

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:23.06.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

A.S.No.677 of 2004

Judgment reserved on 11.06.2015	Judgment pronounced on 23.06.2015
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The Shipping Corporation of India Ltd.
Regd.Office:"Shipping House"
245, Madame Cama road, Bombay 400 021.
Branch office at Rajaji salai
opposite to Customs House
Madras-600 001.

.. Appellant/Defendant

Vs

1.M/S.Gem Granites
No.58, Cathedral road
Madras 600 086
Rep. by Managing partner
R.Veeramani

2.The Oriental Insurance Co. Ltd.
Regional office:"UTI Building"
4th floor, P.B.No.1877
Esplanade, Madras 600 108.

.. Respondents/Plaintiffs

Prayer: First Appeal filed under Order XLI Rule 1 and Section 96 of the C.P.C., against the judgment and decree dated 02.12.1997 of the learned V Additional Judge, City Civil Court, Chennai made in O.S.No.5242 of 1996.

For Appellant : Mr.K.Bijai Sundar

For Respondents : Mr.G.Guruswaminathan for
M/S.Nageswaran and Narichania

JUDGMENT

The First Appeal arises out of the judgment and decree dated 02.12.1997 made in O.S.No.5242 of 1996 on the file of the learned V Additional Judge, City Civil Court, Chennai.

2.The averments made in the plaint are as follows:

(i) The first plaintiff is a partnership firm and the second plaintiff is the public limited company. M/S.Savema SPA, Italy, sold a consignment of spare parts for cutting machine to the first plaintiff as per their invoice No.677 dated 22.06.1987 valued at Indian currency of Rs.3,89,350/-. The said consignment packed in 2 crates containing spare parts for cutting machine were shipped on board the vessel "Vishva Mamta" at the port of loading viz., Marina Di Carrara Italy for safe carriage by sea and delivery at Madras to the first plaintiff, who is the owner of the consignment.

(ii)The defendant, who is a public limited company, issued their bill of lading No.1, dated 29.07.1987 signed at Marina Di Carrara and thereby undertaking to carry and deliver the aforesaid two cases at the port of discharge at Madras.

(iii)The said vessel owned and chartered by the defendant carrier viz., Vishva Mamta, allegedly discharged the suit cargo at Bombay and according to available information, the defendant transhipped the cargo intended for delivery at Madras, on board the vessel for on carriage from Bombay for discharge at Madras. It was arrived at the Madras Port Trust on or around 31.08.1987.

(iv)When the first plaintiff approached the Madras Port Trust, it was informed that the consignment was short landed. In the absence of two cases being made available for delivery, the Madras Port Trust issued 'B' certificate bearing No.711/4 dated 09.10.1987 confirming the short landing of the suit cases. Subsequently, the stammer agents pointed out an unconnected cases under NIL marks and reflected as excess landed to explore the possibility of connecting the same to the suit cargo. The examination of said case by the clearing and forwarding agents and customs revealed that the said case did not contain the consignment intended for the first plaintiff. Thus, due to short landing, the first plaintiff is put to a pecuniary loss of Rs.3,99,002.35 being the CIF value of the suit consignment. Therefore, the first plaintiff by their letter dated 28.11.1987 lodged their claim on the defendant's then local agents under acknowledgment and demanded compensation amounting to Rs.3,99,002.35. In spite of receipt of the said demand letter, the defendant failed and neglected to settle the first plaintiff's claim. The original documents now in the custody of the defendant are the B certificate, invoice and packing list.

(v) The second plaintiff as underwriters of cargo in question for Marine Transit risks settled the first plaintiff's claim by paying a sum of Rs.432712.29 being the proportionate insured value of the consignment short landed. On receipt of such payment, the first plaintiff executed a letter of subrogation in favour of the second plaintiff. Thus, by virtue of the letter of subrogation and Marine Insurance Act, the second plaintiff is entitled to file and maintain the suit. Therefore, the plaintiffs constrained to file the suit directing the defendant (a) to pay a sum of Rs.3,99,002.35 with interest at the rate of 12% per annum from the date hereof until the date of payment in full in view of the commercial cause; (b) to pay the costs of the suit.

3. The gist and essence of the written statement filed by the defendant are as follows:

(i) It is true, consignment of two cases said to contain spare parts for cutting machine was entrusted to the agents of the defendant at the port of Marina Di Carrara, Italy for carriage and discharge at the port of Madras. The said consignment was to be carried by the vessel 'M.V. Vishva Mamta', owned by the defendant. They were not aware of the quantity, quality, value and weight of cargo packed in the said two packages. The carrier issued a Bill of lading with a clause "said to contain" and on the basis of the declarations made by the shipper. Such declarations were neither accepted nor guaranteed to be true by the defendant. Due to some operational reasons, the said vessel did not call at Madras and two packages consigned to the first plaintiff were discharged at Bombay. The said cargo was therefore carried from Bombay by another vessel owned by the defendant namely, M.V. 'Vishva Aditya'.

(ii) The transshipment of cargo is not anything uncommon in the carriage of cargo by sea. Further, the fact of transshipment was notified by the defendant to all the consignees by an advertisement published in "The Hindu" on 28.07.1987. The first plaintiff as well as its clearing agent were well aware of the transshipment as well as the fact that the two packages were being brought to Madras by the vessel M.V. 'Vishva Aditya'. So the plaintiffs are therefore, estopped from now contending that the defendant herein committed a fundamental breach of contract on account of such transshipment.

(iii) As per the practice prevailing in the Indian Ports, the two packages were discharged into the custody of the Madras Port Trust and that were specifically tallied by the Madras Port Trust though under Nil marks. The Madras Port Trust alone is responsible for the delivery of cargo taken charge of them and it is failed to deliver the packages as per the bill of lading. Neither the carrier nor its agents and or servants were present at the time of delivery. Six packages were out turned as 'excess landed', out of which, two in the carriage of cargo by sea.

(iv) The vessel M.V. Vishwa Aditya arrived at the port of Madras on 31.08.1987 and the two packages were discharged in the same order and condition. The defendant as a carrier has fulfilled all its obligations by carrying whatever cargo that was entrusted at the port of loading and discharging the same at the port of discharge as undertaken. In such circumstances, it is not open to the plaintiffs to now contend that the defendant had committed a fundamental breach of contract so as to enable the plaintiffs to sue the defendant in tort or under contract. He has also denied the CIF value assessed by the plaintiffs and the defendant cannot be held liable to compensate the plaintiffs. Therefore, the defendant prayed for dismissal of the suit.

4. The trial Court, after considering the averments both in the plaint and the written statement and arguments of both the counsel, framed five issues and considering the oral evidence of P.W.1 and documentary evidence of Exs.A1 to A14 and Exs.B1 to B3, decreed the suit, against which, the present first appeal has been preferred by the appellant/defendant.

5. After hearing the arguments of both sides counsel, the following points for determination are framed:

1. Whether non examination of author of Exs.B1 to B3 is fatal?
2. Whether the respondents herein have proved the value of damage in accordance with law?
3. Whether the respondents are estopped from claiming damage on the basis of 'B' certificate issued by the Madras Port Trust in view of the letters under Exs.B1 to B3 sent by the clearing agent of the first respondent/first plaintiff?
4. Whether the decree and judgment passed by the trial Court are sustainable?
5. To what relief, the appellant/defendant is entitled to?
6. Heard the learned counsel for the appellant/defendant as well as the learned counsel for the plaintiffs/respondents and perused the materials available on record.
7. Point Nos.1 and 3:

The first plaintiff, a partnership firm has purchased spare parts for cutting machine from M/S. Savema SPA, Italy, as per their invoice No.677 dated 22.06.1987 valued at Indian currency of Rs.3,89,350/- under Ex.A2. The said consignment packed in 2 crates containing spare parts for cutting machine were shipped on board the vessel "Vishva

Mamta". The same was insured with the second respondent as per Ex.A1/insurance policy dated 17.11.1987 and the sum insured was Rs.4,32,712.29. In Ex.A2, it was stated that "Shipment from Italy to Madras, Vessel - Vishva Mamta". In Ex.A3, it was stated that "Two cases said to contain spare parts, Shipment from Italy for transportation to Madras, Vessel name is Vishva Mamta, Port of loading is Marina Di Carrara, Port of discharge is Madras." The bill of lading was marked as Ex.A3.

8. According to the respondents/plaintiffs, two cases have not been reached Madras port trust and hence they had given an enquiry notice. On the basis of the enquiry notice, the Madras Port Trust made an enquiry and issued 'B' certificate stating as "short landing". On the basis of 'B' certificate, the first plaintiff claimed insurance amount from the insurer/second respondent and executed the letter of subrogation and after issuance of notice, the suit has been filed by the respondents/plaintiffs against the defendant/appellant herein for recovery of damages.

9. On perusal of the documents marked by the appellant/defendant would reveal as follows:

(i) The clearing agent of the first respondent namely, Thimmeswara Rao sent a letter Ex.B1 on 28.09.1987, in which, it was stated that clearance of two cases, spare parts for cutting machine arrived in Vishva Aditya were lying at W.Q.2 wharf in damaged condition. Hence, he requested for making arrangement to survey the cargo.

(ii) The said Thimmeswara Rao has also sent another letter Ex.B2 dated 30.09.1987 stating that he would request to issue amended delivery order, which will facilitate the clearing agent to take delivery of cargo.

(iii) He sent another letter Ex.B3 dated 05.10.1987, in which, it was stated as follows:

"Items mentioned against item 1 and item 4 are agreeing according to our invoice while the others are not agreeing which please note. Hence, we would request you to issue a entry letter to customs with a line number to enable us to file the customs papers and arrange for clearance. We would request you to treat this cargo as excess landed according to the Out Turn statement sent to you by the Port Trust and issue us the delivery order."

10. On going through Exs.B1 to B3, it was mentioned that out of two cases, one case is lying under Nil mark. Further, the case is completely broken, contents have come out from the case. Hence the clearing agent Thimmeswara Rao sought for another amended delivery note to clear the cargo. But the said Thimmeshwara Rao was not examined before the Court.

11.It is pertinent to note that after issuance of Exs.B1 to B3, Ex.A4 'B' certificate dated 08.10.1987 has been issued. Then only on 06.11.1987, Thimmeswara Rao, the clearing agent has sent Ex.A5 letter to the appellant's agent for claiming amount. Ex.A6 is the letter dated 21.11.1987 sent by the steamer agent to the clearing agent called for some documents. Then the first plaintiff/first respondent sent Ex.A7 letter dated 28.11.1987 to the agent of appellant to settle the amount. Then only the appellant's agent sent requisition Ex.A8 to the first respondent/first plaintiff stating that already amendment letter was issued on 30.09.1987 and therefore, he was requested to clear the same. The Loss Prevention Association of India Limited has sent letters dated 22.12.1987 and 01.02.1988 to the Oriental Insurance Company Limited stating that tracing of the packages in question could not be effected and 'B' certificate was issued by the Port Trust still holds good. Thereafter, Ex.A14 letter of subrogation was executed.

12.It is well settled law that a person who claims damages has to prove his case by letting oral and documentary evidence. On going through the judgment and decree passed by the trial Court, it would reveal that the first respondent/first plaintiff has not proved his case by examining any witness. It is also well settled law that the plaintiffs are entitled the relief only on the basis of their own case and not by taking advantage of the loop holes from the case of the defendant. The trial Court has held that the respondents/plaintiffs proved that there is short landing of cargo and also the quantum of damages they claimed.

13.It is an admitted fact that author of Exs.B1 to B3, who is the clearing agent of the first respondent/first plaintiff namely, Thimmeswara Rao was not examined before the Court. As soon as the vessel 'Vishva Aditya' reached Madras Port Trust, Exs.B1 to B3/letters came into existence. As per Ex.B2 letter dated 30.09.1987, there are two cases. In Ex.B1 dated 28.09.1987, it was stated that out of two cases, one is lying under NIL mark and the case was completely broken and hence, sought for survey of the above cases. So surveyor was arranged and report has been given, on which basis, the clearing agent sought for amended delivery note for facilitating him to clear the cargo under Ex.B2. As per Ex.B3 dated 05.10.1987, the clearing agent sought for the issuance of entry letter to Customs to enable him to file the customs papers and arrange for clearance and requested to treat that cargo as excess landed. In such circumstances, I am of the view, once it was admitted that there are two packages reached, out of which, one package is lying under Nil mark in damaged condition, it is the duty of the respondents/plaintiffs to prove their case by examining the clearing agent namely, Thimmeswara Rao as to what is the actual damage as per the surveyor report. Admittedly, he was not examined before the Court. So non examination of Thimmeswara Rao is fatal to the case of the respondents/plaintiffs. Hence, adverse inference has been drawn

which shows that one package is lying under the Nil mark in damaged condition.

14.It is pertinent to note that the report given by the surveyor, who surveyed the above cases was not marked and the amended delivery note was also not marked before the Court. It clearly shows that the respondents/plaintiffs have not come to the Court with clean hands.

15.The learned counsel for the respondents/plaintiffs has drawn attention of this Court through the Madras Port Trust, Traffic Department, Traffic Manual Volume II, Shipping Commercial and submits that the above manual shows that what are the procedures to be followed while excess cargo has been landed. The following clauses from the manual are extracted hereunder:
"3.18.Survey:

(i) By Steamer Agents on packages which bear outward signs of having been damaged in transit for which qualified receipts have been granted by the Port Trust.

Clause 3.20 deals with survey by the Port Trust

3.26. In the case of packages without marks, an application for survey will be made by the Steamer Agents and the parties interested viz., the consignees, the Steamer Agents and the Customs and Port Trust representatives must be present at the examination. Shed Master will be responsible if a 'nil' marked package or packages whose marks do not agree with the mark shown in the original delivery order are delivered without an amended Delivery Order.

3.27.Enquiry:

If in the course of delivery, any package is not found the consignee shall bring it to the notice of Shed Master who will arrange to trace the package with the help of the Balance Clerk or Tracer. After following the procedure, if the goods are not found, then only office will be issued 'B' Certificate for short landing.

The Shed Master on receipt of the Enquiry shall depute a tracer for tracing the packages by endorsing his name on the back of it and acknowledge attestation of the Tracer. It is the duty of the Tracer to physically check the shed, the overflow area or any other place where the cargo might have been transferred and report results. The traceability or non-traceability of the package at each locality shall be endorsed by the Tracer on the reverse of the enquiry application with his initial and date. The tracer shall submit his report within three days of the date of Enquiry or immediately the package is traced. If the packages are traceable the Shed Master shall intimate this to the consignee or his representative and also put up on the notice board the availability of the package and location and immediately arrange to issue 'A' certificate. If the packages are not traceable he will ask the Balance Clerk to check up documents as Transfer notes and tally sheets. If the packages do not

find a place in the transfer note and is not available physically in the Shed and is not tallied he will return the enquiry form showing the packages as short-landed to the Section Office who will issue a 'B' Certificate. If the package has been shown as landed he will cause further intensive search and when he is thoroughly satisfied that the packages are not available any where in the Trust's premises, he will report the case as one of landed but missing. The Shed Master shall certify the disposals and send the Enquiry Application to Section Office who will then issue the necessary certificates. The certificates are issued in the form prescribed. "A" Certificate is issued for packages uncleared and that have been traced and are available for delivery.

.. . . .

No package for which 'B' certificate has been granted or shown as short-landed should be delivered until authorised by the Customs in writing. "

16. Learned counsel for the respondents/plaintiffs submits that it is the procedure that once 'B' certificate was issued, until authorised by the Customs in writing, they will not permit to take cargo. But whereas clearing agent of the first respondent himself admitted that out of two packages, one package is lying under Nil mark and it reached the Port Trust in damaged condition. Hence the clearing agent of first respondent sought for appointment of surveyor to survey the cargo and after receiving his report, he sought for amended delivery note. As already stated that the report given by the surveyor was not filed before the Court.

17. At this juncture, it is appropriate to consider the decision relied upon by the learned counsel for the respondents/plaintiffs reported in 2001 (1) CTC 193 (The Trustees of the Port of Madras rep. by its Chairman Madras Port Trust, Rajaji Salai, Madras-1 v. Nizam Paper and Board Mills Limited rep. by its Executive Director S. Mohamed Yusuf Old Palace Building Pudukottai-622 001), it was held that the Madras Port Trust Traffic Manual gives the procedures and practices to be adopted for movement of cargo and consequential handling. In para-8, it is held as follows:

"8. The Madras Port Trust Traffic Manual gives the procedures and practices to be adopted for movement of cargo and consequential handling. When a consignee finds that some of his packages are not delivered, he files an enquiry form. In this case, the enquiry form has been filed by the consignee who received only 437 bales out of the 520 bales that were imported by him. The bales as stated earlier ought to have contained white paper cuttings and computer-paper print outs. The enquiry form which is filed as Ex-A2 brought to the notice of the appellant that 83 bales covered by import application No.651 of 1961 dated 10.11.1981 are not traceable in the harbour premises. In the printed

enquiry form there is also a request that when traced the packages may be pointed out or necessary certificates may be issued. These certificates are issued in the form prescribed. From para 3.27 in volume 2 of the Madras Port Trust Traffic Manual the nature of these certificates can be known.

" 'A' certificate is issued for packages uncleared and that have been traced and are available for delivery. 'B' for packages which have been ascertained to have been short landed or which, the Trust sees reason to believe have not come into its custody and 'C' certificate for packages which have come into its custody but are not available for delivery." "

But the above decision is not relevant to the facts of the present case. Because Madras Port Trust is having traffic manual and they followed the procedures laid down in that manual. As per the Traffic Manual, once 'B' certificate was issued, until authorised by the Customs in writing, they are not permitted to clear the cargo. In the case on hand, Ex.A4 'B' certificate has been issued on 08.10.1987, but much before itself, the first respondent's clearing agent has sent Exs.B1 to B3 letters seeking amended delivery note. In such circumstances, I am of the view, first respondent herein has not proved the quantum of actual damage they sustained. Because as already stated that in Ex.B1, there was a marking. Unless the author of Ex.B1 was examined before the Court, the Court cannot be taken into consideration the damage as claimed by the respondents/plaintiffs. In such circumstances, one package is not in damaged condition. So issuance of 'B' certificate will not given a right to the plaintiffs/respondents to put forth their case by stating that it is short landing. Thus, point Nos.1 and 3 are answered in favour of the appellant/defendant.

18.Point No.2:

The second limb of argument advanced by the learned counsel for the appellant/defendant is that the first respondent/first plaintiff has not proved the actual damage they sustained and they have not filed the document to show that what is the actual value of their goods. In Ex.A2, the value was mentioned as "LIT. 39.030.700". The goods are insured for a sum of Rs.4,32,712.29 as per the insurance policy on 18.05.1987. In Ex.A3, weight of the packages alone was mentioned. Admittedly, the first respondent is claiming amount only on the basis of the sum insured.

19.Learned counsel for the appellant/defendant would submit that invoice is not part of bill of lading and for the reason, he relied upon the decision of the Apex Court reported in AIR 2008 SC 728 (Shipping Corporation of India Ltd. v. M/S.Bharat Earth Movers Ltd. and another), wherein it was held that invoice is not part of bill of lading. It is appropriate to incorporate para-19, which is as follows:

"19. A contention has been raised before us for the first time that the value of the goods had been declared in the Bill of Lading. It is based on the premise that Bill of Lading refers to the invoice. We cannot accept the said contention. Invoice is not a part of the Bill of Lading. The value of the goods is required to be stated on the Bill of Lading so as to enable the shipping concern to calculate the quantum of freight. It cannot, in absence of any statutory provisions, be held to be incorporated therein by necessary implication or otherwise."

20. Learned counsel for the appellant/defendant has also relied upon another decision reported in 1998 (8) SCC 541 (New India Assurance Company Limited v. Economic Transport Corporation) and submits that it is the duty of the respondents to prove that damage is caused only by the defendant carrier. As per Exs.B1 to B3, one package is lying under Nil mark in damaged condition. Under such circumstances, the above decision is not applicable to the facts of the present case.

21. He also relied upon another decision reported in Law Weekly page No.173 in W.Jayaraghavan v. The Leo Films in O.S.A.No.32 of 1946 and submits that as per Section 73 of the Contract Act, nominal damages cannot be recovered in the absence of proof of damage, and proof of damage is necessary to enable recoverability. The law cannot recognise any loss which does not naturally follow from the breach of the contract between the parties. The party suffering by the breach is not entitled to recover damages in respect of every misfortune indirectly occasioned to him by the other side's default, especially when the other side had no notice of the loss flowing as a consequence of his default. But the above decision is not applicable to the facts of the present case, because as per the documents relied upon by the defendant/appellant, out of two packages, one package is lying under the Nil mark and it is badly damaged. For the same, surveyor was arranged and amended delivery note was issued. So the first respondent/first plaintiff cannot avail the claim amount as mentioned in insurance policy.

22. It is well settled that quantum of damage has to be proved by the plaintiff. Even though the first plaintiff/first respondent has received survey report, he has not filed the same before the Court. The amount was only mentioned as "LIT. 39.030.700" in Italian currency and no foreign exchange rate was mentioned and its Indian value has not been given on the date. Under the aforesaid circumstances, the first respondent/first plaintiff has not proved what is the actual damage caused to them. Unless they have proved the actual damage, they have not entitled to any amount. Furthermore, P.W.1 who is the Assistant from the Insurance Company has not personally aware of the same. So the trial Court has committed an

error in coming to the conclusion that the first respondent has proved the actual damage sustained by them. Thus, Point No.3 is answered against the respondents/plaintiffs.

23.Since Point No.3 is answered that the value of damage has not been proved by the first plaintiff, Point Nos.4 and 5 are also answered against the respondents/plaintiffs. Therefore, I am of the considered opinion, the trial Court has not considered Exs.B1 to B3 filed by the defendant/appellant and further, the actual damage sustained by the respondents/plaintiffs has not been proved by way of filing the invoice, survey report and foreign exchange rate on that date. So the decree and judgment passed by the trial Court is unsustainable and they are hereby set aside. Consequently, the First Appeal is allowed.

24.In fine,

- First Appeal is allowed.
- The decree and judgment passed by the trial Court are hereby set aside. Consequently, the suit is dismissed.
- Both the parties are directed to bear their own costs.

KJ

23.06.2015

At the time of pronouncing judgment, learned counsel for the appellant/defendant submits that at the time of admission, he has deposited the amount in the case.

2.Considering the submission made by the learned counsel for the appellant/defendant, if the appellant has deposited the amount in the case, he is permitted to withdraw the same.

kj

23.06.2015

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

kj

To

1.V Additional Judge,
City Civil Court, Chennai.

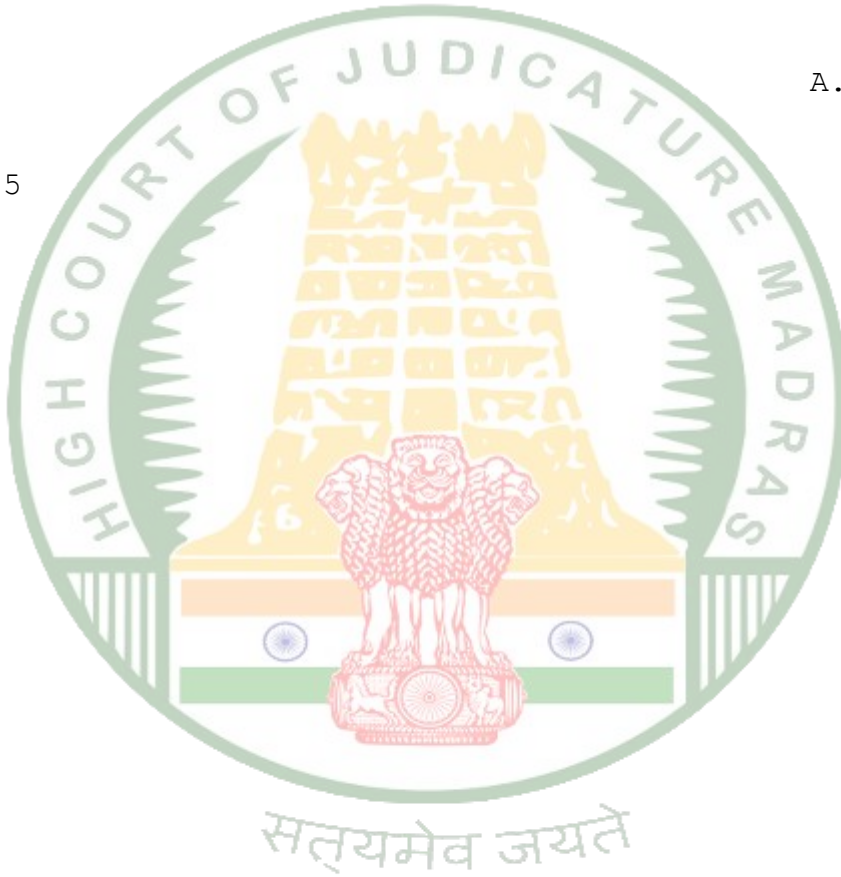
2.The Record Keeper,
V.R.Section, High Court, Chennai.

+ 1 cc to M/s. Nageswaran & Narichania, Advocate Sr.30814

+ 1 cc to Mr.K. Bijai Sundar, Advocate SR.30541

A.S.No.677 of 2004

TEJ(CO)
Eu 23.07.15



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