

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
09~04~2019	30~04~2019

CORAM :THE HONOURABLE **MR. JUSTICE N.SATHISH KUMAR****C.R.P.(NPD).No.3005 of 2012**

Selvaganesan ... Revision Petitioner/Third Party/
Third Party/Petitioner

Versus

1.Kalaiselvi ... 1st Respondent/Petitioner/Plaintiff/
1st Respondent

2.Sabiyulla ... 2nd Respondent/Respondent/
1st Defendant/2nd Respondent

Civil Revision Petition filed under Section 115 of CPC against the fair and decretal order of the Principal District Munsif Ariyalur dated 29.06.2012 in E.A.No.69 of 2010 in E.P.No.40 of 2006 in O.S.No.315 of 2004.

For Revision Petitioner .. Mr.P. Valliappan

For Respondents .. Mr. N. Suresh
for M/s.T.R.Rajaraman

ORDER

Aggrieved over the dismissal of application filed under Section

47 of C.P.C. the present revision is filed. The parties arrayed as per their own rankings as per the trial Court.

2. The brief facts leading to file this revision is as follows:

2.(a) The first defendant in O.S.No.351 of 2003 entered into an agreement for sale of the property in favour of the respondent on 22.1.2001 for a total sale consideration of Rs.2,07,900/- and Rs.10,000/- paid advance on the date of agreement. Time is agreed for three months to complete the sale. After agreement on 14.2.2001 he has received further Rs.25,000/- as further advance. At the time of agreement the Plaintiff wanted some clarification regarding title. However, the first defendant did not clarify the title. Since the first defendant has made some arrangements to sell the property and also sold the property in favour of the second defendant the plaintiff has filed suit for recovery of advance amount of Rs.35,000/- and also charge upon that property. In the above suit the 1st defendant has contested the suit. The 2nd Defendant who was the purchaser of the property from the 1st defendant remained *exparte*. It is the contention of the revision petitioner that the said second defendant died on 25.03.2005 whereas the decree has passed against both the

defendants only on 05.07.2005. The petitioner has purchased the property from the 2nd defendant's legal heirs on 27.07.2006. The decree and judgment passed against the second defendant is nullity. The plaintiff has filed execution application without even impleading the L.Rs of the second defendant and brought the property for sale. The Plaintiff herself with the permission of the court has purchased the property in court auction. Only in the year 2010 on 6.3.2010, after the respondent issued legal notice, the revision petitioner came to know about the auction sale on the basis of the decree passed against the dead person. Hence, he filed application under Section 47 of CPC.

3. It is the contention of the respondent that the second defendant set exparte in execution proceedings on 7.10.2009 the property was brought on sale. Sale was confirmed on 16.12.2009 in favour of the plaintiff. The petitioner has purchased the property during the pendency of the proceedings. Therefore, he is not a *bonafide* purchaser. Decree has already passed in respect of the property. Hence, prayed for dismissal of the application.

4. In the Execution Petition, on the side of the petitioner

Exs.P.1 to P.9 filed and on the side of the respondents no documents were marked. The trial court dismissed the application filed under Section 47 CPC on the ground that the petitioner has purchased the property during the pendency of the proceedings, he is not a *bonafide* purchaser. Further, the Execution Court also held that the death of second defendant was not informed as per Order 22 Rule 10(a) of CPC. Hence, dismissed the application as against which the present revision petition has been filed.

5. The learned counsel appearing for the Revision Petitioner submitted that though the respondent has entered into an agreement said to have received Rs.35,000/- advance towards sale consideration, the sale has not been completed within three months. In fact, first defendant has issued legal notice to complete the sale. Only the plaintiff was not ready to complete the sale. It is his further contention that the property has been purchased by the 2nd defendant from the 1st defendant. Suit has been filed only in the year 2004 for recovery of advance amount of Rs.35,000/- from the first defendant in the event of failure to pay amount charge over the property. It is his further contention that the second defendant died on 25.03.2005 when the suit was pending. Thereafter, the suit was decreed on 5.7.2005, for

return of advance amount also creating charge over the property. Such decree and judgment is a nullity and unexecutable as against the 2nd defendant. The legal heirs of the 2nd defendants were not brought on record nor decree holder obtained any exemption under Order 22 Rule 4 before the decree and judgment. It is the further contention that even in the execution petition also the L.Rs of the second defendants were not brought on record. In the meanwhile L.Rs of the second defendant sold the property on 27.11.2006 in favour of the petitioner. In executing proceedings the property was brought on auction on 7.10.2009 without even impleading the L.Rs. Hence, it is the contention of the learned counsel for the revision petitioner that the decree is inexecutable as against the dead person, the second defendant. Therefore, any court auction based on such decree is nullity. The court auction is not valid in the eye of law. Whereas the Revision Petitioner has got the title to the property much prior to court auction. The title already vested with the revision petitioner. Hence, it is the contention that application under Section 47 is maintainable when the decree is inexecutable and nullity in the eye of law. The trial Court ought to have allowed the application filed under Section 47 of CPC. In support of his submission he has relied upon the following judgments:

1. *Muthulakshmi v. A.R.Sabasranam and others* [AIR 1974 MAD 89]

2. *Angadi Srinivas Deasd by L.Rs. v. M.Girija* [AIR 2016 KARNATAKA 176]

6. Whereas the learned counsel appearing for the respondent submitted that the petitioner has purchased the property during the pendency of the proceedings from the legal heirs of the second defendant. Therefore, he cannot obstruct the decree. It is the further contention that the charge has already created over the property in favour of the plaintiff the moment he paid advance amount under Section 55 (6) of the T.P.Act. Hence, submitted that when the charge is created the charge goes with the property and the revision petitioner purchased the property during the pendency of the proceedings cannot have any right over the property. It is the further contention that the property was brought under court auction and with the permission of the Court, the 1st respondent has purchased the property and the sale also confirmed. Therefore, *Pendente lite* purchaser has no right to assail the sale. Hence, submitted that as long as the charge created over the property, he cannot attack the sale.

7. In support of his submissions he relied upon the following judgments:

1. *Videocon Properties Ltd., v. Dr.Bhalchandra Laboratories and others* [AIR 2004 SUPREME COURT 1787]

2. *K.Savithiri v. L.Ramasamy* **[2017 (3) CTC 812]**

3. *Thirugnanasambandam v. Sundaramurthy Chettiar* **[2014 (4) CTC 850]**

4. *Usha Sinha v. Dina Ram and others* **[(2008) 7 SCC 144]**

5. *Vijayalakshmi Leather Industries P Ltd., v. K.Narayanan* **[2003 AIR (MADRAS) 203]**

8. From the admitted facts, the suit has been filed for recovery of a sum of Rs.35,000/- advance amount paid as per the agreement between the First Defendant and Plaintiff. At the time of filing of the suit title to the property was already transferred in favour of the second defendant. Though suit was filed against both the defendants, second defendant remained exparte. He died on 25.03.2005. However the plaintiff has not taken any steps to bring the L.Rs of the deceased on record. Accordingly the suit was decreed on 5.9.2005 much after the death of the deceased, i.e., second defendant. Whereas the court has passed the decree for the return of advance amount and also charge over the property purchased by the second defendant, the above decree was put in execution only against the first defendant. The reasons best known to the decree holder, second defendant was not impleaded in the execution proceedings nor his legal

representatives were brought on record in the execution proceedings. Execution Petition was filed in the year 2006 itself. Thereafter it appears legal heirs of the second defendant who neither made as a party in the suit nor in the Execution Proceedings has sold the property on 27.11.2006 to the revision petitioner herein. Thereafter, in the execution proceedings, the same property was brought on court auction on 7.10.2009. The respondent/deGREE holder has purchased the property on court auction. The sale was confirmed on 16.12.2009. These are all the admitted facts. Challenging the above above sale, the purchaser from the second defendant's legal heirs have filed application under section 47 on the ground that the decree against the dead person is a nullity and inexecutable. It is also curious to note that much prior to the date of court auction, the property was already transferred in the name of the petitioner, though such sale during the pendency of the proceedings. It is to be noted that the second defendant's legal heirs were not brought on record when the second defendant died on 25.03.2005 itself, much before the decree and judgment. They have not even made as party in the execution proceedings.

9. Be that as it may. Order 22 Rule 4 deals with "procedure in

case of death of one of several Plaintiffs or of sole Plaintiff” Sub-clause 4 of Order 22 Rule 4 deals with the power of the court to exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before the death took place.

10. Clause 5 mandates that even when the plaintiff was ignorant of the death of defendant and could not for that reason make an application for the substitution of the legal representatives of the defendant within the period specified in the limitation act, 1963 (36 of 1963) and he should file an application to set aside the abatement, by invoking section 5 of the Limitation Act. Clause (a) and (b) of sub-clause 5 of Order 22 makes it very clear that to avoid abatement of the suit as against the defendant, the legal representatives of such defendant has to be brought on record. Only exception is carried out under Sub-clause 4 of Order 22 Rule 4 that the Court may exempt the Plaintiff from the necessity of substituting of any such defendant, who

has failed to file written statement or even after written statement he failed to appear and contest the suit. Admittedly there is no materials available on record to show that the plaintiff in this case has obtained any such exemption form the Court to get the decree against the second defendant, who died much prior to the decree and judgment. Without any such exemption the consequence is only abatement of suit as against the second defendant, even the plaintiff is ignorant of the death of the defendant, same is not a ground to contend that legal representatives absence will not invalidate the decree and judgment.

11. The contention of the respondent counsel that order 22 rule 10(a) cast a duty on the pleader to communicate the court about the death of the party. No doubt it is the pleader who is appearing for the party to the suit comes to know of the death of the party, he shall inform the Court. But whereas in this case the second defendant was not representing by any pleader or advocate. Therefore, the respondent now cannot contend that the pleader or advocate had failed to inform the death of the second defendant.

12. In this regard Judgment reported in **AIR 1975 Calcutta 12**, single judge of Calcutta High Court has held that mere allegation

about the plaintiff not coming to know of defendant's death is not sufficient.

13. In **AIR 2016 Karnataka 176** it is held that if the plaintiff not sought exemption in terms of Order 22 Rule 4(4), prior to pronouncement of judgment appeal would be abated and the decree passed by the appellate court against a dead person is nullity.

14. In AIR 1992 Madras 159 this Court has held as follows:

3. It is seen from the rules that an application to bring the legal representatives on record shall be made within the time limited by law and if no application is made within the said period, the suit shall abate as against the deceased defendant. That is the effect of sub-rule (3). Sub-rule (4) provides an exception to sub-rule (3). Under sub-rule (4), it is open to the Court to pass an order exempting the plaintiff from the necessity of bringing on record the legal representatives of any defendant, who had failed to file a written statement or if having filed the written statement, failed to appear and contest the suit at the hearing. But, the language of sub-rule (4) is clear enough to show that the Court must pass an order exempting the plaintiff from the necessity of substituting the legal representatives. Of course, it is not necessary for the plaintiff to file a written application seeking such exemption, as the rule does not require one. Under the said

rule, the Court must apply its mind and think it fit, in the facts and circumstances of the case, to grant the exemption. For granting such exemption, the defendant who died should have remained *ex parte*, either without filing the written statement or after filing the written statement. It is clear from the language of the said rule that the order of exemption shall be passed before a judgment in the case is pronounced. The relevant portion of the said rule reads that the Court 'may exempt the plaintiff and judgment may, in such case pronounced. That part of the sub-rule says that the order of exemption should precede the judgment to be pronounced in the suit. Sub-rule (5) provides for an application to set aside the abatement caused by the failure of the plaintiff to bring the legal representatives of the deceased defendant on record within the time prescribed by law. As stated already, under sub-rule (3), the suit shall abate. Sub-rule (5) provides that even in cases where the suit has abated, it is open to the plaintiff to file an application to have the abatement set aside on the grounds mentioned in the said rule. Clause (a) of sub-rule (5) provides for a situation where the plaintiff was ignorant of the death of the defendant and Clause (b) provides that where an application is filed after the expiry of the period specified therefor in the [Limitation Act, S. 5](#) of the Limitation Act could also be invoked. Thus, Rule 4 of Order 22 is comprehensive enough to deal with a situation where the defendant died after the institution of the suit and before passing of the judgment.

4. This Rule will not apply to a case where the

defendant was dead even at the time when the suit was instituted. This Rule can come into play only in cases where the defendant died subsequent to the institution of the suit, having been alive at the time of the institution. Learned counsel for the respondent contends that the proper interpretation of sub-rules (4) and (5) would be that even in cases where a decree had been passed in spite of one of the defendants being dead and without the legal representatives being brought on record, sub-rule (5) would enable the plaintiff to file an application to set aside the abatement and bring the legal representatives on record. I do not think it necessary or proper at this stage to express my opinion on that matter. In this case, I am only concerned with an application for executing being taken out implicating the legal representatives of the deceased defendant in the suit as parties. It is only in the execution petition, the legal representatives have been made parties. The question before me is, whether the decree, as it stands having been passed against a dead man, can be executed against the legal representatives, who have not been impleaded in the suit as parties."

15. In **AIR 2009 SC 2367** the Honourable Supreme Court has held that exemption from necessity of substituting L.Rs of defendant must be obtained before the pronouncement of the judgment. In para 13 it is held as follows:

"13. As noted herein earlier, a plain reading of Order XXII Rule 4 (4) of the CPC would clearly show that

the Court is empowered to exempt a plaintiff from the necessity of substituting the heirs and legal representatives of any such defendant who has failed to file a written statement or who, having filed it, had failed to appear and contest the suit at the time of hearing of the same, but such an exemption can only be granted before the judgment is pronounced and in that case only, it can be taken against the said defendant notwithstanding the death of such defendant and such a decree shall have the same force and effect as it was pronounced before the death had taken place. Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the appellant relying on a decision of this Court in the case of [Zahirul Islam vs. Mohd. Usman and Others](#), [2003 (1) SCC 476], argued that since an application from exempting the plaintiff/appellant from bringing on record the heirs and legal representatives of the defendant was filed in the present case but in view of the fact that exemption under Order XXII Rule 4 (4) was not allowed in the above mentioned decision and in the aforesaid decision, no such permission was sought or granted by the Court, the High Court was in error in holding that the decree passed in the suit for specific performance of the contract by the trial court was a nullity. We are unable to accede to this submission of Mr. Ranjit Kumar, the learned senior counsel appearing on behalf of the appellant for the simple reasons viz. (1) on the abatement caused on the death of defendant, the suit automatically abated in view of the provisions under Order XXII Rule 4(3) of the CPC and (2) from the decision in the case of [Zahirul Islam vs. Mohd. Usman and Others](#),

(supra), it would be evident that no exemption was sought or granted under Order XXII Rule 4(4) of the CPC in the aforesaid decision. In any view of the matter, Order XXII Rule 4(4) of the CPC clearly says that such exemption to bring on record the heirs and legal representatives of the deceased could be taken or granted by the court only before the judgment is pronounced and not after it. "

16. In **2011 (2) CTC 340** the Honourable Supreme Court has held that when the decree is a nullity it can be challenged and interfered with at any subsequent stage including stage of execution or even in collateral proceedings.

17. In view of the above settled position of law, the decree passed without impleading the L.Rs of the second defendant such decree is certainly nullity against the dead person, which is inexecutable. Whereas the contention of the respondent counsel that charge has been created the moment when the purchase money was paid. In this regard it is useful to refer the judgment reported in AIR 2004 SC 847

"15. The further aspect that requires to be noticed is as to the nature and character of earnest money deposit and in that context the distinguishing features, which help to delineate the differences, if any. The matter is not, at any rate, res integra. In (Kunwar) Chiranjit Singh vs. Har

Swarup [AIR 1926 P.C. 1], it was held that the earnest money is part of the purchase price when the transaction goes forward and it is forfeited when the transaction falls through, by reasons of the fault or failure of the purchaser. This statement of law had the approval of this Court in [Maula Bux vs. Union of India](#) [AIR 1970 SC 1955]. Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be looked into and what may be called an advance may really be a deposit or earnest money and what is termed as 'a deposit or earnest money' may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part payment of the purchase money and security for the performances of the contract by the party concerned, who paid it."

18. The Apex Court has held that the buyer's charge engrafted in clause (b) of paragraph 6 of [Section 55](#) of the Transfer of Property Act would extend and ensure to the purchase-money or earnest money paid before the title passes and property has been delivered. The above charge is a statutory charge in favour of buyer. Consequently, the buyer is entitled to enforce the said charge against the property and for that purpose trace the property even in the hands of third

parties and even when the property is converted into any other form by proceeding against the substituted security. The statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and is only lost in case of purchaser's own default or his improper refusal to accept delivery.

19. In a Division Bench case of this Court reported in **2003 (Madras) 203**, it is held that Pendente Lite purchaser cannot maintain the application under Order 21 Rule 98 and Order 21, Rule 101 CPC. Similarly in **(2008) 7 Supreme Court Cases 144** the Apex Court has held that a transferee from a judgment-debtor is presumed to be aware of the proceedings before a court of law.

20. In AIR 1974 Madras 89, a Division Bench of this Court in para 2 has held as follows:

“In our opinion, the sale dated 20.08.1958 and the subsequent sale dated 08.02.1960 can operate only subject to the eventual result of O.S.No.145 of 1958. These two sales were by private treaty and effected by the father after his daughter had instituted the suit for maintenance. Section 52 of the Transfer of Property Act clearly states that the property in suit

cannot be transferred or otherwise dealt with during the pendency of the suit by any suit cannot be transferred or otherwise dealt with during the pendency of the suit by any party thereto or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. The Courts have uniformly held that a voluntary sale or a sale by private treaty will be hit by Section 52 whatever the position may be with regard to sales in invitum. Though it is true that the sale made to the appellant-plaintiff would not be invalid, it cannot prevail against the decree in O.S.No.145 of 1958, and therefore, against the Court sale held in execution of that decree. *Seetharamanujacharyulu V. Venkatasubbamma*, 59 Mad LJ 485, appears to be on all fours with the case on hand. Once a charge is granted by a decree of Court, it takes effect from the date of the plaint and another sale subsequent to the date of the plaint will naturally be subject to lis pendens, and any conveyance during the pendency of the suit which includes execution proceedings, cannot prevail over the Court sale held in execution of the charge decree. In *Seetharamanujacharyulu v. Venkatasubbamma*, 59 Mad LJ 485 : (AIR 1930 Mad 824), it was held that in circumstance almost similar to those in the present case. Court auction purchase

must prevail. We, therefore, hold that the sale held in execution of the decree is valid and the sale in favour of the plaintiff appellant cannot prevail over it.”

21. No doubt the transferee Pendente Lite cannot claim any right to non-suit the decree. But the fact remains in this case, Judgment-Debtor died even before the decree and judgment. Further, the legal heirs of the second defendant were not brought on record. Even in execution proceedings stage also they were not brought on record. The vendors in this case neither the parties to the suit nor in the execution petition and the property was transferred in the year 2006 itself. On the date of court auction itself the Judgment Debtor did not have any title to the property which was subject matter of court auction. That being the position, the Court auction purchaser, purchasing the property and deriving the title did not arise at all. At any event even assuming that the charge is created over the property decree holder can enforce the charge only as against the property.

22. It is to be noted that though the Court has passed a decree after the death of the second defendant whether the charge has been created and continued is not decided. Though Section 55 (6) (b) of the the Transfer of Property Act makes it clear that the money

paid by buyer before title passes, statutory charge will be created and attached to the property, it is to be noted that such charge will be lost in case of purchaser's own default and in case he refused to accept delivery. Therefore, the charge under Section 55 (6) (b) of the Transfer of Property Act also depends upon certain contingencies that when the buyer has improperly declined to accept the delivery of property or he properly declined to accept delivery. The charge will be lost in case of buyers own default. The above aspect is not even gone into by the trial Court. At any event, the decree passed against the dead person definitely is nullity and inexecutable.

23. In the Execution proceedings though decree was obtained against the second defendant it appears that he was not made as a party in the execution proceedings. Only the first defendant agreement holder who had no right in the suit property at the relevant point of time alone is made as Respondent1 and property was brought into court auction and the decree holder has purchased, the property appears to have sold for Rs.150100/-.

24. Therefore when the decree sought to be executed, when the decree was passed after the death of one of the Defendants,

Execution Petition is filed only against 1st defendant and when the legal heirs of the second defendant also not made as parties in the execution petition, decree passed against the second defendant is nullity in the eye of law, in view of the fact that L.Rs were not brought on record. Further, no exemption whatsoever obtained under Order 22 Rule 4 CPC. When such decree is nullity, its executability can be raised at any stage. The third party purchaser who purchased the property from the legal heirs who are not a party to the suit. He can very well maintain the application questioning the execution of the decree. Accordingly, the sale in favour of the Second Respondent certainly is not valid and liable to be set aside. The decree against second defendant is nullity and inexecutable. The revision is allowed trial Court order is set aside.

25. In the result, the Revision Petition is allowed. No costs.

सत्यमेव जयते

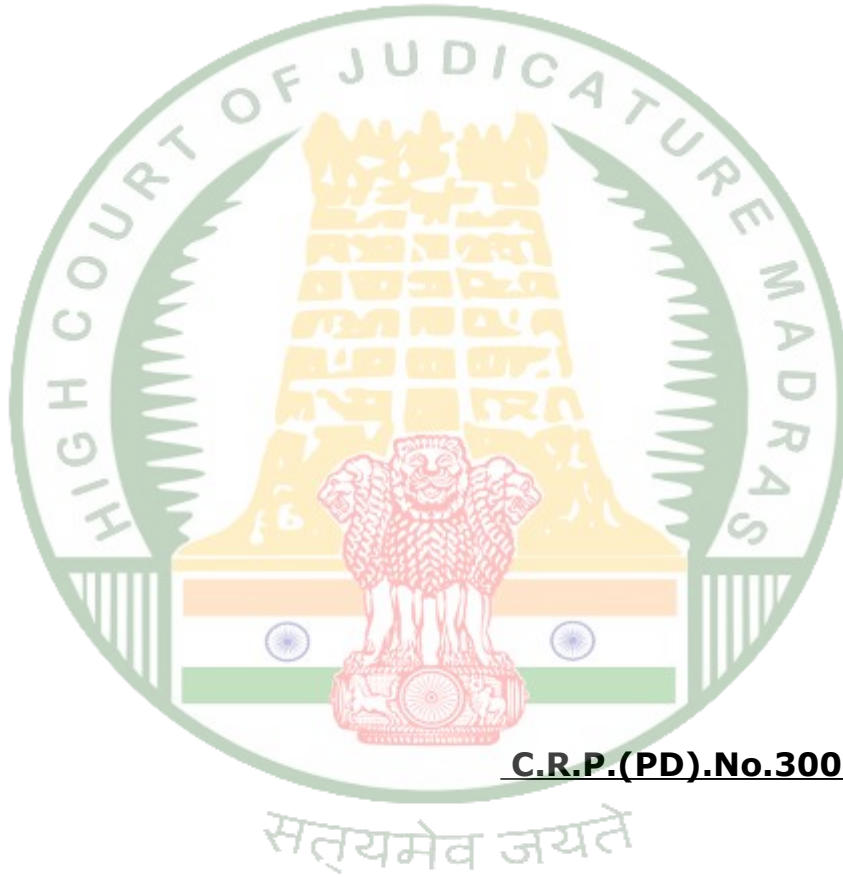
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Speaking order/Non-speaking order
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To
The Principal District Munsif, Ariyalur

N. SATHISH KUMAR, J.

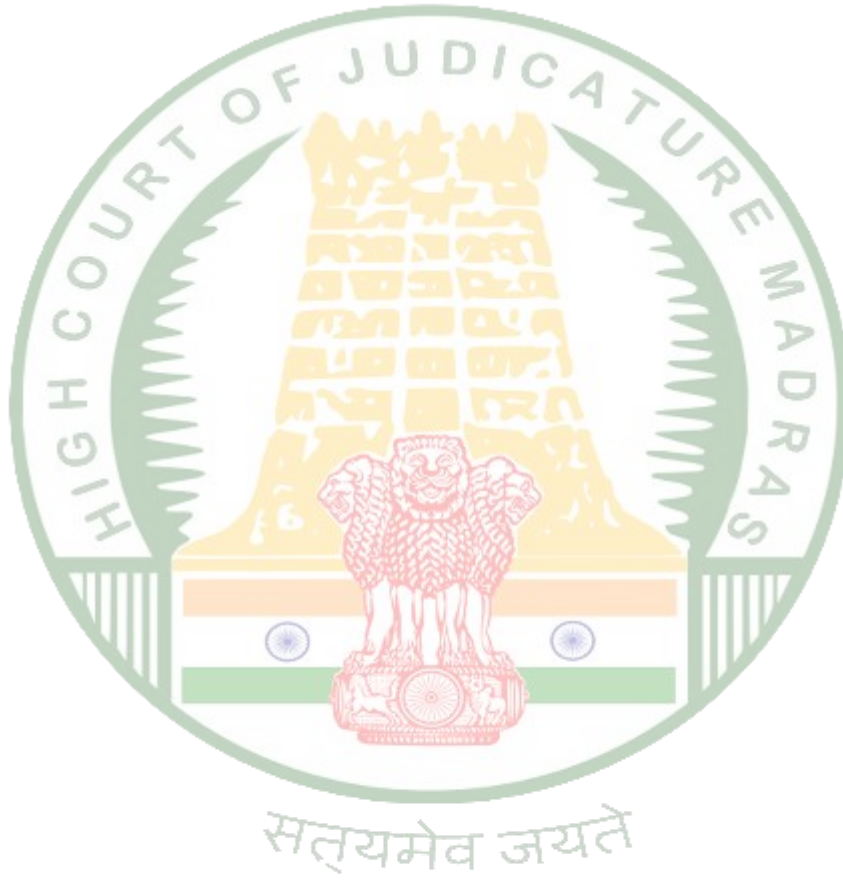
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