

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 29.08.2017

DATED : 06.09.2017

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

AS.No.764 of 2014

and

MP.No.1 of 2014

M/s.Garware Wall Ropes Ltd.,
Geosynthetic Divisions, 2nd Floor,
749-A, Anna Salai,
Chennai - 600 002.Appellant/1st defendant

vs.

1. MARG Ltd.,
(Formerly MARG Constructions Ltd.)
No.4/318, Rajiv Gandhi Salai,
Kotitvakkam, Chennai - 600 041.1st Respondent/Plaintiff

2. The Federal Bank of India,
Rajaram Mehta Nagar,
25, Nelson Manickam Road,
Chennai - 600 029.2nd Respondent/2nd defendnat

Appeal suit is filed under Section 96 of Code of Civil Procedure against the Judgment and Decree dated 30.04.2014 made in O.S.No.9270 of 2010 (C.S.No.1058 of 2008, High Court, Madras) on the file of the XIX Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.T.V.Ramanujam, Senior Counsel
for M/s.Rajesh Ramanathan
For 1st Respondent : Mr.Manoj Menon
for M/s.Menon Karthick.

J U D G M E N T

The first defendant in O.S.No.9270 of 2010 (C.S.No.1063 of 2008) is the appellant. The suit in O.S.No.9270 of 2010 was filed by the first respondent seeking permanent injunction restraining the appellant from demanding or recovering any amount under the Letter of Credit bearing No.MDSC/INCL/ML/1/08-

09 dated 14.07.2008 and its amendment dated 04.08.2008 issued by the second defendant - Bank, except in accordance with the terms of the said Letter of Credit. In particular without delivery of the materials at the site, and consequently, restraining the second defendant from effecting any payment to the first defendant under the said Letter of Credit.

2. According to the plaintiff, it is a construction company engaged in development of Integrated Townships and other infrastructure development projects. The plaintiff was entrusted with a contract for developing a Port at Karaikal. The plaintiff had incorporated a Private Limited Company (Special Purpose Vehicle) known as M/s.Karaikal Port Private Ltd. to construct the said Port at Karaikal. For the purpose of construction, the plaintiff had called for tender and offers from several contractors for executing various works in the proposed Port. One of the works to be done was construction of reinforced wall around the Port. The first defendant offered to take up the reinforced Soil Wall System and offered to supply materials and to construct the Wall at Karaikal Port. The said work being critical work, it is to be completed prior to the construction of the Port in order to commence the operations of the Port in the first quarter of 2009.

3. The first defendant submitted an offer for supply of Soil reinforcement, consisting of Tensar Geogrids, Polymer Connectors, Geotextile etc., for the purpose of construction of reinforcement Soil Retaining Wall System. In terms of Clause III of the Offer, the payment was to be effected through an irrevocable Letter of Credit payable in 30 days from the date of invoice and bill of Lading with Lorry Receipt in terms of Clause VI of the Offer. The supplies were to be commenced within 8 weeks and completed within 12 weeks from the date of opening of the Letter of Credit.

4. The plaintiff further claimed that the defendant was awarded the contract for the value of Rs.2,04,08,700/- on 17.06.2008. As per the conditions of Clause-II of Annexure-1 to the Letter of Awards, 95% of the value was required to be paid through irrevocable Letter of Credit payable in 30 days from the date of bill of lading. The balance 5% of the value was retained by the plaintiff, as retention money which was to be released on expiry of Defects Liability Period.

5. The first defendant agreed to complete the total supply of the materials within 8 weeks, in terms of Clause (j), the time stipulated as 8 weeks was extended to 12 weeks on 23.06.2008. The payment terms was also amended to 100% of the Order value to be paid through irrevocable Letter of Credit, on the first defendant furnishing a Bank Guarantee for 5% of the

Order value. The Proforma Invoice was submitted by the first defendant on 28.06.2008.

6. On 14.07.2008, the second defendant issued an Inland Irrevocable Letter of Credit bearing No.MDSC/INCL/ML/1/08-09 for an aggregate sum of Rs.2,03,84,373/-. In terms of the Letter of Credit, the first defendant was required to submit certain documents for negotiating payment. Certain other conditions were also stipulated by the second defendant under Letter of Credit as set out in Clause 7 of the Letter of Credit. According to the plaintiff, as per Clause 7(2) of the terms, the delivery of the materials had to be effected at the Karaikal Port Project Site. Clause 7(8) of the Letter of Credit also provide that in the event of discrepancies in the documents, the second defendant should provide notice of refusal and if the plaintiff accepts waiver, the second defendant would effect settlement according to the terms of the Letter of Credit.

7. On 22.07.2008, at the request of the first defendant, the time schedule was modified and the first defendant agreed to supply 25% of the overall requirements of materials within one month from the opening of Letter of Credit, i.e., on 14.08.2008. On 04.08.2008, the Letter of Credit was modified. The expiry date for despatch was extended from 12.10.2008 to 26.10.2008 and the place of delivery was specified as M/s.Karaikal Port Pvt. Ltd., Project Site, M/s.Marg Ltd., Keezhavanjore Village, T.R.Patnam Comune Panchyat, Karaikal-609 601.

8. The plaintiff would further plead that the first defendant failed to supply the materials in accordance with the terms of the work order. There was delay in supply of materials by the first defendant. As against the undertaking to supply 25% of the goods by 14.08.2008, the first defendant had supplied goods of a value of only 4%. Between 23.08.2008 and 12.09.2008 the first defendant had made further delivery of materials. On delivery of materials at the site, the plaintiff's representative would sign the Carrier's copy of the Lorry Receipt and the first defendant's Engineer at Karaikal site would sign on the consignors copy of the Lorry Receipt. These documents are signed upon delivery of the materials at the plaintiff's project site. The plaintiff states that in terms of the Letter of Credit the first defendant effected supplies on various dates between 12.08.2008 and 12.09.2008. Thereafter, according to the plaintiff, no material was delivered. While so, on 30.10.2008, the plaintiff received a request from the second defendant to accept a Bill of Exchange and negotiated for payment under Letter of Credit. As no material had been delivered after 12.09.2008 and all payments for materials delivered at the site had been effected, the plaintiff immediately requested the second defendant to provide the

documents furnished by the first defendant claiming payment under the Letter of Credit.

9. On perusing the documents, the plaintiff was surprised to note that the first defendant had alleged certain materials were despatched on 15/16.10.2008 and had furnished the Lorry Receipts signed by its Engineer purportedly, at the Port Site acknowledging delivery of materials which according to them have not been delivered. Therefore, the plaintiff would contend that the first defendant is falsely claiming that the goods have been delivered at the Port Site and making claim under irrevocable Letter of Credit. The plaintiff would further contend that, even though it requested the second defendant not to honour the said claim of the first defendant, the Bank had made it clear that it will not be in a position to stop payment and it will have to honour under the Letter of Credit. Hence, the plaintiff was forced to come forward with the suit for permanent injunction.

10. The sum and substance of the claim of the plaintiff is that the goods having not been delivered at the Port site and delivery having not been acknowledged by the plaintiffs officials, the first defendant cannot claim delivery and seek payment on the basis of the irrevocable Letter of Credit.

11. The first defendant would contest the suit claiming that the claim of the plaintiff that the goods that were booked with the Carrier on 15/16.10.2008 were not delivered, is false to the knowledge of the plaintiff. According to the first defendant, it had imported the goods and they were received Bombay Port and those goods were booked through the Carrier M/s.Dhoble Goods Carriers at Mumbai on 15.10.2008 and 16.10.2008 and those goods were loaded in six heavy vehicles with various registration numbers and the vehicles reached the Karaikal Port passing through various States during the transportation i.e. Maharashtra, Karnataka, Tamil Nadu and Pondicherry. On 19.10.2008 and the goods reached destination viz. Port site at Karaikal and were ready to be unloaded from the vehicles. Unfortunately, the plaintiff did not allow unloading of the goods. Despite several attempts by its officers to convince the officers of the plaintiff to receive goods, the officers of the plaintiff refused to receive goods and hence, the lorries with goods were made to remain at Karaikal for about three days and then the goods were shifted to Godown hired by the first defendant.

12. The first defendant would refer to the conditions in the Letter of Credit, which states that delivery at the Port Site is to be certified by the Engineer of the first defendant company. Therefore, according to the first defendant, once it has made

available the goods at the Port Site at Karaikal, it is the duty of the plaintiff to receive the goods and the plaintiff cannot refuse to take delivery of the goods and seek injunction restraining the first defendant from encashing Letter of Credit.

13. The sum and substance of the plea first defendant is that as per the conditions attached to the Letter of Credit dated 14.07.2008, the delivery is to be certified by the Engineers of the first defendant at Karaikal Site. The same was amended subsequently, as follows :

"Delivery at M/s.Karaikal Port Private Limited, Project Site M/s.Marg Ltd., Keezhavanjore Village, T.R.Patnam Comune Panchayat, Karaika-609 601. "

14. Therefore, according to the first defendant once the goods imported by it were received at Bombay Port and consigned with the carrier and reached the destination, its obligation is completed. Therefore, the plaintiff having refused to take delivery of the goods cannot claim injunction restraining Bank from honouring the Letter of Credit. The second defendant Bank remained ex-parte.

15. The plaintiff filed reply statement claiming that once the first defendant had admitted that the goods have not been delivered at the plaintiff's Port Site and it cannot plead that an attempted delivery would amount to delivery. It is also claimed that either on 19.10.2008 that is the date of delivery or on subsequent dates, the first defendant had not contacted the plaintiff that the goods were never attempted to be delivered at the Kariakal Port Site. According to the plaintiff, the tenor of the written statement itself would amount to fraud practiced by the first defendant by alleging that the materials have been delivered at Karaikal Port Site, while actually the goods were lying with the first defendant, even on the date of suit and on the date of the filing of the written statement.

16. On the above pleadings the learned trial Judge framed the following issues and additional issues for consideration:

1.Whether the plaintiff is entitled for permanent injunction as prayed in the plaint?

2.Whether the plaintiff is entitled for consequential relief of injunction to restrain the 2nd defendant from effecting any payment to the 1st defendant under the suit letter of credit?

3.Whether the first defendant is entitled to get relief as prayed in the counter claim?

4.To what relief the plaintiff is entitled?

5.To what relief the first defendant is entitled?

Additional Issues :

1. Whether it is true that the Bank of India is a necessary party to the suit?

2. Whether the suit is hit by non joinder of necessary party?

17. Before the trial Court, on the side of the plaintiff, PW1 and PW2 were examined and Exs.A1 to A14 were marked. On the side of the first defendant, the Deputy General Manager of the first defendant was examined as DW1, the proprietor of the Carrier was examined as DW2 and one Sananulla, who was the Manager of the Pondicherry Godown was examined as DW3 and one Metta Sudhakar, an employee of the first defendant was examined as DW4 and Exs.B1 to B14 were marked.

18. The trial Court, after consideration of the oral and documentary evidence placed before it, concluded that the attempt by the first defendant in trying to negotiate the Letter of Credit without actual delivery of goods at the Port Site at Karaikal would amount to fraudulent practice and therefore the plaintiff would be entitled to injunction restraining the first defendant from negotiating Letter of Credit. The trial Court also took notice of the fact that the amendment to the Letter of Credit regarding the Clause relating to delivery, which according to it created an obligation on the part of the first defendant to show actual acknowledgment of delivery by the officers of the plaintiff company at the Port Site at Karaikal. The learned trial Judge, further concluded that the mere attempt of delivery without actual delivery having not been made will not entail the first defendant to claim the value of the goods covered by the lorry receipts from the second defendant Bank by trying to negotiate the Letter of Credit.

On the above findings the learned trial Judge decreed the suit as prayed for. Aggrieved, the first defendant is on appeal.

19. Heard Mr.T.V.Ramanujam, learned Senior Counsel for the appellant and Mr.Manoj Menon for M/s.Menon Karthick for the first respondent. The second respondent namely, Federal Bank of India though served has not appeared through counsel.

20. Mr.T.V.Ramanujam, learned Senior Counsel appearing for the appellant would take me through the Letter of credit dated 14.07.2008. In particular referring to clause 2 which relates to the delivery that reads as follows :

"Lorry Receipts - Consignor copy certified by Garware Engineer at Karaikal Site"

and an amendment to it which reads as follows:

"Delivery at M/s.Karaikal Port Private Limited, Project Site M/s.Marg aLtd, Keezhavanjore Village, T.R Patnam Comune Panchayat, Karaikal - 60 601. "

would contend that there was no requirement on the part of the first defendant to obtain the signatures of the Officers of plaintiff in the lorry receipts in order to prove delivery. According to him, the fact that the goods

were booked from Mumbai by Carrier namely, M/s.Dhoble Goods Carriers to Karaikal and the fact that the lorries reached Karaikal having been established by producing documents from various check posts is sufficient to enable the 1st defendant to claim payment.

21. The learned Senior Counsel would contend that the fact that the goods reached Karaikal Port Site cannot be disputed. The plaintiff cannot refuse to take delivery of the goods and contend that there has been fraud practiced by the defendant in attempting to encash the Letter of Credit by producing the acknowledgment in the lorry receipts signed by its own Engineers.

22. Per contra, Mr.Manoj Menon, learned counsel appearing for the first respondent/ plaintiff would contend that once it is shown that the goods are not delivered, such delivery having not been acknowledged by the officers of the plaintiff at the Port Site at Karaikal, the defendant cannot claim the case of the goods on the basis of the acknowledgment of delivery issued by its own Engineers.

23. The very short question that arises in this appeal is :

Whether the claim of the defendant that the goods had not been delivered, due to refusal on the part of the plaintiff is true and that the plaintiff having refused delivery of the goods cannot claim an injunction restraining acknowledgment of the Letter of Credit on the ground that there has been fraud practiced by the first defendant?

Point No.1:

24. In support of his contention that non delivery would not amount to fraud, Mr.T.V.Ramanujam, learned Senior Counsel would rely upon the judgment of the Hon'ble Supreme Court, in I.T.C.Limited Vs. Debts Recovery Appellate Tribunal and others reported in (1998) 2 SCC 70. The Hon'ble Supreme Court while considering the conditions under which the Court could grant injunction against encashment of Letter of Credit and In para 17 of the judgment the Hon'ble Supreme Court has observed as follows:

"17. It is now well settled that the question whether goods were supplied by the appellant or not is not for the Bank. This point has already been decided by the decision of this Court in

U.P.Coop. Federation case referred to above. In that case it was stated (at p.193) by Jagannatha Shetty, J as follows : (SCC para 45)

" The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves. The courts, however, carved out an exception to this rule of absolute independence. The courts held that if there has been 'fraud in the transaction' the bank could dishonour beneficiary's demand for payment. The courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else."

It will be noticed from the italicised underlined portion in the above passage that there will be no cause of action in favour of the bank in cases where the seller has not shipped the goods or where the goods have not conformed to the requirements of the contract. The Bank, in the present case before us, could not, by merely stating that there was non-supply of goods by the appellant, use the words "fraud or misrepresentation" for purposes of coming under the exception. The dispute as to non-supply of goods was a matter between the seller and buyer and did not, as stated in the above decision, provide any cause of action for the Bank against the seller. "

25. Placing reliance on this judgment Mr.T.V.Ramanujam, learned Senior Counsel would contend that mere non delivery of the goods will not amount to fraudulent practice or can be said to irrecoverable injury that enable the plaintiff to obtain injunction against the first defendant from encashing the Letter of Credit.

26. According to the learned counsel, whether the goods are delivered or not once the valid document namely the acknowledgment of delivery as required by the Letter of Credit is produced, then the Bank has to honour its commitment.

27. The learned Senior Counsel would further contend that may be that the plaintiff will have cause of action against the first defendant for non delivery and breach of contract that

will not in any manner enable the plaintiff to seek an injunction restraining the Bank from honouring the Letter of Credit issued by it.

28. Per contra, Mr. Manoj Menon, learned counsel appearing for the respondent would contend that even in I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and others, the Hon'ble Supreme Court has pointed out that there are certain exceptions to the law that the Court shall not order an injunction restraining invocation of Bank Guarantee or Letter of Credit namely fraud and irrecoverable injury. The learned counsel would contend that the claim of delivery made by the first defendant without actually delivering would amount to fraud on the part of the first defendant. The learned counsel would contend that there was no occasion for the plaintiff to refuse the goods when the goods were never delivered. He would also further contend that the contract itself was cancelled on 10.11.2008, therefore, the trial Court was right in granting injunction restraining the Bank in honouring Letter of Credit dated 14.07.2008 in favour of the first defendant.

29. Mr. Manon Menon, learned counsel appearing for the respondent would also invite my attention to the judgment of the Hon'ble Supreme Court in Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co. reported in (2007) 8 SCC 110, wherein the Hon'ble Supreme Court has again reiterated the grounds on which the Banks could be restrained by an order of injunction from honouring Bank guarantee or Letter of Credit issued by them. The Hon'ble Supreme Court had pointed out that

"The Court should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit. There are two exceptions for grant of an order of injunction to restrain the enforcement of an unconditional bank guarantee or a letter of credit: (i) fraud of an egregious nature committed in the notice of the bank which would vitiate the very foundation of the guarantee or letter of credit and the beneficiary seeks to take advantage of the situation; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself or would result in irretrievable harm or injustice to one of the parties concerned. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank guarantee or a letter of credit."

30. Mr. Manoj Menon would also rely upon the judgment of the Hon'ble Supreme Court in State of Andhra Pradesh Vs. M. Radha

Krishna Murthy reported in (2009) 5 SCC 117 and Oriental Insurance Co. Ltd. Vs. Raj Kumari (Smt) and others reported in (2007) 12 SCC 768, wherein the Hon'ble Supreme Court had pointed out to how precedents have to be used. The learned counsel would also rely upon the judgment of the Hon'ble Supreme Court in Svenska Handelsbanken Vs. M/s.Indian Charge Chrome and others reported in (1994) 1 SCC 502, wherein the Hon'ble Supreme Court has dealt with the question of the pleadings and proof of fraud.

31. The sum and substance contention of the learned Senior Counsel is that once it is shown that the first defendant made an attempt to deliver the goods and wrongful refusal on the part of the plaintiff to receive the goods, the plaintiff cannot claim that the first defendant had fraudulently made claim for the value of the goods.

32. As regards irretraivable injuries, the learned counsel would contend that the irretraivable injuries should be to such an extent the plaintiff could not be able to recover the loss that may be caused to it by the Bank in honouring the Letter of credit from the first defendant. It can at best be said that the first defendant had not complied with the requirements of the Letter of Credit. Therefore, the learned trial Judge was not right in concluding that the first defendant practiced fraud. In support of the contentions, the learned counsel would rely upon the Letter of Credit, particularly the clause relating the delivery, which has already been extracted and contend that the Letter of credit does not contemplate an acceptance or acknowledgment of the goods by the plaintiff.

33. The amendment incorporated in it does not also specify that the delivery must be at Karaikal Port project site M/s.Marg Limted must be acknowledged by the plaintiff's officers. According to the learned Senior Counsel, the requirement of Letter of Credit is that once the first defendant Engineers certified the goods that have reached the Port, that is enough to enable the first defendant to make claim against the Bank for the price of the goods that had reached to the project site. He would refer to the evidence on record and contend that it is proved by unimpeachable documentary evidence that the goods had reached the Karaikal Site and therefore, non delivery was due to the unreasonable rejection on the part of the plaintiff to take delivery of the goods. Therefore, according to the learned counsel, the trial Court was wrong in granting a decree for permanent injunction on the ground that the first defendant had fraudulently claimed delivery of the goods.

34. Referring to the documents namely, the lorry receipts issued by the Carriers which have been marked as Ex.B5 before the trial Court as well as E-mail communications dated

23.10.2008, 26.11.2008 and 25.10.2008 he would contend that the fact that the goods reached Karaikal and the officers of the plaintiff had refused to take delivery has been established by the first defendant beyond all reasonable doubts. That being so, the plaintiff having refused to take the goods cannot contend that there has been any fraud practiced by the first defendant in seeking to encash the Letter of Credit.

35. Mr. Manoj Menon, learned counsel would contend that the practice in the past was to get an acknowledgment from the Engineers of the plaintiff. The attempt made by the first defendant to encash the Letter of Credit by producing acknowledgment by its own Engineers amounted to fraudulent practice and therefore, the trial Court was justified in granting decree for injunction.

36. Mr. Manoj Menon, learned counsel would also contend that the first defendant has not complied with the other conditions in para 7 of the Letter of Credit dated 14.07.2008. Therefore, according to him, the claim of the first defendant did not contain the documents referred to in sub section 2 of Clause 7 contemplate delivery at Karaikal Port Project Site Marg Ltd. Hence, the first defendant would not be entitled to encash the Letter of Credit. He would also further contend that the test certificate in the list of required documents has not been produced by the first defendant. The second contention of Mr. Manoj Menon, is that the first defendant has not complied with the required conditions in the Letter of Credit dated 14.07.2008 and therefore, the first defendant should have refused to honour the Letter of credit. This, in my considered opinion, cannot furnish a cause of action for the plaintiff to seek injunction against the second defendant from honouring Letter of Credit in favour of the first defendant.

37. On its own showing in the plaint, the plaintiff has categorically alleged that the second defendant had informed the plaintiff that it will not be in a position to reject the claim submitted by the first defendant.

38. Therefore, if the second defendant chose to reject the documents furnished by the first defendant for its own reasons, the first defendant may have cause of action against the second defendant for breach of undertaking, that will not in any manner come in the way of the Court deciding whether the claim of the first defendant is fraudulent and the decision of the Hon'ble Supreme Court referred supra, very clearly point out that unless fraud or irrecoverable injury is made out, there cannot be an injunction restraining the Bank from honouring the Letter of Credit. The documents and the evidence that are available in this case would point out that the first defendant had infact

attempted to deliver the goods at Port Site on 19.08.2008 and the plaintiff had infact refused to take delivery of its own reasons. Therefore, the plaintiff cannot complain that the first defendant had committed fraud by producing the acknowledgment by its own Engineers. The relevant delivery Clause in the Letter of credit only contemplates an acknowledgment by the Engineers of the first defendant and not from the officers of the plaintiff. Therefore, I do not think the trial Court was right in concluding that the first defendant had fraudulently attempted to encash the Letter of Credit or that there will be irrecoverable injury caused to the plaintiff, if the Letter of Credit is encashed. I am therefore of the considered opinion, that the trial Court was not right in concluding that the plaintiff is entitled to injunction restraining the second defendant from seeking payment of the value of the goods as per the Letter of Credit dated 14.07.2008.

39. It is submitted by Mr.Manoj Menon, the learned counsel for the plaintiff that the second defendant Bank had on 10.11.2008 returned the claim and rejected the claim made by the first defendant. The said rejection may provide a cause of action to the first defendant against the second defendant for damages and that by itself will not enable the plaintiff to seek an order of injunction restraining the first defendant from invoking Letter of Credit issued by the second defendant.

40. I am of the considered opinion that the plaintiff has not established either of the two ingredients namely, fraud and irrecoverable injury to seek a decree for injunction restraining Bank from honouring the Letter of Credit.

41. Therefore, in view of the above discussions, the appeal is allowed and the judgment and decree of the trial court is set aside. The suit in OS.No.9270 of 2010 will stand dismissed with cost. Consequently, the connected Miscellaneous Petition is closed.

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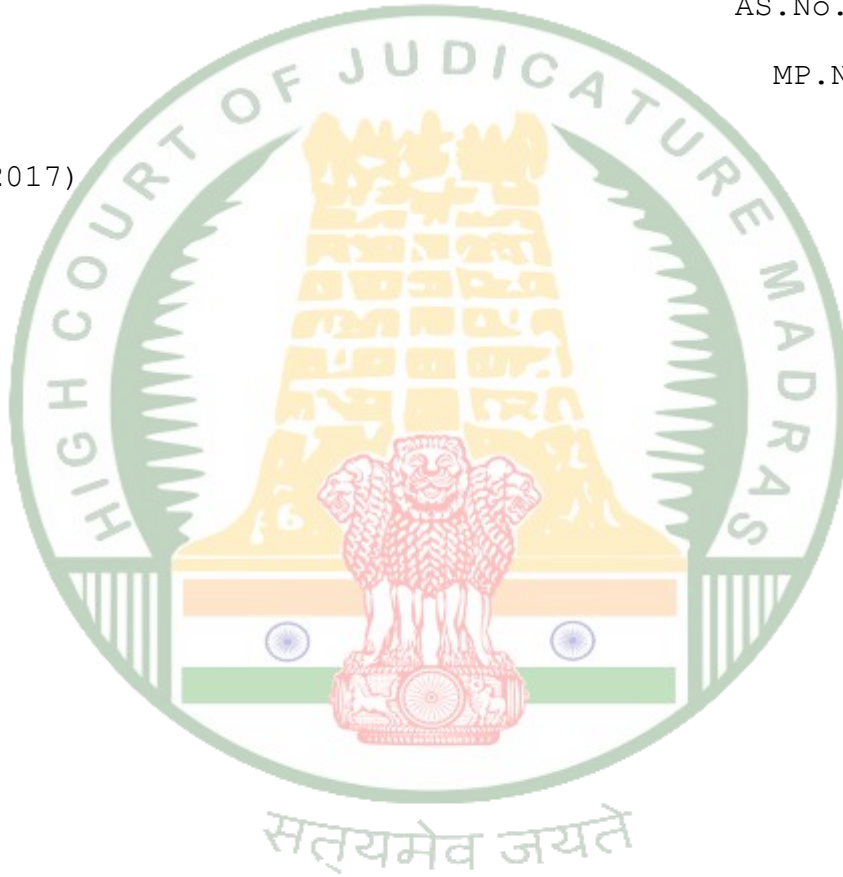
To

The XIX Additional Judge,
City Civil Court, Chennai.

+lcc to Mr.Rajesh Ramanathan, Advocate Sr. 64692
+lcc to Mr.Menon Karthick, Advocate Sr. 64708

AS.No.764 of 2014
and
MP.No.1 of 2014

SSI (CO)
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