

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.11.2017

CORAM

THE HON'BLE MR. JUSTICE **D. KRISHNAKUMAR**

CRP.(PD).No.4199 of 2017

and

CMP.No.19697 of 2017

K.Babu

..Petitioner

Vs.

1.K.Raji

2.S.Vijaya

3.S.Karthick

4.S.Divya Shanmugam

5.S.Durai

..Respondents

PRAYER:

The Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the order and decree dated 31.10.2017 made in I.A.No.150 of 2017 in O.S.No.2357 of 2017 on the file of XVI Additional City Civil Judge, Chennai and allow this Civil Revision Petition.

For petitioner : Mr.R.Natarajan

ORDER

According to the petitioner, the respondents have filed a suit in OS.No.2357 of 2017 for partition and separate possession against the revision petitioner. In the aforesaid suit, the revision petitioner has filed an application in IA.No.150 of 2017 under Order VII Rule 11 (d) of the Civil Procedure Code to reject the plaint. According to the revision petitioner, the respondents have already filed a suit in OS.No.3195 of 2015 for mandatory injunction. The aforesaid suit was dismissed for default. Without obtaining any leave of the court, filing the present suit is not maintainable. Therefore, Order II Rule 2 of the Civil Procedure Code would attract the present case. Hence, the order of the court below is liable to be set aside.

2. The learned counsel for the petitioner further submitted that Order II Rule 2 would squarely apply to the facts of the case. Therefore, the court below has failed to consider the same and erroneously dismissed the said application.

3. On perusal of the order passed by the court below, the trial court has considered the facts of the case by stating that

the present suit has been filed by the respondents for partition and separate possession, whereas the former suit was filed for permanent injunction and mandatory injunction on the ground of encroachment by the revision petitioner. Therefore, the dispute whether Order II Rule 2 of the Civil Procedure Code would attract would be considered at the time of trial. At this stage, the application filed by the petitioner cannot be considered and the court below has rightly rejected the contention of the petitioner. The decision of the Hon'ble Supreme Court in the case of **Om Prakash Srivastava Vs. Union of India and Anr.** reported in **2006 (6) SCC 207**, in which it was held that *"by "cause of action" it is meant every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, a bundle of facts, which is necessary for the plaintiff to prove in order to succeed in the suit"* and the decision of the Karnataka High Court in the case of **Chinnappa Corporation of the City (AR 2005 Karnataka 70)**, wherein it has been held that *"It is not mandatory that the suit for injunction should conjunctively go with the relief of Declaration of title".* Order II Rule 2 of the Civil Procedure Code is based on the principle that the Defendants should not be twice vexed for one the same cause. But in the present scenario, the cause of the former suit is

not same as that of the present suit and also the parties against whom the right were claimed also differs which itself proves that the present suit is not barred under Order II Rule 2 of the Civil Procedure Code".

4. The learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court in the case of **Virgo Industries Eng. Ltd. Vs. Ventured solution Pvt. Ltd** reported in **2012 (5) CTC 359**, wherein it has been held that

"Cause of Action" has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance

founding the action, not merely the technical cause of action".

5. In the light of the above Judgment, it was considered under Order II Rule 2 and held that the suit is barred under Order II Rule 2. But, it has not been considered under order 7 Rule 11. However, relying upon the Judgment reported in **(2014) 6 SCC 424** and other Judgments of this Court as well as the Hon'ble Supreme Court, the learned counsel for the petitioner would fairly submit that the said fact is a mixed fact and therefore, it can be decided at later stage in the aforesaid suit. Further, the learned counsel for the petitioner requested this Court any observations in this Order that observations made in this order will not be influenced by the trial court at the time of deciding the issue in the said suit.

6. In view of the submissions made by the learned counsel for the petitioner, it is made clear that the aforesaid issue involved in the present application is a mixed fact and the same shall be considered at the time of trial after framing issues. Further, it is made clear that any observations made in the order would not influence at the time of trial in the suit.

7. In the view of the above, the Civil Revision Petition fails and accordingly, the Civil Revision Petition is dismissed. Consequently, the connected miscellaneous petition is closed. No costs.

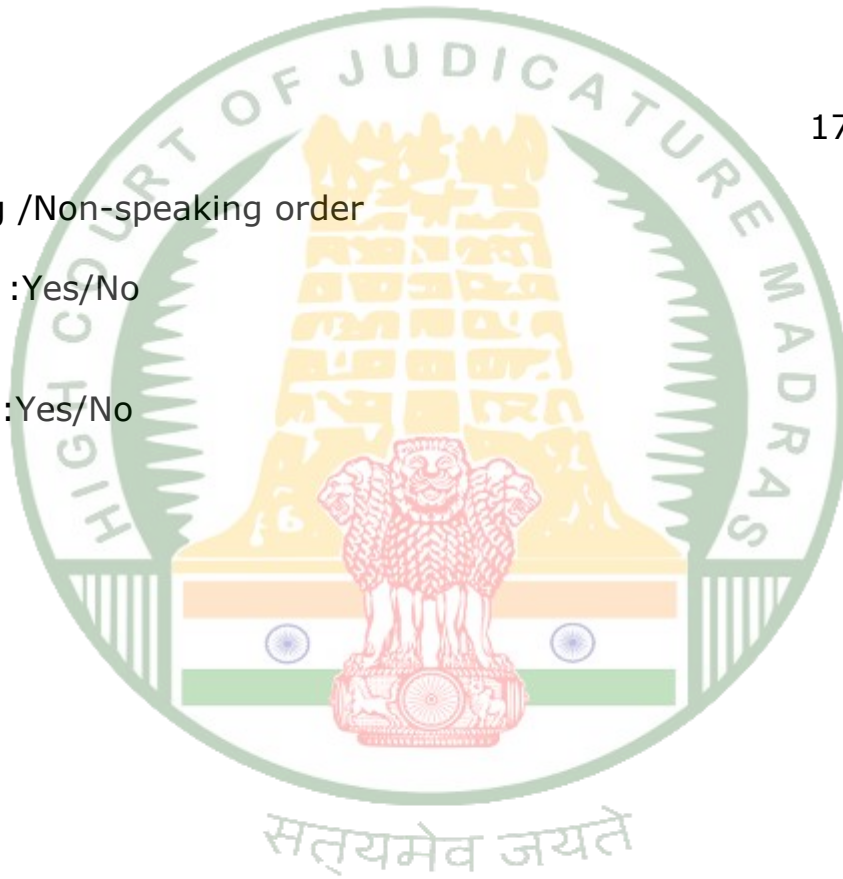
17.11.2017

Speaking /Non-speaking order

Index :Yes/No

Internet :Yes/No

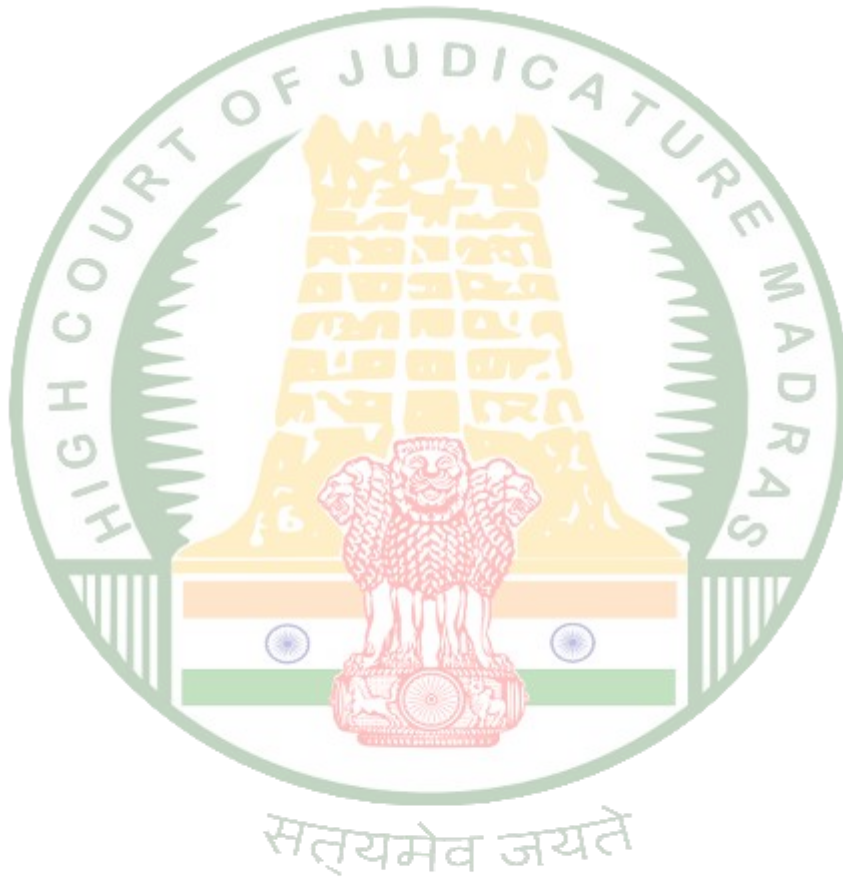
lok



WEB COPY

To

The XVI Additional Judge,
City Civil Court,
Chennai.



WEB COPY

D.KRISHNAKUMAR. J,

lok



CRP.(PD).No.4199 of 2017
and
CMP.No.19697 of 2017

WEB COPY

17.11.2017