

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 18.06.2018

PRONOUNCED ON: 06.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.403 of 2016

1. M/s.Blue Marine Logistics Private Limited
by Managing Director J.Shaik Mohamed
Chennai

2. M/s.Blue Marine Logistics(s) Pte Limited
by Director, J.Shaik Mohamed, Singapore

Plaintiffs

Vs

M/s.United India Insurance Company Limited
Divisional Office XV (Hull), Chennai-2

Defendant

Prayer:- This Civil Suit is filed under Order VI Rule 1 of Original Side Rules of the Madras High Court, read with Order VII Rule 1 of CPC, for the reliefs as stated therein.

For Plaintiff

: Mr.P.Giridharan

For Defendant

: Mr.M.Vijayaraghavan

JUDGEMENT

WEB COPY

This civil suit has been filed, to pass a judgement and decree, against the Defendant:-

- (a) directing the Defendant to pay the 1st Plaintiff a sum of Rs.1.75 crores towards the constructive total loss of barge Blue Marine-I.

(b) directing the Defendant to pay the 1st Plaintiff a sum of Rs.1.5 crores towards the salvage cost of barge Blue Marine-I.

(c) directing the Defendant to pay the 1st Plaintiff interest on the sum of Rs.3.25 crores at the rate of 12% p.a. from the date of filing of the suit till the date of realization.

2. The suit has been filed by M/s.Blue Marine Logistics Private Limited, Chennai, and M/s.Blue Marine Logistics(s) Pte Limited, Singapore, against M/s.United India Insurance Company Limited, Chennai-2, with respect to a Marine Hull and Machinery Policy No.011500/22/10/01/00000005, which was issued by the Defendant, covering the period from 23.04.2010 to 22.04.2011.

3. The 2nd Plaintiff had made an application for issuance of a Marine Hull and Machinery Policy for a sum of Rs.1.75,00,000/-. The suit claim was for a direction to pay to the 1st Plaintiff a sum of Rs.1.75 crores towards constructive total loss of the barge Blue Marine-I and for a direction to pay a sum of Rs.1.5 crores towards the salvage cost of barge Blue Marine-I and for a further sum of Rs.3,25,00,000/- together with interest at 12% p.a. and also for costs of the suit.

4. The 2nd Plaintiff was the owner of the barge Blue Marine-I. With respect to the same, a Marine Hull and Machinery Policy referred to above had been entered into with the Defendant. A seaworthy certificate was issued to the Plaintiff on 4.5.2010 and a policy was thereafter issued by the Defendant and premium was also paid by the Plaintiffs. Loss covered were perils of the sea,

rivers, lakes and other navigable water and also loss of or damage caused by accidents in loading, discharging, shifting cargo or fuel and also owing to the negligence of Masters, Officers, crew or pilots. Very unfortunately, the said barge Blue Marine-I sank on 28.10.2010 owing to combination of bad weather, shifting of cargo and perils of the sea. Thereafter, the Plaintiff reported the incident immediately on 1.11.2010 and also addressed a letter to the Deputy Conservator, Tuticorin Port Trust. Thereafter, there were again exchange of correspondences between the Plaintiffs and the Defendant. The Plaintiffs on the one hand sought release of Rs.35,36,630/- towards attempts for salvage the barge and the Defendant on the other hand sought clarifications on the reasons for sinking of the barge.

5. The Defendant had finally by letter dated 17.2.2012, which was filed as a document to the plaint, had claimed breach of policy conditions and treated the claim as repudiated. They further absolved themselves of any liability and closed the claim. To reiterate, this letter was dated 17.02.2012. The Plaintiffs thereafter on 2.3.2012 addressed a letter to the Defendant requesting a copy of the report of the surveyor. There were exchange of correspondences placing responsibility for the delay in salvaging and re-floating of the barge on each other. The Defendant thereafter addressed a second letter to the Plaintiffs and drew attention of the earlier letter dated 17.2.2012 and claimed that there was a breach of assured clauses and reiterated that they have been absolved of any liability to the Plaintiff under the policy of insurance and repudiated the

claim.

6. The Defendant has filed a written statement and a preliminary point has been taken in the written statement that the suit, which had been filed on 3.6.2016, is barred by limitation. The Defendant relied on the averments of the Plaintiffs that the policy of insurance was repudiated on 17.2.2012 and reiterated on 12.3.2012. The Defendant, thereafter, stated that under Article 44(b) of the Limitation Act, the suit should have been instituted within three years from the date of repudiation. The suit was filed on 3.6.2016 and consequently, barred by limitation. It has been further stated that merely because the 1st Plaintiff was furnished a copy of the survey report on 9.7.2013 or there was discovery of contradictions between two survey reports dated 8.10.2011 and 9.5.2013, it would not extend the period of limitation beyond what was prescribed under Article 44 (b) of the Limitation Act. The cause of action never shift.

7. In the written statement, the 1st Defendant has also denied the allegations made in the plaint. According to the Defendant, the Plaintiffs had insured the Hull of dumb barge "Blue Marine I" under Marine Policy No.011500/22/10/01/00000005 for a sum of Rs.1.75 crores. It has been stated that the policy had been assigned by the 2nd Plaintiff in favour of UCO Bank, Singapore Main Branch and consequently, it was also stated that the suit was bad for non joinder of UCO Bank, as a party to the suit. The Defendant was informed that the barge sank on 28.10.2010 near Tuticorin Port. The Surveyor, J.Basheer & Associates Surveyors Private Limited visited the site of incident. It

was impressed upon the Plaintiffs that the barge must be salvaged. Awaiting such measures, a report dated 8.10.2011 was given by the surveyor. There was no assessment of loss. The report was inconclusive since the surveyor could not inspect the barge. The Plaintiffs took no steps to salvage the barge. It did not accept offers for salvaging. The barge was not retrieved for nearly 1 and ½ years. Consequently, the Defendant had repudiated the claim by letter dated 17.2.2012 and reiterated the repudiation by another letter dated 12.3.2012. Even before this, a letter dated 6.2.2012 had been issued, pointing out the failures on the part of the Plaintiffs. The Defendant claimed that the Plaintiffs had misled them by furnishing a wrong seaworthy certificate. The barge had no Class at the time of the incident. It was carrying heavy load of stones and unable to withstand an ordinary voyage. In the absence of adverse weather conditions the barge still sank. It was specifically denied that the barge sank because of combination of bad weather, shifter of cargo and perils of the sea. The Defendant stated that there was no cause of action and again reiterated that the suit was barred by limitation under Article 44(b) of the Limitation Act.

8. The Defendant has also filed a memo on the point of limitation, which is extracted below to afford clarity as to why this Court had taken the issue of limitation as a preliminary issue:-

“1. The Defendant has pleaded that the suit is barred by limitation under Art.44(b) of the Limitation Act which prescribes period of 3 years from the date of loss or in case of denial of liability by Insurer, 3 years from the date of such denial.

2. The following are relevant dates and events in regard to the

question of limitation in the above suit based on Plaintiff.

<i>S.No.</i>	<i>Date</i>	<i>Event</i>
1	04.05.2010	Date of insurance of Plaintiff's barge
2	28.10.2010	Date of loss (sinking of barge)
3	28.10.2010	Date of intimation of claim to Defendant
4	08.10.2011	Date of survey report
5	06.02.2012	Date of letter proposing rejection of claim
6	17.02.2012	Date of rejection of claim - denial of liability
7	02.03.2012	Date when the Plaintiff allegedly asked for survey report
8	05.06.2012	Plaintiff represented against denial
9	22.07.2012	Defendant replied reiterating their decision and confirming that it is not a fresh decision
10	09.05.2013	Date of addendum survey report
11	09.05.2013	Date when Plaintiff allegedly received survey report. Date when Plaintiff came to know alleged contradictions between survey report and addendum survey report
12	03.06.2016	Date of presentation of plaint, which is beyond 3 year from the date of rejection 17.2.2012.

9. The preliminary issued to be decided on the basis of the facts stated above is whether the suit is barred by the law of limitation, particularly, under Article 44(b) of the Limitation Act.

10. Order 14 Rule 2(2)(b) of CPC is as follows:-

“A bar to the suit created by any law for the time being in force, and for that purpose may if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

11. The above rule contemplates a situation when the Court can examine whether the Court has jurisdiction to try the suit or whether the suit is barred by any law as a preliminary issue after a written statement is filed.

12. If the Defendant files an application under Order 7 Rule 11(1) or (d) of CPC, then that would relate to rejection of the plaint and a reading of the plaint alone has to be taken into consideration while deciding whether the Plaintiff is to be rejected. However, under Order 14 Rule 2 (2) of CPC, the stand of the Defendant in the written statement can also be examined.

13. In 2017 5 SCC 345 (Kuldeep Singh Pathania v. Bikram Singh Jaryal), it was held as under:-

“Para 6. Order XIV Rule 2 provides for disposal of a suit on a preliminary issue and under sub-Rule (2) of Rule 2, if the court is of opinion that a case or part thereof can be disposed of on an issue of law only, it may try that issue first, in case it relates to jurisdiction of the court or bar to entertaining the suit. After the 1976 amendment, the scope of a preliminary issue under Order XIV Rule 2(2) is limited only to two areas, one is jurisdiction of the court, and the other, bar to the suit as created by any law for the time being in force. The whole purpose of trial on preliminary issue is to save time and money. Though it is not a mini trial, the court can and has to look into the entire pleadings and the materials available on record, to the extent not in dispute. But that is not the situation as far as the enquiry under Order VII Rule 11 is concerned. That is only on institutional defects. The court can only see whether the plaint, or rather the pleadings of the plaintiff, constitute a cause of action. Pleadings in the sense where, even after the stage of written statement, if there is a replication filed, in a given situation the same also can be looked into to see whether there is any admission on the part of the plaintiff. In other words, under Order VII Rule 11, the court has to take a decision looking at the pleadings of the plaintiff only and not on the rebuttal made by the defendant or any other materials produced by the defendant.

Para 7....Merely because it is a trial on preliminary issues at the stage of Order XIV, the scope does not change or expand. The stage at which such an enquiry is undertaken by the court makes no difference since an enquiry under Order VII Rule 11(a) of the Code can be taken up at any stage.

Para 8. Thus, for an enquiry under Order VII Rule 11 (a), only the pleadings of the plaintiff-petitioner can be looked into even if it is at the stage of trial of preliminary issues under Order XIV Rule 2(2). But the entire pleadings on both sides can be looked into under Order XIV Rule 2(2) to see whether the court has jurisdiction and whether there is a bar for entertaining the suit.”

14. In the present case, the Defendant has reiterated that the suit is barred by limitation under Article 44(b) of the Limitation Act. Since this goes to the very root of the institution of the suit, this Court by consent both the learned counsel for the Plaintiffs and the learned counsel for the Defendant had taken the above issue as the preliminary issue. Arguments were advanced by Mr.P.Giridharan, the learned counsel for the Plaintiffs and Mr.N.Vijayaraghavan,

15. Before going further, the insurance policy would have to be examined. In the insurance policy, which was for the period 23.4.2010 to 22.4.2011 and which was termed as a Marine Hull and Machinery Policy, the insurer, namely, the Defendant had promised and agreed that they would insure against liability, damage, liability or expenses subject to the clauses, endorsements, conditions and warranties. The amount insured was Rs.1,75,00,000/-. Thereafter, with respect to the clause under notice of loss, it was specifically stated that in the event of loss or damage which involve allowing a claim under the policy, immediate notice thereof and an application for survey should be given to the policy issuing office. Insurance covers loss or damage to the subject matter insured caused by perils of the sea, rivers, lakes or other navigable waters, fire, explosion, violent theft by persons from outside the vessel, jettison, piracy or any other accidents. It also covers loss or damage

caused by accident in loading, discharging or shifting cargo or fuel.

16. In the clause relating to claims and tenders, it has been stated that in the event of an accident, notice must be given prior to survey. In the present case, it is the claim of the Defendant that salvage operations were not carried out by the Plaintiffs even after more than 500 days from the date of intimation of the loss of the barge and the Plaintiffs had not taken any steps to re-float the barge. In the letter dated 17.2.2012, the Defendant has stated as follows:-

“We refer to your claim of 22.10.2010 reported on 28th October 2010. M/s.J.Basheer Associates were deployed for the survey. We sought explanations regarding classifications, casualty report, lowage plan, draft survey report, past voyages, port clearances and weather reports. Though preliminary survey was conducted and you were advised to carry out salvage operations and report the status to the surveyor and insurer, you are yet to carry out the same.

Even after more than 500 days of loss intimation, as insured you have not taken measures to re float the barge. As you have breached the 'duty of the assured' clause to re float the barge/wreck removal, we deem the claim as breach of policy conditions and treat the claim as repudiated. We are absolved of any liability and are closing the claim which please note.”

17. The Defendant again reiterated this stand in their letter dated 12.3.2012 as follows:-

“As you would appreciate that you have breached the duty of the assured clause to protect the barge by salvage operations and re float the same and since it has exceeded more than 500 days as cited in our earlier letter and there seems to be no right or remedy for subrogation, we uphold our decision.”

18. It is, thus, seen that the Defendant had repudiated the claim

finally and without any ambiguity. They had made it clear that they were absolved of any liability and were closing the claim and treating the claim as repudiated.

19. Article 44(b) of the Limitation Act is as follows:-

<i>Description of suit</i>	<i>Period of Limitation</i>	<i>Time from which period begins to run</i>
44(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers	Three years	The date of occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial

20. Consequently, any suit by a Plaintiff should have been filed within a period of three years from the date of repudiation. Even if the date of repudiation is taken as 12.03.2012, the Plaintiffs should have instituted the suit on or before 11.03.2015. The Plaintiffs, instead of instituting the suit, had chosen to prefer a claim before the National Consumer Disputes Redressal Commission, New Delhi. The Plaintiffs had their choice. Even before the National Consumer Disputes Redressal Commission, New Delhi, the issue of limitation was taken up by the Respondent therein, who is the Defendant herein.

21. It is seen that a consumer complaint was filed on 24.11.2015. This was again beyond the period of limitation. The proceedings of the National Consumer Disputes Redressal Commission, New Delhi had been filed before this Court and it is seen that on 25.5.2016, the following order was passed:-

“Learned counsel for the complainant moved application for

permission to withdraw the complaint with liberty to file civil suit. Application is allowed and complaint stands dismissed as withdrawn with liberty to file civil suit.”

22. Section 5 of the Limitation Act is as follows:-

“5. Extension of prescribed period in certain cases:- Any appeal or any application other than an application under any of the provisions of Order XXI of Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the Appellant or the Applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.”

23. This Section applies only for appeal or for any other application under the Provisions of Order XXI of CPC. It would not extend to institution of suits.

24. Section 14 of the Limitation Act is as follows:-

“14. Exclusion of time of proceeding bona fide in court without jurisdiction. (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted

on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.-For the purposes of this section,-

- (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
- (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
- (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

25. Even in this case, there must have been a specific finding by the National Consumer Disputes Redressal Commission, New Delhi that the period taken in adjudicating the issue before the said Forum can be excluded for calculating the period of limitation. However, there had been an observation that the petition before the said Forum was itself filed after the period of limitation. Even though the period of limitation is a mixed question of fact and law, it is clear in this case that the suit had been instituted beyond the period of limitation. Granting opportunity to file a civil suit would not indicate that automatically a civil suit should be examined and taken on file without examining the issues of jurisdiction or limitation. These aspects are fundamental and when a civil suit is presented, the first point which has to be noted is whether it is within the period of limitation or not. In the present case, the Plaintiffs unfortunately have come to Court beyond the period of limitation. The Plaintiffs seeks extension on the basis of the letter dated 9.7.2013, on which date the Plaintiffs came to know

about the contradictions between the report of the surveyor and addendum surveyor report.

26. The learned counsel for the Plaintiffs relied on **2017 5 SCC 776**

(National Insurance Company Limited Vs. Hindustan Safety Glass Works

Limited) wherein in paragraph 14 and 17, it was held as follows:-

“14. However, the learned counsel vehemently argued that in terms of Section 24A of the Act, the claim made by the insured was barred by limitation since the complaint was filed with the National Commission on 13.8.1996 while the loss or damage had occurred on 6.8.1992. Therefore, the National Commission could not have admitted the complaint since it was filed beyond the stipulated period of two years from the date on which the cause of action had arisen.

17. Strictly speaking, the event that caused the loss or damage to the insured occurred on 6.8.1992 when due to heavy incessant rain in Calcutta, the raw materials, stocks, and goods, furniture, etc. of the insured were damaged. On the very next day, the insured lodged a claim with National Insurance. In response, National Insurance first appointed N.T.Kothari & Co. to assess the loss suffered by the insured and a report was given by this surveyor after more than one year. Thereafter, for reasons that are not at all clear, National Insurance appointed a second surveyor which also took about one year to submit its report and eventually gave an addendum to that report thereby crossing one year in completion of its report along with the addendum. In other words, National Insurance itself took more than two years in surveying or causing a survey of the loss or damage suffered by the insured. Surely, this entire delay is attributable to National Insurance and cannot prejudice the claim of the insured, more particularly when the insured had lodged a claim well within time. To make matters worse, National Insurance actually repudiated the claim of the insured only on 22.5.2001 which is well after the complaint was filed with the National Commission.”

27. In the present case, the delay in salvaging the barge was entirely

on the Plaintiffs. Consequently, the period of limitation in the present case

cannot be extended. The date of repudiation is the starting point of the period of limitation. The survey report can have no sanctity and cannot form the basis for commencing the period of limitation.

28. The learned counsel for the Defendant has relied on **2009 2 SCC 252 (Himachal Pradesh State Forest Company Limited Vs. United India Insurance Company Limited)** wherein in paragraph 9 it was held as under:-

“9. It is clear from the record that the timber had been washed away some time in September 1988 and after prolonged correspondence, the Respondent ultimately vide its communication dated 13.10.1988 repudiated the Appellant's claim. It is also clear from the counter affidavit filed by the Respondent that the Appellant had, vide its letter dated 7.11.1987, asked for insurance cover for a period of 8 months and that the period of one year fixed in the insurance policy was evidently a typographical mistake which had, in any case, been rectified in the records of the Company on 17.12.1987, that is long before the flood. The claim of the Appellant that the Respondent Company had, even after 13.10.1988, impliedly admitted its liability under the policy also appears to be incorrect as the surveyors had been appointed on the persistent demand of the Appellant claimant and the premium taken thereafter was only to make good the deficiency in the premium that had been paid for the policy for the period of eight months. It is, therefore, apparent that as on the date of the flood, there was no insurance policy in existence or any commitment on behalf of the Respondent to make the payment under the policy. We, therefore, endorse the argument raised by the Respondent that even accepting the case of the Appellant at its very best that the period of limitation would be 3 years under Section 44 (sic Article 44) of the Limitation Act, the complaint would even then, be beyond time, having been filed in April 1994.”

29. In **2012 1 SCC 791 (Oriental Insurance Company Limited Vs. Prem Printing Press)**, it was held as under:-

“6. This leaves us in no doubt that the final decision about the repudiation was conveyed on 28.7.1994 and till then, the Applicant kept on dangling a carrot of hope before the Respondent herein that the matter regarding repudiation of claim was being considered afresh. If that is so, then the complaint made on 6.8.1994 would be within three months of 28.7.1994 which was a final answer and there would be no question of the general Condition 7 coming into play. Therefore, viewing from this angle, the order of the National Commission need not be interfered with. We, therefore, find it not necessary to go into the question of Section 28 of the Contract Act.”

30. I am conscious of the fact that the limitation is a mixed question of fact and law. But, in this case, the fact is that the claim was repudiated on 17.02.2012 and again confirmed on 22.07.2012. The period of limitation starts from that date. Three years time is provided under Article 44(b) of the Limitation Act. The suit was presented on 03.06.2016. The suit is barred by law of limitation.

31. It is clear that the suit is barred by the law of limitation. The learned counsel for the Plaintiffs took recourse to the addendum surveyor report and stated that the period of limitation would commence from that time. I am not able to agree with that contention.

32. Contract of Insurance was entered into by the Plaintiffs with the Defendant. The surveyor is a third party to the Contractor. Any act by the surveyor cannot alter or ingress upon the terms of the contract entered into between the Plaintiffs and the Defendant. When a claim is made, the Insurer has an option of either submitting itself to the claim or repudiating the claim. If the claim is repudiated, then the Insurer should institute the suit or take recourse to

the legal proceedings within the period of limitation. The period of limitation is given in Article 44(b) of the Limitation Act, namely, three years.

33. Section 5 of the Limitation Act applies only to appeals and applications under Order XXI of CPC. It cannot be pressed into service if a suit is barred by law of limitation. Section 14 of the Limitation Act can be pressed into service only when there was a bona fide prosecution before another Forum and there is a specific order excluding such period and when such proceedings had been initiated within the period of limitation.

34. In the present case, it is found on facts that even the claim before the National Consumer Disputes Redressal Commission, New Delhi, was preferred well after the period of limitation. Consequently, viewed from any angle, the suit is barred by the law of limitation.

35. The argument of the learned counsel for the Plaintiffs that they had come to know about the addendum to the surveyor's report only on 09.05.2013 would not be of assistance to him since the surveyor only assists

WEB COPY

both the insurer and the insured to estimate the loss, to value the loss and to determine the circumstances surrounding the loss. At any rate, the insurer alone has the option of admitting to the claim or repudiating the same. The report of the surveyor cannot form the basis for any claim or contract between the Insurer and the Insured. It cannot alter the terms of such contract. It cannot extend the period of the contract. It can be pressed into service only to assist with respect to the claim made. It cannot be pressed into service for extending the period of limitation for institution of suits. Institution of suits is governed in Article 44(b) of the Limitation Act. If the plaint is barred by law of limitation, the Court cannot examine the issues raised by the Plaintiffs. I hold that the suit has to be dismissed on the ground that it is barred by law of limitation.

36. In the result, this civil suit is dismissed. No costs.

06.07.2018

Index:Yes/No

Web:Yes/No

Speaking/Non Speaking

Srcm

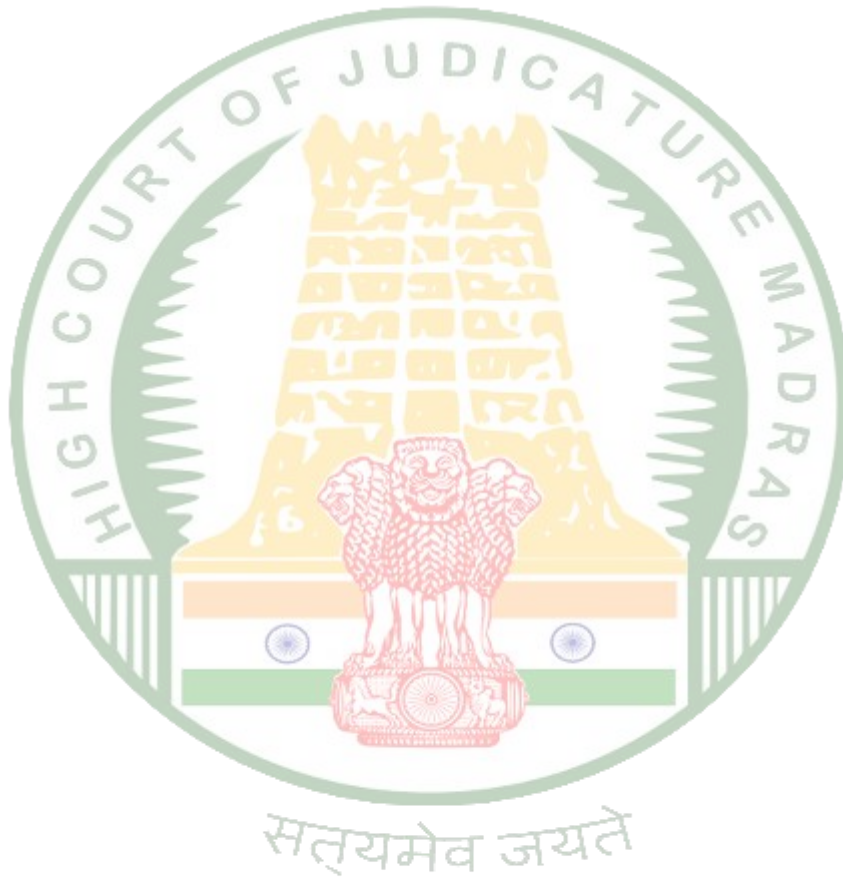
To:

1. The Record Keeper, VR Section, High Court, Madras

Note to Office:-

Issue on 06.07.2018

Pre-Delivery Judgement in
CS.No.403 of 2016



WEB COPY