

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.02.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

C.M.A.Nos.455 to 461 of 2017
and Connected C.M.Ps.

The Branch Manager,
M/s.Iffco Tokio General
Insurance Co. Ltd.,
Coimbatore.

... Appellants/3rd respondents
in all C.M.As.

Vs

Kathiresan

Santhiya (Minor)
rep by R1 Father Kathiresan

1st & 2nd Respondents/
Petitioners in CMA 455/17

Kavitha
Kathiresan

1st and 2nd Respondents /Petitioners
in CMA 456/17

Murugesan
Kavitha

1st and 2nd Respondent/Petitioners
in CMA 457/17

Kathiresan

1st Respondents/Petitioners
in CMA 458/17

Kavitha
Kathiresan

1st and 2nd Respondents/Petitioners
in CMA 459/17

Kavitha

1st Respondents/Petitioners
in CMA 460/17

Santhiya (minor)
rep. By Father Murugesan

1st Respondents/Petitioners
in CMA 461/17

Govindaraj
Duraisamy

(The 3rd Respondents in
CMA 455,456,457,459/17
and the 2nd Respondents in
CMA 458,460,461/17
set aparte in Lower Court.

3rd and 4th Respondents/Respondents 1,2
in CMA 455,456,457,459/17
and 2nd & 3rd Respondents/1,2
Respondents in CMA 458,460 of
461/17

Civil Miscellaneous Appeals filed under Section 173 of the Motor Vehicles Act, against the judgment and decree, made in M.C.O.P.Nos.615 to 621 of 2013, dated 05.02.2016, on the file of the Motor Accident Claims Tribunal, 1st Additional District Court, Tiruppur.

For Appellant : Mr.M.B.Gopalan

J U D G M E N T

IFFCO Tokio General Insurance Co. Ltd., has questioned the liability fastened on them, to pay compensation, on the grounds, inter alia,

- (i) The Maxi Cab vehicle was having a restricted seating capacity and therefore, persons travelling more than the permitted limit were not covered under the policy, for which, the Company is not liable to pay compensation.
- (ii) The driver had no valid and effective driving licence to drive the vehicle, which involved in the accident and therefore, there is a wilful breach on the part of the owner of the vehicle and hence, the company ought to have absolved from its liability.
- (iii) In respect of fatal cases, there is no document to prove the avocation and income of the deceased and therefore, there is no necessity to add certain sum towards future prosects.

2. That on 24.03.2013, about 2.45 Hours, when a Maxi Cab, bearing Registration No.TN 57 X 7272, owned by the 5th respondent herein, and insured with the appellant-Insurance Company, was proceeding, from North to South on Dharapuram to Ottanchathiram Main Road, near Paraivalasu, Ambilikkai, driver of the said vehicle, drove the same in a rash and negligent manner, hit against a tree. The injured passengers were taken to Government Hospital, Ottanchatram and given treatment. Out of seven persons, four of them died. In this regard, a case in Cr.No.33 of 2013, has been registered on the file of Ambilikkai Police Station, for

the offences, under Sections 279, 337, 338, 304(A) IPC. Legal representatives of the deceased and the injured have preferred separate claims, claiming compensation.

3. One of the main objections of the appellant-Insurance Company was that the driver of the Maxi Cab, involved in the accident, did not possess a valid licence to drive the vehicle and that therefore, the appellant-Insurance Company cannot be fastened with the liability. The claimants have submitted that as third parties, they are entitled to be paid a just and reasonable compensation. Per contra, the appellant-Insurance Company placed reliance on the evidence of RW.1 - Regional Transport Officer, South, Tirupur, RW.2 - Regional Transport Officer, Tirupur and RW.3, Senior Officer of the Company that the driver of the Maxi Cab, has no valid driving licence and therefore, the Insurance Company was not liable to pay compensation.

4. On evaluation of pleadings and evidence, the Claims Tribunal, having found that the driver of the Maxi Cab, bearing Registration No.TN 57 X 7272, owned by the 5th respondent herein, was negligent in causing the accident, quantified the compensation. Adducing evidence, the appellant-Insurance Company has proved that the driver of the Maxi Cab do not possess the driving licence and that there was a breach of the policy condition under Ex.R4 - Insurance Policy and therefore, the Claims Tribunal has ordered that the appellant-Insurance Company is entitled for pay and recovery from the 5th respondent herein.

5. Being aggrieved by the award, the appellant-Insurance Company has preferred the present appeals.

Heard the learned counsel for the parties and perused the materials available on record.

6. Though Mr.M.B.Gopalan, learned counsel for the appellant-Insurance Company submitted that the statutory liability, to pay compensation to the accident victims, is restricted to only limited persons, in view of the seating capacity of Maxi Cab, no details have been furnished before this Court, as to whether there were any other person, other than the victims, who had travelled in the vehicle. The total seating capacity of Maxi Cab should not exceed more than 12 persons, excluding driver. In the present case, there are only seven accident victims and hence, the objection that the Insurance Company is not liable to pay compensation, cannot be accepted.

7. A case has been registered in Cr.No.33 of 2013, against the driver of the offending vehicle, for the offences, under Sections 279, 337, 338, 304(A) IPC, on the file of Ambilikkai Police Station. Driver of the Maxi Cab has not been examined, to

prove the manner of accident. There is no evidence to prove that the victims were gratuitous passengers. Therefore, this Court is of the view that the victims should be treated only as third parties and not as gratuitous passengers.

8. However, considering the violation of non-possession of valid driving licence, the Tribunal has ordered the appellant-Insurance Company to pay compensation to the accident victims and recover the same from the owner of the vehicle. Though the appellant-Insurance Company has submitted that the driver of the offending vehicle did not have a valid driving licence and sought for total exoneration, this Court is not inclined to accept the same, in view of the decisions of this Court in United India Insurance Company Ltd., v. S.Saravanan reported in 2009 (2) TNMAC 103 (DB), United India Insurance Company Limited, Salem, Vs. V.Vijayakumar, represented by his mother Kalamani and three others, reported in 2010 (2) TN MAC 388 (DB) and Bajaj Alliance General Insurance Company Ltd., Pune, Vs. Manimozhi and four others, reported in 2010 (2) TN MAC 542 (DB).

9. The question as to whether, it is open to the insurer to seek for total exoneration for payment of compensation to a third party victim or whether it has only a right of recovery under Sections 149 (4) and (5) of the Motor Vehicle's Act, has been extensively considered in ICICI Lombard General Insurance Company Vs. Annakkili, reported in 2012 (1) TN MAC 226, wherein, this Court following the principles of law laid down by the Apex Court and the Hon'ble Division Bench judgments held that, payment of compensation to a third party victim or legal representatives of the deceased, as the case may be, is statutory and considering the interpretation given by the Supreme Court to Sections 147, 149 (4) and (5) vis-a-vis, the defences open to the Insurance Company under Section 149(2)(a) (ii) of the Motor Vehicles Act held that the very introduction of the words, "pay compensation to the third party and recover the same from the insured" in Section 149(4) and (5) of the Act, would reflect the divine intention of the legislature to protect the interest of the third parties, vis-a-vis inter-se disputes between the insured and insurer, and further held that the insurer cannot avoid its liability to pay compensation to a third party, but such avoidance can be made only, if willful breach of terms and conditions of the policy by the insured, by consciously and recklessly allowing the driver, who did not possess a valid and effective driving licence, to drive the vehicle and even if such breach is proved, payment of compensation to the third party victim cannot, at any stretch of imagination, be avoided by the Company and that the only remedy open to the insurer in law is to pay the compensation to the third party victims and recover from the insured. In view of

the above, the insurer cannot be totally exonerated from payment of compensation to third party, but it can avoid its liability only to the insured.

10. In a decision of this Court in Branch Manager, Oriental Insurance Company Ltd., Theni Vs. Mansoor Hussain and another, reported in 2013(2) CTC 57, Hon'ble Mr. Justice, G.M.Akbar Ali, my Esteemed Brother, has considered a catena of decisions of the Supreme Court, as well as this Court and after extracting Section 149(2)(a)(ii), at paragraph Nos.19 to 29, held as follows:

"19. It has to be borne out in mind that only under Section 149 of the Act the Insurer has become a party in a tortuous claim otherwise, it is only a Suit between the victim and the tortfeasor. Only under an Insurance Policy between the tortfeasor and the Insurance Company the Insurer has undertaken to indemnify the insured. Therefore, the defences available to the Insurance Company is very limited.

20. Section 149(2)(a)(ii) reads as follows:

"Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. -

(2) No sum shall be payable by an Insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the Insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an Appeal; and an Insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the Policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle - (a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a Motorcycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, Civil war, riot or Civil commotion; or

b) that the Policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

21. This Section is corresponding to Section 96 of the old Act. In *Iffco Tokyo General Insurance Company v. Jafer Sadiq*, (2012 (1) TN MAC 394 (DB), a Division Bench of this Court (where I was a party) had an occasion to deal with the provisions under Section 96 of the old Act and the provision under Section 149 (2) (a) of the New Act.

22. On a comparative reading of the relevant provisions, we found that upon careful reading of the provisions there is a draftsman's mistake which went unnoticed for all these years under Section 149(2). This Court found as follows:

"36. In the comparative table shown above, Section 96, Clause (ii) (Old Act) deals with the grounds of defence available to the Insurance Company. Sub-clause (a) relates to a Policy which was cancelled by mutual consent, etc., sub-clause (b), which is very important which deals with three conditions -

(i) (a) use of the vehicle for hire or reward not covered by a Permit (b) for organized racing and speed testing (c) use of vehicle for a purpose not allowed by the Permit (d) without side-car being attached, where the vehicle is a Motorcycle.

(ii) deals with vehicle being driven by a person not duly licensed with.

(iii) deals with when the policy is void. - Section 96(2-A) was inserted w.e.f. 16.2.1957.

37. Now if we look at Section 149 of the Act 1988, in sub-section (2) to Section 149; what was in Section 96(2)(a) viz., the defence on cancellation of Policy is not incorporated rather it is deleted. Therefore necessarily, sub-clause (b) of Section 96(2) has become now 149(2)(a). Consequently, 96(2)(c) has become 149(2)(b). Further, consequently, sub-clause (2-A) has been e- numbered as 3. Therefore, 96(3) of the Old Act is now 149(4).

38. Now 96(3) & 149(4) are in pari material which it should not be.

MOTOR VEHICLES ACT, 1939	MOTOR VEHICLES ACT, 1988
96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks. -(3) Where a certificate of insurance has been issued under sub-section (4) of Section 95 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 95, be of no effect:	149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. -(4) Where a certificate of insurance has been issued under sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under Clause (b) of sub-section (1) of Section 147, be of no effect:
Provided that any sum paid by the Insurer in or towards the discharge of any liability of any person which is covered by the Policy by virtue only of this sub-section shall be recoverable by the Insurer from that person.	Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the Policy by virtue only of this subsection shall be recoverable by the Insurer from that person.

39. The reason being after the sentence "by reference to any condition other than those in clause (b) of sub-section (2) shall be of no effect", relates to old "b" which includes a condition excluding driving by a person who is not duly licenced. When it comes to Section 149 (4), rightly or wrongly the sentence "by reference to any condition other than those in clause (b) of subsection (2) shall be of no effect" which relates to the present Clause (b) which reads as that the Policy is void on the ground, etc., whereas it should have been "(a)" which relates to condition excluding driving by a person who is not duly licenced.
40. The difference is very revealing and we do not think it is a mistake or error. But the Parliament appears to have introduced a very significant change under the replacing statute to mean that the defences of Insurer, while being confined to those available under Section 149(2), in respect of defences other than those under Section 149(2), as a rule the Insurer may have to pay and recover. Only under Section 149 (2) (b) which relates to void Policy the Insurer can seek complete exoneration from liability. That is the understanding we get from comparative reading of Section 96(3) and Section 149(4) of the Act.
41. Since the language in Section 149(4) is in pari material with Section 96(3) of the Old Act, it gives an impression that while the Parliament or the draftsman have chosen to use the same expression 'clause (b) of sub-section (2) as used in Section 96(3), the content and substance of the said provision is different as illustrated above. Whether it is the act of Parliament or the error of draftsman, the impact and the effect is very significant affording enormous protection to the innocent motor accident victims providing them improved and better protection in the new Act.
42. A comparative reading as above would show that the Parliament in its wisdom, apart from restricting permissible defences of Insurer to those enumerated under Section 149(2), has gone beyond and ensured that all other defences

other than those provided under Section 149(2) would be of no effect in so far as third party victims are concerned.

43. At the risk of repetition we point out that the defence under Section 149(2)(b) relates to the Policy of the Insurance held to be void under Certain circumstances. Only in a case where the Policy of the Insurance is found to be void as per Section 49(2)(b) the Insurer may be justified in refusing indemnity."

23. This anomaly was pointed out by Mr. S. Srinivasa Ragavan, an Advocate for Insurance Companies, in his article 'LIFTING THE LEGISLATIVE VEIL' published in 2010 (4) CTC 68 J.S. It is pointed out that 'While drafting sub-section (4) of Section 149 of the M.V. Act in 1988, the parliament ought to have amended the provision of law by making clause (b) as clause (a)". In my view, as expressed in the judgment in Iffco Tokyo General Insurance Company v. Jafer Sadiq, 2012 (1) TN MAC 394 (DB), whether it is the draftsman's mistake or the wisdom of the parliament, in fact the New Act had denied the right of the Insurance Company to avoid its liability in cases of driving licences. In that case, even the defence of questioning the licence of the driver is not available to the Insurer. Though there was a suggestion on the side of the Insurance Company, that it is only a draftsman's mistake, we held that it is the wisdom of the Parliament restricting the defences of the Insurer.

24. Therefore, as per the dictum laid down in National Insurance Co. Ltd. V. Swaran Singh and others, 2004 (1) TN MAC 104 (SC) : 2004 (1) TAC 321 (SC); in United India Insurance Co. Ltd. V. S. Saravanan, 2009 (2) TN MAC 103 (DB); in Bajaj Allianz General Insurance Co. Ltd., Pune v. P. Manimozhi and others, 2010 (2) TN MAC 542 (DB), in Branch Manager, United India Insurance Co. Ltd., Dharmapuri Town v. Nagammal and others, 2009 (1) TN MAC 1 (FB) and in Jawahar Singh v. Bala Jain and others, 2011 (1) TN MAC 641 (SC); and in Iffco Tokyo General Insurance Company v. Jafer Sadiq, 2012 (1) TN MAC 394 (DB), it is settled that if the Insurer establishes that there is a breach of Policy condition under Section 149(2)(a)(ii), the Insurance Company though not liable, as it has successfully established its defence, can be directed to pay and recover from the insured.

25. However, in *New India Assurance Co. Ltd. V. Chandran and another*, 2010 (1) TN MAC 65, a learned Single Judge of this Court has held that Where the Insurance Company has positively proved that on the date of accident, the driver of the offending vehicle has not possessed of any licence at all, the owner of the vehicle alone liable to pay compensation. The order of the Larger Bench in *National Insurance Co. Ltd. V. Swaran Singh and others*, 2004 (1) TN MAC 104 (SC), directing the Insurance Companies to pay and later recover even in cases of 'did not hold any licence at all' was negatived holding. It is not a precedent binding on the Courts.
26. In my humble opinion in *Sardari v. Sushil Kumar*, 2008 (1) TN MAC 294 (SC) (cited supra) the question of pay and recover was not considered at all. In *Branch Manager, New India Assurance Co. Ltd. V. Muralikrishnan and another*, 2010 (3) MLJ 271, P.K. Mishra, H. laid down a ratio decidendi which is as follows: "The judgment of the Supreme Court in *National Insurance Company Ltd. V. Vidhyather Mahariwala and others*, 2008 (2) TN MAC 369 (SC) : 2008 (6) CTC 254 (SC) does not, as a rule, exclude the "pay and recover" policy in all cases." It applies to *Sardari's* case also. Similarly, the learned Single Judge has dealt with only Article 142 of the Constitution of India and the self-contained relief under Section 149(4) of the M.V. Act was not urged before the Court for pay and recover."
27. I am of the considered view that the defence available under Section 149(2)(a)(ii) which relates to duly licenced includes no licence also. The contention that in the case of no licence at all the insured was guilty of negligence and failed to exercise reasonable care in the matter fulfilling the Policy condition can not be acceptable as the victim can not suffer for the failure of the insured. The wisdom of the Three-Judges Bench of the Supreme Court in *British India General Insurance Co. Ltd. V. Captain Itbar Singh and others*, 1958-1965 ACJ 1, is very relevant. This Court is also bound by the decision of the Full Bench in *Branch Manager, United India Insurance Co. Ltd., Dharmapuri Town v. Nagammal and*

others, 2009 (1) TN MAC 1 (FB) (cited supra) wherein it is held that - "Where it (Insurance Company) is successful in its defence, it may yet be required to pay the amount to the Claimant and thereafter recover the same from the owner....." It is also relevant to refer to Jawahar Singh v. Bala Jain and others, 2011 (1) TN MAC 641 (SC), where the Supreme Court upheld the order of the Tribunal directing the Insurer to pay and recover from the insured in case of a Minor who did not possess and could not have possessed any licence at all, caused the accident. Therefore, even in case of no licence if the Insurance Company establishes that the driver of the insured vehicle was not in possession of any type of licence, the Insurance Company is to be exonerated but as per sub-section (4) & (5) of Section 149 of the Act, they can be directed to pay and recover. Therefore, the questions are answered accordingly in all the Civil Miscellaneous Appeals. Since in all the above Appeals the Insurance Company has established no licence to the drivers, the Appellants are exonerated but directed to pay the compensation and recover the same from the owner of the vehicle in the same proceedings.

28. In Oriental Insurance Co. Ltd. V. Shri Nanjappan and others, 2004 (1) TN MAC 211 (SC) : 2004 (2) CTC 464 (SC) : 2004 (1) ACC 524 (SC) the mode of recovery is being mentioned and therefore the Counsel of the Insurance Company requested this Court to incorporate such mode to enable the Insurance Company to recover the compensation paid from the owner. Since the mode of recovery is not mentioned in the orders of the Tribunal, I see there is a force in the argument of the learned Counsels for the Insurance Companies.

29. In the result, all the Appeals are disposed of holding that in all the cases of no licence, the Insurance Company, though exonerated but directed to pay and recover the same from the owner of the vehicle. The Insurance Company is entitled to recover the compensation as per the mode incorporated in Paragraph 7 of Oriental Insurance Co. Ltd. V. Shri Nanjappan and others, 2004 (1) TN MAC 211 (SC) ; 2004

(2) CTC 464 (SC) : 2004 (1) ACC 524 (SC), which is incorporated as follows:

"For the purpose of recovering the compensation amount from the insured, the Insurer shall not be required to file a Suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the Insurer and the insured was the subject matter of determination before the tribunal and as if the issue is decided against the owner and in favour of the Insurer. A notice shall be issued to the insured to furnish security for the entire amount. The offending vehicle shall be attached as a part of the security. If necessary arises, the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured/owner of the vehicle shall make payment to the Insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property of the insured".

11. Further, in yet another recent decision in S.Iyyapan v. United India Insurance Co. Ltd., reported in 2013 (7) SCC 62, the Hon'ble Supreme Court, dealing with a similar contention of a valid and effective driving licence, at Paragraph 17, held as follows:

"Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy."

12. Owner of the vehicle, against whom, right of recovery has been granted, has not preferred any appeal. Hence, in the light of the decisions made in ICICI Lombard General Insurance Company Ltd., v. Annakkili and others reported in 2012 (1) TNMAC 227 and S.Iyyapan v. United India Insurance Co. Ltd., reported in 2013 (7) SCC 62, this Court is of the view that there is no manifest illegality in fastening liability on the appellant-Insurance Company to pay compensation to the

respondents/claimants, in each of the appeals and then to recover the same, from the owner of the vehicle.

13. Though the learned counsel for the appellant-Insurance Company has questioned the quantum of compensation, awarded to both the legal representatives of the deceased and the injured, in particular, fixation of monthly income and future prospects, this Court is of the view that except the deceased in M.C.O.P.No.617 of 2013, a student, aged 17 years, at the time of accident, studying in Universal Matriculation School, Tiruppur and Minor Santhiya, aged 15 years, at the time of accident, studying in Krishnammal Birlas Higher Secondary School, Covai, other accident victims are more or less engaged in tailoring and its connected works. Tiruppur is a major textile and knit wear hub, contributing to 90% of total cotton knit wear exports from India and there is every possibility for the respondents/claimants to earn a reasonable income. Hence, this Court is of the view that fixation of monthly income and future prospects, for the above accident victims, cannot be said to be erroneous.

14. In the result, Civil Miscellaneous Appeals are dismissed. The appellant-Insurance Company is directed to deposit the entire amount, less the amount already deposited, with accrued interest and costs, to the credit of M.C.O.P.Nos.615 to 621 of 2013, on the file of the Motor Accident Claims Tribunal, 1st Additional District Court, Tiruppur, within a period of six weeks from the date of receipt of a copy of this order. The claimant in M.C.O.P.No.621 of 2013, is aged 15 years, at the time of accident and by this time, she would have attained majority. The respondents/claimants are permitted to withdraw the said amount, by making necessary applications before the Tribunal. No costs. Consequently, connected Miscellaneous Petitions are also closed.

Sd/-
सत्यमेव जयते

Assistant Registrar

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Sub Assistant Registrar

To

The Motor Accidents Claims Tribunal,
1st Additional District Judge, Tiruppur.

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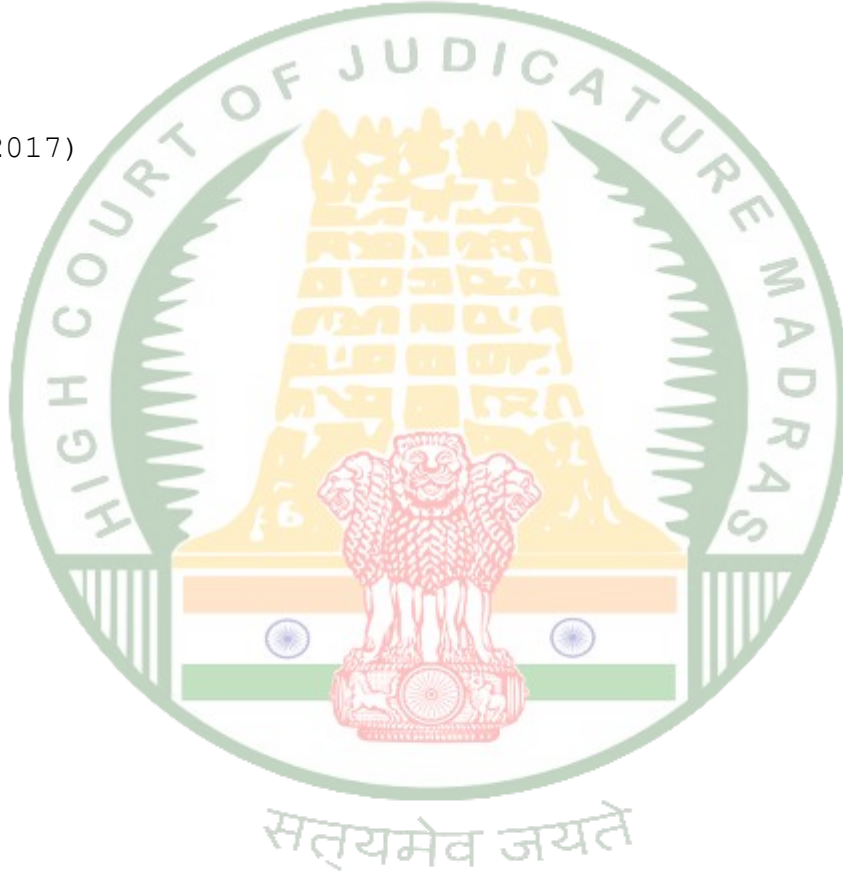
The Section Officer,
VR Section, High Court, Madras.

+7ccs to Mr. M.B. Gopalan, Advocate
Sr. 13126,13125,13124,13123,13122,13121,13120

C.M.A. Nos. 455 to 461 of 2017

RSY (CO)

Vr (27/03/2017)



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