

IN THE HIGH COURT OF JUDICATURE AT MADRAS**Dated: 12.07.2017****CORAM****THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN****CRP(NPD)No.2415 of 2012****and****M.P.No.1 of 2012**

Canara Bank
Represented by its Manager,
Ghetticheviyur Branch,
145 Gobi – Dharapuram Road,
Ghetticheviyur,
Gobichettipalayam Taluk,
Erode District – 638 110.

.. Petitioner

Vs.

1.G.K.Subramaniam
Proprietor M/s.Gomathi Oil Mills

2.R.Duraisamy

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the Order dated 02.08.2011, passed in E.A.No.30 of 2008 in E.P.No.4 of 2007, dated 02.08.2011, on the file of the Additional District Court (Fast Track Court-II), Gobichettipalayam.

For Petitioner : Mr.T.C.A.Srinivasan

For Respondents : Mr.N.Ishtiaq Ahmed (for R1)
Mr.R.T.Doraisamy (for R2)

ORDER

The decree holder in E.P.No.4 of 2007 is the Civil Revision Petitioner before this Court, challenging the order passed in E.A.No.30 of 2008 in E.P.No.4 of 2007 in O.S.No.7 of 2002, dated 02.08.2011, on the file of the learned Additional District Court (Fast Track Court No.II), Gobichettipalayami.

2.The petitioner is the Canara Bank, Ghetticheviyur Branch representing by its Branch Manager. It is the case of the petitioner that the Bank has filed the Civil Suit against the respondents/defendants for recovery of amount of Rs.6,22,074/- with cost and interest at the rate of 16.25% per annum and the preliminary decree was passed on 24.07.2002 and final decree was passed on 30.07.2004. But, the respondents/defendants have not filed any appeal against the judgment and decree passed in O.S.No.7 of 2002. After the decree, the petitioner has filed the Execution Petition in

E.P.No.4 of 2007 before the learned Additional District Judge (Fast Track Court-II), Gobichettipalayam for executing the decree and later the property belongs to the judgment debtor was attached along to the respondents/defendants and the same was public auctioned. Thereafter, the petitioner/bank has filed a petition in E.A.No.30 of 2008 for setting aside the auction sale held on 13.11.2008, filed under Order 21 Rule 90 and Section 151 of C.P.C.

3.In the petition, the petitioner/bank has alleged that the bank has filed the Execution Petition for sale to execute the decree passed in O.S.No.7 of 2002, against the 1st respondent. Pursuant to that, the Court viz., the Additional District Judge, Fast Track Court-II, also brought the property for public auction sale and accordingly, the 2nd respondent is the highest bidder and taken the property in Item Nos.1 and 2 of the petition mentioned property at Rs.2,13,500/- and Rs.50,400/- respectively.

4.Therefore, the petitioner has filed an application by stating that there is a material irregularity and fraud committed in conducting the sale. The petitioner/bank also states that item No.1 of the property mentioned in the execution petition was mortgage property and item

No.2 of the property mentioned in the execution petition was property was attached by the Court as per the judgment in I.A.No.652 of 2001 in O.S.No.346 of 2000, on the file of the Principal Sub-Court, Gobichettipalayam, when the suit is pending before the Court.

5.The petitioner also states that in Plot Nos.1 and 2 in Item No.2 properties mentioned in the execution petition were mentioned as item No.1 and 2 in the attachment petition in I.A.No.652 of 2001. The petitioner who is the decree holder has valued the said property at Rs.1,00,000/- and Rs.50,000/- respectively in the said attachment petition. The Court Amin, who attached that property on 27.08.2001 was valued the properties as Rs.2,00,000/- and Rs.1,00,000/- respectively. The petitioner also states that in the counter affidavit filed by the 1st respondent/Judgment debtor in EPR.No.4 of 2007 on 09.09.2008 stated that the value of the Item No.1 of the properties mentioned in the execution petition (mortgaged properties) as Rs.5,00,000/- and item No.2 of the properties mentioned in the execution petition (item No.1 and 2 in the attachment petition) as Rs.3,00,000/-. But, the Executing Court fixed the upset price for item No.1 of the properties mentioned in the execution petition as Rs.1,25,000/- and item No.2 of the property mentioned in the

execution petition which contain two plots as Rs.50,000/- which is very very low on the following grounds for **Item No.2:**

“(a) Plot (1) in item No.2 land measuring 0.39.5 Hec. (0.97 ½ acre) in New S.F.No.317/2 Shanthipalayam village was valued by the petitioner/decreed holder as Rs.1,00,000/- as on 20.07.2001.

(b) Plot (1) in item No.2 was valued by the amin on 27.08.2001 as Rs.2,00,000/-.

(c) Plot 2 in item No.2 house property was valued by the petitioner/decreed holder as Rs.50,000/- as on 20.07.2001.

(d) Plot 2 in item No.2 house property was valued by the amin on 27.08.2001 as Rs.1,00,000/-.

(e) 1st respondent/judgment debtor in his counter statement in E.P.No.4/2007 filed on 09.09.2008 stated that value of item No.2 (which includes plot 1 and 2 as Rs.3,00,000/-.

(f) court fixed the upset price for item No.2 (which includes plot 1 and 2 as Rs.50,000/-.

(g) court has not fixed upset price for plot 1 and 2 separately

For item No.1.

(a) It is a mortgaged property measuring 0.31.0 Hec. (0.76 acre) in New S.F.No.317 and 0.63.0 Hec. (1.56 acres) in 4 plots in New S.F.No.316 of Shanthipalayam village, which are adjoining plot (1) of item No.2.

(b) Plot 1 of item No.2 was valued by the petitioner/decree holder as Rs.1,00,000/- as on 20.07.2001 and by Court amin as Rs.2,00,000/- as on 27.08.2001 and by 1st respondent/J.D. as Rs.3,00,000/- (for plot 1 and 2 for item No.2) as on 09.09.2008.

(c) Therefore value for 0.92 ½ acre (plot (1) in item No.(2) as per petitioner/D.H. is Rs.1,00,000/- and as per court amin is Rs.2,00,000/- and as per 1st respondent/J.D. is Rs.2,00,000/-. Therefore value for 2.32 acres (item No.1) as per petitioner/D.H., comes Rs.2,26,200/- as on 20.07.2001 as per court amin comes as Rs.4,52,400/- as on 27.08.2001 and as per 1st respondent/J.D. comes as Rs.4,52,400/- as on 09.09.2008.

(d) Court has fixed upset price for item No.1 as Rs.1,25,000/-.

(e) Seven years were over from the date of valuation

fixed by the petitioner as well as court amin. Therefore upset price fixed by the Hon'ble court is very very low."

6.The petitioner also states that the Court fixed the upset price for Item No.1 as Rs.1,25,000/- and seven years were over from the date of valuation fixed by the petitioner as well as Court amin. Therefore, the upset price fixed by the Court is very very low.

7.Apart from that, the petitioner also raised the grounds stating that the 2nd respondent / Court auction purchaser is close relative of the 1st respondent/ judgment debtor. In fact, the petitioner also states that the 2nd respondent is the brother-in-law of the 1st respondent/ judgment debtor. The respondents 1 and 2 colluded together and committed fraud on the Court and took item Nos.1 and 2 of the petition mentioned properties for Rs.2,13,500/- and Rs.50,400/- respectively which are very low price and which are insufficient to satisfy the decree amount which comes more than 17,00,000/-, which is a substantial injury caused to the petitioner bank.

8.The petitioner also raising the grounds saying that the judgment debtor's value was not mentioned in the sale proclamation.

The sale proclamation was not published by affixing in the office of the District Collector and Grama Panchayat within the jurisdiction of the properties are situated. The petitioner also states that due to the above said reasons, there is a material irregularity and fraud committed in conducting the sale which is substantial injury caused to the petitioner bank and therefore, the petitioner/bank has prayed the Executing Court to set aside the auction sale dated 13.11.2008.

9. On receipt of the notice in E.A.No.30 of 2008, the respondents 1 and 2 were filed their counter respectively. It is the case of the 1st respondent that there is no irregularity or fraud in publishing or conducting the sale. The 1st respondent also states that the proclamation of the sale had been published as per rules by affixing a copy of the proclamation in the land, by Tom Tom in the village and affixing copies in the Court notice Board in the Panchayat Office and Revenue Divisional Office.

10. The 1st respondent also states that the upset price had been fixed by the Court after taking into account the value given by the petitioner/decree holder, the value fixed by the Court Amin. The upset price had been fixed above the value given by the petitioner himself.

The petitioner / bank cannot say that the price is low now, he estopped by his own conduct. The 1st respondent also states that there is no collusion between the respondent and the Auction purchaser. Since there are number of person, who are taken part in the bidding and the sale price is more than the fixed price. This also would prove proper publication. The petitioner affidavit does not alleged any other irregularity except the auction of low fixed price. Therefore, the 1st respondent prays for dismissal of E.A.No.30 of 2008.

11.The 2nd respondent in his counter states that the Court auction sale has been properly advertised. The 2nd respondent also states that the Court has applied its mind and had fixed the upset price in sale proclamation at a higher value than the value stated by the decree holder. The Court had ascertained the value through the Court Amin before fixing the upset price.

12.The 2nd respondent also states that as per the rules the auction sale had been advertised by affixing a copy of the proclamation of the property by beat of Tom Tom in the village and affixing a copy of the proclamation in the Panchayat Office, office of the Revenue Divisional officer and the Court notice board.

13.The petitioner/deGREE holder has consented for fixing the upset price in the sale proclamation. If the price is low the petitioner ought to have objected before the sale proclamation with publication. But, he had not done so and hence, the petitioner is estopped from contending the sale price is low.

14.It is the further case of the 2nd respondent/auction purchaser is that the petitioner had induced the Court to fix the low upset price. Therefore, the petitioner cannot be allowed to take advantage of his own fraud and seek the relief on the ground that there is material irregularity in publishing the sale. The petitioner also not pleading any specific charge in conducting the sale. The petition filed by the petitioner/bank is not a bonafide one and the petition has no merits and he prayed the Executing Court for dismissal of the petition.

15.Considering both side arguments, the learned Additional District Judge (Fast Track Court-II), Gobichettipalayam, dismissed the application in E.A.No.30 of 2008, dated 02.08.2011, on the ground that though the petitioner/bank was examined as PW1 and marked documents as Exhibits 1 to 6. There is no evidence and documents

given by the respondents.

16. Though the petitioner/bank has filed the suit in O.S.No.7 of 2002 and obtained decree in favour of the petitioner/bank. Pursuant to the decree of the case, the petition in E.P.No.4 of 2007 was filed to bought the mortgaged property for public auction sale. The learned Judge also states that the petitioner/bank has obtained the decree and attached the property. Both the properties viz., the attached property by the Court as well as the mortgaged property for the auction sale. Accordingly, the petitioner has fixed the price for item No.1 of the properties mentioned in the execution petition at Rs.1,00,000/- and item No.2 of the property mentioned in the execution petition at Rs.50,000/-, whereas the Amin has given the price at Rs.1,75,000/- and accordingly the auction sale deed was fixed by the Executing Court on 10.07.2007 and thereafter, the Court has fixed the auction sale.

17. The learned Judge also states that when the Court has fixed the sale price, the petitioner/bank has not making any objection and the petitioner/bank also not given any reason for non bidding for fixing the price of the properties. Apart from this, the petitioner/bank has not produced any guideline value obtained from the local Sub-

Registrar office before the Court. The learned Judge also states that the auction sale was brought only by the petitioner/bank through the Court and then why the bank has not produced the persons for taking auction sale in the Court auction.

18.The learned Judge also states that in the Court auction held on 10.07.2007, there are four persons including the 2nd respondent were participated in the auction sale and the 2nd respondent/ the Court auction purchaser has taken the bid above the price fixed by the petitioner and the Court at Rs.2,13,500/- and Rs.50,400/- respectively. Therefore, the petitioner/bank without raising the objections that the property was brought on auction sale with a low price, the petitioner/bank has no right to file an application on later point of time for setting aside the auction sale under Order 21 Rule 90 and Section 151 of C.P.C. while petition is totally not maintainable. Therefore, there is no irregularity and fraud committed for fixing the market rate by the Court and the petitioner/bank has not produced any material document to show that the Court was conducted the auction sale at a low price.

19.I heard Mr.T.C.A.Shrinivasan, learned counsel appearing for

the petitioner and Mr.N.Ishtiaq Ahmed, learned counsel appearing for the 1st respondent and Mr.R.T.Doraisamy, learned counsel appearing for the 2nd respondent and perused all the materials available on record.

20.It is unfortunate case filed by the decree holder, who is the bank himself that pursuant to the decree and the Execution filed by the petitioner, the learned Additional District Judge (Fast Track Court No.II), Gobichettipalayam, by following the procedure has brought the property for public auction sale on 13.11.2008, and on that day the auction sale was taken place.

21.For the auction sale of the property in the public auction, the Court namely, the learned Additional District Judge (Fast Track Court-II), Gobichettipalayam, has issued the proclamation of sale and the same has been published as per rules by affixing a copy of the proclamation in the land, by Tom Tom in the village, and affixing copies in the Court notice board, in the office of the local Panchayat Office and the local Revenue Divisional Office.

22.In fact, the valuation of the property was given by the

petitioner himself as item No.1 at the rate of Rs.1,00,000/- and for the 2nd item at the rate of Rs.50,000/-. There is no dispute at all that the valuation has been given by this petitioner/deGREE holder himself. In fact, the Court Amin has fixed the valuation of both the properties at the rate of Rs.1,75,000/-. Thereafter, the public auction sale date was fixed on 10.07.2007. Then only the Court has fixed the valuation at the above rate, but at that time, this petitioner/deGREE holder has not raised any objection in both the fixation of the value of the property, since the property valuation was in high, whereas the Court has fixed with minimum value.

23.It is the case of the petitioner/deGREE holder that the 1st respondent/judgment debtor himself has mentioned in the counter that the value of the properties were given for item No.1 as Rs.5,00,000/- and item No.2 as Rs.3,00,000/-. Therefore, the petitioner has stated that the Court would have taken the valuation of the said property as mentioned by the 1st respondent/judgment debtor.

24.It is the case of the petitioner/bank that the 1st respondent/judgment debtor is liable to pay a sum of Rs.17,00,000/- whereas the

Court was brought the property in the public auction sale on 02.08.2011 at Rs.2,13,500/- for the 1st item of property and 2nd item of property was Rs.50,400/- and hence it is stated by the petitioner that it is low price fixed by the Court.

25.Apart from this, it is the case of the petitioner that the 1st respondent is colluded with the 2nd respondent, who is the auction purchaser and confirming the sale in favour of the 2nd respondent. The 1st respondent/judgment debtor has colluded and auctioned the property at the rate of Rs.2,13,500/- for 1st item and Rs.50,400/- for 2nd item.

26.It is the further case of the petitioner that at that time of auction sale conducted by the Executing Court, the 1st respondent/judgment debtor has not made any objection for the low price of auction in the property. Therefore, the petitioner has filed the above application by stating that there is a material irregularity and fraud committed in conducting the sale which is substantial injury caused to the petitioner/bank. Therefore, the Court auction sale dated 13.11.2008 is to be set aside.

27.The Order 21 Rule 90 of CPC stated as follows:

“90. Application to set aside sale on ground of irregularity or fraud.- (1) Where any immovable property has been sold in execution of a decree, the decree holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation.- The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule.]”

As per the provision Order 21 Rule 90 Clause 2 of CPC that no sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

28.If the auction sale was conducted as irregularity or fraud, then the sale can be set aside, but this ground has not been raised by the decree holder himself by stating that there was a fraud committed by the Court for conducting auction sale of property.

29.Since in this case, the petitioner is a decree holder and he is not a third party or judgment debtor alleged that there was a fraud or irregularity has been committed and conducted in the public auction sale, pursuant to the Execution Petition filed by this petitioner/decreed holder, the sale proclamation was issued. As per the provision under Order 21 Rule 66 of CPC stated as follows:

"66. Proclamation of sales by public auction.-

(1) Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause a proclamation of the intended sale to be made in the

language of such court.

(2) Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold, or, where a part of the property would be sufficient to satisfy the decree, such part;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property;

[Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment debtor by means of an Order under rule 54, it

shall not be necessary to give notice under this rule to the judgment debtor unless the court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties.]

(3) Every application for an Order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto."

30. On fair reading of the above provision under Order 21 Rule 66 Clause 2 of CPC says that if the proclamation has been issued by the Court for executing the decree, where any property is ordered to be sold by public auction in execution of a decree, the such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale, and specify as fairly and accurately as possible. In Order 21 Rule 66(2)(e), it was made clear that every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. Therefore, if the proclamation notice was issued by the petitioner/decreed holder or the judgment debtor, they shall have the right to make an objection about the valuation of the property.

31. In this case on hand, it is no dispute that the proclamation of sale by public notice was issued by the Executing Court and the notice was issued to this petitioner/decreed holder, but on the other hand, this petitioner/plaintiff have not made any objection for the valuation of the property. In fact, the Court himself has fixed the value of both the items of the property has given by the petitioner/plaintiff at the rate of Rs.1,50,000/- in item Nos.1 and 2 respectively, whereas the Court

Amin has given Rs.1,75,000/- for the value of both the properties. After issuing proclamation of the sale by public notice without making any objection, this petitioner cannot say that the Court has fixed the minimum value, when the property was valued in high and the petitioner/plaintiff have no right at all to file the petition for setting aside the auction sale dated 13.11.2008.

32. During the time of arguments, the learned counsel for the petitioner has produced judgment in a case of **Punjab National Bank, Dasuya, v. Chajju Ram and others** reported in **AIR 2000 Supreme Court 2671** in para-5 held as follows:

"The point in issue is no longer res integra After analysing the provisions of the Act, this Court in Allahabad Bank v. Canara Bank, (2000) 4 (SC) 411 held that the word 'proceeding' in Section 31 of the Act would include an execution proceeding pending before a Civil Court before the commencement of the Act. It was further held that, the suits and proceedings so pending would stand transferred to the Tribunal. This conclusion emanated from the fact that the definition of the word 'debt*' contained in Section 2(g) of the Act, inter alia, meant any liability which was due to a

bank and was payable under a decree or order of a Civil Court. The decretal amount, being a debt. as envisaged by Section 2(g) would clearly attract, the provisions of Sections 17 and 18 of the Act. which give exclusive jurisdiction to the Tribunals constituted thereunder to decide the questions regarding recovery of debts due to the banks and financial institutions. Section 31 which deals with transfer of cases reads as under :

"31. Transfer of pending cases. - (1) Every suit or other proceeding pending before any court . immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that, date to such Tribunal.

Provided that nothing in this sub-section shall apply to any appeal pending as aforesaid before any Court.

(2) Where any suit, or other proceeding stands transferred from any court to a Tribunal under sub-section (1), -

(a) the Court shall, as soon as may be after such transfer, forward the records of such suit or other proceeding to the Tribunal; and

(b) the Tribunal may, on receipt of such records, proceed to deal with such suit or other proceeding, so far as may be, in the same manner as in the case of an application made under Section 19 from the stage which was" reached before such transfer or from any earlier stage or de novo as the Tribunal may deem fit."

As per the judgment produced by the learned counsel for the petitioner that a fair reading of the Section 5(2)(b) of the Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), the Execution Application being a proceeding pending in a Civil Court when the Act came into force was liable to be transferred to the Tribunal because the amount for which the execution application had been filed as per the decree which was passed over the amount of Rs.10,00,000/-.

33.It is the case of the petitioner that as per the judgment, he should be transferred to the execution petition to the Debts recovery

Tribunal since the amount of recovery is above Rs.10,00,000/- and the Executing Court have no right to deal the Execution Petition claiming of Rs.10,00,000/- and above.

34.Thus being the case of the petitioner/plaintiff, he would very well inform the learned Executing Court by producing the SARFAESI Act and praying for transfer of the Execution Petition to the Debt Recovery Tribunal, but, all along the petitioner/plaintiff has keep quite and not made any whisper about the SARFAESI Act, but the accepting the public auction sale conducted by the Executing Court on 13.11.2008. Apart from this, in the petition filed in E.A.No.30 of 2008, the petitioner not at all mentioning anything about the SARFAESI Act and his request also not in detail for transfer of the case to the Debt Recovery Tribunal. Therefore, the judgment cited supra is not applicable to this case on hand.

35.Therefore, this Court not warranting interference in the order passed by the Executing Court in E.A.30 of 2008 in E.P.No.4 of 2007, dated 02.08.2011, on the file of the learned Additional District Court (Fast Track Court No.II), Gobichettipalayam and the same is liable to be dismissed.

36.In the result, this Civil Revision Petition is dismissed by confirming the order passed in E.A.No.30 of 2008 in E.P.No.4 of 2007 in O.S.No.7 of 2002, dated 02.08.2011, on the file of the learned Additional District Court (Fast Track Court No.II), Gobichettipalayami. No costs.

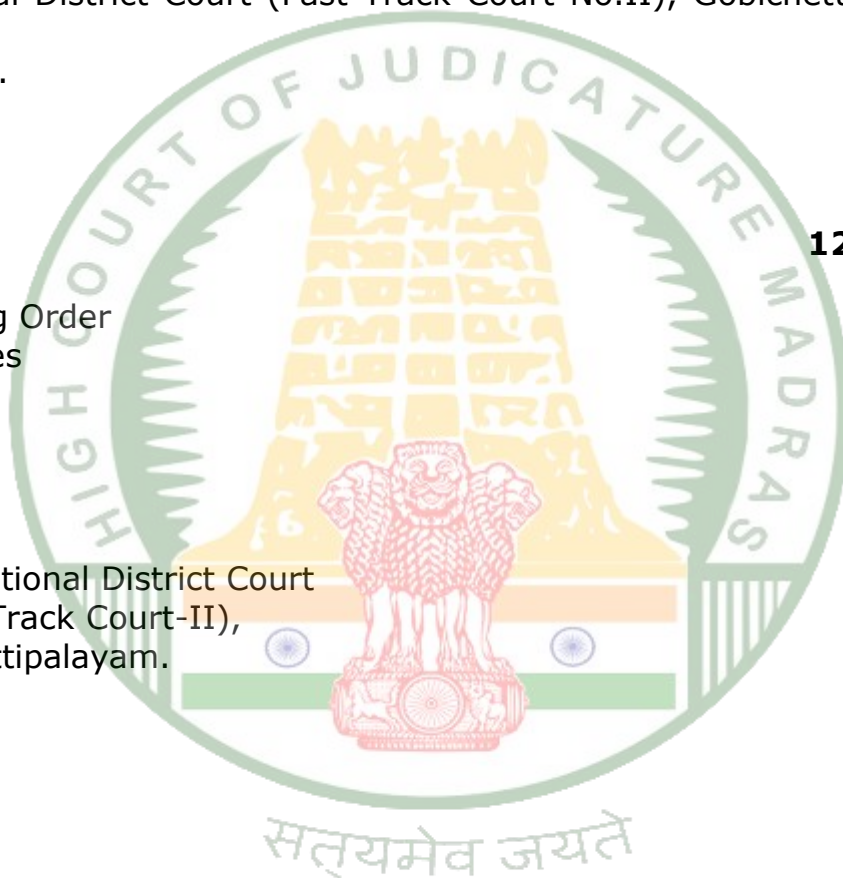
12.07.2017

Speaking Order
Index:Yes

vs

To

The Additional District Court
(Fast Track Court-II),
Gobichettipalayam.



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M.V.MURALIDARAN, J.

VS



**Pre-Delivery order made in
CRP(NPD)No.2415 of 2012
and
M.P.No.1 of 2012**

12.07.2017

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