

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.06.2015
Pronounced on : 13-10-2015

Coram :

THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Criminal Revision Case No. 383 of 2015
and
M.P. No. 1 of 2015

Ms. Krithika Lakshmi Petitioner/Defacto
Complainant

Versus

1. The State represented by
The Inspector of Police
W-13, All Women Police Station
Washermanpet
Chennai - 600 021

2. Sri Ganesh Respondents/
Complainant Accused

Criminal Revision Case filed under Section 397 and 401 of Criminal Procedure Code praying to call for the records connected to S.C. No. 130 of 2011 presently pending on the file of the Juvenile Justice Board, Chennai and to examine the same and to set aside the order passed by the III Additional Sessions and City Civil Judge, Chennai in CrI.M.P. No. 10872 of 2012 on 06.02.2015 declaring the second respondent/accused as Juvenile under Section 7-A of Juvenile Justice Act, 2000 with a consequent direction to transfer the case to the Juvenile Justice Board, Chennai.

For Petitioner : Mr. Ashok Kumar, Senior Counsel
for Mr. M. Velmurugan

For Respondents : Mr. V. Arul
Government Advocate (CrI.side) for R1

Mr. Ramesh, Senior Counsel
for Mr. P. Gnanasekaran for R2

ORDER

This Criminal Revision Case is filed by the defacto complainant assailing the order dated 06.02.2015 passed in CrI.M.P. No. 10872 of 2012 by the III Additional Sessions Judge, Chennai. By the said order dated 06.02.2012, the trial Court declared the second respondent/first accused as Juvenile as contemplated under Section 7-A of Juvenile Justice Act, 2000 with a consequent direction to transfer the case to the Juvenile Justice Board, Chennai.

2. The case of the prosecution is that the defacto complainant and the first accused are neighbours and they are also tuition-mates. It is the further allegation of the prosecution that the defacto complainant and the first accused moved very closely and the first accused repeatedly indulged in sexual intercourse with the defacto complainant. It is the further allegation that even after the defacto complainant was pursuing her Engineering Degree, the first accused had sexual intercourse with her. It is alleged by the defacto complainant that she was made to believe by the first accused that he would marry her and on such false promise, the first accused had forcibly committed the offence of rape. In other words, under the pretext of marriage, the first accused had sexual intercourse with her repeatedly. However, three months before the date of complaint, the first accused refused to talk to her and he had even switched off his mobile phone. In such circumstances, the defacto complainant had given the complaint to the respondent police on 03.03.2010. On the basis of the complaint dated 03.03.2010 given by the defacto complainant, the case in Crime No. 5 of 2010 came to be registered against the first accused for the offence under Section 376 of IPC. After investigation, final report was filed against the accused Nos. 1 to 4 for the offence punishable under Section 376, 417, 420 and 506 (ii) of IPC before the learned XV Metropolitan Magistrate, George Town, Chennai. Subsequently, the case was committed to the Court of Sessions and it was taken on file by the learned Principal Sessions Judge, Chennai in S.C. No. 130 of 2011. Later, it was made over to the file of the learned Additional Sessions Judge, Mahila Court, Chennai for further proceedings.

3. After framing of the charge, the accused 1 to 4 have filed CrI.OP No. 9823 of 2011 before this Court to quash the charge sheet filed against them. By an order dated 20.06.2012, this Honourable Court quashed the charge sheet only in so far as accused 2 to 4, who are father, mother and uncle of A-1.

4. In the course of trial, the revision petitioner, her father and mother were examined as PWs 1 to 3. When the cross-examination of PW1 was in the mid way, the counsel appearing for the accused/second respondent herein has filed a Petition under Section 7-A of the Juvenile Justice Act, 2000 (hereinafter referred to as The Act) praying to declare the second respondent/accused as a Juvenile and consequently to transfer the case to the Juvenile Justice Board, Chennai for further proceedings. The said Petition was dismissed by the learned Additional Sessions Judge, Mahila Court, Chennai on 27.10.2014 against which the second respondent/accused has filed Crl.OP No. 29661 of 2014 before this Court praying to set aside the order dated 27.10.2014. Simultaneously, the second respondent/accused has also filed Crl.OP No. 29714 of 2014 to transfer the sessions case from the file of the Additional Sessions Judge, Mahila Court, Chennai to some other Court. In both the Criminal Original Petitions, the revision petitioner impleaded herself as a party and filed intervening application. By a common order dated 08.12.2014, this Court held that since a conclusive decision has not been arrived at by the trial court as to whether the second respondent/accused is a Juvenile and it is against the provisions of the Act, remanded matter back to the trial court for fresh consideration with a specific direction to pass appropriate orders as contemplated under Section 7-A of the Act within a period of 30 days. By the very same order dated 08.12.2014, this Court transferred the case for hearing to the file of the learned III Additional Sessions Judge, Chennai. Pursuant to such direction issued by this Court, the trial Court passed the order, which is impugned in this Criminal Revision Case, holding that the second respondent/accused is a Juvenile as contemplated under Section 7-A of the Act.

5. The learned senior counsel appearing for the defacto complainant/revision petitioner would vehemently contend that mere proof of age, even without ascertaining the exact date of occurrence, will not confer the benefits contemplated under Section 7-A of the Act in favour of the accused/second respondent herein. As per the provisions of the Act, the second respondent/accused should be a minor as on the date of occurrence. According to the learned senior counsel for the revision petitioner, the offence is not committed only once, but it was repeatedly committed by the accused on various dates. Even though the date of occurrence has not been mentioned in the complaint given by the revision petitioner, it was specifically stated that even when the revision petitioner was pursuing her Engineering Degree in College, the accused indulged in sexual intercourse with her. Therefore, a mere deposition in the cross-examination by the revision petitioner, as PW1, relating to the date of occurrence, will not be a

ground for declaring the second respondent/accused as a Juvenile. The trial Court miserably failed to take note of the strained condition and mind set of the revision petitioner during cross-examination which eventually made her to depose incorrectly regarding the date of occurrence and it cannot be construed as the actual date of occurrence. The trial Court also failed to take note of the fact that the revision petitioner, a young girl, was posed with scandalous questions touching her modesty before obtaining the mistaken admission as to the date of occurrence. Such admission made by the revision petitioner will not be a ground for declaring the second respondent/accused as a Juvenile. The learned senior counsel for the petitioner would further contend that the trial court failed to take into consideration that the accused continued the offence even when the petitioner and the second respondent were pursuing their Engineering degree which would make it clear that for pursuing Engineering degree, one would have attained 18 years of age. When it is the specific allegation of the revision petitioner that even during the time when the petitioner and the second respondent were pursuing their Engineering Degree the accused had committed sexual intercourse with her, the order of the trial Court declaring the second respondent as a Juvenile warrants interference by this Court. Further, the accused/ second respondent herein committed the offence repeatedly on several occasions and it was a continued offence.

6. The learned Senior counsel for the petitioner vehemently pointed out the discrepancy in the order passed by the trial court inasmuch as the trial Court misconstrued the version of the revision petitioner that the accused indulged in sexual intercourse with her 5 to 6 times or to the effect that 5 to 6 months prior to the complaint, the accused had sexual intercourse with her. A reading of the complaint, based on which the first information report came to be registered, would indicate that the first accused had sexual intercourse with the defacto complainant 5 to 6 times and it continued even after they were pursuing their Engineering degree. However, the trial court, by breaking the sentence or version of the defacto complainant, came to an incorrect conclusion as regards the actual date of occurrence. The trial Court did not take into account the prevailing conditions and atmosphere in which the revision petitioner had deposed before the court below especially when she was subjected to scandalous and unwarranted questions during the course of cross-examination. It is also mainly pointed out by the learned senior counsel for the petitioner that the evidence was not completed before the trial Court and a portion or a piece of evidence given by the defacto complainant cannot be taken as a leverage for the accused to get the benefits conferred under Section 7-A of the Act.

7. The learned Senior counsel for the petitioner further pointed out that the court below failed to take into consideration the crucial point as to when the intercourse commenced and continued especially in the light of the statement of the victim that it took place even when she was pursuing her college studies. Further, in the counter filed by the prosecution, it was made clear that the college education commenced during September 2009. Therefore, the admission of the revision petitioner in the cross-examination that the college education commenced during August 2009 in a tranced stage of the cross-examination cannot be taken into account to give the benefit of Section 7-A of the Act in favour of the second respondent/accused.

8. The learned Senior counsel for the petitioner relied on the decision of the Honourable Supreme Court in the case of (Karthi vs. State, represented by The Inspector of Police, Dharapuram Police Station, Erode District) 2013 12 SCC 710 to contend that the commission of offence under Section 376 of IPC shall be construed to have taken place when the accused declined to marry the victim especially when the accused indulged in repeated intercourse on various dates with the victim. In the present case, the refusal to marry took place after the petitioner and the second respondent were pursuing their college studies and at that time, the accused had attained majority. Therefore, relying on this decision, the learned senior counsel for the petitiitoner would contend that the order of the trial court extending the benefits of the provisions of Section 7-A of the Act in favour of the second respondent/accused is liable to be interfered with.

9. The learned Government Advocate (Criminal Side) appearing for the first respondent would contend that the process of taking evidence has not been completed in full. Even the cross-examination of the victim is not completed before the trial Court. The evidence taking process was at a preliminary stage during which the second respondent has filed the instant application to declare him as a Juvenile. Even before the cross-examination of the victim is completed in full, the trial court ought not to have declared the second respondent as a Juvenile. The investigation officer has subjected the second respondent/accused to medical test to ascertain his age and the medical officer has opined, after examining him, that he is aged between 18 and 20. This part of the opinion rendered by the medical officer was not properly considered by the trial court. According to the learned Government Advocate, mere proof of age on the basis of documentary evidence, in a case of this nature, cannot be taken into account to extend the benefits of the Act in favour of the second respondent/accused. The opinion rendered by the Doctor

in arriving at the age of second respondent/accused ought not to have been brushed aside by the trial Court. Even the documentary evidence produced by the second respondent/accused as proof of his age such as birth certificate, matriculation school leaving certificate, higher secondary course certificate, copy of driving licence, voters identity card etc., have been overlooked by the trial court to conclude that the second respondent/accused is entitled to the benefits of the Act. Therefore, the learned Government Advocate prayed this Court to remit the matter to the trial Court for fresh consideration of the case.

10. Contra, the learned Senior counsel for the second respondent/ accused would contend that in the complaint, the defacto complainant has not given the date of occurrence. It is further stated that earlier, the defacto complainant has filed Crl.OP No. 8254 of 2010 before this Court against the order passed by the trial Court refusing to alter the charges. Even in the affidavit filed along with the above said petition, the defacto complainant did not indicate the alleged dates of occurrence. When the accused have filed applications seeking anticipatory bail petitions, the defacto complainant has filed an intervening application in which also she has not chosen to disclose the dates of occurrence. It is further submitted that the trial Court framed the charges in the Sessions Case. As against the first accused/second respondent herein, the charge under Section 376 of IPC was framed. As against the accused Nos. 2 and 3, the charge of Sections 417 read with Section 109 of IPC have been filed. The fourth accused was charged for the offence under Section 506 (ii) of IPC. In this context, the learned Senior counsel for the second respondent relied on the decision in the case of (Abdul Razzaq vs. State of U.P.) 2015 Crl.Law Journal 2411 (SC) and also referred to the provisions of Section 8 of the Act to contend that a person below the age of 18 years at the time of the incident can claim the benefit of the Act at any time. In the present case, to prove the age of the second respondent herein, documents have been produced before the trial court such as matriculation school leaving certificate, higher secondary course certificate, copy of driving licence, voters identity card etc., On the basis of the documentary evidence and by considering the testimony of the revision petitioner during the cross-examination to the effect that the last occurrence took place in the year 2009, the trial court concluded that the second respondent was a minor at the time of commission of offence and rightly extended the benefits of the Act in his favour. Even if the complaint is taken into account, when it is stated that 5 to 6 months prior to the complaint the accused had intercourse with the complainant, it would indicate that the second respondent was a minor by then and therefore, the order passed by the

court below does not call for any interference by this Court.

11. The learned Senior counsel appearing for the second respondent/ accused would rely on the deposition of PW1 in the cross-examination wherein she has deposed that "அ.ச.1 ப.காரில் நான் 5, 6 மாதத்திற்கு முன்பு, எதிரி என்னிடம் தவறாக நடந்தார் என்று சொல்லியுள்ளேன். நான் 5, 6 முறை என்று சொன்னேன். அதை 5, 6 மாதத்திற்கு முன்பு, என்று எழுதியுள்ளார்..... ஆகஸ்டு 2009ல் தான் நாங்கள் இறுதியாக உடலுறவு கொண்டோம். Relying on this piece of evidence in the cross-examination of PW1, the learned Senior counsel for the second respondent would contend that these allegations were never made by the revision petitioner in the complaint given at the first instance and therefore, the Court below rightly concluded that the second respondent is entitled to the benefits of the Act and declared him a Juvenile.

12. I heard the learned senior counsel appearing for the petitioner, learned Government Advocate appearing for the prosecution, learned senior counsel appearing for the second respondent/accused and gone through the records, including the order passed by the trial court, which is questioned in this case.

13. The defacto complainant, in her complaint, has stated that the accused, who is her neighbour and tuition mate, had physical relationship with her by deceitful means by making her to believe that he will marry her. With such false promise, according to the defacto complainant, the second respondent/accused had forcible sexual intercourse with her on several occasion. As the second respondent/accused failed to marry her, the defacto complainant has given the complaint based on which the criminal prosecution came to be launched against the accused. During the course of trial, PW1, revision petitioner herein, has stated that lastly, the revision petitioner had sexual intercourse with her during August 2009 and thereafter he refused to talk to her. Therefore, the defacto complainant has given the complaint dated 03.03.2010.

14. A perusal of the complaint given by the prosecutrix would indicate that she had categorically stated that such occurrence took place 5 to 6 months prior to the date of complaint and the second respondent/accused compelled her to have sex with her 5 to 6 times. It was also complained that 3 to 4 months prior to the complaint given to the respondent/police, the second respondent/accused refused to talk to her and did not attend to her phone calls.

15. With this background, it has to be analysed as to whether the trial Court is right in extending the benefit of Section 7-A of the Act in favour of the second respondent/accused. It is seen from the records that the

cross-examination of PW1 was abruptly stopped and at that stage, the second respondent/accused has filed the instant petition to declare him as a Juvenile. The petition was filed on the strength of the fact that in the complaint, the prosecutrix has not mentioned the date of occurrence or date of commencement of the occurrence, specifically. It is seen from the school certificate of the second respondent that he was born on 19.10.1991. As per the complaint given by the prosecutrix, the accused had physical relationship with her lastly during August or September 2009. If this is taken in to account, atleast on the last time when he had sexual intercourse with the revision petitioner, the second respondent/accused is less than be 18 years of age or he may fall short of few days or months to attain 18 years and in such event, he must be a minor. The trial Court, relying on the school leaving certificate, pass port etc., came to the conclusion that the second respondent/accused was a minor and he has to be extended the benefits of Section 7-A of the Act. In this context, the learned Senior counsel for the second respondent relied on Rule 12 (3) (a) (i) to (iii) of Tamil Nadu Juvenile Justice (Care and Protection), Rules 2007 to contend that if the birth certificate issued by a Corporation or municipality or panchayat is not available, to ascertain the proof of age, then the opinion of a medical officer authorised by the Government shall be considered to determine the age. In this case, the second respondent has produced all the testimonials available with him to show the age and therefore, the prosecution ought not to have obtained a medical opinion from a medical officer to prove the age of the second respondent/accused.

16. As mentioned supra, in the complaint, the victim has not mentioned the date of occurrence, but clearly stated that the accused had sexual intercourse with her not once, but on many occasions. The prosecutrix has also clearly stated that even when she was pursuing her Engineering degree, the accused had sexual intercourse with her. As per the evidence available, the prosecutrix joined the Engineering College during August 2009. When such evidence is available to ascertain the age of the second respondent/accused, the trial Court, merely on the testimony or admission of the prosecutrix in the cross-examination ought not to have considered the application of the second respondent/accused to extend him the benefit of Section 7-A of the Act. The trial Court also failed to take note of the fact that in the present case, the second respondent/accused indulged in sexual intercourse with the prosecutrix not once, but on many occasion, thus, the offence has been committed repeatedly. Therefore, with all the available evidence, the trial Court ought to have first determined the age of the accused with reference to the

earliest point of offence and also on the latest commission of the offence, but it was not done in the present case. The trial Court has also not given clear finding with regard to the allegation of the prosecutrix that the occurrence has taken place 5 or 6 times, both in the house or elsewhere and not 5 to 6 months prior to the complaint. The trial Court also failed to take into account the allegations made by the prosecutrix that even after joining the Engineering college, the accused had sexual intercourse with her on the pretext of marrying her. In this context, the provisions of Section 376 of IPC has to be read along with Section 90 of IPC which would indicate that even the consent obtained on misrepresentation to marry the victim will attract the penal provisions of the Indian Penal Code. In the present case, it is the specific case of the prosecutrix that she was subjected to sexual intercourse by the accused on false pretext of marriage, but for which, she would not have given the consent. Further, at the earliest point of time, the prosecutrix was a minor which factor was not at all considered by the court below. If the complainant was also a minor during the relevant point of time, the consent said to have been given by her is immaterial. This fact was also not taken note of by the trial court while passing the impugned order.

17. The learned Public Prosecutor appearing for the first respondent relied on the decision of the Honourable Supreme Court in (Abdul Razzaq vs. State of Uttar Pradesh) 2015 Criminal Law Journal 2411 (SC) to contend that there should be a clear evidence to show that the accused was a minor at the time of the occurrence and unless it is brought out the trial Court is not entitled to extend the benefits of Section 7-A of the Act in his favour. In the above judgment, it was held by the Honourable Supreme Court that the documents referred to in Rule 12 (3) (a) (i) to (iii) of the Rules shall definitely be sufficient to arrive at a prima facie satisfaction by the Court about the age of the delinquent necessitating further enquiry under Rule 12. It was further held that the Courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability. Relying on this decision, the learned Government Advocate would contend that the ratio laid down by the honourable Supreme Court in the above decision has not been followed by the trial Court and it warrants interference by this Court. It is further stated that in this case, the investigation officer has obtained the opinion of the medical officer to prove the age of the accused, but it was never considered by the trial Court.

18. In this case, the original birth certificate issued by the Corporation has not been produced before the trial Court. There is a difference in the name of the parents in the certificate produced before this Court. The gazette publication produced before this Court has been made during the pendency of the criminal proceedings. These aspects relating to non-production of birth certificate before the lower court has not at all been discussed by the trial Court while passing the impugned order.

19. The learned senior counsel for the second respondent relied on the order dated 15.10.2012 passed by me in CrI.R.C. No. 1291 of 2012, wherein I had an occasion to consider the parameters which are required for ascertaining the age of the accused in similar case. In the above said order, I held that radiologist report is not a definite one to fix the age as always there is a possibility of margin of error of two or three years. I further held in the said order that when the evidence of the School Headmaster is available, through whom the school certificate has been produced to prove the date of birth, it shall be considered. The said decision cannot be made applicable to this case. In the present case, the birth certificate has not been produced before the trial Court. Even for proving the genuineness of the school leaving certificate issued by the Headmaster, the Headmaster or any other competent person has not been examined. In fact, only a sentence is elicited in the cross-examination about the certificate as if it is the age of the accused.

20. The learned Senior counsel for the second respondent/accused placed reliance on the decision of the Honourable Supreme Court in the case of (S. Madheshwaran vs. State of Tamil Nadu) 2002 CrI.Law Journal 4398 to contend that if the delinquent was found to be a juvenile in conflict with law as on the date when the occurrence was committed, being a juvenile in conflict with law, is entitled to the benefit of Juvenile Justice (Care and Protection of Children) Act, 2000. No doubt, only if the accused was a Juvenile, at the time of commission of the offence, he is entitled to the benefit of the Act has held by the Honourable Supreme Court. However, whether the accused was a Juvenile or not at the relevant point of time itself has not been properly considered by the trial Court in the present case and therefore, the order passed by it has to be set aside.

21. On the contrary, the learned Senior counsel for the petitioner relied on the decision of the Honourable Supreme Court in the case of (Ashwani Kumar Saxena vs. State of M.P.) (2012) 9 SCC 750 wherein the Honourable Supreme Court has considered the various aspects of inquiry, investigation, trial

etc., as contemplated under the Act. Relying on the said judgment, the learned Senior counsel for the petitioner would contend that enquiry, as defined in Section 2 (g) of the Act would mean and include every inquiry, other than a trial conducted under this Code by a Magistrate or a Court. By citing this decision, it is contended that the trial Court has not properly conducted the inquiry to ascertain the age of the second respondent/accused before extending the benefit in his favour.

22. In the light of the above discussion, it is evident that the trial Court has not determined the correct age of the second respondent/accused or the date of occurrence in the facts and circumstance of the case.. The trial Court also did not take note of the fact that the offence alleged to have been committed was a continuing offence. The trial Court also did not consider the expert opinion obtained from a Medical Officer to determine the age of the second respondent/accused. The trial court has also not ascertained correctly the date on which the first occurrence took place and the last occurrence committed by the accused/second respondent herein. The trial court was carried away by an admission made by the complainant during the course of cross-examination. The trial court did not consider the prevailing atmosphere which made the prosecutrix to depose erroneously with reference to the occurrence, especially when the cross-examination has not been completed.

23. For all the above reasons, the order dated 06.02.2015 passed in CrI.M.P. No. 10872 of 2012 on the file of the learned III Additional Sessions and City Civil Judge, Chennai is set aside. The Criminal Revision Case is allowed. Consequently, connected miscellaneous petition is closed. The matter is remanded back to the trial court for fresh consideration. The trial Court is directed to determine the correct age of the second respondent/accused independently, at the time when the first occurrence was committed and the date on which the last occurrence was committed, without being influenced by any of the observations made by this Court in this order, as early as possible.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1.The III Additional Sessions Judge
Chennai

2.The Judge,
City Civil Court, Chennai.

3.The Juvenile Justice Board,
Chennai.

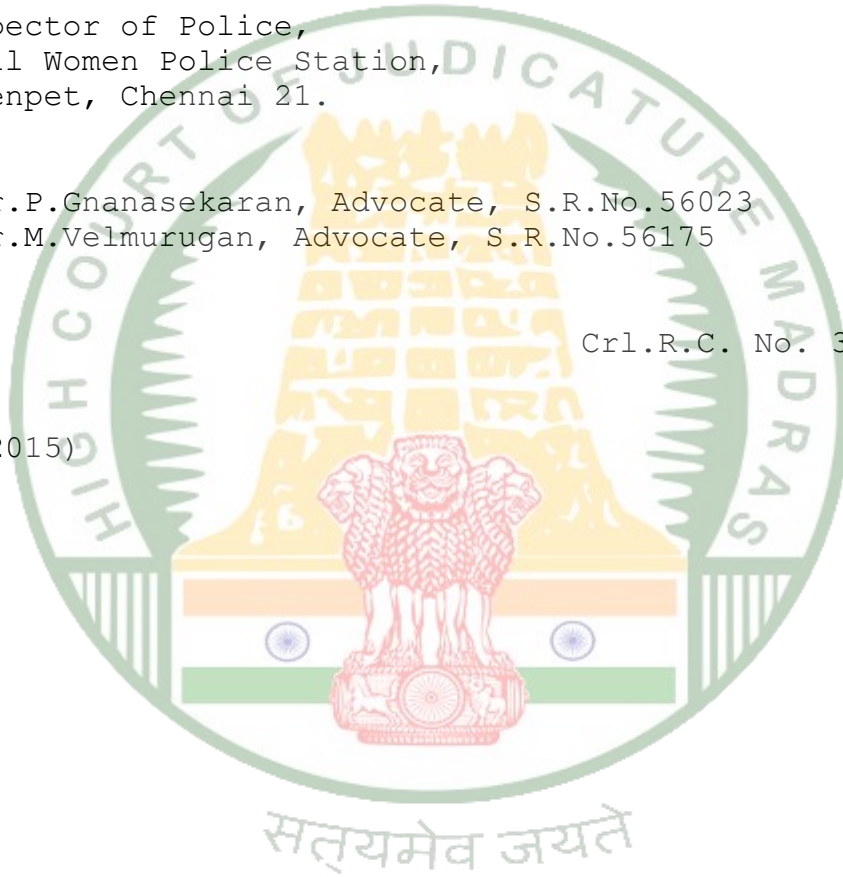
4.The Inspector of Police,
W-13, All Women Police Station,
Washermenpet, Chennai 21.

+1cc to Mr.P.Gnanasekaran, Advocate, S.R.No.56023

+1cc to Mr.M.Velmurugan, Advocate, S.R.No.56175

Cr1.R.C. No. 383 of 2015

TEJ(CO)
CA(26/10/2015)



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