

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.03.2016

DATE OF DECISION: 23.03.2016

CORAM:

The Honourable Mr. SANJAY KISHAN KAUL, CHIEF JUSTICE
and

The Honourable Mr. Justice M.M.SUNDRESH

O.S.A.Nos.130, 131 and 172 of 2015
and Cross Objection Nos.10 and 11 of 2016

O.S.A.Nos.130 and 131 of 2015:

Indian Bank,
Asset Recovery Management Branch,
rep.by its Chief Manager,
Fourth Floor No.55,
Ethiraj Salai,
Chennai - 600 002.

... Appellant/3rd Respondent
Vs.

1. The Official Assignee,
High Court of Madras
Madras.

...1st Respondent/Applicant

2. Reserve Bank of India,
a body incorporated by
Reserve Bank of India Act,
having its Central Office at
Central Office Building,
Shadeed Baget Singh Road,
Mumbai - 400 001
through A.S.Balakrishnan,
General Manager,
Department of Non Banking,
Supervision, Reserve Bank of India,
Rajaji Salai,
Chennai - 600 001,

...2nd Respondent/1st
Respondent

3. The Official Liquidator,
High Court, Madras,
as Liquidator of
M/s.Fidelity Finance Limited
(in liquidation)

...3rd Respondent/2nd
Respondent

4. Mr.Ashok Muthanna
Ex.Chairman,
M/s.Fidelity Finance Limited,
No.1, Smith Road,
Anna Salai,
Chennai - 600 002,

5. Dr.Vandana Goel ... Respondents 4 &5/
Respondents 4 & 5

O.S.A.No.172 of 2015:

Dr.Vandana Goel ... Appellant/5th Respondent

Vs.

1. The Official Assignee,
High Court of Madras, ...1st Respondent/Applicant

2. Reserve Bank of India,
a body incorporated by
Reserve Bank of India Act,
having its Central Office at
Central Office Building,
Shadeed Baget Singh Road,
Mumbai - 400 001
through A.S.Balakrishnan,
General Manager,
Department of Non Banking,
Supervision, Reserve Bank of India,
Rajaji Salai,
Chennai - 600 001, ...2nd Respondent/1st
Respondent

3. The Official Liquidator,
High Court, Madras,
as Liquidator of
M/s.Fidelity Finance Limited
(in liquidation) ...3rd Respondent/2nd
Respondent

4. Indian Bank,
Asset Recovery Management Branch,
rep.by its Chief Manager,
Fourth Floor No.55,
Ethiraj Salai,
Chennai - 600 002.4th Respondent/3rd
Respondent
5. Mr.Ashok Muthanna
Ex.Chairman,
M/s.Fidelity Finance Limited,
(in liquidation)
No.1, Smith Road,
Anna Salai,
Chennai - 600 002 5th Respondent/4th
Respondent

Cross Objection Nos.10 and 11 of 2016:

The Official Assignee,
High Court of Madras
Madras. Cross Objector

Vs.

1. Indian Bank,
Asset Recovery Management Branch,
rep.by its Chief Manager,
Fourth Floor No.55,
Ethiraj Salai,
Chennai - 600 002.
2. Reserve Bank of India,
a body incorporated by
Reserve Bank of India Act,
having its Central Office at
Central Office Building,
Shadeed Baget Singh Road,
Mumbai - 400 001
through A.S.Balakrishnan,
General Manager,
Department of Non Banking,
Supervision, Reserve Bank of India,
Rajaji Salai,
Chennai - 600 001,

3. The Official Liquidator,
High Court, Madras,
as Liquidator of
M/s.Fidelity Finance Limited
(in liquidation)

4. Mr.Ashok Muthanna
Ex.Chairman,
M/s.Fidelity Finance Limited,
No.1, Smith Road,
Anna Salai,
Chennai - 600 002,

5. Dr.Vandana Goel ... Respondents

Prayer: Original Side Appeal in O.S.A.Nos.130 and 172 of 2015 is filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent against the Order dated 27.3.2015 made in Company Application No.1173 of 2013 in C.A.No.759 of 2011 in C.P.No.65 of 2002 on the file of this Court.

Original Side Appeal in O.S.A.No.131 of 2015 is filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent against the Order dated 27.3.2015 made in Company Application No.1174 of 2013 in C.A.No.759 of 2011 in C.P.No.65 of 2002 on the file of this Court.

Cross Objection No.10 of 2016 is filed under Order XLI Rule 22 of C.P.C against the Judgment and Decree dated 27.3.2015 made in C.A.NO.1174 of 2013 in C.P.No.65 of 2002 on the file of this Court.

Cross Objection No.11 of 2016 is filed under Order XLI Rule 22 of C.P.C against the Judgment and Decree dated 27.3.2015 made in C.A.NO.1173 of 2013 in C.P.No.65 of 2002 on the file of this Court.

For Appellant : Mr.Jayesh B.Dolia
in O.S.A.Nos.130 for M/s.Aiyar & Dolia
and 131 of 2015,
respondent No.4
in O.S.A.No.172
of 2015 and
respondent No.1
in Cross Objection
Nos.10 and 11 of 2016

For Appellant : Mr.AR.L.Sundaresan,
in O.S.A.No.172 of Sr.Counsel for
2015 Mr.Om Prakash for
and for respondent M/s.Ramalingam Associates
No.5 in O.S.A.No.
130 and 131 of
2015 and Cross
Objection Nos.10
and 11 of 2016

For Cross Objector: Mr.K.Krishnaswamy
in Cross Objection for Mr.S.Vaduevan
Nos.10 and 11 of
2016 and for
respondent No.1 in
O.S.A.Nos.130,131
and 172 of 2015

For respondent : Mr.S.R.Sundar
No.3 in O.S.A.Nos.
130, 131
of 2016 and Cross
Objection Nos.10
and 11 of 2016

For Respondent : Mr.V.Kalyanaraman
No.2 in O.S.A.Nos.
130, 131 and 172
of 2015 and
Cross Objection
Nos.10 and 11 of
2016.
For R3 in 172/2016 : Mr.P.Atchutha Ramaiya

COMMON JUDGMENT

M.M.Sundresh,J.

Loans were obtained from the Indian Bank for which one Mr.Ashok Muthanna deposited the title deeds of his personal property for the creation of equitable mortgage. He executed memorandum of deposit of title deeds in his individual capacity on 3.11.1999. The loan accounts have been classified as NPA by the Indian Bank on 31.3.2000. Thereafter, O.A.No.524 of 2000 was filed by the Bank for recovery of Rs.409.61 lakhs before the Debt Recovery Tribunal, Chennai. M/s.Fidelity Industries was ordered to be wound up by the Company Court in C.P.No.526 of

2000 on 14.6.2001 filed by M/s.Escorts Finance Limited. Accordingly, an Administrator was appointed. In the meanwhile, the Indian Bank issued notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, 'SARFAESI Act') to M/s.Fidelity Industries Limited and to Mr.Ashok Muthanna on 24.8.2002. Mr.Ashok Muthanna was declared as insolvent in I.P.No.127 of 2000 on 21.10.2002 by the orders of this Court. C.P.No.65 of 2002 was filed by the Reserve Bank of India against M/s.Fidelity Finance Limited, which is a sister concern and Accordingly it was ordered to be wound up by the Company Court on 13.3.2003. Thereafter, the Debt Recovery Tribunal permitted M/s.Indian Bank to implead the Official Assignee in O.A.No.524 of 2000 in and by order dated 20.02.2004. Ashok Muthanna wrote a letter on 29.4.2004 to the Administrator appointed by this Court in C.P.No.65 of 2002 requesting him to sell his personal property mortgaged with Indian Bank to secure the loans availed by M/s.Fidelity Industries Limited for the purpose of repayment to Bank and depositors of M/s.Fidelity Finance Limited.

2. The Administrator appointed in C.P.No.65 of 2002 filed an application in C.A.No.1432 of 2004 seeking permission to bring the property for sale through public auction. It was done with the fond hope that after payment of dues to M/s.Indian Bank, the balance amount may be utilised towards the payment to the depositors of Fidelity Finance Limited. The application was ordered on 16.6.2005 permitting the Official Liquidator to assess the property through a valuer and submit the report. The Bank allegedly took possession of the property under Section 13 (4) of the SARFAESI Act as per proceedings dated 25.7.2015. The Official Liquidator filed an application in C.A.No.1308 of 2005 in C.A.No.1432 of 2004 in C.P.No.65 of 2002 inter alia contending that the Indian Bank will have to be restrained from bringing the property for sale except in accordance with the orders passed by this Court.

3. Thereafter, Company Application No.1432 of 2004 was allowed permitting the Administrator to conduct auction on 27.4.2006 with the upset price of Rs.7.00 Crores. By the letter dated 12.04.2006, the Official Assignee sought particulars from the Indian Bank on the extent of liability on his dealing with the property mortgaged by Mr.Ashok Muthanna and it was accordingly provided by the letter dated 21.4.2006 of the Indian Bank. For the auction conducted on 27.4.2006, there were no bidders. Thereafter, Indian Bank informed the Official Assignee of its intention to stand outside the Insolvency proceedings. It was also informed that it would not like to give up its secured asset.

4. On 4.7.2016, another order was passed by the Court in C.A.No.1432 of 2004 allowing the learned Administrator to conduct the auction on 1.9.2006 fixing the very same upset price of Rs.7.00 Crores. Incidentally, the Bank was directed to give copies of the title deeds to the Administrator. Thereafter, a further order was passed on 23.8.2006 permitting the Administrator of M/s.Fidelity Finance Limited to bring the properties for sale on 1.9.2006 and the balance amount remaining after payment of dues to Indian Bank be utilised towards repayment of deposits of M/s.Fidelity Finance Limited. Thus, the entire proceeds were directed to be deposited for the above said purpose.

5. Though an auction was conducted on 1.9.2006, there were no bidders. The Order dated 23.8.2006 passed by the Company Court was put into challenge by the Bank in O.S.A.No.279 of 2006. However, the appeal was dismissed.

6. Not satisfied with the same, the Indian Bank took the matter before the Apex Court by filing S.L.P.No.12085 of 2007. An application was filed therein in I.A.No.3 of 2007 seeking permission for auction of the property. Before the Apex Court, the parties were Indian Bank, Official Liquidator and Mr.Ashok Muthanna.

7. The Special Leave Petition was converted into Civil Appeal No.5867 of 2008. The Indian Bank brought the property for auction sale under SARFAESI Act with the reserve price of Rs.7.00 Crores. Once again, there were no bidders. A fresh proclamation of sale was ordered fixing the auction for 15.02.2011 with the reserve price of Rs.7.00 Crores. The Official Liquidator filed I.A.No.6 of 2011 in C.A.No.5867 of 2008 seeking stay of the proposed auction sale fixed on 15.2.2011. By the Order dated 11.2.2011, the Apex Court restrained M/s.Indian Bank from conducting the auction on the aforesaid date. Thereafter, the following order was passed by the Apex Court on 4.4.2011 in I.A.Nos.6 and 7:

"We have heard learned counsel appearing for the Bank; the Official Liquidator and the debtor. Having done so, we direct that the subject property shall be put to auction under the strict supervision of the learned Company Court and the bid amount received on auction shall be deposited with the Company Court. However, the said amount shall not be disbursed without the leave of this Court. It goes without saying that this direction is without prejudice to the rights and contentions of all the parties in this appeal."

8. This Court on the application filed by the Official Liquidator in C.A.No.382 of 2011 in C.P.No.65 of 2002 accepted the valuation report with the upset price at Rs.10.00 Crores and directed the Indian Bank to associate Official Liquidator with the proposed auction sale. When the auction was held on 29.7.2011, there were no bidders once again. The fourth attempt was fruitful and the property was sold for Rs.10,00,00,009 /-in the auction held on 26.9.2011. The Indian Bank filed C.A.No.759 of 2011 seeking confirmation of sale and C.A.No.760 of 2011 seeking permission to receive the sale consideration for due appropriation of the loans dues in the account of M/s.Fidelity Industries Limited in C.P.No.65 of 2002. This Court ordered confirmation of sale and permitted and directed to deposit the sale consideration with the office of the Registrar General of this Court. Accordingly, on 14.12.2011, the entire sale proceeds with interest to the tune of Rs.10,02,47,503/- were deposited.

9. The Hon'ble Apex Court disposed of C.A.No.5867 of 2008 on 13.1.2012 directing the Company Court to disburse the sale proceeds into the Court. The following is the order passed:

'Taken on board.

It is stated in the application that in terms of order dated 4th April, 2011, the bid amount received on auction of the subject property has been deposited in the Company Court. If that be so, we dispose of this appeal with a direction to the Company Court to disburse the said amount in accordance with law.'

10. M/s.Indian Bank filed an application in C.A.No.110 of 2012 seeking release of the amount lying with the Office of the Registrar General. This Court directed the Bank to submit its accounts before the Official Liquidator. By Order passed in M.P.No.4 of 2012 in O.S.A.No.118 of 2012, the auction purchaser viz., appellant in O.S.A.No.172 of 2015 was directed to be impleaded. Similarly, in M.P.No.3 of 2012 in O.S.A.No.118 of 2012, Official Assignee was directed to be impleaded. Thereafter, the Official Assignee sent a letter to the Bank not to execute the sale deed or sale certificate in favour of the auction purchaser. The request was not acceded to by the Bank by way of letter dated 31.8.2012 and copy of the sale certificate issued was furnished on 12.9.2012 at request by the Bank with the Official Assignee.

11. By the letter dated 24.6.2013, O.S.A.No.118 of 2012 was allowed setting aside the order passed in C.A.No.110 of 2012 by remitting the matter to be decided afresh after affording an opportunity of being heard to the Official Assignee.

12. An application was filed by the Official Assignee in C.A.No.1172 of 2013 seeking to set aside the sale confirmed by

this Court in C.A.No.759 of 2011 in C.P.No.65 of 2002. Incidentally, an order of injunction was sought for restraining the auction purchaser from alienating or encumbering the property.

13. By the order under challenge, the learned single Judge gave factual findings qua the value of the property fixed being undervalued and without following the proper procedure. It was further held that relevant facts have not been placed before the Court. A further finding has been given that the procedure followed under the SARFAESI Act ought to have been adopted. However, the application filed by Indian Bank in C.A.No.110 of 2012 was not disposed of. In the result, the learned single Judge opined that appropriate orders could be passed only after getting a clarification before the Apex Court on the order passed earlier.

14. Challenging the same, the above appeals have been filed. O.S.A.No.172 of 2015 has been filed by the auction purchaser and O.S.A.Nos.130 and 131 of 2015 have been filed by M/s.Indian Bank. The Official Assignee has filed Cross appeals in Cross Objection Nos.10 and 11 of 2016. This was done in pursuant to the order passed by the Apex Court in S.L.P.(C) Nos.20668 and 20669 of 2015 dated 4.12.2015, which was disposed of in the following manner:

'We do not see any reason to interfere with the impugned order. We are informed that an appeal filed under Section 583 of the Companies Act is pending before the Division Bench of the Madras High Court. The question involved in this petition is somewhat interconnected. Therefore, we leave it open to the petitioner to file intra court appeal, if available under the law before the High Court.

The special leave petition is dismissed with the aforesaid liberty.'

15. The learned counsel appearing for the appellants submitted that once the matter has been concluded by the Apex Court, the same cannot be reviewed indirectly. A plea has been taken before the Apex Court by the Bank, which was acceded to. No objection was raised by the Official Liquidator. When there is no dispute that the Bank is the secured creditor, the consequences would follow. There is no fraud committed by the Bank. Section 17 of the Presidency-Towns Insolvency Act with its proviso would militate against the Official Assignee. It is not as if the Official Assignee was not aware of the proceedings. Atleast from the year 2006 onwards, it was aware of the pending proceedings. After having sit over the fence, a belated attempt is being made without any factual or legal basis. It is the Court, which has passed the order earlier, though on the

application filed by the Bank. Everything was done under the supervision of the Official Liquidator. The role of the Official Liquidator and the Official Assignee is more or less the same. Therefore, the learned single Judge has committed a jurisdictional error in giving the finding against the appellants. The valuation was approved by the Court. There is no perversity in the procedure adopted. Hence, no interference is required.

16. Learned counsel appearing for the Cross Objector/ Official Assignee submitted that by operation of law, the property vests with the Official Assignee. Therefore, any order obtained in his absence would become a nullity and thus not binding. It is a case where the debtor has given a letter voluntarily to sell his property just to defeat the rights of the unsecured creditors. The property would fetch more amount. In support of his contention, the learned counsel has made reliance upon the following citations:

- '1. Kala Chand Banerjee Vs. Jagannath Marwari and another, (1927 (Vol.XXVI) Law Weekly 268 (Privy Council));
2. Velayudha Konar Vs. Kora Miah Sahib and others, (1974 2 MLJ 408 (DB));
3. Sankar Ram & Co. Vs. Kasi Naicker and others, ((2003) 11 SCC 699);
4. S.P.Chengalvaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) and others, ((1994) 1 SCC 1);
5. Central Board of Secondary Education Vs. Vineeta Mahajan (Ms) and another, ((2000) 5 SCC 274) and
6. Kripa Nath and another Vs. Ganga Prasad and others, (AIR 1962 ALLAHABAD 256).'

17. By way of reply, it is submitted on behalf of the appellants that even before the Apex Court, several opportunities have been given to the Official Assignee to give a better offer or to redeem the property. Though the matter was adjourned on quite a few occasions, the Official Assignee could do neither. Therefore, the appeals will have to be allowed and cross objections will have to be dismissed.

18. The facts as narrated are not in dispute. Admittedly, M/s.Indian Bank is a secured creditor. The property in question has been mortgaged in its favour. Three separate proceedings have been initiated by three creditors. The Bank, being the secured creditor, initiated proceedings under SARFAESI Act. As against the Company, a Company Petition was filed and the unsecured creditors sought relief through the Insolvency Proceedings. Now, the legal position is clear. The interest of the secured creditor would come first against the secured asset. In all these proceedings culminating upto the sale followed by

issuance of sale certificate, the Bank and the Official Liquidator were parties. These proceedings happened in the Company Petition. The Apex Court permitted the sale under the aegis of the Official Liquidator which was accordingly done. Earlier upset price fixed was re-visited by increasing the same to Rs.10.00 Crores. The facts would reveal that the earlier attempts to auction the property ended in failure. The Official Liquidator did not raise any dispute in the subsequent valuation fixed. The entire procedure was completed under the supervision of the Official Liquidator. We can safely say that in terms of procedure followed and the valuation fixed, the Apex Court has given its approval. That is the reason why the earlier permission was given to go through the sale and thereafter the appeal was closed being satisfied with the procedure followed.

19. We do not find any element of fraud committed by the appellants. When the valuation was already fixed and approved by the Company Court, after being satisfied with the subsequent report, which in turn, had the approval of the Official Liquidator, we are afraid that the same cannot be questioned subsequently. We also take note of the factum of the inability in bringing the property for auction on the earlier occasions. Thus, both on the question of law and fact, such an issue cannot be reopened.

20. Coming to the role of the Official Liquidator and the Official Assignee, if one has to juxtapose the same, practically, there is no difference. One has to take care of the interest of the creditors under the provisions of the Companies Act as against unsecured creditors under the Insolvency Act.

21. Learned counsel for the Indian Bank submitted that the liability is about Rs.30 Crores. Therefore, we are of the view that the entire exercise at the instance of the Official Assignee would at best be academic, because the amount realised from the sale of the secured asset would not be sufficient even to meet the needs of the secured creditor - M/s.Indian Bank. As discussed above, the entire proceedings happened under the supervision of the Official Liquidator as well as the Court. There is absolutely no material to come to the conclusion that the mode of conducting auction was actuated by fraud or extraneous consideration. The question as to whether the proceedings under SARFAESI Act were followed or not is also quite immaterial as against the fixation of upset price. In our considered view, it was rightly fixed by taking into consideration of the relevant materials, particularly, when we take note of the fact that despite the fixation of upset price at Rs.7 Crores, there were no bidders earlier. In any case, it is nobody's case that it would fetch such an amount beyond Rs.30 Crores so that atleast some money would reach the unsecured creditors after satisfying the secured creditor. Any possible

increase of sale price would be to the benefit of the Bank alone and therefore it cannot be said that it has colluded with the third parties.

22. Coming to the applicability of the Section 17 of the Presidency- Towns Insolvency Act, we are of the considered view that the proviso makes it clear that the power of the secured creditor to realise or otherwise deal with the security would not get affected in any manner. As discussed above, it is not as if the secured creditor has taken an independent action. On the contrary, the entire sale has taken place on an application filed before the Company Court with the active participation of the Official Liquidator and supervision of the Court. The decisions relied upon by the learned counsel for the Official Assignee are to be seen from the context of the suit filed by the secured creditor against the original debtor alone. It was felt by the Court in those decisions that it would be appropriate to implead either the Official Assignee or the Insolvency Court in a suit initiated by the secured creditor. The object was to give an opportunity to redeem the property or avoid collusion. Both these factors are not available to the case on hand. No fraud can be alleged and proved between the Bank and the auction purchaser, especially, when everything was done under the aegis of the Court. When the very same Court has approved the sale earlier, as confirmed by the Apex Court, the subsequent observation and finding would amount to a review, though indirectly. Certainly, in the case on hand, the Bank has not obtained any decree, as there is no dispute on its status. The Official Assignee has not exercised the option of redemption at any point of time. It is also not a case only between the secured creditor as against the unsecured. It rather involves the other creditors under the Companies Act. Therefore, we are of the view that the decisions relied upon are not helpful to the case of the Official Assignee apart from the fact that even otherwise it will be an exercise in futility.

23. In the result, all the Original Side Appeals are allowed and the Cross Objections are dismissed. It is well open to the appellant Bank to pursue the application filed in Company Application No.110 of 2012 before the learned single Judge. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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Copy to:

1. The Sub.Asst.Registrar
Original Side,
High Court,
Madras.

2.The Official Assignee,
High Court, Madras

3.The Official Liquidator
High Court, Madras

+4 ccs to M/s.Ramalinga Associates sr.nos.18296 & 18297/16

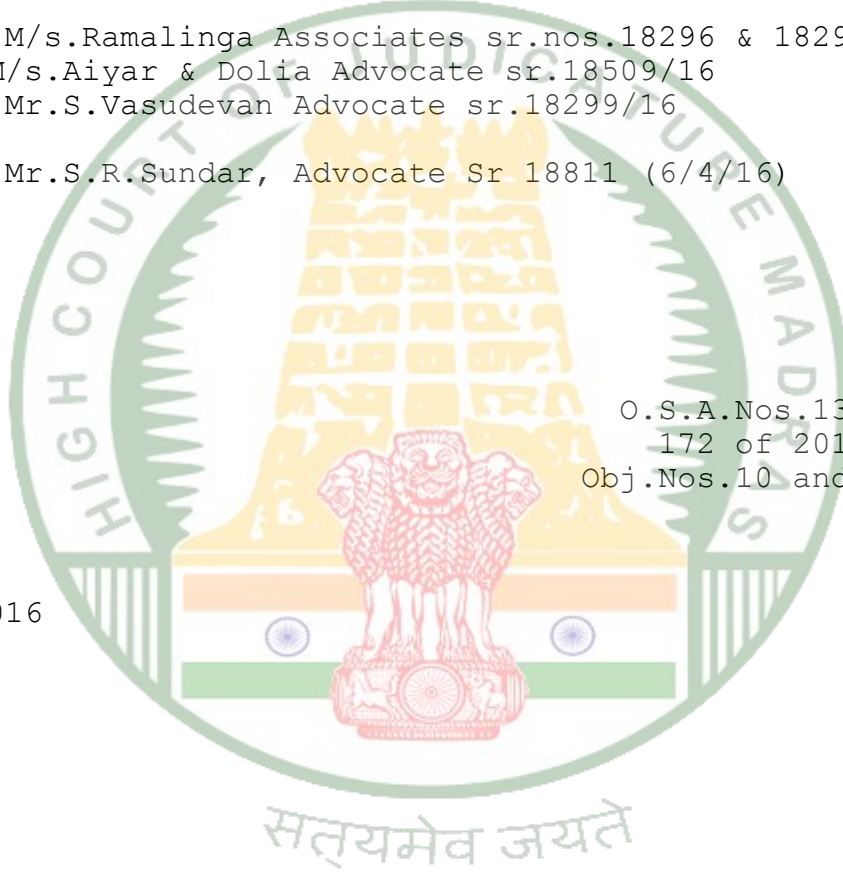
+1 cc to M/s.Aiyar & Dolia Advocate sr.18509/16

+2 ccs to Mr.S.Vasudevan Advocate sr.18299/16

+ 1 cc to Mr.S.R.Sundar, Advocate Sr 18811 (6/4/16)

Judgment in
O.S.A.Nos.130, 131 and
172 of 2015 and Cross
Obj.Nos.10 and 11 of 2016

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