

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.01.2019

DELIVERED ON : 21.01.2019

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.M.S.A. No.16 of 2011 &
M.P.No.1 of 2011

D.Srinivasan ... Appellant / Defendant
vs

1.F.X.Denny (deceased)
2.Sundari
3.Reetabai
4.Tamilselvam
5.Eva Samburanam
6.Anitha Denny
7.Jasmine Iswariya ... Respondents

(Respondents 5 to 7 brought on record as
LRs of the deceased first respondent vide
order dated. 25.10.2017 in CMP.Nos.
15128 to 15130 of 2017)

Appeal filed under Order 21, Rule 90 read with Section 100 of
C.P.C. against the order and decretal order dated 29.6.2010 in
C.M.A.No.135 of 2009 on the file of the II Additional City Civil
Court, Chennai.

For Appellant : Mr.C.B.Muralikrishnan
For Respondents : Mr.R.Karunakaran

for respondents 2 to 4
No Appearance

for respondents 5 to 7

JUDGMENT

This Civil Miscellaneous Second Appeal is directed against
the order of the learned II Additional City Civil Court,
Chennai, dated 29.6.2010 made in C.M.A.No.135 of 2009,
dismissing the appeal preferred by the appellant against the
order dated 3.4.2009 passed in E.A.No.1391 of 2009 in
E.P.No.1518 of 2004 in O.S.No.2138 of 2003 on the file of the X
Assistant Judge, City Civil Court, Chennai.

2. The appellant is the judgment debtor; the deceased first respondent is the original decree-holder; the respondents 2 to 4 are the auction purchasers and the respondents 5 to 7 are legal heirs of the deceased first respondent/decreed-holder.

3. The appellant has filed E.A.No.1391 of 2009 under Order 21, Rule 90 CPC to set aside the sale held on 29.11.2006 in E.P.No.1518 of 2004 in O.S.No.2138 of 2003 stating that despite petition filed by the appellant to adjourn the sale, auction was held on 29.11.2006 for Rs.42,00,000/-. The property sold in the auction is the property mortgaged to Palghat Permanent Fund Limited and the original documents were with them. Without notice to Palghat Permanent Fund Limited, the property was brought for Court auction and Palghat Permanent Fund Limited is necessary party in respect of the sale. It is stated that the first respondent/decreed-holder had fraudulently filed sale papers without entry of mortgage details in the encumbrance certificate. The auction without notice to Palghat Permanent Fund Limited cannot be sustained and prayed for setting aside the court auction sale dated 29.11.2006 held in E.P.No.1518 of 2004.

4. Resisting E.A.No.1391 of 2009, the first respondent filed counter stating that the property was brought for sale on several dates fixed by the Court and finally on 29.11.2006, the respondents 2 to 4 have successfully bid in the auction for Rs.40,65,000/-. It is stated that the auction purchasers deposited the entire amount and the sale was confirmed and also sale certificate was issued in favour of the auction purchasers. It is also stated that there was no bona fide in the petition and prayed for dismissal of the petition.

5. The respondents 2 to 4/auction purchasers filed counter stating that they had participated in the Court auction held on 29.11.2006 on seeing the publication in Makkal Kural Tamil daily and became the successful bidders in the auction for the bid amount of Rs.40,65,000/-. It is stated that the encumbrance certificate does not contain particulars of the alleged mortgage of the property with Palghat Permanent Fund Limited and even in the petition, no particulars of mortgage was mentioned. Though the appellant filed petition in S.R.No.4328 of 2007, the same was returned and the appellant represented the petition on 20.2.2007. On 28.2.2007, notice was ordered and since there was no representation on the side of the appellant, the petition was dismissed for default. Without filing petition to restore the same, the appellant filed Civil Revision Petition and obtained an order to condone the delay in representation. Pursuant to the order in CRP, the said petition was numbered. It is also stated that the respondents 2 to 4 have deposited the entire bid amount on 13.12.2006 and the sale was confirmed on 7.2.2007. On

12.4.2007, sale certificate was registered with the Sub Registrar Officer, Konnur. Hence, prayed for dismissal of E.A.No.1391 of 2009.

6. Before the Executing Court, E.A.Nos.1391 and 1392 of 2009 were heard together. Upon consideration of the rival submissions, the Executing Court dismissed E.A.No.1391 of 2009 with costs of Rs.3000/- to the first respondent and Rs.1500/- each to respondents 2 to 4. The Executing Court also dismissed E.A.No.1392 of 2009. Challenging the order in E.A.No.1391 of 2009, the appellant had filed C.M.A.No.135 of 2009 before the II Additional Judge, City Civil Court, Chennai. By the judgment dated 29.6.2010, the appeal came to be dismissed confirming the order of the Executing Court. Challenging the same, the appellant has filed the present Civil Miscellaneous Second Appeal.

7. On 08.6.2015, the Civil Miscellaneous Second Appeal was admitted on the following substantial questions of law:

- (a) Whether the learned Judge is right in dismissing the appeal without hearing the arguments of the appellant side, which is contrary to the provisions of Order 41, Rule 11 of C.P.C.?
- (b) Whether the Courts below are right in bringing the entire property for sale in contravention of Order 21 Rule 64 C.P.C., which is correct in law and valid?
- (c) Whether the Courts below have committed an error in not considering the mandatory provision of Order 21 Rule 72 of C.P.C. or not?

8. The learned counsel for the appellant submitted that the first appellate Court disposed of the appeal without hearing the arguments of the appellant, which is contrary to the provisions of Order 41 Rule 11 and 17 of CPC and it had also failed to consider the judgment rendered by this Court in C.R.P.No.563 of 2009 where this Court allowed the revision. He would submit that the first appellate Court in fact passed a non-speaking order and the same is liable to be set aside.

9. The learned counsel further submitted that the first appellate Court having found some entires in the encumbrance certificate regarding the loan transaction and come to the conclusion that the Executing Court was right in bringing the auction is erroneous and not valid in law. The Executing Court itself failed to consider the arguments advanced by the appellant's counsel and it had just come to the conclusion that no irregularities were found in the auction.

10. The learned counsel next submitted that the conclusion of the learned Judge that the appellant had failed to deposit the amount as per Order 21, Rule 90 of CPC that too without any order being passed is unsustainable in law. Further, the learned counsel submitted that the sale certificate was issued after filing petition to set aside the sale. The reason for dismissing the appeal confirming the order passed in E.A.No.1391 of 2009 by the Executing Court is unsound and prayed for setting aside the same.

11. Per contra, the learned counsel for the respondents 2 to 4 submitted that after complying with all the legal formalities by the decree-holder, the Executing Court fixed the date for sale by public auction. The respondents 2 to 4 had participated in the Court auction sale on seeing the publication effected in Tamil daily Makkal Kural dated 07.11.2006 and became the successful bidder for the bid amount of Rs.40,65,000/- on 29.11.2006. After the sale, the respondents 2 to 4 have deposited the amount within the statutory period of time. The learned counsel further submitted that the alleged mortgage of the property with Palghat Permanent Fund Limited is no way binding on the respondents 2 to 4 and in fact, the appellant can very well settled the amount, if any, due to Palghat Permanent Fund Limited after appropriating the amount towards decree from the balance amount available in Court.

12. The learned counsel further submitted that there is no specific allegation regarding irregularity or fraud in the public auction. Since the sale was confirmed and also sale certificate issued in favour of the respondents 2 to 4, the Executing Court was right in dismissing the petition filed by the appellant to set aside the sale, which was confirmed by the first appellate Court. According to the learned counsel for the respondents 2 to 4, the intention of the appellant is to drag on the proceedings and not to enjoy the property and thus prayed for dismissal of the appeal.

13. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

14. Question No.1 - Whether the learned Judge is right in dismissing the appeal without hearing the arguments of the appellant side, which is contrary to the provisions of Order 41, Rule 11 of C.P.C. - The appellant had raised a ground that the learned first appellate Judge disposed of the appeal without hearing the arguments of the appellant, which is in violation of the provisions of Order 41, Rule 11 and 17 of C.P.C.

15. On a perusal of the preamble of the judgment passed in C.M.A.No.135 of 2009, it is seen that the learned first appellate Court after hearing the learned counsel appearing for the appellant and the learned counsel appearing for the respondents 2 to 4 therein dismissed the appeal. Since the appellant had failed to take steps to serve notice on the first respondent, appeal against the first respondent was dismissed and the same was mentioned in the preamble itself.

16. The learned counsel for the appellant submitted that the appellant had filed petition to set aside the order of dismissal against the first respondent in C.M.A.No.135 of 2009 dated 21.4.2010 and without hearing the said petition, the first appellate Court dismissed the appeal preferred by the appellant, which is unsustainable in law.

17. On a perusal of the typed set of papers, it is seen that the appellant had filed petition to set aside the order of dismissal against the first respondent on 31.5.2010. The appeal was taken up for hearing on 09.6.2010 and after hearing the learned counsel for the appellant and the respondents 2 to 4, the appeal was adjourned to 29.6.2010 for pronouncing judgment.

18. It is seen that between 31.5.2010 and 09.6.2010, the appellant had not taken steps to get the petition numbered. It is also seen that on 29.6.2010, the appellant had filed petition to re-open the arguments of the appellant side stating that since his counsel was unable to attend the Court on 9.6.2010, the Court was pleased to post the matter for orders on 29.6.2010.

19. As stated supra, in the preamble of the impugned judgment, the learned Judge has recorded the presence of the learned counsel for the appellant and also hearing submissions of both sides. When the learned Judge specifically stated in his judgment in respect of hearing submissions of both sides, how the appellant could say without hearing his counsel, the learned first appellate Court had delivered the judgment. The above said conduct of the appellant would clearly shows that there is no bona fide in the said question raised by him. In view of the above, this Court is of the view that only after hearing the learned counsel for the appellant as well the learned counsel for the respondents 2 to 4, the learned first appellate Court decided the appeal on merits and there is no violation of Order 41, Rule 11 CPC. Thus, Question No.1 is answered accordingly.

20. Question No.2 - Whether the Courts below are right in bringing the entire property for sale in contravention of Order 21 Rule 64 C.P.C., which is correct in law and valid - The learned counsel for the appellant argued that the entire property cannot be sold and as per Order 21, Rule 64 CPC only a portion to satisfy the decree shall be sold and that the sale of entire property is inadmissible in law. Therefore, the sale has to be set aside. In support, the learned counsel relied upon the the decision of the Apex Court in Balakrishnan v. Malaiyandi Konar, reported in (2006) 3 SCC 49 and the decision of the learned Single Judge of this Court in T.Govindarajan and others v. T.Soundarajan, reported in (2007) 2 MLJ 901.

21. Order 21, Rule 64 of CPC provides as under:

"64. Power to order property attached to be sold and proceeds to be paid to person entitled - Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."

22. In Balakrishnan v. Malaiyandi Konar, supra, the Hon'ble Supreme Court held:

"9. The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See Takkaseelai Pedda Subba Reddi v. Pujari Padmavathamma (1997) 3 SCC 377) In all execution proceedings, the court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion but an obligation imposed on the court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See Ambati Narasayya v.

M.Subba Rao, 1989 Supp (2) SCC 693) The duty cast upon the court to sell only such property or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in S.Mariyappa v. Siddappa, (2005) 10 SCC 235."

23. In T.Govindarajan v. T.Soundarajan, supra, the learned Single Judge of this Court held as under:

"10. Court Amin has tested the value of the above properties. It is gatherable from the records that the value of the property is Rs.83,02,210/-. Value of 452/840 share is more than Rs.42,00,000/-. Amount claim in the execution petition is Rs.9,83,000/-. For realizing the short amount of Rs.9,83,000/-, entire properties worth more than Rs.42,00,000/- need not be brought for sale.

11. Under Order 21, Rule 64 C.P.C., only such portion of the property as would satisfy the decree amount should be sold."

24. In E.P.No.1518 of 2004, two items were shown for attachment and sale to realise the decree amount. However, the proclamation of sale was published for only one item i.e., House and ground bearing Old Door No.43, Station Road, Villivakkam, Chennai comprised Survey No.346 Part of No.17, Konnur village, measuring 5331 sq. ft.

25. In E.P.No.1518 of 2004, the property in question was attached on 14.3.2005 and thereafter, sale papers were filed. Despite notice served on the appellant, he was not entered appearance and called absent and set ex parte on 27.12.2005. On 6.2.2006, the Executing Court ordered proclamation of sale by publication on or before 22.03.2006. Since the appellant had filed petition for postponement of sale and later withdrawn, the sale could not be effected on 22.03.2006. Subsequently, on 10.8.2006, the Executing Court ordered sale by proclamation and publication on 04.10.2006. Since 04.10.2006 declared as holiday, the Execution Petition was adjourned to 14.10.2006 and on 14.10.2006, the Executing Court ordered fresh sale by proclamation and publication by 29.11.2006 and further hearing on 06.12.2006. As stated supra, sale took place on 29.11.2006.

26. The grievance of the appellant is that for realising the amount of Rs.15,26,945/- (mentioned in the proclamation), the entire property worth more than Rs.3.50 Crores need not be brought for sale. Admittedly, the appellant has not seriously taken the said ground before the property sold in public auction

on 29.11.2006. Even before the Executing Court while dealing with the petition to set aside the sale, the appellant has not urged the said point seriously. Even no ground was raised in the grounds of revision.

27. In *Balakrishnan v. Malaiyandi Konar*, supra, the Hon'ble Supreme Court held that even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold.

28. In the case on hand, the property in question is a house and ground and in the public auction held on 29.11.2006, the respondents 2 to 4 participated in the auction and was successful bidders for Rs.40,65,000/- and they had also deposited the entire bid amount within the statutory period. Admittedly, the appellant had not stated before the Executing Court that to appropriate the amount mentioned in the proclamation, a portion of the property would be sufficient and the appellant had also failed to state the particular portion to be sold in public auction. The appellant had also not raised any objection before attachment in this regard. Since the auctioned property is a house, it was not possible for the first respondent to brought a portion of the property by way of sale towards the satisfaction of the decree amount.

29. In *Dhirendra Nath v. Sudhir Chandra*, reported in AIR 1964 SC 1300, the Hon'ble Supreme Court expressed the view that non-compliance of the provisions of Order 21, Rule 64 and 66 CPC by selling more extent of property than necessary is not per force a nullity, but is a material irregularity in publishing or conducting the sale and the Court under the first proviso to Order 21, Rule 90 CPC cannot set aside the sale, unless it is satisfied that the applicant had sustained substantial injury by reason of such irregularity and further a party, who received the notice of proclamation, but did not attend at the drawing up of the proclamation or did not object to the said defect cannot maintain an application under that provision.

30. Under Order 21, Rule 90 (3) of CPC, it is provided that no application to set aside the sale shall be entertained upon any ground which the applicant can take on or before the date on which the proclamation of sale was settled.

31. In the present case, admittedly, the appellant after receiving proclamation has not objected selling of more extent of property than necessary. However, the appellant allowed to conduct the sale by the Court and the respondents 2 to 4 are the successful bidders and also sale certificate was issued to respondents 2 to 4, which was registered before the Sub Registrar Office. Based on the sale certificate, the

respondents 2 to 4 have also filed E.P.No.1936 of 2007 for delivery of possession of the property. Since the auctioned property is a house and it was not possible for the first respondent to brought a portion of the property by way of sale towards the satisfaction of the decree, the Executing Court was right in bringing the entire property for sale.

32. As no objection in respect of excessive execution was raised before the proclamation was settled, the objection now made by the appellant cannot be countenanced. The opportunity to object to executability of the decree could be taken only once and repeated applications appear to be unwarranted. In the case on hand, the Executing Court before ordering attachment and settlement of proclamation heard the submission of the appellant and finally ordered sale of the property. Absolutely, there was no ground made out by the appellant to show that the sale was held in contravention of Order 21, Rule 64 CPC. In view of the above discussion, this Court is of the opinion that there is no contravention of provision of Order 21, Rule 64 of CPC in the sale held on 29.11.2006 and Question No.2 is answered accordingly.

33. Question No.3 - Whether the courts below have committed an error in not considering the mandatory provision of Order 21, Rule 72 of C.P.C. or not - As per Order 21, Rule 72 CPC, the decree-holder without express permission of the Court cannot bid for or purchase property brought for sale in execution of decree obtained by him and sale conducted without permission of the Court is in flagrant violation of legal provisions.

34. In the present case, the first respondent/decreed-holder had not participated in the auction and therefore, there is no question of obtaining permission of the Court would arise. Further, the respondents 2 to 4, who are third parties/auctions purchasers knocked off the property in the auction. Hence, this Court is of the view that Question No.3 is unnecessary and no need to further elaborate upon the same.

35. It is the case of the respondents 2 to 4 that there were no objections raised for the proclamation of sale and its publication under Rule 66 of Order 21 of CPC. According to the respondents 2 to 4 that no application either in the form of Order 21, Rule 90 or under Section 47 of CPC could be entertained at this stage, especially when the appellant had failed to avail the same at the earliest point of time. It is the case of the respondents 2 to 4 that the sale cannot be set aside merely on the ground that the price fixed for sale is low and that it will fetch a higher price on resale and there is a presumption in law that the price fetched at a Court sale is adequate.

36. It is settled that mere inadequacy of the price is not a ground for setting aside the Court sale. On a perusal of the sale proclamation, it is seen that the judgment-debtor has not given his value. The decree-holder has given the value of the property as Rs.25,50,000/-. However, the Court had fixed the upset price at Rs.30,00,000/- based on the Test report of the Amin.

37. In the present case, on a perusal of the sale memo, it is seen that the bid started from Rs.30,50,000/- by one S.Shanmugaraja and 40 persons were participated in the auction. Finally, the respondents 2 to 4 knocked off the property to the value of Rs.40,65,000/-. Therefore, the appellant cannot contend that the respondents 2 to 4 took the property in lesser value.

38. The moment sale is held the judgment-debtor loses all his title and interest therein and it is the purchaser that becomes the owner thereof from the date of the sale. As soon as the title to the property vested in the purchaser, the judgment-debtor the erstwhile owner of the property cannot be deemed to have a saleable interest or disposing power over the property. His interest ceased in the property when the auction-purchaser obtained title to the property. After the respondents 2 to 4 becoming the successful bidders and sale certificate was issued in favour of them, the interest of the judgment-debtor was ceased in the property in question.

39. It is reiterated that on 6.2.2006, sale by proclamation on or before 22.3.2006 was ordered and publication for auction was effected in Tamil daily Makkal Kural. The appellant filed E.A.Nos.1495 and 1496 of 2006 seeking to postpone the sale and stay of sale. Subsequently, the appellant withdrawn those petitions. On 10.8.2006, the Executing Court ordered proclamation and sale on 04.10.2006. Since 04.10.2006 declared as holiday, the Execution Petition was adjourned to 14.10.2006 and on 14.10.2006, the Executing Court ordered proclamation and sale by 29.11.2006 and further hearing on 06.12.2006. For the sale on 29.11.2006, due publication in Makkal Kural was effected. On 29.11.2006, auction was conducted and so many persons including the respondents 2 to 4 were participated in the auction and the respondents 2 to 4 were the highest bidders and they have paid 25% of the sale amount. The respondents 2 to 4 deposited the balance sale amount on 13.12.2006 and the Executing Court confirmed the sale on 07.02.2007. The Executing Court issued sale certificate in favour of the respondents 2 to

4 on 09.04.2007, which was duly registered at the Sub Registrar Office, Konnur vide Document No.1888 of 2007. The deceased first respondent/deedee-holder also withdrawn the amount claimed in E.P.No.1518 of 2004 out of the sale proceeds.

40. On a perusal of the typed set of papers, it is seen that sufficient opportunities were given to the appellant before the property brought for sale. Having failed to file necessary application and deposit the entire sale amount, the appellant is not entitled to any relief especially when the Executing Court afforded sufficient opportunity to him.

41. It is to be noted that after obtaining the sale certificate, the respondents 2 to 4 have filed E.P.No.1936 of 2007 for delivery of possession of the property purchased by them in the Court auction and the said petition was contested by the appellant. On 10.9.2007, the Executing Court ordered delivery of possession of the property. Challenging the same, the appellant did not prefer any appeal, however, he had filed E.A.No.423 of 2008 under Section 47 CPC. By an order dated 31.7.2009, E.A.No.423 of 2008 came to be dismissed by the Executing Court on merits. No revision and/or appeal has been filed by the appellant against order passed in E.A.No.423 of 2008.

42. It is also to be noted that as per the order passed in C.R.P.No.563 of 2009 dated 09.03.2009, the petition being E.A.No.1391 of 2009 filed by the appellant under Order 21, Rule 90 CPC was numbered. On a through reading of the affidavit filed in support of the petition, the appellant has not averred how the sale dated 29.11.2006 was affected by irregularity and/or fraud. There is also no specific allegation put forth by the appellant regarding irregularity and/or fraud in the affidavit.

43. After considering all the materials produced before it, by an elaborate order, the Executing Court dismissed E.A.No.1391 of 2009 and after analysing the rival submissions, the first appellate Court rightly confirmed the order of the Executing Court.

44. In view of the above circumstances, this Court is of the view that there is no illegality or perversity or irregularity in the judgment and decree of dated 29.6.2010 passed in C.M.A.No.135 of 2009 on the file of the II Additional City

Civil Court, Chennai, warranting interference, while exercising the jurisdiction under Section 100 CPC. Therefore, the Civil Miscellaneous Second Appeal is dismissed as devoid of merits. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

vs

To

1. The II Additional Judge,
City Civil Court, Chennai.

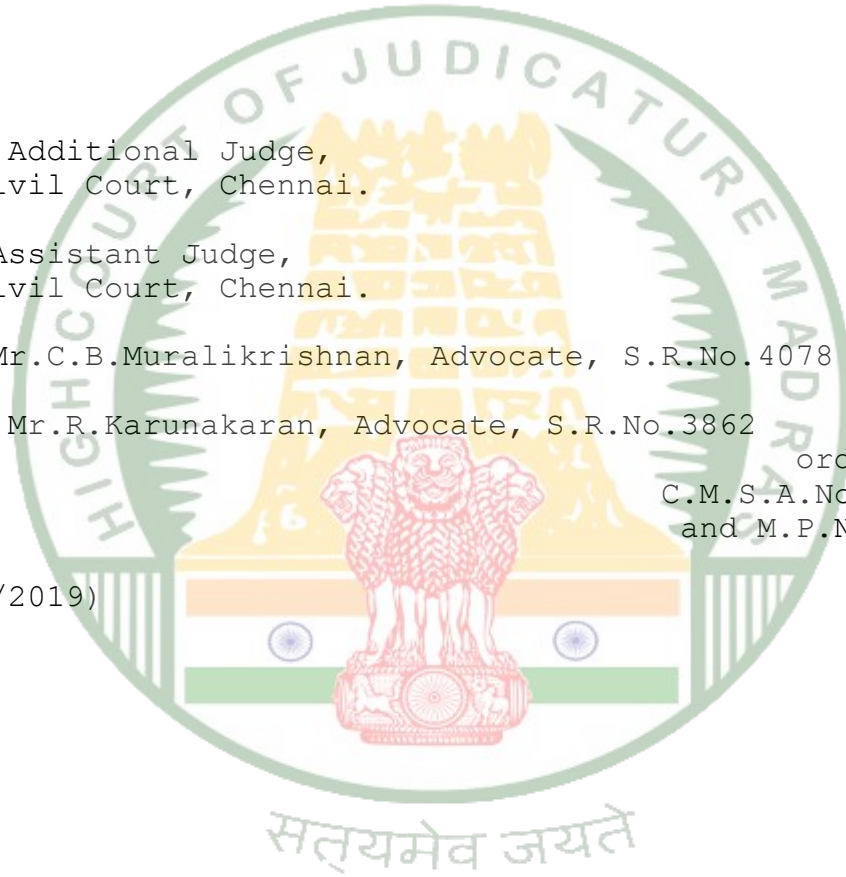
2. The X Assistant Judge,
City Civil Court, Chennai.

+1 cc to Mr.C.B.Muralikrishnan, Advocate, S.R.No.4078

+2 ccs to Mr.R.Karunakaran, Advocate, S.R.No.3862

order in
C.M.S.A.No.16 of 2011
and M.P.No.1 of 2011

GJ-II(CO)
SSM(05/03/2019)



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