

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Orders Reserved on : 27.07.2017)

Orders Pronounced on : 07.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CrI.R.C.No.1120 of 2013

Kavitha

... Petitioner

.. Vs ..

C.Prabhakar

... Respondent

Prayer:- Criminal Revision Case filed under Section 397 r/w. 401 of Cr.P.C., against the order dated 31.07.2013 passed in M.C.No.25 of 2009 by the Family Court, Salem.

For Petitioner : Mrs.Geeta Ramaseshan

For Respondent : Mr.M.Devaraj

ORDER

This Criminal Revision Case is filed by the wife for enhancement of maintenance awarded by the learned Judge, Family Court, Salem, in M.C.No.25 of 2009 dated 31.07.2013.

2. For the shake of convenience, the parties are referred to as per the ranking before the trial Court.

3. The brief facts, which are necessary for determination of the case, are as follows:-

(i) The marriage between the petitioner and the respondent was solemnized on 28.05.2007 at Sakthi Duraisamy Thirumana Mahal, Erode, as per Hindu rites and customs.

(ii) In the counter, the respondent/husband denied various averments and inter alia contended that the revision petitioner/wife lived with him in abroad (Canada) only for eight days and she deserted the matrimonial home on her own accord and not entitled for any maintenance.

(iii) Pending trial, the respondent/husband has filed an application, being represented by his father as Power Agent, to conduct the case before the Family Court, Salem, which has resulted

in Crl.O.P.No.2606 of 2011 and this Court, after taking into consideration the earlier decision of this Court in the case of **Pavithra Vs. Rahul Raj** reported in **AIR 2003 Madras 138**, has allowed the father of the respondent/husband to represent and conduct the case as the respondent's Power of Attorney subject to the legal limitations.

4. During trial, the wife examined herself as P.W.1 and marked Exs.P.1 to P.17, while on behalf of the respondent, he has not entered into the witness box, however, his father namely, Dr.Chandrasekaran was examined as R.W.1 and marked Exs.R.1 to R.10. After trial, the learned Judge of the Family Court, Salem, by an order dated 31.07.2013, has granted maintenance of Rs.10,000/- per month to the wife/revision petitioner herein.

5. Seeking enhancement of the maintenance awarded as stated above, the wife has preferred this criminal revision case alleging that the trial Court erred in holding that the revision petitioner did not comply with her marital obligations and lead companionship just by considering the evidence of the father-in-law, when actually it ought to have been the respondent, who should have been cross examined in

this regard. It is further alleged that the trial Court erred in holding that the revision petitioner forcibly occupied the house of the father-in-law, when she has a right to reside in the premises as a daughter-in-law and also under the various statutory provisions such as the Domestic Violence Act. Further, the trial Court erred by holding that the father of the respondent can know the entire facts of the case and hence, his evidence can be accepted to decide the issue, in the absence of the respondent, inasmuch as in matrimonial matters, spouses are the necessary parties and others can only be a witness for the same. The revision petitioner/wife has further alleged that the trial Court ought to have seen that in matters of marriage, issues of the relationship can be spoken to only by the spouses themselves and ought to have rejected the evidence of the father on this ground alone.

6. After hearing both the parties, on a perusal of records, it is seen that the respondent/husband has not appeared before the trial Court and he has entered appearance in the trial Court represented by his father as Power Agent.

7. In this case, by an order dated 04.07.2014, this Court has directed the respondent/husband to pay the monthly maintenance at the rate of Rs.25,000/- with effect from July 2014 which shall include the amount of Rs.10,000/- already ordered to be paid.

8. After going through the evidence of P.W.1 given in the cross-examination which runs into 6 pages, the only point that is elucidated from the cross-examination of P.W.1/wife is that "கனடாவில் என் கணவருடன் நான் 8 நாட்கள் தங்கியிருந்தேன். அந்த 8 நாட்களிலும் நான் கணவன் மனைவியாக வாழவில்லை என்றும் தகறாறு செய்து கொண்டு இருந்தேன், என்றால் சரியல்ல."

9. The revision petitioner/wife has spent only 8 days in the matrimonial home in Canada and due to the indifference between the parties, she has returned to India on payment of three times of the flight ticket. The cross-examination of R.W.1/father of the respondent/husband, which runs into 14 pages, goes to show that the respondent/husband is in Canada as a Project Leader in HCL Technologies and other things are related to incidental not germane to the issue in maintenance case. Besides, the money sent by his son to

the credit of R.W.1 is also elucidated. Admittedly, the respondent/husband has not attended the proceedings before the Family Court on the strength of the order passed in Crl.O.P.No.2606 of 2011. It remains to be stated that the respondent/husband has not entered into the witness box to deny the maintenance claim of the petitioner/wife nor contested the quantum as prayed for and has not made himself available for cross-examining as to the quantum of income before the trial Court and to arrive at a conclusion for awarding maintenance, which assumes significance. Even in Crl.O.P.No.2606 of 2011, this Court has categorically observed in paragraph No.6 as follows:-

"6. "Therefore, the case can be proceeded with, even in the absence of the petitioner and for the purpose of giving evidence, the petitioner has to come and if the petitioner chose not to give evidence, it is open to the Court to draw adverse inference and pass orders on the evidence available on record."

10. After going through the cross-examination of P.W.1 and R.W.1, this Court finds that matters not germane to the issue involved, have been put in the cross-examination in the matrimonial proceedings and Family Court seems to have acted as a mute

spectator. Originally, family disputes of persons of Muslim religion have been filed before the District Munsif Court on certain restricted grounds and in respect of the Hindu marriages, proceedings have been filed before the Sub Court, while for the persons of Christian religion have to move the District Court. Thereafter, by enactment of the Family Courts Act, all have been uniformly tried by the Family Court headed by the Judicial Officer in the rank of District Judge. The very object and purpose of the Family Court headed by District Judge is to explore the possibility of re-union and to have the cases oriented with the relief, whereas it appears that except the point in issue, all other incidents of marriages and other social events have been put to the wife in the cross-examination. Therefore, this Court finds it disheartening to note that the Family Court established under the Family Courts Act shall not be a mute spectator during cross-examination of the parties.

WEB COPY

11. As observed earlier, the counter filed by the respondent/husband which runs into as many as 15 pages, does not speak much about the entitlement of the revision petitioner for maintenance and the quantum of income of the respondent/husband

to resolve the dispute between the parties. Be that as it may, the respondent has not entered into the witness box to prove his averments. R.W.1 is the father of the respondent/husband. As rightly contended by the learned counsel for the revision petitioner/wife, in the matters of marriage, issues of relationship can be spoken to only by the spouses themselves and not the evidence of the father. The trial Court has committed an error in relying upon the evidence of the father in the absence of evidence of the respondent/husband. Furthermore, the trial Court has held that the father of the respondent/husband would know the entire facts of the case and accepted the version of R.W.1, in the absence of the evidence of the respondent/husband, even the matrimonial issues said to have taken place in Canada, where admittedly, R.W.1 was not present. The revision petitioner/wife has claimed maintenance of Rs.1,00,000/- on the ground that the respondent is earning more than Rs.3,00,000/- due to the off-shore employment in Canada being deputed by HCL Technologies. The said averment of the revision petitioner/wife stands uncontroverted by any evidence by the respondent/husband.

12. In the decision reported in **2014(1) HLR 709 [Seenora**

Benzamin Chokar Vs. Benzamin Manase Cholkar], in paragraph

No.5, the Gujarat High Court has held as follows:-

"5. However, unfortunately in absence of cogent evidence by the either side, the Trial Court had presumed the income of the respondent from agricultural activities to the tune of Rs.6000/- per month and considering such amount as monthly income, the amount of maintenance is increased from 1000/- to 2000/-.

"In the case of ***Gopal Kishanji Ketkar V. Mohammad Hazi Latif and anr.*** Reported in ***AIR 1968 SC 1413***, the Apex Court has considered that the party in possession of the best evidence which would throw light on issue in controversy, if withhold such evidence, the Court ought to draw an adverse inference against him not withstanding that onus of proof does not lie on him."

"In the case of ***Ramrati Kuer v. Dwarika Prasad Singh*** reported in ***AIR 1967 SC 1134***, while considering the provisions of Section 114 of the Evidence Act, the Apex Court has observed and held that neither party producing any evidence even though any of them can produce it, if available, and when absence of such evidence is inconclusive and does not help either party instead of taking adverse inference, it would be appropriate to call upon the parties to prove such thing by production of relevant evidence. The Court has considered that if any party fails to produce accounts but only give oral evidence and when no attempt was made by opposite party to call for accounts, even if, accounts would be the best evidence, at the most oral evidence may not be accepted."

"In the case of *Eureka Forbes Ltd., V. Allahabad Bank* reported in **2010 AIR SCW 3429**, the Apex Court has considered that it is accepted percept of appreciation of evidence that a party which withholds from the Court the best evidence in its power and possession, the Court would normally draw an adverse inference against that party. In any case, the bona-fide of such party would apparently be doubted. Thereby when litigant has failed to produce certain evidence which was obviously in their possession despite prolonged litigation, the Court has drawn an adverse inference against such litigant."

.....

"In the case of *Rama Paswan v. State of Jharkhand* reported in **2007 AIR SCW 2779**, the Apex Court has held that it is cordial rule in the law of evidence that the best available evidence should be brought before the Court. The principles of Evidence Act are based on this rule. However, the Court is not empowered under the provisions of Code to compel either side to examine any particular witness. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw adverse inference. The Court will have to depend on intercepted allegations made by the parties, or on inconclusive inference from the facts elicited in the evidence."

13. The sum and substance of all the above citations are to the effect that in the absence of any specific evidence, the Court can either take an adverse inference or may allow the parties to produce relevant evidence so as to avoid adjudication of intercepted allegations made by the parties or to take inconclusive inference from

the facts elicited in the evidence.

14. It is to be stated that Section 114 of the Evidence Act permits the Court to draw an adverse presumption against the litigant in default to the effect that evidence which is not produced would, if produced, have been unfavourable to the person who withholds it. The rule is contained in well-known maxim:-

"omnia praesumuntur contra spoliatorem". If a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted."

15. In the matter of maintenance claim filed under Section 125 of Cr.P.C., the primary onus is upon the wife to show the income of the husband, but onus is also equally placed on the husband to produce reasonable evidence, which is in his possession to bring before the Court the true and correct income of his earning and if the statements of both husband and wife about the income are not believable, then the Court has to apply some guess work and work out to arrive at a reasonable income that could be drawn by the husband

so as to give maintenance to the wife as envisaged under Section 125 of Cr.P.C.

16. Regarding the guiding principles for the Family Courts to arrive at the quantum of maintenance to be awarded in the maintenance proceedings, the Hon'ble Supreme Court in the decision reported in **1997 (7) SCC page 7 [Smt. Jasbir Kaur Sehgal Vs. The District Judge, Dehradun]**, has held that the trial Court has to consider the status of the parties, their respective needs, capacity of husband to pay, having regard to reasonable expenses for his own maintenance and the maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she lived with her husband and the wife should not feel handicapped in prosecution of the case against her husband for maintenance.

WEB COPY

17. On factual matrix of the case and at the risk of repetition and however, for the shake of clarity, it is to be stated that the respondent/husband has not entered into the witness box to depose about the averments made in the counter affidavit. It is needless to

state that with regard to matrimonial and conjugal relationship between the spouses, the best evidence is that of the parties and not of the father of the respondent, who was examined as R.W.1 as a Power of Attorney Agent appointed by the respondent/husband to conduct the case in Family Court, Salem.

18. With regard to appreciation of the evidence of the Power of Attorney appointed by a spouse in a maintenance proceedings before the Family Court, the Division Bench of this Court in the case of ***R.R.Pauvya Vs. C.Kanagavel (C.M.A.No.2237 of 2007) reported in 2014(5) CTC 177*** in paragraph No.20, has held as follows:-

"20.

(i) Power of Attorney can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A General Power of Attorney holder cannot be allowed to Appeal as a witness on behalf of the principal in the capacity of the principal;

(ii) The Power of Attorney holder does not have the personal knowledge of the matter of the Appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are exclusively to the personal knowledge of the principal.

(iii) In the Family matters, it is not possible for the spouse to engage a power and act on his/her behalf to give evidence before the Family Court which she/he alone has personal knowledge.

(iv) [..... There is no legal impediment under the Family Courts Act, for a Power of Attorney to appear on behalf of the Principal and the only legal embargo is that the recognized agent should not be a legal practitioner. Any person, not being a legal practitioner, can be nominated as an agent under Order 3, Rule 2, C.P.C., to prosecute or defend the parties and until the Family Court passes any specific order, directing appearance of the party, depending upon the facts and circumstances of the case. The persons, who are exempted from the term 'legal practitioner' are the Parents, brothers and sisters. Even then for deposing the facts that are within the personal knowledge of the principal, they should refrain themselves, but the principal should appear before the Court and depose." (emphasis supplied)

19. Considering the limitation and legal interpretation on the evidence of R.W.1 and all the specific evidence of P.W.1 in the witness box and the averments made in the counter affidavit, which are not supported by evidence as the husband has not entered into the witness box, the trial Court has erred in accepting the evidence of R.W.1, the father of the husband to arrive at a quantum and the said

finding is totally misconceived and held to be legally unsustainable and the same is hereby vacated.

20. As stated in the preceding paragraphs, when the husband has evaded all the judicial proceedings in India and seems to have taken a decree of divorce in Canada on the technicality based upon the law available in the Foreign State, which was not binding upon this Court in Tamil Nadu and all the facts that he has not projected his own income following the various decisions cited supra, the trial Court ought to have drawn an adverse inference upon the respondent for not disclosing his income. However, the trial Court has chosen simply to accept the case of R.W.1, who cannot speak about the said fact. Further, R.W.1 has not whispered anything about the alleged income of the respondent/husband. Therefore, the trial Court has committed gross error in awarding maintenance of a sum of Rs.10,000/- per month.

21. Following the decisions cited above, this Court is of the considered view that an adverse inference has to be drawn against the respondent/husband for not producing the evidence before the Court

about his income to arrive at a conclusion and for awarding maintenance. Considering the entirety of the circumstances of the case and the employment said to have been carried on by the respondent/husband, this Court is of the considered view that it is just and proper to award a sum of Rs.50,000/- per month towards maintenance and the same is hereby ordered from the date of the petition filed before the Family Court.

22. At this juncture, it is relevant to state that when a common man knocks at the doors of the Temple of Justice seeking the relief by way of petition, legally termed as plaint under Order 9 of C.P.C., after trial, a decree will be passed in accordance with Order 20 of C.P.C. But that is only a paper decree, which is not of any use until the decree comes to the fructification of the relief granted by the Court, the fruits of the decree as granted under Order 20 of C.P.C. will be only in the execution proceedings under Order 21 of C.P.C. Akin to the above procedure in respect of the maintenance proceedings initiated under Section 125 of Cr.P.C., a paper decree will not serve the purpose unless the estranged wife moves another application under Section 128 of Cr.P.C. for collection of the arrears of maintenance awarded by

the Court. When the estranged wife having been deserted by her husband, left with no other option, to move away from the matrimonial home as to lead a reasonable life to maintain herself, considering the status and mode of life she lived with her husband and hence, to ascertain as to whether the fruits of maintenance decree has reached the hands of the estranged wife, this Court has called for a report regarding the pendency of the petition filed under Section 128 of Cr.P.C. before the Family Courts alone [apart from the Magistrate's Court]. It is disheartening to note that despite the establishments of the Family Court, more number of petitions under Section 125 of Cr.P.C. are pending before the Family Courts alone and further, no uniform procedure seems to have been followed in various Family Courts in Tamil Nadu and Puducherry, regarding payment out/withdrawal of the amount deposited by the husband towards arrears of maintenance.

WEB COPY

23. It remains to be stated that even in a case where the husband has deposited the amount, still, the age-old procedures of issuing further notice to the counsel for the respondent for giving payment of maintenance amount, which is lying in the Court deposit,

are being followed by more number of Family Courts. Equally, an enquiry is also being carried for the disbursement of the admitted award amount. From the questionnaire that has been sent to various Family Courts regarding the procedure for issuance of maintenance award amount deposited by the husband in the Court, also not encourageable or seems to have been more delay in disbursement of the deposited maintenance amount. More number of the Family Courts seems to have followed the very age-old procedures of cheque petition enquiry and issuance of cheque thereon on filing of the memo for payment to the wife. Only in the Family Court in Chennai, the facility of crediting the award amount deposited in the Court to that of the bank account of the wife seems to have been followed through ECS while all other Family Courts across the State are making cumbersome procedures making further difficulty for the wife to come to the Court for the maintenance to live decent livelihood. It is to be stated that except the Family Courts in Chennai, the procedures adopted in all other Family Courts across the State are not encouraging and are not rendering timely justice delivery to the person in need of money to maintain the day-to-day life.

24. It is relevant to state that the Union Government has introduced "Digital India".

The vision of Digital India programme is to transform India into a digitally empowered society and knowledge economy.

The Digital India programme is centred on three key vision areas:

- 1) Digital Infrastructure as a Core Utility to Every Citizen
- 2) Governance and Services on Demand
- 3) Digital Empowerment of Citizens

While, Digital Infrastructure as a Utility to Every Citizen aims to provide,

Mobile phone & bank account enabling citizen participation in digital & financial space.

25. Thus, to enhance timely justice delivery system in respect of disbursement of maintenance amount deposited in the Court in respect of the maintenance proceedings to the wife, the lower judiciary has to update themselves on par with the scheme floated by the Union of India in "Digital India" by utilizing the Digital India

programme as adopted and hence, the following procedures shall be adopted by the trial Courts.

**"PROCEDURE OF MAINTENANCE AMOUNT ORDERED IN
THE MAINTENANCE U/S.125 CRPC and INTERIM
MAINTENANCE IN H.M.O.P. CASES**

1) COURT ORDERS:

1. Final Order in M.C. cases (Maintenance cases).
2. Interim orders in maintenance petition in H.M.O.Ps.

**2) PROCEDURE OF DEPOSIT OF MAINTENANCE AMOUNT
BY THE RESPONDENT:**

1. Respondent shall deposit maintenance amount by way of cash in cash section and receive necessary receipt.
2. Respondent shall also deposit the maintenance amount by way of demand draft/cheque in the cash section.
3. The maintenance amount by way of Salary attachment in the form of demand draft/cheque in favour of Principal Judge, concerned Family Court shall also be received.

**3) PROCEDURE FOR DEPOSITING MAINTENANCE AMOUNT
IN THE BANK:**

1. Cash received towards maintenance amount are deposited in the

account of Principal Judge, concerned Family Court.

2. Cheque and Demand drafts received towards maintenance amount are deposited in the PD account of Principal Judge, concerned Family Court.

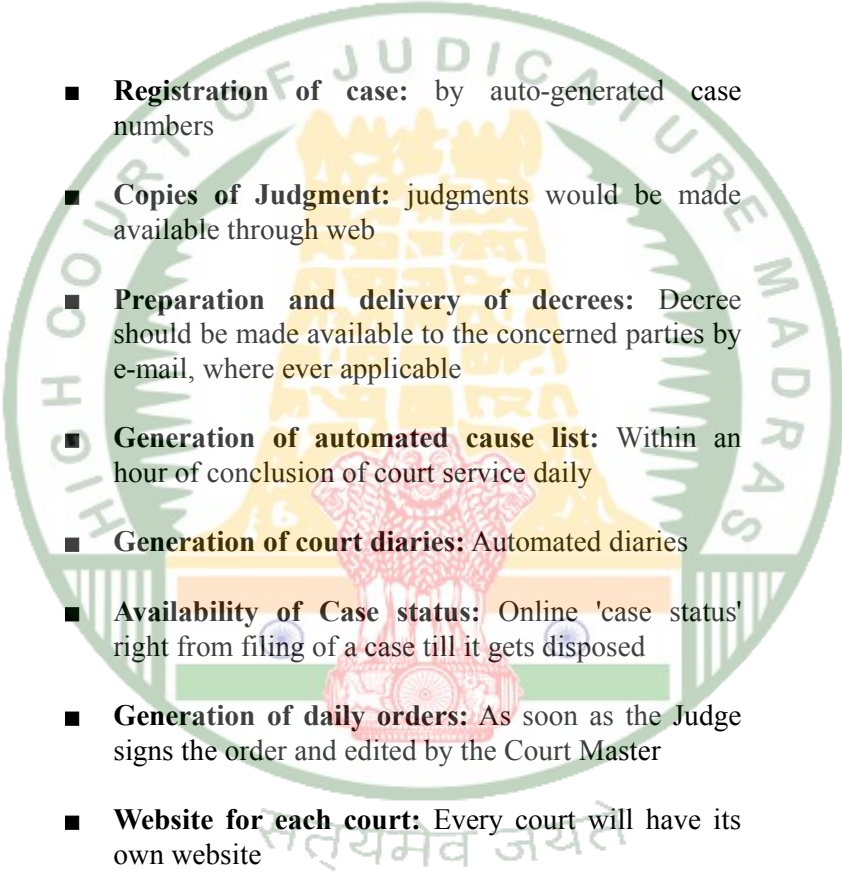
4) PAYMENT OF MAINTENANCE AMOUNT TO THE PETITIONERS:

1. Maintenance amount are credited to the petitioners Account through State Bank of India/notified Bank by way of ECS.
2. The petitioners, those who are not having Bank account shall be paid maintenance amount by way of cash in the case section.
3. The maintenance amount received by way of cheque/demand draft in the name of Principal Judge, concerned Family Court, in the PD account and necessary cheque issued to concerned branch, for clearance through ECS of the concerned parties.

5) PROCEDURE FOLLOWED BY THE COURT FOR DISBURSEMENT OF MAINTENANCE AMOUNT:

1. All Receipts of maintenance amount by way of Cash, Cheque and Demand Drafts are entered in the register in the cash section.
2. Maintenance amount to the Account holder are paid through ECS and for others paid directly by way of making necessary entries in the pay order.

26. It is to be stated that the Hon'ble Supreme Court of India has projected e-Courts Mission Mode Project, which covers the Key Service Levels to be achieved by this project, for litigant public, are:

- 
- **Registration of case:** by auto-generated case numbers
 - **Copies of Judgment:** judgments would be made available through web
 - **Preparation and delivery of decrees:** Decree should be made available to the concerned parties by e-mail, where ever applicable
 - **Generation of automated cause list:** Within an hour of conclusion of court service daily
 - **Generation of court diaries:** Automated diaries
 - **Availability of Case status:** Online 'case status' right from filing of a case till it gets disposed
 - **Generation of daily orders:** As soon as the Judge signs the order and edited by the Court Master
 - **Website for each court:** Every court will have its own website

The envisaged service levels for Registry are:

- 
- **Submission of report of Commissioner/pleader appointed for recording evidence:** Tracking of submission of commissioners' report on a timely basis
 - **Storing of documentary evidence:** Scanning and digitally capturing the cases in the database
 - **Calculation of court fees due and paid for:** Automated calculation of court fee at the end of each transaction and report generated on a daily basis

- **Release of orders to the copying section:** As soon as the judgment is signed.
- **Filing of written statement by the defendant:** Tracking of generation of written statement - to be generated within 30 days of the date of summons or 90 days (if allowed to be extended by the court)."

27. Since payment out through the digital mode was not covered under the e-Court project, I am of the considered view that the Registrar (Judicial) is hereby directed to place the above order before the Hon'ble e-Court committee of this Court for getting the administrative sanction to the District Judiciary, both Family Courts and Judicial Magistrate's Court handily the maintenance cases filed either under Section 125 of Cr.P.C. or any other provisions regarding maintenance, can go digital and adopt themselves as digital payment and disburse the deposited amount in Court towards maintenance to the estranged wife to enhance the timely justice delivery system.

28. In fine, this Criminal Revision Case is partly allowed to the extent indicated below:-

- I. the order dated 31.07.2013 passed by the learned Judge of the Family Court, Salem, in M.C.No.25 of 2009 is hereby modified and quantum of the award of maintenance amount is hereby enhanced to that of Rs.50,000/- per month from the date of filing of the maintenance case.
- II. Maintenance Case in M.C.No.25 of 2009 on the file of the Family Court, Salem, is ordered as indicated in clause [i]
- III. The Registrar (Judicial) is hereby required to place a copy of this order before the Hon'ble e-Court committee for necessary administrative sanction as noted in paragraph No.25, after obtaining necessary orders from The Hon'ble The Chief Justice, for placing the matter before the Hon'ble e-Court Committee and also for circulation of copy of the order to all the Courts across the Tamil Nadu and Puducherry for reference.
- IV. All the Family Courts are required to adopt digital India for disbursement of the award amount to enhance the timely justice delivery system.

V. The statement submitted by the Registrar General shall form part of the case records.

07.09.2017

Index : Yes
Internet : Yes
Jrl

To

The Family Court,
Salem.



WEB COPY



RMT.TEEKAA RAMAN, J.

Jrl

WEB COPY

Order in

Crl.R.C.No.1120 of 2013