

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.03.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**C.R.P.(NPD) No.2815 of 2012
and
M.P.No.1 of 2012**

Devi Palanisamy ... Petitioner

-Vs-

H.Suresh Kumar ... Respondent

Prayer: Civil Revision Petition filed under Section 115 of the Civil Procedure Code, against the Order and Decreetal order passed in I.A.No.22854 of 2010 in O.S.No.6550 of 2010 dated 01.02.2011 on the file of the learned IV Assistant City Civil Court, Chennai.

For Petitioner : Mr.S.V.Karthikeyan

For Respondent : Mr.T.Srikanth

ORDER

The defendant in O.S.No.6550 of 2010 on the file of the learned IV Assistant Judge, City Civil Court, Chennai is the Civil Revision Petitioner before this Court, challenging the order of refusing the grant

of unconditional leave to defend the suit in I.A.No.22854 of 2010 in O.S.No.6550 of 2010 dated 01.02.2011.

2.It is the case of the respondent/plaintiff is that he has filed a suit in O.S.No.6550 of 2010 before the learned IV Assistant Judge, City Civil Court, Chennai under Order XXXVII, Rule 3 of C.P.C., against this petitioner/defendant for recovery of a sum of Rs.5,00,000/- together with interest of Rs.3,20,000/- at the rate of 24% per annum from the date of plaint till the date of realization.

3.It is the case of the plaintiff in the suit that on 26.10.2007 and 27.10.2007, the defendant by namely Smt.Devi Palanisamy has approached the respondent/plaintiff and requested for a sum of Rs.2,50,000/- each on two occasions for interest and on receipt of the said amount, this petitioner/defendant promised to pay to the plaintiff, or order on demand the said sum of Rs.5,00,000/- together with interest at the rate of 24% per annum by executing the two pronotes.

4.At the time of receiving the amount by the respondent/plaintiff at the time of lending the money, this petitioner/defendant requested the respondent/plaintiff to lend money by cash as she is in dire need of

funds and taking sympathy over the defendant and without issuing any cheque of the said amount in favour of the defendant, the respondent/plaintiff lent a sum of Rs.2,50,000/- each as mentioned above, in cash i.e. on 26.10.2007 and 27.10.2007.

5.It is further case of the respondent/plaintiff is that though he has paid the said amount to the petitioner/defendant a sum of Rs.5,00,000/-, but she has not chosen to pay any money whatever either towards principal or towards interest and therefore, now due and payable by the petitioner/defendant to the plaintiff a sum of Rs.3,20,000/- for interest and principal amount of Rs.5,00,000/- by in all for a sum of Rs.8,20,000/-which sum, the defendant has failed and neglected to pay in spite of repeated demands and notice dated 05.06.2010. Therefore, the respondent/plaintiff has filed the above suit for recovery of the amount of a sum of Rs.8,20,000/- together with interest of Rs.5,00,000/- at the rate of 24% per annum from the date of plaint till the date of realization.

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6.On receipt of the summon in the suit, this petitioner/defendant has filed an application in I.A.No.22854 of 2010 seeking the Court below for grant of unconditional leave to defend the suit, since the suit

was filed under Chapter Six under Order XXXVII CPC. In the affidavit, the petitioner/defendant states that he do not know the respondent/plaintiff and he has not so far seen him. Apart from this, the petitioner/defendant also denied that she borrowed a sum of Rs.5,00,000/- from the respondent/plaintiff and she states that she was having money dealing with one Mr.Nemichand, having office at Mint Street, Chennai, and she used to borrow money from him by giving blank promissory notes. To her knowledge about 7 blank pronotes were given to the said Mr.Nemichand.

7.The petitioner/defendant also states that she has settled the entire amount with Mr.Nemichand, but in good faith, she did not collect the blank promissory notes given to Mr.Nemichand. In the said circumstances, the blank promissory notes given by the petitioner/defendant has gone to the hands of the respondent/plaintiff through the said Mr.Nemichand. The petitioner/defendant also states that no person would give a sum of Rs.5,00,000/- by cash, she has also states in the plaint that a sum of Rs.2,50,000/- was given on 26.10.2007 and subsequently on 27.10.2007 but the respondent/plaintiff has not given any reason for making two payments within 1 day interval. Apart from this, the defendant also

states that no witness in the promissory note and she has not paid any interest from the date of borrowing, but no notice has been issued to the respondent/plaintiff about non payment of interest, except the notice dated 05.06.2010 can be kept quiet without issuing any notice from the date of borrowing till 05.06.2010. She also raised a ground saying that the pen used by the plaintiff to fill up the pronote differs from the pen used for signing.

8.The petitioner/defendant also states that the entire claim made by the plaintiff in the suit is totally false and this plaintiff was instigated by Mr.Nemichand to file the case against the petitioner/defendant. The defendant also states that apart from the plaintiff there are three other persons, who have filed case against her at the instigation of the said Mr.Nemichand and all the four persons have issued notice to the respondent/plaintiff on the said date i.e. on 05.06.2010 through the same counsel and all of them claim to have advanced money to the respondent/plaintiff by cash on the same date.

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9.The petitioner/defendant has stated that there are triable issues in the suit and the falsity of the claim made by the plaintiff can be established only during the trial. Further, if really the

respondent/plaintiff has advance the loan amount to the petitioner/defendant the same would be reflected in the Income Tax return. If the Income Tax returns of the plaintiff is summoned the truth will be exposed.

10.The petitioner/defendant also states in the plaint her age is not known to the respondent/plaintiff which is an explicit proof that the plaintiff has not been the petitioner/defendant. Therefore, on the above grounds the petitioner/defendant has filed the petition for leave be grant to defend the suit.

11.A counter affidavit has been filed by the respondent/plaintiff by denying all the averments made in I.A.No.22854 of 2010, the plaintiff in his counter states that all the allegations are contained in the affidavit are nothing, but filtered falsehoods and usual song of all the borrowers and there is no iota of truth it. The deponent of the affidavit has forgotten her status, indulged in perverted allegations which are not true and correct even to the knowledge of the deponent of the affidavit. The plaintiff states that having borrowed money from the plaintiff and having had the timely help given by the plaintiff, the defendant has not hesitated to indulge in such reckless allegations,

when the defendant approached the plaintiff for a loan on 26.10.2007 and 27.10.2007, the plaintiff was about to issue a cheque in favour of the defendant, but the defendant represented to the plaintiff that she was in dire need of funds and instead of money lending by cheque, she had frantically requested the plaintiff to the money lend by the cash. For the sin of the plaintiff dancing to the tunes of the defendant in lending money by cash, the plaintiff faced with such reckless allegations at the hands of the defendant. The plaintiff further states that a close reading of the affidavit discloses that the defendant admitted the signature under the suit promissory note, but what all the defendant alleges that she had executed blank promissory notes in favour of one Mr.Nemichand while she used to borrow money. How, the said promissory notes had reached the plaintiff hands to file the present suit against the defendant. So the said allegation is nothing, but a patent, deliberate falsehood introduced for the purpose of the application. In any event, the defendant admits the execution of the promissory note, that is her signature in the suit promissory note.

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12.The plaintiff also states in the counter that in the plaint, he had not mentioned the age of the defendant and it is not the ground for getting unconditional leave to defend the suit, since it is stated by

the plaintiff that at the time of borrowing money, the plaintiff is entitled to make enquiry about the status of the defendant and he is not bound to question or enquire the age of the defendant. Therefore, not knowing the age of the defendant will not preclude the plaintiff from filing the suit for recovery of the money due to the plaintiff. The plaintiff also states that the defendant has not come forward with clean hands and the defence raised by the defendant is nothing, but illusory, moonshine, sham, nominal and it lacks bonafides, devoid of merits and the same is liable to be dismissed with costs.

13. Considering both side cases, the learned IV Assistant Judge, City Civil Court, Chennai by order dated 01.02.2011 dismissed the application filed by the petitioner/defendant in I.A.No.22854 of 2010 on the ground that the petitioner/defendant has not raised any triable issue for leave to defend the suit.

14. The learned Judge says that while granting the leave to defend the suit, if the Court is of the opinion that the defendant's case raises a triable issue, then leave to defend the suit shall ordinarily be granted unconditionally, further, if the facts disclosed by the defendant do not indicate that he has a substantial issue to raise or that the

defence is frivolous or vexatious, leave may be refused, also if the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences, leave can be declined.

15.The learned Judge also states that it is the case of the defendant that she did not know the plaintiff, but she had money dealings with one Mr.Nemichand from whom she borrowed money on giving blank promissory notes and she has also discharged the said loan from the said Mr.Nemichand, but she has not got back the promissory note in good faith. But the petitioner/defendant has not even mentioned the particulars of the said loan from Mr.Nemichand and the particulars of the discharge of the same.

16.The learned Judge also states that when the defendant admits her signature in the suit promissory note, she is not entitled to contend that she did not know the respondent/plaintiff and there is no proper reply for the notice and rejoinder sent by the respondent/plaintiff and as such the petitioner has failed to raise any triable issue, the plaintiff has relied on the Judgment of this Court reported in **2005 (1) CTC 748** wherein the rejection of petition for

leave to defend was confirmed as no triable issue was involved. In a similar case referred to therein also the defendant sought leave to defend the suit alleging that he had borrowed money from one Mr.G and executed the blank promissory note and the said amount was repaid, but pronote was not taken back and that the defendant not dealing with the plaintiff, therefore, the said case reported in the said judgment is squarely applicable in the case in hand, since, the petitioner/defendant has failed to substantiate her claim that she has discharged the loan, obtained from Mr.Nemichand by furnishing relevant particulars and producing the relevant materials.

17.The learned Judge also states that the facts disclosed by her will indicate that she has a substantial issue to raise and the defence is valid and will give rise to a triable issue. Therefore, the Court is satisfied that the facts disclosed by the petitioner do not indicate that she has a substantial issue to raise and that the defence intended to be put by the petitioner is frivolous and vexatious. Therefore, there is no merit in the petition filed by the petitioner and as such the petitioner is not entitled for any leave to defend the case and accordingly, the learned Judge has dismissed the said petition. Challenging the said order, the present Civil Revision Petition has been

filed by the petitioner/defendant.

18.I heard Mr.S.V.Karthikeyan, learned counsel appearing for the petitioner and Mr.T.Skandakumar, learned counsel appearing for the respondent and perused the entire records.

19.It is the case of the plaintiff is that on 26.10.2007 and 27.10.2007, the plaintiff has lend a sum of Rs.2,50,000/- each and both the value of cash received from the plaintiff, the defendant has executed the promissory note to the plaintiff and the defendant promised to pay to the plaintiff, or order on demand the said sum of Rs.5,00,000/- together with interest at the rate of 24% per annum. It is the further case of the plaintiff is that at the time of lending money, the plaintiff has ready to issue cheque in favour of the defendant, but the defendant requested the plaintiff in respect of issuing cheque in favour of the defendant, the amount of Rs.2,50,000/- may be given to her by way of cash, accordingly, the plaintiff has given the cash amount to the defendant on the two dates. Thereafter, the defendant has failed to pay any interest or the principal amount and hence on 05.06.2010, the plaintiff has issued a lawyer notice demanding the principal amount of Rs.5,00,000/- along with interest at the rate of

24% per annum by totally a sum of Rs.8,20,000/-, on failure in payment of the said demand amount of Rs.8,20,000/-, the plaintiff has filed the suit under Order XXXVII of Code of Civil Procedure 1908.

20. When the defendant invoking the provision under Order XXXVII Rule 3 of CPC, by filing an application in I.A.No.22854 of 2010, to grant unconditional leave to defend the suit, she has stated that she does not know about the plaintiff, but in her affidavit except the allegations that he has not borrowed the said amount, but she has not denied the signature found in the pronote and also not stated that the signature is not belongs to the defendant.

21. It is the case of the defendant that she had a money dealing with one Mr.Nemichand, having office at Mint Street, Chennai, when she used to borrow money from him by giving blank promissory notes. To her knowledge, she issued more than 7 blank pronotes to the said Nemichand and she has settled the entire amount with Mr.Nemichand, but in good faith, she did not collect the blank promissory note. Apart from this, the defendant also states that the plaintiff, there are three other persons were also filed three other suits which was instigated by the said Nemichand and filed against the defendant. Therefore, all the

pronotes were issued by the defendant with a blank pronotes to the said Nemichand and on the instigation only the suit has been filed. Apart from this, the defendant also states that the pen used by the plaintiff to fill up the pronote differs from the pen used for signing.

22. On fair reading of the affidavit I have not seen that any ground raised by the defendant is triable issue in the suit. This Court has categorically held in a case reported in **2005 (1) CTC 748**, that no triable issue involved, the Court can reject the leave to defend petition and in the said judgment, the rejection of the petition to grant leave to defend the suit was confirmed.

23. As per the Order 37 Rule 3(5) of CPC governs the case on hand, hence the same is extracted below:

"Rule 3. Procedure for appearance of defendant.- In a suit to which this order applies, the plaintiff shall, together with the summons under Rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend

may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexations."

24.The Hon'ble Judge of this Court in the above Judgment has clearly held that the Court has discretion to grant leave and the discretion to be exercised on sound judicial principles. The leave to defend may be granted unconditionally or upon such terms as may appear to the Court to be just, provided the Court is satisfied that the facts disclosed by the defendant do indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is not frivolous or vexations.

25.The Hon'ble Supreme Court in the case reported in ***M/s.Mechelec Engineers & Manufacturers v. M/s.Basic Equipment Corporation, 1976 (4) SCC 687*** following the decision reported in ***Sm.Kiranmoyee Dassi v. Dr.J.Chatterjee, AIR 1949 Cal 479***, the Hon'ble Supreme Court held as follows:

"7.We need not dilate on the well established principles repeatedly laid down by this Court which govern jurisdiction of the High Courts under Section 115, CPC. We think that these principles were ignored by the learned

Judge of the High Court in interfering with the discretionary order after a very detailed discussion of the facts of the case by the learned Judge of the High Court who had differed on a pure question of fact – whether the defences could be honest and bona fide. Any decision on such a question, even before evidence has been led by the two sides, is generally hazardous. We do not think that it is fair to pronounce a categorical opinion on such a matter before the evidence of the parties is taken so that its effects could be examined. In the case before us, the defendant had denied, inter alia, liability to pay anything to the plaintiff for an alleged supply of goods. It is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the trial Court to grant leave unconditionally may be questioned. In the judgment of the High Court we are unable to find a ground of interference covered by Section 115, CPC.

8. In *Kiranmoyee Dassi Smt v. Dr J. Chatterjee Das*, after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17, CPC in the form of the following propositions (at p.253):

“(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference

that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set-up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

In this case, the Honourable Supreme Court has held that only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the trial Court to grant leave unconditionally may be questioned."

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26. In yet another case, the Hon'ble Supreme Court in a case of ***Mrs. Raj Duggal v. Ramesh Kumar Bansal, AIR 1980 SC 2218***, the Honourable Supreme Court has held in para-3 as follows:

"3. Leave is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a

real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency."

27. Per contra, the learned counsel appearing for the petitioner/defendant has produced judgment reported in **2012 3 CII 648** in the case in **S.Nagalakshmi v. R.Nagalingam**. On fair reading of the said judgment, the said case is not applicable to the case on hand, but in the said judgment it is stated that the payment of consideration had to be presumed, accused contended that amount exceeding Rs.20,000/- had to be paid by cheque, but the case in hand it is not the case of the signature found in the pronote is not belongs to her, but she states that the blank pronote was given to one Mr.Nemichand and on the instigation only the suit has been filed.

28. The learned counsel appearing for the petitioner/defendant

also produced one another judgment rendered by this Court in a case of ***K.Vasantha Devi and another v. Mahesh Kumar Rathi*** reported in ***2004 (3) CTC 321*** and in the said judgment, the Civil Revision Petition has been filed, challenging the order of dismissal for leave to defend, the learned Judge clearly held that the suit filed for recovery of sum against husband and wife, the wife execution itself the promissory note revealed that only husband's name was found in the body of promissory note and name of wife was conspicuously absent in body of pronote and the husband alone has signed revenue stamp and wife had signed on left on side and not on revenue stamp. Therefore, the Execution of promissory note is itself a triable issue and leave to be granted. But the case on hand it is not the case of the defendant, the signature found in the pronote was not belongs to her, but she admitted that since she was having money dealing with the said Nemichand and at the time of issuing seven blank pronotes to the said Nemichand, after settling the said amount, he has not return back the same to the petitioner/defendant. Therefore, she stated that on the instigation only the present suit has been filed by the plaintiff. Hence, the judgment produced by the learned counsel appearing for the petitioner is not relevant to this case on hand. The Hon'ble High Court of Calcutta held that the principles applicable to the cases covered by

Order 37 of CPC in the form of the following propositions rendered in the case of **Smt.Kiranmoyee Dassi v. Dr.J.Chatterjee** reported in **1945 (49) Cal WN 246** held as follows:

"(a)If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b)If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c)If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d)If the defendant has no defence or the defence set-up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e)If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave

to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

29.As per the above judgment, if the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend and if the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend as per the preposition read by the Hon'ble High Court of Calcutta in the above judgment cited supra. The petitioner/defendant has no defence and hence the defendant is not entitled to leave to defend the suit. The learned IVth Assistant Judge, City Civil Court, Chennai has clearly states that the defendant has not satisfied and not given good defence and hence the order passed by the learned Judge in I.A.No.22854 of 2010 is not warranting interference by this Court. Accordingly, this Civil Revision Petition is liable to be dismissed.

30.In the result, this Civil Revision Petition is dismissed, confirming the judgment and decree passed in I.A.No.22854 of 2010 in O.S.No.6550 of 2010 dated 01.02.2011, on the file of the learned IVth Assistant Judge, City Civil Court, Chennai. No costs. Consequently, connected miscellaneous petition is closed.

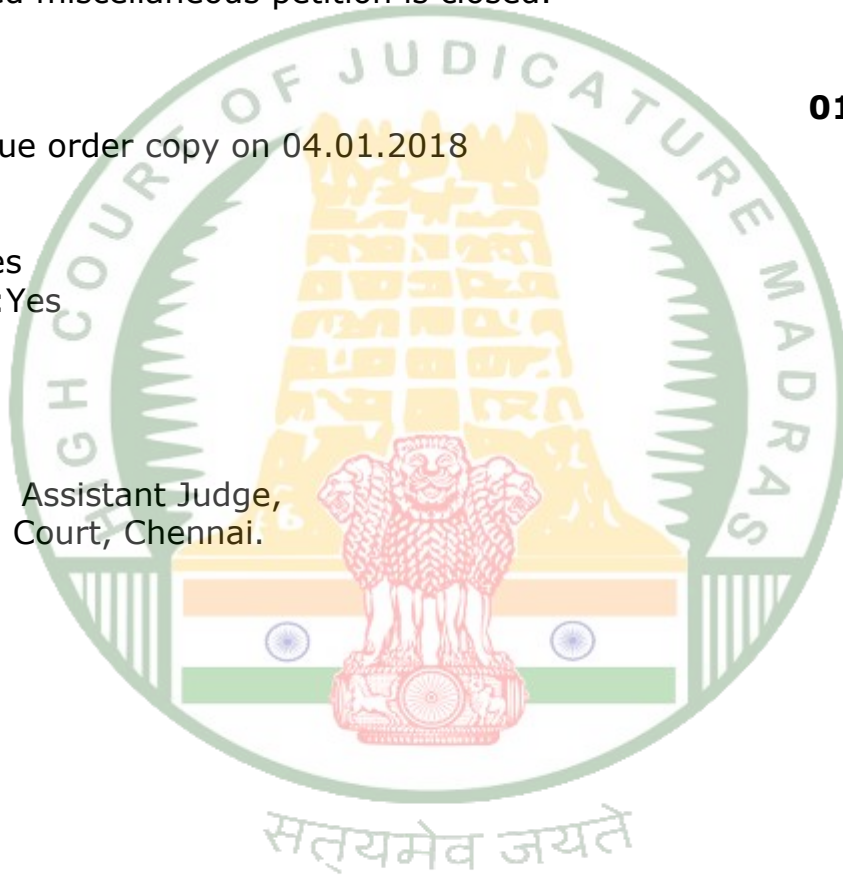
01.03.2017

Note:Issue order copy on 04.01.2018
vs

Index:Yes
Internet:Yes

To

The IVth Assistant Judge,
City Civil Court, Chennai.



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M.V.MURALIDARAN, J.

VS



**Pre-Delivery order made in
C.R.P.(NPD) No.2815 of 2012
and
M.P.No.1 of 2012**

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