

In the High Court of Judicature at Madras

Reserved on : 27.03.2018

Pronounced on :25.04.2018

Coram:

The Hon'ble Mr.Justice **M.VENUGOPAL**
and
The Hon'ble Mr.Justice **S.VAIDYANATHAN**

O.S.A.No.47 of 2018 and
C.M.P.No.3066 of 2018

1. M/s Shanthi Engineering Works,
Rep. By Mr.Vijay, Managing Partner,
Old No.36, New No.83,
Venkatarangam Pillai Street,
Triplicane, Chennai – 5

2. A.Sreenivas, Partner,
M/s Shanthi Engineering Works,
Old No.36, New No.83,
Venkatarangam Pillai Street,
Triplicane, Chennai – 5

3. J.Visalakshi, Partner
M/s Shanthi Engineering Works,
Old No.37, Old Door No.4,
New Door No.7, Rama Rao Road,
Mylapore, Chenna – 4

4. M/s Gayathri Gupa
Partner,
M/s Shanthi Engineering Works,
Old No.36, New No.83,
Venkatarangam Pillai Street,
Triplicane, Chennai – 5

...Appellants

Vs.

T.K.K.N.N.Vysya Charities,
Rep by its Managing Trustee,
Mr.D.V.S.Prasad,
New No.83, Venkatarangam,
Pillai Street, Triplicane,
Chennai - 5

..Respondents

Prayer: Original Side Appeal filed under Order 36 Rule 2 of Original Side Rules r/w Clause 15 of the Letters Patent Act to set aside the fair and decreetal order of the Learned Judge made in Application No.2405 of 2017 in C.S.No.286 of 2017 dated 18.01.2018.

For Appellants : Mr. Parthasarathy,
Sr.Counsel for
Mr.P.Dineshkumar

For Respondents : Mr.S.N.Kirubanandam

M.VENUGOPAL,J.,

Introduction:

The Appellants / Respondents / Defendants have preferred the instant Original Side Appeal [As 'Aggrieved Persons'] as against the order dated 18.1.2018 in Application No.2405 of 2017 in C.S.No.286 of 2017 passed by the Learned Single Judge.

2. Earlier, the Learned Single Judge while passing the impugned

Order in Application No.2405 of 2017 in C.S.No.286 of 2017 on 18.01.2018 at Paragraph Nos.15 to 18 had observed the following and resultantly allowed the Application by directing the Appellants / Respondents / Defendants to furnish Security to the value of suit claim of Rs.79,16,475/- on or before 15.02.2018, failing which ordered 'Attachment Before Judgment' of the immovable property comprised in Plot No.37, Old No.4 New Door No.7, Rama Rao Road, Mylapore, Chennai – 4 and the movables in the schedule property at No.83, Venkatarangam Pillai Street, Triplicane, Chennai – 5 without further delay.

“15.The defendants have taken a very hostile stand in the entire proceedings. They have freely used the word 'illegal' to any order passed by the Court. They have claimed that they are in lawful possession. However, it is only just and necessary that they come forward to furnish security to the value of the suit claim. This is all the more important, because the defendants have been attempting to protract the proceedings. They have filed applications under Section 10 of the CPC, though, there is no relevance in issues between the suit in the City Civil Court, Chennai and in the present suit. As a matter of fact, the proceedings in the City Civil Court, Chennai had also gone adversely against the defendants herein.

16. It is also seen that the Plaintiff being a Trust had also approached this Court, seeking to demolish the superstructure and rebuild the superstructure. This Court had an occasion to examine the legality of such proposal and also granted permission in A.No.5088 of 2013 in C.S.No.439 of 1977. Consequently, the Plaintiff has every right to call upon the defendants to vacate and hand over vacant possession.

17. The defendants are in continuous occupation. It is natural that they will have to pay the damages / rent to the Plaintiff. The suit is based on such claim. In view of the stand taken by the tenants, it is only justifiable that the Plaintiff apprehends that the defendant would vacate and evade any further judicial process. Under these circumstances, particularly when there is a reasonable apprehension that the defendants might vacate the premises to the disadvantage of the plaintiff and also remove the movables, the defendants have to be called upon to furnish security to the value of the suit claim.

18. Accordingly, A.No.2405 of 2017 is allowed , as prayed for. A.No.3416 is dismissed. No costs. The Respondents / Defendants are directed to furnish security to the value of the suit claim of Rs.79,16,475/- (Rupees Seventy nine lakhs sixteen thousand four hundred and seventy five only) on or before 15.02.2018, failing which, there shall be an order of attachment before judgment to attach the immovable property, comprised in Plot No.37, Old

Door No.4, New Door No.7, Rama Rao Road, Mylapore, Chennai -4 and the movables in the Schedule Property at No.83, Venkatrangam Pillai Street, Triplicane, Chennai – 5, without any further reference.”

The Appellants Pleas :

3. The Learned Senior Counsel for the Appellants submits that the Impugned Order of the Learned Single Judge in Application No.2405 in C.S.No. 286 of 2017 dated 18.01.2018 in allowing the Application filed by the Respondent / Plaintiff to furnish security, failing which directing the Attachment in question is against Law and the same is liable to be set aside.

4. The Learned Senior Counsel for the Appellants contends that the amount of damages determined by the Respondent / Plaintiff is only tentative in nature and the same is not a conclusive one, as admitted by the Respondent / Plaintiff, which aspect was not appreciated by the Learned Single Judge at the time of passing the Impugned Order.

5. Advancing his arguments, the Learned Senior Counsel for the Appellants puts forward an argument that the amount of rent determined

by the Respondent / Plaintiff per month is an exorbitant, arbitrary one and without any basis.

6. The Learned Senior Counsel for the Appellants proceeds to point out that in the instant case, the 'Lease' entered into between the Appellants and Plaintiff is only in respect of the 'Land alone' and not on 'Super Structure'. The Appellants take a stand that in respect of the super structure standing in the suit property, the Respondent / Plaintiff has no right and in fact, the super structure was constructed by the Appellants.

7. The Learned Senior Counsel for the Appellants comes out with a plea that the Learned Single Judge should have seen that the order in R.C.O.P.No.1585 of 2012 relied on by the Respondent / Plaintiff relates to a 'Fair Rent' of the building and not in respect of the 'Land' and as such, the said order is inapplicable to the Appellants' case.

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8. The Learned Senior Counsel for the Appellants brings it to the notice of this Court that the Learned Single Judge should have seen that the Appellants filed a Civil Suit in O.S.No.2171 of 2014 on the file of the

Learned XIVth Assistant Judge, City Civil Court, Chennai seeking relief of Permanent Injunction and that the Respondent / Plaintiff filed a counter claim seeking relief of recovery of vacant possession and for Mesne profit and cost and therefore, the present suit in C.S.No.286 of 2017 on the file of this Court is perse not maintainable.

9. The version of the Appellants is that the Learned Single Judge should have seen that the Respondent / Plaintiff claimed a 'Mesne Profits' at the rate of Rs.68,000/- per month in the counter claim in O.S.No.2171 of 2014, but, the Respondent / Plaintiff claimed Rs.2,28,250/- in the present suit without any basis, which is clearly an unsustainable one.

10. The prime contention advanced by the Learned Senior Counsel for the Appellants is that the Learned Single Judge had failed to appreciate the 'Undertaking Affidavit' filed by the Appellants / Defendants to the effect that the property covered under the Petition for 'Attachment Before Judgment' shall not be alienated by them during the pendency of the Suit.

11. The Learned Senior Counsel for the Appellants submits that

the Learned Single Judge had failed to see that the Respondent / Plaintiff had failed to make a specific averment in an Affidavit in Application No.2405 of 2017 in regard to the allegation that the Appellants are making an endeavour to sell the property to Third Parties. Further, in the absence of any specific allegation in the affidavit in Application No.2405 of 2017 in C.S.No.286 of 2017, the extraordinary relief of 'Attachment' under Order 38 Rule 5 of CPC should not have been granted by the Learned Single Judge.

12. Continuing further, it is the stand of the Appellants that the Learned Single Judge had omitted to see that it was essential on the part of the Respondent / Plaintiff to exhibit that the Appellants had made an attempt to 'Encumber the property with a view to defraud the claim of the Respondent / Plaintiff'.

13. Lastly, it is the submission of the Learned Counsel for the Appellants that the Appellants / Defendants filed I.A.No.6117 of 2017 in O.S.No.2171 of 2014 on the file of the Learned XIV Assistant Judge, City Civil Court, Chennai seeking to condone the delay of 32 days in filing an Application under Section 9 of the Madras City Tenants

Protection Act, 1921.

Appellants' Citations:

14. The Learned Senior Counsel for the Appellants cites the decision of this Court [**Sundaram Fasteners Limited V. S.Venkatesan**] **O.S.A.Nos.291 and 337 of 2013 and M.P.No.1 of 2013** wherein it is held as under:-

“ 29. Coming to the aspect of the Appellant / Plaintiff seeking for issuance of an order by this Court, in A.No.3488 of 2012, in directing the Respondent / Defendant to furnish security to an extent of Rs.2,01,62,274,- within a time limit fixed by this Court, failing which, pass an order of Attachment Before Judgment of the immovable properties of the Respondent [filed under Order XIV Rule 8 Original Side Rules read with Order 38 Rule 5 of the Civil Procedure Code], it is to be pertinently pointed out by this Court that the Power to attach is not to be exercised so lightly and without concrete proof of mischief aimed at. In fact, vague allegations are not sufficient. Before exercising jurisdiction under Order 38 Rule 5 of Civil Procedure Code and passing orders for the attachment of the properties before judgment. A Court of Law is to satisfy itself primarily about the real certainty of the Plaintiff's success and of the existence of a serious danger with the Defendant is performing all acts with dishonest intention of defeating or delaying possible Decree.

30. It is to be remembered that an 'Attachment' itself does not create any charge in property. Also that, by reason of an 'Attachment', no Decree is passed. Moreover, 'Attachment Before Judgment' is a matter of relief and not procedure. Further, an order of 'Attachment Before Judgment', passed by a Competent Court of Law, is certainly a drastic remedy and affects the basic right of a person to deal with his property.

31. It is to be noted that before passing an order of attachment under Order 38 Rule 5(1) of the Civil Procedure Code, a Court of Law is to satisfy itself that the Defendant is about to dispose of his property or is about to remove the property from its jurisdiction. Also, a Court of Law is to see whether the Defendant is intending to do so with a view to cause obstruction or to delay the execution of any Decree that may be passed against him. The Plaintiff must precisely set out the grounds on which the belief or apprehension can be entertained, that the Defendant is likely to dispose of or remove the property. A mere mechanical reproduction of the wordings / ingredients of Order 38 Rule 5(1) C.P.C., in verbatim, without any supporting materials, are not adequate enough, as opined by this Court."

15. The Learned Senior Counsel for the Appellants relies on the decision of this Court in **Shinago Holdings Private Limited Chennai – 2 and another V.M.Ethiraj and Another** reported in 2017 4 L.W. at

Page 193 at Special Pages 198 and 199, at Paragraphs 6(xv) and 6(xviii) it is observed as under:-

“6(xv) A prayer to furnish security followed by attachment in the event of default will be acceded to, only when a person making the prayer is able to demonstrate and establish before the Court that the property that is being sought to be preserved is under imminent danger of being removed from the jurisdiction of the court or is under imminent threat of being liquidated and the party making such prayer should also be able to satisfy the court that such attempts for removal / liquidation of assets and properties are being done with an intention of defeating a possible decree (in arbitration proceedings, decree should be read as Award).

6(xviii) In the normal course, there should be affidavits from third parties, who are prospective purchasers or there should be some affidavits or materials to show that attempts are being made to sell away the machineries.

6(xix) There is absolutely nothing that has been placed before the Court. There is nothing before the Court to come to any prima facie conclusion in this regard. Therefore, on that short point, we have no hesitation in holding that the order directing the appellants before us, namely, Shinago and S.V.Sugars (respondent Nos.1 and 2 in the Section 9 applications) to furnish security that too to the tune of Rs.250 Crores is not sustainable. In our opinion, requisite ingredients for such order are absent and therefore, the

order cannot be sustained. In our considered opinion, it is also harsh.”

16. The Learned Senior Counsel for the Appellants adverts to the decision of Hon'ble Supreme Court reported in **(2017) 10 Supreme Court Cases at page 643 at Special Page 656 and 657, [Raptakos Brett and Company Limited V. Ganesh Property]** wherein at Paragraph Nos.24 and 25 it is held as follows:

“24. From a reading of the provisions of Order 2 Rule 2 and Rule 4 of the Code and also the principles laid down in the aforementioned cases, it is clear that under Order 2 Rule 2 read with Rule 4, the plaintiff can also claim mesne profits or arrears of rent in a suit filed for ejectment of the tenant. The plaintiff can further file a fresh suit for claiming mesne profits or arrears of rent for the period subsequent to the decree passed in the earlier suit having become final. But in a case where the plaintiff has claimed mesne profits or arrears of rent in a suit filed for ejectment of the tenant and has relinquished his rights vis-a-vis mesne profits or arrears of rent in the suit proceedings itself, the provisions of Order 2 Rule 2 will come into play and in comparison to the second suit for mesne profits or arrears of rent till the decree, the earlier suit will attain finality.

25. Applying the above principles to the facts of the

present case, we find that the decree in the earlier Suit No.1481 of 1986 filed for ejectment of the appellant Company and mesne profits attained finality on 09.09.1998 [Raptakos Brett & Co. V.Ganesh Property, (1998) 7 SCC 184 and 25.9.1998 [Raptakos Brett Co., Ltd., V. Ganesh Property] when this Court had dismissed Civil Appeal No.4657 of 1998 and the application respectively filed by the appellant herein. However, vide order dated 25.09.1998, this Court had directed that if the appellant hands over the peaceful vacant possession of the premises in question on or before 08.10.1998 then they will have to pay Rs.2500/- for the use and occupation charges for the month of October 1998 otherwise Rs.50,000/- as fixed earlier. It is not in dispute that in the present case, the appellant had handed over peaceful vacant possession to the respondent on 8.10.1998 and also that the respondent had relinquished the plea of mesne profits during the suit proceedings itself. Thus the prohibition contained in Order 2 Rule 2 would squarely apply.”

17. The Learned Senior Counsel for the Appellants places reliance on the decision of Hon'ble Supreme Court **[Raman Tech & Process Engg. Co., and Another V. Solanki Traders]** reported in **(2008) 2 SCC at Page 302 at special page 304** wherein at Paragraph **Nos.5 and 6** it is observed as under:-

“5. The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It Should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (see Prem Raj Mundra V.Md. Maneck Gasi, AIR (1951) Cal 156, for a clear summary of the principles.)”

Plea of Respondent:

18. Conversely, it is the submission of the Learned Counsel for the Respondent / Plaintiff that the Respondent / Plaintiff / Trust is the owner of the Schedule Mentioned Property and the same is situated in a predominantly commercial and developed area. According to the Respondent / Plaintiff, the Trust is governed by a Scheme framed by this Court in C.S.No.330 of 1910 and subsequently modified as per orders of this Court.

19. The Learned Counsel for the Respondent / Plaintiff contends that originally the suit schedule property was rented to S.P.Jeyaprakash, Proprietor of the Appellants- Company / Shanthi Engineering Works, subsequently, the said S.P.Jeyaprakash had inducted the Appellants 2 to 4 / Defendants 2 to 4, as Partners by changing the constitute of the business without the written consent or knowledge of the Trust and as such, the said conduct amounts to subletting without the knowledge of the true owner.

20. The Learned Counsel for the Respondent / Plaintiff points out that the Appellants / Tenants / Defendants without the knowledge and

consent of the true owner, had demolished / altered certain portions of the super structure and acted detrimental to the interest of the Trust and running (i). M/s Shanthi Engineering Works (ii). Mahalakshmi Industries (iii). M/s Global Plastics in single portion, thus, removed the demarcations originally existed in the building.

21. The stand of the Respondent / Plaintiff is that the 1st Appellant / 1st Defendant was inducted as tenant, forty years ago and that the Appellants / Defendants are in unauthorised occupation of 2000 square feet, as tenancy stood terminated by a Letter dated 18.01.2014 from 19.03.2014, the status of the Appellants / Defendants is that of trespassers.

22. The Learned Counsel for the Respondent / Plaintiff points out that to augment income of the Trust, as per Resolution by the Extraordinary Meeting of the Trust, an Application was moved before this Court and permission was granted to put up new construction in the property.

23. Also the Learned Counsel for the Respondent / Plaintiff submits that the Respondent / Plaintiff unanimously decided to develop the property [measuring an extent of 10.33 grounds out of total extent of

46 grounds through the Joint Development Agreement with M/s Sri Partha Builders, represented by its Proprietor, Swaminathan] in its Extra Ordinary General Body Meeting that took place on 25.08.2013 and 24.11.2013 through the Joint Development Agreement and the same was approved by this Court in Application No.5088 of 2013 in C.S.No.439 of 1977. Therefore, when the 1st Appellant / 1st Defendant was called upon to vacate and deliver the vacant possession of the property, the 1st Appellant / 1st Defendant filed a suit in O.S.No.2171 of 2014 on the file of the Learned XIV Assistant Judge, City Civil Court, Chennai seeking the relief of permanent injunction and in the said suit, the Respondent / Plaintiff filed a written Statement and a counter claim seeking possession and Mesne Profits.

24. The Learned Counsel for the Respondent contends that the trial Court had dismissed the Application for Injunction in I.A.No.6482 of 2014 in O.S.No.2171 of 2014 on 30.04.2015 and on a Civil Miscellaneous Appeal, the same was modified and in further proceedings before this Court, an 'Order of status quo' was granted and that the suit was directed to be disposed of by 30.03.2017.

25. The Leaned Counsel for the Respondent drew the attention of

this Court that the adjacent tenant at No.83 in V.R.Pillai Street, Triplicane, Chennai – 5 filed a suit for 'Fixation of Fair Rent' and an amount of Rs.22,090/- was fixed on the property measuring an extent of 481.25 Square Feet. As a matter of fact, the land value was taken at Rs.1 Crore per ground namely, 2400 square feet, though, it is over 3 Crores and the Learned Rent Controller on 10.10.2013 in RCOP No.1585 of 2012 fixed a sum of Rs.22,090/- towards fair rent for 481.25 Square feet and in present market value, the rents payable by the Appellants / Defendants is Rs.2,28,250/-

26. Expatiating his submission, the Learned Counsel for the Respondent / Plaintiff contends that the fair rent at Rs.46/- per square feet was fixed by the Learned Rent Controller after taking into consideration the land value at Rs.1 Crore and after following the ingredients of Section 4(1) of the Tamil Nadu Lease and Rent Control Act, 1960 and as such, the present value of the land in that area is Rs.2,64,00,000/- per ground [Approximately 2400 square feet] for an area of 2000 square feet under the unauthorised occupation, the rent payable is Rs.2,28,250/- per month and that the occupation of the 1st Appellant / 1st Defendant on and from March, 2014 after the termination of the tenancy is an unauthorised and illegal one and that the total amount for the period from March 2014 to January 2017 comes to

Rs.79,16,475/- [i.e., 2,26,185x35 Months]

27. The Learned Counsel for the Respondent points out that the Respondent / Plaintiff reliably understands that the 1st Appellant / 1st Defendant and the 3rd Appellant / 3rd Defendant own a Plot No.37, Old No.4, New No.7, Rama Rao Road, Mylapore, Chennai – 4. It is the only property owned by them and there is every chance to encumber or transfer the property by the Appellants / Respondents to defraud the Respondent / Plaintiff / Applicant's legal entitlement of recovery of damages / rent in their event of success. Therefore, the Respondent / Plaintiff had filed an Application No.2405 of 2017 in C.S.No.286 of 2017 seeking for an direction being issued by this Court in directing the Appellants / Respondents / Defendants to furnish security to the value of Rs.79,16,475/-, failing which an Order of Attachment before Judgment be passed attaching the immovable property comprised in Plot No.37, Old Door No.4, New Door No.7, Rama Rao Road, Mylapore, Chennai and the movables in suit property at No.83, Venkatarangam Pillai Street, Triplicane, Chennai - 5 with a view to protect the interest of the Respondent / Plaintiff.

28. The Learned Counsel for the Respondent refers to the order

dated 27.10.2017 in I.A.Nos.13226 and 13237 of 2017 in O.S.No.2171 of 2014 filed by the 1st Appellant / 1st Defendant [as Petitioner / Plaintiff] before the Learned XIV Assistant Judge, City Civil Court, Chennai against the Respondent / Plaintiff and five others under Order IX Rule 7 of the Code of Civil Procedure seeking to set aside exparte order passed in counter claim and to restore the suit and wherein the two applications came to be dismissed holding that the sufficient cause to restore the suit was not put forth on the side of the Petitioner therein [1st Appellant] and further, any good cause was also not assigned for the non appearance of the 1st Appellant.

Respondent Decisions:

29. The Learned Counsel for the Respondent cites the decision of Hon'ble Supreme Court between **Atma Ram Properties (P) Ltd., V. Federal Motors (P) Ltd.** reported in (2005) 1 Supreme Court Cases at Page 705 at Special Page 711 wherein at Paragraph No.4 it is observed as under:

“4. Ordinarily, this Court does not interfere with discretionary orders, more so when they are of interim nature, passed by the High Court or subordinate courts / tribunals. However, this appeal raises an issue of frequent recurrence and, therefore, we have heard the learned

counsel for the parties at length. Landlord-tenant litigation constitutes a large chunk of litigation pending in the courts and tribunals. The litigation goes on for unreasonable length of time and the tenants in possession of the premises do not miss any opportunity of filing appeals or revisions so long as they can thereby afford to perpetuate the life of litigation and continue in occupation of the premises. If the plea raised by the learned Senior Counsel for the respondent was to be accepted, the tenant, in spite of having lost at the end, does not lose anything and rather stands to gain as he has enjoyed the use and occupation of the premises, earned as well a lot from the premises if they are non-residential in nature and all that he is held liable to pay is damages for use and occupation at the same rate at which he would have paid even otherwise by way of rent and a little amount of cost which is generally insignificant.”

30. The Learned Counsel for the Respondent refers to the decision of **Hon'ble Supreme Court [Ramrameshwari Devi and Others V. Nirmala Devi and Others]** reported in (2011) 8 Supreme Court Cases at Page 249 at Special Page 251 and 252 wherein it is laid down as below:

“It is abundantly clear from the facts and circumstances of this case that the appellants have seriously obstacles at every stage during the course of trial and

virtually prevented the court from proceeding with the suit. This is a typical example of how an ordinary suit moves in our courts. Some cantakerous and unscrupulous litigants on one ground or the other do not permit the courts to proceed further in the matter.

The Supreme Court has to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to wrongdoer his illegitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs.

Swarn Singh V. State of Punjab, (2000) 5 SCC 668: 2001 SCC (Cri)414, relied on

In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately, wasted in a large number of uncalled for cases. The credibility of the entire judiciary is at stake unless effective remedial steps are taken without further loss

of time.”

Appellants Reply:

31. By way of reply, the Learned Senior Counsel for the Appellants contends that the value of the property fixed by the Learned XI Rent Controller in Rent Control Proceedings in R.C.O.P.NO.1585 of 2012 is of no relevance because of the fact the claim for 'Determination of Damages and Mesne Profits' are pending adjudication before the Learned XIV Assistant Judge, City Civil Court, Chennai in O.S.No.2171 of 2014 in the Additional Written Statement.

32. The Learned Senior Counsel for the Appellants submits that when the issue relating to 'Damages and Mesne Profits' is already pending by way of counter claim in O.S.No.2171 of 2014 on the file of the trial Court, the same cannot be agitated and in fact, the plea of estoppel will squarely apply.

33. The Learned Senior Counsel for the Appellants strenuously takes a plea that the Appellants / Respondents / Defendants are law abiding citizens and when the matter is decided in O.S.No.2171 of 2014 on the file of Trial Court, then, whatever entitlement is determined by the Court concerned, the same would be duly complied with by the

Appellants.

34. The Learned Senior Counsel for the Appellants / Respondents / Defendants forcefully takes a plea that the Appellants / Defendants are not taking steps and further, they did not have any intention either to encumber or transfer the property and in reality, the Appellants / Tenants for nearly 30 years had put up their own super structure over the property.

35. Besides that, it is represented on behalf of the Appellants that they have the necessary solvency to meet in determination of the amounts that may be determined by the trial Court in O.S.No.2171 of 2014 on the file of the Learned XIV Assistant Judge, City Civil Court.

36. The Learned Senior Counsel for the Appellants proceeds to state that the Managing Partner of the 1st Appellant / 1st Defendant before the Learned Single Judge filed a solemn affidavit dated 22.09.2017 in Application No.2405 of 2017 in C.S.No.286 of 2017 interalia stating that what was originally leased out is only the Ground and as such, the ground rent of Rs.2,000/- was paid till the beginning of

the year 2014 for 2000 square feet of land, over which a super structure was put up by him to run the 1st Appellant / 1st Defendant and since the Respondent / Plaintiff / Applicant had refused to receive the rent, a suit in O.S.No.5915 of 2016 was filed for deposit of rent on the file of Learned XIV Assistant Judge, City Civil Court, Chennai and the same is pending.

Discussions & Findings :

37. At the outset, this Court points out that the following elements are to be established to the subjective satisfaction of the Court concerned :

(a) The concerned Defendant / Defendants is / are about to dispose of the entire or any portion of his/ their property/ properties;

(b) He / they is / are about to remove the entire or any portion of his / their property from the local area jurisdiction of the concerned court;

(c) The particular Defendant / Defendants is / are intending to do so with a view to obstruct or delay in the execution of any decree that may be passed against him or them.

38. It is to be relevantly pointed out that mere vague allegations that the particular Defendant / Concerned Defendants is / are about to dispose of the property or remove it without any supporting particulars /

materials would not constitute to be a case of sufficient compliance with the Rule envisaged. More importantly, it is the prime duty of the Plaintiff in a given case to substantiate the grounds on which he apprehends or entertains the belief that the concerned Defendant / Defendants would remove or dispose of the property or to furnish the source of his / their information and belief by means of an affidavit.

39. Indeed, the mechanical verbatim reproduction of the ingredients of Civil Procedure Code in respect of Order 38 Rule 5 are vague allegations unsupported by particulars would unerringly point out that the requirements under Order 38 Rule 5 Civil Procedure Code are not complied with.

40. The purpose of ordering the 'Attachment Before Judgment' is to prevent a decree to be finally passed turning out to be an infructuous one. Before the Court of Law endeavouring to exercise the power of 'Attachment before Judgment', the concerned Court should be subjectively satisfied that there is a reasonable chance of a decree being passed against the concerned Defendant in a suit.

41. The term 'Property' includes a movable or immovable property

as per decision '**Chedi Lal V. Kuarji reported in (1895) ILR page 17.** Undoubtedly, the principle of Section 64 of Civil Procedure Code, which enjoins that when the property is attached to the execution of decree, any private transfer of the property in negation to the attachment would be void against all claims enforceable under attachment, shall apply to 'Attachment Before Judgment'

42. It cannot be gainsaid that the order rejecting the Petition to provide security affects the right of a litigant and therefore, being a 'Judgment within the meaning of Clause 15 of the Letters Patent of Appeal' is maintainable.

43. It is true that as per Order 38 Rule 5 of Civil Procedure Code the option is available to a Court of Law in demanding security coupled with the production of the property or to remit its values or otherwise a notice can be issued to the Defendant for a particular date of hearing to show cause as to why he should not confer security.

44. It is to be pointed out by this Court that prior to the exercise of jurisdiction under Order 38 Rule 5 of Civil Procedure Code and passing orders by the concerned Court for Attachment of Property before

Judgment, a Court must subjectively satisfy itself in regard to the Plaintiff's success and all the imminent / great danger with the concerned Defendant / Defendants is carrying on all acts with a mala fide and dishonest intention of either delaying or defeating the possible 'Decree' that may be passed against him. To put it precisely, the power to 'Attach' is not to be exercised in a lighter and cavalier fashion.

45. In this connection, this Court worth recalls and recollects the decision of **Hon'ble Supreme Court [M.K.Govindankutty Menon V. Reena w/o Late Kaithachirayil & Others]** reported in **AIR 2007 Kerala Page 254** wherein it is observed as follows:-

"In the instant case, before proceeding to attach the property belonging to the petitioner, Court should have considered whether the apprehension of the plaintiffs that the petitioner will alienate his properties was well founded and also as to whether there was sufficient guarantee that the properties of the petitioner will be available for the plaintiffs to proceed against in the event of the plaintiffs being able to obtain a positive decree against the petitioner also. Counter affidavit contains a clear and unambiguous undertaking by the petitioner to the effect that he shall not alienate the property in question and that under no circumstances a situation of the plaintiffs being unable to secure the fruits of the prospective decree on account of

transfer by the petitioner of his property will arise. The affidavit sworn to by the petitioner was quite convincing and it was highly improper on the part of the Court to have ignored the undertakings in the affidavit and insisted on the petitioner submitting security for the entire plaint claim. The plaint claim was only around Rs.4 Lakhs and under the impugned order, the defendants together have been called upon to furnish security for a total amount of Rs.22 Lakhs. Though Order 38 Rule 5 enables the Court to direct the defendant to furnish security in such sum as may be specified in the order, it will be excessive and erroneous exercise of jurisdiction if a Court insists on production of security far in excess of the prospective decree-debt.”

46. Further in the decision of **Hon'ble Supreme Court [Bank of India V. M/s National Tile Work Industries and others]** reported in **AIR 1989 Delhi at Page 60** wherein at **Spl.Page 62**, it is held as under:

“The object of the entire order of the Code is to safeguard the interest of the plaintiff and thwart any possible attempt by the defendant to obstruct or delay the satisfaction of a decree which might be passed against the defendant and to achieve this purpose. R.5 thereof enables the court to issue attachment before judgment of the property of the defendant so that any attempt on the part of the defendant to delay or defeat the satisfaction of the decree is forestalled.

In accordance with the provisions of O.38, R.5 of the Code, it is incumbent upon the plaintiff to satisfy the Court that the defendant has intention to obstruct or delay the execution of any decree that may be passed in this suit and for this purpose the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. It is only on the satisfaction of all these conditions that the plaintiff can be said to be entitled to an order of attachment before Judgment in terms of O.38, R.5. Thus, before this R.5 can be invoked it must inter alia, be shown by the plaintiff that defendant has acted or is about to act with intent to obstruct or delay the execution of any decree that may be passed against him. The Court must be satisfied that all the ingredients of this rule exist. Mere fact that no harm would be caused to defendant or that defendant would not be prejudiced by such an order could be no ground to pass order under O.38, R.5 for attachment before judgment. It is in its very nature an extraordinary jurisdiction and has to be exercised sparingly and strictly in accordance with procedure prescribed by the Code. There must be some definite evidence on these points and not mere vague allegations. The plaintiff must also prove a prima facie case in his favour. The approach of this Court has essentially to be very cautious and not casual or routine like."

47. Moreover, this Court aptly points out the decision reported in

AIR 1953 Madhya Bharat 247 [Dr.B.R.Choudhary V.P.V.Bhagwat]

wherein it is held that the mere apprehension of the Plaintiff that his dues might remain unpaid or mere nervousness for recovery is not relevant consideration. That apart, a mere bald averment that Defendant is contemplating to alienate the property is not sufficient, as per decision **AIR 2000 Madras Page 213, 217 [Renox Commercials Ltd., V. Inventa Technologies Pvt., Ltd.,]**

48. There is no two opinion of a crystalline fact that ingredients of Order 38 Rule 5 CPC are not there to convert an unsecured debt into a secured debt. Even though an Order 38 Rule 5 CPC is a protective measure with a view to safeguard the interest of concerned Plaintiff, it cannot be brushed aside that a mere apprehension of the Plaintiff does not attract the specific requirements of the Section.

49. No wonder an 'Attachment Before Judgement' under Order 38 Rule 5 CPC is a Draconian, a harsh remedy and the same shall not to be ordered by a Court of Law, unless a clear prima facie case is made out in this regard. It is worthwhile to make a significant mention that an Order of 'Attachment before Judgement' passed under Order 38 Rule 5 of CPC is mainly intended to protect the interest of the Plaintiff in case of

decree being passed, the same stands fulfilled.

50. Per contra, the object of Order 21 of Civil Procedure Code is that when 'Once the execution commences, the process of Court is not defeated'. By means of an 'Attachment Order' no decree is passed and at any cost, an 'Order of Attachment' does not create any 'Change' in the property. For passing an order under Order 38 Rule 5 CPC, the intention of the concerned Defendant is sine qua non.

51. It is to be borne in mind that utmost caution is required in issuing an order of Attachment before Judgment as per decision **AIR 1969 Jammu and Kashmir at Page 22 [Smt.Vidhya Devi V. Shri Harish Chander and Another]**. An order of 'Attachment before Judgment' is not to be granted simply based on assumptions, surmises and conjectures. An 'Attachment Before Judgment' cannot be passed merely for the sake of asking or because the Garnishee owes a huge sum payable to the Defendant, as per decision **AIR 2003 Andhra Pradesh Page 13 [Surender Singh Bajaj V. M.s Kitty Steels Limited and Another]**.

52. In this connection, this Court aptly points out that any order passed by a Court of Law, simpliciter, in attaching the property without subjectively satisfying itself in regard to the value of the property offered as security, the same is not legally tenable one, in the considered opinion of this Court.

What is Rent?

53. It is to be pointed out that the term 'Rent' is the entire amount agreed to be paid by a Tenant to his Landlord in respect of his enjoyment of what is let to him whether termed as 'Rent or not'. The word 'Rent' is comprehensive and very wide and includes all payment agreed to be made by the tenant in respect of the enjoyment of the building and for all amenities provided for the more beneficial and convenient enjoyment of the building, as per decision **M/s Isherdas Sahni & Brothers V. Rajeswara Rao and others** reported in 1968 2MLJ 233 at page 245.

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54. Under the Tamil Nadu Buildings [Lease and Rent Control] Act, 1960 only two types of Rents are foreseen under the Act, i.e., (i) Contractual Rent (ii) Fair Rent. Where no fair rent is determined, Court cannot decide what is reasonable rent in a Petition for Eviction on

the ground of 'Wilful Default' as per decision **Nagarajan.M. V.Selvasubramaiaam reported in 2001- 1-L.W. 300.** Any sum of money, which the tenant agrees to pay as consideration for the tenancy would be 'Rent', as per decision **Sakunthala Rajappa V. K.Kamala reported in [1972] 2 MLJ 454 at Special Page 461.**

Jurisdiction:

55. It is to be relevantly pointed out that in the decision of this Court [**Palaniswamy and others V.Srivysaraja Matam, Kumbakonam and another**] reported in [2003] 1 L.W.656 at Special Pages 658 and 659, at Paragraph No.10 it is interalia observed as follows:

“10..... When once it is proved that it is a public Trust, then naturally the plaintiff is entitled to file only a suit for recovery of possession since the defendants are not entitled to claim benefit under the Act.”

Apart from that, the Judgment of Civil Court is a relevant evidence, as per Section 13 of Indian Evidence Act, 1872. To put it precisely, an exclusive jurisdiction conferred on a Civil Court, as per Section 9 of the Civil Procedure Code is not fettered except on some clear principle. Moreover, the Rent Controller can go into the issue as regards 'Denial of Title' and in this regard, his jurisdiction is limited, as per decision of

Hon'ble Supreme Court [**Life Insurance Corporation of India V. India Automobiles & Company and others**] reported in 106 L.W. Page 569 [SC].

56. Undoubtedly, any individual / Landlord may institute appropriate proceedings against his tenant for possession of a building on the grounds adumbrated under the Rent Control Act. The jurisdiction of a Civil Court can be excluded by an express provision of a statute or by means of an irresistible conclusion being reached in this regard. Even parties by their consent cannot confer jurisdiction on the Learned Rent Controller to do something.

Glimpse of the Madras City Tenants' Protection Act, 1921 :

57. It is to be pointed out that Definition 2(1) of the Madras City Tenants' Protection Act, 1921 reads as under:-

[(1) 'Building' means any building, hut or other structure, whether of masonry, bricks, wood, mud or metal or any other material whatsoever used-

(i) for residential or non-residential purposes in the City of Madras, in the municipal towns of Coimbatore, Madurai (Every local area, which immediately before the 1st May 1971 was constituted as the Madurai Municipality under

the Tamil Nadu District Municipalities Act, 1920 (Tamil Nadu Act V of 1920), was deemed to be the City of Madurai under the Madurai City Municipal Corportion Act, 1971 (Tamil Nadu Act 15 of 1971). Vide Section 511 of the latter Act read with Rule 2 in Schedule VII thereto), Salem and Tiruchirappalli (This expression was substituted for the original expression by Section 4 of the Tamilnadu City Tenants' Protection (Amendment) Act, 1979 (Tamilnadu act 2 of 1980), which deemed to have come into force on the 9th January, 1974) [in the townships of Kodaikanal, Avadi, Kathiwakkam, Ambattur, Madhavaram, Bhavanisagar, Courtallam and Mettur or in such other municipal town or township as the Government may, by notification, specify and in any village within eight kilometers of the city of Madras or of the municipal towns or town or township aforesaid].

(ii) for residential purposes only, in any other area; and includes the appurtenance thereto;]

58. Section 2(2) of the said Act under the head 'Land' says that it does not include buildings. Section 2(3) of the Act, 1921 defines the Term 'Landlord', which runs as under:-

"2(3) 'Landlord' means any person owning any land, and includes every person entitled to collect the rent of the whole or any portion of the land, whether on his own account or on behalf of or for the benefit of any other person, or by virtue of any transfer from the owner or his predecessor in

title or of any order of a competent Court or of any provision of law]”

59. A tenant, who continues to be in possession of the Land after determination of the tenancy by forfeiture would fall within the definition of 'Tenant', as per Section 2(4) of the Tamilnadu City Tenant Protection Act, 1921. A tenant before he claims right under Section 9 of the Act, 1921 should satisfy the Court that he had put up superstructure on the demise land and that he continues to be the owner thereof on the date of his Petition for issuance of an order directing the Landlord to sell the land to him, as per decision **1987 100 L.W. Page 86 [Sivaperumal Trust V. Seethalakshmi Ammal (died) (Managing Trustee of N.K.N.K.R. Dharma Trust Madurai) and others]**. Under Section 2(4) of the Act, a tenant of land is an individual liable to pay rent in respect of such land under the tenancy agreement express or implied. A tenant, who is not in possession of the property has no right to file a petition under Section 9 of the City Tenants Protection Act. A Physical possession of the property by a tenant is a requisite factor for him to exercise his 'Right of Purchase' under Section 9 of the Act. In order to claim benefit under Section 3 of Act, 1921, a tenant must establish physical and actual possession with him.

60. Section 9 of the Act, 1921 refers to an Application to Court for

directing the landlord to sell the lands. Section 9 of the Act is based on Equity, since, when the land is sold to the tenant, the guarantee of enjoyment of the super structure put up by him is very much assured. Of course, there are certain statutory requirements, which are to be complied with by a tenant, if he is desirous of availing the benefits. In fact, the tenants right under Section 9 of the Act is only a privileged statutory right and not a vested right. Really speaking, when a landlord files an Ejectment Suit, a Petition / Application under Section 9 of the Act 1921 can be filed.

61. Section 6 of the Madras City Tenants Protection Act, 1921 speaks of 'Determination of Rent'. Section 7 of the Act refers to an 'Application of Landlord for Fixing of Rent'. Section 7-A of the Act pertains to an 'Application by the Tenant'. Section 9-A of the Act speaks of filing of an Appeal as against an Order passed by this Court under Sections 6, 7, 7-A or 9. If a tenant is not in a physical property or super structure, the issue of immunity from eviction does not arise, on any score. Section 9 of the Act will apply only when there is an admitted relationship between the Landlord and Tenant.

62. Be it noted, that in a case where a tenancy is governed by the ingredients of Transfer of Property Act, 1882 as well as General Law

when a tenancy of Lease determined under Section 111 of the Transfer of Property Act, the tenants' right to continue in possession of the particular property comes to an end and for the subsequent period when he occupies the premises in question is liable to pay damages for use and occupation at the rate of which the landlord could have let out the premises to another, consequent to the vacation of the premises by him, by means of demand for possession or by an entry of the landlord without notice or by the tenant quitting a tenancy at sufferance or a tenancy at Will is determined.

Definition of Licence and Lease:

63. It is to be pointed out that the Word 'License' is a permission to perform some activity using the immovable property of nature, who holds a right to that property. In fact, the term 'Licence' is defined under Section 52 of the Indian Easement Act, 1882. Admittedly, a 'Licence' granted by the owner enables licensee a right to do or continue to do certain specified things in or upon an immovable property.

64. Apart from the above, Section 105 of Transfer of Property Act, 1882 defines 'Lease' who is a transfer of right to enjoy such property, made for a certain time express or implied or in perpetuity, in

consideration of price paid or promised or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who acts the transfer on such terms.

65. In the present case, the source of information, belief and material particulars obtained in regard to there being every chance to encumber or transfer the only property owned by the Respondent / Defendant at Plot No.37, Old No.4, New Door No.7, Ramarao road, Mylapore, Chennai -4 with a view to defraud the Respondent / Plaintiff requiring entitlement of recovery of damages etc., were not established to the subjective satisfaction of this Court.

66. As far as the present case is concerned, even though in Application No.2405 of 2017, the Respondent / Plaintiff [as an Applicant] had sought for a relief of furnishing of security by the Appellants / Defendants to the value of suit claim of Rs.79,16,475/-, this Court taking note of the fact that the Respondent / Plaintiff had claimed the aforesaid sum of Rs.79,16,475/- for the period from March 2014 to January, 2017, based on the Land value taken at Rs.1 Crore per ground and also the Respondent / Plaintiff had referred to an order in R.C.O.P.No.1585 of

2012 dated 10.10.2013 wherein the Small Causes Court [Learned Rent Controller] had fixed a sum of Rs.22,090/- towards fair rent per month for 481.25 square feet and on that basis of market value, tentatively claimed a rent payable by the Appellants / Defendants as Rs.2,28,250/- per month and also, this Court bearing in mind the stand taken by the Appellants / Defendants in their counter to A.No.2405 of 2017 where from it is evident that in between the respective parties, there are pending legal proceedings before the Learned XIV Assistant Judge, City Civil Court, further, this Court, after going through the undertaking given by the 1st Appellant / 1st Defendant at Paragraph No.14 of the Counter affidavit to the effect that '....immovable property involved in the Application will not be encumbered or Transferred by the Owners of the Property and the Applicant should be rest assured that the Respondents have the necessary solvency at their own to meet any determination of the Amounts that may be fixed by the XIV Assistant City Civil Court, Chennai after determination of the issues in O.S.No.2171 of 2014' and also this Court, considering the valuation report furnished by the Government Approved Valuer & Chartered Engineer in respect of the land and residential Building located at Plot No.37, Ramarao Road, Luz church road, Mylapore, wherein a fair market value of the property is assessed at Rs.3 Crores in the following manner:

V	Abstract as on date (L+B)	
a.	Market value of the property	Rs.3,00,00,000
b.	Guideline value of the property (Rs.2,18,750/- +Rs.35,91,800)	Rs.2,54,50,550
c.	Forced sale value of the property (90% of Market Value)	Rs.2,70,00,000
	Hence the fair market value of the property assessed is say 3.00 Crores (Rupees three Crores only)	

is of the considered view that the pleadings and the defence set out by the parties as on date are to be tested and proved in a threadbare, complete and comprehensive manner. Also that the Managing Partner of the 1st Appellant / 1st Applicant had sworn to an affidavit dated 22.09.2017 before the Learned Single Judge at Paragraph No.4 in A.No.2405 of 2017 inter alia stating that 'he will deposit the amount of Rs.1/- to Rs.1.50/- per square feet payable every month both for the past period commencing from 01.01.2014 to till date and also for the future period and this amount can be deposited by him either to the credit of the present Application or in O.S.No.5915 of 2016 on the file of Learned XIV Assistant Judge, City Civil Court, Chennai...', this Court comes to an irresistible conclusion that the views taken by the Learned Single Judge to the effect that 'when there is a reasonable apprehension that the defendants might vacate the premises to the disadvantage of the plaintiff and also remove the movables, the defendants have to be

called upon to furnish security to the value of the suit claim' and accordingly allowed the Application in A.No.2405 of 2017 in C.S.No.286 of 2017 directing the Appellants / Respondents / Defendants to furnish security to the value of Rs.79,16,475/- on or before 15.02.2018 etc., are not correct and viewed in that perspective, this Court sets aside the same. Consequently, the Original Side Appeal succeeds.

Result:

In fine, the Original Side Appeal is allowed. No costs. The Impugned Order dated 18.01.2018 in A.No.2405 of 2017 is hereby set aside by this Court for the reasons assigned in this Appeal. Resultantly, Application No.2405 of 2017 is dismissed. Before parting with the case, this Court directs the parties to complete the pleadings in the main case [if not completed already] and it is open to the respective parties to raise all factual and legal pleas to substantiate their version / case at the time of conduct of trial of the main Suit in C.S.No.286 of 2017, by letting in oral and documentary evidence, by examining the necessary witnesses and marking documents on their side. Liberty is granted to the respective parties to make an earnest request before the Learned Single Judge for early disposal of the main Suit. Consequently connected

Miscellaneous Petition is closed.

[M.V.J.]

[S.V.N.J.]

25.04.2018

Index:Yes/No.; Internet:Yes/No.

Speaking Judgment / Non speaking Judgment

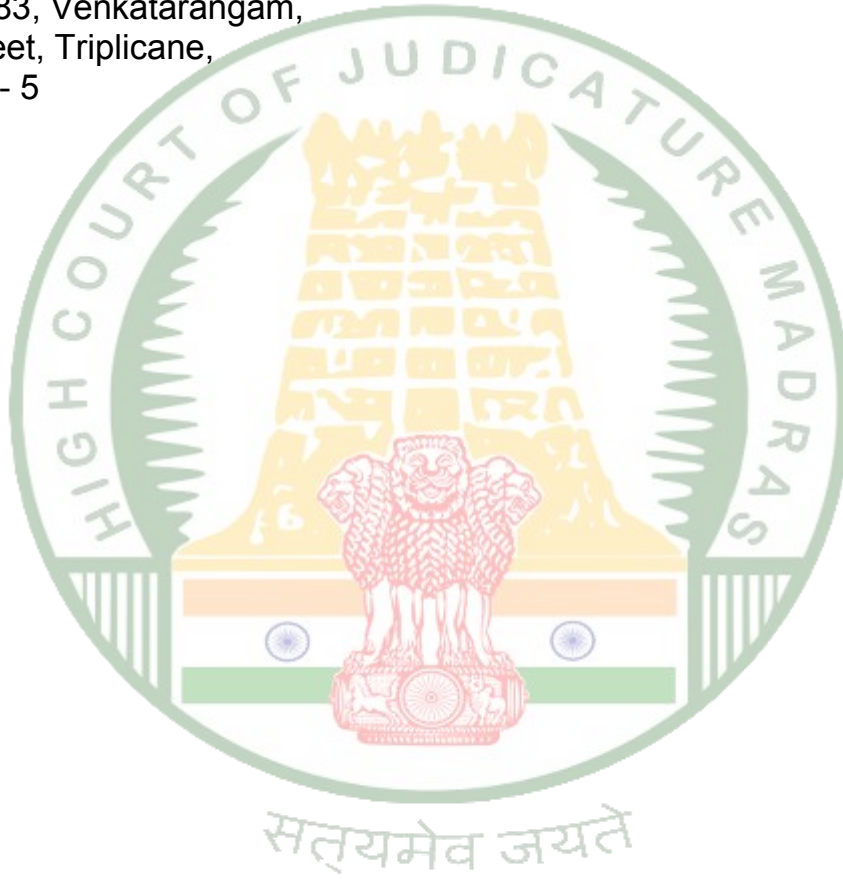
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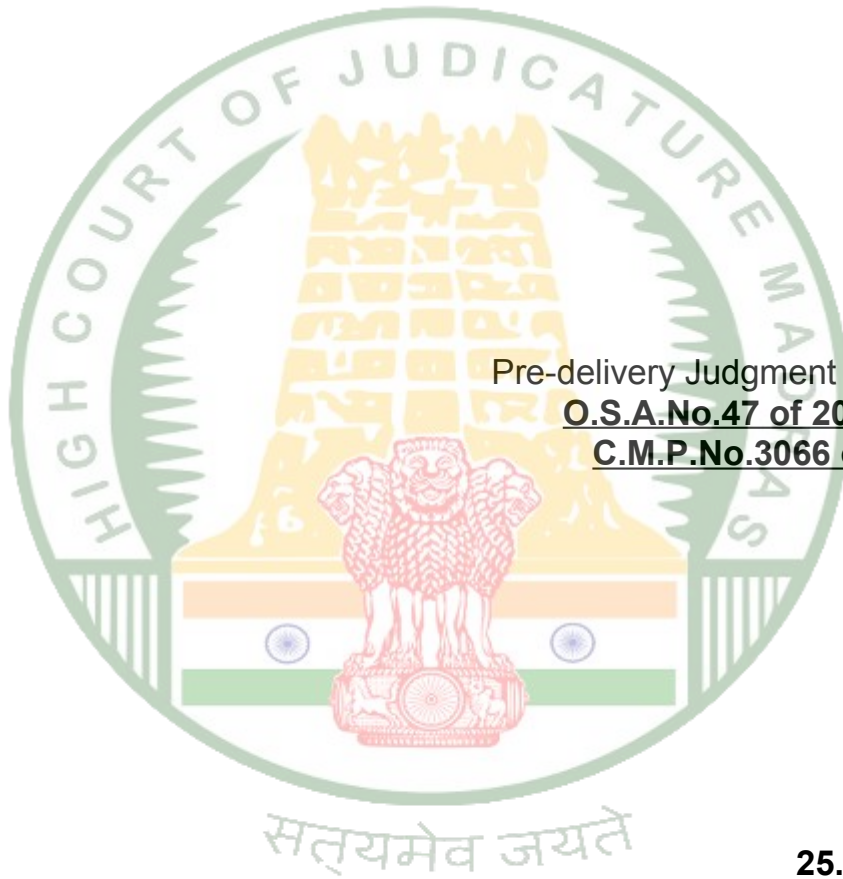
T.K.K.N.N.Vysya Charities,
Rep by its Managing Trustee,
Mr.D.V.S.Prasad,
New No.83, Venkatarangam,
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**M.VENUGOPAL,J.,
and
S.VAIDYANATHAN,J.,**

ssd



Pre-delivery Judgment made in
O.S.A.No.47 of 2018 and
C.M.P.No.3066 of 2018

25.04.2018

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