

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 18.08.2020	Delivered on 02.09.2020
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CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CRP. PD.No.625 of 2018
and CMP No.3275 of 2018

Rajasekar

... Petitioner

Vs.

Govindammal (late)

1. Dhavamani

... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the order and decretal order in I.A.No.788 of 2017 in O..No.245 of 2011 on the file of Principal District Munsif, Ulundurpet dated 09.10.2017.

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For Petitioner : Mrs.R.Poornima

For Respondent : Mr. C.D.Vivekanandan

ORDER

This matter is taken up for hearing through Video-Conferencing.

This Revision is by the second defendant in OS No.245 of 2011, a suit for partition and separate possession of the plaintiff's half share in the suit properties and for mesne profits.

2. The second defendant was set *exparte* in the suit on 19.09.2011 for not filing the written statement. The other defendants had filed a written statement and the suit was being proceeded with. According to the second defendant, he had plotted out the items 1 to 5 of the suit properties and sold to the other defendants in the suit, when he approached the other defendants they had informed him that they would be engaging a counsel and prosecuting the suit. Therefore, he thought that his interest would also be protected by the purchasers and required them to conduct the suit on his behalf also.

3. Only on 04.08.2017 he came to know that the other defendants had also remained *exparte* and the suit is to be decreed in favour of the plaintiff, as proclaimed by the plaintiff in the village. Immediately, he had engaged the present counsel and made search of the records only to find that he was set ex

parte on 19.09.2011 and since the other defendants also did not prosecute the suit, the evidence of the defendants was closed and the suit was posted for arguments. He would also further aver that he was under the belief that the counsel who had appeared for the other defendants were prosecuting the matter on his behalf also. Claiming that he came to know about the *ex parte* order only on 04.08.2017, he had filed the present application on 07.08.2017, under Order 9 Rule 7 of the Code of Civil Procedure, seeking to set aside the *ex parte* order passed against him, to permit him to file a written statement and proceed with the suit.

4. This application was resisted by the plaintiff contending that the claim made in the affidavit was false. The second defendant was served with summons and he did not choose to appear through counsel, therefore, he was set *ex parte* as early as on 19.09.2011. Having sold the property he had no interest in the suit properties and hence, he did not choose to engage a counsel to defend the suit on his behalf. The plaintiff would also point out that the evidence on the side of the plaintiff was completed and the 51st defendant in the suit, who had filed a written statement was examined in chief on 15.03.2016, he was also cross-examined on 20.09.2016 and the suit was posted

for arguments. It is at this stage, the second defendant has come up with the present application. It is the further contention on the plaintiff/respondent that the application has been filed only with the object of delaying the proceedings in the suit. It is also contended that the application itself is barred by limitation. The learned Trial Judge, who heard the application concluded that the application filed six years after the order setting the defendant *ex parte* is barred by limitation, in view of the decision of this Court in **Visalakshi v. Umapathy**, reported in **2015 (5) CTC 67**. Upon such conclusion, the learned Trial Judge dismissed the application, hence the Revision.

5. I have heard Mrs.R.Poornima, learned counsel appearing for the petitioner and Mr.C.D.Vivekanandan, learned counsel appearing for the respondent.

6. The main question that arises in this Revision Petition is, as to whether, an application under Order 9 Rule 7 could be said to be barred by limitation, since it is filed three years after the order setting the defendant *ex parte*. There are conflicting decisions of this Court on the period of limitation for an application under Order 9 Rule 7 of the Code of Civil Procedure. While

in some decisions, this Court has taken the view that an application under Order 9 Rule 7 of the Code of Civil Procedure can be filed at any time before the pronouncement of judgment in a suit or proceeding, the others have taken a view that Article 137 of the Limitation Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure.

7. Mrs.R.Poornima, learned counsel appearing for the petitioner would submit that an application, under Order 9 Rule 7 of the Code of Civil Procedure, is not an application to set aside an order setting the defendant *ex parte*, though it is broadly understood as one seeking to set aside an *ex parte* order. To appreciate the argument of the learned counsel, it is necessary to advert to the language of the Rule. Rule 7 of Order 9 of the Code of Civil Procedure reads as follows:

“7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.—Where the Court has adjourned the hearing of the suit, ex parte, and the defendant, at or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms

as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.”

A reading of the above provision makes it clear that what is expected of a defendant in a suit which has been adjourned for an *exparte* hearing is to appear at such later hearing and assign good cause for his previous non appearance. If the Court accepts the cause, it can hear him in answer to the suit as if he had appeared on the day fixed for his appearance. The Rule nowhere contemplates an application to set aside an order setting the defendant *exparte*. Therefore, according to the learned counsel appearing for the petitioner the object of the Rule is only to enable a person, who has not appeared at a previous hearing to appear at a later hearing and seek the permission of the Court to defend the suit as if he had appeared on the day fixed for his appearance.

8. The learned counsel would also rely upon the judgment of the Hon'ble Supreme Court in *Arjun Singh v. Mohindra Kumar and Others*, reported in *AIR 1964 SC 993*, wherein the Hon'ble Supreme Court had observed as follows:

“Order IX Rule 7 does not put an- end to the litigation nor does it involve the determination of any issues in controversy in the suit. A decision or direction in an interlocutory proceeding of the type provided for by Order IX, Rule 7 is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under Order IX, Rule. 13.”

9. My attention is also drawn to the judgment of this Court in **Gokarakonda Venkatasubbiah v. Daliparathi Lakshmiharasimham**, reported in **Vol 49 (1925) MLJ 273**, wherein this Court had held that a defendant, who was set *exparte* will have a right to appear during the future hearings and put forth his evidence. While doing so, this Court had observed as follows:

“... The petitioner before me states that all he now wants is to be allowed to put forward his evidence, the suits having merely reached the point at which the plaintiffs' evidence has been closed. Is he debarred from doing that or is he not? I have had this point argued before me in order to decide for the guidance of the Lower Court whether the exparte order does or does not now bar the petitioner from resuming

appearance in the suits at the stage at which they now are. The point is a novel one and there is an absence of authority on it. But my view is that the petitioner is not so debarred, in other words, that the exparte order only covers the period during which the party was actually absent and does not act as a bar to his subsequent appearance. Respondents contend that this view is opposed to Order 9, Rule 7; but I do not think so.

One cardinal principle to be observed in trials by a Court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing. It follows that a party should not be deprived of that right, and in fact the Court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it. Is there any rule of procedure then which gives power to a Court to say to a party when he appears to plead his case that it cannot hear him because at the previous hearing he was absent ? I do not so read Order 9, Rule 7. That applies to a party who wishes to be relegated back to the position which he would have been in if he had appeared at a previous hearing at which he was absent, and who wishes the proceedings taken in his absence to be taken over again in his presence, so that

he may regain the opportunities of cross-examination, etc., which he lost by his absence. After all " exparte " only means that the party has not been heard because he was absent and the adjournment of the hearing " exparte " in the word's of Rule 7 applies only to the hearing on the particular day when that hearing and adjournment " exparte " was made. I do not see any ground for extending its operation to all subsequent hearings of the suit. ”

10. Further arguing, the learned counsel would draw my attention to the observations of the Hon’ble Supreme Court in ***Sangram Singh v. Election Tribunal, Kotah and others***, reported in ***AIR 1955 SC 425***, wherein the Hon’ble Supreme Court has observed as follows:

“We have seen that if the defendant does not appear at the first hearing, the Court can proceed exparte, which means that it can proceed without a written statement; and Order IX, rule 7 makes it clear that unless good cause is shown the defendant cannot be relegated to the position that he would have occupied if he had appeared. That means that he cannot put in a written statement unless he is allowed to do so, and if the case is one in which the Court considers a written statement

should have been put in, the consequences entailed by Order 8, rule 10 must be suffered....” .

“What those consequences should be in a given case is for the Court, in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases an order awarding costs to the plaintiff would meet the ends of justice: an adjournment can be granted or a written statement can be considered on the spot and issues framed. In other cases, the ends of justice may call for more drastic.”

Thus, it is clear from the above decisions, there is no limitation for filing a petition under 9, Rule 7, Code of Civil Procedure.

[Emphasis supplied]

11. Relying upon the above observations, the learned counsel appearing for the petitioner would submit that the defendant, who has been set *ex parte*, has a right to appear at the subsequent hearings and lead evidence. But at the same time, he is precluded from the relegating back to the position which he would have been, if he had appeared at a previous hearing, without the permission of the Court. The language of Rule 7 is so couched that it relates only to the permission to be taken from the Court for such relegation. The

learned counsel would also rely upon the judgment of this Court in ***Palani Nathan v. Devanai Ammal***, reported in 1989 (2) MLJ 259, wherein this Hon'ble Court after referring to ***Gokarakonda Venkatasubbiah v. Daliparthi Lakshmiharasimham***, referred to supra and almost all the decisions on the point had held that there is no limitation for filing a petition under Order 9 Rule 7 of the Code of Civil Procedure.

12. The learned counsel would also rely upon the judgment of this Court in ***Valleeswari v. Kamalakannan and another***, reported in 2010 (1) MadWN (Civil) 581, wherein a similar view is expressed by Hon'ble Mr. Justice M. Jeyapaul, ***Kasturi and others v. Saravanan @ Sakthi Saravanan***, reported in 2010 (7) MLJ 802, wherein Hon'ble Mr. Justice R.S. Ramanathan, followed the judgment in ***Palani Nathan v. Devanai Ammal***, reported in 1989 (2) MLJ 259, to reach the conclusion that there is no limitation for an application under Order 9 Rule 7, ***Karuppusamy and another v. K.C. Palanisamy***, reported in 2013 (7) MLJ 349; wherein also a similar view was reiterated by this Court. Reliance is also placed on the judgment of the Hon'ble Mr. Justice D. Krishnakumar, in ***Civil Revision Petition (MD) (PD) No.2473 of 2016*** dated 01.12.2016, which also reiterated the said position of law. Reference is also

made to the judgment of this Court in **Rajaji v. R.Krishnaji**, reported in **2006 (1) LW 790**, wherein *Hon'ble Mrs.Justice R.Banumathi*, held that there is no limitation for filing an application under Order 9 Rule 7 of the Code of Civil Procedure.

13. Contending contra, Mr.C.D.Vivekanandan, learned counsel appearing for the respondent would rely upon the judgments of this Court in **G.Krishnasamy v. G.Seenivasan & another**, made in **CRP (MD) No.2819 of 2018 (PD)** dated **04.06.2019**, judgment in **Ramdoss v. Mohan and others**, made in **CRP (PD) No.2412 of 2016** dated **23.08.2016** and the judgment in **Visalakshi v. Umapathy**, reported in **2015 (5) CTC 67**. The learned counsel would also draw my attention to the judgment of a Division Bench of the Kerala High Court in **Y.Daniel and others v. Annamma**, made in **I.A.No.2902 of 2011** dated **15.03.2012**, wherein, the Division Bench has extracted the judgment of the learned Single Judge of the Kerala High Court in **Cleetus v. South Indian Bank**, reported in **2007(3) KLT 868**, wherein it was laid down that an application under Order 9 Rule 7 would be governed by Article 137 of the Limitation Act and the limitation for filing such application would be three years.

14. Reliance is also placed on the judgment of the learned Single Judge of the Delhi High Court in ***Tarlochan Singh and Ors. v. Union Bank of India and Ors.***, made in ***IA No.11281 of 2012*** dated ***11.12.2012***, wherein it is seen from the report that an application to condone the delay of 2360 days in filing an application, under Order 9 Rule 7 of the Code of Civil Procedure, was rejected by the Delhi High Court. It should be pointed out that the Delhi High Court had no occasion to consider, as to whether, there is any period for limitation prescribed for an application, under Order 9 Rule 7 of the Code of Civil Procedure.

15. I have considered the rival submissions.

16. The point that would arise for determination in this Revision is, as to whether, Article 137 of the Limitation Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure. The Hon'ble Supreme Court in ***Sangram Singh v. Election Tribunal, Kotah and others***, reported in ***AIR 1955 SC 425***, referred to supra, had clearly held that there is no limitation for filing a petition under Order 9 Rule 7 of the Code of Civil Procedure. As the language of the provision itself would suggest an application contemplated under Rule 7

of Order 9 is not one to set aside an act of Court, but one to seek permission to put the clock back so that the defendant can defend the suit as if he was present at the earliest stages of the suit. The logic or rationale behind those decisions which conclude that there is no limitation for filing an application under Order 9 Rule 7 can be explained from another angle.

17. A person who has been set *exparte* in the proceedings will definitely have a right to seek to set aside the *exparte* decree that is passed against him within 30 days from the date of such *exparte* decree. This has been made clear by the Hon'ble Supreme Court in **Arjun Singh v. Mohindra Kumar and Others**, reported in **AIR 1964 SC 993**, wherein the Hon'ble Supreme Court had held that a rejection of an application under Order 9 Rule 7 of the Code of Civil Procedure, will not operate as *res judicata*, while the Courts considered an application under Order 9 Rule 13, made after an *exparte* decree is passed in the suit or proceedings. If there is nothing in law that would prevent a person who is set *exparte* in the year 2011, from filing an application to set aside an *exparte* decree that is passed in the year 2017, within 30 days of such *exparte* decree, I do not see how there could be a prohibition against a person, who seeks permission of the Court to relegate himself back to the position which he

would have been in, if he had appeared at the previous hearing, before passing of such a decree.

18. If it is held that an application under Order 9 Rule 7 would be barred due to lapse of time be it 3 years or 30 days, it would automatically mean that an application to set aside the *ex parte* decree that is made within time after the decree would also be barred. Such a situation was envisaged by the Hon'ble Supreme Court when it held that an order passed rejecting an application under Order 9 Rule 7 will not operate as *res judicata*, if the defendant chooses to file an application to set aside the *ex parte* decree. If we are to go by the language of Order 9 Rule 13, the defendant, who has suffered an *ex parte* decree, has to only explain his absence on the day on which such *ex parte* decree came to be passed, if he files an application within 30 days of such *ex parte* decree. Therefore, in my considered opinion, an anomaly will be created, if the Courts are to conclude Article 137 or any other Article of the Limitation Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure.

19. I am in entire agreement with the contention of the learned counsel appearing for the petitioner that an application contemplated under Order 9

Rule 7 is, in essence not one to set aside an act of Court, but one seeking permission of the Court to re-open the proceedings and enable the defendant, who was absent to participate in the proceedings as if he were present. It has been repeatedly held that an *ex parte* defendant has a right to participate in the subsequent stages of the same litigation. This Court had even as early as in 1925, in ***Gokarakonda Venkatasubbiah v. Daliparathi Lakshmiharasimham***, held that the defendant who had remained *ex parte* can participate in the subsequent proceedings and Order 9 Rule 7 of the Code of Civil Procedure, does not prevent such participation. It only applies to a case, where a party declared *ex parte* seeks to be delegated back to the position which he would have been in, if he had appeared at the previous hearing.

20. Adverting to the decisions which take the view that Article 137 would apply, I can straight away point out that those decisions are against the spirit of the judgments of the Hon'ble Supreme Court in ***Sangram Singh v. Election Tribunal, Kotah and others***, reported in ***AIR 1955 SC 425***, and ***Arjun Singh v. Mohindra Kumar and Others***, reported in ***AIR 1964 SC 993***. Unfortunately, the two decisions of the Hon'ble Supreme Court which have a great bearing on the issue before us, viz., the judgment of the Hon'ble Supreme

Court in **Sangram Singh** 's case and **Arjun Singh**'s case, cited supra, were not brought to the notice of the learned Judge, who decided **Visalakshi v. Umapathy**, reported in **2015 (5) CTC 67**. The learned Judge has referred to the decision of the Delhi High Court and concluded that Article 137 would apply to the case on hand.

21. In **G.Krishnasamy v. G.Seenivasan & another**, referred to supra, the learned Judge has merely followed the judgment in **Visalakshi v. Umapathy**, to conclude that Article 137 of the Limitation Act would apply. The same is the case in **Ramados v. Mohan & Others**, made in **CRP No.2412 of 2016** dated **23.08.2016**, wherein we find no discussion, excepting that the decision in **Visalakshi v. Umapathy**, is applied. As regards the decision of the Division Bench of the Kerala High Court in **Y.Daniel and others v. Annamma**, referred to by the learned counsel for the respondent, the Division Bench only accepted the view in **Cleetus v. South Indian Bank**, reported in **2007(3) KLT 868**, but there are earlier decisions of the Kerala High Court taking a different view.

22. As I had already pointed out the judgment in **Tarlochan Singh and Ors. v. Union Bank of India and Ors.**, does not touch upon the issue. I must

also point out that the judgment in **Gokarakonda Venkatasubbiah v. Daliparthi Lakshmiharasimham**, was approved by the Hon'ble Supreme Court in **Sangram Singh**'s case. In **Pilla Reddy v. Thimmaraya Reddy and Others**, reported in **1997 (1) MLJ 37**, Hon'ble Mr.Justice S.S.Subramani, had after referring to almost all the cases on the point concluded that there is no limitation for an application under Order 9 Rule 7 of the Code of Civil Procedure.

23. As I had already pointed out none of the decisions which conclude that Article 137 of the Limitation Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure, have taken note of the earlier decisions of the Hon'ble Supreme Court in **Sangram Singh v. Election Tribunal, Kotah and others**, reported in **AIR 1955 SC 425**, and **Arjun Singh v. Mohindra Kumar and Others**, reported in **AIR 1964 SC 993**. I am sure that the learned Judges, who decided those cases, would not have taken a view as they had if only the judgments of the Hon'ble Supreme Court had been brought to their notice.

24. I therefore find that those judgments, viz., the judgment in **Visalakshi**

v. Umapathy, reported in 2015 (5) CTC 67, judgment in *G.Krishnasamy v. G.Seenivasan & another*, made in *CRP (MD) No.2819 of 2018 (PD)* dated *04.06.2019*, judgment in *Ramdoss v. Mohan and others*, made in *CRP (PD) No.2412 of 2016* dated *23.08.2016*, cannot be held to be good law, inasmuch as, they are in conflict with the decisions of the Hon'ble Supreme Court in *Sangram Singh v. Election Tribunal, Kotah and others*, case reported in *AIR 1955 SC 425*, and *Arjun Singh v. Mohindra Kumar and Others*, case reported in *AIR 1964 SC 993*. For the foregoing reasons, I conclude that Article 137 of the Limitation Act, does not apply to an application under Order 9 Rule 7 of the Code of Civil Procedure and the same can be filed at any time before the judgment is delivered in the suit or proceeding.

25. Now, coming to the facts of the present case, it is seen that the second defendant/petitioner herein, was set *ex parte* on 19.09.2011 and the other defendants were contesting the suit. As has been pointed out the reason assigned by him for not appearing in Court is that since he had sold the property he had entrusted the matter with the other defendants. As has been seen earlier, there is a distinct difference in the language of Order 9 Rule 7 and order 9 Rule 13 of the Code of Civil Procedure. While Order 9 Rule 7 requires

the applicant to assign good cause for his non appearance; Order 9 Rule 13 requires the applicant to assign sufficient cause. The difference in the language is also noticed by the Hon'ble Supreme Court in *Arjun Singh*'s case, cited supra. Whether a cause shown is a good cause or not, within the meaning of the Rule, will depend on the facts and circumstance of each and every case.

26. The suit in OS No.245 of 2011 is a partition suit launched against almost 54 defendants and the second defendant/the petitioner herein, has purchased the suit property from the first defendant, who happens to be the son of the plaintiff. It is also stated that the first defendant had also remained *ex parte* and the petitioner/second defendant had plotted out the property and sold to various persons and the purchasers are arrayed as defendants 3 to 54. As a vendor, the second defendant is answerable to the claims of the defendants 3 to 54, who are the purchasers.

27. The reasons assigned in the affidavit filed in support of the application cannot be termed as *mala fide*. Having sold the property, the petitioner might have *bona fide* believed that the purchasers would protect their interest. I see no negligence or indifference in such belief being entertained by

the petitioner. I am therefore of the considered opinion that the Trial court was not right in dismissing the application. The Trial Court would have done well to afford an opportunity to the second defendant to contest the suit on merits.

8. For the foregoing reasons, The Civil Revision Petition will stand **allowed**. The Order in IA No.788 of 2017 dated 09.10.2017 is set aside, the IA No.788 will stand allowed, the *exparte* order dated 19.09.2011 made against the second defendant will stand set aside and the second defendant is permitted to defend the suit, as if he was present at the earlier stages of the suit. Consequently, the connected miscellaneous petition is closed.

29. However, considering the fact that the proceedings in the suit will be delayed further, the second defendant shall compensate the plaintiff for the delay by way of costs. I direct the petitioner to pay a sum of Rs.5,000/- as costs to the first respondent/plaintiff. The cost shall be paid to the counsel appearing for the first respondent in this Court on or before 14.10.2020 and the receipt shall be produced before the Trial Court.

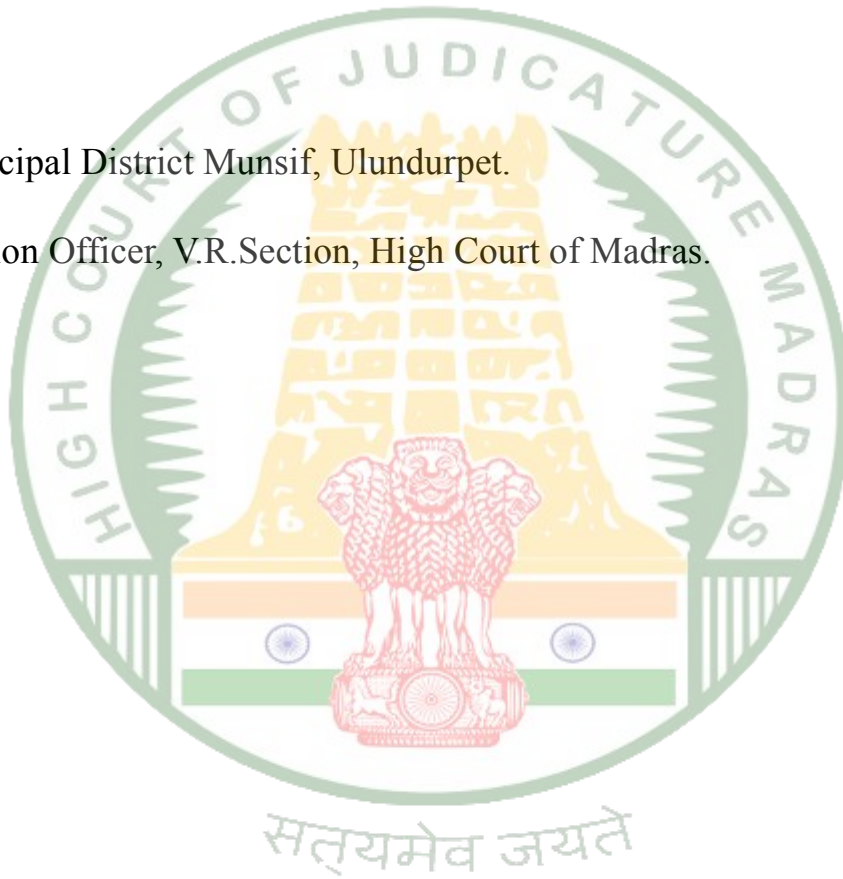
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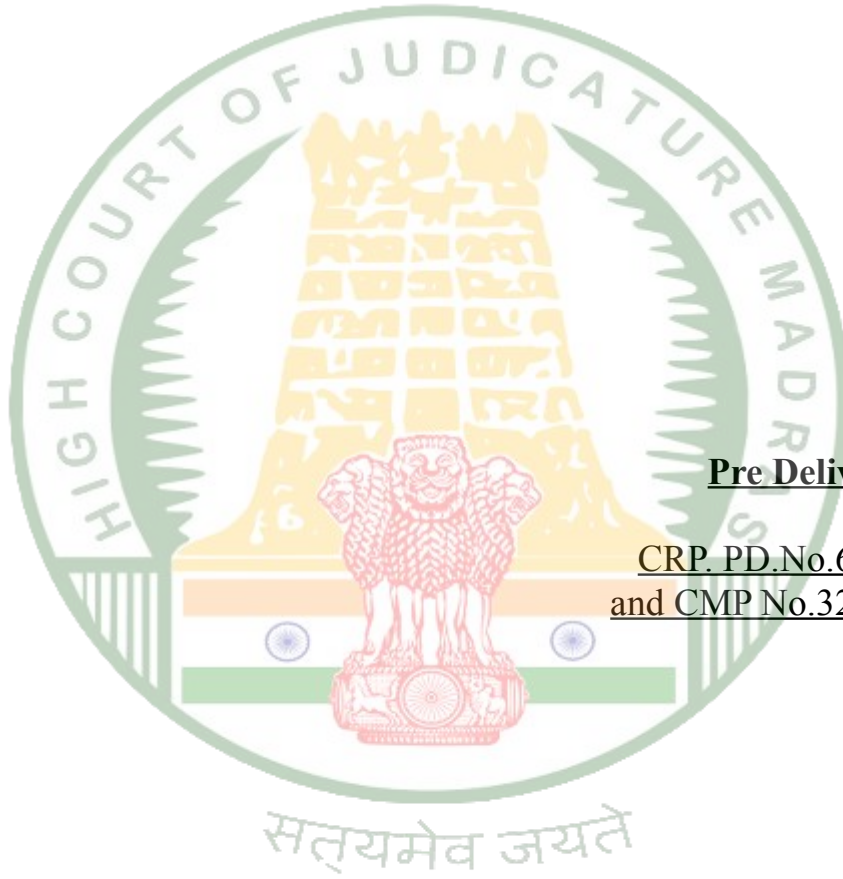
1. The Principal District Munsif, Ulundurpet.
2. The Section Officer, V.R.Section, High Court of Madras.



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R.SUBRAMANIAN, J.
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