

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.11.2018

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

C.R.P.(NPD).No.593 of 2013
and
M.P.Nos.1 & 2 of 2013

1.Shankunthala Bansal
2.Vikash Bansal
3.Deepak Bansal

.. Petitioners

..Vs..

1.Puspalatha Gadia
2.M/s.Deepak Road Carriers,
No.14, Coral Merchant Street,
Chennai - 600 001.

.. Respondents

Prayer: Civil Revision Petition filed under Section 115 of Code of Civil Procedure against the fair and decreetal order dated 07.09.2012 passed in I.A.No.18018 of 2010 in O.S.No.1740 of 2003 on the file of the learned XIV Assistant City Civil Court, Chennai.

For Petitioners

: Mrs.Chitra Sampath
Senior Counsel
for Mr.Vikram U.Jain

For Respondent 1

: Mr.P.Valliappan

ORDER

The instant revision has been filed challenging the order dated 07.09.2012 passed by the XIVth Assistant Judge, City Civil Court, Chennai in I.A.No.18018 of 2010 in O.S.No.1740 of 2003.

Brief facts leading to the filing of the instant revision:

2. The petitioners are the defendants 2 to 4, the first respondent is the plaintiff and the second respondent is the first defendant in the suit O.S.No.1740 of 2003. The first respondent filed a summary suit under Order XXXVII of Code of Civil Procedure for recovery of Rs.3,18,546/- together with interest at the rate of 24% per annum from the date of plaint till the date of realisation against the petitioners. The suit was filed for the alleged non-repayment of loan by the late S.K.Bansal who is the husband of the first petitioner and the father of the second and third petitioners, in which, an ex parte decree came to be passed on 24.09.2003. I.A.No.18018 of 2010 was filed by the petitioners in O.S.No.1740 of 2003 seeking to set aside the ex parte decree under

Order IX Rule 13 of Code of Civil Procedure. Thereafter, on coming to know that the decree was passed under Order XXXVII of Code of Civil Procedure, an application I.A.No.4745 of 2011 was filed by the petitioners for amendment of I.A.No.18018 of 2010. Seperate counters were filed by the first respondent in I.A.No.18018 of 2010 as well as in I.A.No.4745 of 2010. The amendment application filed by the petitioners in I.A.No.4745 of 2011 to amend the provision of law as Order XXXVII Rule 4 of Code of Civil Procedure was allowed by the Trial Court by its order dated 05.04.2011. Subsequently, I.A.No.12096 of 2011 was also filed by the petitioners in I.A.No.18018 of 2010 seeking permission of the Court to file an additional affidavit showing special circumstances to set aside the decree in order to comply with the requirements of Order XXXVII Rule 4 of Code of Civil Procedure. A counter was also filed by the first respondent in I.A.No.12096 of 2011. The Trial Court allowed I.A.No.12096 of 2011 by order dated 07.09.2012 and permitted the petitioners to file an additional affidavit. But by order dated 07.09.2012 passed on the same date in I.A.No.18018 of 2010, the Trial Court dismissed the application filed by the petitioners to set aside the ex parte decree dated 24.09.2003 passed under Order XXXVII of Code of Civil Procedure.

Aggrieved by the said order, the instant revision has been filed.

Submissions of the learned counsels:

3. Heard, Mrs.Chitra Sampath, learned Senior counsel for the petitioners and Mr.P.Valliappan, learned counsel for the first respondent.

4. According to the learned Senior counsel for the petitioners, the first petitioner is the wife and the second and third petitioners are the children of S.K.Bansal. According to her, it is the case of the first respondent who is the plaintiff in the suit that S.K.Bansal borrowed money from the first respondent and did not repay the same and as on 31.03.2000, he has acknowledged that a sum of Rs.3,18,546/- is due and payable to the first respondent by him. Therefore, based on those averments, the first respondent filed a summary suit O.S.No.1740 of 2003, after the death of S.K.Bansal against the petitioners who are his legal heirs for the recovery of the said sum together with interest at the rate of 24% per annum from the date of plaint till the date of realisation to the extent of the properties inherited by them from S.K.Bansal.

5. The learned Senior counsel for the petitioners also submitted that in the affidavit filed in support of I.A.No.18018 of 2010, the petitioners have categorically pleaded that they did not receive any suit summons and further they have stated that only on 05.10.2009, when they applied for Encumbrance Certificate, they came to know that several suits were filed by the first respondent against the petitioners. Thereafter, according to the learned Senior Counsel, the petitioners immediately filed an application I.A.No.18018 of 2010 under Order IX Rule 13 of Code of Civil Procedure seeking to set aside the ex parte decree dated 24.09.2003 passed against them in O.S.No.1740 of 2003. According to the learned Senior counsel for the petitioners, even though the death certificate of S.K.Bansal as well as the Encumbrance Certificate was filed before the Trial Court, the Trial Court has not considered the same, but has erroneously rejected the application, even though the petitioners have shown special circumstances for setting aside the decree and triable issues are also involved in the suit.

6. Per contra, learned counsel for the first respondent would submit that the Civil Revision Petition is not maintainable, since the

subject matter of challenge is an appealable order. He drew the attention of this Court to Order XXXVII Rule 7 of Code of Civil Procedure which deals with the procedure in suits filed under Order XXXVII of Code of Civil Procedure. According to him, when there is no procedure provided for under Order XXXVII Code of Civil Procedure, the procedure adopted in ordinary suits will have to be followed and therefore, Order XLIII read with Section 104 of Code of Civil Procedure is applicable for the case on hand. According to him, under Order XLIII Rule 1 (d) of Code of Civil Procedure, as in the case of rejection of an application filed under Order IX Rule 9 of Code of Civil Procedure seeking to set aside an ex parte decree passed in an ordinary suit, the same procedure will have to be followed for rejection of an application filed under Order XXXVII Rule 4 of Code of Civil Procedure and hence, only an appeal is maintainable and not a revision.

7. The next submission made by the learned counsel for the first respondent is that the documents namely Encumbrance Certificate as well as the death certificate of S.K.Bansal were not marked as exhibits before the Trial Court and therefore, the learned Senior counsel for the

petitioners cannot rely upon the same, before this Court, at this stage and no application can also be entertained by this Court for filing of those documents by way of additional evidence. According to the learned counsel for the first respondent, no triable issues are involved in the suit as it is a mere loan transaction supported by statement of account executed by S.K.Bansal.

Discussion:

8. The suit was filed by the first respondent as a summary suit for non-repayment of loan by S.K.Bansal who died on 04.02.2000, against the first petitioner who is his wife and the second and third petitioners who are his children. It is the case of the petitioners, as seen from the affidavit filed in support of I.A.No.18018 of 2010 in O.S.No.1740 of 2003 that they were not aware of the suit instituted by the first respondent against them and they came to know only on 05.10.2009, when they obtained an Encumbrance Certificate which discloses that several suits were instituted by the first respondent against S.K.Bansal and his properties were also the subject matter of attachment. I.A.No.18018 of 2010 was filed by the petitioners on 08.10.2009 before the Trial Court,

seeking to set aside the ex parte decree under Order IX Rule 13 of Code of Civil Procedure.

9. If the petitioners have really received the suit summons, they would have filed an application under Order XXXVII Rule 4 of Code of Civil Procedure. After filing of the application I.A. No.18018 of 2010 under Order IX Rule 13 of Code of Civil Procedure, they came to know that the decree was passed under Order XXXVII of Code of Civil Procedure. Thereafter, they have filed an application I.A.No.4745 of 2011 seeking amendment of provision of law to Order XXXVII Rule 4 of Code of Civil Procedure instead of Order IX Rule 13 of Code of Civil Procedure in I.A.No.18018 of 2010.

10. In the additional affidavit filed in support of I.A.No.18018 of 2010, they have raised the following triable issues:

a) The statement of account said to have been executed by S.K.Bansal is dated 31.03.2000, whereas S.K.Bansal died on 04.02.2000. Therefore, S.K.Bansal could not have signed the statement of account on 31.03.2000 as he died on 04.02.2000 itself. The statement of account

dated 31.03.2000 allegedly executed by S.K.Bansal is disputed by the petitioners.

b) No proper particulars of the transaction and no documents as required under Order XXXVII of Code of Civil Procedure has been filed by the respondents and the plaint is bereft of all the required particulars as required for the filing of a summary suit. The summary suit under Order XXXVII of Code of Civil Procedure as filed and framed is not maintainable against the estate of a dead person.

c) The first respondent claims to be a financier, but surprisingly has filed the suit as an indigent person which is not believable.

d) There are several triable issues involved and therefore, a summary suit is not maintainable against the petitioners. Even though, the petitioners have raised the above mentioned triable issues, the same are disputed by the learned counsel for the first respondent in this revision.

11. As seen from the defences raised by the petitioners in I.A.No.18018 of 2010, this Court is of the considered view that the defences raised are triable in nature, which have to be adjudicated by the Trial Court in accordance with law, after oral and documentary

evidence are let in by both the parties to the dispute. It is the case of the petitioners that S.K.Bansal died on 04.02.2000. But, the statement of account allegedly signed by S.K.Bansal disclosing that a sum of Rs3,18,546/- is due and payable by him to the first respondent is dated 31.03.2000. If the statement made by the petitioners is found to be true, S.K.Bansal could not have given a statement of account dated 31.03.2000 disclosing that a sum of Rs.3,18,546/- was due by him to the first respondent as on 31.03.2000 as he was dead by then. M.P.No.2 of 2013 has been filed by the petitioners to permit them to mark additional documents namely death certificate of S.K.Bansal who died on 04.02.2000 and the Encumbrance Certificate dated 05.10.2009. Both the documents are certified copies obtained from the Trial Court in O.S.No.1740 of 2003. It is the case of the petitioners that even though, the death certificate of S.K.Bansal as well as the Encumbrance Certificate dated 05.10.2009 were filed before the Trial Court, the Trial Court has not marked those documents as exhibits and considered the same in the impugned order dated 07.09.2012 passed in I.A.No.18018 of 2010 which are indeed vital documents which the Trial Court ought to have considered the same in its final order passed in I.A.no.18018 of

2010. But under the impugned order, the same has not been considered by the Trial Court.

12. Insofar as the contention of the learned counsel for the first respondent that a revision is not maintainable under Section 115 of Code of Civil Procedure and only an Appeal is maintainable, the said contention is untenable. Order XXXVII Rule 7 of Code of Civil Procedure deals only with the procedure in suits instituted under Order XXXVII of Code of Civil Procedure.

13. Ex parte decree passed in summary suits (Order XXXVII of Code of Civil Procedure) and in ordinary suits are distinctive. The grounds required for setting aside an ex parte decree passed in an ordinary suit and in a summary suit are different. To set aside an ex parte decree passed in a summary suit, special circumstances will have to be shown whereas in an ordinary suit it is enough that sufficient cause for non-appearance are shown. The expression special circumstances is not defined in the Civil Procedure Code nor is it capable of any precise definition by the Court as it varies from case to case. In the case on hand, the case of the petitioners is that they did not receive the suit summons and S.K.Bansal died on 04.02.2000 much prior to the date of

the statement of account i.e., on 31.03.2000, based on which, the suit was filed. Further the statement of the petitioners in their affidavit filed in support of I.A.No.18018 of 2010 is also supported by documentary evidence, the veracity of those documents can be tested only after trial.

14. Order XXXVII Rule 7 Code of Civil Procedure says that except as provided there under, the procedure in suits under Order XXXVII shall be the same as the procedure in suits instituted in the ordinary manner. Since special circumstances will have to be established under Order XXXVII Rule 4 of Code of Civil Procedure the said provision of law cannot be equated with Order 9 Rule 13 of Code of Civil Procedure. Therefore the provisions of Order 9 Rule 13 Code of Civil Procedure will not apply to Order XXXVII Rule 4 Code of Civil Procedure. Order XLIII Rule 1 (d) of Code of Civil Procedure provides for appeal only in respect of rejection of Order 9 Rule 13 application and in the list enumerated under Order XLIII Code of Civil Procedure read with Section 104 Code of Civil Procedure, there is no provision for appeal against an Order passed under Order XXXVII Rule 4 Code of Civil Procedure. The Hon'ble Supreme Court has also held in the case of *Rajni Kumar vs. Suresh Kumar Malhotra And Another* reported in **2003 (5) SCC 315** that Order XXXVII Rule 4

Code of Civil Procedure is different from Order 9 Rule 13 and therefore, the provisions of Order 9 Rule 13 will not apply to a suit under Order XXXVII Code of Civil Procedure. The relevant portion of the said Judgment is extracted hereunder:

“10. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 CPC. Rule 7 of Order 37 says that except as provided thereunder the procedure in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 of Order 37 specifically provides for setting aside decree, therefore, provisions of Rule 13 of Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the right to contest the suit as a matter of course. Nonetheless, he may be declared ex parte if he does not appear in response to summons, or after entering appearance before framing issues; or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9 Rule 11, if a defendant is set ex parte and that order is set

aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But an application under Order 9 Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte against the defendant. If the Court is satisfied that (1) summons was not duly served, or (2) he was prevented by sufficient cause from appearing when the suit was called for hearing, it has to make an order setting aside the decree against him on such terms as to cost or payment into court or otherwise as it thinks fit and thereafter on the day fixed for hearing by court, the suit would proceed as if no ex parte decree had been passed. But in a suit under Order 37, the procedure for appearance of the defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to defend the suit unless he enters appearance within ten days of service of summons either in person or by a pleader and files in court an address for service of notices on him. In default of his entering an appearance the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, up to the date of the decree together with costs. The plaintiff will also be entitled to judgment in terms of

sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted the procedure applicable to suits instituted in the ordinary manner, will apply.

11. It is important to note here that the power under Rule 4 or Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear

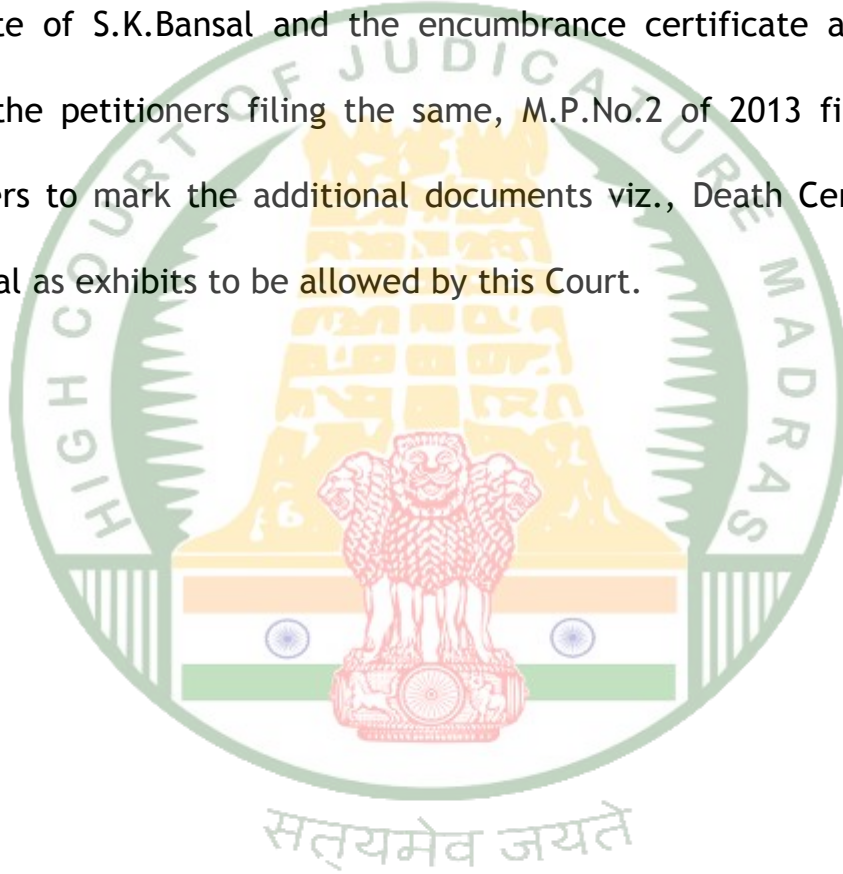
to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the court considers it reasonable so to do, on such terms as the court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the court, all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to the defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit.

In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.”

15. In the case on hand, special circumstances have been shown by the petitioners to set aside the ex parte decree as required under Order XXXVII Rule 4 of Code of Civil Procedure. Since an Order passed under Order XXXVII Rule 4 of Code of Civil Procedure is not an appealable order, the revision filed by them under Section 115 of Code of Civil Procedure before this Court is maintainable. The Trial Court has erroneously not considered the death certificate of S.K.Bansal as well as the Encumbrance Certificate dated 05.10.2009 in the impugned order which are indeed vital to the correct adjudication of the dispute between the parties. The contentions raised by the petitioners in I.A.No.18018 of 2010 are indeed triable issues and special circumstances have also been shown by them to set aside the ex parte decree dated 24.09.2003.

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16. In the light of the above observations recorded, this Court is of the considered view that the Trial Court ought to have allowed I.A.No.18018 of 2010. Since the Trial Court did not mark the death certificate of S.K.Bansal and the encumbrance certificate as exhibits, despite the petitioners filing the same, M.P.No.2 of 2013 filed by the petitioners to mark the additional documents viz., Death Certificate of S.K.Bansal as exhibits to be allowed by this Court.



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Conclusion:

17. In the result, the order dated 07.09.2012 passed in I.A.No.18018 of 2010 in O.S.No.1740 of 2003 on the file of the learned XIV Assistant City Civil Court, Chennai is hereby set aside and the ex parte decree dated 24.09.2003 passed in O.S.No.1740 of 2003 is set aside and the Civil Revision Petition is allowed as prayed for. Consequently, M.P.No.1 of 2013 is closed and M.P.No.2 of 2013 is allowed as prayed for. No costs. In view of the long pendency of the suit, this Court directs the Trial Court to dispose of the suit within a period of three months from the date of receipt of a copy of this Order.

23.11.2018

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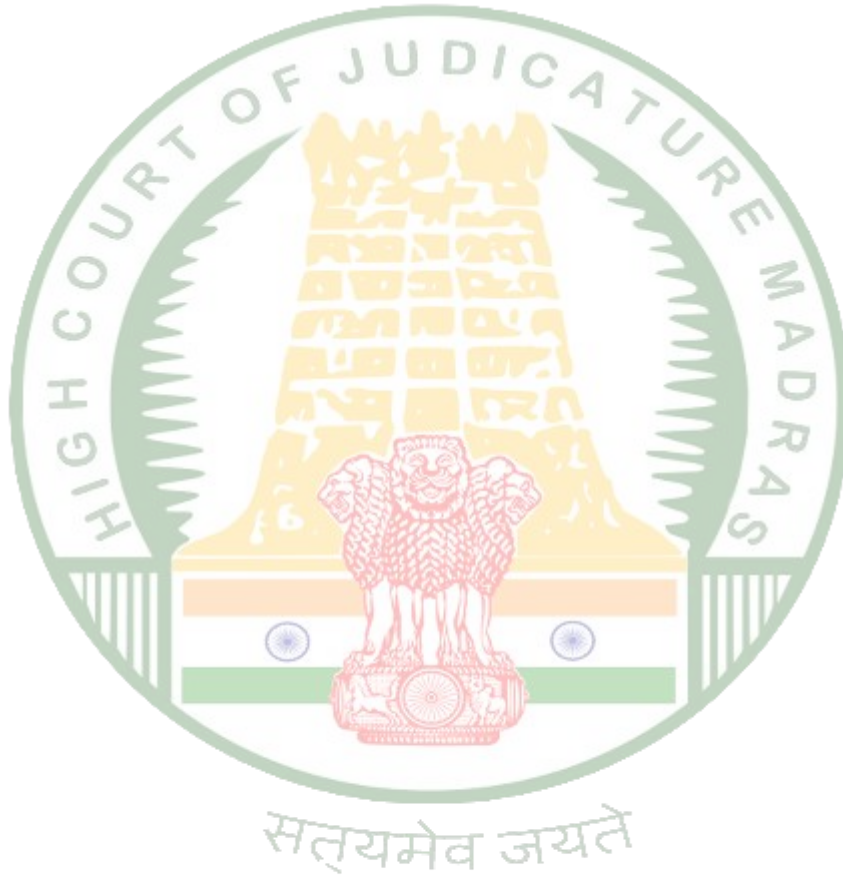
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Speaking/Non-Speaking orders

Note: Registry is directed to send back the original records to the Trial Court immediately.

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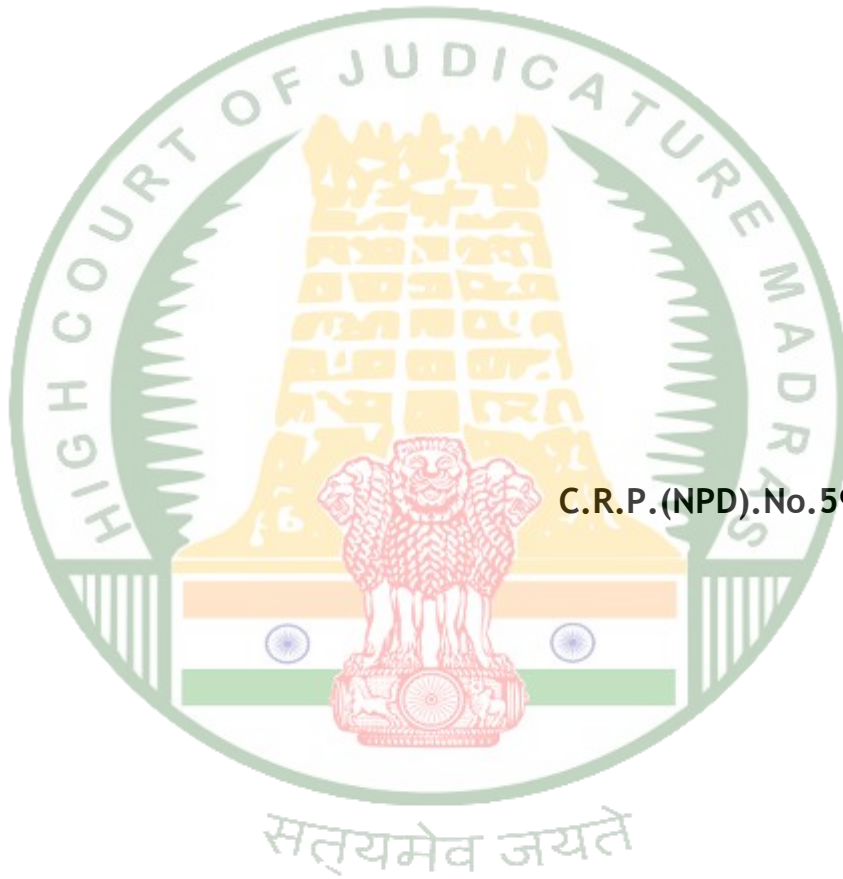
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