming title under Ex.P1- Will dated 30.01.1935 and Codicil dated 19.12.1935 and the said Will was also probated under Ex.P8

in O.P.175/1936 dated 30.01.1935, the only question that has to be decided is that as per the Will whether the male heirs of the first defendant alone is entitled to have absolute right over the plaint ABC suit properties or both the male and female heirs are equally entitled to Plaint ABC schedule properties? Admittedly both the parties are claiming right under the Will, the Will is said to have executed by S.T.M. Bashyam Naidu while in sound disposing state of mind. A careful reading of the recital in Ex.P1- Will of S.T.M.Bashyam, shows that the wife of the said S.T.M. Bashyam during her life time can enjoy the properties and his first defendant and his brother Kamalanabhan are equally entitled to 1/2 share and they are having only life interest. After their life time only their male issues are entitled to have absolute right in their respective shares and only in the absence of male issues female issues are entitled to have absolute right over the properties. Since, in this case as per the Will the first defendant and his brother Kamalanabhan partitioned the schedule mentioned properties. The said partition was not challenged by the Plaintiff the same was admitted by her. Therefore, she admitted that both the father of the Plaintiff, the first defendant and her uncle Kamalanabhan are entitled to half share. Ofcourse they are having only life interest over the property. After their life time their male issues are entitled

to will mentioned property and in case of no male issues, female issues are entitled to have absolute right over the property. In this case, admittedly the ABC plaintiff schedule properties covered under partition deed Ex.P3 and the same would show as 'B' schedule properties under the partition and the Plaintiff has not challenged the partition deed. The Plaintiff herself stated that 'B' schedule property is shown as Plaintiff ABC properties. Admittedly, the first defendant has got a male issue i.e., the third defendant. Therefore, as per the will dated 30.01.1935 Ex.P1, the male heir of the first defendant is entitled to have absolute right over the property. Since the third defendant is the male heir of the first defendant, as the female issues the Plaintiff and the fourth defendant are not entitled to any share in the property. Thus, the Plaintiff as a female heir is not entitled to any share as per the Will. This issue is answered accordingly.

21. Issue No.1:

Since issue no.3 is answered in favour of the defendants and as against the Plaintiff, the Plaintiff is not entitled to $\frac{1}{4}$ th share in the suit ABC schedule properties. As far as 'D' Schedule movable property is concerned, the plaintiff has not proved that they are in existence. Therefore, she is not entitled to the same. Further, the

Plaintiff is not entitled to any relief in respect of 'B' schedule property as prayed by her.

22. Issue No.4:

Since the issue Nos. 1 and 3 are answered against the Plaintiff, the Plaintiff is not entitled for any accounting from the defendants 1 to 4 as prayed for.

23. Issue No.5:

The Plaintiff has filed the suit against the defendants by wrongly interpreting the will. The claim is based on Will-Ex.P1 and partition deed- Ex.P3. However, considering the relationship of the parties, the first defendant is not entitled to the exemplary costs.

24. In view of the aforesaid facts and circumstances of the case, the plaintiff has not established her right to partition in the suit properties. Therefore, the suit is liable to be dismissed

25. Accordingly the suit is dismissed. Considering the relationship of the parties. There is no order as to costs.

30.07.2020

Index : Yes/No
Internet : Yes/No
tsh/arr

List of Witness examined on the side of the plaintiff

Hemalatha Mohan - PW1

List of documents marked on the side of the plaintiff

SL. No	Exhibits	DESCRIPTION OF DOCUMENTS	DATED
1.	P1	Copy of the Will executed by STM.Bashiam Naidu	30.01.1935
2.	P2	Copy of the Codicil executed by STM.Bashiam Naidu	19.12.1935
3.	P3	Partition deed entered into between Kamalanabhan and Ramachandra Naidu	12.10.1950
4.	P4	Notice sent by plaintiff's counsel to defendants 1 and 2	22.04.1985
5.	P5	Notice sent to plaintiff's counsel for 5 th defendant	10.05.1985
6.	P6	Notice sent by plaintiff's counsel to defendants 1 and 2	13.05.1987
7.	P7	Notice sent by the plaintiff counsel to defendants 1, 4 and 6	13.05.1987
8.	P8	Probate of the Will and Testament in OP.No.175/1936	30.01.1935
9.	P9	Codicil	19.12.1935
10.	P10	Certified copy of the settlement deed	08.04.1976
11.	P11	Certified copy of Settlement deed	12.05.1995
12.	P12	Certified copy of Sale deed	29.09.1997
13.	P13	Certified copy of Sale deed	16.06.2003

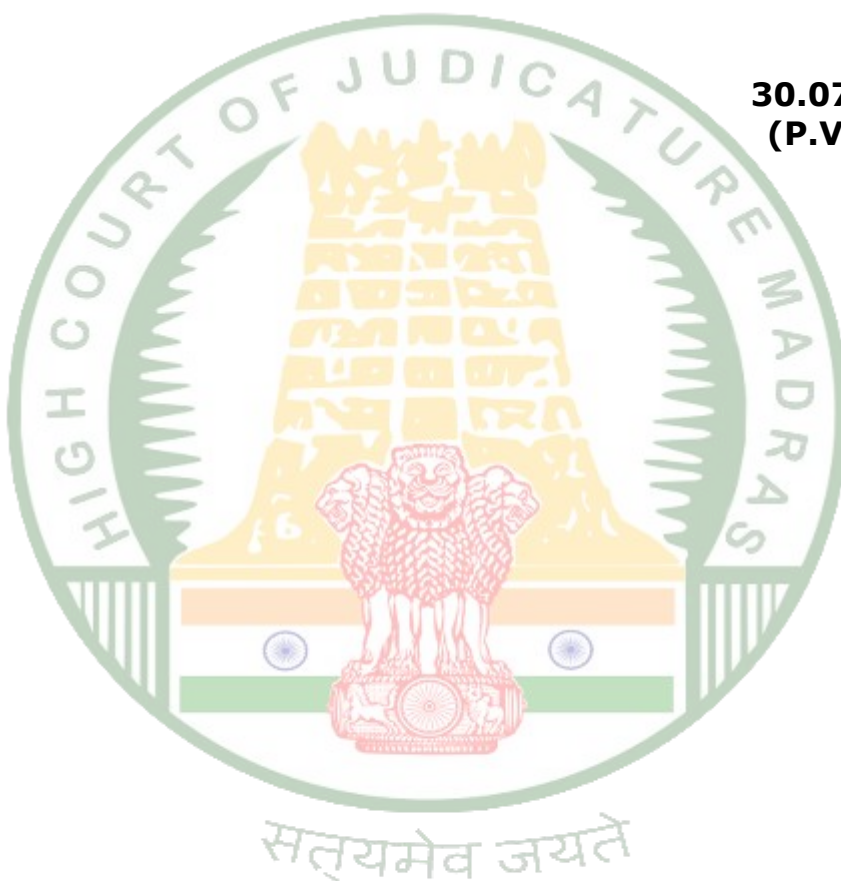
List of Witness examined on the side of the defendants

R. Krishna Kumar - DW1

List of documents marked on the side of the defendants

SL. No	Exhibits	DESCRIPTION OF DOCUMENTS	DATED
1.	D1	Copy of the writ petition in WP.No.5208 of 1993	

**30.07.2020.
(P.V.J.)**



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C.S.No.952 of 1990

P. VELMURUGAN, J.

tsh/arr



Pre Delivery Judgment in

CS.No.952 of 1990

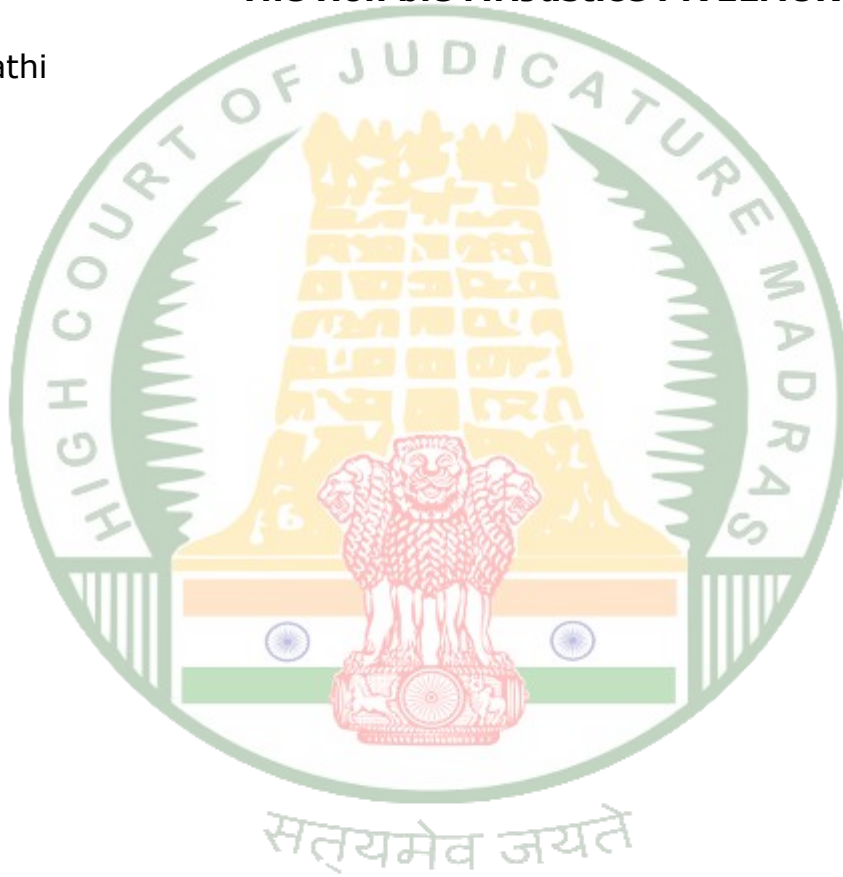
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30.07.2020

**Pre Delivery Judgment in
CS.No.952 of 1990**

**To
The Hon'ble Mr.Justice P.VELMURUGAN**

From
A.R.Revathi
P.A.,



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