

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.04.2016

CORAM

THE HON'BLE MR. JUSTICE T.MATHIVANAN

S.A.No.848 of 2014

&

M.P.No.1 of 2014

&

C.M.P.Nos.702, 1065 & 2569 of 2016

L.Mohanam

... Appellant

Vs.

- 1.Ayisha Begum (Since Died)
- 2.Mohamed Idris
- 3.K.Zeauddin
- 4.T.M.Abdul Rahman (since died)
- 5.Pukhraj Jain (Since died)
- 6.Sohanraj Jain
- 7.Dhanraj Jain
- 8.Nasreen Begum
- 9.Syed Irfanullah Batcha
- 10.Nazia
- 11.Minor Saniya Kulsam

... Respondents

Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree dated 03.04.2014 and made in A.S.No.189 of 2012 on the file of the V Additional Judge, City Civil Court, Chennai confirming the judgment and decree dated 14.06.2006 and made in O.S.No.9869 of 1990 (P.O.P.No.324 /1986) on the file of the VII Asst.Judge, City Civil Court, Chennai.

For Appellants : Mr.N.Jothi
Assisted by Mr.M.C.Govindan

For Respondents : M/s.Vedavalli Kumar for R1 R2
Mr.S.Muthu Durai for R5 to R7

R3 to R5 given up

JUDGMENT

This memorandum of second appeal has been directed against the judgment and decree dated 03.04.2014 and made in the appeal in A.S.No.189 of 2012 on the file of the learned V Additional Judge, City Civil Court, Chennai confirming the judgment and decree dated 04.06.2006 and made in the suit in O.S.No.9869 of 1990 on the file of the learned VII Assistant Judge, City Civil Court, Chennai.

2. The appellant herein is the 6th defendant in the suit. The deceased first respondent is the original plaintiff and since she had passed away during the pendency of the suit, the second respondent has been impleaded as the legal representative of the deceased plaintiff Ayisha Begum in view of the order dated 12.08.1988 and made in I.A.No.14292 of 1988 on the file of the trial Court. The third respondent herein is the first defendant in the suit. The respondents 4 to 7 were given up at the stage of first appeal itself.

3. The second appeal was not admitted at the time of first hearing and therefore, the substantial questions of law, though raised in the grounds of appeal, were not able to be formulated at the initial stage as required under sub-section (1) and (4) of Section 100 of the Code of Civil Procedure (in short hereinafter be referred to as the Code).

4. Originally the deceased Ayisha Begum had instituted a petition in O.P.No.324 of 1986 to permit her to institute the suit as an indigent person. That petition was allowed and converted as a suit in O.S.No.9869 of 1990 granting permission to sue as an indigent person. The relief sought for by the original plaintiff Ayisha Begum (since deceased) are extracted as under:

- i. To grant a decree against the defendants 1 and 2 declaring that the sale deed dated 07.01.1985 executed by the 2nd defendant in favour of the 1st defendant is null and void and illegal.
- ii. To direct the 6th defendant or any person claiming right through or under or after him to deliver vacant possession of the entire property at No.107 (Old No.13) Protugeesee Church St, Sevenwells, George Town, Chennai-1, morefully described in the schedule 'B' to

the plaintiff after demolishing any addition if added to the buildings (amended as per the order dated 06.12.1998);

iii. For recovery of costs.

5. As per the plaint 'B' schedule, the suit property has been described as under:

"House, ground and premises in Old No.13 (New No.107) in Portuguese Church Street, George Town, Madras and comprised in O.S.No.7154, R.S.No.1699 Collector's Certificate No.4443 measuring 840 square feet bounded on the North by Hawker Teasor Lane, South by Zainulabdeen's house; East by the Portuguese Church Street on the west house to Portuguese Church and within the registration district of Madras North and Sub-Registration District of Sowcarpet.

6. It is significant to note here that the operative portion of the order of this Court dated 12.04.2006 and made in C.R.P (PD) No.54 of 2005, seems to be the pivot around which the entire issue in respect of the second appeal oscillates. The operative portion of the order dated 12.04.2006 to be extracted:

"12. Thus the Civil Revision Petition is dismissed with exemplary costs of Rs.5000/-, out of which Rs.2500/- shall be paid by the revision

petitioner to the Tamil Nadu Mediation and Conciliation Centre, High Court, Madras within four weeks from today failing which his defence in the suit in O.S.No.9869 of 1990 shall be struck off without any further reference to this Court. The trial Court is directed to dispose of the suit on merits and in accordance with law in view of the earlier order of this Court in C.R.P.No.934 of 2004 as well as in the light of the observations in this order on or before 29th September 2006."

7. This order was found basis for the judgment of the trial Court, which was confirmed by the 1st appellate Court. The operative portion of the judgment of the trial Court which contains only 8 lines, reads as under:

"The plaintiff and 6th defendant counsel present. The 6th defendant counsel is admitting that he has not paid the cost to imposed by the Hon'ble High Court in C.R.P (PD) No.54 of 2005. Hence, the defendant defence has to be struck off. Memo filed on behalf of D6 for adjournment is rejected. Hence, as per 6th defendant defence struck off as per the High Court Order. Records perused. PW1 already examined. Documents marked. Plaintiff side heard. Suit is decreed as prayed for with costs. 2 months time."

8. The operative portion of the order of this Court dated 12.04.2006 and made in C.R.P (PD) No.54 of 2005

contains the following distinctive nature:

- a) Out of Rs.5,000/- being the exemplary cost, a sum of Rs.2500/- shall be paid by the revision petitioner to the Tamil Nadu Mediation and Conciliation Centre, Madras within four weeks time from the date of order.
- b) It appears that no time limit is given to pay or deposit the remaining portion of cost i.e., Rs.2500/-. Moreso, the order does not specifically speak as to whom the remaining amount of Rs.2500/- to be paid.
- c) If Rs.2500/- is not paid by the revision petitioner to the Tamil Nadu Mediation and Conciliation Centre, High Court, Madras within four weeks from the date of order, i.e., from 12.04.2006, the defence of the revision petitioner in the suit in O.S.No.9869 of 1990 shall be struck off without any further reference to this court. It is understood that in case the amount of Rs.2500/- is not paid within the four weeks time from the date of order, the defence filed by the revision petitioner (appellant) shall be struck off without further reference to this Court. Therefore, it is thus clear that on the failure of the revision petitioner to pay the above

said amount to the Tamil Nadu Mediation and Conciliation Centre, the striking off his defence will be followed automatically without further reference to this Court.

- d) From the above context it is thus made clear that it is not open to the trial Court to pass a specific order of striking off the defence of the appellant (6th defendant) for his non-compliance of the conditional order.
- e) The trial Court was specifically directed to dispose the suit on merits and in accordance with law.
- f) The first defendant, who is the third respondent herein had filed his written statement on 10.12.1996. The second defendant, who is the fourth respondent herein (T.M.Abdul Rahman (since deceased)] had filed his written statement on 12.12.1996. Their defences were available intact at the time of passing of the judgment by the trial Court. The appellant, being the 6th defendant, had filed his written statement on 09.08.2004 and filed his additional written statement on 16.11.2004.

9. It is to be noted that as per the order of this Court, as aforestated, the trial Court was directed to dispose of the suit on merits and in accordance with law. Even if it is presumed that the defence of the appellant (D6) is liable to be struck off for his failure to comply with the order of this Court, the defences filed by the defendants 1 and 2, who are respondents 3 and 4 herein were very much available and necessary issues were also formulated. However, the trial Court has not assigned any reason or answered the question as to on what basis or under what circumstance the defences filed by the defendants 1 and 2 were skipped off without disposing the suit in respect of the prayer portion (b) of the plaint.

10. Prayer Portion (b) is extracted as under:

"(b)to pass judgment and decree against the defendants 1 and 2 (respondents 3 and 4 herein) declaring that the sale deed dated 07.01.1985 executed by the second defendant in favour of the first defendant is null and void and illegal."

Prayer portion b(i) is to direct the 6th defendant or any person claiming right through or under or after him to deliver vacant possession of the entire property at No.107

(old No.13), Portuguese Church Street, Seven Wells, George Town, Chennai - 1, morefully described in the schedule B to the plaint after demolishing any addition if added to the buildings, as per order dated 06.12.1997.

11. The trial Court ought to have disposed of the suit on merit as directed by this Court in respect of the prayer (b). But, the trial Court has miserably failed to consider this aspect. Having been failed to dispose the suit on merits as aforestated, the judgment of the trial Court dated 14.06.2006 can be termed as *per incurium*.

12. It is to be seen that the non-compliance of the order passed by this Court dated 12.04.2006 by the revision petitioner herein was not at all brought to the notice of this Court by the plaintiff, because he is the party entitled to the costs. He is having the responsibility to see as to whether the conditional order of this Court is complied with by the revision petitioner or not. If the failure on the part of the revision petitioner was brought to the notice of this Court, this Court would have had an opportunity to pass appropriate order. The order does not say that if the appellant fails to pay the portion of the exemplary cost i.e., Rs.2500/- to the Tamil Nadu Mediation

and Conciliation Centre, High Court, Madras, the trial Court shall strike off the defence filed by the appellant/6th defendant while disposing the suit on merit as well as in accordance with law.

13. It may also be relevant to note here that as envisaged under Section 35-B Sub-Section (1), payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of,—

- (a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs,
- (b) the defence by the defendant, where the defendant was ordered to pay such costs.

14. It is also pertinent to note here that as aforestated, if on the date next following the date of order of payment of costs, the issue, as to payment of cost is not raised by either of the parties or taken notice of by the Court, it cannot be said that thereafter on all or any subsequent date the same can be resuscitated or that Section 35-B would continue to apply with all its rigour thereafter as well. If on the crucial date fixed for the payment of cost (within four weeks time), the date next following the date of order of payment of costs, the

question is not raised before the Court, then **impliedly a waiver of right to get** the costs would necessarily follow. Hence, on the subsequent dates it would not be open to the first respondent/plaintiff to reopen the issue of non-payment of costs before the Court and seek the striking off the defence filed by the appellant/sixth defendant under Section 35-B afresh.

15. In this regard, this Court would like to have reference of Full Bench judgment of Punjab and Haryana High Court in ***Prem Sagar And Ors. vs Phul Chand And Ors.*** Reported in ***AIR 1983 P&H 385 (Full Bench)***. In the above cited case, a significant question was arisen for the consideration and adjudication of the reference before the Full Bench as a corollary to the ratio of the Bull Bench in ***Anand Parkash v. Bharat Bhushan Rai, AIR 1981 Punj & Har 269*** in the context of Section 35-B of the Code of Civil Procedure. Hon'ble Mr.Justice S.S.Sandhawalia, Chief Justice, while speaking on behalf of the Full Bench of Punjab and Haryana High Court has observed in Paragraph No.6 as under:

"6. Adverting back to the language of Section 35B as also to the ratio of Anand Parkash's case (AIR 1981 Punj & Har 269) (supra) it would be

obvious therefrom that the crucial date on which the statute focuses itself is the date next following the date of the order of payment of costs. It is from the said date that the further prosecution of the suit or the defence is made conditional on the payment or tender of costs. The twin object or purpose, therefore, appears to be to avoid procrastination or delay by the parties in the already tardy pace of civil proceedings and to impose a heavy sanction for any non-compliance with the order to pay costs. As was observed in Anand Prakash's case (supra) such orders are in essence in terrorem, so that the unscrupulous litigant may not indulge in dilatory tactics. It calls for pointed notice that even here the result is not automatic and as held by the Full Bench a discretion still remains with the trial Judge under S. 148 of the Civil P. C. to exercise his power in favour of the defaulting party. Therefore, if on the date next following the date of the order of payment of costs the issue is not raised by either of the parties or taken notice of by the Court, it cannot be said that thereafter on all or any subsequent date the same can be resuscitated or

that Section 35B would continue to apply with all its rigour thereafter as well. Indeed it seems inevitable that if on the crucial date fixed for the payment of costs the question is not raised at all, then impliedly a waiver of the right arising in favour of the party entitled to costs would necessarily follow. Therefore, on subsequent dates it would not be open to the parties to reopen the issue at their will and seek the barring of the further prosecution of the suit or the defence under Section 35B afresh. It is axiomatic that the law for the vigilant and not for these who blissfully sleep over their rights."

16. This Court would like to place it on record that even if the cost is not paid within the time fixed by the Court, the result is not automatic and the discretion still remains with the Court under Section 148 CPC to exercise the power in favour of the defaulting party.

17. The trial Court happened to pass the judgment and decree on 14.06.2006. From the perusal of the judgment of the trial Court dated 14.06.2006, this Court is able to find that the trial Court had formulated the following

three issues and one Additional Issue based on the pleadings of the parties to the suit:

Issues:

1. Whether the sale deed dated 07.01.1985 executed by the 2nd defendant in favour of the 1st defendant is to be declared as illegal and null and void?
2. Whether the plaintiff is entitled to get recovery of possession of the suit property from the 6th defendant as prayer for?
3. To what relief is the plaintiff entitled?

Additional Issue:

1. Whether the suit in respect of the prayer for declaration and recovery of possession has been correctly valued and proper Court fee paid?

18. With reference to Issue No.1 i.e., Whether the sale deed dated 07.01.1985 executed by the 2nd defendants in favour of the 1st defendant is to be declared as illegal and null and void, the written statements filed by the defendants 1 and 2 have not been incorporated and discussed in detail in the judgment. The trial Court also did not say anything as to on what basis the suit was decreed as prayed for granting two months time to the appellant/6th defendant for surrendering vacant possession of the suit property. Further, the following crucial question is also arisen for the consideration of this Court

"Can there be any decree and judgment to deliver vacant possession of the property in the absence of pleadings to set aside the sale deed dated 10.06.1988 bearing Document No.266 of 1988 on the file of the Sub-Registrar, Sowcarpet, Chennai registered in favour of the appellant/6th defendant."

19. Having been formulated the above said three issues and one additional issue, none of the issues has been discussed and answered by the trial Court. Unfortunately, all the issues are kept unanswered. Under this circumstance, one more question is arisen as to whether in the instant case, the judgment has been validly delivered.

20. Order XX Rule 4(1) relates to the judgments of Small Causes Courts. It envisages that judgments of a Court of Small Cause need not contain more than the points for determination and the decision thereon. Sub-Rule (2) of Rule 4 of Order XX relates to the judgments of other Courts. It postulates that judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. Rule 5 of Order XX CPC mandates the Court to state its decision on each issue. It envisages as under:

"In suits in which issues have been framed,

the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

21. As held by the Supreme Court in **Fomento Resorts V. Gustava Ranato [AIR 1985 SC 736]** Order XX Rule 5 rules that decision on all issues in the judgment is mandatory unless the finding upon any one issue or more is sufficient for the decision of the suit. To avoid delay and protraction of litigation court decide all points involved and not merely rest its decision on one single point.

22. Andhra Pradesh High Court in **Aziz Ahmed V.I.A.Patel [AIR 1974 AP 1; ILR 1972 AP 421]**, has observed that while pronouncing judgments even in ex parte cases, Court must apply its mind to facts of the case and the points at issue. The Karnataka High Court in **Mahaboob Saheb V. Anjaneyulu [(1973) 2 Mys LJ 91]** has held that the defendant's absence could not absolve the learned Judge of his duty to apply his mind to the relevant allegations made by the plaintiff in support of his case and to arrive at a decision. Patna High Court has also in **Ram Padarath Singh Vs. Baidynath Prasad [AIR 1973 Pat 389; 1973 BLJR 580]** has

observed that in appealable cases the trial Court should pronounce its opinion on all the issues as to avoid a remand if the appellate Court differs from the trial Court on the preliminary issue.

23. From the languages couched in Rule 5 of Order XX CPC, this Court finds that that Court has to state its findings or decisions supported by reasons. Word "finding" means a decision upon a question of fact reached as a result of judicial examination or investigation by a Court. Finding of fact means determination and conclusion by way of reasonable inference from the evidence of a case, either by Court or an administrative agency concerning facts averred by a party and denied by another.

24. As observed by the Apex Court in ***Daffardar Bhagar Singh Vs. ITC [AIR 1969 SC 340]***, the word "finding" only covers material question which arise in a particular case for the decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decisions, has been the subject-matter of controversy.

25. Gauhati Bench of Bombay High Court in ***Mahabir***

Kanoo V. Kedareshwar Bakshi [1987 Cur Civ Cas 638 (Gau)] has held that to decide means settle (questions, issues, dispute) by giving victory to one side; give judgment (between, for, in favour of, against) and decision means settlement (of question etc.,) conclusion, formal judgment, making up the mind resolve. The word 'belief' means a conviction of truth of a proposition, existing subjectively in mind or induced by argument. The words "belief", "finding of facts", and decisions are substantially the same in the context of Order XX Rule 5 CPC.

26. This Court has carefully examined and analysed the judgments of the Courts below as well as the grounds of appeal and only on the basis of the grounds of appeal the following substantial questions of law are formulated:

1. In the absence of pleadings to set aside the Sale Deed dated 10.06.1988 in Document No.266 / 1988, on the file of the Sub-Registrar, Sowcarpet, Chennai - 600 001, registered in favour of this appellant, can there be any decree to deliver vacant possession of the property?
2. When the plaintiff never sought for the relief of redemption of mortgage at any point of time can he seek for the cancellation of any particular sale deed

without seeking any relief as against the Mortgage which stood assigned to a third party followed by respective Sale Deeds one after the other subsequent thereto?

3. Whether the trial Court render the judgment contrary to Order XIV Rule 2(1) CPC without discussing any issue?

4. Whether the Courts below have not written the judgments in accordance with the provisions of Order XX Rule 5 of the Code of Civil Procedure.

27. The facts which are absolutely necessary for the disposal of this second appeal are as under:

i) Original plaintiff Ayisha Begum (since deceased) and one Tayub Begum are sisters. The other sisters and brothers were dead. Tayub Begum @ Tayub Nissa was given in marriage to one Sheik Abdul Khader. She had delivered two sons and two daughters through him. At the later stage, he divorced her and went away abroad along with their four children. Their whereabouts are not known for over the statutory period. Tayub Begum was a rich lady. The suit property bearing Old No.13 and New No.107, Protugeesee Church St, Sevenwells, George Town, Chennai-1, morefully described in the schedule 'B' was originally owned by her.

She had leased out the suit house to third defendant Pukhraj Jain (since deceased), who is none other than the father of the respondents 4 and 5.

ii) While Thayub Begum was alive she had executed a registered simple mortgage deed in favour of one Indra Garwar Bai Taleda in respect of the suit property for Rs.9000/-. It was agreed between the parties that in case of default, the mortgaged property to be sold in public auction or by private negotiation in terms of Section 69 of the Transfer of Property Act. The mortgagor Mrs.Tayub Begum was unable to discharge the mortgage.

iii) Tayub Begum had died on 01.04.1978 intestate. Ahmed died later. According to the deceased plaintiff Ayisha Begum, since she being the sister of Tayub Begum, she alone is the heir and legal representative of Tayub Begum. Taking advantage of the loneliness of Tayub Begum, one G.Ahmed who was a stranger to her, had left his two unmarried daughters viz., Ayisha Sultana and Nasreen to attend on her. Ayusha Sultana was given in marriage by Tayub Begum and Nasreen continued to live with her.

iv) Thereafter, the original mortgagee Indra Garwar

Bai Taleda had assigned the mortgage in favour of the second defendant T.M.Abdul Rahman by way of a registered deed of assignment dated 27.12.1994. In the assignment deed, Nasreen has been described as the adopted daughter of Tayub Begum.

v) The Income Tax Department had attached the rental income from the tenants of the suit property for non-payment of income tax dues by Mrs.Tayub Begum. Ms.Nasreen had no funds to redeem the mortgage as well as to pay the Income Tax dues left by Mrs.Tayub Begum.

Vi) Under this circumstance, the second defendant T.M.Abdul Rahman and the said Mrs.Nasreen had taken steps to bring the suit property for public auction through M/s.Murray & Co. In fact no body had participated in the public auction in view of the subsisting attachment by Income Tax Department. The assignee/mortgagee T.M.Abdul Rahman/second defendant had entered into a private sale transaction with the first defendant Zeauddin (3rd respondent in the appeal) on 07.01.1985. The said Nasreen had also joined with him as a confirming party in executing the sale deed registered as Document No.68 of 1985 on the file of Sub-Registrar, Sowcarpet. Thus, the purchase made

by the first defendant Zeauddin was fully accepted by the assignee Abdul Rahman and the said Nazreen Banu as well.

vii) The Purchaser, Zeauddin (first defendant in the suit/ third respondent in the appeal) had paid a portion of the sale consideration directly to the Income Tax Department towards the tax dues and got the property released from the attachment and paid the balance amount of sale consideration to the assignee of the mortgage, namely T.M. Abdul Rahman (D2). Thus, the property was fully purchased by the said Zeauddin (first defendant/third respondent).

viii) Only under this circumstance, the deceased plaintiff Mrs.Ayisha Begum had entered into the scene, claiming to be the sister of Mrs.Tayub Begum and filed a petition in O.P.No.324 of 1986 which was subsequently registered as suit in O.S.No.9869 of 1990 on the file of the City Civil Court, Chennai against the first defendant Zeauddin and T.M.Abdul Rahman for declaration that the sale deed dated 07.01.1985, which was executed in favour of Zeauddin (D1) by the second defendant T.M.Abdul Rahman is null and void.

ix) The appellant herein, who is the 6th defendant in

the suit had purchased the property from the first defendant Zeauddin through a registered sale deed dated 10.06.1988 (Document No.266 of 1988) on the file of the Sub-Registrar, Chennai. During the pendency of the suit. The original plaintiff Ayisha Begum had passed away and the second respondent Mohamed Idris had impleaded himself as plaintiff claiming to be the legal heir of Mrs.Ayisha Begum.

X) The suit in O.S.No.9869 of 1990 was contested by the third respondent/first defendant, fourth respondent /second defendant as well as by the appellant herein Mr.L.Mohanam, being the 6th defendant. Third respondent/first defendant in his written statement has contended that the deceased plaintiff Ayisha Begum is not at all the sister of Tayub Begum @ Tayub Nissa.

xi) The third respondent/first defendant says that the present impleaded plaintiff Mohamed Idris had filed a suit in O.S.No.9822 of 1992 for redemption in which, he had admitted that the interest on the mortgage created by Tayub Begum was paid upto March 1978. It may be relevant to note here that the question as to whether there is a right of redemption or not would be a matter in issue in

the said suit.

xii) He has also contended that a notice in writing to the mortgagor is necessary only when principal money is due before the right of private sale could be exercised. When the interest under the mortgage amounting atleast to Rs.500/- was in arrears and remains unpaid for three months, no notice is contemplated before the right of private sale is exercised. The original mortgagee or the assignee mortgagee is under no legal obligation to make a roving enquiry to find out the legal representatives of the mortgagor or to take any action in court of law. Equally an assignment to a stranger is not prohibited in law.

28. The third respondent/first defendant has further contended that the mortgage was not time barred. Admittedly interest was paid upto 1978 and as such the liability was therefore acknowledged and hence the assignment as well as the sale are valid. Assuming for a moment, without admitting that 12 years from 09.01.1970 is the period of limitation. It only means that the right to file a suit is only extinguished and the right to recover the money in any other manner still survives.

29. The fourth respondent/second defendant has adopted

the written statement of the third respondent/first defendant.

30. The appellant being the 6th defendant has contended that the plaintiff has no right of redemption and therefore, cannot continue the suit. The plaintiff has to establish his right or locus standi by proving the relationship with Tayub Begum, the mortgagor of the property.

31. He has further contended that after verifying the encumbrances and after taking legal opinion, he had purchased the suit property on 10.06.1988 for a sale consideration of Rs.2,00,000/-. According to the appellant/sixth defendant, the present suit in O.S.No.9869 of 1990 was numbered only in the year 1990 and that he had purchased the property as early as in the year 1988 i.e., two years prior to the numbering of the suit. As per the appellant/sixth defendant, the plaintiff ought to have paid the court fee by adding 20% in the year 1989 and 1990 and valued the suit at the rate of Rs.2,40,000/- instead of valuing it for Rs.400/- and paying a paltry court fee of Rs.30.50. He has further contended that proper court fee should have been paid on the plaint while the plaintiff is

seeking the relief of recovery of possession from him. The prayer in respect of clause (a) has to be valued based on the instrument dated 07.01.1985 for which the plaintiff had paid only a paltry court fee, but he ought to have paid Rs.18,000/- on the plaint. He has urged the court to try the issue of court fee as preliminary issue before going into the merits of the suit.

32.It is also his case that since the plaintiff has been seeking the relief of recovery of possession without paying the proper court fee, the suit is hopelessly barred by limitation. He would state further that he had purchased the suit property in the year 1988 and the relief of possession is claimed only in the year 1997, after a lapse of 9 years. Thus, the suit is barred by the law of limitation.

33. The suit in O.S.No.9822 of 1992 which was filed by the plaintiff for redemption of mortgage was dismissed on the ground of non-payment of court fee.

34. Subsequently, in pursuant to the order passed in I.A.No.19597 of 2002, it was restored to file on 10.08.2004. As against this order, a revision in

C.R.P.No.934 of 2004 was filed before this Court. While disposing of the Civil Revision Petition on 23.06.2004, this Court had directed the trial Court to dispose the suit in O.S.No.9869 of 1990 within a time frame.

35.It appears from the records that the learned trial Judge (VII Assistant Judge, City Civil Court, Chennai) had issued a test warrant for the determination of the market value of the suit property for payment of proper Court fee. The Court Ameen, in pursuant to the test warrant, had filed a report on 31.08.2004 valuing the suit property at Rs.20 lakhs. It is also manifested from the records that the appellant herein/6th defendant had filed a petition on 21.09.2004 under Order VII Rule 10(1)and (2) of the Code of Civil Procedure to return the plaint of the present suit viz., O.S.No.9869 of 1990 for being instituted before the proper Court on the ground of pecuniary jurisdiction. This petition was rejected on 22.09.2004 on the ground that the Court had not so far fixed the market value of the suit property and that the question of returning the plaint did not arise.

36. Thereafter, the first respondent Mohamed Idris

(Legal representative of deceased plaintiff Ayusha Begum) had filed a petition in I.A.No.16591 of 2004 under Order XXIII Rule 1 and 3 of CPC seeking permission to withdraw the suit in O.S.No.9822 of 1993 with liberty to file a fresh suit for the same cause of action. However, this petition was allowed partly and accordingly the suit in O.S.No.9822 of 1992 was ordered to be withdrawn with an observation that no permission is required as contemplated under Order XXIII Rule 1 and 3 to file a fresh suit based on fresh cause of action, if any. Since the suit in O.S.No.9822 of 1992 was ordered to be withdrawn, there remained only one suit i.e., O.S.No.9869 of 1990.

37. On perusal of the records it is also revealed that based on the additional written statement of the appellant herein/6th defendant, the issue of pecuniary jurisdiction pertaining to the Court fee was taken up by the trial Court as a preliminary issue and ultimately it was decided on 13.12.2004 with a finding that the prayer for declaration in the suit had been correctly valued and that the prayer for recovery of possession was not correctly valued. Therefore, the impleaded plaintiff Mohamed Idris/first respondent herein was directed by the trial Court to value the recovery of possession at Rs.2,00,000/- and to pay the

deficit Court fee of Rs.9375.50 within the stipulated period of 7 days.

38. This order was challenged by the appellant/6th defendant in C.R.P (PD) No.54 of 2005 before this Court. The same was dismissed by this Court on 12.04.2006 with an exemplary cost of Rs.5,000/-. The operative portion of the order of this Court dated 12.04.2006 had already been extracted and available in the opening paragraph and hence it need not be extracted once again.

39. Having been aggrieved by this order dated 12.04.2006, the appellant herein had filed a review application in Rev.Application No.84 of 2006 before this Court. While dismissing the review application on 12.12.2006, this Court in Paragraph 10 of the order has observed as under:

"10.....If at all the review petitioner is aggrieved by the order of this Court dated 12.04.2006, the proper remedy is only to file an appeal on merits."

In the very same order at Paragraph No.11, this Court has that:

"11.It is stated by the learned counsel for the first respondent that as the cost of Rs.5,000/-, as

ordered by this Court on 12.04.2006, was not paid within the stipulated time, the trial Court struck-off the defence of the review petitioner as directed by this Court in the order dated 12.04.2006 and the suit was already decreed on 14.06.2006 in favour of the plaintiff."

40. It is also revealed from the records that the revision petitioner had challenged the order of this Court dated 12.04.2006 and made in the review application before the Apex Court in S.L.P (Petition for Special Leave to appeal (Civil) in C.C.No.1779 of 2007). The Special Leave Petition was dismissed on the ground of want of merit. Thereafter, the appellant/6th defendant seems to have filed an appeal in A.S.No.189 of 2014 on the file of the V Additional Judge, City Civil Court, Madras. The first appeal was also dismissed on 03.04.2014 confirming the judgment and decree of the trial Court dated 14.06.2006 and made in the suit in O.S.No.9869 of 1990.

41. The first appellate Court, while dismissing the first appeal, after confirming the judgment and decree of the trial Court in the suit in O.S.No.9869 of 1990, has simply observed that it is not necessary to decide that

there is necessity to interfere with the trial Court's judgment and decree. It is also revealed from the judgment of the first appellate Court dated 03.04.2014 that during the course of hearing of the first appeal, Exs.A7 to A14 were allowed to be marked on the side of the plaintiffs. Ultimately it is decided by the first appellate Court that in view of Exs.A7 to A14, the trial Court's judgment cannot be challenged or set aside.

42. On a cursory perusal of the judgment of the first appellate Court, this Court finds that two points were carved out by the first appellate Court for consideration:

1. Whether the appeal is to be allowed on the point of law or on fact and to dismiss the suit?

2. Whether C.M.P.No.1275 of 2003 is to be allowed or not?

These two points were answered as against the appellant herein /6th defendant and eventually, the appeal was dismissed.

43. This Court has perused the materials including the judgments of the courts below with due care and caution. Having considered the relevant circumstances this Court would say that both the Courts have not written the judgments in accordance with the provisions of Order XX

Rule 5 of the Code of Civil Procedure. At this stage, this Court is of view that both the Courts have not applied their judicial mind to render the decision which is required to be made under Order XX Rule 4 (2) and 5 of the Code. As argued by Mr.N.Jothi, learned counsel for the appellant, the judgments of both the courts are not in accordance with the provisions of Order XX Rule 4(2) as well as Rule 5 of the Code of Civil Procedure.

44. Another important question arises for the consideration of this Court is as to whether the judgment of the trial Court could be termed to be a judgment in terms of Section 2(9) of the Code of Civil Procedure. Section 2 (9) of the Code of Civil Procedure define the term "Judgment" in the following manner:

" 2 (9). "judgment" means the statement given by the judge of the grounds of a decree or order."

45. In England, the word "Judgement" is generally used in the same sense as a decree in the Code of Civil Procedure. A judgment must contain the grounds of the decision. This dictum is laid down in **Vidyacharan Vs. Khulachand (AIR 1964 Sc 1099; [1964] 6 SCR 129)**.

46. In the Chambers Dictionary (Deluxe Edition) Sixth

reprint, Page 905, the meaning of the word "judgment" is given as 'the act of judging, comparing of ideas to find out the truth, the faculty by which this is done, an opinion formed; a legal verdict or sentence etc., In the New Shorter Oxford English Dictionary (1983 edn. P 1459) some of the meaning given are: the sentence of Court of justice, a judicial decision or order in court. One of the meanings given to the word 'judgment' in Webster's Comprehensive Dictionary (International Edition, Vol.1, 1984) reads thus:

"The result of judging the decision or conclusion reached as after consideration or deliberation."

47. In **Cellular operators Association of India Vs. UOI** reported in **AIR 2003 SC 899**, the Apex Court in Paragraph No.21 has observed as under:

"we however, need not go into the aforementioned question in view of the order proposed to be passed by us, in our opinion the learned Tribunal failed to assign sufficient or cogent reasons in support of its findings. In relation to some issues, no reason has been assigned. Some issues although noticed have not been adverted to. Some issues have even not be noticed. The impugned order of the TDSAT, does

not fulfil the criteria of a judgment."

48. On coming to the instant case on hand, the judgment of the trial Court contains only 8 lines. Mr.N.Jothi, learned counsel, in this regard, has argued that the decree of the trial Court is not a full fledged decree and therefore, the doctrine of res judicata would also not apply in this case in view of the order passed by the Supreme Court in S.L.P.No.31445 of 2012, which was preferred by the appellant / sixth defendant challenging the judgment passed in O.S.A.No.310 of 2010.

49. On this line, it is very much essential to make reference to the judgment passed in the suit in C.S.No.434 of 2007 as well as to the judgment passed in O.S.A.No.310 of 2010 which was filed by the appellant challenging the judgment of this Court passed in C.S.No.434 of 2007. It is also necessary to make reference to the order passed by the Apex Court in S.L.P.No.31445 of 2012.

50. The suit in C.S.No.434 of 2007 seems to have been filed by the appellant herein viz., Mr.L.Mohanam as against the first respondent and two others seeking a decree for declaration that the first defendant therein (Mohamed

Idris) had no redeemable right over the plaint schedule property and that he is the absolute owner of the suit property and also for cancelling the *ex parte* decree dated 14.06.2006 and made in the suit in O.S.No.9869 of 1990 on the file of the learned VII Judge, City Civil Court, Chennai and also for permanent injunction. In the said suit, the third issue is very much relevant which reads thus:

"3.Whether the plaintiff is entitled to the relief of cancellation of ex parte decree dated 14.06.2006 passed in the suit in O.S.No.9869 of 1990 by the VII Assistant City Civil Judge, Chennai, since the same was obtained by alleged misrepresentation on the part of the 1st defendant herein?"

While answering this third issue along with the fourth issue therein, a learned single Judge of this Court has observed as under:

"Therefore, on a mere allegation that the ex parte decree has been passed on a misrepresentation made by the 1st defendant, the lawful decree passed by the trial Court in O.S.No.9869/90 cannot be set aside or cancelled."

51. The suit in C.S.No.434 of 2007 filed by the

appellant herein was dismissed. Challenging the judgment and decree dated 26.07.2010 and made in C.S.No.434 of 2007, the appellant herein had preferred an appeal in O.S.No.310 of 2010. A Division Bench of this Court, while dismissing the appeal has observed in Paragraph No.28 of the judgment as under:

"In this case, we have seen supra that the details of misrepresentation or fraud have not been set out by the appellant/plaintiff in his pleadings and that even the projected misrepresentation or fraud has not been substantiated by reliable evidence. Under such circumstances, the party who suffered such a judgment or decree or order cannot be allowed to multiply the proceedings by filing a separate suit for cancellation of or setting aside such judgment, decree or order claiming the same to be wrong or erroneous. In such cases, the course open to the judgment debtor is to challenge the decree in the very same proceedings either by filing an application to set aside the decree if it is an exparte decree or by filing a review application to review the judgment based on which the decree was granted or file an appeal in the appellate forum or a revision before the competent forum to entertain revision against such decree or order as the case may be. The appellant/plaintiff has not chosen to adopt any one of the above said methods to challenge the

exparte decree dated 14.06.2006 made in O.S.No.9869 of 1990 by the VII Assistant Judge, City Civil Court, Chennai."

In Paragraph No.31 of the judgment, the Division Bench has also observed that:

"31. A meek attempt was also made on the side of the appellant herein/plaintiff by contending that the judgement is a non-speaking judgment and it simply says that on perusal of the evidence, the court was satisfied that the plaintiff's case was proved and that hence the suit was decreed as prayed for. Such a plea is also not available to be raised in a separate suit, thereby converting the separate suit into virtually an appeal against the judgement in the other case. If at all the appellant herein was aggrieved by the manner in which the judgement was pronounced and the decree was passed in the former suit, he ought to have filed an appeal against the decree passed in the said suit. But the appellant herein/plaintiff has not chosen to do so. Even an ex parte decree will constitute res judicata and bar a fresh suit. Therefore, the belated attempt made to challenge the judgement and decree in the former suit by fixing a separate suit is neither maintainable nor sustainable."

52. The judgment of the Division Bench dated

24.06.2011 and made in O.S.A.No.310 of 2010 was challenged before the Supreme Court in S.L.P.No.31445 of 2012. When the Special Leave Petition came up for hearing before the Apex Court on 13.12.2013, the learned counsel for the petitioner viz., the appellant herein had sought the leave to withdraw the Special Leave Petition reserving liberty for the petitioner to raise all question open to him in the appeal already preferred by him before the High Court. Accordingly, the Special Leave Petition was dismissed as withdrawn with as liberty prayed for subject to all just exceptions.

53. Keeping in view of the above fact as well as the specific order passed by the Supreme Court in S.L.P.No.31445 of 2012 dated 13.12.2013, the question of res judicata insofar as this case is concerned does not arise.

54. This Court takes the risk of repetition in making reference to the judgment of the trial Court dated 14.06.2006 and made in O.S.No.9869 of 1990. From the preamble portion it appears that when the suit came up for final disposal, the learned counsels for the second plaintiff and the sixth defendant, who is the appellant

herein were present. The defendants 1 and 2, who are the respondents 3 and 4 herein remained absent and therefore, they were made *ex parte*. The appellant's counsel had admitted that the appellant (sixth defendant) had not paid the cost imposed by this Court in C.R.P (PD) No.54 of 2005 and therefore the defence had been struck off and the memo filed by him was also rejected. Under this circumstance, the judgment, which is impugned herein, came to be passed.

55. In the judgment portion, which contains only 8 lines as stated in the earlier paragraphs, it is stated that: the plaintiff and the sixth defendant counsels are present. The six defendant's counsel is admitting that he has not paid the cost imposed by the Hon'ble High Court in C.R.P (PD) No.54 of 2005. Hence, the sixth defendant's defence plea has to be struck off. The memo filed on behalf of sixth defendant is rejected. Hence, as the 6th defendant's defence struck off as per the High Court order. Records perused. PW1 already examined. Documents marked. Plaintiff's side heard. Suit is decreed as prayed for with costs. Two months time.

56. In relation to *ex parte* decree, the civil courts

in Tamil Nadu following a common format in writing the judgment in two lines:

"Perused the record and the evidence of PW1. Claim proved. The suit is decreed as prayed for with costs."

57.Hon'ble Mr.Justice M.Y.Iqbal, Chief Justice of Madras High Court, as he then was, while penning an article under the caption of "*Ex parte Decree and Duty of Court*", which is published in 2011 (3) CTC 67, in the journal section has stated as under:-

"This is how the subordinate judges of the State of Tamil Nadu pass orders/decrees in the suit ex parte."

His Lordship has also made reference to the observation made by Sir Lawrence Jenkins about a century before in *Deonandan v. Janki Singh* [1916 (44) Cal. 573]. Sir Lawrence Jenkins has observed as under:

"The fundamental principle of law is that the plaintiff when he comes to Court must prove his case and he must prove it to the satisfaction of the Court, his burden not lightened because the defendant is absent. On the other hand, the responsibility increases."

His Lordship has also made reference to the observation of Lord Macnaghten as under:

"When the matter is heard ex parte in absence of contestant defendant, who is not represented, it is the duty of the counsel to bring to the notice of the Court adverse as well as favourable authorities.[81 IC 867]"

"Great caution should be exercised when suits are heard ex parte. This principle is of universal application." [1871 (8) BLR 44]

58. As aforestated and in view of the order passed by the Supreme Court in S.L.P.No.31445 of 2012 dated 13.12.2014, the appellant/sixth defendant had preferred the appeal in A.S.No.189 of 2012 before the V Additional Judge, City Civil Court, Chennai and hence the lis is still in subsistence before this Court. The Apex Court in **Swarnan Latta Ghosh V. H.K.Banerjee** reported in **AIR 1969 1 SCC 709** has thus observed:

"6. Trial of a civil dispute in court is intended to achieve, according to law and the procedure of the court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the

dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial, the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest: it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the court has decided against him, and more so, when the judgment is subject to appeal. The appellate court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just."

59. As observed in the decision cited supra, it is unfortunate to state that the learned trial Judge as well

as the learned first appellate Court Judge have recorded no reasons in support of their conclusions.

60. The Calcutta High Court in ***Monmatha Kumar Ray Vs. Josada Lal Podder and Others*** reported in ***AIR 1924 Calcutta 647*** has observed that proof of plaintiff's title to decree must be given for even ex parte decree.

61. Even if a case is heard ex parte it is the duty of the Court to consider the interest of the absent party and not to pass a decree except on proof by the plaintiff that he is entitled to that decree. The same ratio is laid down in the following decisions:

1. Bhujangrao Vs. Baliram reported in AIR 1928 Nagpur 165;
2. Sheonarayan Harlal Maheshwari Vs. Kanhaiyalal Devidin reported in AIR (35) 1948 Nagpur 168;
3. C.N.Ramappa Gowda Vs. C.C.Chandregowda Reported in (2012) 5 SCC 265;
4. Chitrakala Vs. P.Mahesh and Others reported in 2013 (4) CTC 545;
5. C.N.Ramappa Gowda Vs. C.C.Chandregowda (Dead by Lrs) and another reported in 2013 (4) CTC 865.
6. S.Arul Dhas Vs. F.Hubert and another reported in 2015-3-L.W.241

7. G.Selvam and others Vs.Kasthuri and Others reported in 2015 (4) CTC 673.

62. Mr.N.Jothy has further contended that the defence filed by the appellant/sixth defendant should not be struck off for non-payment of costs in the appellate stage as the appellant/sixth defendant is the bonafide purchaser of the property in question for valuable consideration. While advancing his argument he has also invited the attention of this Court to the decision of the Division Bench of the Apex Court made in **Manohar Singh Vs. D.S.Sharma and Ors.** reported in **AIR 2010 Supreme Court 508**. In this case Hon'ble Justice R.V.Raveendran while penning down the judgment on behalf of a Division Bench in Paragraph Nos.5 and 6 has observed thus:

"5.... Section 35B provides that if costs are levied on the plaintiff for causing delay, payment of such costs on the next hearing date, shall be a condition precedent to the further prosecution of the suit by the plaintiff. Similarly, if costs are levied on the defendant for causing delay, payment of such costs on the next date of hearing, shall be a condition precedent to the further prosecution of the defence of the suit by the defendant. This takes us to the meaning of the words "further prosecution of the suit" and "further prosecution of the defence". If the

Legislature intended that the suit should be dismissed in the event of non-payment of costs by plaintiff, or that the defence should be struck off and suit should be decreed in the event of non-payment of costs by the defendant, the Legislature would have said so. On the other hand, Legislature stated in the rule that payment of costs on the next date shall be a condition precedent to the further prosecution of the suit by plaintiff (where the plaintiff was ordered to pay such costs), and a condition precedent to the further prosecution of the defence by the defendant (where the defendant was ordered to pay such costs). This would mean that if the costs levied were not paid by the party on whom it is levied, such defaulting party is prohibited from any further participation in the suit. In other words, he ceases to have any further right to participate in the suit and he will not be permitted to let in any further evidence or address arguments. The other party will of course be permitted to place his evidence and address arguments, and the court will then decide the matter in accordance with law. We therefore reject the contention of the respondents that section 35B contemplates or requires dismissal of the suit as an automatic consequence of non-payment of costs by plaintiff.

6. We may also refer to an incidental issue. When section 35B states that payment of such costs on the date next following the date of the order shall be a condition precedent for further

prosecution, it clearly indicates that when the costs are levied, it should be paid on the next date of hearing and if it is not paid, the consequences mentioned therein shall follow. But the said provision will not come in the way of the court, in its discretion extending the time for such payment, in exercise of its general power to extend time under section 148 of CPC. Having regard to the scheme and object of section 35B, it is needless to say that such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms. No party can routinely be given extension of time for payment of costs, having regard to the fact that such costs under section 35B were itself levied for causing delay."

63. Similar view has also been taken by the Punjab and Haryana High Court in **Roor Singh V. Raghbir Singh and Other** reported in **2003 AIHC 523**. In this case, a question with regard to permissibility of striking of the defence for non-payment of costs was arisen before a learned single Judge of Punjab and Haryana High Court. While dealing with this question, the learned Judge in Paragraph No.4 and 5 has observed as under:

"4. *Shri Paramjit Kalia, learned counsel for the defendant-respondent has argued that the principle of waiver as enunciated by the Full Bench in Prem Sagar's case (supra) would be attracted because it*

is admitted by the plaintiff-petitioner in his application that the issue with regard to non-payment of costs was raised on 1.2.2000. The result of such averment would be that it would be deemed that on 17.1.2000 and 27.1.2000 the issue of non payment of costs was not raised. Once the opportunity of raising issue of non payment of costs is lost on the date following the date of hearing the rigour of Section 35B of the Code is taken away.

5. Having heard the learned counsel for the parties, I am of the considered opinion that the view taken by the Civil Judge does not suffer from any illegality warranting interference of this Court under Section 115 of the Code. The judgment in the case of Prem Sagar (supra) is absolutely clear in as much as it is observed that if the issue of non payment of costs is not raised the same cannot be resuscitated. Moreover, the subsequent view taken by this Court in Sher Singh and Ors. v. Mehma and Anr. (1993-1)103 P.L.R. 751 is that the objection of Section 35B of the Code is to secure efficacious, prosecution of the suit and not to penalise the party against whom the costs have been awarded. Therefore, the principles of waiver would apply to this case. Similar view has been taken by this Court in the case of Pitshpa v. Kundan Lal, (1994-1)106 P.L.R. 717."

64. As indicated by Mr.N. Jothy, learned counsel for the appellant/sixth defendant out of the cost of Rs.5,000/-

Rs.2,500/- shall be paid to the Tamil Nadu Mediation and Conciliation Centre, High Court, Madras within four weeks time from the date of order. Insofar as the remaining portion of Rs.2500/- is concerned no time limit is given by this Court. A plain reading of the provision, namely Section 35-B merely shows that the adjournment should be granted on a condition that the costs were to be paid on the next date, if no such condition is imposed by the Court, such condition cannot be read in the order itself. Therefore the order of the trial Court that failure of the defendant to make payment of cost in question disable him from prosecuting the defence any further cannot be sustained. The appellant / sixth defendant could participate in the further prosecution of the suit, but the order shall not specifically say that the defence filed by the appellant/sixth defendant will be struck off as he has failed to pay the cost imposed by this Court.

65.It is obvious to note here that the provisions of Section 35-B do not debar the defendant from prosecuting the case for ever as the defence is not struck off, but is merely suspended. The following two views assume importance. The first one is that the non-payment of cost could only result in not permitting the appellant to

participate in further prosecution of the case. But, it could not result in the striking of the defence or the dismissal of the suit. Secondly if the costs are to be paid by the next date, that condition has to be recorded in the order itself.

66. As aforesaid, insofar as the first portion of the cost of Rs.2500/- is concerned, no condition is specified by this Court. However, the ultimate discretion is vested with the Court under Section 148 of the Code of Civil Procedure to extend the time for payment of costs. The above ratio has also been applied in ***Prakash Narain Vs. Additional District Judge and Ors.*** reported in ***AIR 1981 Allahabad 120***. With reference to failure of defendant to pay costs under Section 35-B, a learned Judge of Allahabad of High Court has held that where the defence of the defendant was struck off by the Court on failure to pay costs for causing delay under Section 35-B, the order was improper, as the order in such a case could be that the defendant could not enter into his defence unless the costs were paid. The provisions of S.35-B do not debar the defendant from prosecuting the case for ever.

67. Another learned Judge of Orissa High Court in ***Sri Kasi Biswanath Dev V. Paramananda Routrai and others***

reported in **AIR 1982 Orissa 80** has observed that Section 35-B is admittedly a procedural provision. Undoubtedly, it was introduced into the statute with a view to controlling the conduct of parties in litigations. The language of S.35-B indicates that it is directory. If, the provisions is taken to the mandatory it will take away the court's right to exercise its direction in the interest of justice. The cause of justice is paramount and a procedural law cannot be raised to the pedestal of being such a mandatory provision as would take away the court's right in a given case to exercise its discretion in the interest of justice.

68. The Karnataka High Court in *Thambuswamy Vs. Special Land Acquisition Officer, Bangalore* reported in AIR 1983 Karnataka 203 has held that:

"6.....The language of Section 35-B neither suggests explicitly nor by way of implication, a command to the Court, that the Court shall not grant further adjournment at the request of such party in whose favour it has once exercised its discretion to grant adjournment on payment of costs, notwithstanding the facts that he had complied with the order of payment of costs in terms of the said section. To hold otherwise and read into the section, the view taken by the learned City Civil Judge while refusing to grant further adjournment at the

request of the 1st claimant under the impugned order, would lead to far-reaching consequences and result in failure of justice. The learned City Civil Judge, in my view, has wholly misconstrued the true scope and ambit of Section 35-B, C. P. C."

A similar ratio has also been applied by the Delhi High Court in ***Black Diamond Glassware P. Ltd., Vs. Kusumlata Gupta and others*** reported in ***AIR 2004 Delhi 88***.

69. This Court has carefully gone through the judgments of the Courts below as well as the grounds of second appeal. It is to be remembered that in Paragraph No.26 this Court has formulated four substantial questions of law based on the grounds raised in the memorandum of appeal. Since this Court has decided to remit the suit back to the file of the trial Court for fresh disposal, on merits and in accordance with law, the substantial questions of law 1 and 2 are left to the domain of the trial Court to answer. Insofar as the substantial questions of law 3 is concerned, this Court has answered that the trial Court has rendered the judgment entirely contrary to the provisions of Order 14 Rule 2(1) of CPC without discussing any issue independently. Insofar as

the substantial questions of law No.4 is concerned, this Court is of view that the Courts below have not written the judgments in accordance with the provisions of Order XX Rule 5 of the Code of Civil Procedure. Accordingly, the substantial questions of law 3 and 4 are answered while the substantial questions of law 1 and 2 are left to the domain of the trial Court to be answered.

70. Having regard to the relevant facts and circumstances, narrated above, this Court finds that in the interest of justice, the judgment of the trial Court which contains only 8 lines is not in consonance with the provisions of Order XX Rule 4(2) and 5 of the Code of Civil Procedure. The non-payment of cost within the specified period does not entitle dismissal of suit. As observed by the Apex Court in **Manohar Singh Vs. D.S.Sharma and Ors**, cited supra, if costs are levied on the plaintiff for causing delay under Section 35-B, payment of such costs on the next hearing date shall be a condition precedent to the further prosecution of the suit by the plaintiff. Similarly, if costs are levied on the defendant for causing delay, payment of such costs on the next date of hearing, shall be a condition precedent to the further prosecution of the defence of the suit by the defendant.

71. Insofar as this case is concerned, the Doctrine of Waiver of right could very well be applied. Placing reliance upon the Full Bench decision of the High Court of Punjab and Haryana made in Anand Parkash's case (**AIR 1981 Punj & Har 269**) and **Prem Sagar and Ors Vs. Phul Chand and Ors.** reported in **AIR 1983 PH 385**, this Court is also of view that where the party entitled to cost awarded by the Court fails to raise objection as to non-compliance on the date fixed for such payment, it will not be open to the party to re-open the issue of their will on subsequent date and seeking barring of further prosecution or defence under Section 35-B as the implied waiver of the right would arise.

72. Keeping in view of this fact, this Court is of considered view that the second appeal is deserved to be allowed and the judgment and decree dated 03.04.2014 and made in A.S.No.189 of 2012 on the file of the V Additional Judge, City Civil Court, Chennai and the judgment and decree dated 14.06.2006 and made in the suit in O.S.No.9869 of 1990 (POP No.324 of 1986) on the file of the VII Additional Judge, City Civil Court are liable to be set aside.

73. It is significant to note here that this Court while disposing the Civil Revision Petition in C.R.P. (PD) No.54 of 2005 on 12.04.2006. had directed the appellant/six defendant to pay a sum of Rs.5,000/- towards exemplary cost, out of which a sum of Rs.2500/- shall have to be paid by the appellant/sixth defendant to the Tamil Nadu Mediation and Conciliation Centre functioning within the campus of High Court, Madras.

74. Admittedly, the said order has not been complied with. Under this circumstance, the appellant/sixth defendant has come forward with a petition in C.M.P.No.2569 of 2016 under Section 148 r/w. Section 151 of the Code of Civil Procedure to enlarge the time to deposit the cost as directed by this Court by its order dated 12.04.2006 in C.R.P (PD) No.54 of 2005. Section 35-B of the Code of Civil Procedure does not come in the way of the Court in its discretion to extend the time for such payment in exercise of its general power to extend time under Section 148 of the Code of Civil Procedure. Having regard the scheme and object of Section 35-B such extension however can only be given in exceptional circumstances and by subjecting the defaulting party to further terms. Similarly, the Court has

also power to grant adjournments under Order XVII Rule 1 of CPC. The provisions of Code thus clearly demonstrate that under the scheme of Code of Civil Procedure, a suit cannot be dismissed for non-payment of costs. This principle is laid down by the Apex Court in ***Manohar Singh Vs. D.S.Sharma and Ors.*** reported in ***AIR 2010 Supreme Court 508.***

75. Considering this aspect as well as the circumstances narrated in the affidavit filed in support of the petition in C.M.P.No.2569 of 2016, the Civil Miscellaneous Petition is allowed and the time for depositing the cost is enlarged and the exemplary cost of Rs.5000/- (Rupees Five Thousand Only) has also been enhanced to Rs.25,000/- (Rupees Twenty Five Thousand only), out of which a sum of Rs.10,000/- (Rupees Ten Thousand only) shall be paid to the Tamil Naud Mediation and Conciliation Centre, High Court, Madras, within a period of four weeks from the date of receipt of a copy of this order and the remaining amount i.e., Rs.15,000/- (Rupees Fifteen Thousand only) shall be paid to the first respondent herein, namely Mohamed Idris.

In the result, the second appeal is allowed and the suit in O.S.No.9869 of 1990 is remitted back to the trial

Court with a direction to dispose of the same on merits and in accordance with law within the stipulated period of 4 months from the date of receipt of a copy of this order without being influenced by the observation made in this judgment. No costs. Consequently the connected miscellaneous petitions are closed.

05.04.2016

Index: yes/no
Internet: yes/no

gpa

To

- 1) V Additional Judge
City Civil Court,
Chennai
- 2) VII Asst.Judge,
City Civil Court,
Chennai

T.MATHIVANAN.J. ,

gpa

S.A.No.848 of 2014 & M.P.No.1 of 2014 &
C.M.P.Nos.702, 1065 & 2569 of 2016

05.04.2016

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