IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.12.2018

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THE HON'BLE MR.JUSTICE M.SUNDAR

W.M.P.No. 30191 of 2017
and
REV.APPLN.No.SR105504 of 2017

The Tamil Nadu Industrial Investments
Corporation Limited,
SIDCO Project Office Buildings,
Thiru-Vi-Ka Industrial Estate,
Guindy, Chennai 600 032.

and present Address:
No.27, First Floor,
Rajaji Road,
Tambaram West,
Chennai- 600045.

....Petitioner/Review Petitioner

Vs.

1. Virgo Polymer(India)Limited,
   A-1-A, MMDA Industrial Complex,
   Maraimalai Nagar,
   Kancheepuram District.

2. Commissioner of Commercial Taxes,
   Chepauk, Chennai 600 005.

3. Deputy Commercial Tax Officer,
   Nandanam Assessment Circle,
   Chennai 600 028.

..Respondents/Respondents

Prayer in W.M.P.sr.No.30191 of 2017:

Writ Miscellaneous Petition filed under Article 226 of the Constitution of India praying to condone the delay of 65 days in filing the above Review Petition S.R.No.105504 of 2017.

Prayer in Review Application No.105504 of 2017:

Review Petition filed under Article 226 of the Constitution of India read with Order 47 Rule 1 of C.P.C and Section 114 of C.P.C, to review the order passed in W.P.No.12576 of 2005 dated 24.07.2017.

W.P.No.12576 of 2005

Petition filed under Article 226 of the Constitution of India, praying for issue of writ of mandamus directing the respondent to return the title documents deposited with them by the petitioner as Collateral security for the loan availed by the petitioner without insisting on any payment of sales tax or such other levy.

For Petitioner : Mr.K.Magesh

For Respondents : Mr.Praveen S.Kumar of M/s.Rank Associates for R1.

Master Ganesh.R Government Advocate (Taxes) for R2 and R3

Common Order

This common order will dispose of both these petitions i.e., W.M.P.No.30191 of 2017 as well as the review application SR.No.105504 of 2017.

2. A writ petition came to be filed by one Virgo Polymer (India) Limited [hereinafter referred to as 'Virgo' for brevity] against the Tamil Nadu Industrial Investments Corporation Limited ('TIIC' for brevity), Commissioner of Commercial Taxes and Deputy Commercial Tax Officer, Nandanam Assessment Circle, arraying them as respondents 1,2 and 3 respectively.

3. Respondents 2 and 3 shall be collectively referred to as 'Commercial Tax Department' for the sake of convenience and clarity.

4. After full contest, the aforesaid writ petition filed by Virgo i.e., W.P.No.12576 of 2005, came to be disposed of by this Court on 24.07.2017 by a detailed order.

5. To be noted, Virgo, TIIC and Commercial Tax Department were represented before this Court when the writ petition came to be disposed of after full contest on 24.07.2017. Learned counsel who appeared for respective parties, as set out in the order dated 24.07.2017, reads as follows:

' For Petitioner : Mr.V.Kuberan
for M/s.Rank Associates

For Respondents : Mrs.Rita Chandrasekaran for R-1
for M/s.Aiyar & Dolia

: Mr.T.M.Pappiah,
Spl.G.P. For RR 2 and 3.'

6. Further to be noted, as mentioned supra, writ petitioner is Virgo, first respondent is TIIC, respondents 2 and 3 are Commercial Tax Department.

7. The crux and gravamen of the writ petition has been captured and encapsulated in paragraph Nos.1 to 11 of the aforesaid order dated 24.07.2017 which reads as follows:

> 'Subject matter of the writ petition is a Hire Purchase Agreement dated 31.01.1996 (hereinafter referred to as 'said HP agreement').
>
> 2.Said HP agreement is between the writ petitioner company, i..e, Virgo polymer (India) Limited, and respondent No.1 before me, i.e., The Tamil Nadu Industrial Investments Corporation Limited ('TIIC' for brevity).
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> 3.Said HP agreement is for purchase of circular weaving Machine Model LSHD N 4 and the name of the supplier is M/s.Lohis Starlinger Limited, Bangalore - 80. To be precise, subject matter of said HP agreement is 16 nos. of such machines (hereinafter collectively referred to as 'said machineries' for the sake of brevity).
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> 4.As would be evident from the prayer in the writ petition, which has been extracted supra in this order, the writ petitioner has come up with a prayer to mandamus TIIC (respondent No.1 before me) to return title documents deposited with them by the writ petitioner as collateral security for loan availed by the writ petitioner for purchase of said machineries under the HP agreement. To be noted, this is a collateral security besides hypotheca under the said HP agreement.
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> 5.To be noted, intriguingly, the prayer in the writ petition does not give details about the properties which have been given as collateral security. Today, in the hearing, this was put to the learned counsel for the writ petitioner.
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> 6.Thereafter, on instructions, both the learned

counsel for the writ petitioner, Mr.V.kuberan, of M/s.Rank Associates, as well as Mrs. Rita Chandrasekar of M/s. Aiyar and Dolia, appearing for TIIC/respondent No.1, submit that properties that were given as collateral security consisting of two industrial sheds in SIDCO Industrial Estate, Maraimalainagar, one bearing No.B37 with land admeasuring an extent of 22 cents or thereabouts with 3000 sq.t. of superstructure thereon in the form of shed and the other bearing No.B48, with land admeasuring an extent of 42 cents or thereabouts with 9000 sq.ft. of superstructure in the form of shed (hereinafter referred to as 'collateral security properties').

7.The entire writ petition turns on a very narrow compass. That narrow compass is sales tax payable on said machineries.

8.TIIC would contend that sales tax payable on said machineries has to be paid by the writ petitioner vide clause 8 of the said HP agreement, which reads as follows:

"8.The HIRER further covenants and agree to pay to the OWNER sales tax and any other taxes, levies or dues, that may become payable under any rules or law in force at the time of transfer of ownership of the machinery and equipments from the OWNER to the HIRER."

9.Per contra, learned counsel for the writ petitioner would contend that the sales tax component has already been split into 60 Equated Monthly Installments ('EMIs' for brevity). In support of his contention, learned counsel for the writ petitioner, Mr.Kuberan, draws my attention to the general conditions governing the loan, particularly Clause 16. In the light of the order that I propose to pass, I am not embarring upon the exercise of resolving the above controversy in this writ petition.

10.It is not in dispute that the total hire rent is 148.50 lakhs (Rupees One Crore forty eight lakhs fifty thousand only) payable in 60 EMIs of Rs.2,47,500/- each. It is also not in dispute between the parties that all the 60 EMIs have been duly paid without any default.

11.Therefore, as stated supra, the only point on which the entire writ petition turns is sales tax payable on the said machineries.'

8. In the course of the hearing, on 24.07.2017, the then counsel who appeared for TIIC submitted that if the sales tax amount which according to TIIC has been paid by it is protected

by way of a bank guarantee, TIIC is willing to release the title deeds of the collateral security properties, with a rider that the bank guarantee can either be invoked or returned, subject to decision being taken on Virgo approaching TIIC in this regard. This is captured and encapsulated in paragraph No.18 of the order in the writ petition. Paragraph No.18 reads as follows:

> '18.The first respondent/TIIC would submit that if this sum of sales tax paid by them is protected by way of a bank guarantee, they are willing to release the title deeds for the collateral security properties, with a rider that the bank guarantee can either be invoked or returned subject to a decision being taken on the writ petitioner approaching them on the aforesaid two aspects touching upon the lone issue being sales tax payable on said machineries.'

9. Inter alia on the basis of aforesaid stated position of then counsel for TIIC, this Court disposed of the writ petition, and the operative portion of the order as contained in sub-paragraphs (a) to (f) reads as follows:

> '19.Therefore, the following order is passed:
>
> a)The writ petitioner shall furnish a bank guarantee from a reputed bank favouring TIIC (making TIIC the beneficiary) for a sum of Rs.17,00,000/- (Rupees Seventeen lakhs only), within a fortnight from the date of receipt of a copy of this Order;
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> b) On such bank guarantee being produced, as aforesaid by the writ petitioner, the first respondent / TIIC shall cancel the charge, if any and release the original title deeds and all other attendant documents pertaining to collateral securiy properties being two industrial sheds at SIDCO Industrial Estage, Maraimalainagar, bearing No.B37, land admeasuring an extent of 22 cents or thereabouts with 3000 sq. ft. of superstructure in the form of shed and No.B48, land admeasuring an extent of 42 cents or thereabouts with 9000 sq.ft. of superstructure in the form of shed, to the writ petitioner within a fortnight therefrom;
>
> c)After furnishing the bank guarantee as aforesaid, the writ petitioner shall submit a representation to the first respondent/TIIC raising the two pivotal aspects pertaining to the lone issue of sales tax payable on said machineries;
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> d)The first respondent/TIIC shall make every effort to reconcile/ resolve the issue and respond suitably in writing to the same within six (6)

weeks therefrom;

e)Though obvious, it is made clear that all questions pertaining to sales tax payable on said machineries are left open for being decided without being swayed by the contents of this order.

f)It is made clear that if the ultimate decision of TIIC regarding the sales tax payable on said machineries is adverse to the writ petitioner, either in full or in part, this order will not preclude the writ petitioner from assailing the same in a manner known to law.'

10. Thereafter, it comes to light from the submissions made in the instant miscellaneous petition and the Review Application SR.No.105504 of 2017, that TIIC carried the matter in appeal by way of an intra Court appeal, being W.A.No. 1108 of 2017 to a Hon'ble Division Bench of this Court. The Division Bench, after full contest and detailed hearing, disposed of the writ appeal by an order dated 11.09.2017.

11. Two paragraphs, in the order of the Hon'ble Division Bench dated 11.09.2017 in W.A.No.1108 of 2017 are of utmost relevance. Those two paragraphs are paragraph Nos.9 and 10 and the same read as follows:

'9. Mr.Kuberan, learned counsel, who appears on behalf of the contesting respondent i.e., respondent No.1, says, that a perusal of paragraphs 18 and 19 of the impugned judgment, would show that it proceeded on a consent given by the appellant, with regard to the amount, for which, bank guarantee was required to be furnished by Respondent No.1. It is further submitted by the learned counsel, that no ground, whatsoever, has been taken in the appeal impugning this aspect of the matter.

10.On the other hand, Mr.Magesh, in rejoinder, says that the appellant did not give its consent to return of the title documents with respect to the subject property, upon bank guarantee been furnished in the sum of Rs.17,00,000/-. In other words, Mr.Magesh, says that, if bank guarantee is furnished, which would cover the interest component as well, the appellant would have no difficulty in releasing the title documents.'

12. From paragraph Nos.9 and 10 of order of Division Bench in writ appeal re-produced supra, it emerges clearly that what actually transpired before this Court on 24.07.2017, when the writ petition came to be disposed of was put in issue. Therefore, relying on the time honoured principle laid down in

this regard by Hon'ble Supreme Court inter alia in Ram Bali Vs.State of Uttar Pradesh, 2004 SCC (Crl) 2045, State of Maharashtra Vs.Ramdas Shrinivas Nayak and Anr (1982 (2) SCC 463), Bhavnagar University Vs.Palitana Sugar Mill (P) Ltd. And Ors. (2003 (2) SCC 111), and Roop Kumar Vs.Mohan Thedani (2003 (6) SCC 595)), Hon'ble Division Bench came to the conclusion that the only remedy available to TIIC is to approach the learned Single Judge by way of an appropriate application, if so advised. Saying so, the writ appeal was disposed of.

13. Aforesaid aspect of the matter is articulated and set out by the Hon'ble Division Bench in paragraphs 13 to 15 of the order in W.A.No.1108 of 2017. Paragraphs 13 to 15 are extracted and reproduced here under:

> '13. It is trite to state that, as to what transpired before the Court in the proceedings held before it can, if at all, be conclusively reflected only in the judgment of the Court, which cannot be contradicted by any assertions made by a party in an affidavit or by any other evidence. In case a party is of the view that the proceedings of the Court have been incorrectly recorded in the judgment, it is incumbent upon such party to move the concerned Court for rectification, while the matter is still fresh in the mind of the Judge, who passed the order. There is no other way known to law to correct the record of the Court. (See Ram Bali Vs. State of Uttar Pradesh, 2004 SCC (Crl) 2045, State of Maharastra Vs. Ramdaas Shrinivas Nayak and Anr (1982 (2) Scc 463), Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. And Ors. (2003 (2) SCC 111), and Roop Kumar Vs. Mohan Thedani (2003 (6) Scc 595)).
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> 14.Therefore, having regard to the submissions of Mr.Magesh, in our view, the only remedy available to the appellant is to approach the learned single Judge, by way of an appropriate application to correct the record. Thus, if the appellant is so advised, it may approach the learned Single Judge in that behalf, albeit, in accordance with law.
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> 15.Accordingly, the writ appeal is disposed of in the aforementioned terms. There shall, however, be no order as to costs.'

14. Under the aforesaid circumstances, TIIC has now come with the instant review application SR.No.105504 of 2017 and W.M.P.No. 30191 of 2017 therein.

15. To be noted, W.M.P.No. 30191 of 2017 is filed for condonation of 65 days delay in filing Review Application

S.R.No.105504 of 2017.

16. The ground on which delay condonation petition is filed is that TIIC carried the matter by way of intra court appeal which has been alluded to supra, and owing to the filing of intra Court appeal and its subsequent disposal, the delay of 65 days has occurred.

17. Mr.K.Magesh, learned counsel on record is before this Court on behalf of TIIC, which is the petitioner in W.M.P.No.30191 of 2017 and review petition in Review Application SR.No.105504 of 2017. On behalf of Virgo, Mr.Praveen S.Kumar of M/s. Rank Associates is before this Court. On behalf of Commercial Tax Department, Master Ganesh.R, Government Advocate (Taxes) is before this Court.

18. Learned counsel for TIIC, while reiterating the reason for delay, which has been re-produced supra, referred to the review petition. A perusal of the review petition reveals that it has been filed under Article 226 of the Constitution of India. Considering the narrow scope on which the review petition and W.M.P.No. 30191 of 2017 would now turn, this Court is of the considered view that elaborate analysis on this aspect may not be required while considering these two petitions. Learned counsel for TIIC submits that counsel who appeared for TIIC in the earlier round of litigation when the writ petition came to be disposed of this Court, did not agree for a sum of Rs.17 lakhs as bank guarantee. This is specifically set out in paragraph No.7 of the review petition and the most relevant portion of paragraph No.7 of the review petition reads as follows:

> '....But the Counsel did not agree for a sum of Rs.17 lakhs as a bank guarantee and there is no such instruction given by the Corporation to the then counsel who appeared in the Writ Petition. Without instruction from the revision petitioner Corporation, how this amount of Rs.17 lakhs arrived after a lapse of 15 years from the date of payment to sales tax authorities is unacceptable and is liable to be modified.'

19. Responding to the aforesaid submissions of learned counsel for TIIC, Mr.Praveen S.Kumar of M/s.Rank Associates submits that the same counsel had appeared on behalf of Virgo in the earlier round of litigation also. Learned counsel draws the attention of this Court to Tamil Nadu Electricity Board and

another Vs. N.Raju Reddiar in (1997) 9 SCC 736.

20. Learned counsel for Virgo submitted that the practice of changing advocates and filing the such petitions has been deprecated by the Hon'ble Supreme Court. Be that as it may, learned counsel emphasised counsel for TIIC who appeared in the earlier round/base litigation did agree for a bank guarantee for aforesaid sum and did submit before that title deeds of properties given as collateral security will be released if bank guarantee for aforesaid sum is furnished.

21. It is also pointed out that it is a well established principle that a review petition should necessarily be filed by the same counsel who appeared in the first round of litigation unless there are some extra-ordinary circumstances which makes it impossible for the same counsel to file the review petition.

22. In the instant case, review petition by TIIC has not been filed by the same counsel. As would be evident from the array of parties which has been extracted supra, Mr.K.Magesh did not appear for TIIC in the earlier round when the writ petition came to be disposed of on 24.07.2017, and the instant review petition has now been filed by learned counsel Mr.K. Magesh, who is the counsel on record for TIIC. To be noted, Ms.Rita Chandrasekar of M/s.Aiyar and Dolia appeared on behalf of TIIC in the earlier round/base litigation.

23. With regard to Commercial Tax Department, learned State Counsel i.e., Government Advocate (Taxes) submits that there are no dues to the tax department with regard to machineries which are subject matter of the instant writ petition and the issue if any, is only between TIIC and Virgo. While TIIC claims that it has paid the tax liability and it is entitled to reinbursement of the same from Virgo, Virgo is contesting the same and saying that it has already been recovered from Virgo. In this back drop, as the tax liability payable to the Commercial Tax Department has been paid, it is submitted by learned State counsel that his position i.e., stated position of Commercial Tax Department is completely neutral in the instant petitions. This is noticed and taken on record.

24. This takes us back to the rival contentions.

25. In the instant case, it is not a mere procedural issue

of the review petition being filed by a different counsel i.e., counsel other than the one who appeared in original/base litigation, in the order which is being sought to be reviewed, but the narrative captured supra would reveal that the entire review petition is predicated primarily on the ground that the earlier counsel who appeared for TIIC did not agree that the title deeds of Virgo, given as collateral security, will be released if the payment said to have been made qua tax liability by TIIC is protected by way of a Bank Guarantee. Therefore, it is an issue pertaining to what transpired in this Court in the hearing on 24.07.2017. It is in this view of the matter that the Hon'ble Division Bench, referring to time honoured principle laid down in this regard, had said that this is a matter in which the learned single Judge has to be approached if at all, and if so advised.

26. As already alluded to supra, the entire review turns on whether TIIC agreed that they would release the title deeds if the payments made by them to the Commercial Tax Department is protected by a Bank Guarantee, which in turn is the basis on which the order came to be passed.

27. In the aforesaid backdrop of settled principles, Raju Reddiar's Case which has been pressed into service by Virgo has been followed by a learned Single Judge of Madras High Court in R.Swaminathan Vs. Sivagowri in Review Application No.51/2009 dated 03.08.2009 where it has been held that the review petition has to be filed by the same counsel on record. In this R.Swaminathan's case (Paragraph No.27) Raju Reddiar's case principle laid down by Hon'ble Supreme Court has been extracted and relevant portion reads as follows:

> 27. Added further, the learned counsel for the respondent/wife relies on the decision of Hon'ble Supreme Court in Tamil Nadu Electricity Board Vs N.Raju Reddiar (1997) 9 SCC 736 wherein it is held as follows:
>
> "....except in rare cases where error of law or fact is apparent on the record, no review can be filed; that too by the advocate on record who neither appeared nor was party in the main case. It is salutary that court spends valuable time in deciding a case. Review petition is not, and should not be, an attempt for hearing the matter again on merits. Unfortunately, it has become, in recent time, a practice to file such review petitions as a routine; that too, with change of counsel, without obtaining consent of the advocate on record at earlier stage.

This is not conductive to healthy practice of the Bar which has the responsibility to maintain the salutary practice of profession.”

This principle applies in full force and this principle is completely non-negotiable in the instant case as the review petition, as mentioned supra itself is pivoted and predicated on whether the counsel for TIIC agreed for being protected by a Bank Guarantee. As TIIC is now singing a different time and as it has been set out in paragraph No.7 of the review petition, it emerges clearly that this review petition filed by a different counsel on record by changing the counsel who had appeared in the base litigation is clearly unacceptable.

28. Besides N.Raju Reddiar, R.Swaminathan which has been noticed by this Court, it has been repeatedly held that review has to be filed by the same counsel on record and the practice of filing review through another counsel disputing more so disputing what transpired in the previous proceeding has been deprecated by Hon'ble Supreme Court and this Court.

29. More recently, this Court in Dr.M.Rajendran Vs. M.Daisyrani and others in Review Application (Writ).No.704 of 2017 dated 19.01.2018 following earlier judgments/case laws on the point reiterated the position that a review petition cannot be filed by a different counsel i.e., by other than the one who appeared in the original litigation. In paragraphs 15 and 18 of the order, this Court in Dr.M.Rajendran's case has held that as under:

> '15. The learned counsel filed the present review petition, was not the counsel appeared in the writ petition or in the clarification petition thereafter decided. In this regard, this Court has to consider the very fact that whether a different counsel shall be permitted to file review petitions, when they have no knowledge about the arguments advanced by the counsel on record or the counsel appeared in the writ petition or in the clarification petition. The Hon'ble Supreme Court of India in the case of Tamil Nadu Electricity Board and another Vs. N.Raju Reddiar and another, reported in (1997) 9 SCC 736 has observed as follows:
>
> 1.It is a sad spectacle that a newpractice unbecoming and not worthy of or conducive to the profession is cropping up. Mr.Mariaputham, Advocate-on-Record had filed vakalatnama for the petitioner-

respondent when the special leave petition was filed. After the matter was disposed of, Mr.V.Balachandran, Advocate had filed a petition for review. That was also dismissed by this Court on 24-4-1996. Yet another advocate, Mr.S.U.K.Sagar, has now been engaged to file the present application styled as application for clarification, on the specious plea that the order is not clear and unambiguous. When an appeal/special leave petition is dismissed, except in rare cases where error of law or fact is apparent on the record, no review can be filed; that too by the Advocate-on-Record who neither appeared nor was party in the main case. It is salutary to note that the court spends valuable time in deciding a case. Review petition is not, and should not be, an attempt for hearing the matter again on merits. Unfortunately, it has become, in recent time, a practice to file such review petitions as a routine; that too, with change of counsel, without obtaining consent of the Advocate-on-Record at earlier stage. This is not conducive to healthy practice of the Bar which has the responsibility to maintain the salutary practice of profession. In Review Petition No.2670 of 1996 in CA No.1867 of 1992, a Bench of three Judges to which one of us, K.Ramaswamy, J., was a member, had held as under:

The record of the appeal indicates that Shri Sudarsh Menon was the Advocate-on-Record when the appeal was heard and decided on merits. The review petition has been filed by Shri Prabir Chowdhury who was neither an arguing counsel when the appeal was heard nor was he present at the time of arguments. It is unknown on what basis he has written the grounds in the review petition as if it is a rehearing of an appeal against our order. He did not confine to the scope of review. It would not be in the interest of the profession to permit such practice. That apart, he has not obtained 'No Objection Certificate' from the Advocate-on-Record in the appeal, in spite of the fact that Registry had informed him of the requirement for doing so. Filing of the 'No Objection Certificate' would be the basis for him to come on record. Otherwise, the Advocate-on-Record is answerable to the Court. The failure to obtain the 'No Objection Certificate' from the erstwhile counsel has disentitled him to file the review petition. Even otherwise, the review petition has no merits. It is an attempt to reargue the matter on merits.

18. In the case of Tamil Nadu Electricity Board and another Vs. N.Raju Reddiar and another, reported in (1997) 9 SCC 736, the Hon'ble Supreme Court has again to the extent of dismissing the Review Application with an exemplary costs of Rs.20,000 as it is an abuse of the process of Court in derogation of healthy practice. In the case on hand, also the learned counsel now appearing in the Review Application had not appeared in the writ petition, the review petitioner filed the present review petition only by changing the counsel on record. Thus, this Court is not inclined to consider any of the grounds raised in the present review petition.'

30. Therefore, I deem it appropriate to dispose of the review petition at the SR stage itself along with the application for condonation of delay.

31. The reason given for condonation of delay has already been alluded to supra and no useful purpose would be served in condoning the delay as it would not lead to any useful out come. It is in this view of the matter that this Court deems it appropriate to dispose of both i.e., delay condonation petition and the review petition at the S.R. Stage itself.

32. In the light of the above, and owing to all that have been set out supra, both W.M.P.No.30191 of 2017 and review application SR.No.105504 of 2017 are dismissed as bereft of merits.

33. Considering that the review petitioner is TIIC, which this Court is informed, is a Government undertaking, this Court refrains from imposing costs though it is a fit case to be dismissed with costs. Changing counsel and filing a review petition by singing a different time/changing or shifting stands which certainly has to be curbed as such practices are an anathema to a healthy and robust justice delivery system.

34. In the result, both the petitions are dismissed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Commercial Taxes,
Chepauk, Chennai.

2.The Deputy Commercial Tax Officer,
Nandanam Assessment Circle,
Chennai 600 028.

+1cc to Mr.K.Magesh, Advocate, S.R.No.85379

W.M.P.No. 30191 of 2017
and
REV.APPLN.No.SR105504 of 2017

SSD(CO)
GSP(08/02/2019)