

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.07.2016

PRONOUNCED ON : 29.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
and
THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.618 of 2015

Senba @ Senbaga Srikumar .. Appellant/1st Accused

- Vs -

State rep. by The Inspector of Police,
Kalapet Police Station,
Puducherry.
(Crime No.120/2009) .. Respondent/Complainant

Prayer:- Appeal filed under Section 374 (2) of the Code of Criminal Procedure against the judgment passed by the learned III Additional Sessions Judge at Puducherry in S.C.No.74 of 2012 dated 10.09.2015.

For Appellant : Mr.V.Gopinath
Sr.Counsel for Mr.L.Mahendran

For Respondent : Mr.V.Balamurugane
Additional Public Prosecutor

(Pondy)

J U D G M E N T

(Judgment of the Court was delivered by S.Nagamuthu, J.)

The appellant is the first accused in S.C.No.74 of 2012 on the file of the learned III Additional Sessions Judge at Puducherry. There were four other accused who were arrayed as accused 2 to 5. The trial Court framed charges against all the five accused for offences punishable under Section 302 r/w 34 I.P.C., Section 201 r/w 34 I.P.C. and Section 506(ii) r/w 34 I.P.C. By judgment dated 10.09.2015, the Trial Court convicted the accused 1 to 3 and 5 alone for offences under Section 302 r/w 34 I.P.C. and sentenced them to undergo imprisonment for life and pay a fine of Rs.1000/- in default to undergo rigorous imprisonment for one year. The trial Court acquitted the accused 1 to 3 and 5 from all the other charges. The 4th accused is still absconding and the case has been split up for separate trial. Challenging the said conviction and sentence the appellant / first accused alone has come up with this appeal.

2. The case of the prosecution in brief is as follows:

2.1. The appellant / first accused and the second accused were life convicts. The accused 3 to 5 were involved in various other crimes and they were under-trial prisoners. All these five accused were lodged in Cell No.6 at Yard No.1 at the Central Prison, Kalapet in Puducherry.

2.2. The deceased in this case was one Mr.Selvaraj @ Siva. On 14.08.2009, he was brought to the Central Prison in pursuance of an order of remand made by the learned Judicial Magistrate No.1, Puducherry. After 06.00 p.m. on 14.08.2009, he was lodged in Cell No.6, Yard No.1, Central Prison, Kalapet along with accused 1 to 5. P.Ws.9 and 16 who were accused in some other cases were also lodged in the same Cell No.6 as under-trial prisoners.

2.3. During the night at 10.30 p.m. the inmates of Cell No.6 told P.W.6 who was a Jail Warder that the deceased had fallen sick. P.W.2 the Principal Warder took the deceased from out of the cell and further took him to the Primary Health Center at Kalapet for treatment. After treatment, he brought back the deceased to the prison and lodged him in the same cell at 11.40 p.m. on 14.08.2009. P.W.6 was on duty till 01.00 a.m. on 15.08.2009. Around 12.30 a.m. he noticed the deceased sleeping in the cell.

2.4. As per the Jail Rules, after lodging the prisoners in the cell, the same shall be closed and locked at 06.00 p.m. everyday and the same would be opened on the next day morning at 06.00 a.m. As per the said procedure, on 15.08.2009, P.W.2 opened the Cell No.6. All the five accused and P.Ws.9 and 16 came out of the cell. The deceased did not come out. P.W.2 and other Warders entered into the cell and found the deceased motionless. P.W.2 informed the same to P.W.1.

2.5. P.W.1 was the then Superintendent of the said prison. On getting the said information at 06.20 a.m. on 15.08.2009, immediately, he rushed to Cell No.6. He found that the deceased was dead. Soon, P.W.1 forwarded a complaint to the Inspector of Police, Kalapet Police Station. On receipt of the said complaint, P.W.28, the then Sub Inspector of Police, Kalapet Police Station registered a case in Crime No.120 of 2009 under Section 174 Cr.P.C. on 15.08.2009 at 11.20 a.m.

2.6. P.W.29 took up the case for investigation. The Executive Magistrate (P.W.22) conducted inquest on the body of the deceased. P.W.29 examined various witnesses including these accused. Based on the report of P.W.22, he altered the case into one under Sections 147 and 302 I.P.C. He examined many persons including the officials and the Warders in the prison and recorded their statements. The Postmortem revealed that the deceased had died due to injuries on the chest and other parts of the body more particularly due to the fracture of the sternum between second and third ribs. On completing the investigation, he laid chargesheet against the accused alleging that the accused 1 to 5 had attacked

the deceased in the prison as he did not agree for homosex. Thus, according to the final report filed by P.W.29, these five accused caused the death of the deceased. P.Ws.9 and 16 claimed to have witnessed the occurrence and therefore they were shown as eye witnesses.

2.7. Based on the above report of P.W.29 and other materials placed, the trial Court framed charges as detailed in the first paragraph of this judgment. The accused denied the same as false. In order to prove the case, on the side of the prosecution, as many as 29 witnesses were examined, 63 documents and 19 material objects were marked.

2.8. Out of the said witnesses, P.W.1 was the then Superintendent of Police of the Central Prison, Puducherry. According to him, all these five accused and P.Ws.9 and 16 were lodged in Cell No.6 in the Central prison. The deceased was also lodged in the same cell at 06.00 p.m. on 14.08.2009. He has further stated that on 15.08.2009 at 06.20 a.m. P.W.2 the Warder informed him that the deceased was lying in Cell No.6 motionless indicating that he was no more. He has further stated that he went to the cell, verified the same and made a complaint to the police. P.W.2 was the Principal Warder of the said cell. He was on duty on the day of occurrence. According to him, on 14.08.2009, at 06.30 p.m. the deceased was lodged in Cell No.6 as under-trial prisoner. He has further stated that around 07.00 p.m. he was informed that the deceased had fallen sick and therefore sent him to the Primary Health Centre at Kalapet and after treatment, the deceased was brought back to the prison. He has further stated that as per the Rules of the prison, on 15.08.2009, at 06.00 a.m. when he opened the Cell No.6, the accused 1 to 5 and P.Ws.9 and 16 came out safely but the deceased was lying still inside the cell and he was found dead and he informed the same to P.W.1. P.W.3 is yet another Warder in the same prison. According to him, on 14.08.2009, at 06.30 p.m. the deceased was lodged in Cell No.6. He has further stated that he turned for duty at 01.00 a.m. on 15.08.2009 and at that time, when he peeped through the main gate of the cell, he found the deceased sleeping and in the morning along with P.W.2 when he opened the cell at 06.00 a.m. he found the deceased lying dead in the cell.

2.9. P.W.4 was yet another Warder in the prison during the relevant time and he has also stated the same facts. P.W.5 was another male Warder in the prison. According to him, on 14.08.2009, around 10.30 p.m. when he was on rounds, the first accused informed him that the deceased was unwell and he was sleepless. He in turn informed the same to P.W.2. Then P.W.2 took the deceased out of Cell No.6 and rushed him to the Primary Health Centre, Kalapet and after treatment, he was again brought back and lodged in Cell No.6 at 11.40 p.m. P.W.6 is yet another jail Warder. He was on duty along with P.W.5 and he has also stated the same facts.

2.10. P.W.7 is the wife of the deceased. According to her, a
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case was registered against the deceased on the file of the Thavalakuppam Police Station and he was arrested in connection with the said case and remanded to judicial custody. According to her, the deceased was lodged in the Central Prison and on 15.08.2009, she was informed that the deceased was no more. P.W.8 is a neighbour of the deceased, has stated that he heard about the death of the deceased in the prison. He was treated as hostile.

2.11. P.W.9 was one of the inmates in Cell No.6 along with the deceased and the accused. He was examined to speak to the fact that the deceased was attacked by these five accused and killed. But unfortunately, he turned hostile and he has not supported the case of the prosecution in any manner. P.W.10 has stated that when the deceased was taken to the Primary Health Centre for treatment on 14.08.2009 at around 10.30 p.m., he escorted him and after treatment, according to him, he was brought back to the prison at 11.30 a.m. and handed over to P.W.2 and the deceased was accordingly lodged in the prison. P.W.11 was yet another escort who took the deceased to the Kalapet Primary Health Centre. According to him, on 14.08.2009, he turned out for duty at 08.00 p.m. and he was on duty till 06.00 a.m. on 15.08.2009. He has further stated that at 10.30 p.m. the deceased was taken to the Primary Health Centre for treatment and at that time he found that from the lungi of the deceased a bad odor of urine was smelt. He found that the right hand shoulder of the deceased reddish. He has further stated that past 11.00 p.m. he was brought back to the prison and lodged in Cell No.6.

2.12. P.W.13 was the staff nurse in the Primary Health Centre, Kalapet. According to her, at 11.00 p.m. on 14.08.2009, the deceased was brought to the Primary Health Centre by two policemen under escort for treatment. The deceased told that he had irritation in both the eyes and he was unable to sleep. P.W.13 has further stated that she gave pain killer tablets and also gave injection for the same. She further advised the escort to take him back to the prison and bring him back the next day for further treatment. P.W.14 is the sister of the deceased. She has stated that she came to know about the death of the deceased later. P.W.15 is a neighbour of the deceased. He has also not stated anything incriminating except that he heard about the occurrence.

2.13. P.W.16 is yet another star witness of the prosecution. He is one of the inmates along with the accused and the deceased. He was examined as an eyewitness to speak about the fact that these accused attacked the deceased and killed him. But unfortunately, he also turned hostile and he has not supported the case of the prosecution in any manner.

2.14. P.W.17 is the Village Administrative Officer at Kalapet village. He has stated about the confession statement made by accused 1 and 2 while in police custody on 02.10.2009. He has further stated that in pursuance of the said disclosure statement made, three lungi and two shirts were produced and the same were recovered. P.W.18 is the photographer who has stated that he took photographs of the deceased and Cell No.6 from various angles.

M.Os.5 to 14 are the photographs and CDs. P.W.19 was the then learned Judicial Magistrate No.1 at Puducherry. He has stated that he recorded the statements of P.Ws.9 and 16 under Section 164 Cr.P.C.

2.15. P.W.20 Dr.Balaraman has spoken about the postmortem conducted on the body of the deceased. According to him, he along with Dr.Diwakar conducted autopsy. He gave opinion that the deceased had died due to shock and hemorrhage due to blunt injuries on the chest. P.W.21 has stated that during the relevant time, he was working as the Sub Inspector of Police at Thavalakuppam Police Station. He further stated that he arrested the deceased for offence under Section 307 I.P.C. in Crime No.131 of 2009 and produced him before the learned Judicial Magistrate No.I, Puducherry and in pursuance of the remand order passed by the learned Magistrate, he took the deceased to the Central Prison, Kalapet and handed over him to the jail authorities at 05.45 p.m. on 14.08.2009. P.W.22 was the then District Magistrate, Puducherry and he has stated that he asked the Sub Divisional Magistrate to conduct enquiry and sent a report to NHRC, New Delhi.

2.16. P.W.23 was working as a Warder cum ambulance driver in the Central Prison, Kalapet. On 14.08.2009, he has stated that at 11.00 p.m. as per the direction of the Principal Warder, he drove the ambulance carrying the deceased to the Primary Health Centre for treatment and after treatment, he brought back the deceased in the same vehicle at 11.30 p.m. to the prison. P.W.24 an Assistant in the Sub Divisional Magistrate Court has stated that as per the orders of the Court, he forwarded the material objects for chemical examination.

2.17. P.W.25 was the Sub Divisional Magistrate (Executive Magistrate) Puducherry (North). During the relevant period, according to him on 15.08.2009 at 08.20 a.m. he received information about the above occurrence. After having received the report from the District Court, he along with Tahsildar and videographer went to Kalapet Jail. According to him, after following the procedure, he held enquiry in the prison. He examined the inmates and various officers and then he submitted a report. P.W.26 has stated that he was the Tahsildar, Ulavarkarai Taluk during the relevant period. He has further stated that he accompanied P.W.25 when he visited the prison for holding inquest. P.W.27 is yet another photographer who took photographs of the deceased. P.W.28 the then Sub Inspector of Police, Kalapet Police Station has spoken about the registration of the case and the investigation done by him. P.W.29 the then Inspector of Police, Kalapet Police Station has spoken about the investigation done and the chargesheet laid by him.

3. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. However, they did not choose to examine any witness nor mark any document on their side. Their defence was a total denial. Having considered all the above, the trial Court convicted accused 1, 3

and 5 as detailed in the first paragraph of this judgment and that is how, the appellant / first accused alone is before this Court with this appeal.

4. We have heard Mr.V.Gopinath, learned senior counsel appearing for the appellant and the learned Additional Public Prosecutor (Puducherry) appearing for the Government of Puducherry and also perused the records, carefully.

5. From the narration of facts and from the evidences let in by the prosecution, it can be culled out that on 14.08.2009, at 06.20 p.m. the deceased was lodged in Cell No.6 in the Central Prison, Kalapet, Puducherry. There is no dispute that all the five accused were also lodged already in the same cell. It is also not in dispute that P.Ws.9 and 16 were also lodged in the same cell. Thus, from 6.20 p.m. onwards in Cell No.6, there were a total number of 8 persons namely all the five accused, P.Ws.9 and 16 and the deceased.

6. It is also in evidence that around 10.00 p.m., the first accused informed the jail Warder that the deceased had fallen sick. Therefore, he was taken to the Primary Health Centre at Kalapet. P.W.13, the staff nurse at the Primary Health Centre has stated that the deceased told her that he had irritation in his eyes and therefore he was unable to sleep. There was no other complaint made by the deceased. She gave pain killer tablets and an injection. She advised to take the deceased back to the prison and bring him back in the morning for further treatment before the Doctor on the next day. Thus, he was brought back to the prison around 11.30 p.m. and he was again lodged in the very same cell. Thus, there is no dispute that he was lodged in Cell No.6 along with the accused 1 to 5 and P.Ws.9 and 16.

7. On the next day morning at 06.00 a.m. as per the procedure followed in the jail, Cell No.6 was opened by P.W.2 and the five accused and P.Ws.9 and 16 came out safely. But, the deceased was found dead inside the cell. The medical evidence as spoken by Dr.R.Balaraman (P.W.20) clearly shows that there were blunt injuries on the body of the deceased. He has further stated that there was fracture of the sternum and the deceased died due to shock and hemorrhage due to the said injuries.

8. Now the question is whether all these five accused or any one or more of them had caused these injuries, which resulted in the death of the deceased.

9. The learned senior counsel appearing for the appellant would submit that the possibility of the deceased sustaining the injuries before he was brought to the prison has not been ruled out. There is no medical record to show that at 06.20 p.m. before he was lodged, that any medical examination was conducted on him. It is also not in the record that the deceased made any complaint of any such injury to him. Around 10.00 p.m., the first accused had informed the jail Warder that the deceased was unwell. When he was taken by two police escorts to the Primary Health Centre, Kalapet, it is not the case of the prosecution that any injury was

noticed on the deceased. But the police constable (P.W.11) who escorted him to the Primary Health Centre has stated that in the shoulder of the deceased there was redness and that is also not supported by any medical evidence. The deceased also did not inform the staff nurse that he had any such injury already sustained. He complained only of irritation in the eyes and therefore he was sleepless. Had it been true that he had already fractured his sternum, he would have suffered unbearable pain and in such an event, he would have informed the same to the staff nurse at the Primary Health Centre. The very fact that he did not make any such complaint would go only to suggest that until he was treated by the nurse at the Primary Health Centre, he has not suffered the injuries out of which later on he died.

10. The learned senior counsel would further submit that while he was being brought back to the prison or in the prison premises, the deceased would have sustained the said injuries either by an accidental fall or manhandling by someone else. This possibility, according to the learned senior counsel, has not been ruled out. We find some force in the said argument. But, on this score, we cannot hold that the deceased had sustained injuries outside Cell No.6 before he was lodged at 11.30 p.m. as there is no evidence that he was manhandled before he was lodged in Cell No.6 at 11.30 p.m.

11. Inside the cell No.6, according to the case of the prosecution, all the five accused attacked the deceased, caused injuries, which resulted in his death. But P.Ws.9 and 16 who have been examined to speak about the same, unfortunately, as we have already pointed out, have turned hostile and they have not supported the case of the prosecution in any manner. Though they made statements under Section 164 Cr.P.C. to the effect that all these five accused had caused injuries on the deceased, they have disowned the same while under examination. It is an elementary principle of law that a statement given by a witness under Section 164 Cr.P.C., being a former statement, can be used either to contradict the maker of the statement as provided under Section 145 of the Evidence Act, by the adverse party or to use the same to corroborate the evidence of the maker of the statement as provided in Section 157 of the Evidence Act. In other words, we cannot treat the statements of these two witnesses under Section 164 of Cr.P.C. as a substantive evidence, so as to hold that whatever they have stated in their statements could be taken into consideration. Thus, the evidences of P.Ws.9 and 16 are not at all useful for the prosecution.

12. The learned Additional Public Prosecutor (Puducherry) would submit that since the deceased had sustained injuries, only inside Cell No.6, where these accused alone were there with the deceased, it should be presumed that these accused alone have attacked the deceased.

13. We find it difficult to accept the said argument. In Cell No.6 along with the deceased, there were seven other persons

including P.Ws.9 and 16. If the argument of the learned Additional Public Prosecutor that it should be presumed that the accused 1 to 5 were responsible for the injuries on the body of the deceased because they were in the cell, then the same presumption is to be raised against P.Ws.9 and 16 also because they were also with the other accused in Cell No.6.

14. Further, among the five accused, some one or more would have caused these injuries and others would have been innocent and they would have been sleeping in a corner of the cell without knowing as to what was happening to the deceased. Therefore, simply because these five accused were in the cell, we cannot conclusively raise a presumption that these five accused had caused the injuries on the deceased, which resulted in his death. Unless it is pointedly proved that any one or more of the specified accused were responsible for the injuries on the deceased, which resulted in his death, going by a general assumption that all the inmates in the cell would have caused the injuries on the deceased cannot be raised. Such conclusion could be arrived at only on mere surmise, which is not permissible in law. Thus, in our considered view, the prosecution has failed to prove as to whether any one of these accused or more of these accused had caused injuries on the deceased, which resulted in the death of the deceased. Simply because they were in the cell No.6 where the deceased had died, we cannot afford to convict a person who would have been innocently sleeping in a corner of the cell for the simple sin of being in the cell along with the others. Thus, we hold that the prosecution has failed to prove the case against the appellant beyond any reasonable doubt. Though the occurrence had taken place in the prison cell where the appellant, deceased and other accused were lodged, we are unable to give a finding as to who among the accused or all the accused had caused the death of the deceased. Therefore, we are forced to acquit the appellant / first accused.

15. It is true that the accused 2, 3 and 5 have not filed any appeal challenging their conviction and sentence, they also stand in the same footing like that of appellant / first accused herein and since there is no evidence to conclusively prove that the accused 2, 3 and 5 have committed the crime, they are also entitled for acquittal. In this regard, we may refer to the Judgment of the Hon'ble Supreme Court in Dandu Lakshmi Reddy vs. State of A.P. reported in 1999 (7) SCC 69, in paragraph 25, the Hon'ble Supreme Court has held as follows:

"25.The mother of the appellant Narayanamma is languishing in jail at present pursuant to the conviction and sentence awarded to her in this case. Of course her conviction is not before us as she did not file any special leave petition. But this Court has set up a judicious precedent for the purpose of averting miscarriage of justice in similar situations. On the evaluation of a case, if this Court reaches the conclusion that no conviction of any accused is possible the benefit of that decision must be extended to his co-

accused also though he has not challenged the order by means of an appeal petition to this Court. (vide Rajaram v. State of M.P.)"

16. Similar view has been taken by the Hon'ble Supreme Court in Rajaram and others v. State of M.P. reported in (1994) 2 SCC 568, wherein, in paragraph No.10, the Hon'ble Supreme Court has held as under:

"10. Ram Sahai (accused 4) has not filed any appeal against his conviction and sentence. However, we find that his case is identical to the case of the appellants and there is no distinguishing feature. In our opinion it is therefore appropriate that the benefit of our Judgment should also be made available to Ram Sahai. His conviction is also altered from The one under Sections 302/149 IPC to one under Section 304 Part II read with Section 149 IPC. He is also sentenced to five years' rigorous imprisonment and to pay a fine of Rs.1000. In default to payment of fine, he shall suffer further rigorous imprisonment for one year. The fine when realised from Ram Sahai shall be paid to PW 7 Sahodara Bai."

17. Similarly in Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra reported in JT 2002 (2) SC 158, the Hon'ble Supreme Court, after having referred to the Harbans Singh case, has held in paragraph No.8 as follows:

"8. After bestowing our anxious consideration on the fact situation in this case and also the spirit of Article 21 of the Constitution, we hereby order that the conviction passed on the second accused Jabbar shall also stand altered to section 304, part I and a sentence of rigorous imprisonment for ten years be awarded to him. This is done on a parity of reasoning and justice, otherwise glaring injustice would result as for him in a case where his role was by no means more serious than that of the present appellant who was A1 in the case."

18. In view of the said settled position of law, though, in the instant case, the accused 2, 3 and 5 have not made any appeal, the conviction and sentence imposed on them are also liable to be set aside. Accordingly, we are inclined to set aside the same.

19. Admittedly, in this case, the deceased died while he was in the prison cell. It is the duty of the State to ensure the safety of the remand prisoners while in prison cell or in the prison premises. In this case, since the deceased had to die because of lack of safety provided by the State, in our considered view, as provided under Section 357-A Cr.P.C, the dependents of the deceased are entitled for compensation to the tune of Rs.3,00,000/- which is the minimum compensation to be awarded under the Union Territory of Puducherry Victim Assistance Scheme, 2012. Therefore, we direct the Union Territory of Puducherry State Legal Services

Authority to award a sum of Rs.3,00,000/- to the dependents of the deceased under the Union Territory of Puducherry Victim Assistance Scheme, 2012 framed under Section 357-A of Cr.P.C.

20. In the result,

(i) The appeal is allowed and the conviction and sentence imposed by the learned III Additional Sessions Judge at Puducherry in S.C.No.74 of 2012 dated 10.09.2015 against the appellant / first accused (Senba @ Senbaga Sri Kumar) is set aside and the appellant / first accused is acquitted. The fine amount, if any, paid by him shall be refunded. Since the appellant / first accused is in jail, he is directed to be set at liberty forthwith, unless his detention is required in connection with any other case.

(ii) The conviction and sentence imposed by the learned III Additional Sessions Judge at Puducherry in S.C.No.74 of 2012 dated 10.09.2015 against the second accused (Kummi @ Kummikumaran), the third accused (Senthil @ Senthilkumar @ Suruttai Senthil) and the fifth accused (Meesai @ Saarangan) are set aside and they are acquitted. The fine amount, if any, paid by them shall be refunded.

(iii) It is further directed that a sum of Rs.3,00,000/- [Rupees Three Lakhs only] be awarded by the Union Territory of Puducherry State Legal Services Authority under the Union Territory of Puducherry Victim Assistance Scheme, 2012 framed under Section 357-A of Cr.P.C. to the dependents of the deceased and disburse the amount after ascertaining as to who are all the dependents of the deceased who are entitled for the amount and their respective share by holding necessary enquiry. The said exercise shall be completed within a period of six months from today.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1. The III Additional Sessions Judge,
Puducherry.

2.-do- thro'The Principal Sessions Judge, Puducherry.

3.The Judicial Magistrate II,
Puducherry.

4.The Chief Judicial Magistrate,
Puducherry.

5.The Superintendent, Central Prison,
Puducherry.

6. The The Inspector of Police,
Kalapet Police Station,
Puducherry.

7. The Public Prosecutor (Pondy),
Madras High Court.

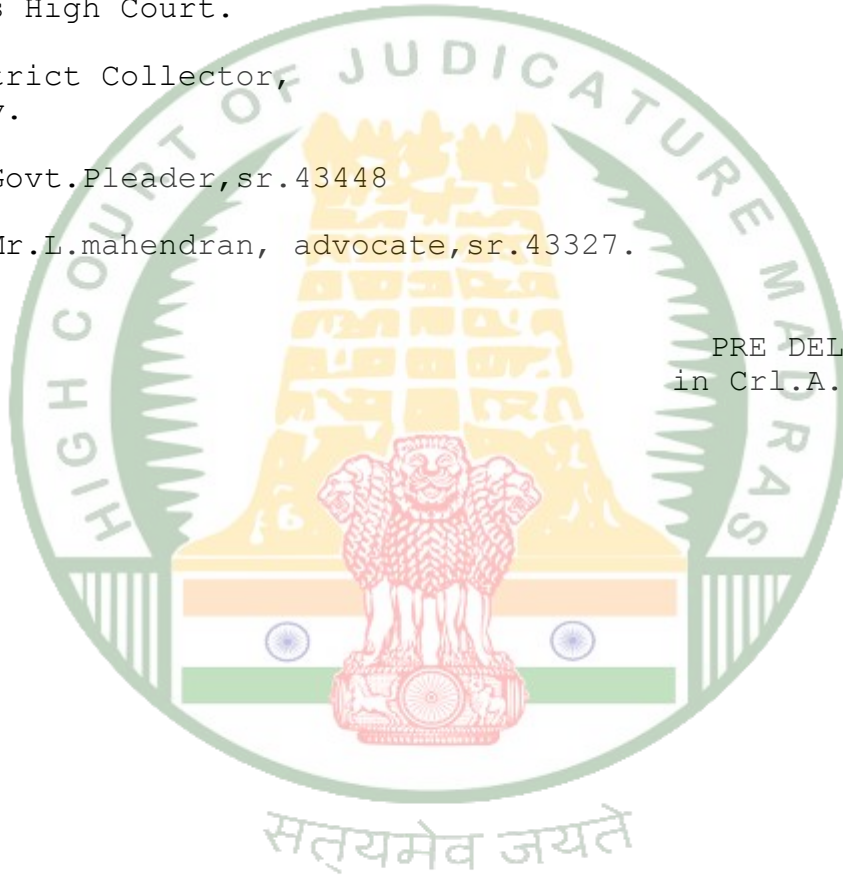
8.The District Collector,
Puducherry.

+1 cc to Govt.Pleader,sr.43448

+2 cc to Mr.L.mahendran, advocate,sr.43327.

krd 11/8

PRE DELIVERY JUDGMENT
in Crl.A.No.618 of 2015



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