

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.09.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.961 of 2017
and C.M.P.No.4789 of 2017

1.M.Indirani

2.M.Suseela

3.S. Selvi

... Petitioners

Vs.

Ponnusamy

... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 20.02.2017 made in I.A.No.901 of 2013 in O.S.No.1020 of 2012 on the file of I Additional District Munsif Court, Salem.

For Petitioners : Mr.K.Selvaraj

For Respondent : Mr.AR.L.Sundaresan, Senior Counsel

for Mr.S.R.Mounaswaminathan

ORDER

(The matter is heard through “Video Conferencing/Hybrid Mode”.)

Civil Revision Petition is filed against the fair and decretal order dated 20.02.2017 made in I.A.No.901 of 2013 in O.S.No.1020 of 2012 on the file of I Additional District Munsif Court, Salem.

2.The petitioners are the defendants and respondent is plaintiff in O.S.No.1020 of 2012 on the file of I Additional District Munsif Court, Salem. The respondent filed the said suit for declaration that the sale deed dated 05.12.2005 executed by the petitioners 2 and 3 in favour of 1st petitioner as null and void, permanent injunction and mandatory injunction. The 1st petitioner filed written statement on 18.06.2013. Originally, the 1st petitioner filed I.A.No.901 of 2013 under Order VII Rule 11 of C.P.C to reject the plaint and subsequently, the petitioners 2 and 3 were also impleaded as petitioners 2 and 3.

3. According to the petitioners, the suit is barred by principles of *res judicata* as earlier suits filed by the respondent were dismissed after full-fledged trial and the respondent is re-litigating the issue already decided.

4. The respondent filed counter affidavit, denied all the averments made in the affidavit filed in support of the above I.A. and stated that in the earlier suits, the title of the parties was not decided. Those suits were filed only for easementary right and injunction. The petitioners have not specifically mentioned under which clause of Order VII Rule 11 of C.P.C., they are seeking rejection of plaint. The respondent has mentioned necessary averments and cause of action to maintain the suit in the plaint and prayed for dismissal of the said I.A.

5. The learned Judge considering the averments made in the plaint, affidavit, counter affidavit and the judgments relied on by the parties, dismissed the I.A. holding that in an application filed under Order VII

Rule 11 of C.P.C., the averments made in the plaint and the documents relied on by the plaintiff alone can be looked into and the averments made in the affidavit and counter affidavit filed in support of the application are not relevant to decide the suit. The learned Judge has also held that question of *res judicata* is a mixed question of law and fact, which can be decided only based on the evidence let in by the parties in the trial.

6. Against the said fair and decretal order dated 20.02.2017 made in I.A.No.901 of 2013 in O.S.No.1020 of 2012, the petitioners have come out with the present Civil Revision Petition.

7. The learned counsel appearing for the petitioners contended that the impugned order of the learned Judge is contrary to the provisions of Order VII Rule 11 read with Section 11 and Section 151 of Civil Procedure Code. The Learned Judge failed to consider that this is the third round of litigation by suppression of material facts by the respondent. The present suit is barred by principles of *res judicata*. Originally, the suit property belonged to one Ayyammal, who sold the property to the

petitioners 2 and 3 by sale deed dated 02.05.1983. At the instigation of the respondent, the said sale deed was cancelled on 03.06.1983. Later on, the respondent and his brothers purchased the suit property by sale deed dated 13.06.1983. The respondent filed three suits in respect of the suit property and after full-fledged trial, the suits were dismissed. The First Appeal and Second Appeal filed by the respondent were also dismissed. In view of the earlier judgments, the present suit is barred by *res judicata*. The present suit is nothing but re-litigation of already decided issue. The respondent suppressing the material fact of dismissal of the suit in O.S.No.1260 of 1983 in respect of the very same property and dismissal of First Appeal in A.S.No.209 of 1991, filed the present suit in O.S.No.1020 of 2012. In the earlier suit, it has been held that the respondent has no right, title or interest over the suit property. Exhibits 1 to 8 marked by the petitioners in I.A.No.901 of 2013 will clearly reveal that the respondent is re-litigating the issue and prayed for allowing the Civil Revision Petition.

7(i).In support of his contentions, the learned counsel appearing for the petitioners relied on the following judgments:

(i) (1977) 4 SCC 467 (T.Arivandandam vs. T.V.Satyapal and another);

“5.We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the Court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving complaints. The learned Munsif must remember that if on a meaningful - not formal - reading of the complaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII, Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage.”

(ii) (2004) 3 SCC 137 (Sopan Sukhdeo Sable and others vs.

Assistant Charity Commissioner and others);

“11.In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal and Ors. (1998 (2) SCC 70) it was held that the basic question to be decided while dealing with an application filed under Order VII Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order VII Rule 11 of the Code.

12.The trial Court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order VII Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order X of the Code.

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17. The real object of Order VII Rule 11 of the Code is to keep out of courts irresponsible law suits. Therefore, Order X of the Code is a tool in the hands of the Courts by resorting to which and by a searching examination of the party, in case the Court is prima facie of the view that the suit is an abuse of the process of the Court, in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order VII Rule 11 of the Code can be exercised.”

(iii) (1998) 3 SCC 573 (K.K.Modi vs. K.N.Modi and others)

“44.One of the examples cited as an abuse of the process of Court is relitigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as *res judicata*. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a

given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of the Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.”

8.Per contra, the learned Senior Counsel appearing for the respondent contended that in the earlier suits, the title of the parties was not an issue. Earlier three suits were filed only for easementary right and injunction. The respondent in paragraph 6 of the plaint and cause of action portion made averments with regard to earlier suits and cause of action for the present suit. The respondent has not suppressed any materials and not

played fraud on the Court. In an application filed under Order VII Rule 11 of C.P.C., the averments made in the affidavit, written statement and documents relied on by the defendant cannot be considered to decide the issue. Only the averments made in the plaint and documents relied on by the plaintiff alone can be considered to decide the I.A. filed under Order VII Rule 11 of C.P.C. for rejection of plaint. The learned Judge considering all the materials and provisions of Order VII Rule 11 of C.P.C. properly, dismissed I.A. by giving valid reason. There is no reason to interfere with the order of the learned Judge and prayed for dismissal of the Civil Revision Petition.

8(i).In support of his contention, the learned Senior Counsel appearing for the respondent relied on the following judgments:

(i) **2021 SCC Online SC 565 [Srihari Hanumandas Totala Vs.**

Hemant Vithal Kamat and others]:

“17.Order 7 Rule 11(d) of CPC provides that the plaint shall be rejected “where the suit appears from the statement in the plaint to be barred by any law”. Hence,

in order to decide whether the suit is barred by any law, it is the statement in the plaint which will have to be construed. The Court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case. Before proceeding to refer to precedents on the interpretation of Order 7 Rule 11(d) CPC, we find it imperative to refer to Section 11 of CPC which defines *res judicata*:

"11. *Res judicata*.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

18. Section 11 of the CPC enunciates the rule of *res judicata* : a court shall not try any suit or issue in which the matter that is directly in issue has been

directly or indirectly heard and decided in a 'former suit'. Therefore, for the purpose of adjudicating on the issue of *res judicata* it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while adjudicating on *res judicata*, before referring to *res judicata* as a ground for rejection of the plaint under Order 7 Rule 11. Justice R C Lahoti (as the learned Chief Justice then was), speaking for a two Judge bench in V. Rajeshwari v. T.C. Saravanabava (2004) 1 SCC 551 discussed the plea of *res judicata* and the particulars that would be required to prove the plea. The court held that it is necessary to refer to the copies of the pleadings, issues and the judgment of the 'former suit' while adjudicating on the plea of *res judicata*:

"11. The rule of *res judicata* does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given

case only copy of judgment in previous suit is filed in proof of plea of *res judicata* and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780] the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as *res judicata*. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh v. Bhooralal [AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of *res judicata* and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy. of State for India in Council [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of *res judicata* cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into

the pleadings, the issues and the judgment in the previous suit.”

19. At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether *res judicata* can be the basis or ground for rejection of the plaint. In *Kamala v. KT Eshwara Sa* (2008) 12 SCC 661, the Trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. Justice S. B. Sinha speaking for the two judge bench examined the ambit of Order 7 Rule 11(d) of the CPC and observed:

“21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court

can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision."

20. The Court further held:

"23. The principles of *res judicata*, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face disclose no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event,

the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”

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26. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:

(i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;

(ii) The defense made by the defendant in the suit must not be considered while deciding the merits of the application;

(iii) To determine whether a suit is barred by *res judicata*, it is necessary that (i) the ‘previous suit’ is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and

(iv) Since an adjudication of the plea of *res judicata* requires consideration of the pleadings, issues and decision in the ‘previous suit’, such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.”

(ii) **2010 (1) LW 451 (Kaja Mohideen vs. Rajendran and others);**

“8. According to me, as rightly pointed by Mr.G.Sridharan, learned counsel for the respondents, that the question of *res judicata* is a mixed question of law and fact and that cannot be decided in an application under Order VII Rule 11 of the Civil Procedure Code.”

9. Heard the learned counsel appearing for the petitioners as well as the learned Senior Counsel appearing for the respondent and perused the materials on record.

10. From the materials available on record, it is seen that the petitioners have filed the present I.A.No.901 of 2013 under Order VII Rule 11 of C.P.C. to reject the plaint filed by the respondent. According to the petitioners, the suit is hit by the principles of *res judicata* and the

respondent is re-litigating the issue for third time. The issue in the present suit is already decided in earlier three suits for declaration and injunction in O.S.Nos.1260 of 1983, 800 of 1999 and 742 of 2001. All the three suits filed by the respondent were dismissed and First Appeal and Second Appeal were also dismissed. This issue has to be decided as per the provisions of Order VII Rule 11 of C.P.C. and the said provision is extracted for easy reference.

Order VII Rule 11 of C.P.C. :

"11.Rejection of plaint.—The plaint shall be rejected in the following cases:—

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9;

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]"

11.As per Order VII Rule 11 of C.P.C., a plaint can be rejected, when the defendant substantiates any one of the ingredients mentioned therein. The application under Order VII Rule 11 of C.P.C. has to be decided only based on the averments made in the plaint and documents relied on by the plaintiff. The averments made in the plaint have to be taken to be correct and true and then only, the provision of Rule 11 can be applied to find out whether plaint can be rejected in any one of the conditions enumerated in the said provision. The averments made in the

written statement, affidavit filed and documents filed by the defendant cannot be taken into account to decide the issue of rejection of plaint.

12.In the present case, the respondent/plaintiff has mentioned that earlier suits filed by him except O.S.No.1260 of 1983 in paragraph 6 of the plaint and in cause of action paragraph, the respondent has stated the cause of action that has arisen for filing of present suit. The petitioners have not disputed the averments made by the respondent. On the other hand, their case is that the title of the suit property was already decided in the earlier suits and the present suit is barred by principles of *res judicata*. The learned counsel appearing for the petitioners filed judgments delivered in earlier suits and referred extensively at the time of arguments. Even though the said documents are not relevant to decide the issue of rejection of plaint, the learned counsel for the petitioners extensively referred the same.

13.It is seen from the judgments that the respondent has not sought

for any declaration of title in the above suits. In the earlier suits, the respondent sought for only the relief of easementary right and permanent injunction. Further the 1st petitioner is not a party to the earlier suits. The question of *res judicata* cannot be decided based on the averments made in the affidavit filed in support of the application filed to reject the plaint. The petitioners have to let in evidence during trial to prove that the present suit is hit by the principles of *res judicata*. The bar claimed under the principles of *res judicata* is mixed question of law and fact and the same can be decided only by appreciating the evidence let in during the trial. Further this issue was already decided by the Madurai Bench of this Court in the earlier C.R.P. in the judgment reported in **2010 (1) LW 451 cited supra**, wherein this Court in paragraph 8, it has been held as follows:

“8. According to me, as rightly pointed by Mr.G.Sridharan, learned Counsel for the respondents, that the question of *res judicata* is a mixed question of law and fact and that cannot be decided in an application under Order 7 and Rule 11 of the Civil Procedure Code. Nevertheless, having regard to the fact that the respondents herein filed E.A.No.241 of 2006 under

Order 21, Rule 97, 101 of the Civil Procedure Code, as rightly contended by the learned Counsel for the revision petitioner, the suit cannot be maintained as the respondents herein have invoked the jurisdiction of the Execution Court by filing the application under Order 21, Rules 97, 101 of the Civil Procedure Code. As per Order 21, Rule 101 of the Civil Procedure Code, all questions including questions relating to right, title or interest in the property arising between the parties to the proceedings on an application under Order 21, Rule 97 or Rule 99 of the Civil Procedure Code, or the representatives to the adjudication of the application, shall be determined by the Court dealing with an application and not by a separate suit. In this case, the respondents herein are the legal representatives of the tenant in R.C.O.P.No.25 of 2004, against whom, the order of eviction was obtained. They have also filed the application under Order 21, Rule 97 of the Civil Procedure Code. Therefore, when the parties have invoked the provisions of Order 21, Rule 97, 101 of the Civil Procedure Code, irrespective of the fact that the suit filed by them at earlier point of time, the suit cannot be proceeded with and all the questions relating to right

or title of the parties have to be decided only in the application filed under Order 21, Rule 97 of the Civil Procedure Code. This position has been made clear in the judgment reported in 1998-2-L.W. 418 in Shreenath and another Vs. Rajesh and Others. In the said judgment, the order of the Honourable Supreme Court quoting the passage in the judgment reported in 1995(1) SCC 242, in Noorduiddin Vs. Dr.K.L.Anand, wherein it is held as follows:

"Para 8: Thus the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the Court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21, Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right,

title or interest in the immovable property under execution and finality Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution." "

14.The Division Bench of this Court in the judgment reported in **2021 (1) MWN (Civil) 635 (S.Thakeer Ali vs. S.M.Gutha)** has also considered this issue in paragraphs 17 and 18 and the same are extracted hereunder:

“17.The legal principle, which can be culled out from the various decisions of the Hon'ble Supreme Court and this Court as to the scope of application of Order VII, Rule 11 are to the effect that if on a meaningful, not formal, reading of the plaint it is manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order VII, Rule 11 C.P.C. Disputed questions cannot be decided at the time of considering an application filed under Order VII, Rule 11. The power to reject a plaint under Order VII, Rule 11 ought not to be exercised except any clear cut case and, if there is any serious question to be decided, then the suit has to proceed

further.

18.The power under Order VII, Rule 11 can be exercised when the plaint is read as a whole, it does not disclose material facts giving rise to a cause of action, which can be entertained by a Civil Court, it may be rejected in terms of Order VII, Rule 11. The Court can look into only plaint allegations and the documents submitted by the plaintiff himself, but cannot look into the Defendant's defence. In other words, actual or probable Defence cannot be looked into at the stage when an Application under Order VII, Rule 11 is considered. To put it differently, the Court has to scrutinise the averments/pleas in the Plaint and the pleas taken by the Defendants in the Written Statement are corley irrelevant and the matter is to be decided only on the Plaint averments.”

15.From the above order and judgments, it is clear that question of *res judicata* cannot be decided in the application filed under Order VII Rule 11 of C.P.C. This issue is no longer *res integra*.

16. The averments made in the plaint discloses cause of action for the suit filed by the respondent. The learned Judge considering the averments made in the plaint and the judgments relied on by the counsel for the parties, dismissed I.A. holding that question of *res judicata* is a mixed question of law and fact and application can be decided only based on the averments made in the plaint and documents relied on by the respondent and averments made in the affidavit and the documents filed to reject the plaint cannot be considered in the application for rejection of plaint. The learned Judge has given cogent and valid reason for rejection of application. There is no error or irregularity in the order of the learned Judge warranting interference by this Court.

17. For the above reasons, the Civil Revision Petition stands dismissed. The suit is of the year 2012 and hence, the learned Judge is directed to dispose of the suit in O.S.No.1020 of 2012 as expeditiously as possible, in any event, not later than six months. No costs. Consequently, connected Miscellaneous Petition is closed.

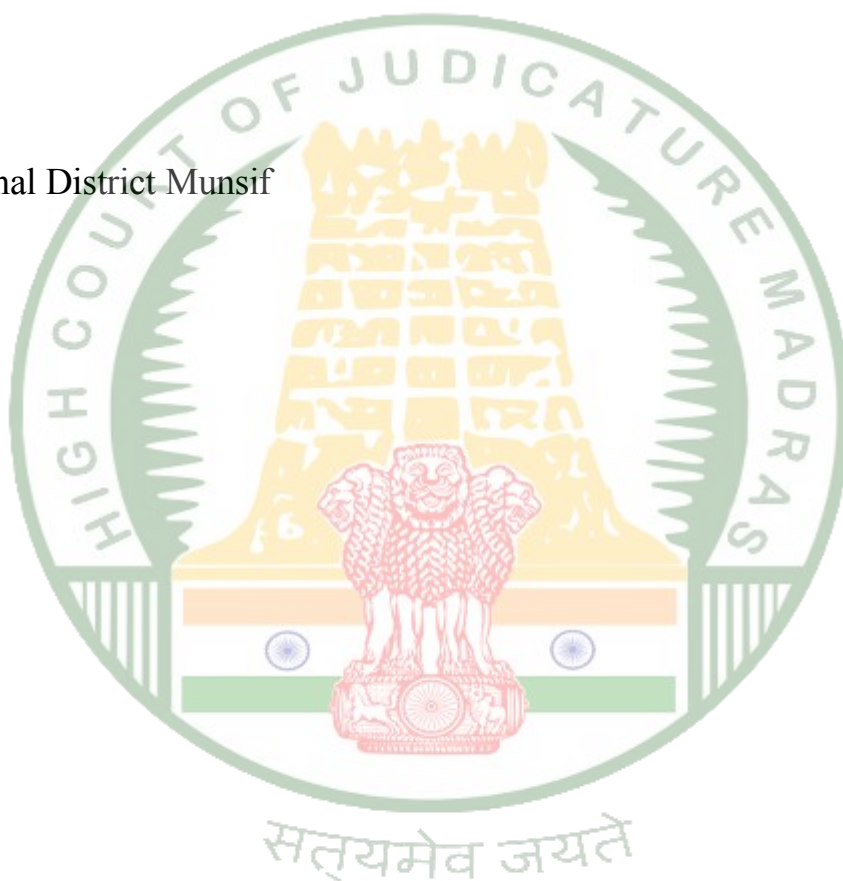
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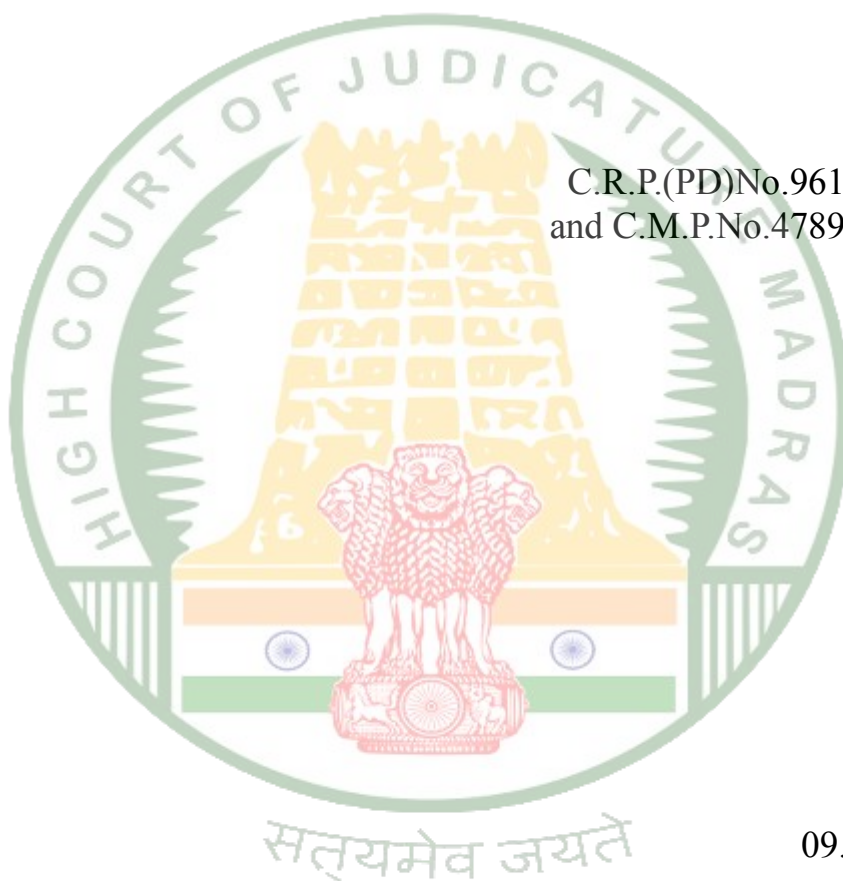


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