

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11/09/2020

DELIVERED ON : 15/09/ 2020

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

C.R.P(NPD)NO.4003 of 2019

Tamilselvi
D/o. K.Rajagopal

... Petitioner

Vs

1.A.Ramya

2.A.Kousalya

..... Respondents

Prayer: Civil Revision Petition filed under Sec. 115 of Civil Procedure Code praying to set aside the fair order and decreetal order dated 30.10.2019 in I.A. No.533 of 2018 in O.S.No.856 of 2012 on the file of III Additional District Munsif, Coimbatore and stay all proceedings in E.P.No.45 of 2018 and allow the present revision.

For Petitioner : Ms.A.L.Ganthimathi

For Respondents : Mr.T.Sundaranathan

ORDER

The present Civil Revision petition is directed against the order of dismissal of a petition filed under Sec.5 of the Limitation Act for condoning the delay in filing the petition to set aside the ex-parte decree.

2. The petitioner is the first defendant contesting party and the respondent/plaintiff and the second defendant are the mother and daughter. The respondent preferred the above suit for setting aside the sale of the suit properties which stood in the name of the plaintiff in the years 1997 and 1999 by the mother in favour of the petitioner as fraudulent, without her knowledge and not for the welfare of the plaintiff, who was a minor then.

3. The suit was decreed ex-parte on 18.11.2016 and the petition to set aside the ex-parte decree was filed on 04.06.2018 with a delay of 533 days. The Trial Court has dismissed the petition for condoning the delay as the

reasons stated are not sufficient and satisfactory.

4. The learned counsel for petitioner would contend that the petitioner being in possession of the suit properties for more than 20 years, pursuant to a sale made by the Kartha for the welfare of the minor, and having filed the counter and written statement in the suit in time and prosecuting the appeal filed by the plaintiff before appellate court, had no intention to remain ex-parte. The suit by itself is barred by limitation as the respondent/plaintiff filed the same at the age of 26 on information from her uncle. Wrong noting of the hearing date and wrong information by the named junior advocate is the bonafide reason. But the Trial Court culling out one particular sentence in the affidavit, which was projected by the respondent, had dismissed the petition. According to her substantial justice shall be done by permitting the petitioner to contest the case on merits rather than dismissing the same on technicalities. For the fault of the advocate the litigant shall not be penalised and relied on various judgments of Supreme Court, which are extracted in the later part of the judgment.

5. More than the petitioner, the learned counsel for petitioner had taken the Court to the length and breadth of the pleadings and very anxious to establish that the petitioner has approached the Court on false averments and her conduct and reasons stated in the affidavit filed in support of the petition are not, as rightly held by the Trial Court, not sufficient and satisfactory. He would contend that the petitioner/first defendant in collusion with the second defendant had collusively purchased the property, hereby defeating the interest of the minor. The sale is legally not sustainable. With a malafide intention to protract the proceedings and defeat the rights of the plaintiff, she deliberately remained ex-parte and filed the petition with delay, despite knowledge. He would draw the attention of the Court to the suit filed by the petitioner in the year 2017 in O.S.No.1091 of 2018, the written statement and rejection of plaint filed in the said suit, wherein it is specifically pleaded that the suit was decreed ex-parte on 18.11.2016, whereas in spite of having knowledge, the statement of the petitioner that she came to know of ex-parte decree only on 21.05.2018 is utter false. In support of his contentions he would rely on several judgments.

6. It is relevant to look into the applicability of those judgments, the discussion of which will elicit the factual and legal position to decide the above revision.

7. In the judgment of G.Jayaraman vs. Devarajan reported in CDJ 2007 MHC 742, it is held that delay cannot be excused as a matter of judicial generosity. Rendering substantial justice is not to cause prejudice to the opposite party.

8. Para 16 of the judgment reads as under:

“ 16. As stated earlier, delay cannot be excused as a matter of judicial generosity. Rendering substantial justice is not to cause prejudice to the opposite party. Money Suit was filed way back in 1998 and Revision Petitioner/Plaintiff has been pursuing the matter for nearly 7 to 8 years. The matter could not reach finality because of one Application or another filed by the Respondent/Defendant. The party claiming indulgence must prove that he has reasonable diligent in prosecuting the matter. This test for condoning the delay is not satisfied in this case. Liberal exercise of jurisdiction under

Section 5 of the Act would cause prejudice to the Plaintiff/Decree Holder, who has been pursuing the money Suit for quite a long time. In condoning the delay, there is improper exercise of discretion and therefore, the impugned order cannot be sustained.”

9. In the above case money suit was filed in the year 1998. Summon was served on 20.11.1998. Defendant remained ex-parte and on petition the same was set aside on 27.11.1998. After that he had not filed written statement for 4 years and was again set ex-parte on 30.06.2003. In the Execution petition also remained absent and was set ex-parte on 22.03.2004. Again ex-parte order was set aside and thereafter taken time for filing counter. At that stage, in the year 2015, he filed a petition to set aside the ex-parte decree dated 30.06.2003. Obviously the conduct of the party in protracting the proceedings for more that 7 years would prejudice the rights of the other side. The High Court had rightly came to a decision to dismiss the petition.

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10. But in the instant case, the petitioner was diligently following up the Civil Miscellaneous Appeal in C.M.A.No. 7 of 2015, but during its pendency the suit was decreed ex-parte. Even assuming that the fact was made known through written statement and petition for rejection of plaint in February 2018, the delay in filing the petition in the month of May 2018, cannot be compared with the case dealt with in the above judgment. The above judgment is not applicable to the facts of the present case.

11. The judgment of Katari Suryanaryana & Others vs. Koppiseti Subba Rao & Others, reported in CDJ 2009 SC 715, has been cited for the proposition that at least once in a year; one should contact the lawyer. It is held as under.

12. *In the above case the parties were neighbours. They were co-sharers. It is difficult to conceive that the petitioners were not in touch with their advocate from December 1999 to December 2006. If not every week, they are expected to contact their lawyers once in a year. Ignorance of legal consequence without something more would, in one opinion, be sufficient to*

condone such a huge delay.

13. Interestingly, in the very same judgment various other decisions were extracted. The relevant portions are extracted as under:

“In Union of India V. Ram Charan & Ors. [(1964) 3 SCR 467], a Three Judge Bench of this Court, held:

“... Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance.”

....

“12. It is no doubt true that in terms of Section 3 of the Limitation Act, 1963 as also the provisions of the said Act, a suit must be filed within the prescribed period of limitation. The civil court has no jurisdiction to extend the same.

13. However the provisions of the Limitation Act should be construed in a broad manner. Different provisions of the Limitations Act may require different constructions, as for example, the court exercised its power in a given case liberally in condoning the delay may have to be taken into consideration for examining its correctness by the court in each case. We however may not be understood to lay down a law that the same principle would apply in case of construction of section 3 of the limitation Act."

14. From the above decisions cited by the learned counsel for respondent, it is very clear the Court shall not adopt pedantic approach and should not be overstrict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties. Ultimately, what is important is that the parties shall contest the case on merits, rather than being prevented on peripheral issues. Doing justice, that too substantial justice shall be based on the true rights of the parties and no party shall be prejudiced of this valuable right of getting justice on technicalities or frivolous grounds. For that purpose the Hon'ble Supreme Court in the above

case observed that “ *Limitation Act should be construed in a broad manner. Different provisions of Limitations Act may require different constructions, as for example, the Court exercised its power in a given case liberally in condoning the delay may have taken into consideration for examining its correctness by the Court in each case.*”

15. The above observation makes it clear that the Courts shall not adopt narrow or strait jacket formula and consideration shall be based on the facts and circumstances of each case and ultimately the resolution of dispute on merits in the main suit shall be given paramount importance. In the present case the paramount consideration shall be as to whether the sale of the suit properties was fraudulent or not, minor or not? and whether the plaintiff has filed the suit within three years on attaining majority or not has to be decided. But side tracting the issue on certain averments made in the merits of the case will definitely cause prejudice and such derailment of justice shall not happen.

16. In the very same judgment the Honb'le Supreme Court relied on other judgment reported in Perumon Bhagwathy Dewaswom, Perinadu Village vs. Bhargavi Amma (Dead) by Lrs and Ors, the relevant portion is extracted as under:

“ 9. This Court also made some observations in Ram Charan (Supra) about the need to explain, in addition to alleging that the plaintiff/appellant not being aware about the death, the reasons for not knowing about the death within a reasonable time. Those observations have stood diluted in view of subsequent insertion of sub-rule (5) in Rule 4 and addition of Rule 10A in Order 22 CPC by Amendment Act 104 of 1976, requiring (i) the court to take note of the ignorance of death as sufficient cause for condonation of delay, (ii) the counsel for the deceased party to inform the court about the death of his client.”

The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :

(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and

circumstances of the case, and the type of case. The words 'sufficient cause' in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case."

Therefore, sufficient cause should be understood and applied in a reasonable, pragmatic, practical and liberal manner depending upon the facts and circumstances of the case. In the present case, it is not that the petitioner

kept idle without contacting the advocate. But, on the other hand, she was in continuous touch with them and filed another suit also. She had also prosecuted the appeal filed by the respondent in C.M.A.No.7 of 2015. While pursuing the appeal before the Appellate Court it is probable for losing track of the case before the Sub-ordinate forum. It is also relevant to note that the very same advocate, against whom the allegation is made, has prepared the affidavit and hence the reason may be true that the junior advocate was lethargic in not watching the progress of the suit. However, as per the above judgment sufficient cause should be understood and applied in a reasonable and practical manner to advance substantial justice. The above judgment, rather, is favourable to the case of the petitioner.

17. The judgment reported in CDJ 2009 SC 2102, Dalip Singh vs. State of U.P. And Others relied on for the proposition that hearing shall be denied to the party, who is prima facie found suppressing facts and misleading the Court is concerned, the Hon'ble Supreme Court finding the suggestive assertion made by the holder in proceedings under land ceiling matter that he had no knowledge of the proceedings initiated by the

prescribed authority and a false statement that he was ill continuously for 10 months without the support by medical certificates was held to be misrepresentation and suppression of facts. But the facts and circumstances of the above case will not apply to the present case. The disputed fact remains that the junior advocate lost track of the suit proceedings, was not denied by him. In fact he himself prepared the affidavit and signed in the petition filed for condonation of delay. In that event it cannot be held that the statement is false or misrepresentation. Further as held by Honb'le Supreme Court in Nand Kishore vs. State of Madhya Pradesh (CDJ 2011 SC 646) that the *“Court may not be in a correct position to arrive at any final conclusion while only reading or relying upon a sentence in the statement of a witness that too by reading it out of context. The evidentiary value of a statement should normally be appreciated in its correct perspective, attendant circumstances and the context in which the statement was made.”*

18. In that view of the matter, clinging on to one sentence that the petitioner could not get in touch with the advocate, the affidavit shall not be read in isolation and out of context. Affidavit should have been read in its

entirety and the decision should have been taken. Hence, misrepresentation or suppression of fact cannot be attributed to the petitioner in full, but, considering the merits of the suit, the Trial Court should have taken the decision.

19. The next judgment which has been relied on by the respondent reported in CDJ 2010 SC 575, Balawant Singh Vs. Jagdish Singh and Others is for the proposition that liberal construction should not lead to injustice. The relevant portion read by the learned counsel reads as under:

“ Sometimes the Courts have taken a view that delay should be condoned with a liberal attitude, while on certain occasions the Courts have taken a stricter view and wherever the explanation was not satisfactory, have dismissed the application for condonation of delay. Thus, it is evident that it is difficult to state any straight-jacket formula which can uniformly be applied to all cases without reference to the peculiar facts and circumstances of a given case. It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the

legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If we accept the contention of the Learned Counsel appearing for the applicant that the Court should take a very liberal approach and interpret these provisions (Order 22 Rule 9 of the CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such approach or interpretation would hardly be permissible in law. Liberal construction of the expression 'sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must

exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect 'sufficient cause' as understood in law. [Advanced Law Lexicon, P. Ramanatha Aiyar, 2nd Edition, 1997] The expression 'sufficient cause' implies the presence of legal and adequate reasons. The word 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. We find it unnecessary to discuss the instances which would fall under either of these classes of cases. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention. [Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edition, 2005]”

In the above judgment, Hon'ble Judges relied on the judgment of Perumon Bhagvathy Devaswom (Supra). A reading of the above paragraph enlighten us that it is difficult to state any straight-jacket formula which can uniformly applied to all cases without reference to the peculiar facts and circumstances of a given case. It also mandates that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective and Courts should not give such an interpretation to provisions which would render the provision ineffective or odious. It is further observed that Liberal construction of the expression "sufficient cause" is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bonafide is indisputable.

20. In that view of the matter it is imperative to bear in mind that the case of the petitioner is that the sale, which had taken place 20 years back was made for the welfare of the minors by the Kartha and the petitioner is in possession of the property ever since. It is also important to note that a specific averment has been made in the written statement that the sale

proceeds were deposited in “Kamadenu deposit” Receipt KTA No.924361 dated 01.10.1997 for a period of ten years from 01.10.1997 to 30.09.2007 in the name of the minor and it was used for her educational purposes. It is also more relevant to note that the disputed sale was made after disposing of other properties of the mother, the second defendant herein, who was left penniless after the death of her husband. It is difficult for a single woman, in those days, to maintain agricultural lands, having a girl child in hand without support. It is also probable, in order to generate income rather than keeping it idle to liquidate and deposit the money, so that it will fetch interest and will become handy in times of need. In such circumstances, to prove the purchase was not genuine but fraudulent and the sale was not for the welfare of the minor requires elaborate evidence. The sale cannot be set aside by a stroke of pen setting the defendant ex-parte and by dismissing the petition to condone the delay. Such an order will be subversive of the true intent of the legislation and render it ineffective and odious. It is well settled that rules of limitation is not to destroy the right. In order to advance substantial justice as held by the Hon'ble Supreme Court, court shall be liberal in certain circumstances. The present facts and circumstances are one such to give liberal construction

in favour of the petitioner rather than dismissing it by following narrow and strait-jacket formulae. The above judgment is more in favour of exercising the discretionary power in favour of the petitioner to advance substantial justice and is of little avail to the respondent.

21. Yet another judgment relied on by the respondent in B.Madhuri Goud vs. B. Damodar Reddy reported in CDJ 2012 SC 997 for the proposition that in absence of supporting affidavit filed by the advocate against whom lethargy is attributed, the explanation given for delay will not stand proved; will not apply to the case on the hand. We have already discussed of the circumstances. The matter was not taken on appeal before a different forum or that the advocate appearing for the petitioner before the appellate forum or other forum is different or on change of vakalat. But the fact is that the same advocate prepared the affidavit and he continue to appear for the petitioner. It implies that he has given his tacit acceptance and filing of a supporting affidavit in the present circumstances is not necessary. Further it is curable, in the event Courts directs such action. Therefore, the reliance placed by the counsel for respondent will not be of much use to deny

the exercise of discretionary power.

22. The judgments reported in CDJ 2014 SC 1105, H. Dohil Constructions Co.P. Ltd vs. Nahar Exports Ltd and another and judgment of Madras High Court in CDJ 2017 MHC 6741, Gali Simhachalam Vs. M.Chandrasekar & Others deal with condoning the delay of 1727 & 1155 days in refiling the appeals. Allegations were made against the advocate for the delay. In such circumstances it was held that throwing the blame on the previous counsel to whom appeal papers were entrusted without details as to steps taken by the litigant to ensure the appeal filed was registered for pursuing the remedy before Court cannot be accepted. Such a situation does not arise in the present case. As discussed above the litigation is continued with the same advocate and under his legal advice. Therefore, it cannot be said that the action of the petitioner lacks bonafide.

23. Another judgment relied on by the petitioner in Mohammed Sahid & Others Vs. Raziya Khanam (dead) through Lrs and another, DCJ 2018 SC 1059 for the proposition application for condonation of delay with incorrect

facts and were negligent in pursuing the matter and rightly refused to condone the delay is concerned it is akin to the judgment of the Hon'ble Supreme Court in Dalip Singh (Supra). The other judgments relied by the learned counsel for respondent also reiterate the same principles. Therefore, I am of the considered opinion that the Hon'ble Supreme Court has categorically held that in the given facts and circumstances of each case, in order to advance substantial justice appropriate decision shall be taken.

24. Bearing this in mind, the facts and circumstances of the present case is analysed, it gives an impression that the petitioner, prima facie, has merits to defend her case through elaborate trial. The second defendant though engaged a counsel subsequently remained ex-parte. The petitioner has made a specific averment that the second defendant mother had disposed of her personal properties for the welfare of the minor and brought up the fatherless child. It is contended by the learned counsel for petitioner that unable to financially sustain herself and single handedly maintain the property, which was not generating income the mother in the capacity as Kartha sold the same for the welfare of the minor. The sale proceeds of the

suit property was deposited in Kamadhenu Deposit Receipt in KTS No.924361 dated 01.10.1997 for a period of ten years from 1.10.1997 to 03.09.2007 in the name of the plaintiff, who was a minor then and utilised for her education. This fact is very much material to render substantial justice. It is also curious to note that the petitioner had taken a stand in her written statement that the plaintiff filed the suit at the age of 26 years. In spite of the same, the respondent has not chosen to prove her age by producing birth certificate or certificates issued by the school or college or other educational authorities, but the suit was held to be proved without framing any issue as to maintainability or limitation on this aspect and without a finding thereon. Just by an ex-parte award, the immovable property cannot be snatched away from a person, who claims that the sale was bonafide and that she purchased it for valuable consideration. Refusing to set aside ex-parte decree will certainly make dispensation of substantial justice a farce and result in odious situation prejudicing the petitioner.

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25. As contended by the learned counsel for the petitioner, there is no reason for the petitioner, who filed the written statement and counter

affidavits in time and who is diligently following the appeal in C.M.A.No.7 of 2015 filed against dismissal of injunction application filed by the plaintiff to leave the suit astray, that too when she has a good legal defence to protect her valuable right to property. The judgments relied on by the petitioner reported in 2017 (2) MLJ 468 and 1999 (1) L.W. 739 for the proposition that to advance substantial justice liberal construction should be given to Sec.5 of Limitation Act and that Rules of Limitation are not to destroy the rights of the parties, have already been discussed in the previous paragraphs.

26. It is also well settled by the Hon'ble Supreme Court in Raifq and another vs. Munshilal and another, reported in AIR 1981 SC 1400, which ratio followed in various judgments of this Court hold that an innocent party shall not suffer injustice merely because his chosen advocate defaulted. In the present case the petitioner has named the junior advocate and the same has been facitly admitted.

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27. The Hon'ble Supreme Court in M.K.Prasad vs. P.Arumugam , CDJ 2001 SC 404, has observed as under:

“ 8. In the instant case, the appellant tried to explain the delay in filing the application for setting aside the ex-parte decree as is evident from his application filed under Section 5 of the Limitation Act accompanied by his own affidavit. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex-parte decree, the court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case we set aside the order impugned and condone the

delay in filing the application for setting aside ex-parte decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the ex-parte decree as well.”

28. Therefore, the petitioner shall not be precluded from contesting the case on merits and suffer prejudice. At the same time the hardship caused to the respondent plaintiff shall not go unaddressed. In the interest of justice the respondent shall be compensated for the time and expenses. It can be done only by awarding compensatory costs and by issuing appropriate direction to the Trial Court to dispose of the case expeditiously.

29. Considering the totality of facts and circumstances of the above revision, the order passed in I.A.No.533 of 2-18 in O.S.No.856 of 2012 dated 30.10.2019 on the file of III Additional District Munsif, Coimbatore is set aside and the delay of 553 days in filing the petition is condoned. The Trial Court is directed to dispose of the suit as expeditiously as possible. The petitioner is directed to pay a sum of Rs.10,000/- towards costs to the

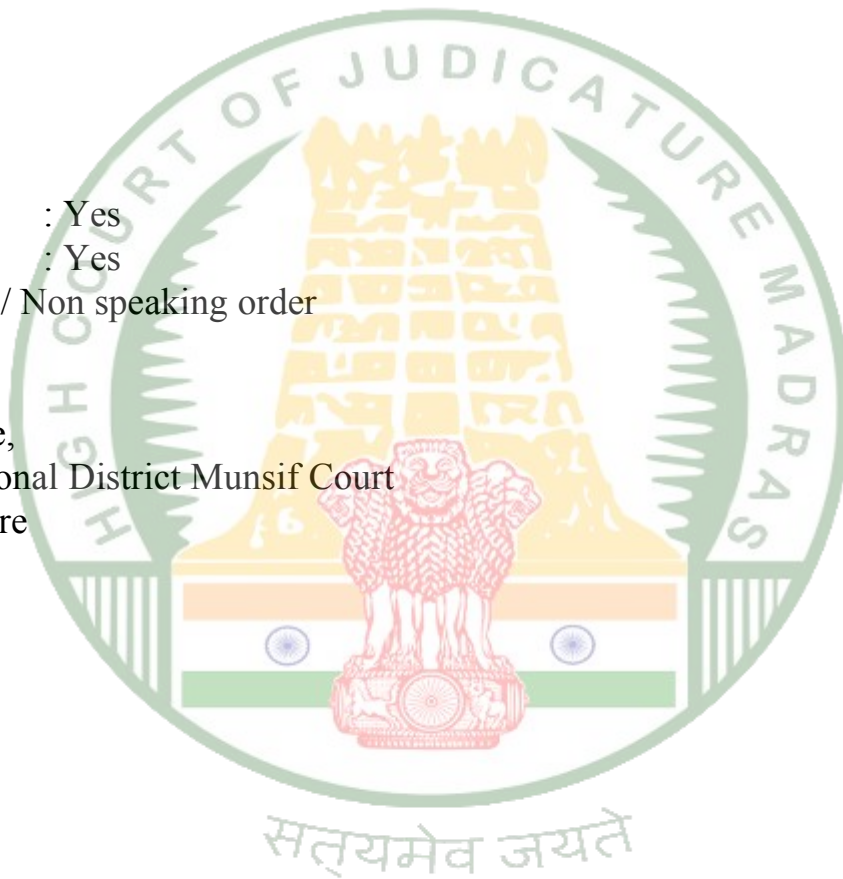
respondent within a period of four weeks from the date of receipt of a copy
this order.

In the upshot the Civil Revision petition is allowed. No costs.

15.09.2020

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Speaking / Non speaking order

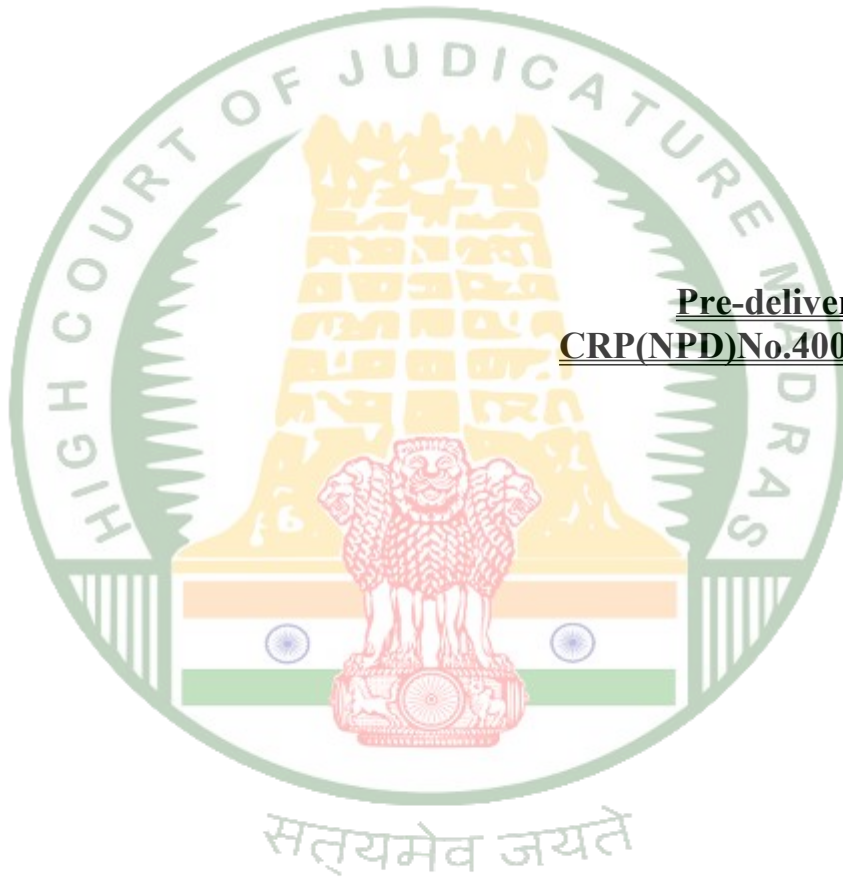
To
The Judge,
III Additional District Munsif Court
Coimbatore



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C.R.P(NPD).No.4003 of 2019

M.GOVINDARAJ, J.
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