

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[ORDERS RESERVED ON : 24.11.2020]

[ORDERS PRONOUNCED ON : 05.01.2021]

CORAM:

THE HONOURABLE MR. JUSTICE **RMT.TEEKAA RAMAN**

C.R.P. [PD] No.937 of 2019

and

C.M.P.No.6146 of 2019

1. V.Gowrishankar

2. K.Subramani

[2nd Petitioner died vide
memo dated 10.11.2020.]

... Petitioners/Defendants 1 and 2

.. Vs ..

1. S.Balakumar

2. B.Subramaniam

3. T.Bakkiyam

4. B.Adhisheshakumar

5. K.M.Veluswamy

... Respondents/Plaintiffs

... Respondent/3rd Defendant

Prayer:- Civil Revision Petition is filed under Article 227 of the Constitution of India, against the Decreetal Order and Common Order dated 28.04.2017 passed by the learned II Additional District Judge, Salem, in I.A.No.332 of 2016 in O.S.No.310 of 2015.

For Petitioners : Mr.V.R.Kamalanathan
for Mr.Velayutham pichaiya
For RR-1 to 4 : Mr.M.R.Jothimanian
for Mr.T.Dharani
For R-5 : No Appearance

ORDER

This Civil Revision Petition is filed under Article 227 of the Constitution of India.

2. Defendants 1 and 2 in the suit are the revision petitioners herein. The respondents 1 to 4 herein have filed a suit for the relief of declaration and for permanent injunction. The main prayer is to declare the Sale Deed dated 16.02.2012, which is registered as Document No.1089 of 2012 on the file of Sub Registrar, Suramangalam, is void ab-initio and not binding on the plaintiffs and for consequential permanent injunction restraining the defendants and their men from interfering with the peaceful possession and enjoyment of the suit property.

3. The defendants have entered appearance before the trial Court. They have also filed two Interlocutory Applications before the trial Court. I.A.No.332 of 2016 was filed by the revision petitioners herein under Order VII Rule 11 of CPC to reject the plaint. The third defendant namely, K.M.Velusamy has also filed an application for same

relief in I.A.No.206 of 2016. The plaintiffs in the suit have filed counter in the said Interlocutory Applications. After enquiry, both I.A.Nos.332 and 206 of 2016 were dismissed and hence, the defendants 1 and 2 have preferred this Civil Revision Petition before this Court.

4. Initially, the respondents 1 to 4/plaintiffs had filed a suit in O.S.No.129 of 2013 before the learned II Additional Subordinate Judge, Salem, for the relief of declaration to declare the Sale Deed dated 16.02.2012 registered as Document No.1089 of 2012 on the file of S.R.O. Suramangalam, is void *ab-initio* and not binding on the plaintiffs and for permanent injunction to protect the possession.

5. On a perusal of the certified copy of the order in I.A.No.117 of 2015, it is seen that as per the endorsement made by the Judicial Officer, the petition was not allowed as prayed for, as observed by the learned II Additional District Judge, Salem, in his impugned order. It is only the petition was allowed and the parties were at liberty to work out their remedy as per law. In other words, there was no liberty either impliedly or expressively. Even as per the judgment in the main suit in

O.S.No.129 of 2013, the certified copy clearly shows that the petition filed under Order 23 Rule 1 and 2 CPC was allowed and the main suit was dismissed as withdrawn without costs and admittedly, as per the endorsement made by the Judicial Officer in the I.A. as well as in the judgment copy in the suit in O.S.No.129 of 2013 goes to show that there was no liberty either impliedly or expressively.

6. In view of the contents as per certified copy, this Court has no hesitation to hold that the finding rendered by the learned II Additional District Judge, Salem, in his order that as if the suit has been permitted to be withdrawn as prayed for, does not appears to be correct and it is factually wrong. The petition was not allowed as prayed for. It was wrongly mentioned by the learned trial Judge. Hence, I find that such a finding rendered by the learned II Additional District Judge, Salem, is *ex facie* error apparent on the face of the records.

7. After perusing the certified copy of the order in I.A.No.117 of 2015 filed under Order 23 Rule 1 and 2 of CPC and the judgment copy in O.S.No.129 of 2013, this Court is of the considered view that the suit

was dismissed as withdrawn without costs. In other words, at the risk of repetition, however for the sake of clarity, it is to be noted that the suit was dismissed as withdrawn without liberty. Thereafter, there is no appeal or revision against that order and hence, the same has attained finality.

8. Learned counsel for the petitioners would submit that the second petitioner viz., K.Subramani died on 29.01.2020 and he has filed a memo to that effect and the said memo dated 10.11.2020 is recorded.

9. Learned counsel for the respondents 1 to 4/plaintiffs drawn my attention to the various pleadings in the suit and contended that when an application is filed under Order 7 Rule 11 of CPC for rejection of the plaint, the Court is not bound to go through the averments made in the written statement. The scope of enquiry, in a petition filed under Order 7 Rule 11 of CPC for rejection of the plaint, the Court has to take into consideration only the pleadings in the plaint and none more.

10. Learned counsel for the respondents 1 to 4/plaintiffs,

regarding the scope of Order 7 Rule 11 of CPC, relied upon the following decisions of the Hon'ble Apex Court.

[1] 2020 SCC OnLine SC 482 [Shakti Bhog Food Industries Ltd., Vs. Central Bank of India and Another];

(2) (2003) 1 SCC 557 [Saleem Bhai Vs. State of Maharashtra] and

(3) 2019 (3) L.W. 70 [N.Mohan Vs. P.Govindasami & others].

11. Per contra, in support of his contention, the learned counsel for the revision petitioners/defendants 1 and 2 relied upon the following decisions of the Hon'ble Apex Court.

[i] (2011) 9 SCC 126 [Khatri Hotels Private Limited and another Vs. Union of India and another]

[ii] 2020 SCC OnLine SC 562 [Dahiben Vs. Arvindbhai Kalyanji Bhanusli and Others]

[iii] (2014) 14 SCC 254 [Suresh Kumar Dagla Vs. Sarwan and another].

[iv] (2017) 5 SCC 63 [V.Rajendran and another Vs. Annasamy Pandian (Dead) through Legal representative Karthyayani Natchiar]

[v] (2000) 5 SCC 458 [K.S.Boopathy & Others Vs. Kokila & Others].

12. Now coming into the legal position as to whether the application in I.A.332 of 2016 on the file of the Trial Court is filed under Order VII Rule XI CPC, has to be allowed:

The defendants 1 and 2 in the suit have filed the above I.A.No.332 of 2016 alleging that the earlier suit in O.S.No.129 of 2013 filed for the very same relief was allowed to be withdrawn and the same was dismissed without grant of any leave or liberty. The factual position has already been extracted in the preceding paragraphs. As per the plaint averments in the suit in O.S.No.310 of 2015, an averment to the effect that there was a liberty to file a fresh suit on the very same cause of action, however, which this Court finds *ex facie* error apparent on the face of the records.

13. Secondly, as per the plaint averment, the prayer in the suit is for declaration that the Sale Deed dated 16.02.2012, is null and void. Admittedly, the second suit in O.S.No.310 of 2015 was filed on 23.11.2015. The Sale Deed is of the year 2012. The limitation for filing of the suit is three years and hence, from the date of the Sale Deed to the

date of the institution of the second suit in O.S.No.310 of 2015 is totally out of time fixed under Limitation Act.

14. The third point that was urged by the learned counsel for the revision petitioners/defendants 1 and 2 is that since the earlier suit was dismissed as withdrawn without liberty, subsequent suit filed, on the very same cause of action amounts to re-litigation.

15. Point for consideration:-

Whether in a petition filed for rejection of the plaint under Order 7 Rule 11 of CPC, the Court can go into the question of re-litigation as to the prime aspect and point of limitation, simpliciter.

The question as to whether re-litigation amounts to abuse of process of court is no longer *res integra*.

(i) The judgment reported in (1998) 3 S.C.C. 573 - [**K.K.Modi Vs. K.N.Modi and Others**], paragraph No.44 is usefully extracted hereunder.

One of the examples cited as an abuse of the process of court is re-litigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to

re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of court.

(ii) In yet another decision that was reported in **2003 (4) CTC 347 - (K.K.Swaminathan Vs. Srinivasagam)**, paragraph No. 27 is usefully extracted hereunder:-

"27. One of the most abuse of process of the Court is re-litigation. It is an abuse of process of the Court and contrary to justice to re-litigate the same issue, which has already been tried and decided earlier against him. If the same issue is sought to be re-agitated by frivolous and vexatious suits, it is not as if the Court is powerless to stop the proceedings when it is brought to its notice. O.S.No.2473 of 1996 is sheer abuse of process of the Court re-agitating the same issue, in my view, should not be allowed to continue.

(iii) Yet another decision reported in **2009 (5) CTC 710 : 2009 (5) LW 79 - [Tamil Nadu Handloom Weavers' Co-operative Society, rep. by its Managing Director, 350 Pantheon Road, Egmore, Chennai 8 Vs.**

S.R.Ejaz, rep. By his Power Agent Muralidhar T.Balani], paragraph

No.34, is usefully extracted hereunder:-

"Therefore, the second suit is barred not only on the ground that the issue raised in the said suit was directly in issue in the former suit between the parties or their predecessor-in-interest but also on the ground of a deeming fiction. The explanation IV to Section 11 of CPC was inserted with a specific purpose, to put an end to the litigation once for all. In the absence of such a provision, the parties would file suits after suits with new grounds. There should be finality to litigation. The principles of constructive res judicata would be applicable in such cases. In case parties are permitted to initiate re-litigation, it would have the effect of unsettling matters which were settled earlier. "

(iv) In the judgment reported in 2011(2) MWN (Civil) 363, in C.R.P.No.4311 of 2010 - [1.Lakshmi, 2.Sarojini, 3.K.Rajasekar, 4.Karthikeyan, 5.K. Muralidharan, 6.K.Sakundathala, 7.Manikandan, 8.Veni, 9.R.Natarajan Vs. 1.Prasanna Mani, 2.RR Ever Green Developers (India) Pvt Ltd, rep. By is Managing Director, Mr.Rajkumar, Tirupur Town 641 603, paragraph No.25 reads as follows:

"25.The above decisions will clearly establish that no party can be allowed to relitigate the matter."

16.What is 'abuse of the process of the Court'? Of course, for the term 'abuse of the process of the Court' the Code of Civil Procedure has not given any definition. A party to a litigation is said to be guilty of abuse of process of the Court, in any of the following cases:-

- (1) Gaining an unfair advantage by the use of a rule of procedure.
- (2) Contempt of the authority of the Court by a party or stranger.
- (3) Fraud or collusion in Court proceedings as between parties.
- (4) Retention of a benefit wrongly received.
- (5) Resorting to and encouraging multiplicity of proceedings.
- (6) Circumventing of the law by indirect means.
- (7) Presence of witness during examination of previous witness.
- (8) Institution vexatious, obstructive or dilatory actions.
- (9) Introduction of Scandalous or objectionable matter in proceedings.
- (10) Executing a decree manifestly at variance with its purpose and intent.
- (11) Institution of a suit by a puppet plaintiff.
- (12) Institution of a suit in the name of the firm by one partner against the majority opinion of other partners etc.

(See The Code of Civil Procedure - A.I.R. Commentary to Section 151, C.P.C.) The above are only some of the instances, where a party may be

said to be guilty of committing abuse of the process of Court.

(i) In the decision reported in **1988 (2) KLT 732 - [Sreedharan Vs. Seethala]**, the Kerala High Court has an occasion to consider what is meant by abuse of process of Court and it was held as follows:

(a).The term "abuse of the process of the court" has not been defined.

(b).An abuse of the process of court can be committed by the court or by a party. It is therefore clear that where a court employed a procedure in doing something which it never intended to do, but resulted in miscarriage of justice, there is what is called an abuse of the process of the court.

(c).What then is an abuse of the process of the court committed by a party to the proceedings? Instituting vexatious, obstructive or dilatory action in court of law is one instance; where a party should be held to be guilty of an abuse of the multiplicity of proceedings for one's own aggrandisement is yet another instance where a party could be said to have committed an abuse of the process of the court."

(ii) The decision reported in **1998 (I) CTC 66 - [Ranipet Municipality Rep. By Its Comer. and Special Officer, Ranipet Vs. M.Shamsheerkhan]**, this Court has held as follows:

(a) If he did not ask for grant of that right, he should

not be allowed to file a separate suit as and when an auction notice was issued. Such a conduct on the part of the respondent is really an abuse of the process of Court.

(b) Such a conduct on the part of the respondent amounts to abuse of the process of the Court.

(iii) The **Division Bench of Panjab and Haryana**, in the decision reported in *I.L.R Panjab and Haryana 1988(2), Volume 15*, has held that

"the general principles contained in Section 11, Order II, Rule 2, Order IX Rule 9 and Order XXIII Rule 1(4) of the Code which are based on justice, equity and good conscience do govern those proceedings. It is held that a second petition for the ejectment of the tenant on a ground on which an earlier petition was got dismissed as withdrawn without liberty to file a fresh petition would be barred and not maintainable."

Wherein, the Division Bench has taken note of the decision laid down by the Hon'ble Supreme Court reported in [1977 SC 789], which reads as hereunder:

"as has been repeatedly held by the Supreme Court and was reiterated in Lal Chand (dead) by L, Rs.

and others v. Radha Kishnan, (6)"

"The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded on equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by an multiplicity of proceedings involving determination of the same issue."

(iv) In the decision of the Hon'ble Supreme Court **1994 (5) SCC 355 - [Municipal Corporation of Delhi Vs. C.L.Batra]**, the suit was withdrawn without obtaining any leave for filing a separate suit. While considering the same, in Paragraph of the judgment (at page 356 of the report), the Hon'ble Judge has said as follows:

"Secondly, the assess had filed a writ petition, praying for similar relief. When interim order was not granted on that writ petition, he withdrew the writ petition and filed this suit. This was an abuse of process of law. No liberty was obtained from the Court to file a suit on the same cause of action, when the writ petition was withdrawn." (Italics supplied)"

All the above decisions clearly established that no party can be allowed to re-litigate the matter and in such case, the Court shall reject the suit

plaint under Order VII Rule XI of CPC and the point of rejection can very well be gone into in the petition for rejection of plaint, on the ground of abuse of process of Court.

17. Point of Limitation Simpliciter:

It is true that on ex-facie reading of the plaint, if it is found that the suit was barred by limitation, the Court can reject the plaint. In the latest decision of the Hon'ble Supreme Court in the case of **"Raghwendra Sharan Singh Vs. Ram Prasanna Singh (Dead) by LRs. reported in AIR 2019 SC 1430 = 2019(3) MLJ 377 (SC)**, it was held as follows:

"8.Now, so far as the application on behalf of the original plaintiff and even the observations made by the learned trial Court as well as the High Court that the question with respect to the limitation is a mixed question of law and facts, which can be decided only after the parties lead the evidence is concerned, as observed and held by this Court in the cases of Sham Lal alias Kuldip (supra); N.V.Srinivas Murthy (supra) as well as in the case of Ram Prakash Gupta (supra), considering the averments in the plaint if it is found that the suit is clearly barred by law of limitation, the same can be rejected in exercise of

powers under Order 7 Rule 11(d) of the CPC".

(i) Similarly in the case of ***Canara Bank Vs. Sellathal and ors.*** reported in ***CDJ 2020 SC 271 = 2020 (2) ALT 68***, the Hon'ble Supreme Court has reiterated the same, which reads as follows:

"11. At this state, it is also required to be noted that the suits have been filed after a period of 15 years from the date of mortgage and after a period of 7 years from the date of passing of the decree by the DRT. In the plaints, it is averred that the plaintiffs came to know about the mortgage and the judgment and decree passed by the DRT only six months back. However, the said averments can be said to be too vague. Nothing has been averred when and how the plaintiffs came to know about the judgment and decree passed by the DRT and the mortgage of the property. Only with a view to get out of the law of limitation and only with a view to bring the suits within the period of limitation, such vague averments are made. On such vague averments, plaintiffs cannot get out of the law of limitation. There must be specific pleadings and averments in the plaints on limitation. Thus, on this ground also, the plaints were liable to be rejected. As observed herein above, the plaints are vexatious, frivolous, meritless and nothing but an abuse of process of law and court. Therefore, this is a fit case to exercise the powers under Order 7 Rule 11 (d) of the CPC.

Both the courts below have materially erred in not rejecting the complaints in exercise of powers under Order 7 Rule 11(d) of the CPC. Both the courts below have materially erred in not exercising the jurisdiction vested in them.” (emphasis supplied)

(ii) In the case of ***Dahiben Vs Arvinbhai Kalyanji Bhanusali(Gajara)(D) thr. Lrs & Ors.*** judgment reported in ***CDJ 2020 SC 606***, the Hon'ble Supreme Court had reiterated the above proposition that bar of limitation is going to the root of jurisdiction of Court. On a bare and wholesome reading of the plaint, if the court finds that the suit is barred by limitation, the Court is bound to reject the plaint.

18.The question of limitation is always treated as lack of jurisdiction rather than bar of law. The term “jurisdiction” is a verbal coat of many colours and is required wider meaning. The lack of jurisdiction may be inherent, pecuniary, territorial, subject matter including limitation and res judicata etc. The issue of limitation is generally considered as mixed question of fact and law, but, in some cases, the facts required to bring the suit within limitation may be

different from the facts required to get the relief prayed.

19. In the decision reported in ***KM Modi Case and Municipal Corporation of Delhi***, as cited supra, the Hon'ble Apex Court has dealt with the issue of re-litigation, and the same amounts to abuse of process of Court and the said plea of re-litigation can be gone into in the petition filed to reject the plaint. Based upon the above decision and also the factual matrix of this case, this Court finds that the earlier suit was dismissed as withdrawn in simpliciter, in the absence of any liberty to file a fresh suit in the very same cause of action and calling upon the defendants to face ordeal of trial in subsequent suit is barred since it amounts to re-litigation. This Court is of the considered view that the second suit filed on the very same cause of action is nothing but a re-litigation and the same can be gone into in the petition for rejection of the plaint.

20. In the decision of ***Dahiben case***, reported in ***2020 SCC OnLine 562***, the Hon'ble Apex Court has categorically held that when a

suit is barred by limitation and the sole point that has to be considered is only the point of limitation without any factual interference. In other words, when the plea of limitation is simplicitor, the said plea for limitation whether the suit is barred by limitation, simplicitor without any intervention of the factual position, that is, without recording evidence can be taken for consideration in the petition for rejection of the plaint.

21. In the instant case, as extracted supra, the Sale Deed is dated 16.02.2012 and the plaintiffs have filed the present suit in O.S.No.310 of 2015 before the Additional District Judge, Salem, on 23.11.2015 and the prayer in the suit is to declare the Sale Deed as *ab-initio* null and void and for challenging the Sale Deed, three years is limitation period and three years is already gone and therefore, the very main prayer in the suit is hit on a plea of limitation simplicitor. The plea of limitation simplicitor is that the suit is barred by limitation on *ex facie* cannot be brush aside lightly and hence, in view of the ratio laid down by the Hon'ble Apex Court in the above decisions, I am inclined to hold that the present suit is barred by limitation.

22. In view of the ratio laid down by the Hon'ble Apex Court in

the above two decisions reported in **2020 SCC OnLine SC 562 - [Dahiben Vs. Arvindbhai Kalyanji Bhanusli and Others], 1994 (5) SCC 355 - [Municipal Corporation, Delhi Vs. CL Batra]**, and based upon the plaint averment, and plaint-prayer read with plaint documents, I find that the present suit is nothing but re-litigation of the earlier suit, which was dismissed without any liberty or leave and hence, the defendant cannot be called upon to take the second round of litigation as the same is amounts to re-litigation on same cause of action and also relief sought for in the second suit is squarely barred under law of limitation. Hence, this Court is inclined to accept the contentions put forward by the counsel for the revision petitioners/defendants 1 and 2.

23. For the reasons stated supra, this Civil Revision Petition is allowed and the order dated 28.04.2017 passed by the learned II Additional District Judge, Salem, in I.A.No.332 of 2016 in O.S.No.310 of 2015 is set aside. I.A.No.332 of 2016 in O.S.No.310 of 2015 stands allowed. Consequently, the plaint in O.S.No.310 of 2015, on the file of learned II Additional Subordinate Judge, Salem, is ordered to be struck off. No costs. Consequently, the connected miscellaneous petition is

closed.

05 .01.2021

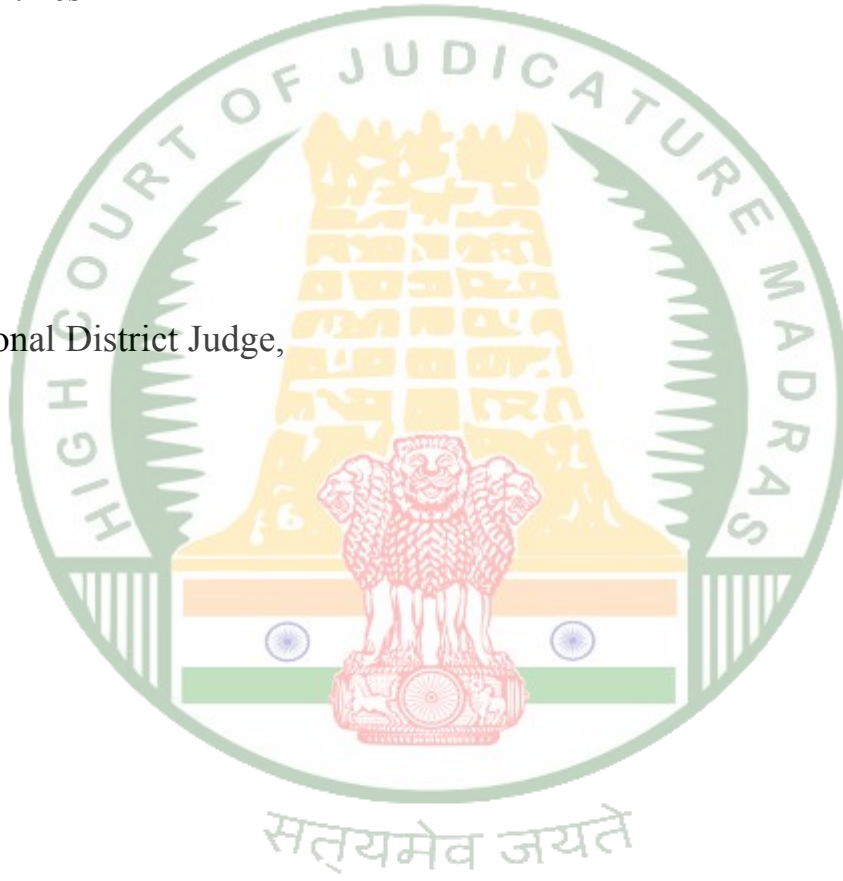
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To

II Additional District Judge,
Salem.



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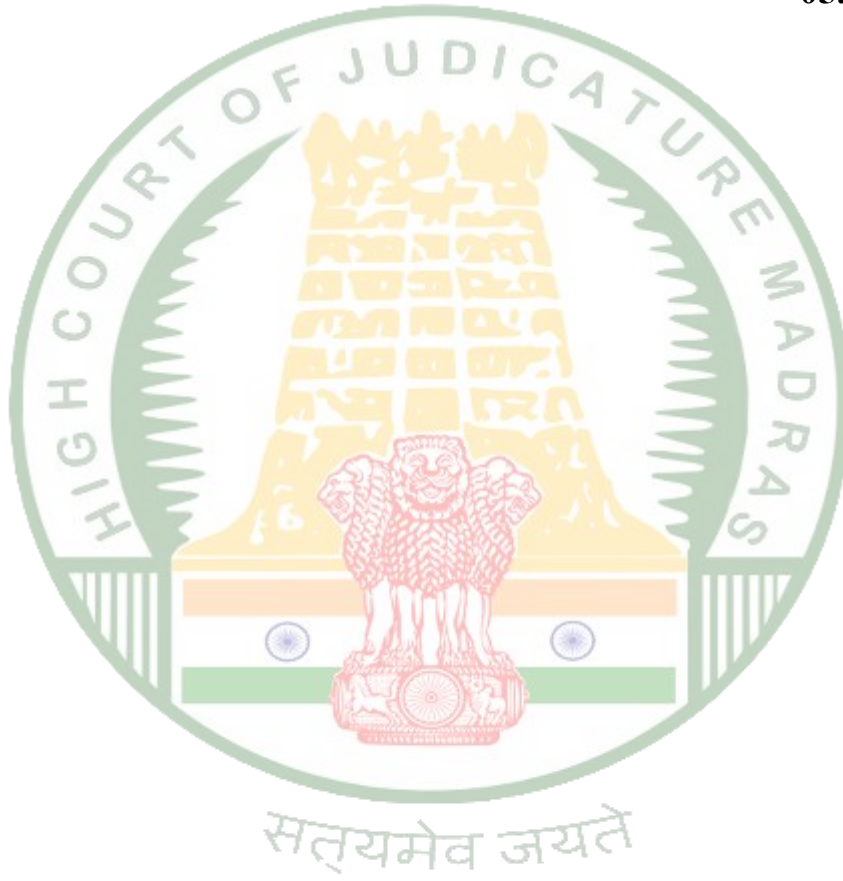
RMT.TEEKAA RAMAN, J.

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**Pre-Delivery Order made in
C.R.P. [PD] No.937 of 2019**

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