IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 9TH DAY OF JANUARY 2015/19TH POUSHA, 1936

Crl.Rev.Pet.No. 2461 of 2013 ()

(AGAINST THE JUDGMENT IN CRL.A.NO. 563/2009 OF ADDITIONAL SESSIONS COURT (ADHOC-1), ERNAKULAM DATED 20-09-2012)

CC.NO. 1061/2001 OF CHIEF JUDICIAL MAGISTRATE COURT, ERNAKULAM DATED 31-07-2009

REVISION PETITIONER/3RD APPELLANT/ACCUSED NO.5:

PAUL MATHEW,S/O.LATE MATHEW PAUL, AGED 49 YEARS,
ADVOCATE, IST FLOOR,VYSHAKH,
N.H.PALARIVATTOM, KOCHI-25.

BY ADVS.SRI.JOBY JACOB PULICKEKUDY
SRI.ANIL GEORGE

RESPONDENT(S)/RESPONDENTS/STATE/COMPLAINANT/ACCUSED NO.1 & 2:

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1. M/S.LAB & GENERAL EXPORTS PVT. LTD.,
HAVING ITS REGISTERED OFFICE AT 11/1, HOSUR ROAD,
BANGALORE-560 029. REP. BY ITS CHAIRMAN & MANAGING DIRECTOR - PAUL SOMAN THROUGH HIS POWER ATTORNEY
HOLDER : CHERIAN MATHEW,
S/O.ELANJIKKAL CHERIAN MATHEW (LATE),
RESIDING AT 31/K.K.P.NAGAR, U.C.COLLEGE,ALUVA. PIN-682 305.

*2. M/S.CITRA FUELS LTD.,DOOR NO.35/1442,
KOCHANNTH BUILDING, JANATHA JUNCTION,
PALARIVATTOM, KOCHI, PIN-682 032. (DELETED)

*3. JOHN MILTON,
CHAIRMAN & MANAGING DIRECTOR, CITRA FUELS LTD
DOOR NO.35/1442, KOCHANNTH BUILDING, JANATHA JUNCTION,
PALARIVATTOM, KOCHI, PIN-682 032. (DELETED)

4. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM. PIN-682 031.

*R2 & R3 ARE DELETED FROM THE PARTY ARRAY IN CRL.M.A.NO.9049/2013 AS PER ORDER DATED 09/01/2015.

R1 BY ADV. SRI.DILIP J. AKKARA
R4 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 19-12-2014, ALONG WITH CRL.R.P.NO. 1010/2014, THE COURT ON 09-01-2015 PASSED THE FOLLOWING:

sts

Crl.Rev.Pet.No. 2461 of 2013

APPENDIX

PETITIONER'S ANNEXURES:

ANNEX A1	COPY OF THE COMPLAINT FILED BY THE 1ST RESPONDENT.
ANNEX A2	COPY OF THE NOTICE DATED 06/11/2000
ANNEX A3	COPY OF THE REPLY NOTICE SENT BY THE REVISION PETITIONER.

RESPONDENT'S ANNEXURES:

ANNEX R1(A)	COPY OF THE JUDGMENT DATED 4/4/2013 IN CRL.R.P.NO.670/13.

/TRUE COPY/

P.A.TO.JUDGE

sts

C.R.

K. Ramakrishnan, J.

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Crl.R.P.Nos. 2461/2013 & 1010/2014

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Dated this, the 09th day of January, 2015.

ORDER

Accused Nos. 3 to 5 in C.C.No.1061/2001 on the file of the Chief Judicial Magistrate's Court, Ernakulam are the revision petitioners herein.

2. The case was taken on file on the basis of a private complaint filed by the first respondent against five accused persons including the present revision petitioners alleging offences under Section 138 of the Negotiable Instruments Act.

3. The case of the complainant in the complaint was that complainant is a Private Limited Company registered under the Indian Companies Act having its registered office at Bangalore and the company is empowered to represent through its Managing Director and Chairman Paul Soman and he had executed a power of attorney in favour of Cherian Mathew through whom the complaint was filed. First accused is a Public Limited Company having its office at Palarivattom, Kochi and second accused is the Chairman and Managing Director of the Company and accused Nos. 3 to 5 are its

Directors. Accused Nos. 2 to 5 were in charge and responsible for the day to day conduct and business of the company at the time when the offence was committed. During May 1999, second accused on behalf of the first accused Company requested the complainant for a loan of Rs.5,00,000/- and as per Ext.P2 Resolution of the Board of Directors of the first accused Company dated 21.05.1999 decided to borrow Rs.5,00,000/- from the complainant agreeing to replay the same within four months. Accused Nos.2 to 5 were participated in the meeting which passed the resolution. Thereafter, accused Nos.3 to 5 who are the revision petitioners herein authorised second accused to receive the money on behalf of the first accused Company as per Ext.P3 letter of authorisation and this was attested by the Managers of the Banks and accordingly, the complainant on 24.05.1999, handed over a demand draft of Rs.5,00,000/- to the second accused in the name of the first accused Company which he received on behalf of the first accused Company with the knowledge and consent of the other Directors of the Company who are the present revision petitioners. The amount has to be paid on or before 22.09.1999. But, the loan was not paid.

So, the second accused had sent Ext.P4 letter dated 29.11.1999 and letter dated 17.01.2000 requesting two months time on the first occasion and again requested three months time. The amount was not paid. So, the complainant issued a notice dated 19.04.2000 requesting them to pay the amount with interest. But, the amount was not paid. Thereafter, PW1, the Managing Director of complainant Company came to Ernakulam and met all the accused persons personally and demanded the money and as agreed between the accused persons, second accused had issued Ext.P6 Cheque drawn on Nedungadi Bank Ltd., Ernakulam South Branch from the account maintained by the first accused and signed by the second accused with the consent and knowledge of the other accused persons in favour of the complainant in discharge of that liability. But, at the time when the cheque was given, no date was put and they wanted the cheque to be presented after first week of October, 2000 and they agreed that they will pay the amount with interest before that date. Interest up to 24.07.2000 was paid. During first week of October, 2000, the Managing Director of the complainant - Company (PW1) again approached all the accused and they gave consent to the complainant to present the cheque for encashment on 25.10.2000. Accordingly, the complainant put the date as 25.10.2000 and presented the cheque, but, it was dishonoured for the reason 'funds insufficient' evidenced by Ext.P7 dishonour Memo. The complainant issued Ext.P8 notice to all the accused which were received by them evidenced by Ext.P9 series postal acknowledgments. Accused Nos. 3 to 5 who are the revision petitioners herein sent Ext.P10, P11, P12 reply notices containing false allegations. They have not paid the amount. So, they have committed the offence punishable under Section 138 of the Negotiable Instruments Act (Hereinafter called 'the Act'). Hence the complaint.

4. When the revision petitioners along with accused Nos.1 and 2 appeared before the court below, the particulars of offence were read over and explained to them and they pleaded not guilty. The first accused was represented through second accused. In order to prove the case of the complainant, the Managing Director and Chairman of the complainant Company was examined as PW1 and Exts. P1 to P12 were marked on their side. After closure of the complainant's evidence, the accused including the revision

petitioners were questioned under Section 313 of Code of Criminal Procedure and they denied all the incriminating circumstances brought against them in the complainant's evidence. First and second accused further submitted through second accused that they have not committed any offence. Accused Nos.3 to 5 submitted a joint statement stating that they were not in the day to day administration of the company's business and it was managed by the second accused. Though they were shown as Directors, they are not engaged in the day to day business of the company, PW1 and the second accused were relatives and misusing their position and in order to cause loss to the first accused Company, some monetary transactions have been entered into between them. Further, they were not aware of the issuance of the cheque as claimed by the complainant and they were not Directors of the first accused Company at that time. So, they have not committed any offence. In order to prove their case, third accused was examined as DW1 and Exts.D1 and D2 were marked on their side. After considering the evidence on record, court below found that the defence taken by accused Nos. 3 to 5 is not sustainable and rejected their contentions and found all the accused guilty under Section 138 of the Act and convicted them thereunder and sentenced the first accused to pay a fine of Rs.2,00,000/- and sentenced accused Nos.2 to 5 to undergo imprisonment till rising of the court and to pay a fine of Rs.2,00,000/- each in default to undergo simple imprisonment for six months each. It is further ordered that if the fine amount is realised, an amount of Rs.9,00,000/- be paid to the complainant as compensation under Section 357 (1)(b) of Code of Criminal Procedure (wrongly shown as 357 (3) of Code of Criminal Procedure). Aggrieved by the same, the present revision petitioners filed Crl.Appeal No.563/2009 before the Sessions Court, Ernakulam which was made over to Additional Sessions Court, (Adhoc-I), Ernakulam for disposal and the learned Additional Sessions Judge dismissed the appeal confirming the order of conviction and sentence passed against them. Aggrieved by the same, the present revision has been filed by the revision petitioners who are accused Nos.3 to 5 in the court below.

5. Heard both sides.

6. Counsel for the revision petitioners submitted that there is nothing on record to show that PW1 is the Managing

Director cum Chairman of the complainant-Company entitled to represent the company. Further, the complaint was filed by a power of attorney holder and in the absence of any evidence to show that company has passed any resolution authorising the Managing Director cum Chairman to further delegate his powers to somebody else on the basis of which Ext.P1 power of attorney was executed, the complaint filed by the power of attorney is not maintainable. The learned Counsel also argued that it will be seen from Ext.D2 - the Form 32 submitted by the first accused Company before the Registrar of Companies that they resigned on 06.03.2000 and the resignation has come into effect from that day onwards and as such, they were no longer the Directors of the Company as on the date on which the said offence was said to have been committed by the first accused Company. Mere delay in sending Form 32 by the company to the Registrar of Companies is not sufficient to mulct the liability of the first accused Company on the directors who retired from the company. The courts below have not properly appreciated the same. He had relied on the decisions reported in **Saumil Dilip Mehta Vs. State of Maharashtra and Others [2002 KHC 3055], Dushyant D.**

Anjaria Vs. M/S. Wall Street Finance Ltd. & Others [2001 (105) Company Cases 655 (Bombay)], Harshendra Kumar D. Vs. Rebatilata Koley etc. [AIR 2011 SUPREME COURT 1090] and also **Anita Malhotra Vs. Apparel Export Promotion Council and Another [(2012) 1 Supreme Court Cases 520]** in support of his case.

7. On the other hand, the Counsel for the first respondent submitted that though the complaint was filed through the power of attorney, in fact, the complainant was none other than the company itself and PW1 - the Managing Director was examined to prove the case of the complainant and thereby, the filing of the complaint, though even assuming that not proper, was ratified by the company by examining the Managing Director himself who is competent to represent the company. Further, it is specifically alleged in the complaint itself that each one of the directors of the first accused Company have participated in the entire transaction starting from borrowing of the amount and issuance of the cheque and that was explicitly mentioned in the complaint. So, the submission made by the Counsel for the revision petitioners that there is no specific allegation against them is not correct.

Further, once it is alleged by the complainant that the cheque was issued with their knowledge though they are not involved in day to day administration of the company, then, the burden is on them to prove that it was not done with their consent. Further, the Form 32 was received only on 14.11.2000 which was much after the issuance of the cheque. So, once the cheque is issued at the time when they were the directors, then, offence is completed as against them also. So, courts below were perfectly justified in convicting the revision petitioners also for the offence alleged and concurrent findings of the court below on this aspect do not call for any interference.

8. The case of the complainant in the complaint was that complainant is a Company registered under the Indian Companies Act represented by its Chairman and Managing Director, PW1 - Paul Soman and as requested by the second accused, who is the Managing Director cum Chairman of the first accused Company for lending an amount of Rs.5,00,000/-, he had agreed to pay the same. Accordingly, first accused Company had passed Ext.P2 resolution for availing loan of Rs.5,00,000/- from the complainant Company and that

decision was taken in the meeting attended by all the Directors of the Company including the revision petitioners. Further, as per Ext.P3 authorisation, the revision petitioners have authorised the second accused to receive the amount on behalf of the first accused Company and accordingly, the Demand Draft for Rs.5,00,000/- drawn in the name of the first accused Company was handed over to the second accused who received the same for and on behalf of the first accused Company. According to the complainant, though the amount had to be paid on or before 22.09.1999, the same was not paid and as per Ext.P4 letter dated 29.11.1999, the time was extended by two months and thereafter as per Ext.P5 letter dated 19.04.2000, the complainant requested the second accused to pay the amount with copy to the revision petitioners. But, the amount was not paid. Thereafter, he met the accused persons personally and as agreed by them, Ext.P6 cheque for Rs.5,00,000/- drawn on Nedungadi Bank Ltd., Ernakulam South Branch from the account of the first accused Company was given to him requesting to present the same after first week of October 2000 and accordingly on 25.10.2000, he had presented the cheque and the cheque was dishonoured and in spite of notice issued, they have not paid the amount.

9. The case of the revision petitioners was that they were not in charge of the day to day administration of the first accused Company and it was managed by the second accused and they were not the directors of the company at the time when the cheque was issued and the allegation that they consented for issuing the cheque etc is not correct and so, they denied the same.

10. In order to prove the case of the complainant, PW1 the Managing Director cum Chairman of the complainant Company was examined. He had deposed in support of his case in the complaint. It is true that he had admitted in his evidence that he had not produced the articles or Memorandum of Association of the complainant Company to show that he is the Managing Director of the complainant Company and that he had not produced any resolution authorising him to further delegate his power to represent the company to the power of attorney holder shown in Ext.P1 power of attorney. It is true that if it is not proved by the complainant that the Managing Director is further authorised to

delegate his powers by a resolution of the Board of Directors of the Company, the further delegation made by him is not valid. But, when the person who is entitled to represent the company himself had come to the witness box and examined and ratified the act of that person, then, any irregularity in filing of the complaint will be ratified and make the filing of the complaint perfectly legal. Further, in this case, it is seen from the complaint that the complaint was filed by the company itself and it can be represented through a living person and it was represented by its Chairman and Managing Director who was examined as PW1. Except making a suggestion that he is not the Managing Director, the factum of lending the money, his capacity to pay the amount etc were not under serious challenge. Since the complaint itself was filed by the company, any irregularity in making the person who represents the company will not make the complaint not maintainable as the company is the payee of the cheque who is entitled to maintain an action against the accused persons. So, the submission made by the Counsel for the revision petitioners that the complaint is not maintainable has no substance in view of the discussions made above.

11. It will be seen from the complaint that the complainant had specifically made allegations in the complaint that accused Nos. 2 to 5 including the revision petitioners were responsible for the conduct of day to day affairs of the company and it is also alleged in the complaint itself that the cheque was given with the consent of all the accused persons when he met them personally in their offices. So, under the circumstances, on the basis of the allegations in the complaint, it cannot be said that the complaint is not maintainable as against the present revision petitioners, but, the question as to whether they were in charge of the day to day affairs of the company and the transaction had taken place including the issuance of the cheque with their consent and knowledge etc are matter for evidence.

12. In the decision reported in **N. Rangachari Vs. Bharat Sanchar Nigam Ltd. [(2007) 5 Supreme Court Cases 108]**, the Hon'ble Supreme Court has held that under Section 141 of the Negotiable Instruments Act, 1881, a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the

time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Further, it is observed in the same decision that a company, though a legal entity, cannot act by itself but can only act through its Directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act. Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the Directors of the company are in charge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the Directors to establish it at the trial. It is in that context that Section 141 of the Act provides that when the offender is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company.

13. Further, Section 141 of the Negotiable Instruments Act reads as follows:

> **[141. Offences by companies:-** (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> *Explanation*:- For the purposes of this section,
> (a) "company" means any body corporate and includes a firm or other association of individuals; and
> (b) "director", in relation to a firm, means a partner in the firm.]

14. So, it is clear from the above Section and the decision that when there are allegations in the complaint that

all the Directors were responsible for the day to day administration of the company and with their consent and knowledge that the entire transaction had taken place, then, complaint making all the Directors along with the company as accused is maintainable, but, whether they are guilty of the offence or not will depend upon the evidence adduced by the directors of the company who claimed exemption from liability by proving that they were not in charge of the company at the time when the offence was committed or the cheque was not issued with their consent or they executed due diligence to prevent the commission of the crime.

15. The offence under Section 138 will be said to have been committed if the following ingredients are proved.

i) The drawer of the cheque had issued a cheque in discharge of a legally enforceable debt in favour of the payee or holder in due course from the account maintained by him.

ii) That the cheque when presented was dishonoured for the reason 'funds insufficient' or 'exceeds arrangement'.

iii) The payee or holder in due course of the cheque had issued notice within 15 days from the date of intimation of dishonour to him by the banker.

iv) The drawer of the cheque had not paid the amount within 15 days of receipt of that notice.

(This is the position regarding the time for sending notice and payment before the Section is amended by Amendment Act of 2002)

16. So, it must be proved by the complainant that at the time when the cheque was issued, it was dishonoured and when the notice was issued, all the persons were the directors of the company and there were in day to day charge of the company at that time.

17. The case of the revision petitioners was that they were not the directors of the company at the time when the offence was committed. According to them, they resigned from the company on 06.03.2000 and thereafter, they have no connection with the affairs of the first accused Company. In order to prove the same, the third accused was examined as DW1 and Ext.D1 and D2 were marked on their side.

18. Ext.D2 is the Form 32 submitted under Section 303 of Companies Act, 1956 intimating the status of the company as required under Section 303 of the Companies Act. It is seen from Ext.D2 that the present revision petitioners were

shown as resigned from the Directorship of the first accused Company with effect from 06.03.2000. It is seen signed on 13.03.2000, but, reached the Company Registrar's Office on 14.11.2000 and it was on that date, it was recorded after receiving the required fine for delayed submission of the Form. It is true that it was submitted by one T.K.Radhakrishnan, Director and not by any of the present revision petitioners who were shown as the accused. Further, no evidence has been adduced on the side of the complainant or the first accused to prove that the entries in Ext.D2 were not correct. DW1 was not cross examined on behalf of first accused to show that the particulars mentioned in Ext.D2 was not correct. The complainant had no case that Ext.D2 was filed by the revision petitioners in collusion with accused Nos.1 and 2. It is for the company to prove that they are still the Directors of the company and especially when they did not cross examine DW3, on that aspect, then, it has to be presumed to have been proved that they have resigned from the company from 06.03.2000 as mentioned in Ext.D2 and they were no longer the Directors of the company at the time when the alleged cheque was issued as claimed by the complainant. Further, it was brought out in evidence that second accused and PW1 were relatives and it was on the basis of the relationship that he had agreed to lend money to the first accused Company as well.

19. In the decision reported in **Saumil Dilip Mehta Vs. State of Maharashtra and Others [2002 KHC 3055]**, it has been observed that a Director of the public limited company or private limited company can tender his resignation unilaterally and without filing in Form 32 and without sending a notice to the Registrar of Companies. The filing in the said form and giving due intimation and information to the Registrar of the Companies is the duty of the Company Secretary and not of an individual Director. It is for the Company Secretary to fill in the forms as prescribed and to give due information and intimation to the Registrar of Companies, as the law requires. Once it is proved by the accused who claimed to be a resigned director and that, he had resigned from the company on a particular date, then, he cannot be mulcted with liability of any transaction that had taken place after his retirement. Same view has been reiterated in the decision reported in **Dushyant D. Anjaria**

Vs. M/S. Wall Street Finance Ltd. & Others [2001 (105) Company Cases 655 (Bombay)] and **Harshendra Kumar D. Vs. Rebatilata Koley etc. [AIR 2011 SUPREME COURT 1090]** and **Anita Malhotra Vs. Apparel Export Promotion Council and Another [(2012) 1 Supreme Court Cases 520]**.

20. Further, in the decision reported in **Anita Malhotra's case** (cited supra), it has been observed that the annual return of a company filed with Registrar of Companies is a public document under Section 74(2) read with Section 610 and 163 of Companies Act, 1956 and therefore, it is admissible in evidence and the person who says that it is not correct as to disprove the contents of the same. In this case, the case of the revision petitioners was that they resigned from the first accused Company on 06.03.2000 and they have submitted the resignation on that day and the delay in sending the intimation to the Company Registrar was that of the first accused Company and they are not responsible for the same. Further, it is seen from Ext.D2 that the date of resignation was noted as 06.03.2000 and Form 32 was prepared on 11.03.2000 and admittedly, it was submitted on 14.11.2000

after paying the requisite fine for the delay in filing the return/particulars as required under the Companies Act. Further, this aspect when proved through DW1 was not challenged by cross examination by accused Nos.1 and 2 who are the Company and the Managing Director cum Chairman of the first accused Company who alone can challenge the particulars mentioned in Ext.D2 which they did not challenge. So, under the circumstances, courts below were not justified in coming to the conclusion that since Ext.D2 was submitted before the Registrar of Companies only on 14.11.2000 after the issuance of the cheque and as such, they are also liable along with the first accused Company is unsustainable in law and that finding is liable to be set aside. Further, once it is accepted that they had resigned from the company on 06.03.2000, then, the case of the complainant that PW1 met the revision petitioners during September 2000 and it was at that time, Ext.P6 cheque was issued with the consent and knowledge of all directors by the second accused on behalf of the first accused cannot be believed as well. So, under the circumstances, courts below were not justified in coming to the conclusion that the revision petitioners are also liable along with the first accused Company under Section 138 of the Act and conviction and sentence passed against them by the courts below in view of the discussions made above are unsustainable in law and the same are liable to be set aside. The Counsel for the first respondent filed an application to receive document as Crl.M.A.No.7673/2014, that was allowed. It was judgment in Crl.R.P.No.670/2013 filed by accused Nos.1 and 2 in same case and the conviction and sentence as against them was confirmed by this court. The liability of the revision petitioners has not been considered in that case as it relates to the revision petitioners who are accused Nos.1 and 2 in the lower court alone and that is not having any bearing in this revision. So, the order of conviction and sentence passed by the court below against the revision petitioners alleging that they are also liable to be convicted along with the first accused Company under Section 138 of the Act are hereby set aside.

So, the revisions are allowed and order of conviction and sentence passed against the revision petitioners under Section 138 of the Act are hereby set aside and they are acquitted of the charge levelled against them giving them the benefit of doubt. They are set at liberty. The bail bond executed by them will stand cancelled. The amount if any deposited by them as directed by the Sessions Court or by this court for suspending the sentence is directed to be returned to them by the court below on making application by them to that court.

Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.Ramakrishnan, Judge.

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[True copy]

P.A to Judge