

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27.03.2017

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Criminal Appeal No.160 of 2017

G.Gangatharan

... Appellant/Complainant

Vs

P.S.Pushpalatha

... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C., against the Judgment of the Hon'ble III Additional District and Sessions Judge, Salem in C.A.No.155 of 2015 dated 11.08.2016 acquitting the Accused by setting aside the order of conviction of the Accused in S.T.C.No.599 of 2009 dated 26.10.2015 passed by the Hon'ble Judicial Magistrate - III, Salem, who passed sentence under Section 138 of the Negotiable Instruments Act, 1881.

For Appellant : Mr.Sri.S.Natana Rajan

For Respondent : Mr.R.Murugabharathi

JUDGMENT

The Appellant/Respondent/Complainant has filed the instant Criminal Appeal before this Court, being dissatisfied with the Judgment of the Learned III Additional District and Sessions Judge, Salem dated 11.08.2016 in C.A.No.155 of 2015.

2.The First Appellate Court, while passing the impugned Judgment in C.A.No.155 of 2015 on 11.08.2016, at paragraph 31, had observed as under:

"31.In the instant case it is crystal clear that the notice Ex.P.7 was not served upon the accused. In such circumstances, in view of the decisions above this court holds that the complainant has not complied with the requirement under Section 138(b) of the N.I. Act."

3.As a matter of fact, the First Appellate Court, at paragraph 32 of its Judgment in C.A.No.155 of 2015 dated 11.08.2016, had held as under:

"32. It was submitted by the complainant that the accused has not offered any explanation as to how the other two cheques did come under the custody of the complainant if really other cheques were lost as mentioned in the public notice Ex.D.1. It is true that the accused has not offered any explanation in this regard but however in view of the discussions made above, it is the duty of the complainant to prove the legally enforceable debt or liability and the alleged loan transaction between the complainant and the accused and since she has failed in her attempt, the non explanation of the accused is not fatal to her defence."

and ultimately, came to the consequent conclusion that the Respondent/Complainant (Appellant before this Court) had failed to establish his case and accordingly, set aside the conviction of the Appellant/Accused (Respondent before this Court) and acquitted her in respect of an offence under Section 138 of the Negotiable Instruments Act, 1881. In short, the First Appellate Court had allowed the Appeal in C.A.No.155 of 2015 preferred by the Appellant/Accused (Respondent herein).

4.Earlier, the Learned Judicial Magistrate No.III, Salem, in S.T.C.No.599 of 2009, on 26.10.2015, at paragraph 53, had, among other things, observed as under:

"53.... it is clear that the cheque leaves marked as ExP1 to P3 contains the signature of the accused and the accused has not let evidence so as to rebut the presumption under section 118 and 139 of Negotiable Instrument Act. Further more, the very fact that the accused had failed to reply to the statutory notice U/S 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the accused was not able to contest the existence of legally enforceable debt or liability. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes in to play and the same has not been rebutted even with regard to the materials submitted by the complainant and hence this court is of the view that ExP1 to ExP3 cheque leaves were issued for discharging the subsisting liability and that has been proved by PW1/Complainant. Hence the

contentions raised are not fatal to the prosecution."

and found that the Complainant (Appellant before this Court) had proved the guilt of the Respondent/Accused beyond all reasonable doubt and sentenced him to undergo six months Simple Imprisonment and imposed a fine of Rs.5,000/-, in default of payment of fine, the Respondent/Accused was directed to undergo Simple Imprisonment for one month.

5.Questioning the validity and legality of the Judgment of Acquittal passed by the First Appellate Court in C.A.No.155 of 2015 dated 11.08.2016, the Appellant/Respondent/Complainant has preferred the instant Criminal Appeal before this Court, by contending that the First Appellate Court had failed to note that the Respondent/ Appellant/Accused had not disputed or denied Exs.P1 to P3 in regard to her signatures as well as the cheque leaves.

6.According to the Learned Counsel for the Appellant, the Respondent/Accused had not lodged any complaint before the Publication of Ex.D1 either before the concerned Police authorities or to the Bank of the Respondent in regard to the cheques purported to have been lost.

7.The Learned Counsel for the Appellant projects an argument that the First Appellate Court ought to have drawn an inference that Exs.P1 to P3 - Cheques were correctly issued to the Appellant/ Complainant by the Respondent/Accused only in order to discharge the debt towards the borrowal of loan made by the Respondent/Accused from the Appellant/Complainant.

8.The Learned Counsel for the Appellant takes a primordial stand that in Ex.D1 - Paper Publication dated 02.03.2009, the Respondent/ Accused had not disputed the signatures found in the cheque leaves as "one that does not belong to her".

9.It is represented on behalf of the Appellant that the suit in O.S.No.621 of 2009 was filed by the Respondent and her husband against the Appellant/Complainant on 12.05.2009 wherein a relief was sought to handover the cheques covered by the case in S.T.C. which was dismissed for default and although the Appellant had filed the Written Statement in the said suit, the Respondent/Accused had not taken steps to restore the suit to file.

10.The Learned Counsel for the Appellant brings it to the notice of this Court that if Ex.D5 (Copy of Stop Payment Letter dated 02.03.2009) was really served upon the Respondent's Bank on 02.03.2009, then, Exs.P1 to P3 (Cheques) would not have been returned stating 'Funds Insufficient' but would have been returned as 'Stop Payment'. In this connection, it is the plea

of the Appellant/ Complainant that the very fact that the Bank had returned all the three cheques with the endorsement 'Funds Insufficient' clearly discloses that D.W.1 and D.W.2 had not spoken the truth and sided the Respondent.

11.The Learned Counsel for the Appellant submits that Ex.D5 (Copy of Stop Payment Letter) would be definitely available in the Bank records of D.W.1 and D.W.2 and more particularly, there would have been an endorsement in the Bank Account of the Respondent in regard to the receipt of the Stop Payment Letter on the alleged date, as stated by the Respondent and also not to pass the cheques covered under Ex.D5.

12.The Learned Counsel for the Appellant strenuously contends that for a 'Hand Loan', there would not be any other document except the cheques issued by the Respondent in respect of the loan received by her from the Appellant.

13.The Learned Counsel for the Appellant proceeds to state that Sections 118 and 139 of the Negotiable Instruments Act, 1881 draw a presumption to the effect that once the signature in Negotiable Instruments Act is not disputed, the Drawer of that instrument admits her liability under the said instrument to the 'Drawee' of that Instrument.

14.Conversely, it is the submission of the Learned Counsel for the Respondent/Accused that in the present case, the First Appellate Court at paragraph 30 of its Judgment in C.A.No.155 of 2015, had observed that 'the notice was served not upon the accused but upon an unknown person' and ultimately opined that Ex.P7 - Notice was not served upon the Respondent/Accused and therefore, it was held that the Appellant/Complainant had not complied with the requirement of Section 138(b) of the Negotiable Instruments Act.

15.Advancing his arguments, the Learned Counsel for the Respondent submits that the First Appellate Court in its Judgment in C.A.No.155 of 2015 at paragraph 32, had, inter alia, observed that '.... It is true that the accused has not offered any explanation in this regard but however in view of the discussions made above, it is the duty of the complainant to prove the legally enforceable debt or liability and the alleged loan transaction between the complainant and the accused and since she has failed in her attempt, the non explanation of the accused is not fatal to her defence'.

16.At this stage, this Court relevantly points out that in the Complaint in S.T.C.No.599 of 2009 on the file of the trial Court, the Appellant/Complainant, at paragraph 4, had stated that he presented the Item No.1 to 3 Cheques bearing No.555450 (Rs.2,50,000/-); No.555451 (Rs.2,50,000/-); No.555452 (Rs.2,50,000/-) for collection on 27.05.2009, 28.05.2009,

29.05.2009. However, it was returned with Cheques Return Memo from the Respondent/Accused Bank stating as 'Funds Insufficient'.

17.A cursory perusal of the Complaint in S.T.C.No.599 of 2009 on the file of the trial Court indicates that the Appellant/Complainant had averred that the Respondent/Accused was liable to pay the cheque sums along with interest at the rate of 24% and that there was a 'Legally Enforceable Liability' between the Respondent/Accused and the Appellant/Complainant as per Section 138 of the Negotiable Instruments Act.

18.It is to be noted that the Cheque No.555450 dated 27.07.2009 was for Rs.2,50,000/- drawn on Canara Bank, Fort Main, Salem; again the Cheque No.555451 dated 28.05.2009 was for Rs.2,50,000/- drawn on Canara Bank, Fort Main, Salem; the third Cheque bearing No.555452 dated 29.05.2009 drawn on Canara Bank, Fort Main, Salem was for Rs.2,50,000/-.

19.In the present case, the Appellant/Complainant had issued a statutory Legal Notice - Ex.P7 dated 19.06.2009 to the Respondent/ Accused demanding payment in respect of the aforesaid bounced cheques within 15 days from the date of receipt of the said notice by the Respondent/Accused. The said notice was acknowledged by the Respondent/Accused on 20.06.2009. Since the Respondent/Accused had failed to pay the amount due in the cheques in question, the Appellant/Complainant had filed the Complaint before the trial Court which was taken on file in S.T.C.No.599 of 2009.

20.P.W.1 (the Appellant/Complainant), in his evidence, had deposed that Exs.P1 to P3 were the Cheques issued by the Respondent /Accused on 27.05.2009, 28.05.2009 and 29.05.2009 for Rs.2,50,000/- each and the Return Memos from the Bank were Exs.P4 to P6 and Ex.P7 is the Office Copy of the Appellant's Lawyer's Notice issued to the Respondent/Accused and Ex.P8 was the Acknowledgement.

21.The Appellant/Complainant, in his Proof Affidavit before the trial Court, had stated that on 26.01.2009 the Respondent/Accused received a sum of Rs.15,00,000/- as Hand Loan and gave six signed different dates cheques to him and that he gave the money to her after receiving the total six cheques and that the present complaint was filed only in respect of three cheques and in respect of three cheques another case was filed in S.T.C.No.600 of 2009 and that the three case cheques which were deposited for collection by him at the Respondent/Accused Canara Bank got returned because of the reason that 'Insufficient Funds' and therefore, the Complaint was filed by him.

22.P.W.1, in his cross examination, had stated that it was correct to state that at the time when he lent money there was no document to show that he had money in his hands and that he was having the money in cash and that he is paying the income tax. Further, in his cross examination, he had stated that he had claimed 24% interest for the amount lent by him and that it was correct to state that it was not mentioned that the cheque was issued (inclusive of the interest).

23.It is the evidence of D.W.1 (Junior Manager of Salem Branch Canara Bank) that he was authorised by the Manager by tendering evidence before the Court and that the Cheque bearing No.555450 was returned because of the reason that 'Stop Payment was issued' and Ex.D2 was the True Copy maintained by the Bank for the return of the cheque. Another Cheque bearing No.555451 was returned for the reason Stop Payment being issued and the concerned document was Ex.D3 and another Cheque bearing No.555452 was also returned because of issuance of Stop Payment vide Ex.D4.

24.D.W.1, in his cross examination, had deposed that the letter issued for effecting Stop Payment in respect of Cheque bearing No.555452 was of the year 2009 and they were not able to trace out the said letter although several years had elapsed.

25.D.W.2 (Senior Manager of Salem Canara Bank), in his evidence, had deposed that it was correct to state that in Ex.D5 the date was mentioned as 02.03.2009 and further, the Canara Bank Seal was affixed as 03.03.2009. Further, D.W.2 had proceeded to add in his evidence in Ex.D5 - Letter, it was mentioned that six cheques were lost.

26.The clear-cut stand of the Appellant/Complainant before this Court is that Ex.P7 - Legal Notice dated 19.06.2009 was addressed to the Respondent/Accused and that Ex.P8 was the acknowledgement for the receipt of the notice. In this connection, this Court, on mere running of the eye over the signature found in Ex.P8 - Acknowledgement Card, is of the considered view that it was not received by the Respondent/Accused. However, on her behalf, Ex.P7 - Legal Notice dated 19.06.2009 was received.

27.Indeed, on behalf of the Appellant/Complainant, a heavy reliance is placed in regard to the ingredients of Section 27 of the General Clauses Act to point out that in the instant case, even though the notice was not received by the Respondent/Accused, on behalf of her, it was received by someone and therefore, the Legal Notice Ex.P7 addressed to the Respondent/Accused through registered post was issued and the same satisfies the requirement of Section 138(b) of the

Negotiable Instruments Act. Further, a stand is taken on behalf of the Appellant/Complainant that in the instant case, there is no evasion of service of notice by the Respondent/Accused. But, on her behalf, some one had received and therefore, it is a Proper Service.

28. Coming to the aspect that in the Income Tax Statement, the Appellant/Complainant had not shown such a huge amount having been lent by him to the Respondent/Accused, it is to be pointed out that merely because an amount/sum purportedly lent to the Respondent/Accused was not reflected in the Income Tax Return or not shown in respect of the Assessee concerned, one cannot immediately jump to a conclusion that no such sum was advanced to the Respondent/Accused.

29. Admittedly, in the instant case, no pronote/pronotes were executed by the Respondent/Accused. Moreover, for filling up of a cheque leave, the handwriting used, merely because it was different from the signature of the Respondent/Accused and the ink used to sign was different from the ink used for filling up the cheque leaves, one cannot come to a hazy conclusion that there was no transaction between the Appellant/Complainant and the Respondent/Accused. Even though a plea is taken on behalf of the Respondent/Accused that the cheques were lost, it passes beyond one's comprehension as to how the cheques came into the hands of the Appellant/Complainant.

30. Ordinarily, in a criminal case, the onus is on the Complainant to establish his case against the Respondent/Accused beyond all shadow of doubt. In fact, an Accused can maintain silence. Furthermore, he need not enter into the witness box for the purpose of adducing evidence. Per contra, he can collect/gather favourable points from the evidence of the prosecution witnesses and can make an endeavour before the Court concerned to shake the case of the Appellant/Complainant. A preponderance of probability can be raised/ shown on his behalf.

31. It cannot be gainsaid that it is the duty of the Complainant to prove his case. But, in so far as the offence under Section 138 of the Negotiable Instruments Act is concerned, it is to be borne in mind that it is a civil liability clothed in a criminal colour. Apart from that, an offence under Section 138 of the Negotiable Instruments Act does not involve any moral turpitude. The purpose of cheque transaction is for ensuring credibility and by indicating Section 138 of the Negotiable Instruments Act, the efficacy of the Bank transactions to operate in healthy atmosphere is the purpose in the considered opinion of this Court. Besides the above, when a cheque is seen in a different ink than that of the signature affixed in a different ink, then the said cheque under Negotiable Instruments Act as per Section 20, it cannot be

termed as an 'Inchoate Instrument', as opined by this Court.

32. In fact, the defence of the Respondent/Accused is that the cheque leaves were lost by her and the same taken by the Appellant/ Complainant were misused resulting in a false case being foisted upon her. In the instant case, before the trial Court the Respondent/ Accused had not gone into the witness box to speak about the facts which were especially within her knowledge as per Section 106 of the Indian Evidence Act, 1872. It is the duty of a person who knows about the entire circumstances of the case to adduce evidence on his/her behalf and to subject to cross examination. Section 106 of the Indian Evidence Act is an exception to the General Rule to governing the 'onus of proof' applies to such matters of defence which were supposed to be specially within the knowledge of the concerned litigant. Of course, the standard of proof by the Respondent/Accused is not so high as in the case of prosecution. It is only when the Prosecution had adduced evidence, if believed, which would result in conviction, then, the onus of proving need not would lie on the Accused under Section 106 of the Indian evidence Act.

33. In the case on hand, admittedly, the Respondent/Accused had not disputed her signature seen in the cheques. Ordinarily, the presumption under Section 118 of the Indian Evidence Act would come into operative play. Furthermore, as per Section 114 of the Indian Evidence Act, a presumption on facts is to be raised to assist the Court for deciding as to the burden of proving in a set of circumstances.

34. Suffice it for this Court to significantly point out that Section 114 of the Indian Evidence Act, 1872 enables the Court to presume the existence of probable facts, regard being had to the human conduct and common course of events as to the common sense being used as a judicial tool. In reality, Section 114 of the Indian Evidence Act authorises the Court to draw a presumption. The words 'may presume' in Section 114 of the Indian Evidence Act unerringly point out that a Court of Law cannot be compelled to draw presumption. It is left to the Court concerned to make and not to make presumptions according to the circumstances of a given case. Of course, whether a presumption ought to be raised or not depends upon the facts and circumstances of each case.

35. It cannot be brushed aside that a 'Presumption' is a legal or factual assumption drawn from the existence of certain facts. Where the fact that the cheque was issued by the party and presented in the bank but was dishonoured was proved, presumption would be that the cheque was issued for consideration, as per decision Vasanti Babli Borkar V. Kishore

K. Shah, AIR 2007 (NOC) 744 (Bom.) What was permissible in the Indian Evidence Act, 1872 was converted into a statutory obligation in the Negotiable Instruments Act.

36. In reality, the difference between Section 114 and Section 118 of the Negotiable Instruments Act is that the Court has difficult task to make a presumption or not, but, secondly, a Court of Law is to bound to begin with a presumption. However, once the presumption is made, there is no difference between the cases; in the manner of displacing the presumption or disproving the 'presumed' fact. Besides this, any presumption as to the quantum of consideration as distinguished from the mere existence of consideration, has accordingly to be drawn, not by means of Section 118 or even under Section 114 of the Indian Evidence Act, but only from the recitals, if any, that instrument may contain.

37. Moreover, Section 118 of the Negotiable Instruments Act, 1881 enacts a special rule of evidence which governs the parties to the instrument or persons claiming under them either in a suit or proceeding pertaining to the bill of exchange and does not affect the rule contained in Section 114 of the Indian Evidence Act in cases not falling within Section 118 of the Negotiable Instruments Act, as per decision Official Receiver V. Abdul Shakoor, AIR 1965 SC 920.

38. It is to be aptly pointed out by this Court that Section 27 of the General Clauses Act, 1897 gives rise to a presumption that the service of notice was effected when it is sent to the correct address by Registered Post. As a matter of fact, the Presumption as regards service is not a conclusive one and the same is a rebuttable one. The only difference between the Presumption of Law under Section 27 of the General Clauses Act and the Presumption of Fact under Section 114 of the Indian Evidence Act, 1872 is that in the former case, a presumption was to be made by the Court, while in the latter case, it may or may not be made, of course, based on the facts and circumstances of a given case. Even a 'Presumption of Law' is a rebuttable one, unless it is made un rebuttable by some provision of Law.

39. In short, under Section 114 of the Indian Evidence Act and under Section 27 of the General Clauses Act, a Presumption can be raised that a notice stood served on a person. Besides this, a notice whether was received or served on the addressee is a question of fact to be determined at the time of trial of a case. Further, the Presumption under Section 114 of the Indian Evidence Act is a Presumption of Fact and it is for a Court of Law to decide about the said presumption depending upon the facts and circumstances of a given case.

40. Be that as it may, as far as the present case is concerned, this Court is of the considered view that [of course based on the available material on record] the Respondent/Accused ought to be examined in the present case before the trial Court because of the reason that she must explain the circumstances under which her signature was found in Exs.P1 to P3 - Cheques and further, as to how the Appellant/Complainant was in possession of the case cheques. Further, this Court proceeds to add that Section 139 of the Negotiable Instruments Act mandates a presumption that the cheque leaves were issued to discharge a legally enforceable debt or liability. Moreover, the very fact that the Respondent/Accused had issued Stop Payment Letters to the concerned Bank after issuing necessary cheques creates an impression in the mind of this Court that she is to explain under what circumstances the Stop Payment Letter was issued to the Bank although she had come out with a Paper Publication Ex.D1 that the Cheques were lost. Moreover, for a heavy sum covered under Exs.P1 to P3, the signature of the Respondent/Accused found therein were not disputed. Therefore, to prove or to bring it to the notice of the Court concerned, the facts which are especially within the knowledge of the Respondent/Accused, this Court opines that the evidence of the Respondent/Accused is very much necessary. Therefore, under the existing circumstances, this Court comes to an irresistible and inescapable conclusion that the Remand of the entire subject matter in issue is a Fair, Equitable and prudent course of action. Ultimately, the truth alone should prime and necessary facts which are within the knowledge of the Respondent/Accused must be brought before the Court in a diligent fashion. Since the Respondent/Accused had not appeared as a witness before the trial Court, the strongest possible circumstance was to discredit the truth of her case. In short, when the matter is within the domain/knowledge of the Respondent/Accused, he or she is to prove the same as per decision Sachindra Nath Das V. Corporation of Calcutta, ILR (1966) 1 Cal 216. Viewed in that perspective, this Court, without expressing any opinion on the merits of the matter, interferes with the Judgment of the First Appellate Court in C.A.No.155 of 2015 dated 11.08.2016 and the Judgment of the trial Court in S.T.C.No.599 of 2009 dated 26.10.2015 and sets aside the same, to prevent an aberration of Justice. Consequently, the Criminal Appeal succeeds.

41. In the result, the Criminal Appeal is allowed. The Judgments of the First Appellate Court as well as the trial Court are set aside for the reasons assigned by this Court in this Appeal. The entire subject matter in issue is remanded back to the trial Court for fresh disposal in the manner known to Law and in accordance with Law. Considering the peculiar facts and circumstances, the Respondent/Accused is directed to examine

herself as a witness on her side so as to prove the necessary facts especially within her knowledge and to subject herself to cross examination. The trial Court shall permit the Respondent/ Accused to let in oral and documentary evidence by examining other witnesses on her side also if she so desires/chooses. Also, it is open to the Appellant/Complainant to examine any other witness/witnesses [other than the one already examined]. The trial Court is directed to restore the case within in a period of two weeks from the date of receipt of copy of this Judgment. Considering the fact that the cheque transactions is of the year 2009 and nearly eight years have elapsed, the trial Court is directed to dispose of the main case in S.T.C.No.599 of 2009 afresh (uninfluenced and untrammelled with any of the observations made by this Court in this Appeal), with an open mind in a fair, free, unbiased, in an objective and dispassionate manner (of course, after providing necessary opportunities to the respective parties by adhering to the principles of Natural Justice) within four month thereafter. Soon after disposal of the case in S.T.C.No.599 of 2009, the trial Court is directed to send a Compliance Report to the Registrar (Judicial) of this Court without fail.

-s/d-
Assistant Registrar(CSIII)

True Copy

Sub-Assistant Registrar

Sgl

To

1.The III Additional District and Sessions Judge,
Salem.

1a -do- Thro The Principal Sessions Judge, Salem

2.The Judicial Magistrate No.III,
Salem.

2a. -do-Thro The Chief Judicial Magistrate Salem

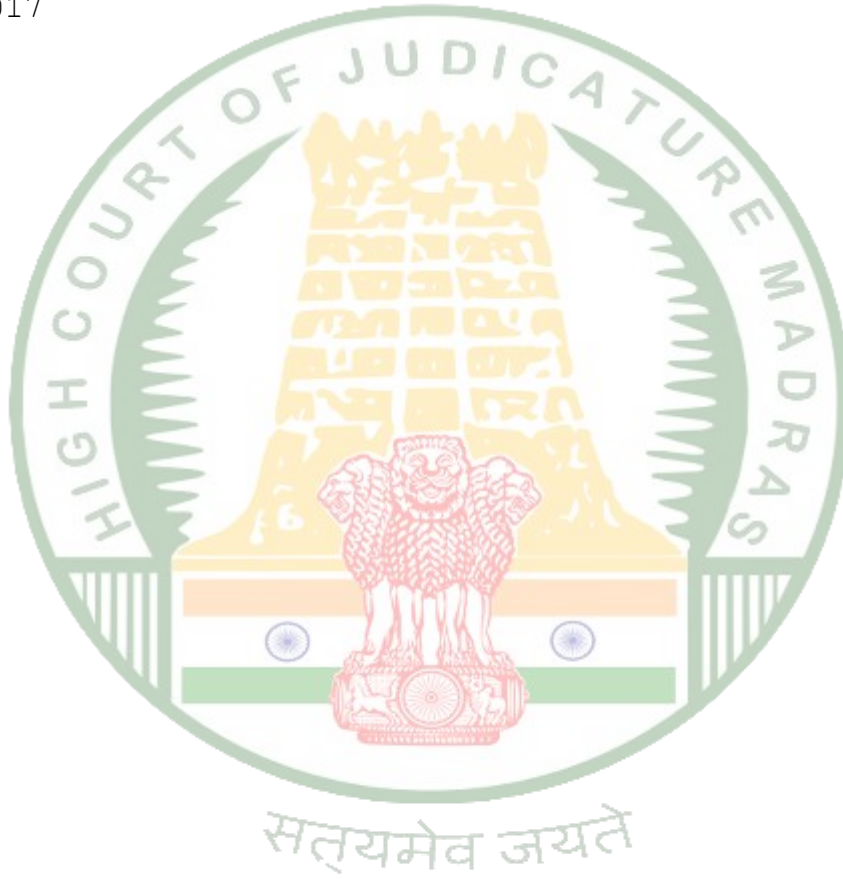
3.The Registrar (Judicial)
High Court, Madras.
[For favour of information
and follow up action]

4.The Section Officer,
Record Section,
High Court, Madras.

+1 cc to M/s.S.Natanarajan Advocate sr 18924
+1 cc to M/s.R.Murugabharathi Advocate sr 18927

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