

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2018

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE S.BASKARAN

O.S.A.No.193 of 2018
and
C.M.P.No.9930 of 2018

Geodis Overseas Private Ltd., (India),
Repd. by its Director,
Industrial Project South India,
2B & C, Ega Trade Centre,
318, Poonamallee High Road,
Kilpauk, Chennai 600 010.
(now at Dowlath Tower, 12th Floor,
Nos.59, 61 and 63, Taylors Road,
Kilpauk, Chennai 600 010.)

... Appellant/1st Respondent/1st Defendant

Vs

1.Falcon Tyres Limited,
K.R.S.Road, Metagali,
Mysore (Karnataka)
Pin Code - 570 016.
Rep. by 'Insolvency Resolution Professional'
Anand Ramachandra Bhatt (Registration No.IBBI/IPA-001/
IP-P00467/2017-2018/10810)
No.81, 8th Main Kumara Park West,
Serpentine Road, Bangalore 560 020
Appointed by the Hon'ble National Company
Law Tribunal (NCLT) Bengaluru bench
in CP (IB) No.01/bb/17 dated 30.08.2017

... 1st Respondent/Applicant/Plaintiff

2.Falcon Tyres Limited
Rep. by its Authorized Signatory
R.Venkatesh,
K.R.S.Road, Metagali,
Mysore (Karnataka) Pin Code-570 016.

... R2/R2/Plaintiff

3.Maersk India P. Limited CFS Division,
Repd. by its Director,
Prince 25/26, Prince Towers,
1st Floor, Nungambakkam,
Chennai 34, Tamil Nadu.

... R3/R3/2nd Defendant

4.Mr.C.Manikkam, District Judge (Retd.)
22, 1st Floor, Raj Enclave, Lakhmi Nagar, 6th Street,
Jalladianpet, Medavakkam, Chennai 600 100.
(Appointed as the Commissioner pursuant to the
Hon'ble Madras High Court's order dated 08.02.2017
in A.No.341 of 2017 in A.No.5304 of 2015 in
A.No.4318 of 2011 in C.S.65 of 2011) ... R4/R4/Commissioner

PRAYER :

Appeal against the Judgment and Order dated 15.02.2018
passed in Application No.327 of 2018 in C.S.No.65 of 2011.

filed under order XIV Rule VIII of O.S.Rules read with
Section 151 of the code of Civil Procedure, praying to take an
record the order dated 30/08/2017 in CP(IB) No.1/BB/17 passed by
the Hon'ble Natitonal company law Tribunal, Bengaluru Bench,
and consequently, stay all furhter proceedings in and pursuant
to C.S.No.65 of 2011.

For Appellant : APS.Ahluwalia
Senior counsel for M/s.T.N.C.Kaushik

For Respondentsml: Mr.Abhishek Jain (for R1)

Mr.P.Giridharan (for R3)

J U D G M E N T

(Judgment of this Court was made by N.Kirubakaran, J.)

The party who has immense faith in the justice delivery
system has been unsuccessfully approaching this Court often,
even though the appellant acted duly, to comply with the orders
passed by this Court. Even though facts are favouring the
appellant, in view of the enactment of Insolvency and Bankruptcy
Code, this Constitutional Court is unable to render proper
justice to the appellant.

2. Originally the first respondent/plaintiff purchased tyre
manufacturing machineries from a foreign country and the
appellant was appointed to move those machineries from the
foreign country to India including customs clearance,
transportation and delivery at Mysore factory of the first
respondent. Even though the machineries reached Chennai Port

and they were not cleared on certain issues. Hence the first respondent filed the suit. The 1st respondent filed a Suit against the appellant for a mandatory injunction, directing the appellant to clear the units covered by 9 invoices under 9 EPCG licences as schedule to be released from CFS immediately, upon the payment of customs duty by the 1st respondent and for mandatory injunction, directing the appellant/1st defendant to pay all the detention charges and demurrage charges till the date of release, so that the containers could be released from CFS.

3. An application number 87/11 was taken out by the 1st respondent to pass an order of interim injunction, directing the appellant/ 1st defendant to clear 87 units covered by 9 invoices under 9 EPCG licences as schedule to be released from CFS immediately upon the payment of customs duty by the 1st respondent and another application number 1397/2011 was filed by the appellant to vacate the interim order dated 28.01.2011 passed in O.A.No.87/2011 and both the applications were disposed by the learned single Judge of this court on 21.04.2011, giving 9 directions. The said directions are extracted as follows:

"Hence, the applications for disposed of with the following directions:

(i) Within a week from today, the first defendant shall file necessary documents before that customs department and have the machinery covered by all the 9 invoices and the 87 units of machinery, assessed to duty, including anti dumping duty, if any. The representative of the plaintiff shall also be associated with this process, so that immediately upon the assessment being completed, the plaintiff comes to know of the liability.

(ii) Within a week from the date of assessment by the customs department, the plaintiff shall directly paid the duty levied by the customs department, including the anti dumping duty as demanded by them, without prejudice to their right to establish before the customs department that anti dumping duty was not leviable in respect of some of the machinery and also without prejudice to their contention that it is the sole responsibility of the first defendant to pay the excess anti dumping duty. If the plaintiff succeeds in their claim before the customs department, they would get refund of the excess duty paid, directly from the customs department. If the plaintiff fails in their

claim for refund, they are at Liberty to seek amendment of the plaint, so as to seek recovery of the excess duty paid, if such payment was attributable to any mistake on the part of the first defendant. It will then be open to the first defendant to contest such a claim on the ground that there was no mistake on their part.

(iii) after the payment of the customs duty and antidumping duty by the plaintiff, the first defendant shall obtain necessary certificates from the customs department, for production to the liner and/or to the second defendant, so that the cargo can be cleared;

(iv) Within a week from today, first defendant shall pay the entire detention and other charges to the liner and obtain a valid delivery order in original.

(v) Within a week of procuring the delivery order from the liner, the first defendant shall submit the other documents such as bill of entry, examination order and the relevant certificates from the customs department to the second defendant and also pay the entire demurrage charges as claimed by the second defendant. Immediately there after, the first defendant shall de-stuff the containers and arrange to dispatch them to the location at which the cargo was to be delivered by the first defendant, as per their original contract.

(vi) Within a week from today, the second defendant shall surrender the fixed deposit receipt handed over by the plaintiff in pursuance of the orders passed on 28.01.2011, to the Registrar General. The Registrar General shall sign the necessary discharge or make necessary endorsement on the original fixed deposit receipt and hand over the same to the counsel for the first defendant, upon the counsel for the first defendant producing proof (a) that the Customs Department had cleared the cargo (b) that the liner has issued valid delivery order and (c) that the second defendant as well as J.M.Baxy and Co., and GDL had released the entire cargo of 87 units covered by 9 invoices, for transportation by road to the factory of the plaintiff;

(vii) After getting a delivery order from the liner and after getting the cargo released from the second defendant, the first defendant shall file a memo into Court, after serving a copy upon the counsel for the

plaintiff indicating the total expenses incurred by the first defendant towards detention charges and demurrage;

(viii) Within a week from the date of service of such a memo, by the first defendant upon the counsel for the plaintiff, the plaintiff shall deposit into Court, an amount equivalent to 50% of the amount indicated in the memo filed by the first defendant. If the plaintiff fails to deposit the said amount, the first defendant will have a lien over the cargo and will have a right to approach this Court for its sale by way of public auction and the realisation of the money. If the money is so deposited by the plaintiff, it would be open to the first defendant to seek payment out of the said amount, subject however to the right of the plaintiff to amend their claim in the plaint, so as to seek recovery of the said amount;

(ix) To facilitate the parties to understand the obligations imposed upon each one of them, it is clarified that I have made the plaintiff liable to pay the entire anti dumping duty in the first instance and proceed against the first defendant for recovery of the same by seeking amendment of the plaint, in case they are not able to get refund of the same from the customs department. Similarly, I have made the first defendant liable to make payment of the entire amount of detention charges and demurrage in the first instance so that the cargo is cleared and made available for transportation to Mysore. But, I have made the plaintiff to deposit 50% of these charges, after the clearance of the cargo, so that the loss on this account is shared by both parties in equal proportions for the present, with liberty to the plaintiff to amend the pleadings and with liberty to the first defendant to make a counter claim for the remaining half. No costs."

The said order was challenged by the 1st respondent in OSA No.296 of 2012 and he withdrew the said OSA as the Division Bench of this Court was not inclined to give any favourable order. Thereafter, appellant/1stdefendant complied with part of the original order dated 21.04.2011. However, as the 1strespondent/plaintiff failed to pay 50% of Rs.6,10,85,913.96/- being the amount paid by the appellant as detention and demurrage charges, the appellant/1st defendant filed an application number 4318/2011 for attachment of complete cargo

under the subject project movement, mentioned in the schedule to the judges summons lying in the factory premises of the 1st respondent/plaintiff at Mysore, Karnataka and bring the same into the custody of this court and consequently, allow the appellant/1st defendant to sell the machineries through public auction to realise the amount of Rs.6,10,85,913.96/- as the 1st respondent/plaintiff failed to comply with direction of the learned single Judge, dated 21.04.2011.

4. The said Application No.4318 of 2011 filed by the appellant was allowed by this Court on 04.07.2012, confirming the original order dated 21.04.2011 and directed the plaintiff/1st respondent to deposit a sum of Rs.3,05,42,956.98/- within a period of one week from the date of receipt of a copy of that order, failing which, the cargo lying at the factory premises of the 1st respondent at Mysore, Karnataka was directed to be attached through the District and Sessions Court Mysore and be brought to custody of this Court to be brought for public auction and the amount due under the order dated 21.04.2007, could be realised from and out of the amount realised through public auction and the balance sum after deducting the auction expenses shall be deposited to the credit of the Suit.

5. The 1st respondent/plaintiff instead of complying with the said order, preferred an O.S.A.No.323/2012 and the Division Bench of this Court by an order dated 27.08.2012, granted a conditional interim stay on depositing a sum of Rs.3,05,42,956.98/- and on such deposit the appellant/1st defendant was not entitled to withdraw the same. A modification petition in MP.No.1 of 2012 to modify the order dated 27.08.2012 has been filed to change the direction to deposit the amount and for expeditious trial of the suit. By order dated 13.09.2012, the modification petition was dismissed. Thereafter, the 1st respondent/defendant withdrew O.S.A.No.323 of 2012 on 16.10.2012.

6. The Central Bank of India filed application Nos.1192 and 1193 of 2013 in A.No.4318 of 2011 with the prayer to stay the proceedings pending before the Principal District and Sessions Judge, Mysore. However the said applications were dismissed by this Court by order dated 18.07.2013.

7. The appellant/1st defendant visited the factory premises of the 1st respondent/plaintiff along with a bailiff to cut down the electricity connection and to take the machineries but the same could not be lifted as the were heavy machineries. Hence, the 1st respondent/plaintiff filed an application in O.A.Nos.821

of 2015 and 5304 of 2015, for modification of the order dated 13.08.2012. During the argument on the said application the 1st respondent/plaintiff came forward and undertook to pay a sum of Rs.3,05,42,956.98/- in three instalments. As per that undertaking, this Court extended the time and directed the 1st respondent/plaintiff to deposit the instalments as per the direction of this Court and in case of default 17 machineries as mentioned in the list of machineries submitted by the 1st respondent would be brought for sale and to deposit the balance amount as per the decree of the suit by order dated 04.09.2015. However, the 1st respondent failed to comply with the order.

8. The appellant/1st defendant in compliance of the order of this Court, dismantled the machineries. However, the estimated cost to bring the machineries back to the custody of this Court was found to be Rs.1,00,00,000/- and therefore, an application No.341 of 2017 was filed to modify the order dated 04.09.2015 by the appellant with a prayer to appoint an Advocate or retired District Judge to conduct auction of 79 schedule mentioned machines lying at Mysore factory. This Court by order dated 08.02.2017 appointed Mr.C.Manikkam, retired District Judge of this Court to conduct auction at the factory premises in Mysore.

9. The process of auction could not be completed, within a period of three months by the Commissioner appointed by this Court and he filed a report dated 15.05.2017 and thereafter, one Mr.Ramesh Nayak was appointed as surveyor/valuer by order dated 08.01.2018. Thereafter an application No.327 of 2018 was filed by the insolvency resolution professional appointed by National Company Law Tribunal (NCLT), Bangalore by order dated 30.08.2017, seeking to record factum of appointment and to stay all further proceedings in C.S.No.65 of 2011, pursuant to the earlier orders passed by this Court and submitted that the proceedings could not go on, in view of the bar created under section 14 read with section 328 of Insolvency and Bankruptcy Code 2016. After hearing all the parties, the learned single Judge of this Court allowed the said application staying all further proceedings pursuant to the earlier orders passed by this Court. The said order is being challenged before this Court.

10. Heard Mr.APS.Ahluvalia, learned senior counsel for the appellant and Mr.Abhishek Jain, learned counsel for 1st respondent.

11. Mr.APS.Ahluvalia, learned senior counsel for the appellant would submit that Section 14 of the Insolvency and Bankruptcy Code 2016, speaks about the proceedings against the Corporate Debtor viz., the 1st respondent and not the proceedings initiated by the Corporate Debtor and therefore, the moratorium

as per Section 14 of the Insolvency Bankruptcy Code is not attracted; secondly he would submit that the appellant is being penalised for delaying in complying with the Court's order but for the Court order the appellant would not have spent so much in the transactions; thirdly he would submit that the lien has been created over the property for the Corporate Debtor by the order of this Court and therefore, this Court has got power and jurisdiction to enforce the lien under Section 14 of the Insolvency and Bankruptcy Code. He would rely upon the judgement of Delhi High Court in Power grid corporation of India Limited Vs. Jyoti structures Ltd., reported in 2018 1 CLJ 284 (Delhi), wherein it has been held that the moratorium under Section 14(1) (a) of the code is intended to prohibit the debt recovery auctions against the assets of the Corporate Debtor and not all proceedings, which do not result in endangering or diminishing or adversely affects the assets of the corporate debtor. He also relied upon the order passed by the National Company Law Tribunal, New Delhi in Kanti commercials Pvt. Ltd., Vs. Belthangady Taluk rubber growers marketing & processing, in which, the order of admitting and ordering moratorium passed by National Company Law Tribunal, Bangalore in the application filed by the respondent was set aside on the ground that as on date of the demand notice issued under sub section (1) of section 8 of the Insolvency and Bankruptcy Code, a suit between parties were pending and therefore, the application under section 9 of the Insolvency and Bankruptcy Code was not maintainable. By relying upon these orders he would submit that suit initiated by the 1st respondent/plaintiff cannot be stayed as the suit is only by the corporate debtor and not against the corporate debtor. Hence, he seeks to set aside the order passed by the learned single Judge.

12. Mr. Abhishek Jain, learned counsel appearing for the 1st respondent submit that Section 14 of the Insolvency and Bankruptcy Code is squarely attracted. It was rightly confirmed by the learned single Judge. Once an order of moratorium under Section 14 of the Insolvency and Bankruptcy Code is passed by the competent segment, the proceedings have to be stayed. He would rely upon the judgment of the Hon'ble Supreme Court in Alchemist Assets Reconstruction Company Ltd., Vs. Hotel Gaudavan Pvt. Ltd., reported in Manu/SC/1690/2017 # AIR 2017 SC 5124 and Innoventive Industries Limited Vs. ICICI Bank and others, reported in Manu/SC/1063/2017 # 2018 (1) SCC 407 to contend that once moratorium order has been passed under Section 14 no proceedings will be proceeded.

13. No doubt suit was originally initiated by the 1st respondent/plaintiff against the appellant/1st defendant. Pursuant

to the orders of this Court only the 1st respondent spent money for releasing the goods from CSF with the hope that he would get back the money. However, the 1st respondent/plaintiff miserably failed to comply with the orders of this Court passed on various dates. In fact, the 1st respondent is prolonging the matter by filing applications after applications and appeals after appeals. However, the obligations cast upon on the 1st respondent were not discharged or orders of this Court have not been complied with, whereas the party who duly complied with the orders passed by this Court on various dates is yet to see the colour of the coin. Therefore, the present appeal has been filed against the order of the learned single Judge staying further proceedings on the ground of moratorium order passed under Section 14 of the Insolvency and Bankruptcy Code.

14. It is a fact that the suit has been pending for the past seven years. Many applications were filed and appeals were filed and they have not yielded any results. Meanwhile, an application has been filed by Edelweiss asset reconstruction company Ltd., who got the assignment of loan rights of South India Bank Limited, Corporate Debtor, who granted a term loan of Rs.50,00,00,000/- to the 1st respondent/plaintiff. Failure to discharge the loan amount made the South Indian Bank to assign loan rights to the aforesaid reconstruction company. Therefore, the said reconstruction company initiated C.P.(IB).14/BB/2017, under section 7 rule 4 of Insolvency and Bankruptcy (application to adjudicating authority) rules 2016 before the National Company Law Tribunal, Bangalore bench against the first respondent/plaintiff. The National Company Law Tribunal, Bangalore by order dated 30.08.2017 appointed one Mr. Anand Ramachandra Bhatt to act as insolvency resolution professional, who filed an application before this court that the proceedings shall not go on in view of the bar created under section 14 read with rule 27 of the Insolvency and Bankruptcy Code. Section 14 of the Insolvency and Bankruptcy Code 2016 is usefully extracted as follows:

"14. Moratorium.-(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; (c) any action to foreclose, recover or

enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period. (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process: Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be. "

15. As rightly held by the learned single Judge, the proceedings mentioned under clause (a) to (d) of sub section 1 of section 14 of Insolvency and Bankruptcy Code is capable of including all proceedings for recovery against the corporate debtor and even the proceedings initiated by the secured creditor under SARFAESI Act have been included under clause c of sub Section 1 of section 14 of the Insolvency and Bankruptcy Code. Even the proceedings initiated by the secured creditor cannot be proceeded with against the corporate debtor. Therefore the contention made by the learned senior counsel for the appellant that the proceedings initiated by the corporate debtor could be continued, is rejected.

16. Assuming for a moment that the proceedings initiated by the Corporate Debtor could proceed with, in this case, in the suit filed by the Corporate debtor, the appellant as a corporate creditor intends to auction the machineries imported by the respondent/corporate creditor and recover the money paid by the appellant based on this Court's order dated 21.04.2011 passed by this Court. Therefore, the said recovery is bared under Section 14 (1) (a) Insolvency and Bankruptcy Code. The learned single judge rightly held that the moratorium order passed under Section 14 of the Insolvency and Bankruptcy code would prohibit

all the proceedings including the proceedings initiated by the corporate debtor. The learned single Judge, rightly relied upon section 238 of Insolvency and Bankruptcy code which is overriding other laws. Section 238 of the Insolvency and Bankruptcy code reads as follows:

"The provisions of this code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law "

Section 238 of Insolvency and Bankruptcy code makes it very clear that the provisions of the code could override other laws. Therefore the other laws will not have any effects in view of section 238.

17. As rightly relied upon by the learned counsel for the first respondent the Honourable Supreme Court in M/s Innoventive Industries Limited vs. ICICI bank and others reported in MANU/SC/1063/2017 # AIR 2017 SC 4084 wherein the Honourable Supreme Court discuss the effect of Moratorium while considering repugnance between Maharashtra relief undertaking (special provisions Act), 1958 and the Insolvency and Bankruptcy code. Paragraph 55 of the said judgement is extracted as follows:

"it is clear, therefore, that the earlier State Law is repugnant to the latter parliamentary enactment as under the said State Law, the state Government may take over the management of the relief undertaking, after which a temporary Moratorium in much the same manner as that contained in sections 13 and 14 of the code takes place under Section 4 of the Maharashtra act. There is no doubt that by giving effect to the state law, the aforesaid plan or scheme which may be adopted under the parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the state government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the Moratorium imposed under Section 4 of the Maharashtra act would directly clash with the Moratorium to be issued under sections 13 and 14 of the code. It will be noticed that whereas the Moratorium imposed under the Maharashtra act is discretionary and may relate to one or more of the matters contained in Section 4(1), the Moratorium imposed under the code relates to all matters listed in section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra act is out of the way, the

parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the code. Further, the non-obstante Clause contained in Section 4 of the Maharashtra act cannot possibly be held to apply to the central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier state enactment by virtue of article 254 (1), would operate to render the Maharashtra act void vis-A-vis action taken under the later Central enactment. Also, section 238 of the code reads as under:

Section 238. Provisions of this code to override other laws.

The provisions of this code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

It is clear that the later non-obstante clause of the parliamentary enactment will also prevail over the Limited non-obstante Clause contained in Section 4 of the Maharashtra act. For these reasons, we are of the view that the Maharashtra act cannot stand in the way of the corporate insolvency resolution process under the code"

18. Similarly in another judgement, the Honourable Supreme Court in Alchemist Asset Reconstruction Limited Vs. Hotel Gaudavan Pvt. Ltd., reported in AIR 2017 SC 5724 held that instead of pendency of proceedings before the Company Law Tribunal, proceedings were set aside the order passed by the District Judge under section 37 of the Arbitration and Conciliation Act stating that effect of section 14 (1)(a) is that the arbitration which have been initiated against the aforesaid moratorium is non est law. In view of sections 14 and 238 of Insolvency and Bankruptcy code, the learned single Judge rightly allowed the application and stayed all further proceedings for sale of the machineries attached by the orders of this Court dated 13.08.2012 till the expiry of 180 days from the National Company Law Tribunal's order dated 30.08.2017 or such stay extended period, as may be granted by National Company Law Tribunal. Therefore, the appeal has to be dismissed.

19. This Court is conscious of the efforts taken by the appellant to recover the money spent based on the orders passed by this Court and this Court is unable to help the person/the party, who continues to have faith in the system and approach this Court. Equity is in favour of the appellant. However, the

law is in favour of the 1st respondent, who consistently failed to comply with the orders of this court or violated the orders of this Court. Though it is a constitutional Court of law, when there is a clash between equity and law, law alone prevail over equity and therefore, left with no other option this court dismisses the Appeal filed by the appellant. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

sai

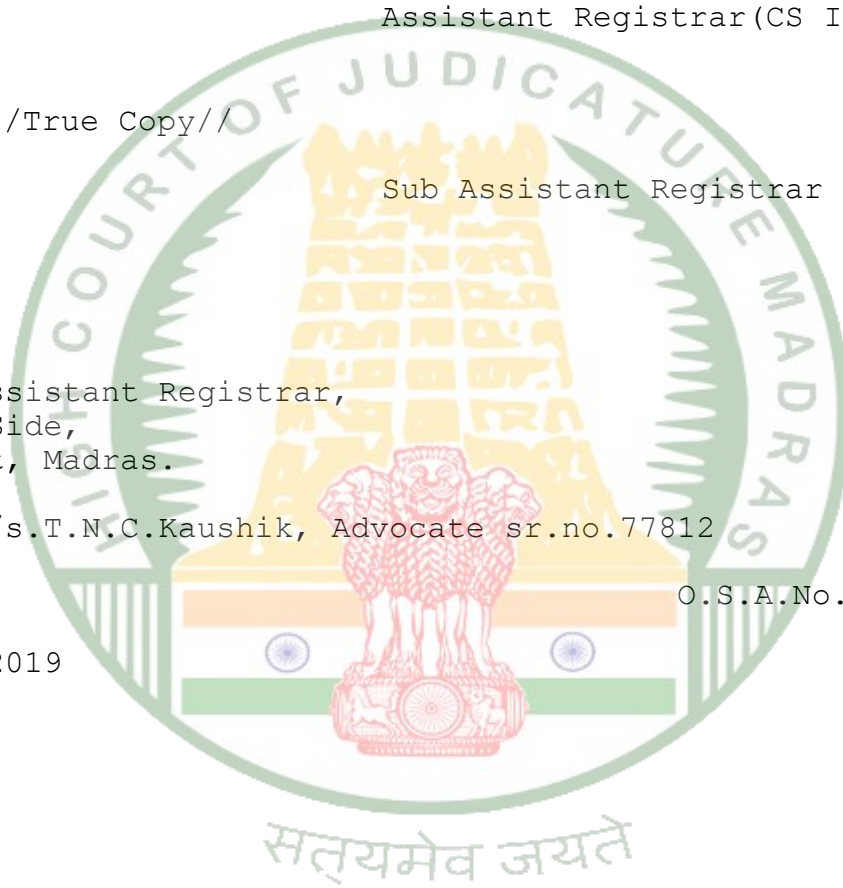
TO:

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+1cc to M/s.T.N.C.Kaushik, Advocate sr.no.77812

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