

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved : 23..08..2021

Orders Pronounced : 30..09..2021

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THE HON'BLE MRS.JUSTICE S.KANNAMMAL

Civil Revision Petition No.378 of 2017
and
C.M.P.No.1657 of 2017

K.Dhamodharan

... Petitioner

-Versus-

Janakiraman

... Respondent

Petition filed under Article 227 of the Constitution of India, praying to set aside the order dated 21.10.2016 made in I.A.No.351 of 2015 in O.S.No.22 of 2010 by the learned Subordinate Judge, Madurantakam, Kanchipuram District.

For Petitioner : Mr.M.S.Subramanian

For Respondent(s) : Mr.V.G.Suresh Kumar

ORDER

This Civil Revision Petition has been filed seeking to set aside the order dated 21.10.2016 whereby the learned Subordinate Judge, Madurantakam, has refused to condone the delay of 1235 days in filing the application to set aside the *exparte* decree dated 18.10.2010 made in O.S.No.22 of 2010 and thereby dismissed the delay condonation application.

2. The brief facts leading to the filing of the civil revision petition are as follows:- The respondent is the plaintiff and the petitioner is the 1st defendant in the suit. The suit was filed for preliminary decree for partition of suit properties into four equal shares and allotment of one such share to the respondent. According to the respondent, the defendants 1 and 3 and herself are the absolute owners of the suit properties as they were purchased from out of joint family income. Since the petitioner is the elder member of the family, suit properties described as Item Nos.1 to 6 have been purchased in his name under different sale deeds. Therefore, they are entitled to equal share in the suit properties. When the respondent demanded her share, the petitioner and defendants 2 and 3 in the

suit refused to partition the suti properties and hence the suit.

3. It appears that the defendants 2 and 3 have filed their written statement sailing with the plaintiff and claiming $\frac{1}{4}$ share each in the suit properties. However, as the 1st defendant had remained set ex parte despite summons, he was set exparte. The plaintiff let in evidence, both oral and documentary, and, on the side of the defendants 2 and 3, the 2nd defendant was examined as D.W.1. The trial court, after having considered the oral and documentary evidence, decreed the suit and pass a preliminary decree for partion of of the suit properties as prayed for. Thereafter, the respondent filed an application for final decree.

4. The case of the petitioner in I.A.No.351 of 2015 is that in 2010 he received suit summons and immediatley, he engaged a counsel to defend the suit. Thereafter, he did not receive any informaton from his counsel and he was under the bonafide belief that suit was pending. In the mean time, he fell ill due to liver problem and therefore, he was unable to contact his counsel. Recently, when he visted a marriage of one of his close relatives, he came to know that the suit was decreed exparte on 18.10.2020 and thereafter, he had also got it confirmed the

same from his counsel. Hence, there had occurred delay of 1235 days in filing the application to get the ex parte decree set aside. If the delay is condoned, no prejudice would be caused to the respondent, but on the other hand, if the delay is not condoned the petitioner would be seriously prejudiced.

5. The respondent vehemently opposed the delay condonation petition *inter alia* contending that that petitioner was not diligent in defending the suit. The suit was pending for a long time. The respondent denied that the petitioner could not appear before the court as he was suffering from liver problem and came to know about the ex parte decree only when he visited a marriage function of his relative. On receiving summons, the petitioner appeared himself in the court on day fixed for hearing and he did not engage any counsel thereafter to defend him. The defendants 2 and 3 alone had contested the suit. The suit was decreed on 18.10.2010 and a final decree application was filed in I.A.No.78 of 2011 wherein notice was sent to the petitioner and the defendants 2 and 3. Again the defendants 2 and 3 alone contested the final decree proceedings. After the Advocate Commissioner was appointed and the properties were inspected by the Advocate Commissioner, the petitioner filed the application seeking to set aside the ex

parte decree with enormous delay of 1235 days.

6. The learned Principal District Judge having found that though the petitioner was set ex parte, the suit was decreed on merits after contest by the other defendants and rejected the contention of the petitioner that he came to know about the decree only on 18.10.2010 when he visited a marriage function of one of his relatives. The learned judge has further held that the petitioner did not put forth sufficient reason for the delay and as such the learned Judge has dismissed the delay condonation application. Challenging the same, the petitioner has come up with the present revision petition.

7. The learned counsel for the petitioner would submit that it was only an ex parte decree passed against the petitioner for his failure to appear on the day fixed and not a decree on merits. According to the petitioner, the exception to the provision under Order XVII, Rule 2 of CPC is not applicable as petitioner who was the 1st defendant did not appear on the date fixed by the court and therefore, it was only an ex parte decree and therefore, the provision of Order IX, Rule 13 of CPC alone applicable.

8. The learned counsel further submitted that length of delay is not a matter for deciding the petition under Section 5 of the Limitation Act and rendering substantial justice is the paramount consideration. But, the learned judge of the trial court did not consider the legal position and has mechanically dismissed the delay condonation application holding that there was no material to substantiate the sufficient cause for the delay.

9. Per contra, the learned counsel for the respondent contended that it was not an ex parte decree as contended by the petitioner. Though the petitioner was set aside, the other defendants contested the suit by filing written statement and letting in evidence on their side and the trial court had decreed the suit on merits only after full trial. Therefore petition under order X Rule 13 of CPC is not maintainable. Even assuming that set aside application is maintainable, according to the learned counsel, as rightly held by the learned Judge of the trial court, the petitioner had not shown sufficient cause for the delay and therefore, the learned judge of the trial court was right in refusing to condone the delay.

10. I have considered the rival submissions carefully.

11. The provisions of Order XVII, Rule 2 and 3 of Code of Civil

Procedure reads as under:-

2. Procedure if parties fail to appear on day fixed.—

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit.

Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.— Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of

the suit, for which time has been allowed, the Court may, notwithstanding such default—

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under Rule 2.”

12. Order 17 Rule 2 of the Code provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit.

13. The Explanation appended to Order 17 Rule 2 of the Code provides that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party was present.

14. Order 17 Rule 3 of the Code, however, provides that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to further the progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, (a) if the parties are present, proceed to decide the suit forthwith, or (b) if the parties are, or any of them is, absent, proceed under Rule 2.

15. At this stage, it would be relevant to mention and reproduce the provisions of Order 9 Rule 13 of the Code which reads as under:

"13. Setting aside decree ex-parte against defendant- In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons were not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs,

payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that here the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation- Where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant Bank has withdrawn the appeal, no application shall lie under this rule for setting aside that ex-parte decree."

16. In **T.Kalyanasundaram v. M.S.Armuganayakar, 2005(4) CTC 451**, upon which the learned counsel for the petitioner placed reliance, a Division Bench of this court has held as follows:-

6. The Honourable Supreme Court of India in the judgment referred to earlier while interpreting Order 17, Rules 2 and 3 had laid down the Law as hereunder:

"In Rule 2, the expression used is "make such order as it deems fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17, Rule 3(b) only course open to the Court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence on a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit

in one of the specified modes, Rule 3 empowers the Court to decide the suit forthwith. The basic distinction between the two Rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the

Explanation may proceed with the case if that prima facie is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision. This clearly has imprints of an ex parte adjudication and not of a decision on merits. There is not even any indication as to what evidence was evaluated and/or whether the merits were tested."

From the above, it is clear that Law laid down by the Supreme Court in the above referred to judgment is binding on us. In fact, we are guided only by the above referred to judgment in holding that the Trial Court in this case had no jurisdiction to pass a decree on merits and it ought to have disposed of the suit only in terms of Order 17, Rule 2,

without the aid of the Explanation to the said sub rule. In the light of our decision, namely, the decree dated 13.10.2003 would only be an ex parte decree and not a decree on merits, we have no other go except to hold that the application under Order 9, Rule 13 filed by the defendant is maintainable.”

17. In **Venkatalakshmi @ Rathnamma Vs. Bayamma, 2003-2-L.W.25**, a learned single Judge of this court has held as follows:-

"At the outset, it has to be decided whether an application, under Order IX Rule 13 C.P.C., as it came to be filed by the petitioner, could be taken as a proper step or proceeding in law? A cursory glance made into the said provision of law wherein the language is complete and clear and unambiguous to the effect that 'in any case in which a decree is passed exparte against a defendant, he may apply to the Court by which the decree was passed for an order to set aside' and therefore, there is absolutely no impediment caused on the part of the petitioner to have resorted to the said provisions of law for filing an application to set aside the exparte decree as passed by the trial Court. Since it is clear from the language employed in the Section, it

could be presumed that even if other defendants are in the suit and if the said suit has been decided against them in a contested manner on merits, if no participation is there on the part of any one or other defendants, such a defendant who has been set exparte in the suit, is at liberty to file an application under order IX Rule 13 C.P.C. and hence, this question regarding the maintainability of the application filed by the petitioner before the trial Court under Order IX Rule 13 C.P.C. is decided as maintainable in law.”

18. In **B. Janakiramaiah Chetty v. A.K. Parthasarathi** [(2003) 5 SCC 641], the scope of Order 17 Rule 2 and Order 17 Rule 3 of the Code has been dealt with elaborately. The relevant portions of the judgment read as follows:

“7. In order to determine whether the remedy under Order 9 is lost or not what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule 2.

8. The Explanation permits the court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is

adjourned. As the provision itself shows, discretionary power given to the court is to be exercised in a given circumstance. For application of the provision, the court has to satisfy itself that: (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the court to adopt any of the modes provided in Order 9 or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the court may in its discretion deem as if such party was present. Under Order 9 Rule 3 the court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are “proceed with the case”. Therefore, on the

facts it has to be seen in each case as to whether the Explanation was applied by the court or not.

9. In Rule 2, the expression used is “make such order as it thinks fit”, as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the only course open to the court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the court to decide the suit forthwith. The basic distinction between the two Rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation

to Rule 2 and Rule 3 is that a discretion has been conferred on the court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is ‘where the evidence or a substantial portion of the evidence of a party’. There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court while acting under the Explanation may proceed with the case if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision.”

19. In **Bank of India Vs. Mehta Brother**, 2009-1-L.W.439, the

Honourable Supreme Court has observed as under:-

"13. We have carefully examined the provisions under Order 9 Rule 13 of the Code as well as its proviso and other relevant provisions under Order 9 of the Code. A reading of Order 9 Rule 13 of the Code would clearly show that under this provision it was clarified that an ex parte decree was ordinarily to be set aside only against the defendant against whom the decree was ex parte and the suit was to be revived only qua the said defendant applying for setting aside the ex parte decree. It is true that the heading of Order 9 Rule 13 of the Code starts with the expression "setting aside of an ex parte decree". But if we examine this provision under Order 9 Rule 13 of the Code as well as its proviso in depth and in detail, it would not be difficult for us to come to a conclusion that under Order 9 Rule 13, it has been clarified that an ex parte decree is ordinarily to be set aside only as against the defendants against whom the decree has been ex parte and the suit is to be revived only qua the defendant who applied for setting aside the ex parte decree. Keeping this in mind, let us now examine whether the proviso to Order 9 Rule 13 of the Code gives ample power to the court to set aside the decree passed in favour of the contesting defendants at the time of setting aside the ex parte decree against other

defendants. Therefore, let us now deal with the proviso to Order 9 Rule 13 of the Code. It provides that in cases where the decree is of such a nature that the same cannot be set aside only as against the defendant applying for setting it aside, the decree could also be set aside as against any or all of the other defendants. Therefore, in our view, this proviso confers power on the court to set aside the entire decree if the court is of the view that the decree passed was of such a nature that the same could not be set aside only as against the defendant applying for setting aside the decree, the decree could also be set aside as against any or all of the other defendants. Therefore, this proviso clearly confers powers on the Court to set aside the entire decree where the said decree was of such a nature that it is expedient in the interest of justice to set aside the decree as against any or all of the other defendants also.

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15. Therefore, if we go by the above mentioned interpretation, a decree can be set aside as against all or any of the other defendants, regardless of the fact whether they appeared, contested or not.

... ..

16. Therefore, keeping this in mind, let us now consider whether a contested decree by some of the defendants can be set aside while considering the application for setting aside the ex parte decree against one of the defendants. This would, in our view, certainly depend on the nature of reliefs claimed by the plaintiff in his plaint and the nature of the decree in question. If the decree is indivisible, the court would be at liberty to set aside the decree not only against the defendant who applied for setting aside the ex parte decree passed against him, but also as against all or any of the other defendants.”

20. From the above, one thing is clear that the first proviso to Order IX, Rule 13 of CPC itself says that if the decree is of such a nature that it cannot be set aside only against the defendant making the application under Order 9, Rule 13 of CPC the court has discretion to set aside the decree against all or any of the other defendants. There cannot be any controversy that if a decree is passed in favour of the plaintiff against some of the defendants on contest and against other defendants ex parte and if an application under Order 9, Rule 13 C. P. C. is made by one of the defendants against whom the ex parte decree has been passed,

then the court has ample discretion to set aside the decree against all the defendants. Ordinarily the decree against all the defendants can be set aside in the following cases:

- (1) Where the decree is joint and indivisible:
- (2) Where the decree proceeds on a ground common to all the defendants;
- (3) Where the relief to which the applicant is entitled cannot effectively be given except by setting aside the decree against the other defendants also;
- (4) When the suit would result in two inconsistent decrees if the ex parte decree is not set aside against the other defendants.

Thus, in the considered view of this court, there cannot be any controversy so far as the legal proposition is concerned. In view of the nature of the relief claimed by the plaintiff in the plaint and the decree being indivisible in nature, though it was on contest insofar as the defendants 2 and 3 are concerned, as it was ex parte decree as against the petitioner/1st defendant, this court is of the firm opinion

that if the delay is condoned, the decree against the other defendants is also liable to be set aside.

21. In the case hand, though suit summon was served on the 1st defendant who is the petitioner in the instant revision petition and was present on the day fixed under the summon in person, and thereafter, case was adjourned to some other day, subsequently, the 1st defendant was not present nor engaged any counsel to defend him in the suit. He, was, therefore, subsequently set exparte.

22. In order to determine whether the remedy under Order 9 is lost or not, what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule 2. It is not in dispute that on the day when the petitioner/1st respondent was set exparte, the trial was not commenced. In other words, on the date when the 1st defendant was set exparte, the evidence of the plaintiff was at not all commenced. Thus, it could be seen that though the 1st defendant was already set ex parte, when the defendants 2 and 3 had contested the suit, the trial court had proceeded to decide the suit on merits and the suit

decreed the suit in favour of the plaintiff. Thus, while the decree in the suit was on merits as against the defendants 2 and 3, it was an ex parte insofar as the 1st defendant is concerned. From the language employed in Order 9, Rule 13 of CPC, this court presumes that even if other defendants are in the suit and if the said suit has been decided against them in a contested manner on merits, if no participation was there on the part of any one or other defendants, such a defendant who has been set exparte in the suit, is at liberty to file an application under order IX Rule 13 C.P.C. However, in light of the legal position and the facts and circumstances of the case, this court is of the considered view that for want of participation of the 1st defendant in trial, the decree cannot be said to be on merits and it is only an ex parte decree. For the above said reason, the question of maintainability under Order X Rule 13 of CPC is answered in favour of the petitioner herein.

23. Insofar as the question of delay is concerned, it has been consistently held by the Honourable Supreme Court that the expression 'sufficient cause' should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The

learned Subordinate Judge has refused to condone the delay mainly on the ground that each and every day delay has not been explained and there was no valid reason assigned for the delay. It is needless to state that the length of delay is not a matter for deciding the petition under Section 5 of the Limitation Act and rendering substantial justice is the paramount consideration. As already stated, the respondent and the defendants 1 and 2 claimed that the suit properties are joint family properties purchased from out of the income of the joint family and they are entitled to equal share though the properties were purchased in the name of the petitioner. But, it was denied by the petitioner/1st defendant. Therefore, this court is of the considered view that an opportunity must be given to the petitioner to meet with the merits of the case. Considering the facts and circumstances of the case and the amount deposited by the petitioners as directed by this court and also the law on condonation of delay, this Court is inclined to take a lenient view overriding technicalities in order to subserve the cause of justice and condone the delay on cost to the respondent.

24. **In the result**, the Civil Revision Petition is allowed on condition that the petitioner pays a sum of Rs.10,000/- as costs directly to the respondent herein through his counsel appeared in the final decree proceedings within a period of

four weeks from the date of receipt of a copy of this order failing with the revision petition will stand dismissed automatically without any further reference to the court. Having regard to the fact that the suit has been filed for partition of immovable properties and the long pendency of the same, this court directs the learned Subordinate Judge, Madurantakam, Kanchipuram District, to dispose of the suit in accordance with law, as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of this order. The parties to the suit are directed to cooperate with the trial court for early disposal of the suit. Consequently, connected CMP is closed.

Index : yes / no

Internet : yes / no

Speaking / Non Speaking Order

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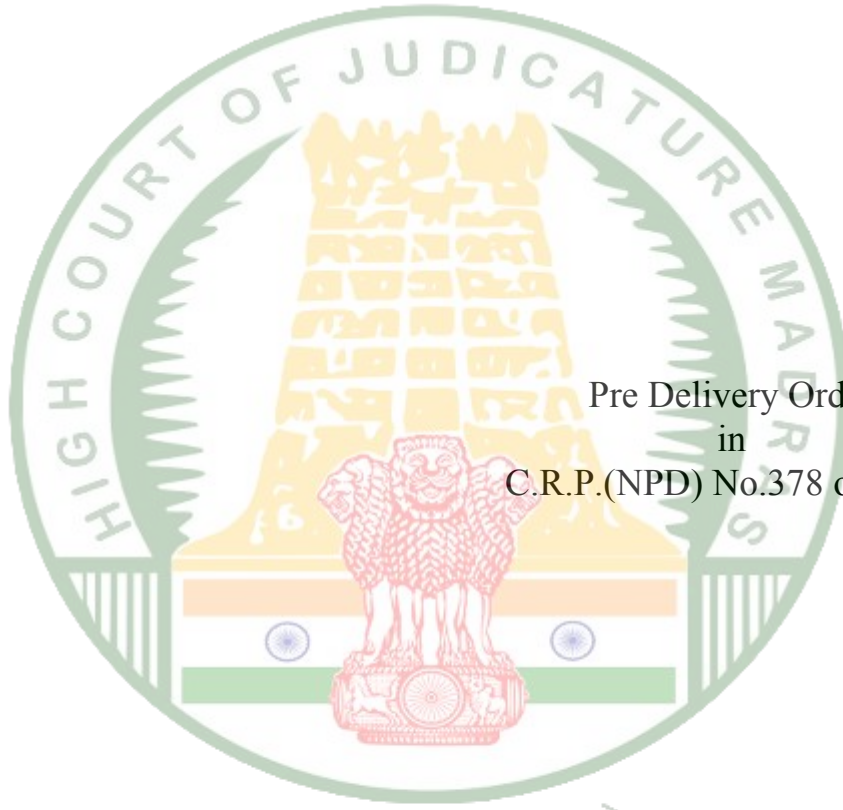
1.The Subordinate Judge, Madurantakam, Kanchipuram District.

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C.R.P.No.378 of 2017

S.KANNAMMAL.J.

Kmk



Pre Delivery Order
in
C.R.P.(NPD) No.378 of 2017

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