

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:20.01.2015

Coram

THE HONOURABLE Mr. JUSTICE SATISH K.AGNIHOTRI
AND

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

W.A.No.920 of 2014

1.V.Dorairaj

...Appellant/Petitioner

V.

1. The District Forest Officer,
Nilgiris South Division,
Udhagamandalam.
2. The Accountant General (A&E) of Tamil Nadu,
Chennai - 600 018.
3. The Treasury Officer, District Treasury,
Udhagamandalam, The Nilgiris.
4. The Chairman-cum-Managing Director,
Tamil Nadu Tea Plantation Corporation Ltd.,
Coonoor, Nilgiris District.

...Respondents

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent Act,
against the order dated 04.06.2013 in W.P.No.14805 of 2012 passed by
the Learned Single Judge.

W.P.No. 14805 of 2012 filed under article 226 of the
Constitution of India, for the issuance of a Writ of Certiorarified
Mandamus, to call for the records relating to the impugned orders
passed by the 1st respondent in Ref. No.12046/2008/E1 dated 7.2.2011
and by the 3rd respondent in L.Dis.1675/ 2011/D1 dated 23.3.2011 and
to quash the same and consequently direct the respondents to refund
the sum of Rs.2,34,731/- to the petitioner with 12% penal interest
for illegally retaining the amount inspite of clear categorical and
unambiguous orders of this Honourable Court in W.P.No.18277/ 2008
dated 15.2.2010 and W.P.No.8852/2010 dated 26.10.2010 by computing
the penal interest till the date of actual refund of dated 26.10.2010

by computing penal interest till the date of actual refund of Rs.2,34,731/- to the petitioner

For Appellant : Mr.R.Saseetharan
For Mr.S.Kumara Devan

For 1st Respondent : Mr.M.K.Subramanian, Spl.G.P. (Forest)

For 2nd Respondent : Mr.V.Vijayashankar

For 3rd Respondent : Mr.P.S.Sivashanmugasundaram,
Special Government Pleader

For 4th Respondent : Served - No appearance

JUDGMENT

(Judgment of the Court was delivered by M.VENUGOPAL, J.)

The Appellant/Petitioner has filed the instant intra-Writ Appeal before this Court as against the order dated 04.06.2013 in W.P.No.14805 of 2012 passed by the Learned Single Judge.

2.The Learned Single Judge, while passing the impugned order on 04.06.2013 in W.P.No.14805 of 2012, in paragraph 6, had, among other things, observed that 'In other words, when the petitioner was not allowed to retire on reaching the age of superannuation on 31.12.1993, as per Rule 51 (1)(c) of the Rules, his service right to receive salary or subsistence allowance freezes on the date of retirement. Therefore, he ceases to receive the monthly salary. When he ceases to receive the monthly salary as a Government Servant and when he no longer continues so for the reason he is not a Government Servant, it necessarily follows that the petitioner is not legally entitled to receive even the subsistence allowance, for, the said allowance is only payable to a serving Government Employee placed under suspension in lieu of the salary. It must be made clear that the provisions for payment of subsistence allowance are made to pay the said allowance in lieu of monthly salary to the government servants who are in service but not retired. When a government servant retires from service on reaching the age of superannuation, he ceases to be government servant, therefore, legally, he is neither entitled to get salary nor subsistence allowance even if the pending enquiry is not complete for the simple reason that, during such an extension of service beyond the period of retirement, the service rights which have accrued to the government servant shall freeze at

the level reached on the date of retirement and the salary during that period is replaced with provisional pension which has accrued to the government servant on that date as per Rule-56(1)(c) of the Rules. Therefore, undoubtedly, the subsistence allowance paid to the petitioner beyond 31.12.1993 is liable for recovery by the respondents.'

3.Added further, the Learned Single Judge, in paragraph 7 of the order passed in the Writ Petition, had observed as follows:

"7. It must also be pointed out that when the respondents sought to recover the same, this Court, as stated earlier, ordered not to recover the same and accordingly the respondents also had given up recovery of the said amount. Finally, when they came forward to pay the pension, at such stage, they are entitled to implement the order of punishment treating the period of suspension from 01.12.1992 to 31.10.2006 as substantive punishment and also the punishment of stoppage of full pension for a period of 5 years was imposed on him vide G.O.(3D) No.44, dated 12.12.2006. Therefore, the earlier orders of this Court in ordering not to recover the subsistence allowance does not mean that the respondents are also restrained to re-adjust the same at the time of disbursal of the terminal/ pensionary benefits. It must be highlighted at this juncture that if the plea of the petitioner that no recovery should be made is accepted, then the punishment imposed on him as mentioned above for the misconduct of the petitioner would be rendered totally meaningless and it would amount to paying double premium to the bad conduct of the petitioner which cannot be allowed by this court. Also, the petitioner served in the rank of a Gazetted Officer and it is seen that he was also the Pension Sanctioning Authority for his subordinates. Thus, it goes without saying that he was well-versed with the Pension Rules and he should not have accepted the subsistence allowance inadvertently paid to him after he was allowed to retire on 29.07.2002. When he received the said allowance despite fully knowing that he was ineligible to receive the same, this Court

has no hesitation to observe that, in a way, he is guilty of misrepresentation and his action does not deserve any indulgence by this Court. Even otherwise, any indulgence would only result in allowing the petitioner to gain unjust enrichment which can never be permitted by this Court. Therefore, having regard to Rule-56(1)(c) read with the instruction thereto as well as the T.N. Pension Rules in particular Rule 69(2) thereof, this Court holds that the subsistence allowance worked out at 50% of salary and the pension worked out at 50% of pay last drawn actually worked out to 100% of salary which was received by the petitioner beyond the date of superannuation is clearly prohibited. Therefore, the Department is at liberty to adjust whatever amount that is wrongly paid to the petitioner from and out of the pension/terminal benefits without reference to the earlier orders of this Court as those orders have nothing to do with the adjustment of the sums wrongly paid to the petitioner and received by him knowing fully well that he is not eligible to receive the same."

and consequently dismissed the Writ Petition without costs.

4.The Learned Counsel for the Appellant contends that the impugned order of the Learned Single Judge is illegal besides the same being contrary to facts and circumstances of the case.

5.The Learned Counsel for the Appellant urges before this Court that the impugned order of the Learned Single Judge dated 04.06.2013 in W.P.No.14805 of 2012 is perverse and contrary to the earlier order of this Court in W.P.No.18277 of 2008 dated 15.02.2010 and W.P.No.8852 of 2010 dated 26.10.2010 wherein it was specifically observed that the order of recovery of amount already paid towards subsistence allowance from the Appellant/Petitioner could not be sustained and a direction was issued to settle the entire pensionary benefits, after deducting the penalty of Rs.4,72,562.57 towards the loss caused by the Appellant.

6.The prime stand taken on behalf of the Appellant is that the Learned Single Judge had failed to take into consideration that a very vital fact that inspite of the specific direction issued by this Court in W.P.No.18277 of 2008 dated 15.02.2010 and W.P.No.8852 of 2010 dated 26.10.2010, the Forest Officer, Udthagamandalam had sent a

proposal to the 2nd Respondent/Accountant General (A&E) of Tamil Nadu, Chennai with a request to recover an amount of Rs.2,34,331/- which was paid by means of subsistence allowance together with the amount of loss caused by the Appellant.

7.The Learned Counsel for the Appellant strenuously projects an argument that since the 2nd Respondent/Accountant General, Chennai had authorised the retiral benefits in respect of the Appellant after deducting a sum of Rs.2,34,331/-, the Appellant has challenged the proposal dated 07.02.2011 of the Forest Officer, Udhagamandalam by filing W.P.No.14805 of 2012.

8.The core plea taken on behalf of the Appellant/Petitioner is that the two orders passed by this Court in W.P.No.18277 of 2008 dated 15.02.2010 and W.P.No.8852 of 2010 dated 26.10.2010 had become final and when it binds the 1st Respondent/District Forest Officer, Udhagamandalam, then, the Learned Single Judge had wrongly held that the Department is at liberty to adjust whatever amount that was paid wrongly to the Petitioner from and out of his pension/terminal benefits without reference to the earlier orders of this Court as those orders had nothing to do with the adjustments of the sums wrongly paid and received by the Appellant knowing fully well that he was ineligible to receive the same.

9.Yet another submission made on behalf of the Appellant is that the Learned Single Judge, while passing the impugned order on 04.06.2013 in W.P.No.14805 of 2012, had failed to appreciate that in the earlier orders in W.P.No.18277 of 2008 dated 15.02.2010 and W.P.No.8852 of 2010 dated 26.10.2010, this Court had considered the hardship of the Appellant which he might suffer due to the recovery as he had retired from service on 31.12.1993 and in fact, no terminal benefits were paid for more than 9 years due to the pendency of criminal proceedings and in any event, any recovery which may be effected at this distance point of time caused hardship to the Appellant and ultimately held that the recovery of payments paid as subsistence allowance was unsustainable one.

10.Expatiating his contention, the Learned Counsel for the Appellant submits that the Appellant although he was to retire from service on 31.12.1993 on attaining the age of superannuation was not allowed to retire from service on the ground that a disciplinary proceedings was pending against him.

11.Continuing further, it is the stand of the Appellant that after 9 years from the date of his superannuation, he was allowed to

retire, by means of G.O.Ms.No.238 dated 29.07.2002 with effect from 13.12.1993, which was the date of his superannuation, from service without prejudice to the disciplinary proceedings initiated against him.

12.The Learned Counsel for the Appellant brings it to the notice of this Court that the Learned Single Judge had failed to take into account of the fact that the Government had imposed a punishment of stoppage of pension for a period of five years on the Appellant, by virtue of G.O.(3D)No.44 dated 12.12.2006, no whisper was made either as to the payment of pension or payment of subsistence allowance from 29.07.2002, when the G.O.(D).No.238 was passed allowing the Appellant to retire from service.

13.The Learned Counsel for the Appellant contends that by means of G.O.(3D).No.60 dated 31.12.1993, the Appellant was not allowed to retire from service on reaching the age of superannuation but retained in service as per Fundamental Rule 56(1)(c) and that in the said order, the Government had ordered that the salary of the Appellant shall be reduced with effect from 01.01.1994 to the amount of provisional pension which would have been admissible to him and that the said amount was paid by way of subsistence allowance to ensure fair disciplinary proceedings. Also that, the subsistence allowance for the period of suspension and retention of service from 31.12.1993 and 31.01.2006 wrongly paid by the Respondents, but these aspects were not looked into by the Learned Single Judge in a proper and real perspective.

14.The Learned Counsel for the Appellant submits that the Appellant filed W.P.No.18277 of 2008 before this Court against the G.O.Ms.No.3 dated 06.01.2003 and G.O.(3D).No.44 dated 12.12.2006 and the proceedings of the District Forest Officer dated 19.09.2008 and this Court on 15.02.2010 upheld the orders in G.O.Ms.No.3 dated 06.01.2003 and G.O.(3D)No.44 dated 12.12.2006, but in regard to an erroneous payments of subsistence allowance was concerned, the recovery could not be sustained and it was held that the said recovery of loss caused to the Government was sustained and in short, allowed the said Writ Petition to the extent of recovery of erroneous payment was concerned.

15.The Learned Counsel for the Appellant draws the attention of this Court to the effect that inspite of the order passed by this Court in W.P.No.18277 of 2008 on 15.02.2012, the 1st Respondent/District Forest Officer, Udhagamandalam requested the

Government to recover the amount of subsistence allowance wrongly paid to the Appellant and therefore, the Appellant was performed to file W.P.No.8852 of 2010 directing the 1st Respondent/District Forest Officer, Nilgiris District to send a clear pension sanction order to the District Treasury without recovery of erroneous payments.

16.The Learned Counsel for the Appellant contends that the Learned Single Judge, while passing the impugned order dated 04.06.2013 in W.P.No.14805 of 2012, had failed to appreciate that in the final order in W.P.No.8852 of 2010, this Court, while allowing the Writ Petition, had issued a direction to the 1st Respondent/District Forest Officer, Nilgiris District to send a proposal for pension to the 2nd Respondent/Accountant General for sanction by holding that the Respondents shall settle the entire pensionary benefits due to the Appellant, of course, after deducting a sum of Rs.4,72,562.57, being the loss caused to the Government.

17.The main grievance of the Appellant is that inspite of the two orders passed by this Court in W.P.No.18277 of 2010 dated 15.02.2010 and W.P.No.8852 of 2010 dated 26.10.2010, the 1st Respondent/District Forest Officer, Niligiris District passed an order on 07.02.2011, whereby he made a request to the 2nd Respondent/Accountant General to recover the amount of subsistence allowance paid from 30.07.2002 to 31.10.2006 and as such, the Appellant/Petitioner had filed the present Writ Petition.

18.The Learned Counsel for the Appellant submits that as per Rule 69 of the Tamil Nadu Pension Rules, 1978, any erroneous payments cannot be recovered, if stoppage of pension is ordered and in the counter filed by the 2nd Respondent/Accountant General, it was admitted that as per Rule 69 of the Tamil Nadu Pension Rules, 1978, no recovery shall be made when the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period. As such, the recovery could not be effected since the punishment of stoppage of full pension for a period of 5 years which was imposed upon the Appellant and if recovery was effected, the Appellant would get a meagre amount of pension at the age of 74 years.

19.During his last leg of argument, the Learned Counsel for the Appellant submits that the Learned Single Judge had failed to take into account that the date of superannuation of the Appellant was on 31.12.1993 but he was retained in service because of the disciplinary proceedings and after a lapse of 15 years, a punishment of stoppage of five years of full pension was imposed and as such, he could not

get full terminal benefits and because of the hardship, the erroneous payment in question could not be recovered.

20. Per contra, it is the submission of the Learned Counsel for the 2nd Respondent that as per F.R.53(1)(a) if a Government Servant under suspension continues to be under suspension after the date of retirement, the amount of subsistence allowance shall be reduced to the amount of pension which will be provisionally admissible to him, whether or not the Government Servant will be exonerated of the charges for which he was placed under suspension and such allowance will not be subject to periodic increase/decrease.

21. Proceeding further, the Learned Counsel for the 2nd Respondent submits that as per Rule 69(1) of the Tamil Nadu Pension Rules, 1978, where departmental proceeding is pending in respect of a Government Servant, the Head of Office shall pay the provisional pension not exceeding the maximum pension that would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant.

22. Continuing further, the Learned Counsel for the 2nd Respondent refers to Rule 69(2) of the Tamil Nadu Pension Rules, 1978 wherein it is stated that payment of provisional pension made under Sub-rule (1) shall be adjusted against the final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period.

23. The main plea taken on behalf of the 2nd Respondent is that during the course of suspension, the Government servant is entitled to the subsistence allowance in lieu of salary till the date of retirement on superannuation and provisional pension in lieu of pension from the date following the date of retirement and therefore, it follows that such a benefit is allowed in lieu of salary/pension and not in addition to salary or pension.

24. The Learned Counsel for the 2nd Respondent takes a stand that the recovery of subsistence allowance for the period from 01.12.1992 to 31.10.2006 was held unsustainable by the order dated 15.02.2010 of this Court in W.P.No.18277 of 2008 following the decision of the Hon'ble Supreme Court in the case of Syed Abdul Qadir reported in (2009) 3 SCC 475. But the amount paid to the Appellant/Petitioner during the period from 01.02.1992 to 31.10.2006 does not represent any overpayment of pay and allowances but a compensatory allowance in

lieu of salary/pension, during the period of suspension, to be adjusted against future payment of arrears of salary/pension depending on the final orders passed on conclusion of the disciplinary proceedings.

25.The Learned Counsel for the 2nd Respondent contends that any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, under such circumstances, law implies an obligation of the payee to repay the money, otherwise it would amount to unjust enrichment, as per decision of the Hon'ble Supreme Court in Chandi Prasad Uniyal and others V. State of Uttarakhand and others, 2012 (8) SCC 417.

26.The Learned Counsel for the 2nd Respondent submits that what is to be adjusted is only the provisional pension that was replaced by a regular pension and such adjustment is covered by the relevant Rules and the decision of the Hon'ble Supreme Court reported in 2012 (8) SCC 147 (cited supra) and if not adjusted, it would amount to grant of double benefits i.e. Payment of subsistence allowance as well as pension for the same period resulting in unjust enrichment of the Appellant. Moreover, extension of double benefits to a person who was punished for his proven financial irregularities, may not be the intention of Law/Rules or of the Court.

27.At the outset, it is to be pointed out by this Court that the 1st Respondent, by means of impugned order in Reference No.12046/ 2008 E1 dated 07.02.2011, had instructed the 2nd Respondent to issue authorisation after effecting recovery of the excess amount paid as subsistence allowance from 30.07.2002 to 31.10.2006. Resultantly, the 3rd Respondent had recovered a sum of Rs.2,34,731/- as per orders of the 1st Respondent dated 07.02.2011 along with other recoveries to an extent of Rs.7,07,294/-, by means of impugned order dated 23.03.2011 and remitted the amount by means of cheque to the 4th Respondent/Corporation.

28.The Appellant (Petitioner in W.P.No.14805 of 2012) had challenged the impugned orders of the 1st Respondent dated 07.02.2011 and the order of the 3rd Respondent dated 23.03.2011 seeking to quash the same in so far as the recovery of Rs.2,34,731/- for the period from 30.07.2002 to 31.10.2006 as an illegal one. Further, he sought for passing of an order by this Court in directing the Respondents to refund a sum of Rs.2,34,731/- with 12% penal interest towards illegal recovery by computing the penal interest till the date of actual refund.

29.It is not in dispute that in W.P.No.18277 of 2008 dated 15.02.2010 and W.P.No.8852 of 2010 dated 26.10.2010, it was held that the order of recovery of amount already paid towards subsistence allowance from the Appellant/Petitioner could not be sustained and a direction was issued to settle the entire pensionary benefits due to him after deducting a sum of Rs.4,72,562.57, which is the loss caused by the 4th Respondent.

30.At the risk of repetition, this Court very pertinently points out that this Court, while allowing W.P.No.18277 of 2008 on 15.02.2010, in paragraph 13, had categorically observed that the order of recovery of amount already paid towards subsistence allowance from the Petitioner (Appellant herein) cannot be sustained, but in regard to the penalty amount from the terminal benefits proceeded to state that no interference is called for, since the liability of the Petitioner was fixed in a properly conducted enquiry and also opined that the recovery of loss sustained by the Government servant was covered by Rules and allowed the Writ Petition to that extent.

31.Apart from the above, in W.P.No.8852 of 2010 (filed by the Appellant herein), this Court on 26.10.2010, in paragraph 15, had clearly observed that as far as the amount of Rs.4,72,562.57 is concerned, the Petitioner is bound to pay the penalty amount etc. and opined that it is the duty on the part of the Respondents to settle the entire pensionary benefits due to the Petitioner, of course, after deducting the penalty of Rs.4,72,562.57 paise. Furthermore, this Court, while allowing the Writ Petition, in paragraph 16, had issued a direction to the Respondents particularly, the 4th Respondent/District Forest Officer, Nilgiris District (1st Respondent herein) to send proposal for pension to the Accountant General (2nd Respondent herein) within a period of four weeks from the date of receipt of copy of the order and thereafter, the Accountant General was directed to pass appropriate order releasing the pensionary benefits due to the Petitioner within a period of four weeks.

32.It is to be noted that in W.P.No.18277 of 2008 and W.P.No.8852 of 2010 (filed by the Writ Petitioner/Appellant), except the 2nd Respondent (viz., the Accountant General (A&E) of Tamil Nadu, Chennai), the other Respondents were parties in W.P.No.14805 of 2012 and the orders so passed in the said Writ Petitions on 15.02.2010 and 26.10.2010 certainly are relevant facts in issue and bind the inter se parties, all the more when the said orders had become conclusive and final.

33.From the above, it is quite evident that a recovery of Rs.2,34,731/- cannot be made from the Appellant because of the orders passed by this Court in W.P.No.18277 of 2008 dated 15.02.2010 and W.P.No.8852 of 2010 dated 26.10.2010 as stated supra and as such, the proposal sent by the 1st Respondent to the 2nd Respondent, by means of letter dated 07.02.2011 in respect of the recovery and based on the said proposal, the authorisation made by the 2nd Respondent, in regard to the retirement benefits of the Appellant, after effecting recovery of a sum of Rs.2,34,731/-, are clearly unsustainable in the eye of law, as opined by this Court. However, we hold that the observations of the Learned Single Judge, in paragraph 7 of the order dated 04.06.2013 in W.P.No.14805 of 2012, had inter alia observed to the effect that 'x x x Therefore, the earlier orders of this Court in ordering not to recover the subsistence allowance does not mean that the respondents are also restrained to re-adjust the same at the time of disbursal of the terminal/ pensionary benefits. It must be highlighted at this juncture that if the plea of the petitioner that no recovery should be made is accepted, then the punishment imposed on him as mentioned above for the misconduct of the petitioner would be rendered totally meaningless and it would amount to paying double premium to the bad conduct of the petitioner which cannot be allowed by this court. x x x x etc.' are clearly unsustainable, in the eye of law. As such, this Court, to prevent an aberration of justice and in furtherance of substantial cause of justice, interferes with the said order passed by the Learned Single Judge and sets aside the same. Resultantly, the Writ Appeal succeeds.

34.In the result, the Writ Appeal is allowed, leaving the parties to bear their own costs. The order passed by the Learned Single Judge, in W.P.No.14805 of 2012 dated 04.06.2013 is hereby set aside for the reasons assigned by this Court in the present Appeal. The 1st Respondent is directed to refund a sum of Rs.2,34,731/- to the Appellant/Petitioner together with interest at 9% per annum from the date of illegal deduction till date of realisation, within a period of four weeks from the date of receipt of copy of this Judgment.

Sd/-

Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

Sgl

To

1. The District Forest Officer,
Nilgiris South Division,
Udhagamandalam.
2. The Accountant General (A&E) of Tamil Nadu,
Chennai - 600 018.
3. The Treasury Officer, District Treasury,
Udhagamandalam, The Nilgiris.
4. The Chairman-cum-Managing Director,
Tamil Nadu Tea Plantation Corporation Ltd.,
Coonoor, Nilgiris District.

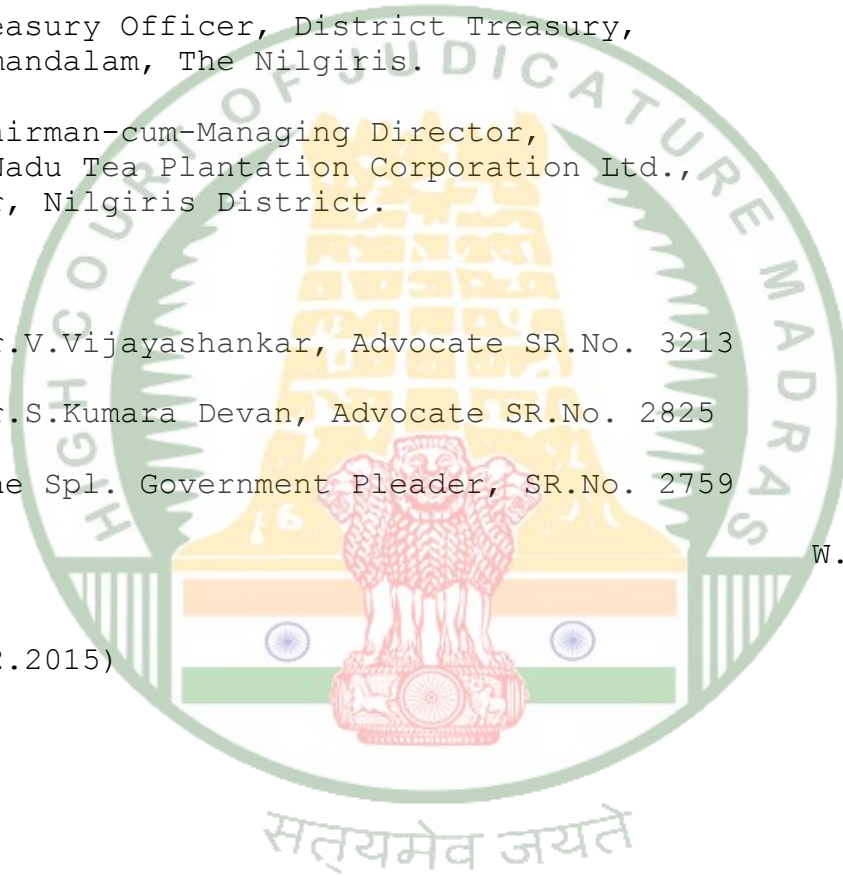
1 CC to Mr.V.Vijayashankar, Advocate SR.No. 3213

1 CC to Mr.S.Kumara Devan, Advocate SR.No. 2825

1 CC to the Spl. Government Pleader, SR.No. 2759

W.A.No.920 of 2014

JP (CO)
PSI (11.02.2015)



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