

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2016

CORAM:

THE HON'BLE MR.JUSTICE R.MALA

Crl.O.P.No.20184 of 2015

Suresh Babu

.. Petitioner / Accused No.3

Vs.

State by

1. The Inspector of Police
Talampur Police Station,
Kancheepuram District.

... Respondent / Complainant

2.Jeeva Narayanan

... Respondent /Defacto Complainant

Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to quash the First Information Report in Crime No.155 of 2015 on the file of the first respondent.

For Petitioner : Mr.M.Ravindran, Senior Counsel
for Mr.B.Manoharan

For respondent-1 : Mr.C.Emalias
Additional Public Prosecutor

For respondent-2 : Mr.A.Kumaraguru

O R D E R

The petitioner/A3 in Crime No.155 of 2015 has come forward with this application to quash the FIR which is filed against him for offences under Sections 406 and 420 of IPC.

2. The case of the prosecution is that during the year 2012 the defacto complainant, intended to purchase a house and hence, approached the accused persons who were running the construction/real estate business in the name and style of M/s.Unitech Ltd.. The said company developed individual 'Villas' at Nallambakkam Village, Chengaplet Taluk, Kancheepuram District. The accused persons took the complainant to the said place and showed Plot Nos. 37, 42, 78, 86, 48, 51, 56 to her. Out of the said plots, the defacto complainant

selected Plot No.42. A1, one Kalaivani also agreed to construct a house for the complainant in the said Plot. They also showed a fully constructed house to the complainant. On the next day when the complainant was ready and willing to part with 10% of the total amount, she was informed that Plot No.42 was sold out and that if she wishes, she may take plot No.37 as all the houses will be looking identical. Since No.37 is not a lucky number, the complainant refused. But the accused persons pacified her by saying that they do not want to lose a customer like the complainant and that they would change the plot number as 38A and would construct a house for her within one year. Believing the same, on 27.06.2012, she parted with a sum of Rs.6,52,790/- out of which Rs.50,000/- was taken as token advance for construction and the remaining amount as the undivided share amount for her plot. Since the door number was changed to 38A as per the wish and will of the complainant, the accused persons demanded a further sum of Rs.4,51,283/- in excess. When questioned, the accused persons stated that the said plot is a corner plot with free flow of air and that the complainant can put up a garden in that. Since the accused party accepted for the change of plot number as per her wish, the complainant accepted to pay the said amount. On 14.08.2012, she remitted Rs.60,00,000/- through RTGS. After completion of the construction, the accused persons informed the complainant about the same through telephone. When the complainant demanded for completion certificate, the accused persons threatened her saying that if she does not accept the said house, she has to pay 5% interest for the balance amount to be remitted by her. Since the accused persons cheated her, she came forward to file a private complaint before the learned Magistrate, on whose orders, the present complaint in Crime No.155 of 2015 for the offences u/s.406 and 420 IPC, was registered.

3. Learned Senior Counsel appearing for the petitioner/third accused would submit that though the construction of the said 'Villa' was completed as per the agreement, the complainant had not chosen to take possession and settle the balance dues. She had refused to take possession saying one reason or the other. He would further submit that even if there is any violation in the agreement, the complainant should have invoked Arbitration proceedings as per clause 38 of the agreement for construction of row house apartment dated 29.06.2012.

4. However, the complainant had chosen to file a complaint u/s.156[3] Cr.P.C. It is the further submission of the learned Senior Counsel that the learned Magistrate had issued orders to register the case, without taking into consideration, the nature of the case and the said order was passed in total non-application of mind. In support of his contention, he would relied upon the following decisions:-

[a]Priyanka Srivastava and Another vs. State of Uttar

Pradesh and Others reported in 2015(6) SCC 287

[b]Ramdev Food Products P. Ltd., vs. State of Gujarat reported in 2015 (6) SCC 439

5. It is also his submission that even if we take into account that there is a violation in the contract, the Court has to look into, as to whether any criminal breach and whether any prima facie case is made out against the accused. It is further stated that the documents on the side of the defence have also to be taken into consideration while dealing with the petition filed under Section 482 Cr.P.C. The communication between both the parties also to be taken into account. In support of the aforesaid contentions, the learned Senior Counsel relied on the following decisions:

[a] All Cargo Moves (India) Pvt. Ltd. and Others vs. Dhanesh Badarmal Jain and Another reported in 2007 (14) SCC 776.

[b] State of Haryana and Others vs. Bhajanlal and Others reported in 1992 (1) SCC 335.

6. Learned Senior counsel also brought to the notice of this Court an unreported judgment dated 05.06.2015 made in Crl.O.P.Nos.31158 & 18514 of 2014 (PNPJ) wherein, the learned Single Judge of this Court, while applying the principles rendered in Bajanlal's case, has quashed the FIR since no prima facie case has been made out. In the instant case, it is not the case of the complainant that the property which she purchased was not built up as per the agreement, but it is her case that the property was not in accordance with 'Vasthu'. Even if that be the case, the complainant could have taken the matter to an Arbitrator by invoking the Arbitration clause and though the company has informed the complainant about the completion of the building as early as 21.01.2013, she kept quiet for nearly one year and thereafter, had preferred a complaint for the reasons best known to her. A bare reading of the complaint would disclose that the issue is purely civil in nature and hence, learned Senior counsel prays for quashing the First Information Report.

7. On the other hand, the learned counsel appearing for the 2nd respondent/defacto complainant would submit that the complainant had asked for 'Villa' No.42 at the first instance. But, the accused persons told her that the said Plot No.42 had already been sold to someone else and they insisted her to choose Plot No.37, which is as same as Plot No.42. Even after two days, when she was disagreeable with the said plot stating that it is not suitable to her as per "Vasthu", the accused persons willingly changed the Plot number as '38A' instead of '37', and convinced her to enter into an agreement on 29.06.2012. Thereafter, an agreement for sale and an construction agreement had been entered into between them on the same day. After receiving the telephonic call from the accused

persons stating that the 'Villa' is ready for occupation, the complainant visited the plot and found that it was not built up as per 'Vasthu' and drainage connection was also not as per the plan shown to her. Immediately, she issued notice on 01.09.2013 refusing to take possession. Since, no response was forthcoming even after eight months, she issued another notice on 02.04.2014. Since the second notice also went in vain, the 2nd respondent had chosen to prefer the present complaint. In support of his contentions, the learned counsel placed reliance on the decision of the Hon'ble Apex Court in Vijayander Kumar and Others vs. State of Rajasthan and Another reported in CDJ 2014 SC 109.

8. The learned Additional Public Prosecutor would submit that the petitioner is the Assistant General Manager of Unitech Limited and only as per the statement recorded u/s.161 Cr.P.C., the case was taken up for investigation and on investigation, it was found that the said case is of civil in nature. However, he prayed for dismissal of the Criminal Original Petition.

9. Heard the learned Senior Counsel for the petitioner; learned counsel for the 2nd respondent/defacto complainant and the learned Additional Public Prosecutor and perused the materials placed on record.

10. Upon hearing the submissions made on either side and upon perusing the documents including the Agreement for sale of UDS and the Construction Agreement entered into between the 2nd respondent and the defacto complainant dated 29.06.2012, it is the admitted fact that the petitioner is A3 in the case and he is the Assistant General Manager of Unitech Limited and A1 is the Sales Executive and A2 is the Manager [Commercial] and that the said Unitech Limited is a Developers and Promoters of Villas and that an agreement was entered into between the parties on 29.06.2012.

11. The point for consideration is as to whether any prima facie case has been made out against the petitioner?

12. The first point to be decided is whether the documents filed by the accused has been taken into consideration for deciding the quash application under Section 482 Cr.P.C ?

12.1. At this juncture, it would be appropriate to consider the decision rendered in All Cargo Moves (India) Pvt. Ltd. and Others vs. Dhanesh Badarmal Jain and Another reported in 2007 (14) SCC 776, wherein at paragraph 16 it was held as follows:-

"16. We are of the opinion that the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety, do not disclose an offence. For the said purpose, this Court may not only take into

consideration the admitted facts but it is also permissible to look into the pleadings of Respondent-1/plaintiff in the suit. No allegation whatsoever was made against the applicants herein in the notice. What was contended was negligence and/or breach of contract on the part of the carriers and their agent. Breach of contract simplicitor does not constitute an offence. For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie correct, take into consideration the correspondence exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is inexpressible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the court." [Emphasis supplied]

12.2. It would also be appropriate to consider the decision made in the case of State of Orissa v. Debendra Nath Padhi reported in AIR 2005 SC 359, wherein it was held that the High Court may consider unimpeachable evidence while exercising jurisdiction for quashing under Section 482 of the Code.

Considering the facts of the present case in the light of the above decisions, I am of the view that since the documents filed by the petitioner/A3 is the correspondence exchanged between the parties and they are admitted documents, they can be relied upon for deciding this quash application under Section 482 Cr.P.C.

13. At this juncture, it would be appropriate to consider the various decisions in respect of quashing of the FIR on the applications filed u/s.482 Cr.P.C.

(a) In the decision made in State of Haryana and Others vs. Bhajanlal and Others reported in 1992 (1) SCC 335, the Honble Apex Court has held that the Court has to look into whether a criminal proceeding is manifestly attended with mala fide intention and/or whether the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused. It would be useful to extract the paragraph 102 of the said decision:

"102. In the backdrop of the interpretation of

the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the inherent power under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or right formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused."

(b) In the decision made in Hridaya Ranjan Prasad Verma and Others vs. State of Bihar and Another reported in (2000) 4 Supreme Court Cases 168, it would be useful to extract paragraphs 12 to 14 of the said decision:

"12. On a reading of the complaint portions of which have been extracted earlier it is clear that the main offence alleged to have been committed by the appellants is 'cheating' punishable under section 420 IPC.

13. Cheating is defined in Section 415 of the Code as,

"415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation - A dishonest concealment of facts is a deception within the meaning of this section.

The section requires -

(1) Deception of any person.

(2) (a) Fraudulently or dishonestly inducing that

person

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body mind, reputation or property.

14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. in the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. "

(c) In the unreported decision dated 16.09.2011 rendered by me in Crl.O.P.(MD).No.12 of 2010, Desh Mithar Popli vs. State, it was held in paragraphs 10 and 11 as follows:

"10. At this juncture, it is also appropriate to consider the decision in Hridaya Ranjan Prasad Verma and Others vs. State of Bihar and Another reported in (2000) 4 Supreme Court Cases 168, wherein, this Court has held as follows:

11. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot given rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

(d) In the unreported decision dated 05.06.2015 made in Crl.O.P.Nos.31188 and 10514 of 2014, Tamilarasi vs. State, it was held in paragraph 9 as follows:

"9. I have no quarrel with the preposition of law laid down in the aforesaid judgments of the Apex Court. The Hon'ble Supreme Court in State of Haryana Vs. Bhajan Lal AIR 1992 SC 604 has laid down the parameters for quashing an FIR. If the complaint in this present case is tested on the anvil of the law laid down in Bhajan Lal's case, it is clear that the FIR in this case is a sheer abuse of process of law in as much as the complaint does not disclose the commission of any offence much less any cognizable offence."

14. Considering the above citations along with the complaint, it is not the case of the complainant that the construction was not done in accordance with the specifications and the plinth area is not in accordance with the agreement, but it is the case of the complainant that the property she intended to purchase was not in accordance with Vasthu.

15. It is an admitted fact that an agreement had been entered into between the parties in pursuance of the allotment letter and the complainant had agreed to the terms of the sale agreement and had also paid the sale consideration as per the clause stipulated. The payment made by way of Cheque, Demand Draft, RTGS was also not in dispute between the parties. It is also admitted between both the parties that on completion of the construction of 'Villa' in Plot No.38A, the same had been duly intimated to the complainant on 21.01.2013. Only at that point of time, the dispute had started between the parties.

16. Thus, the principle laid down by the Hon'ble Apex Court in the case of State of Haryana and Others vs. Bhajanlal and Others reported in 1992 (1) SCC 335 and the various other decisions discussed supra would show that the case on hand relates to the Civil dispute since there is a specific arbitration clause as per clause 38 of the agreement for construction of row house apartment dated 29.06.2012. However, the complainant without seeking for the relief under the arbitration clause had chosen to prefer a criminal complaint. Hence, it is a fit case to quash the FIR, by applying the dictum laid down in Bhajanlal's case.

17. The second limb of the argument advanced by the learned Senior Counsel appearing for the petitioner is that the learned Judicial Magistrate had not considered the averment made in the complaint, but he had simply forwarded the same to the Investigating Officer, which amounts to non-application of mind. To substantiate the said proposition, the learned Senior Counsel

relied upon the decisions of the Hon'ble Apex Court wherein it was held that while deciding the quash application filed under Section 156(3) Cr.P.C, the learned Judicial Magistrate must apply his mind and thereafter, forward the complaint to the investigating agency.

18.1. In the decision made in Priyanka Srivastava and Another vs. State of Uttar Pradesh and Others reported in 2015 (6) SCC 287, in paragraph 31, it was held as follows:

"31. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

18.2. In the decision made in Ramdev Food Products P. Ltd., vs. State of Gujarat reported in 2015 (6) SCC 439, it was held that direction for investigation under Section 156(3) Cr.P.C is to be issued only after application of mind by the Magistrate. It is appropriate to incorporate paragraph 22.1 of the said decision:

22. Thus, we answer the first question by holding that:

22.1. The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to

straightaway direct investigation, such a direction is issued.

18.3. At this juncture, it would also be appropriate to incorporate the relevant portion in the FIR.

“அய்யா, இன்று 23.04.2015-ந் தேதி பகல் 12.00 மணியளவில் வாதி ஜீவா நாராயணன் என்பவர் செங்கல்பட்டு குற்றவியல் நடுவர் எண்.1 நீதிமன்றத்தில் மனு அளித்து G.T.M.P.No.10888/14 படி விசாரணை செய்து நடவடிக்கை எடுக்க வேண்டி Direction கேட்டு வந்து கொடுத்த புகாரின் மீது தாழம்பூர் காவல் நிலைய குற்ற எண்.155/2015, பிரிவ , 406,420இதச-வில் வழக்கு பதிவு செய்து இதன் அசல் நகலை கனம் துஆ No.1 செங்கல்கட்டு நீதிமன்றம் அனுப்பிய,ம் மற்ற நகல்களை சம்மந்தப்பட்ட அதிகாரிகளுக்கு அனுப்பிய,ம் நான் விசாரணைக்கு எடுத்துக் கொண்டேன்.”

19. In the case on hand, it is not known as to whether the learned Magistrate has applied his/her mind while forwarding the complaint to the respondent police for investigation, because a copy of the order said to have been passed by the said Magistrate in CrI.M.P.No.10888 of 2014 had not been produced before this Court nor annexed in the typed set of papers. Hence, the argument advanced by the learned Senior Counsel for the petitioner, in this regard is unacceptable.

20.1. The learned counsel appearing for the 2nd respondent/defacto complainant relied upon the decision of the Hon'ble Apex Court made in the case of Vijayander Kumar and Others vs. State of Rajasthan and Another reported in CDJ 2014 SC 109 and submits that if a complaint make out both civil as well as a criminal offence and only because a civil remedy may also be available to the complainant, that itself cannot be a ground to quash a criminal proceeding. It would be appropriate to incorporate paragraphs 12 and 13 of the said decision:

"12. Learned counsel for the respondents is correct in contending that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to the informant/complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint discloses a criminal offence or not. This proposition is supported by several judgments of this Court as noted in paragraph 16 of judgment in the case of Ravindrakumar Madhanlal Goenka and Another V. Rugmini Ram Raghav Spinners Private Limited [2009] 11 SCC 529.

13. On considering the facts of the present case it is

found that the facts were properly noticed by the High Court on earlier occasion while examining the petition preferred by the appellants for quashing of FIR of this case. The same view has been reiterated by the High Court in the order under appeal for not interfering with the order of cognizance by the learned Magistrate. Hence, we do not find any good ground to interfere with the criminal proceedings against the appellants at this stage. The appeal is, therefore, dismissed. No costs."

There is no quarrel over the said proposition because admittedly on perusal of the complaint, no criminal offence has been made out against the petitioner except that his name has been mentioned and it is not stated that he entered into an agreement with the defacto complainant.

20.2. The next decision relied on by the learned counsel for the 2nd respondent/defacto complainant is made in the case of Sridhar v. State rep by Special Sub-Inspector of Police, Tiruppur District and Another reported in CDJ 2013 MHC 4509, wherein it was held that at the time of deciding the quash application, it is not the duty caused upon the Court to decide whether it is a fit case for conviction. It is appropriate to incorporate paragraph 32 of the said decision:

"32. It would not be proper for the High Court to analyse the case of the complainant in the light of all the probabilities in order to determine whether conviction would be sustainable and on such premise arriving at a conclusion that the proceedings are to be quashed. In a proceedings instituted on a complaint, exercise of inherent powers to quash the proceedings is called for only in a case in which the complaint does not disclose any offence or is frivolous, vexatious or oppressive. There is no need to analyse each and every aspect meticulously before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. The statement of witnesses made on oath to be verified in full and materials put forth in the charge-sheet ought to be taken note of as a whole before arriving at an conclusion. It is the material concluded during the investigation and evidence led in court which decides the fate of the accused persons."

21. There is no quarrel over the ratio decidendi made out in the above decision. But in the instant case, the facts itself would show that it is only civil in nature. Merely because the construction was not in accordance with the Vasthu, the defacto complainant had preferred a criminal complaint, after a delay of

more than a year, though there is an arbitration clause in the agreement. Thus, the conduct of the complainant itself would show his malafide intention. Hence, the dictum laid down by the Hon'ble Apex Court in State of Haryana and Others vs. Bhajanlal and Others reported in 1992 (1) SCC 335 is squarely applicable and so, it is a fit case to quash the proceedings against this petitioner.

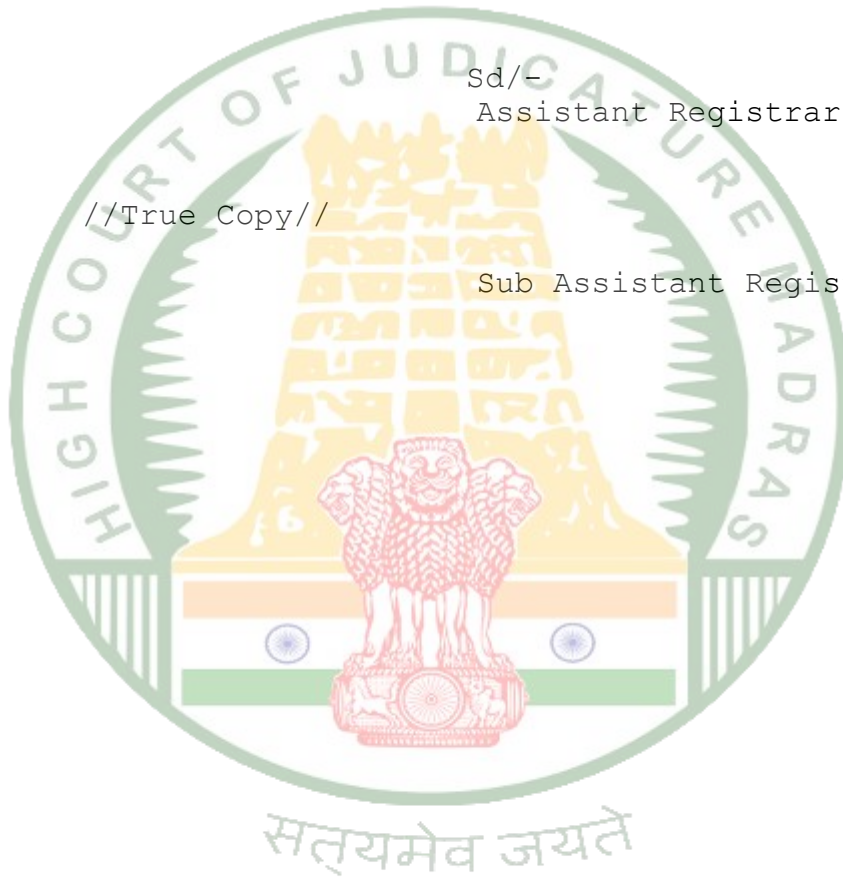
22. Accordingly, the Criminal Original Petition is allowed and the FIR in Cr.No.155/2015 is hereby quashed, as against the petitioner.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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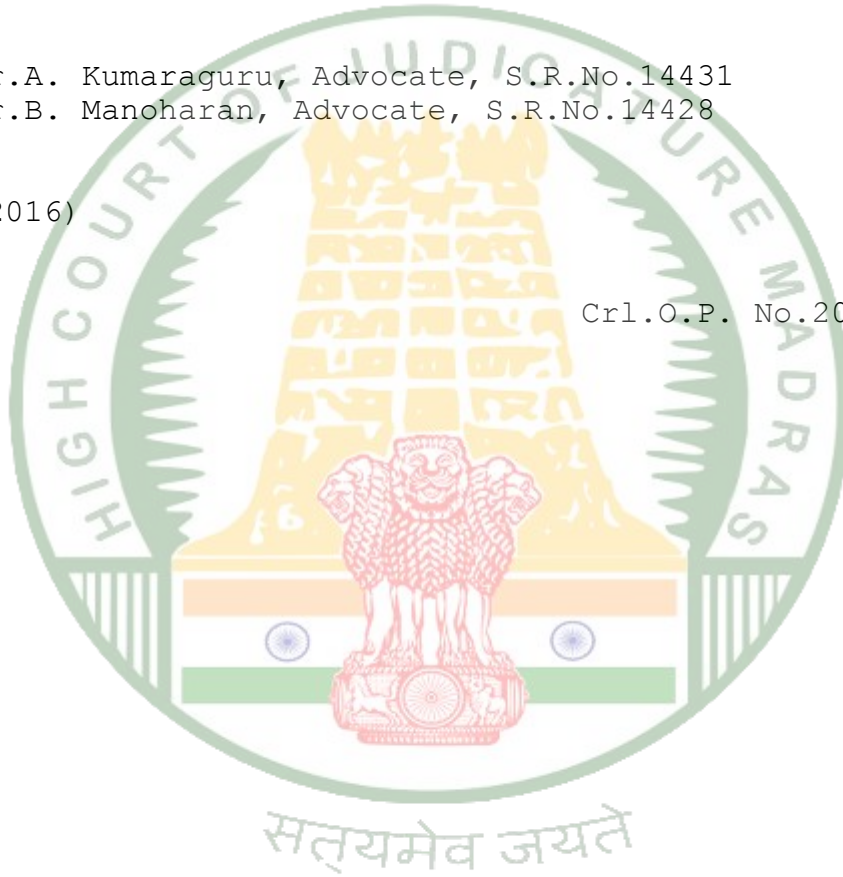
1. The Inspector of Police
Talampur Police Station,
Kancheepuram District.

2.The Public Prosecutor,
High Court, Madras - 600 104.

+1cc to Mr.A. Kumaraguru, Advocate, S.R.No.14431
+1cc to Mr.B. Manoharan, Advocate, S.R.No.14428

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