

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.08.2019

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

CRL.O.P.No.336 of 2015

1. Narayanamma

2. Kiruppanna

3. Muniyappa

4. Seenappa

5. Venkateshappa

6. Krishnappa ...Petitioners/Accused 1 to 6

Vs.

Chikka Venkateshaiah ...Respondent/Defacto Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records pertaining to C.C.No.56 of 2013 pending on the file of the Judicial Magistrate No.I, Hosur, Krishnagiri District and quash the same as illegal, incompetent and ultravires by allowing the present criminal original petition.

For Petitioners : Mr.R.Jayaprakash

For Respondent : Mr.A.Balamurugan

ORDER

This petition has been filed seeking to quash the proceedings in C.C.No.56 of 2013, pending on the file of the Judicial Magistrate-I, Hosur, Krishnagiri District.

2. The respondent filed a complaint before the Inspector of Police, Berigai Police Station, Krishnagiri, against the petitioners and an FIR came to be registered in Crime No.129 of 2008 on 24.06.2008, for the offences under Sections 420, 465 and 468 of IPC.

3. The FIR was investigated and a closure report came to be filed by the concerned police on 24.07.2009 before the Judicial Magistrate-I, Hosur.

4. After nearly two years, a protest petition came to be filed by the respondent against the petitioners. The protest petition was converted into a private complaint and the Court below took cognizance of the private complaint and issued process to the petitioners under Section 204 of Cr.P.C.

5. The learned counsel for the petitioners submitted that the Court below while converting the protest petition into a private complaint, failed to take note of the closure report filed by the police and the statements recorded from the witnesses by the police and therefore the cognizance taken by the Court below is illegal. The learned counsel for the petitioners further submitted that even if the entire allegations made in the complaint are taken as it is, no offence of forgery and cheating is made out and therefore the proceedings before the Court below is liable to be quashed by this Court.

6. The learned counsel for the petitioner in order to substantiate his submissions, relied upon the following judgments:

1. (2009) 8 SCC 751
Mohammed Ibrahim & ors Vs. State of Bihar and ors
2. (2010) 4 SCC 185
Ramesh Pandurao Hedau Vs State of Gujarat
3. (2018) 4 MLJ (Cr1) 392
T.Muthuramalingam Vs. The Inspector of Police, DCB and ors
4. (2019) 1 LW (Cr1) 771
A.Rajendra and ors, Vs. The State and ors
5. (2019) SCC Online SC 877
Vishnu Kumar Tiwari Vs. State Of Uttar Pradesh

7. The learned counsel appearing on behalf of the respondent submitted that he has received an intimation from the respondent to the effect that the respondent is withdrawing the vakalat and has directed the counsel not to appear in this case. Therefore, the learned counsel for the respondent expressed his helplessness and submitted that he cannot appear for the respondent and make his submissions.

8. In view of the above development, this Court has to decide this case on the basis of materials available on record and after taking into consideration the submissions made by the learned counsel for the petitioners.

9. The case of the respondent is that, the property at Sy.No.55/2B, Muduguriki Village, Krishnagiri District, belonged to his father-in-law. After his demise, property vested on his wife. However, the petitioners executed a registered gift deed dated 28.05.2007, in favour of the Commissioner/BDO, Shoolagiri, for construction of a school under a scheme. While executing the gift deed, the property belonging to the wife of the respondent was also included in the gift deed. Therefore, according to the respondent, the petitioners have committed an offence of forgery and cheating.

10. The Sub Inspector of Police, Berigai Police Station, who conducted the investigation, took the statement of the witnesses, filed a closure report on the ground that the property belonging to the wife of the complainant is intact and there is no construction put up in the property. The investigating officer has further stated that the dispute is purely civil in nature and therefore the closure report was filed as "mistake of fact".

11. The protest petition that was filed by the respondent was converted into a private complaint by the Court below and cognizance was taken for an offence under Section 420, 465 and 468 of IPC.

12. As stated above, the main allegation that has been made against the petitioners is that, the petitioners without having any right, title or interest over the property, have fraudulently executed the gift deed on 28.05.2007 by including the property of the wife of the respondent in Sy.No.55/2B. The 1st question that has arisen for consideration is whether the allegation made in the complaint, even if it is taken as it is, will constitute an offence of forgery and cheating. It will be relevant to rely upon the judgement cited by the learned counsel for the petitioners in this regard.

13. The Hon'ble Supreme Court in the case of Mohammed Ibrahim & Others vs. State of Bihar and another referred supra has held as follows:

12. Section 464 defining "making a false document" is extracted below :

"464. Making a false document.--A person is said to make a false document or false electronic record---

First.--Who dishonestly or fraudulently -

(a) makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any digital signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the digital signature,

with the intention of causing it to be believed that such document or a part of document, electronic record or digital signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly.--Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with digital signature either by himself or by any other person, whether such person be living or dead at the time of such alternation; or

Thirdly.--Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practiced upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

Explanation 1 - A man's signature of his own name may amount to forgery.

Explanation 2 - The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in

the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

[Note: The words 'digital signature' wherever it occurs were substituted by the words 'electronic signature' by Amendment Act 10 of 2009]."

13. The condition precedent for an offence under sections 467 and 471 is forgery. The condition precedent for forgery is making a false document (or false electronic record or part thereof). This case does not relate to any false electronic record. Therefore, the question is whether the first accused, in executing and registering the two sale deeds purporting to sell a property (even if it is assumed that it did not belong to him), can be said to have made and executed false documents, in collusion with the other accused.

14. An analysis of section 464 of Penal Code shows that it divides false documents into three categories:

1. The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed.

2. The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person.

3. The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind; or (b) intoxication; or (c) deception practised upon him, know the contents of the document or the nature of the alteration.

In short, a person is said to have made a 'false document', if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practicing deception, or from a person not in control of his senses.

15. The sale deeds executed by first appellant, clearly and obviously do not fall under the second and third categories of 'false documents'. It therefore remains to be seen whether the claim of the complainant that the execution of sale deeds by the first accused, who was in no way connected with the land, amounted to committing forgery of the documents with the intention of taking possession of complainant's land (and that accused 2 to 5 as the purchaser, witness, scribe and stamp vendor colluded with first accused in execution and registration of the said sale deeds) would bring the case under the first category.

16. There is a fundamental difference between a person executing a sale deed claiming that the property conveyed is his property, and a person executing a sale deed by impersonating the owner or falsely claiming to be authorised or empowered by the owner, to execute the deed on owner's behalf. When a person executes a document conveying a property describing it as his, there are two possibilities. The first is that he bonafide believes that the property actually belongs to him. The second is that he may be dishonestly or fraudulently claiming it to be his even though he knows that it is not his property. But to fall under first category of 'false documents', it is not sufficient that a document has been made or executed dishonestly or fraudulently. There is a further requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed.

17. When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by someone else. Therefore, execution of such document (purporting to convey some property of which he is not the owner) is not

execution of a false document as defined under section 464 of the Code. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither section 467 nor section 471 of the Code are attracted.

14. This judgment was relied upon by this Court in T. Muthuramalingam vs. The Inspector of Police, DCB and others referred supra. The relevant portions of the judgment is extracted hereunder:

15. Even assuming that the petitioner is dishonestly or fraudulently claiming 80 cents of land belonging to the second respondent, the same will not satisfy the requirement of Section 464 of IPC since further requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed, is not present in the case. Once Section 464 of IPC is not attracted, automatically, the offence under Sections 465, 468 and 471 will not be attracted. Therefore, even on a plain reading of the complaint given by the second respondent, no offence has been made out under Sections, 465, 468 and 471 of IPC.

15. It is clear from the above judgment that even if the allegations made in a complaint is taken as it is, no offence of forgery can be made out against the petitioners. The respondent is attempting to establish the offence of forgery against the petitioners on the ground that the petitioners have created false document. In order to attract the ingredients of false document, the petitioners should have either executed the document claiming themselves to be wife of the complainant or the petitioners should have altered or tampered with a document or they should have obtained the document by practicing deception. None of these ingredients are satisfied in this case. Execution of a document pertaining to a property, for which a person is not the owner, by itself will not amount to execution of a false document as defined under Section 464 of the code.

16. The next issue that arises for consideration is whether the Court below was right in taking cognizance of the complaint after converting the protest petition into a private complaint, even without taking note of the closure report filed by the police and without taking note of the statements recorded by the police under Section 161 of Cr.P.C.

17. Useful reference can be made by the judgments cited by

the learned counsel for the petitioners.

18. This Court in A.Rajendra and others vs. The State and others, referred supra has held as follows:

9. When the protest petition is filed by the second respondent questioning the closure report filed by the Deputy Superintendent of Police, Thiruchendur Division, the Court below is left with three options. The first option is to disregard the closure report and take cognizance of the final report and issue summons to the accused person. The second option is to accept the closure report and issue refer charge notice to the de facto complainant to enable him to file a protest petition and the third option that is available to the Court below is to order further investigation on the protest petition filed by the de facto complainant.

10. If the Court below wants to convert the protest petition into a private complaint, it is open to the Court to do so, provided that the Court below had considered the entire closure report filed by the Police and it had come to a conclusion that the materials placed by the de facto complainant was not considered by the respondent Police or the de facto complainant has come up with some further materials in order to substantiate his case. This exercise has not been done by the Court below, while converting the protest petition into a private complaint and taking cognizance of the same.

14. The above two judgments squarely apply to the facts of the case. As held by this Court, the order taking cognizance of the private complaint, ought to have reflected the application of the mind of the Court below, in considering the closure report, which is already available before the Court. There is absolutely no reference to the closure report in the order taking cognizance of the private complaint by the Court below. The Court below must have also taken into consideration the fact that the second respondent was repeatedly attempting to improve his case at every stage and the Court below did not take this important aspect into consideration. The Court below also did not take into consideration the fact that the dispute between the parties is already pending before the Arbitrator. The most important factor, which the Court below did not take into consideration is that the

entire dispute is purely civil in nature and the second respondent instead of pursuing the remedy before the civil forum has attempted to give the dispute a criminal colour and has managed to keep the criminal case pending for the last four years. Not once, but twice the Police have thoroughly investigated this case and have filed closure reports. Therefore, some credence must be given for these closure reports and the Court below cannot completely disregard these closure reports and take cognizance of the private complaint independently.

19. The Hon'ble Supreme Court in a recent judgment has considered the same point in Vishnu Kumar Tiwari vs. State of Uttar Pradesh, referred supra, the relevant portions of the judgment are extracted hereunder:

23. In fact, the case itself was decided by a Bench of three learned Judges of this Court in view of the divergence of opinion in the Court. The Court held as follows:

6. It is too well settled that when police after investigation files a final form under Section 173 of the Code, the Magistrate may disagree with the conclusion arrived at by the police and take cognizance in exercise of power under Section 190 of the Code. The Magistrate may not take cognizance and direct further investigation in the matter under Section 156 of the Code. Where the Magistrate accepts the final form submitted by the police, the right of the complainant to file a regular complaint is not taken away and in fact on such a complaint being filed the Magistrate follows the procedure under Section 201 of the Code and takes cognizance if the materials produced by the complainant make out an offence. This question has been raised and answered by this Court in the case of Gopal Vijay Verma v. Bhuneshwar Prasad Sinha[(1982) 3 SCC 510 : 1983 SCC (Cri) 110] where under the view of the Patna High Court to the contrary has been reversed. The Court in no uncertain terms in the aforesaid case has indicated that the acceptance of final form does not debar the Magistrate from taking cognizance

on the basis of the materials produced in a complaint proceeding.

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26. This is a case where following the First Information Report, the Investigating Officer conducted an investigation. Statements were taken from the complainant, his wife and his son. This is apart from the statements which were taken from the Doctors who treated the daughter of the second respondent/complainant. The Investigation Officer concluded that there is no material which would warrant the accused being sent for trial. When such a report is filed before the court, it is beyond the shade of doubt that the Magistrate may still choose to reject the final report and proceed to take cognizance of the offences, which in his view, are seen committed. He may, on the other hand, after pondering over the materials, which would include the statements of witnesses collected by the Investigating Officer, decide to accept the final report. He may entertain the view that it is a case where further investigation by the Officer is warranted before a decision is taken as to whether cognizance is to be taken or not.

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35. We have also gone through the protest petition along with the counter affidavit. No doubt, in paragraph 2, there is a general reference to demands for property from the deceased and father of the deceased and torture. Paragraphs 3 to 15 thereafter relate to the circumstances relating to the death of the daughter of the second respondent. In the said paragraphs, the case is sought to be made out that forged documents were produced before the Investigating Officer. Affidavits of the mother and brother of the deceased, inter alia, were also filed to project the case of forgery. For instance, in the affidavit of the mother of the deceased, she claims that she has not gone to the hospital on the 9th and 10th of October, 2007, whereas, according to the statement under Section 161 of the Code, she is alleged to have stated that on 09.10.2007, the deceased was admitted at Priti Hospital by them which apparently includes the mother. We have noticed that in regard to that no doubt the Chief Judicial Magistrate has relied upon judgment in Mohammed Yusuf

and others v. State of Uttar Pradesh and others 9 and taken the view that if cognizance is taken on the basis of the protest petition and the documents annexed with, that is illegal. He also took the view that the Magistrate has to take cognizance on the basis of statements of witnesses recorded by the Investigating Officer, in the case diary and the material collected during investigation.

36. A learned Single Judge of the High Court of Allahabad, in the aforesaid decision, had this to say in paragraph 11:

"11. Where the Magistrate decides to take cognizance under Section 190(1)(b) ignoring the conclusions reached at by the Investigating Officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigation Officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Sections 200 and 202 Cr.P.C. The Magistrate could not take cognizance under Section 190(1)(b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taken into account extraneous material i.e. protest petition and affidavits while taking cognizance under Section 190(1)(b) Cr.P.C. the impugned order is vitiated."

37. The Chief Judicial Magistrate has adhered to the law laid down by the learned Single Judge. In fact, we may notice that in regard to this aspect, if the learned Single Judge, who has rendered the impugned judgment in this case, had a different view, he ought to have referred the matter to a larger Bench.

38. In H.S. Bains (supra), there was a private complaint within the meaning of Section 190(1)(a) of the Code. The matter was referred to the Police under Section 156(3). The Investigating Officer filed a final report. Therein, the court took the view that apart from the power of the Magistrate to take cognizance notwithstanding the final report, under Section 190(1)(b), he could also fall back upon the private complaint which was initially lodged but after examining the complainant and his witnesses, as contemplated under Sections 200 and 202 of the Code. In regard to taking cognizance under Section 190(1)(b) of the Code of a final report, undoubtedly, it is not necessary to examine the complainant or his witnesses though he may do so.

39. In Mahesh Chand (supra), no doubt the matter was commenced by a First Information Report and followed up by the complainant in the court under Section 190(1)(a) of the Code. On the First Information Report, after investigation, a final report was filed. The final report came to be accepted and it was closed. This is despite the fact that there was the protest petition. A third complaint, as it were, came to be filed by the complainant. This Court went on to hold that acceptance of the final report would not stand in the way of taking cognizance on a protest/complaint petition.

40. In Kishore Kumar Gyanchandani (supra), after the final report was accepted on a protest petition which was treated as a complaint, evidence was taken within the meaning of Section 200 of the Code.

41. In Rakesh Kumar (supra), the final report was filed which was accepted by the Magistrate but he simultaneously directed the case to be proceeded as a complaint case and statements under Sections 200 and 202 of the Code came to be recorded.

42. In the facts of this case, having regard to the nature of the allegations contained in the protest petition and the annexures which essentially consisted of affidavits, if the Magistrate was convinced on the basis of the consideration of the final report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the protest petition as a complaint. The fact that he may have jurisdiction in a case to treat the protest

petition as a complaint, is a different matter. Undoubtedly, if he treats the protest petition as a complaint, he would have to follow the procedure prescribed under Section 200 and 202 of the Code if the latter Section also commends itself to the Magistrate. In other words, necessarily, the complainant and his witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the complainant in the protest petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the final report. That is, if the material is such that it persuades the court to disagree with the conclusions arrived at by the Investigating Officer, cognizance could be taken under Section 190(1)(b) of the Code for which there is no necessity to examine the witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the protest petition as a complaint, the remedy of the complainant would be to file a fresh complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court.

43. It is true that law mandates notice to the informant/complainant where the Magistrate contemplates accepting the final report. On receipt of notice, the informant may address the court ventilating his objections to the final report. This he usually does in the form of the protest petition. In *Mahabir Prasad Agarwala v. State*¹⁰, a learned Judge of the High Court of Orissa, took the view that a protest petition is in the nature of a complaint and should be examined in accordance with provisions of Chapter XVI of the Criminal Procedure Code. We, however, also noticed that in *Qasim and others v. The State and others*¹¹, 10 AIR 1958 Ori. 11 11 1984 CrLJ 1677 a learned Single Judge of the High Court of Judicature at Allahabad, inter alia, held as follows:

4. In the case of *Abhinandan Jha* MANU/SC/0054/1967 (supra) also what was observed was 'it is not very clear as to whether the Magistrate has chosen to treat the protest petition as complaint.' This observation would not mean that every protest petition must necessarily be treated as & complaint whether it satisfies the conditions of the complaint or not. A private complaint is to contain a complete list of

witnesses to be examined. A further examination of complainant is made under Section 200 Cr.P.C. If the Magistrate did not treat the protest petition as a complaint, the protest petition not satisfying all the conditions of the complaint to his mind, it would not mean that the case has become a complaint case. In fact, in majority of cases when a final report is submitted, the Magistrate has to simply consider whether on the materials in the case diary no case is made out as to accept the final report or whether case diary discloses a prima facie case as to take cognizance. The protest petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a protest petition the case is to become a complaint case.

44. We may also notice that in Veerappa and others v. Bhimareddappa¹², the High Court of Karnataka observed as follows:

9. From the above, the position that emerges is this: Where initially the complainant has not filed any complaint before the Magistrate under Section 200 of the Cr. P.C., but, has approached the police only and where the police after investigation have filed the 'B' report, if the complainant wants to protest, he is thereby inviting the Magistrate to take cognizance under Section 190(1)(a) of the Cr. P.C. on a complaint. If it were to be so, the protest petition that he files shall have to satisfy the requirements of a complaint as defined in Section 2(d) of the Cr. P.C., and that should contain facts that constitute offence, for which, the learned Magistrate is taking cognizance under Section 190(1)(a) of the Cr. P.C. Instead, if it is to be simply styled as a protest petition without containing all those necessary particulars that a normal complaint has to contain, then, it cannot be construed as a complaint for the purpose of proceeding under Section 200 of the Cr. P.C.

45. Complaint is defined in Section 2(d) of the Code as follows:

(d) " complaint" means any allegation made orally or in writing to a Magistrate, with a 12 2002 CriLJ 2150 (Karnataka) view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a noncognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

46. If a protest petition fulfills the requirements of a complaint, the Magistrate may treat the protest petition as a complaint and deal with the same as required under Section 200 read with Section 202 of the Code. In this case, in fact, there is no list of witnesses as such in the protest petition. The prayer in the protest petition is to set aside the final report and to allow the application against the final report. While we are not suggesting that the form must entirely be decisive of the question whether it amounts to a complaint or liable to be treated as a complaint, we would think that essentially, the protest petition in this case, is summing up of the objections the second respondent against the final report.

20. It is clear from the above judgments that if the learned Magistrate wants to convert the protest petition into a private complaint, he has the jurisdiction to do so. However, at the time of taking cognizance, the learned Magistrate has to necessarily apply his mind on the closure report filed by the police and the statements recorded by the police during the course of investigation. This exercise has not been done by the Court below, while converting the protest petition in to a private complaint and taking cognizance of the same.

21. Therefore, the cognizance taken by the Court below is also liable to be interfered by this Court.

22. In view of the above discussion, the criminal proceedings against the petitioners is an abuse of process of Court and it requires the interference of this Court in exercise of its jurisdiction under Section 482 of Cr.P.C.

23. In the result, proceedings in C.C.No.56 of 2013 on the file of the Judicial Magistrate-I, Hosur, Krishnagiri District is hereby quashed and accordingly this criminal original petition is allowed.

ssr

Sd/-
Assistant Registrar

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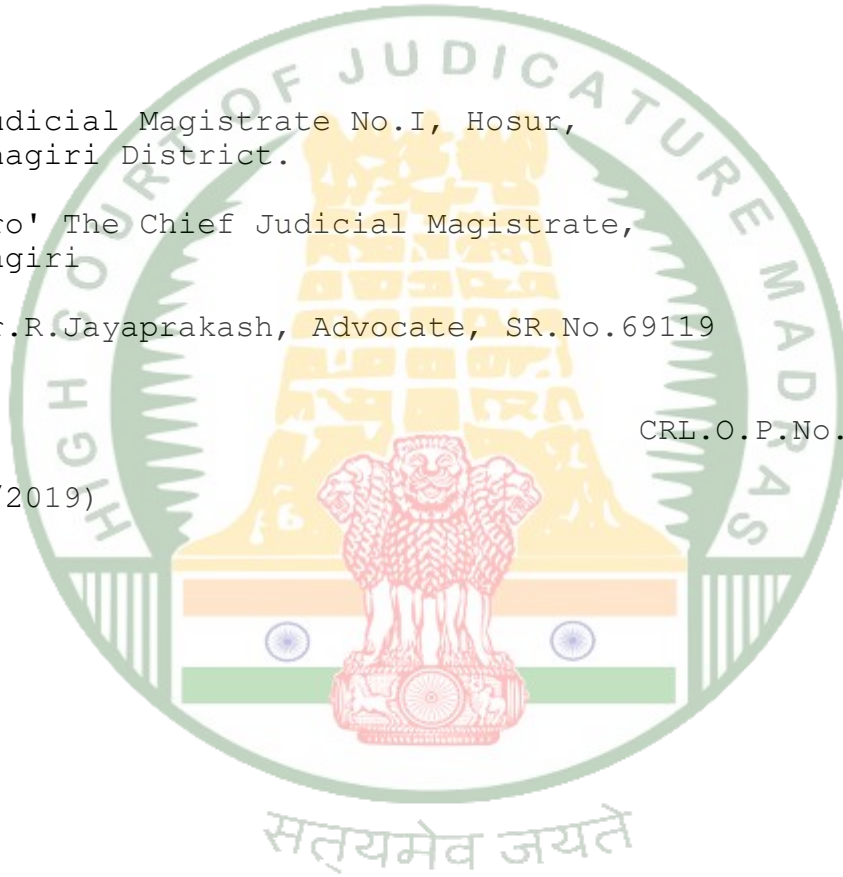
Sub Assistant Registrar

To

1. The Judicial Magistrate No.I, Hosur,
Krishnagiri District.
 - 2 -Do- Thro' The Chief Judicial Magistrate,
Krishnagiri
- +1cc to Mr.R.Jayaprakash, Advocate, SR.No.69119

CRL.O.P.No.336 of 2015

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