

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on : 01.12.2016

Orders pronounced on : 23.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.P.No.40941 of 2015

G.Dhanasekaran

.. Petitioner

Vs.

1. Inspector General of Registration,
100, Santhome High Road,
Pattinampakkam,
Chennai-600 028.
2. The District Registrar (Administration),
Virudhunagar Registration District,
Virudhunagar District.
3. R.Kumaresan District Registrar,
(Audit) Villupuram
4. Secretary to Government,
P & AR Department,
Fort St.George,
Chennai-600 009.
5. Additional Chief Secretary to Government,
(Full Addl. Charge),
Commercial Tax and Registration Department,
Fort St.George,
Chennai-600 009.
6. Secretary to Government (In-charge),
Law Department,
Fort St.George,
Chennai-600 009.

(RR-4 to 6 are impleaded as per order
dated 21.11.2016 in W.M.P.No.34497 of 2016
in W.P.No.40941 of 2015)

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorarified Mandamus to call for the entire records of the first respondent-Inspector General of Registration in the proceedings in Lr.No.11161/A2/2015, dated 10.12.2015 and quash the same and direct the first respondent to restore the seniority of the petitioner according to the rank fixed by the Tamil Nadu Public Service Commission in the directly recruited post of Sub-Registrar Grade-II and to include the name of the petitioner in the temporary panel of Sub-Registrar Grade-I for the year 2011-12 over and above the third respondent with consequential service benefits including further promotion.

For Petitioner : Mr.S.Vadivelu
For Respondents : Mr.K.Venkatramani,
Addl. Advocate General,VII
assisted by Mr.K.Dhananjayan, Spl.G.P.
for RR-1, 2 and 4 to 6
No appearance for R-3

ORDER

The petitioner has filed this Writ Petition praying for issuance of a Writ of Certiorarified Mandamus to call for the entire records of the first respondent-Inspector General of Registration in the proceedings in Lr.No.11161/A2/2015, dated 10.12.2015 and quash the same and direct the first respondent to restore the seniority of the petitioner according to the rank fixed by the Tamil Nadu Public Service Commission in the directly recruited post of Sub-Registrar Grade-II and to include the name of the petitioner in the temporary panel of Sub-Registrar Grade-I for the year 2011-12 over and above the third respondent, with consequential service benefits including further promotion.

2. The brief facts which are necessary for disposal of the Writ Petition, are as follows:

(a) The petitioner is a directly recruited Sub-Registrar Grade-II as per the proceedings in No.35746/A2/2008, dated 26.07.2008, issued under Rule 12(b) of the General Rules, in the list of selected candidates of directly recruited Sub-Registrar Grade-II. The petitioner's Serial Number is 9 and the third respondent's Serial Number is 11. The first respondent, by proceedings No.35746/A2/2008, dated 21.08.2008, appointed the petitioner as Sub-Registrar Grade-II and the petitioner's Serial Number is 8 in the direct recruitment of Sub-Registrar Grade-II and the third respondent's seniority number is 10. Thus, the petitioner is senior to the third respondent by two numbers.

(b) While so, by proceedings in No.35746/A2/2008-1, dated 05.09.2008, the petitioner was asked to pass the Departmental Test in the third language in Telugu within the period of probation. In the above proceedings, dated 05.09.2008, the petitioner's name is found at Sl.No.7 in the list of directly recruited Sub-Registrar Grade-II and the Serial Number of the third respondent is 9 with Kannada as the third language. Since the petitioner has not passed the Telugu language test within the period of probation, his probation was extended by two years upto 31.08.2013. The petitioner passed the Telugu language test on 27.08.2013, i.e. with the extended period of probation and he was declared to have satisfactorily completed the probation in the post of Sub-Registrar Grade-II on 27.08.2013.

(c) In the interregnum, by proceedings in No.15111/A1/2011-I, dated 23.06.2011, the select list for the temporary panel of Sub-Registrar Grade-I for the year 2011-2012 was issued. This list for 2011-2012 is purely temporary as indicated in paragraph 2 of the said proceedings, in view of the pendency of S.L.P. (Civil) Nos.5588 and 5589 of 2006. The third respondent's name is found in Sl.No.12 in the said selected list. The petitioner's name was not included in the panel for the post of Sub-Registrar Grade-I for the year 2011-2012. Consequently, the petitioner's name was not included in the subsequent panel of Sub-Registrar Grade-I for 2012-2013 in the proceedings dated 17.10.2013. The petitioner's name in unselected list for Grade-I from Grade-II Sub-Registrar is at Sl.No.20. The said panel is temporary, in view of the pendency of the proceedings before the Supreme Court. While so, the first respondent, by proceedings dated 03.12.2013, informed the second respondent-District Registrar that though it was informed by the second respondent in the earlier communications that the probation of the petitioner was extended upto 31.08.2013 for not passing the third language test; the petitioner attended the said test in the month of August, 2013; and after publication of the result, necessary report would be sent for declaration of probation, till date no such report has been sent and accordingly, directed to send such report on or before 15.12.2013. But, no response was given to the same by the second respondent.

(d) In the above situation, by proceedings dated 27.01.2014, the first respondent issued the seniority list of Sub-Registrar Grade-II as on 01.01.2014 and the seniority number of the petitioner is 22. By proceedings in No.3099/A5/2014-1, dated 03.02.2014, the list for Sub-Registrar Grade-I for the year 2013-2014 was issued by the first respondent and the petitioner's name is not found in the said Sub-Registrar Grade-I list. The petitioner's name was also not included in the panel for Sub-Registrar Grade-I for the year 2014-2015, in the proceedings dated 30.12.2014. The only reason for not including

the petitioner's name in all the panels for the post of Sub-Registrar Grade-I for the years 2011-2012, 2012-2013 and 2013-2014, is not passing the third language test within the probation period upto 31.08.2011, but he passed only during the extended period of probation on 27.08.2013.

(e) Since the petitioner's name was not included in the panel, the petitioner gave representation, dated 16.03.2015 to the first respondent to restore his original seniority as per the TNPSC selection list in the cadre of Sub-Registrar Grade-II. Since the said representation was not considered, the petitioner filed W.P.No.31642 of 2015 and this Court, by order dated 07.10.2015, directed the respondents 1 and 2 to consider the petitioner's representation, dated 16.03.2015, on merits and in accordance with law, after putting on notice the third respondent and to pass orders within a period of eight weeks from the date of receipt of a copy of the order and to communicate the decision to the petitioner. Pursuant to the said order of this Court in W.P.No.31642 of 2015, the petitioner again made representation, dated 28.10.2015 to the first respondent making a specific reference to his earlier representation, dated 16.03.2015. But the first respondent, by the impugned proceedings dated 10.12.2015 in Lr.No.11161/A2/2015, without reference to the representation, dated 28.10.2015, to restore the petitioner's seniority above the third respondent in the post of Sub-Registrar Grade-II as fixed by the TNPSC which has been reduced from Sl.No.9 in the post of Sub-Registrar Grade-II to Sl.No.22 as on 01.01.2014 by the first respondent by his proceedings No.60352/A2/2013, dated 27.01.2014, has rejected the claim of the petitioner. Hence, the present Writ Petition has been filed for the relief stated above.

3. When the Writ Petition is taken up for consideration, learned counsel for the petitioner submitted that even during the extended period of probation, the petitioner is a probationer and he is entitled to temporary promotion as Sub-Registrar Grade-I under Rule 23(e) read with 39(a)(i) of the General Rules under the Tamil Nadu State and Subordinate Service Rules. In this connection, learned counsel made detailed arguments by inviting the attention of this Court to the above said Rule 23(e) read with 39(a)(i). It is further contended by the learned counsel for the petitioner that non-passing of the Telugu language test within the prescribed period of probation, but passing the Telugu language test within the extended period of probation on 27.08.2013, does not involve penalty in the service law. In this regard, he made detailed submissions by inviting the attention of this Court to Rule 28, para 4 of the said General Rules. Thus, it is the submission of the learned counsel for the petitioner that the petitioner should have been temporarily promoted as Sub-Registrar Grade-I with reference to

the said Rule 23(e) read with Rule 39(a) relating to temporary promotion.

4. With regard to the reduction of seniority of the petitioner, it is submitted by the learned counsel for the petitioner that the seniority cannot be reduced except as a measure of penalty, as per Rule 35(a) of the said General Rules. Non-passing of the Telugu language test within the original probation period, but passing the test within the extended period of probation, is not at all penalty, and therefore, the reduction of the seniority as per the TNPSC seniority from Sl.No.8 to Sl.No.22, is patently illegal. In this regard, learned counsel for the petitioner made detailed arguments by inviting the attention of this Court to the said Rule 35(a) and Article 311(2) of the Constitution of India. In support of the above submissions, learned counsel for the petitioner relied on a decision of the Supreme Court reported in 1999 (6) SCC 637 (Saroj Rani Vs. State of Punjab) and a decision of the Punjab and Haryana High Court reported in 2015 (4) SLR 643 (Punjab and Haryana) and prayed for allowing the Writ Petition.

5. Countering the above submissions, learned Additional Advocate General appearing for the respondents 1, 2 and 4 to 6 submitted that as far as the seniority of the petitioner, who is a direct recruit Sub-Registrar Grade-II through the TNPSC, his seniority assigned by the TNPSC would remain the same without any alteration, as per Section 40(1) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016. So far as the promotion of the petitioner from the post of Sub-Registrar Grade-II to the next higher category, i.e. Sub-Registrar Grade-I is concerned, the issue is governed by Rule 2 of the Special Rules for the Tamil Nadu Registration Subordinate Service. If the case of the petitioner is analysed in the above background of the relevant Rules, it could be seen that the petitioner joined as Sub-Registrar Grade-II by direct recruitment through the TNPSC on 01.09.2008 and the three-year period for declaration of probation ended on 31.08.2011. Within that three-year period, the petitioner has not passed the third language test and hence, his probation has not been declared under Rules 6 and 7 of the Special Rules for Tamil Nadu Registration Subordinate Service and as such, he is not an approved probationer under Section 3 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016. Learned Additional Advocate General further submitted that the petitioner has not satisfactorily completed his probation and therefore, he does not qualify for promotion as per Section 41 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016, before the three-year period of 31.08.2011. In the meantime, the panel for the post of Sub-Registrar Grade-I has been drawn temporarily by the first respondent for the year 2011-2012. The petitioner's probation was not declared then, and only the qualified persons whose probation was declared, were included in

the said panel in accordance with Section 47(1) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016. Hence, by virtue of the above said provisions, the petitioner's prayer to include his name in the temporary panel for the post of Sub-Registrar Grade-I, is not sustainable, and hence, the learned Additional Advocate General prayed for dismissal of the Writ Petition.

6. Keeping in mind the above submissions made by the learned counsel for the parties, I have carefully considered the same and perused the materials available on record.

7. The prayer of the petitioner is two-fold. One, to restore his TNPSC seniority and two, to include his name in the temporary panel for promotion to the post of Sub-Registrar Grade-I for the year 2011-2012 and promote him accordingly. It is seen that the petitioner is a direct recruit to the post of Sub-Registrar Grade-II and was appointed as such by proceedings, dated 21.08.2008. The petitioner's TNPSC seniority is in Sl.No.8 and the third respondent's seniority is Sl.No.10. Thus, the petitioner is senior to the third respondent by two numbers. The petitioner was directed to pass the third language test, namely Telugu, in the post, within the probation period. Since the petitioner did not pass the Telugu language test within the probation period, his probation was extended upto 31.08.2013. The petitioner has passed the said test only on 27.08.2013, i.e. within the extended period of probation and he was declared to have satisfactorily completed the probation in the post of Sub-Registrar Grade-II. Since he has not passed the test within the period of three years, his name was not included in the temporary panel for the post of Sub-Registrar Grade-I for the year 2011-2012. Moreover, the petitioner's seniority in the post of Sub-Registrar Grade-II has been reduced for not passing the third language test within the period of probation. It is the submission of the learned counsel for the petitioner that even during the extended period of probation, the petitioner is entitled for temporary promotion to the post of Sub-Registrar Grade-I, as per Rule 23(e) read with 39(a)(i) of the General Rules under the Tamil Nadu State and Subordinate Service Rules. In this regard, it is appropriate to extract the said Rules 23 (e) and 39(a)(i), which reads as follows:

"Rule 23(e): Service on temporary promotion counting for probation:

A probationer in any category of a service who is promoted temporarily under the provisions of Rule 39 to a higher category in the same service shall be entitled to count towards his probation, if any, in the former category the period of duty performed by him in the latter category during which he would have held a post in the former category but for such temporary promotion."

"Rule 39: Temporary promotion: (a)(i) Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a higher category in a service or class by promotion from lower category and there would be undue delay in making such promotion in accordance with the rules, the appointing authority may temporarily promote a person, who possesses the qualifications prescribed for the post, otherwise than in accordance with the rules."

8. It is seen that on 23.06.2011, a temporary panel of Sub-Registrar Grade-I for the year 2011-2012 was issued with reference to the said Rule 23(e) read with Rule 39(a)(i), as no regular panel could be prepared because of the proceedings pending in the Supreme Court in S.L.P.(Civil) Nos.5588 and 5589 of 2006 on the question as to whether the rule of reservation is applicable to SC candidate and MBC candidate, when they are appointed by transfer to higher post in the same Department. Therefore, it is clear that the panel consists of only probationers, because of the pendency of the case in Supreme Court. Even during the extension of probation period, the status of the petitioner is only a probationer. But the petitioner's name was not included in the temporary panel and his seniority was reduced, only for the reason that he has not passed the Telugu language test within the period of probation, but passed the Telugu language test on 27.08.2013 within the extended period of probation. Only as a penalty, the petitioner's name was not included in the temporary panel for the year 2011-2012 and his TNPSC rank was reduced from Sl.No.8 to Sl.No.22. In this regard, it is useful to notice Rule 28, para 4 of the said General Rules under the Tamil Nadu State and Subordinate Service Rules, which reads as follows:

"Rule 28: Extension of probation: ...

.. ..

In case where the probation of probationer is extended a condition shall unless there are specific reason to the contrary, be attached to the order of extension of probation that the probationer's increment shall be stopped, until he is declared to have satisfactorily completed his probation. Such stoppage of increment shall not be treated as a penalty but only as a condition of extension of probation and shall not have the effect of postponing future increments after he has passed the prescribed tests, or examinations or after he is declared to have satisfactorily completed his probation."

9. A perusal of the above said Rule 28 para 4 shows that not passing the language test within the prescribed period, but passing the test within the extended period, shall not be treated as penalty. The said Rule 28 para 4 also shows that though the increment is temporarily postponed, it will be sanctioned on the passing of the language test within the extended period. Therefore, it is clear that the respondents cannot deny the temporary promotion as Sub-Registrar Grade-I with reference to Rule 23(e) read with Rule 39(a)(i) of the General Rules under the Tamil Nadu State and Subordinate Service Rules. Hence, the submission of the learned Additional Advocate General, by relying upon Section 47(1) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016, that the petitioner's prayer to include his name in the temporary panel for the post of Sub-Registrar Grade-I, is not sustainable, cannot be accepted.

10. In the above context, a reference could be placed to the judgment of the Supreme Court reported in 1999 (6) SCC 637 (Saroj Rani Vs. State of Punjab), relied on by the learned counsel for the petitioner, and the relevant portion of the same reads as follows:

"24. So far as Question (e) regarding the preference inter se between the candidates who passed the test within the first five chances and the others who passed in more than five chances is concerned, we find the reasons given by the High Court in the impugned judgments including the Full Bench in Baldev Raj (Baldev Raj Vs. State of Punjab - CWP.No.16959 of 1994 decided on 17.09.1996 (P & H) (FB)) to be well considered, which does not call for any interference. It is not in dispute, the promotion to the post of Assistant from amongst the eligible candidates is seniority-cum-merit. Eligible candidate in this context means all those who passed the examination in less than or more than five chances. They constitute one group. There is no division among the qualifiers either under the rules or any order. This one cohesive group has to wait for promotion till vacancy arises. Regarding the promotion from among these eligible candidates, when the principle of seniority-cum-merit is to be applied, there cannot be any preference inter se among the said two groups. Thus the impugned order has rightly concluded, no preference can be given to those who have qualified in the first five chances over those who qualified in more than five chances."

11. A reading of the above judgment of the Supreme Court shows that just passing the examination in five chances will have no preference over those passing the examination in more

than five chances. The above said judgment of the Supreme Court was followed by the Punjab and Haryana High Court in the decision reported in 2015 (4) SLR 643 (Punjab and Haryana) (Shamsher Singh Vs. State of Punjab), which was also relied on by the learned counsel for the petitioner. It is worthwhile to quote the relevant portion of the said judgment of the Punjab and Haryana High Court, which reads as follows:

"2. ... Grant of annual grade increment to the person junior who passed the departmental examination earlier on completion of one year service would not affect the original inter se seniority position so long as both passed the test before the period of probation expired. It may have been a different matter if the petitioner had not cleared the test within time. If the rule is structured in such a way that non-passing of the test within the probationary period would result in withholding of the annual increment to await the passing of the departmental examination then loss of seniority may entail. Where non-passing of the prescribed test does not result in automatic termination or discharge from public service by operation of rule then it would be hard to contend that person junior would become senior only for the reason that he received financial benefit of increment earlier. I fail to see the connection between award of annual grade increment and the rule of seniority in the cadre. The prescription of the departmental examination is only a qualifier for purposes of confirmation in service. It only offers periodic chances to be availed to qualify for confirmation just as was the position in cases of promotion in the repealed Punjab State Assistant Grade Examination Rules, 1984 where five chances were offered to clerks for promotion to the post of Assistant but within the duration allowed otherwise they would be passed over. The question with respect to preference being given to such Clerks who had passed the Assistant Grade Examination in the first five chances for promotion to the higher post came up for consideration before a Full Bench of this Court in the case of Baldev Raj and others Vs. State of Punjab and others, decided on 17.09.1996. The Full Bench held that persons who passed the test within the first five chances would not be given any preference over such Clerks who had passed the Assistant Grade Examination in more than five chances. The matter, thereafter, was carried to the Supreme Court in the case of Saroj Rani and others Vs. State of Punjab and others, 1999 (6) SCC 637 : 1999 (4) SLR 787 (SC). The Court while adjudicating upon the issue had framed the issue whether the person who has passed the test in the first five chances has preference over the persons passing

the test in more than five chances? The Supreme Court endorsed the view of the Full Bench in Baldev Raj's case and held that all such candidates as had qualified the Assistant Grade Examination irrespective of the number of chances constituted a single homogenous group and as such no preference could be given to such employees who had qualified in the first five chances over and above those who had qualified in more than five chances. The ratio of the ruling can be applied in principle to the present case."

12. Learned counsel for the petitioner also invited the attention of this Court to Article 311(2) of the Constitution of India, which reads as follows:

Article 311: Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State--

.. ..

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges."

13. Keeping the above dictum laid down by the Supreme Court and the relevant provisions of law, it is seen that there is reduction in the rank from Sl.No.8 to Sl.No.22 and the petitioner was not promoted to the post of Sub-Registrar Grade-I from the post of Sub-Registrar Grade-II, even though he has passed the Telugu language test within the extended period of probation. Moreover, no enquiry was held and no charges had been framed against the petitioner. Therefore, the reduction in rank from Sl.No.8 to Sl.No.22 and not promoting the petitioner to the post of Sub-Registrar Grade-I from the post of Sub-Registrar Grade-II, is in violation of Article 311(2) of the Constitution of India.

14. At this juncture, learned counsel for the petitioner invited the attention of this Court to Rule 8(iv) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules, under which, the reduction in rank is a major penalty and hence, before the punishment of reduction in rank from Sl.No.8 to Sl.No.22 imposed on the petitioner, the procedures prescribed in Rule 17(b) of the Tamil Nadu Civil Service (Discipline and Appeal) Rules, should have been followed, which has not been done in this case. Therefore, on that ground also, the petitioner's reduction in rank from Sl.No.8 to Sl.No.22 is invalid.

15. As observed earlier, there cannot be any penalty without any enquiry or charges, as contemplated under the Rules. When that being the position, there cannot be any reduction in the rank, since the Rule 35(a) preserves the seniority of the petitioner. Under such circumstances, non-inclusion of the petitioner's name in the temporary panel for promotion to the post of Sub-Registrar Grade-I for the year 2011-2012, dated 23.06.2011, is not legally sustainable. The petitioner's name should have been included in the said temporary panel.

16. Therefore, the impugned order, dated 10.12.2015, is liable to be set aside. Accordingly, the impugned order is set aside. The Writ Petition is allowed. The first respondent is directed to restore the seniority of the petitioner according to the rank fixed by the Tamil Nadu Public Service Commission in the directly recruited post of Sub-Registrar Grade-II and to include the name of the petitioner in the temporary panel for promotion to the post of Sub-Registrar Grade-I for the year 2011-12 over and above the third respondent, with consequential service benefits, including further promotion. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

cs

Copy to

1. Inspector General of Registration,
100, Santhome High Road,
Pattinampakkam,
Chennai-600 028.
2. The District Registrar (Administration),
Virudhunagar Registration District,
Virudhunagar District.
3. Secretary to Government,
P & AR Department,
Fort St.George,
Chennai-600 009.

4. Additional Chief Secretary to Government,
(Full Addl. Charge),
Commercial Tax and Registration Department,
Fort St.George,
Chennai-600 009.

5. Secretary to Government (In-charge),
Law Department,
Fort St.George,
Chennai-600 009.

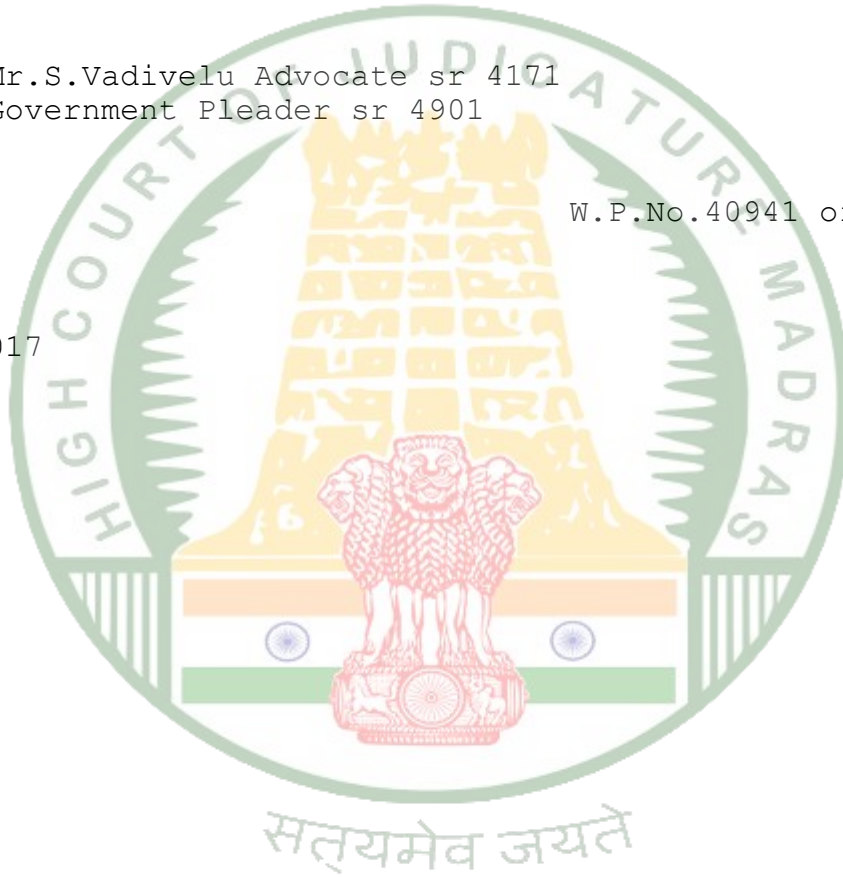
6. The District Registrar (Audit)
villupuram

+1 cc to Mr.S.Vadivelu Advocate sr 4171

+1 cc to Government Pleader sr 4901

W.P.No.40941 of 2015

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