

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.R.P. (NPD) Nos.439 to 444 of 2018

AND

CMP Nos.2317 to 2322 of 2018

1. M/s.Futnani Dairy Farm
Rep. by its Managing Partner
Madhusudhan Futnani

2. Madhusudhan Futnani ... Petitioners in all cases

vs.

1. Bank of Baroda
Rep. by its Chief Manager,
Egmore Branch.

2. M/s.New ERA Urban Amenities Ltd.,
Rep. by its Managing Director,
Mr.S.Thiyagaraja Chettiar.

3. Mr.S.Thiyagaraja Chettiar ... Respondents in all cases

Civil Revision Petitions filed under Article 227 of the Constitution of India against the fair and decretal order dated 26.04.2017, passed in M.A.Nos.405 to 410 of 2010 in M.A.Nos.8 to 13 of 2007 in M.A.Nos.77 to 79 of 2004 in M.A.No.323 of 2003 in I.A.No.2317 of 1999 in O.A.No.659 of 1997, on the file of the Debts Recovery Tribunal-1, Chennai.

COMMON ORDER

(Order of the Court was delivered by S.MANIKUMAR, J)

Material on record discloses that from Bank of Baroda, Egmore, Chennai, M/s. New ERA Urban Amenities Ltd., represented by its Managing Director Mr.S.Thiyagaraja Chettiar, has availed Cash Credit facility upto a limit of Rs.2 Crores on 22.04.1992. Mr.S.Thiyagaraja Chettiar, has executed a General Form of Guarantee and guaranteed due repayment and discharge of the amount due by M/s. New ERA Urban Amenities Limited.

2. On 14.07.1992, M/s.Futnani Dairy Farm, a partnership firm through Power of Attorney has offered security, for the loan facility availed by M/s.Futnani Dairy Farm, and deposited with Bank of Baroda, title deeds to create equitable mortgage of their property described as Schedule 'A' and 02.04.1996, also executed other documents. Borrowers and guarantors have defaulted in payment. Hence, Bank of Baroda, Chennai has filed O.A.No.659 of 1997, before the Debts Recovery Tribunal, Chennai, against them, for the following reliefs/interim reliefs:

1. To pass an order declaring

(a) that an amount of Rs.3,89,33,249.39p is due from the respondents 1 to 9 to the applicants and that the respondents are jointly and severally liable to pay the said amount together with interest thereon at the rate of 20.75 per cent per annum with quarterly rests from 11.8.97 till date of payment and full costs of this proceedings including costs that may be incurred in the proceedings before the Recovery Officer;

(b) that the said amount together with interest and costs as mentioned above is recoverable personally from the respondents.

(c) that the Schedule 'A', 'B' properties being mortgaged / hypothecated to the applicant are liable to be sold realised for recovery of the said amount with interest and costs;

(d) To pass an order directing the Recovery Officer to realise the Book Debt hypothecated to the Bank.

ii. To issue a certificate to the Recovery Officer in terms of the order that may be passed as per prayer 1 and to direct him to recover the amounts in terms of the certificate that may be issued and pay it to the applicants.

iii. To grant such other and further reliefs as may be prayed for the applicants and as may be deemed fit and proper in the circumstances of the case.

Interim Reliefs sought for are.

The applicant submits that the Schedule 'A' property mortgaged by the Third respondent is of the value of Rs.10,00,000/- only. This will not cover the entire amount of Rs.3,89,33,249.39p due from the respondents to be recovered.

The said respondent No.2 owns the following property:

(a) Land and building at CASA COURT at No.1, Ranjit Road, Kotturpuram, Chennai, Block No.15, Corporation Division No.99, Zamin Adayar, Chennai-20.

(b) Land of an extent 57 acres 43 cents at No.76, Perunthottam Village Pandaravadal Division Sirkazhi Taluk, Nagai Quaida Millet District.

(c) Land and Building at Cudalur Village (O.B Desam) measuring an extent of 122.03 acres in old Survey No.2 and new survey no.2/1, 2/2, 2/3 and 2/4 known as Wallwood Estate and land measuring an extent of 300.22 acres comprising in old survey No.3 and new survey No.3/1, 3/2, 3/3, 3/4 and 3/5 known as BALMADIS Estate.

The said second respondent because of lots of debts incurred by him,

is trying to alienate the above properties and secretly appropriate the sale proceeds recovered out of them.

Hence in the interest of justice, the abovesaid properties should be attached and sold through Court.

Further, the second respondent herein may be restrained by order of injunction from selling alienating or mortgaging the above said properties. Unless the said orders are passed, it will be difficult for the applicant to recover in full the amount/s due."

3. Defendants 3, 4, 6, 7, 8 and 9 remained exparte on 18.09.1998 and final order against them in OA No.659 of 1997 has been passed on 03.09.1999. The abovesaid defendants filed I.A.No.2317 of 1999 in O.A.No.659 of 1997 before the Debts Recovery Tribunal-I, Chennai, to set aside the order dated 03.09.1999.

4. After considering the rival submissions, to provide an opportunity to the abovesaid defendants, the tribunal vide order dated 05.12.2002 in I.A.No.2317 of 1999 in OA No.659 of 1997, imposed a condition, to pay 50% of the recovery amount or Rs.2 Crores, which ever is less, within eight weeks, to Bank of Baroda, Chennai, the applicant therein, under intimation to the recovery officer.

5. Debts Recovery Tribunal-I, Chennai, has further ordered that on furnishing proof of payment, the abovesaid defendants can be given a further opportunity to file reply statement and contest the case on merits.

Tribunal has further ordered that in such situation, the case would stand reopened and final order and recovery certificate, in so far as it relates to Defendant Nos.3, 4, 6, 7, 8 and 9, would stand set aside. The tribunal also made it clear that the final order dated 03.09.1999, would be operative, and binding and enforceable against the defendants 1 and 2.

6. M/s.Futnani Dairy Farm, represented by its Managing Partner Mr.Madhusudhan Futnani and Mr.Madhusudhan Futnani, in his individual capacity, defendants 3 and 4 therein, have filed M.A.No.323 of 2003 in I.A.No.2317 of 1999 in O.A.No.659 of 1997 on the file of Debts Recovery Tribunal-I, Chennai, to recall, review and modify the order in I.A.No.2317 of 1999 dated 05.12.2002, and to permit the firm and its partner, to file their written statement in O.A.No.659 of 1997.

7. The conditional order directing defendants 3, 4, 6, 7, 8 and 9, has not been complied with. There was a delay of 359 days in filing M.A.No.323 of 2003. Hence, M/s.Futnani Dairy Farm, represented by its Managing Partner Mr.Madhusudhan Futnani and Mr.Madhusudhan Futnani, in his individual capacity, have filed M.A.No.77 of 2004 in M.A.No.323 of 2003 , for condoning the delay of 359 days in filing the application to recall, review or modify the order in I.A.No.2317 of 1999.

8. M.A.No.78 of 2004 has been filed to condone the delay of 50 days

in representing M.A.No.323 of 2003 and M.A.No.79 of 2004 has been filed to recall, review or modify the order made in I.A.No.2317 of 1999.

9. On 26.06.2006, M.A.Nos.323 of 2003, 77 to 79 of 2004, filed to condone the delay have been dismissed for default. Thereafter, to set aside the said order made in M.A.Nos.77 to 79 of 2004, M/s.Futnani Dairy Farm, represented by its Managing Partner Mr.Madhusudhan Futnani and Mr.Madhusudhan Futnani, in his individual capacity, defendants 3 and 4 have filed M.A.Nos.8 to 13 of 2007, for the following reliefs

(i) M.A.No.8 of 2007, is filed by the defendants to condone the delay of 145 days in filing the application to set aside the exparte order dated 26.06.2006, passed in M.A.No.77 of 2004.

(ii) M.A.No.9 of 2007, is filed by the defendants to condone the delay of 145 days in filing the application to set aside the exparte order dated 26.06.2006, passed in M.A.No.78 of 2004.

(iii) M.A.No.10 of 2007, is filed by the defendants to condone the delay of 145 days in filing the application to set aside the exparte order dated 26.06.2006, passed in M.A.No.79 of 2004.

(iv) M.A.No.11 of 2007, is filed by the defendants to set aside the order dated 26.06.2006, passed in M.A.No.77 of 2004.

(v) M.A.No.12 of 2007, is filed by the defendants to set aside the order dated 26.06.2006, passed in M.A.No.78 of 2004.

(vi) M.A.No.13 of 2007, is filed by the defendants to set aside the order dated 26.06.2006, passed in M.A.No.79 of 2004.

10. When, M.A.Nos.8 to 13 of 2007, filed in M.A.Nos.77 to 79 of 2004

in M.A.No.323 of 2003 in I.A.No.2317 of 1999 in O.A.No.659 of 1997, have been taken up for hearing on 11.05.2010 and by a common order, DRT dismissed all the petitions. For details and brevity, common order, is extracted hereunder.

"In the result:- MA-8/2007 filed to condone the delay of 145 days in filing the application to set aside the exparte order passed in MA.77/2004, MA-9/2007 filed to condone the delay of 145 days in filing the application to set aside the exparte order passed in MA.78/2004, MA-10/2007 filed to condone the delay of 145 days in filing the application to set aside the exparte order passed in MA.79/2004, MA-11/2007 filed to set aside the order passed in MA.77/2004, MA-12/2007 filed to set aside the order passed in MA.78/2004, MA-13/2007 filed to set aside the order passed in MA.79/2004 in OA-659/1997, are dismissed with no order as to costs."

11. Thereafter, M/s.Futnani Dairy Farm, represented by its Managing Partner Mr.Madhusudhan Futnani and Mr.Madhusudhan Futnani, in his individual capacity, defendants 3 and 4, have filed M.A.No.405 of 2010, against M.A.No.8 of 2007, M.A.No.406 of 2010, against M.A.No.9 of 2007, M.A.No.407 of 2010, against M.A.No.10 of 2007, M.A.No.408 of 2010, against M.A.No.11 of 2007, M.A.No.409 of 2010, against M.A.No.12 of 2007 and M.A.No.410 of 2010, against M.A.No.13 of 2007, respectively.

12. Prayer made in each of the M.As., are as follows:

M.A.No.405 of 2010: to set aside the order dated 11.5.2010 in M.A.No.8 of 2007 in M.A.No.77 of 2004 in M.A.No.323 of 2003 in

I.A.No.2317 of 1999 in O.A.No.659 of 1997.

M.A.No.406 of 2010: to set aside the order dated 11.5.2010 in M.A.No.9 of 2007 in M.A.No.78 of 2004 in M.A.No.323 of 2003 in I.A.No.2317 of 1999 in O.A.No.659 of 1997.

M.A.No.407 of 2010: to set aside the order dated 11.5.2010 in M.A.No.10 of 2007 in M.A.No.77 of 2004 in M.A.No.323 of 2003 in I.A.No.2317 of 1999 in O.A.No.659 of 1997.

M.A.No.408 of 2010: to set aside the order dated 11.5.2010 in M.A.No.11 of 2007 in M.A.No.78 of 2004 in M.A.No.323 of 2003 in I.A.No.2317 of 1999 in O.A.No.659 of 1997.

M.A.No.409 of 2010: to set aside the order dated 11.5.2010 in M.A.No.12 of 2007 in M.A.No.78 of 2004 in M.A.No.323 of 2003 in I.A.No.2317 of 1999 in O.A.No.659 of 1997.

M.A.No.410 of 2010: to set aside the order dated 11.5.2010 in M.A.No.13 of 2007 in M.A.No.79 of 2004 in M.A.No.323 of 2003 in I.A.No.2317 of 1999 in O.A.No.659 of 1997.

13. Pending disposal of the above MAs, Mr.Harish Chandra M.Futnani, the 5th defendant in O.A.No.659 of 1997 died. Thereafter, Ms.Ayesha Harishchandra Futnani, Ms.Monica Harishchandra Futnani and Mrs.Champa Harishchandra Futnani, have been impleaded, as defendants 10 to 12, as per the order of the tribunal dated 24.08.2015, in M.A.No.25 of 2015.

14. After hearing the submissions of the learned counsel for the bank, and others who had appeared, ultimately, the tribunal, at paragraph No.12 in O.A.No.659 of 1997 dated 31.01.2017, partly allowed the said application, as hereunder.

"12. In the result, application is allowed partly as under:

(a) The applicant bank is entitled to the recovery certificate against the defendants 1 to 4, 6 to 9 for a sum of Rs.3,89,33,249.39p together with interest at 12% per annum simple interest from the date of application till the date of realization with costs which includes advocate fees as per the rules prevailing in the State.

(b) It is further ordered that the equitable mortgage of the application 'A' Schedule property created by the 1st defendant on the strength of Ex.A-7, Power of Attorney dt. 27.12.1990 in favour of the applicant bank as a security for the due discharge of the credit facilities availed by D1, is invalid and unenforceable under law. Consequently, it is ordered that the claim against the defendants 10 to 12 is hereby dismissed.

(c) It is further ordered that the amount remitted by or realised if any from defendants 1 and 2 during the course of the proceedings, shall be given due credit to the loan account of the Defendants 1 & 2.

(d) It is further ordered that amount realized, if any, from the 3rd defendant or its partners shall be refunded/returned to the 3rd defendant and its partners/legal representatives together with simple interest @ 9% p.a. from the date of receipt of the amount till the date of repayment.

(e) In case of default, the 2nd defendant is personally liable to pay the amount of such deficiency with interest mentioned above until realization.

(f) The applicant bank is directed to file costs memo within two weeks of the receipt of this order.

(g) Issue recovery certificate in favour of the applicant bank in terms of this final order."

15. After the final orders made in O.A.No.659 of 1997 dated

petitioners have been dismissed by the Debts Recovery Appellate Tribunal, on 26.04.2017, as hereunder.

"In view of the fact that present Appeal has been filed against an interim order in which case final order has been passed, hence, all six Appeals stand dismissed with liberty and right to the Appellants that irrespective of anything mentioned in the final order, they will challenge the final order and will be entitled to raise all these point raised in the Appeals in the Appeal to be filed against the final order.

All the six Appeals stand dismissed."

16. Being aggrieved by the dismissal of the appeals in M.A.Nos.405 to 410 of 2010, dated 26.04.2017, instant Civil Revision Petitions (NPD) 439 to 444 of 2018, have been filed.

17. The only contention raised by Mr.Venkatesh Mohanraj, learned counsel for the petitioners is that, unless and until the Debts Recovery Tribunal and the appellate forum have addressed the issue of setting aside the exparte final order, petitioners cannot file an appeal against the final order made in O.A.No.659 of 1997 dated 31.01.2017, and that therefore, the orders impugned before us, requires interference.

18. Learned counsel for the petitioners further submitted that the

appellate tribunal has failed to appreciate the fact that, even the tribunal in interim order, dated 05.12.2002, while imposing a condition of payment of 50% of the dues or Rs.2 Crores, which ever is less, as the case may be, the tribunal has observed that there was no mortgage of the properties of Mr.S.Thiyagaraja Chettiyar, the 3rd respondent herein, in favour of the bank. According to the learned counsel for the petitioners, the appellate tribunal has failed to take note of the above.

19. Inviting the attention of this Court to the paper publication in a newspaper "Madurai Mani", at Madurai, learned counsel submitted that when the properties mortgaged are located in Madras, bank has projected a case of effective service.

20. Learned counsel for the petitioners further submitted that the order made in M.A.Nos.405 to 410 of 2010, be set aside and that an opportunity be given to the petitioners to contest O.A.No.659 of 1997, on merits. For that purpose, learned counsel submitted that the petitioners be put on terms. Except the above, no other submissions have been made.

21. Heard the learned counsel for the petitioners and perused the material available on record.

22. Loan has been availed in the year 1992. Details of mortgage as

culled out from O.A.No.659 of 1997 on the file of the DRT, are as follows:

A	Date of Mortgage	14.07.1992 02.04.1996 (Extension)
B	Name of the Mortgagor	M/s.Futnani Dairy Farm, 3rd respondent through the first respondent
C	Name of the Mortgagee	Bank of Baroda, Egmore Branch, Madras-8
D	Sum Secured	Rs.200 lacs in cash credit Rs.22 lacs in ad-hoc cash credit together with interest
E	Rate of Interest	20.75 percent per annum with quarterly rests
F	Property subject to mortgage	land of an extent of 9.47 acres of Semancherry Village, Thiruporur, Chingleput Taluk & District, more particularly described in Schedule 'A' hereunder
G	Amount due as on date of application	Rs.3,89,33,249.39p together with interest at 20.75 per cent per annum being the aggregate amount due under cash credit and ad-hoc cash credit

23. OA No.659 of 1997 has been filed by the Bank, for the relief as stated supra. Record of proceedings extracted supra, makes it abundantly clear that the petitioners who have borrowed huge amount from Bank of Baroda have, dragged on the proceedings, by filing Interim applications one after another. Defaulted in appearance, and taken up the matter further before the Debts Recovery Appellate Tribunal, Chennai, by filing M.A.Nos.405 to 410 of 2010.

24. Vide order, dated 31.01.2017 in O.A.No.659 of 1997, Debts Recovery Tribunal-I, Chennai, held that the bank is entitled to recovery certificate, against the defendants 1 to 4, 6 to 9 therein, for a sum of Rs.3,89,33,249.39p, together with interest, at the rate of 12% simple interest from the date of application, till date of realisation with costs. Claim against defendants 10 to 12 has been dismissed. Further orders, have been passed.

25. When O.A.No.659 of 1997 was pending, on the file of DRT-I, Chennai, for nearly 20 years, nothing prevented the petitioners from approaching the appellate forum, to take up the M.A.Nos.405 to 410 of 2010, pending since 2010. There is no material to indicate that the petitioners herein, have sought for any expeditious disposal of the appeals. Had the petitioners really intended to contest O.A.No.659 of 1997, on merits they could have approached the appellate tribunal with a petition, for expeditious hearing of M.A.Nos.405 to 410 of 2010. There is no interim order restraining DRT-I, in proceeding with O.A.No.659 of 1997. Thus, the said tribunal, after considering the contentions of the parties therein, has passed final orders on 31.01.2017, holding that the bank is entitled to recovery certificate, as stated supra.

26. Contention of the learned counsel for the petitioners that, unless and until the appellate forum had adjudged the issues relating to setting

them exparte, on merits, the petitioners cannot challenge the final order in O.A.No.659 of 1997 dated 31.01.2017, cannot be accepted, for the reason that there is a decree already passed, against them also

27. Further, interim orders passed in any proceedings, merge with the final orders. Defendants have already been set exparte. Orders have been passed on the petitions filed to modify / condone the delay.

28. On the principle of law that interim order merges with final orders, we deem it fit to consider few decisions.

(i) In **South Eastern Coalfields Ltd v. State of MP and Others** reported in (2003) 8 SCC 648, the Hon'ble Supreme Court held as follows:

"The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage.

(ii) In **Prem Chandra Agarwal and Another v. Uttar Pradesh Financial Corporation and Others** reported in (2009) 11 SCC 479, the Hon'ble Supreme Court held that once a final order is passed, all the earlier

<http://www.judis.nic.in> interim orders merge into the final order, the interim orders cease to exist.

(iii) In **State of West Bengal and Others Vs Banibrata Ghosh and Others** reported in (2009) 3 SCC 250, the Hon'ble Apex Court held that the Interim Order does not decide the fate of the parties to the litigation finally, it is always subject to and merges with the final order passed in the proceedings.

29. From the above, it could be seen that though loan was borrowed in the year 1992, OA for recovery and appropriate further orders, was filed in the year 1997, by filing applications, one after another, petitioners have dragged on the recovery proceedings for nearly 20 years. The Hon'ble Supreme Court, held that the provisions of SARFAESI Act, 2002, have to be implemented to effectuate recovery of public money. Though, Mr.Venkatesh Mohanraj, learned counsel for the petitioners has made submissions imputing the conduct of the bank, going through the material on record, we are of the view that it is otherwise.

30. For the above reasons, we are of the view that the contentions of the petitioners are liable to be rejected and accordingly, rejected. Civil Revision Petitions, categorised as Non-Pre-Decree cases, are misconceived, and deserve to be dismissed with costs.

31. Accordingly, Civil Revision Petitions are dismissed with cost of

Rs.50,000/- i.e. cost of Rs.25,000/- by each of the petitioners to be paid to the bank, within one month from the date of receipt of a copy of this order, failing which, it is open to the bank to take appropriate action, in accordance with law. Consequently, the connected Civil Miscellaneous Petitions are closed.

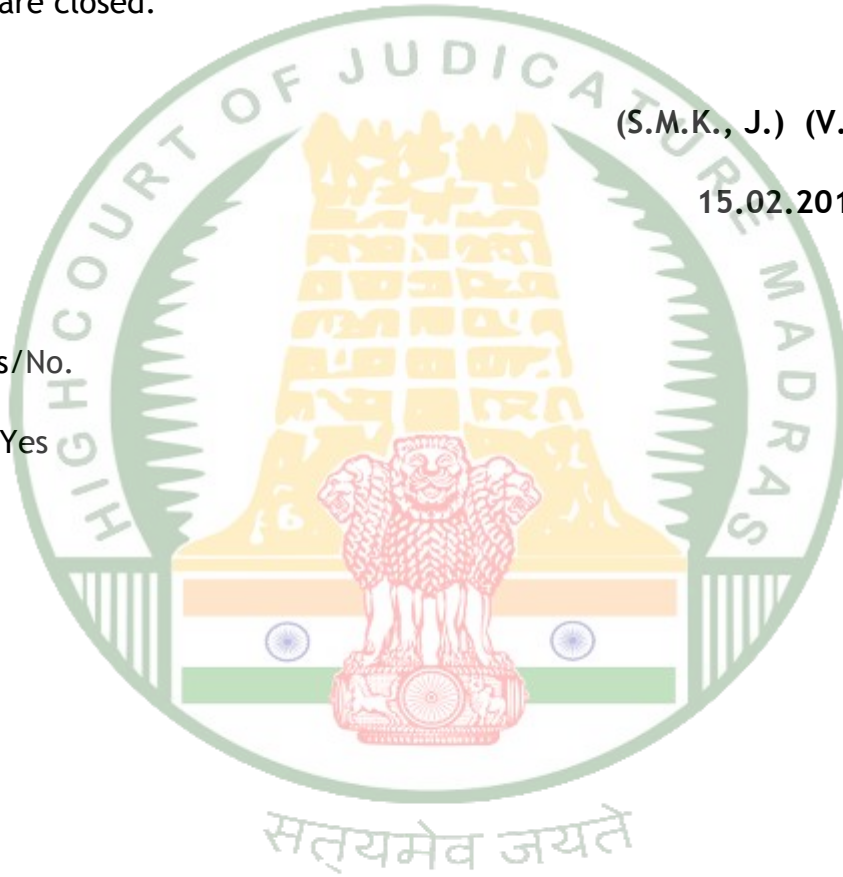
(S.M.K., J.) (V.B.S., J.)

15.02.2018

Index: Yes/No.

Internet: Yes

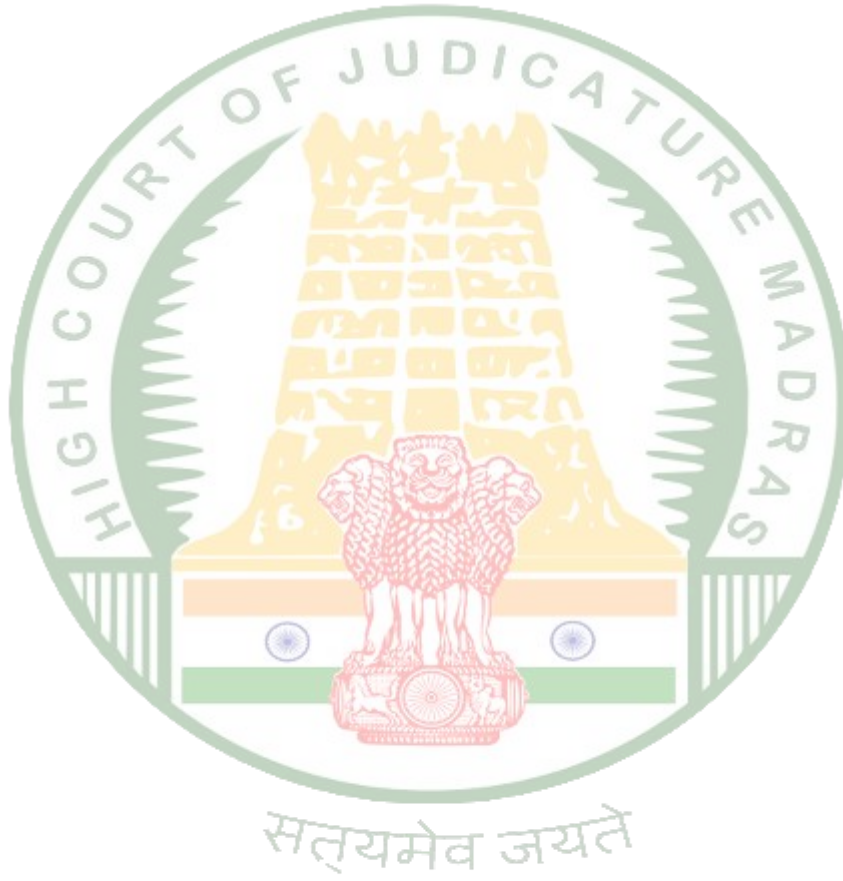
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To

The Chief Manager,
Bank of Baroda
Egmore Branch.



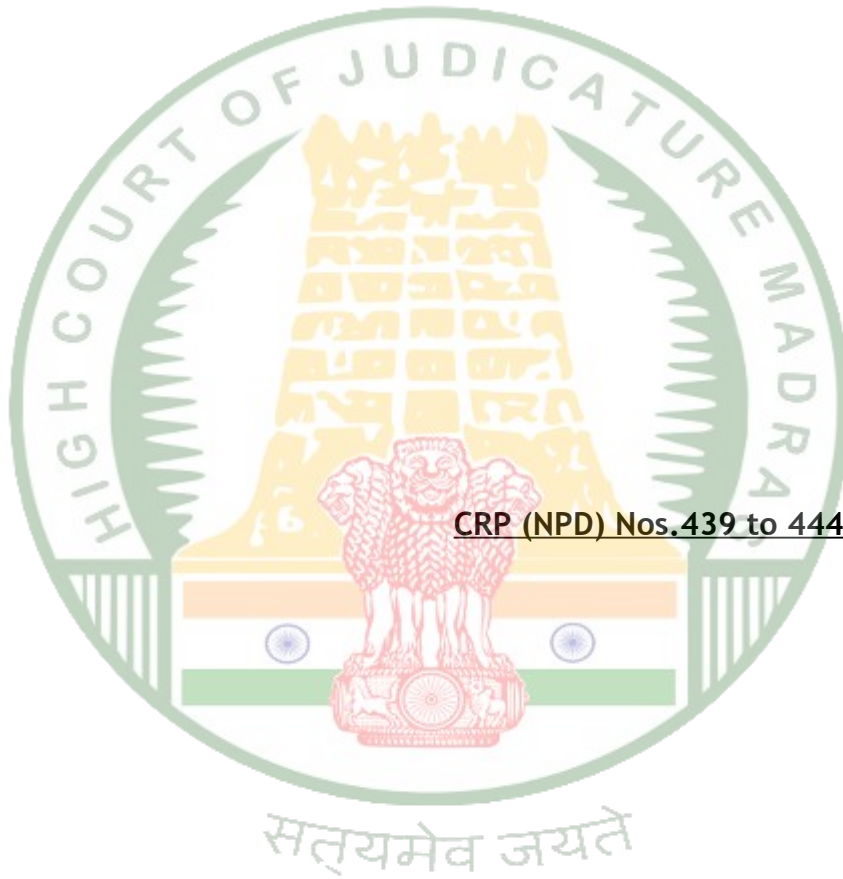
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S.MANIKUMAR, J.

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V.BHAVANI SUBBAROYAN, J.

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CRP (NPD) Nos.439 to 444 of 2018

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