

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.07.2021

PRONOUNCED ON : 03.08.2021

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.(NPD)No.3610 of 2018
and C.M.P.No.20184 of 2018

Tamil Nadu Housing Board,
Rep. By its Managing Director,
Tamil Nadu Housing Board,
No.331, Anna Salai,
Nandanam, Chennai-35.

... Petitioner

Vs.

1. Jayanthi
2. Suganthi
Both are represented by
Power of Attorney Agent
A.Alagupandian

... Respondents

Prayer :- Civil Revision Petitions are filed under Section 115 of CPC., to set aside the docket order to issue fresh direction warrant passed on 22.06.2018 in E.P.No.3495 of 2015 in O.S.No.4714 of 1999 on the file of the learned IX Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.C.Emalias
For Mr.Sivakumar
For Respondents : Mr.P.Paramasivadas

ORDER

This Civil Revision Petitions is directed as against the docket order dated 22.06.2018 passed by the learned IX Assistant Judge, City Civil Court, Chennai in E.P.No.3495 of 2015 in O.S.No.4714 of 1999, thereby issuing fresh warrant as against the petitioner.

2. The petitioner is the judgment debtor and the respondents are the decree holders. The petitioner acquired land for the development of Besant Nagar Phase-II scheme for the total extent of 96.92 acres comprised in Survey No.88/1, 2 etc of Thiruvanmiyur Village, Mylapore Taluk, Chennai. For the administrative purpose, the entire extent of 96.92 acres was split up into five blocks. The land in survey No.86/13A and 86/13B ad measuring 20 cents and 21 cents respectively, falls in block No.III out of the total extent of 23.44 acres. The Acquisition Officer has passed an award vide Award No.5/86 dated 23.09.1986 including the land comprised in Survey No.86/13A and 86/13B ad measuring 20 cents and 21 cents respectively.

3. The land comprised in survey No.86/13A to an extent of 20

cents registered in the name of Kadambadi Ammal under patta No.30. She had sold it in favour of the first respondent herein on 14.04.1981 vide registered document No.1346/81. Similarly, the another land to an extent of 21 cents comprised in Survey No.86/13B registered in the name of one Durairaj under patta No.150. He had sold out the said land in favour of the second respondent herein on 26.03.1981 vide document No.2285/81. Both the respondents herein have purchased the said properties after 4(1) notification dated 09.08.1978. As per the award, they were ordered to pay the compensation on production of original documents. Aggrieved by the said award the respondents filed petition in L.A.O.P.No.146 of 1987 before the learned VI Assistant Judge, City Civil Court, Chennai and by the judgment and decree dated 08.11.1990, the said Court fixed the land value at Rs.500/- per cent against the value at Rs.328/-.

4. In fact, the respondents filed writ petition before this Court in W.P.Nos.17231 and 17232 of 1997 for direction directing the petitioner to consider their application for issuance of no objection certificate on 04.06.1997. Both the writ petitions were dismissed as withdrawn by this

Court by an order dated 19.11.1997 with liberty to prosecute appropriate remedy before the appropriate forum. Even before the said writ petitions, they also filed another writ petition in W.P.No.11895 of 1986 challenging the acquisition proceedings and the same was also dismissed as withdrawn by an order dated 18.11.1988.

5. While being so, suppressing the above facts, the respondents have filed a suit in O.S.No.4717 of 99 for declaration declaring that the award passed in Award No.5 of 1986 dated 23.09.1986 has become unenforceable and mandatory direction directing the petitioner to issue no objection certificate in respect of the above said properties in favour of them as per their application dated 04.06.1997 to deal with the properties. The said suit was decreed on 30.04.2001 and the petitioner preferred an Appeal Suit in A.S.No.273 of 2003 and the same was also dismissed on 08.10.2001. Aggrieved by the same the petitioner filed Second Appeal with the delay of 748 days before this Court and it was also dismissed on 05.03.2009. Aggrieved by the same, the petitioner filed Special Leave Petition before the Hon'ble Supreme Court of India in S.L.P.(CS)No.18145 of 2014 to condone

the delay of 1906 days and the same was also dismissed on 17.11.2014.

6. In the mean while, on the strength of the decree obtained by the respondents, they filed Execution Petition in E.P.No.3495 of 2015 on the file of the IX Assistant City Civil Court, Chennai, to execute the decree dated 30.04.2001. In that Execution Petition, on 27.04.2016 directed the petitioner to issue no objection certificate within a period of one month. Thereafter, the said execution petition was dismissed for default for non-payment of batta. Therefore, the respondents filed an application in E.A.No.1983 of 2017 to restore the execution petition with the delay of 341 days and the same was allowed by the order dated 07.04.2019 and the E.P. also restored in E.A.No.3111 of 2017 and directed the respondents to pay batta for issuance of warrant. Aggrieved by the same, the present Civil Revision Petition.

7. The learned counsel appearing for the petitioner raised three grounds challenging the entire execution proceedings. The first one is, the suit itself is not maintainable as against the Housing Board. The second one

is, the execution proceedings is barred by limitation under Section 135 of the Limitation Act. The third one is, once the execution petition was dismissed for default, another execution petition only maintainable and the earlier execution petition cannot be restored. He further submitted that the suit filed by the respondents is not maintainable and the trial Court has no jurisdiction to try the suit as per Section 88 of the Housing Board Act. No notice served as contemplated under Section 138 of Tamil Nadu Housing Board Act, 1981 before instituting suit as against the Tamil Nadu Housing Board.

7.1. He further submitted that the respondents already challenged the acquisition proceedings in W.P.No.11895 of 1986 and the same was dismissed by this Court by an order dated 08.11.1988. Thereafter, they also challenged the award passed in Award No.5 of 1986 dated 23.09.1986 in W.P.Nos.17231 & 17232 of 1997. Both the Writ Petitions were dismissed as withdrawn by an order dated 19.11.1997. This Court never gave any liberty to file civil suit challenging the award proceedings. After having been failed before this Court in the above Writ Petitions, the impugned suit has been laid by the respondents and cleverly prayed for declaration declaring

that the award passed in Award No.5 of 1986 dated 23.09.1986 has become unenforceable and mandatory direction to the petitioner to issue no objection certificate.

7.2. He further submitted that the execution petition itself barred by limitation. The execution petition has to be filed within a period of three years from the date of decree viz., 12.10.2004. As per order 21 Rule 32 of C.P.C and under Article 135 of the Limitation Act, the Execution Petition has to be filed within a period of three years from the date of decree passed in the appeal suit in A.S.No.273 of 2003 viz., 12.10.2004. Whereas the execution petition has been filed only on 29.09.2015 after the period of eight years. Though the petitioner preferred a Second Appeal before this Court, it was dismissed on the condone delay stage. The Hon'ble Supreme Court of India also dismissed the condone delay petition, as such the decree passed in the appeal suit has to be taken into consideration for limitation. Accordingly, the respondents ought to have filed execution petition on or before 12.10.2007. Therefore, the Execution Petition is barred by limitation and liable to be dismissed.

7.3. He further submitted that the execution petition was dismissed for default on 02.08.2016 on the ground that the respondents failed to pay batta. Once the Execution Petition was dismissed, it cannot be restored by way of restoration petition. The respondents ought to have been filed fresh Execution Petition, instead of filing the restoration petition that too with the petition to condone the delay. The Court below without considering those facts, mechanically allowed the condone the delay petition and restored the Execution Petition. He further submitted that those grounds, which are raised before this Court by way of this present Civil Revision Petition, are categorically permitted to raise at any stage even in the collateral proceedings. In support of his contention, he relied upon the following reported judgments :-

(i) Order dated 21.09.2015 in W.P.No.5522 of 2015 passed by this Court in the case of M.G.Hanif Vs. The Secretary To Government and ors

(ii) (2011) 14 SCC 713 – State of Punjab Vs. Amarjit Singh

(iii) AIR 1954 SC 340 – Kiran Singh and ors Vs. Chaman Paswan

and ors

(iv) (2006) 8 SCC 336 – Commissioner Bangalore Development

Authority Vs. K.S.Narayan

(v) (1972) 4 SCC 165 – State of Rajasthan Vs. Rao Raja Kalyan

Singh

(vi) (2015) 1 LW 921 – T.Amuthan Anthony Vs. C.S.Balakrishnan

& ors

(vii) (2001) 1 SCC 469 – Ratansingh Vs. Vijaysingh and ors

(viii) (2002) SCC Online Raj 160 – Moman Vs. Munshi and ors

(ix) (2005) 4 MLJ 163 – Damodaran Pillai and ors Vs. South

Indian Bank Limited

8. Per contra, the learned counsel appearing for the respondents submitted that the land which were acquired from the neighbors of the respondents herein are already re-conveyed and the entire project of the petitioner herein has been dropped. Further the respondents are in possession and enjoyment of the suit properties which was alleged to have acquired. In pursuant to the decree, the transfer certificate was also quashed in favour of the respondents herein. He further submitted that the grounds raised by the learned counsel appearing for the petitioner, never raised before any of the Court, even pendency of the appeal suit and also before

this Court. Further they failed to raise any grounds before the Hon'ble Supreme Court of India in S.L.P. Therefore, all of sudden, these grounds cannot be raised here that too after passing the order in the Execution Petition. If at all, the petitioner really aggrieved by the order passed in the main Execution Petition dated 27.04.2016, they ought to have filed Civil Revision Petition challenging the said order. Without challenging the said order and the petitioner raised the above grounds in the present Civil Revision Petition, when the Execution Petition is pending only to execute the warrant as against the petitioner for noncompliance of the direction issued by the Execution Court. When the respondents filed petition to restore the Execution Petition, the petitioner had endorsed that "No objection" and in view of the said endorsement, it was allowed.

8.1. He further submitted that the execution petition has been filed in time and not barred by limitation. Though the suit was decreed by the judgment and decree dated 30.04.2001, aggrieved by the same, the petitioner preferred an appeal suit in A.S.No.273 of 2003 and the same was dismissed by the judgment and decree dated 12.10.2004. As against the

judgment and decree passed in the appeal suit, the petitioner filed Second Appeal along with the petition to condone the delay in filing the Second Appeal. Though this Court passed order in the condone the delay petition on 25.01.2007, it was passed on merits and as such it has to be construed as decree. Thereafter, the petitioner also filed Special Leave Petition before the Hon'ble Supreme Court of India and the same was also dismissed on 17.11.2014. Thereafter on 14.10.2015, the respondents filed the Execution Petition. Therefore, the execution petition has been filed within the time and not barred by any law. In support of his contention, he relied upon the judgment reported in *(2005) 1 SCC 436* in the case of ***Shyam Sundar Sarma Vs. Pannalal Jaiswal*** and ors and prayed for dismissal of this present petition.

9. Heard Mr.C.Emalias, learned counsel appearing for the petitioner and Mr.P.Paramasiva Das, learned counsel appearing for the respondents.

10. Originally the suit properties were owned by one Kadambadi Ammal and Durairaj under patta No.30 and 150 respectively. The petitioner

proposed to acquire lands to an extent of 96.92 acres for the purpose of development of the Besent Nagar, Phase-II Scheme. The petitioner issued notification under Section 4(1) of the Land Acquisition Act on 09.08.1978. Before passing award, the subject properties were sold out by the said Kadambadi Ammal and Durairaj in favour of the respondents herein, by the registered sale deeds dated 18.04.1981 and 20.06.1981.

11. Admittedly, the said sales were executed after the notification issued under Section 4(1) of the Land Acquisition Act, in favour of the respondents herein. In fact, the respondents had filed petition for enhancement of compensation in L.A.O.P.No.146 of 1987 in which the land value was fixed at Rs.500/- against the value fixed by the Land Acquisition Officer, at Rs.328/-. The respondents after having been failed before this Court in challenging the said acquisition proceedings by way of Writ Petitions in W.P.No.11895 of 1986 and W.P.Nos.17231 & 17232 of 1997, they filed the present suit in O.S.No.4714 of 1999. The relief sought for by the respondents are as follows :-

“14. The plaintiffs, therefore, pray for a

*Judgment and Decree against the dendants
herein as follows :-*

(a) For a declaration declaring that the Award No.5/86 dated 23.09.1986 passed by the defendant Board has become unenforceable as it is not being acted upon, insofar as the suit properties bearing survey No.86/13A (0.20Ac.) and survey No.86/13B (0.21 ac.) (now described in the joint patta as S.No.86/13) respectively, morefully described in the schedule hereunder, belonging to the plaintiffs herein, in view of the dropping of the Besent Nagar Phase-II Scheme by the defendant in that locality;

(b) For a mandatory direction directing the defendant herein to issue No objection Certificate in respect of the suit properties separately in favour of the plaintiffs herein as per their application dated 04.06.1997;

(c) For the costs of the suit and

(d) For such other or further reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.”

12. The petitioner proposed to acquire lands for public purpose to development of the Besant Nagar, Phase-II Scheme. On request made by the petitioner, the government of Tamil Nadu by the Government Order in G.O.Ms.No.1096, Housing and Urban Development Department dated 17.07.1998, has approved notification under Section 4(1) of the Land Acquisition Act, for an extent of 92.96 acres land. For the administrative purpose the entire extent of 92.96 acres was split into five blocks. Accordingly, the Government of Tamil Nadu authorised the Special Deputy Collector (Land Acquisition), Tamil Nadu Housing Board, to perform the functioning of the Collector under Section 5(A) of the Land Acquisition Act.

13. the Special Deputy Collector Land Acquisition conducted enquiry under Section 5(1) of the Land acquisition Act and passed an award in Award No.5 of 1986 on 23.09.1986 by fixing the compensation at Rs.328/- per cent. While pending notification under Section 4(1) of the Land Acquisition Act, the respondents had purchased the subject properties. After having been failed before this Court by way of Writ Petitions, the respondents modified the payer and filed the suit. However the said suit was decreed by the judgment and decree dated 30.04.2001.

14. The learned counsel appearing for the petitioner vehemently contended that there is specific bar of jurisdiction to try the suit by the Courts as against the Tamil Nadu Housing Board. The award has been passed by the Deputy Collector (Land Acquisition) Tamil Nadu Housing Board and as such, there is a bar to file suit before the civil Court as against the order passed by the Housing Board. In this regard, it is relevant to extract Section 88 of the Tamil Nadu Housing Board Act as follows :-

“88. Bar of jurisdiction of courts: No order made by the Government or the competent authority in exercise of any power conferred by or under this Chapter shall be called in question in any court and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Chapter.”

Therefore, the suit as against the Tamil Nadu Housing Board itself clearly barred before the civil Courts. Unfortunately, the Courts below viz., the trial Court as well as the first appellate Court failed to consider the same and decreed the suit. Therefore, the civil Court has no jurisdiction to decide suit.

15. Of course, the petitioner filed Second Appeal before this Court as against the judgment and decree passed in the Appeal Suit with delay. Therefore, this Court dealt with regard to the condone the delay petition alone and dismissed the same, without going into the merits of the suit. The Hon'ble Supreme Court of India also dismissed the Special Leave Petition on the condone the delay stage itself. However, the Courts below viz., the trial Court and the first appellate Court has no jurisdiction to try the suit. As no jurisdiction to try the main suit itself, no interim relief can be granted as against the petitioner. It is also to be noted that the respondents already approached this Court by way of Writ petition by challenging the award and acquisition proceedings initiated by the Special Deputy Collector (Land acquisition) Tamil Nadu Housing Board, Madras and failed before this Court. Thereafter, by way of modified prayer, they filed the present suit. Therefore, the suit itself is not maintainable before the civil Court.

16. The learned counsel appearing for the respondents vehemently contended that the petitioner never raised these grounds before any of the Courts below or before the Hon'ble Supreme Court of India. Therefore, they

cannot raise before this Court that too in the execution proceedings. In this regard, the learned counsel appearing for the petitioner relied upon the Order ***dated 21.09.2015*** passed by the Hon'ble Division Bench of this Court in ***W.P.No.5522 of 2015*** in the case of ***M.G.Hanif Vs. The Secretary To Government and ors*** in which, the Hon'ble Division Bench of this Court relied upon the judgment of the Hon'ble Supreme Court of India and held that the decree passed by the Court without jurisdiction can be challenged in the execution and even in collateral proceedings. The defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties. Therefore, the above judgment is squarely applicable to the case on hand. As stated supra, after having been failed before this Court by way of Writ Petition and the respondents cleverly filed the present suit with modified prayer. When the suit itself not maintainable as against the petitioner, the decree cannot be executable and it can be challenged at any stage of execution and even in collateral proceedings.

17. The learned counsel appearing for the petitioner relied upon the another judgment reported in **(2011) 14 SCC 713** in the case of ***State of Punjab Vs. Amarjit Singh*** in which, the Hon'ble Supreme Court of India held that the jurisdiction of civil Court challenging the acquisition proceedings stands excluded and as such, the civil court has no jurisdiction to go into the question of the validity or legality of the notification under Section 4(1) and declaration under Section 6, except by the High Court in a proceeding under Article 226 of the Constitution. The civil Court thereby is devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Land Acquisition Act.

18. He also relied upon the judgment of the Hon'ble Supreme Court of India reported in **(2006) 8 SCC 336** in the case of ***Commissioner Bangalore Development Authority Vs. K.S.Narayan***, held that when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up

whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings.

19. The learned counsel appearing for the petitioner relied upon the yet another judgment reported in (2006) 8 SCC 336 in the case of **Commissioner, Bangalore Development Authority Vs. K.S.Narayan**, in which the Hon'ble Supreme Court of India held as follows :-

“14. In our opinion the view taken by the High Court is wholly erroneous. It is not the case of the plaintiffs that the plaint scheduled property is not covered by the notification issued under Section 17 of the Act. As a matter of fact, there is no dispute that the land regarding which the suits have been filed is covered by the notification. The main ground on which the suits have been filed is that the notice as required by sub-section (5) of Section 17 of the Act was not served upon the plaintiffs. The plaintiffs are claiming title to the property and are seeking the relief of possession on the ground that the notification has been rendered invalid on account of non service of

notice upon them under sub-section (5) of Section 17 of the Act. The plaintiffs are clearly assailing the validity of the acquisition proceedings. It is not their case that the plaintiff scheduled property is outside the purview of the land regarding which the notification under Section 17 had been issued. The ground for assailing the notification, namely, that notice under sub-section (5) of Section 17 of the Act was not served upon the plaintiffs and its effect could only be examined in a writ petition filed under Article 226 of the Constitution before the High Court and not by the civil court. The judgments and decrees passed by the High Court are, therefore, clearly illegal and have to be set aside.”

20. In another judgment reported in **(1972) 4 SCC 165** in the case of **State of Rajasthan Vs. Rao Raja Kalyan Singh**, the Hon'ble Supreme Court of India held as follows :-

“6. Though this issue is not very specific but undoubtedly it covers the plea taken by the respondent in paragraph 1 of his written

statement. That apart the plea of maintainability of the suit is essentially a legal plea. If the suit on the face of it is not maintainable, the fact that no specific pleas were taken or no precise issues were framed is of little consequence.”

The Hon'ble Supreme Court of India held that maintainability of the suit is a legal plea. If the suit on the face of it is not maintainable, the fact that no specific pleas were framed is of little consequence.

21. As stated supra, the jurisdiction of the civil Court to take cognizance of the cases arising under the Land Acquisition Act is barred. The civil Court thereby devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Land Acquisition Act. The only right of an aggrieved person is to approach the constitutional court viz., the High Court and the Supreme Court. Therefore, the decree itself is voidable one and cannot be executed.

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22. The learned counsel appearing for the petitioner raised another ground that the execution petition itself is barred by limitation, since the

decree obtained by the respondents was confirmed by the judgment and decree in the appeal suit dated 12.10.2004. Therefore, the respondents ought to have filed execution petition within a period of three years viz, on or before 12.10.2007. Admittedly, the suit was contested by the petitioner and the same was decree and aggrieved by the same the petitioner filed appeal suit and the same was dismissed by the judgment and decree dated 12.10.2004. Thereafter the petitioner failed to file the Second Appeal in time and it was filed with delay. This Court dismissed the condone delay petition in M.P.No.3 of 2009 in S.A.SR.No.10875 of 2007 by an order dated 05.03.2009.

23. On perusal of the said order, the petitioner filed the Second Appeal with the delay of 748 days in filing the said Second Appeal. Therefore, this Court without going into the merits of the Second Appeal, dismissed the condone delay petition. Aggrieved by the same, the petitioner filed Special Leave Petition before the Hon'ble Supreme Court of India with the delay of 1906 days in filing the S.L.P. The Hon'ble Supreme Court of India by an order dated 17.11.2014 dismissed the condone delay petition for

the reason that no satisfactory explanation is furnished. Therefore, the decree passed in the appeal suit is the decree and the date of the said decree has to be calculated for filing the Execution Petition.

24. In this regard, the learned counsel appearing for the petitioner relied upon the judgment of the Hon'ble Supreme Court of India, reported in **(2001) 1 SCC 469** in the case of **Ratansingh Vs. Vijaysingh and ors**, which reads as follows :-

7. The forerunner of the said Article in the Limitation Act, 1908, (for short the old Limitation Act) was Article 182. It worded like this:

“182. For the execution of a decree or order of any civil court not provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908 3 years (or where a certified copy of the decree or order has been registered 6 years).

The time from which the period would begin to run was shown as (1) the date of the decree or order, or (2) where there has been an appeal the date of the final decree or order of the appellate

court, or the withdrawal of the appeal. (There are some other items also in the third column of the Article but they are not relevant for the purpose of this case). Section 48 of the old CPC prescribed a period of 12 years before the expiry of which a fresh application could be made for execution. It must be noted that the present Limitation Act has amended Section 48 of the old CPC. The position under Article 182 of the old Limitation Act was quite different from its corresponding Article 136 of the present Limitation Act. Now period of execution of a decree starts running from the date when it becomes enforceable. In the Objects and Reasons for introducing the bill for altering the parameters of Article 182 following has been stated, inter alia, thus:

Existing Article 182 has been a fruitful source of litigation and therefore the proposed Art.135 (now Art.136) in lieu thereof, provides that the maximum period of limitation for the execution of a decree or order of any civil court shall be 12 years from the date when the decree

or order became enforceable (which is usually the date of the decree or order) or, where the decree or subsequent order directs any payment of money or delivery of any property to be made at a certain date or at recurring periods, from the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree or order. There is no reason why a decree should be kept alive for more than 12 years; Section 48 of the Civil Procedure Code, 1908, provides that a decree ceases to be enforceable after 12 years.

8. When is a decree becoming enforceable? Normally a decree or order becomes enforceable from its date. But cases are not unknown when the decree becomes enforceable on some future date or on the happening of certain specified events. The expression enforceable has been used to cover such decrees or orders also which become enforceable subsequently.

9. Filing of an appeal would not affect the enforceability of the decree, unless the appellate court stays its operation. But if the appeal results

in a decree that would supersede the decree passed by the lower court and it is the appellate court decree which becomes enforceable. When the appellate order does not amount to a decree there would be no supersession and hence the lower court decree continues to be enforceable.

10. A decree is defined in Section 2(2) of the CPC as under:

“2.(2) 'decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Sec. 144, but shall not include- (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default.”

Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of

the suit. It may be partly preliminary and partly final."

25. He also relied upon the judgment reported in **(2002) SCC Online Raj 160** in the case of **Moman Vs. Munshi and ors**, in which the Hon'ble Supreme Court of India held as follows :-

10. In Ratan Singh v. Viyay Singh and Ors., AIR 2001 SC 279, the Hon'ble Supreme Court considered a large number of judgments of various High Courts in a case where the second appeal was dismissed as being time-barred, but considering the provisions of the Limitation Act, observed as under:

Filing of an appeal would not affect the enforceability of a decree unless the Appellate Court stayed its operation. But if the appeal results in decree, that would supersede the decree passed by the lower Court and it is the appellate court's decree which becomes enforceable. When the appellate order does not amount to a decree, there would be no supersession ... Hence the lower Court's decree

continues to be enforceable ... As no decree was passed by the High Court in second appeal, the decree of the First Appellate Court remains unaffected and the enforceability once commences remains undisturbed for a period of twelve years therefrom. The execution process initiated by the appeal long after expiry of twelve years from 1.8.1973 is, thus, irretrievably barred.

11. Thus, in view of the above, it can be summarised that by virtue of the provisions of Order 41 Rule 5 of the Code, merely filing of an appeal would not amount to stay or mere institution of the appeal does not prevent the decree-holder to execute the decree and unless the Appellate Court puts an embargo, the decree is executable. Even if the Appellate Court reverses the decree in view of the provisions of Section 144 of the Code, there can be restitution without any hinderance and if the Appellate Court had stayed the execution proceedings, the period of stay is to be computed and excluded from the period of limitation for execution of the

decree.”

The Hon'ble Supreme Court of India held that filing of the appeal would not affect the enforceability of a decree unless the appellate Court stayed its operation. If the appeal results in decree, that would supersede the decree passed by the lower Court and it is the appellate Court's decree which becomes enforceable. When the appellate order does not amount to a decree, there would be no supersession and hence the lower Court's decree continues to be enforceable.

26. In the case on hand, admittedly the first appellate Court stayed the decree passed by the trial Court and finally dismissed the appeal suit by the judgment and decree dated 12.10.2004. Thereafter, the petitioner filed Second Appeal before this Court and Special Leave Petition before the Hon'ble Supreme Court of India and both were dismissed in its limini that too, in the condone the delay petition itself. Therefore, no decree passed by this Court or by the Hon'ble Supreme Court of India as such, the decree passed by the first appellate Court continuous to be enforceable and it remains unaffected and undisturbed by the appellate Courts. Therefore, the

respondents ought to have filed the Execution Petition within a period of three years from the date of judgment passed by the first appellate Court viz., on or before 12.10.2007. Therefore, the above judgments are squarely applicable to the case on hand and the judgment cited by the learned counsel appearing for the respondents is not helpful to the case on hand and the Execution Petition itself is barred by limitation.

27. The learned counsel appearing for the petitioner raised yet another ground that the Execution Petition cannot be restored beyond 30 days from the date of dismissal for default. The Limitation Act is not at all applicable to restore the Execution Petition when it was dismissed for default. In this regard, he relied upon the judgement reported in **(2005) 4 MLJ 163** in the case of **Damodaran Pillai and ors Vs. South Indian Bank Limited**, which reads as follows :-

“9. The learned Executing Court allowed application of restoration filed by the Respondent herein on the ground that it acquired the knowledge about the dismissal of the Execution Petition only on 25.3.1998.

10. The learned Judge, however, while

arriving at the said finding failed and/or neglected to consider the effect of sub-rule (3) of Rule 106. A bare perusal of the aforementioned rule will clearly go to show that when an application is dismissed for default in terms of Rule 105, the starting period of limitation for filing of a restoration application would be the date of the order and not the knowledge thereof. As the applicant is represented in the proceeding through his Advocate, his knowledge of the order is presumed. The starting point of limitation being knowledge about the disposal of the execution petition would arise only in a case where an ex- parte order was passed and that too without proper notice upon the judgment debtor and not otherwise. Thus, if an order has been passed dismissing an application for default, the application for restoration thereof must be filed only within a period of thirty days from the date of the said order and not thereafter. In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the execution petition was, therefore, wholly

irrelevant.

11. We may notice that the period of limitation has been fixed by the provisions of the Code and not in terms of the second schedule appended to the Limitation Act, 1963.

12. It is also not in dispute that the Kerala amendment providing for application of Section 5 of the Limitation Act in Order XXI, Rule 105 of the Code became inapplicable after coming into force of the Limitation Act, 1963, (Act LVI of 1964).

13. It is also trite that the civil court in absence of any express power cannot condone the delay. For the purpose of condonation of delay in absence of applicability of the provisions of Section 5 of the Limitation Act, the court cannot invoke its inherent power.

14. It is well-settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to.

15. An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the Code.

Application of the said provision has, thus, expressly been excluded in a proceeding under Order XXI of the Code. In that view of the matter, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the court cannot be invoked.”

The Hon'ble Supreme Court of India held that application for restoration must be filed within the period of thirty days from the date of the said order. In the absence of applicability of the provision of Section 5 of the Limitation Act, the Court cannot invoke its inherent power. In a proceeding under Order 21 of CPC, Section 5 of Limitation Act is not applicable. Those provisions under Section 5 of the Limitation Act have expressly been excluded in a proceedings under Order 21 of CPC and the Court below ought not to have allowed the petition to condone the delay in filing the petition to restore the Execution Petition.

28. In the case on hand, admittedly the Execution Petition was dismissed for default on 02.08.2016, on the ground that batta was not paid. Thereafter, the respondents did not file petition to restore the same within a

period of 30 days. They filed E.A.No.1983 of 2017 to condone the delay of 341 days in filing the petition in E.A.No.3111 of 2017 to restore the Execution Petition. Both the petitions were allowed and the Execution Petition was restored. Therefore, the execution Court should not have entertained the petition under Section 5 of the Limitation Act to condone the delay in filing the restoration petition.

29. Overall, the trial Court has no jurisdiction to try the suit in respect of the land acquisition proceedings. Further there is clear bar under Section 88 of the Tamil Nadu Housing Board Act to try the suit as against the Tamil Nadu Housing Board, that too the proceedings arising out of Land Acquisition Act. More over, the Execution Petition is barred by limitation, since it was filed after the period of three years and the Court below ought not to have been restored the same by allowing the petition to condone the delay. Therefore, the decree itself is not enforceable one and the entire execution proceedings is liable to be set aside.

30. In fine, the order dated 22.06.2018 passed by the learned IX Assistant Judge, City Civil Court, Chennai in E.P.No.3495 of 2015 in

O.S.No.4714 of 1999 is hereby set aside and the entire execution proceedings is also set aside. Accordingly, the Civil Revision Petition stands allowed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

03.08.2021

Internet : Yes

Index : Yes/No

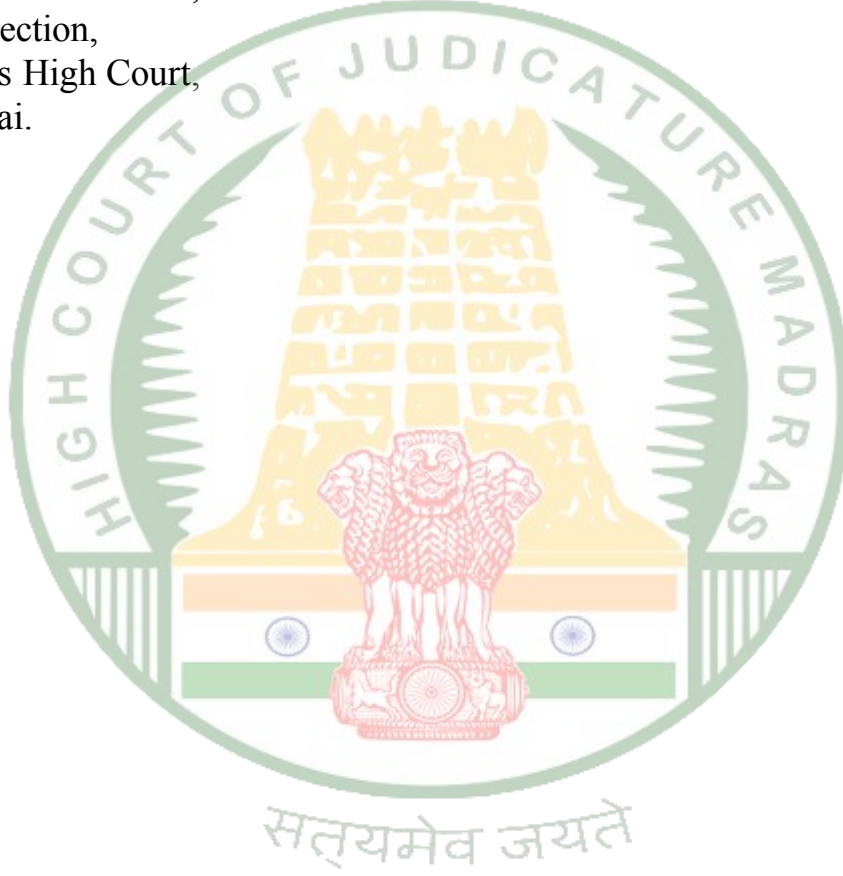
Speaking order/Non-speaking order
rts



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To

1. The IX Assistant Judge,
City Civil Court, Chennai.
2. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

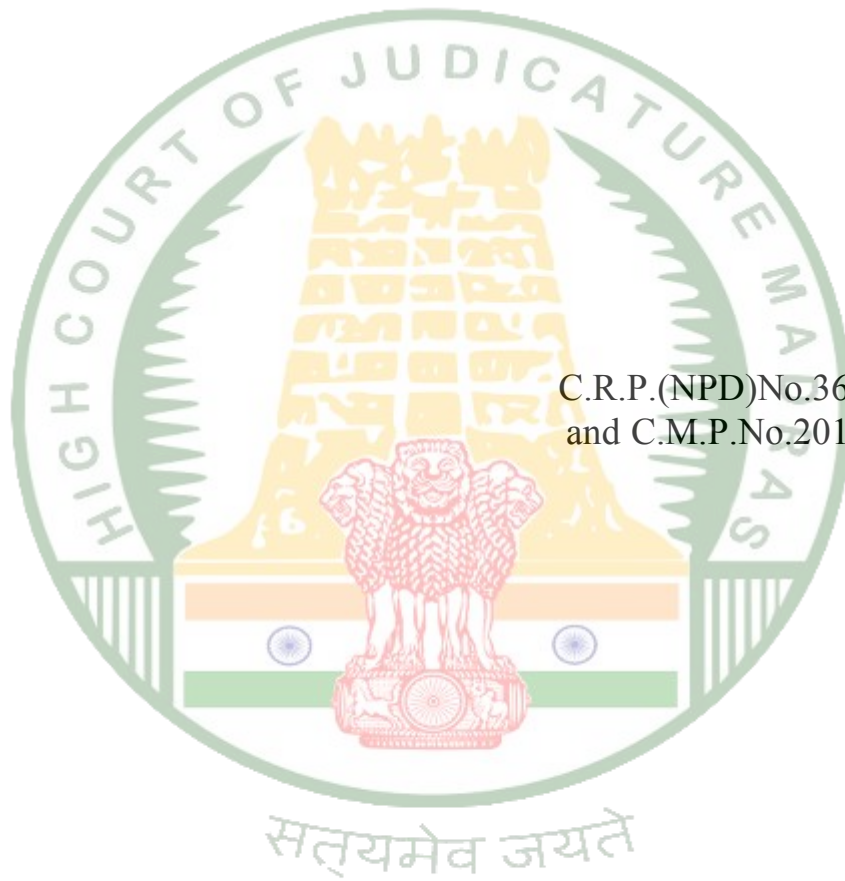


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C.R.P.(NPD)No.3610 of 2018

G.K.ILANTHIRAIYAN, J.

rts



order in
C.R.P.(NPD)No.3610 of 2018
and C.M.P.No.20184 of 2018

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03.08.2021