

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 28.01.2019

DELIVERED ON: 01.02.2019

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.R.C.No. 660 of 2018 and Crl.O.P. No.220 of 2018

- 1 Rehman
- 2 N. Thiagarajan @ Simon
- 3 Praveen Kumar
- 4 V. Pandian @ Pandi
- 5 Nazar Nazir
- 6 Y. Shameer
- 7 R. Muthuraman
- 8 M. Aravind Kumar
- 9 P. Tamil Selvan
- 10 S. Ranjith Kumar

Petitioners in both Crl.O.P. & Crl.R.C.

vs.

The Intelligence Officer
 Directorate of Revenue Intelligence
 No.27, G.N. Chetty Road
 T. Nagar
 Chennai 600 017

Respondent in both Crl.O.P. & Crl.R.C.

Prayer in Crl.R.C. No.660 of 2018:

Criminal Revision Case filed under Sections 397 and 401 Cr.P.C. seeking to call for the entire records in Crl.M.P. No.3271 of 2017 in R.R. No.9 of 2017 in F.No. DRI/CZU/VIII/48/ENQ-a/INT-21/2017 on the file of the Principal Special Judge (NDPS Cases),

City Civil Court, Chennai and set aside the order dated 28.03.2018 passed by the Principal Special Judge (NDPS Cases), City Civil Court, Chennai in Crl.M.P. No.3271 of 2017 and allow the Criminal Revision Case.

Prayer in Crl.O.P. No.220 of 2018:

Criminal Original Petition filed under Section 482 Cr.P.C. seeking to call for the entire records in Crl.M.P. No.3437 of 2017 in R.R. No.9 of 2017 in F.No.DRI/CZU/VIII/48/ENQ-a/INT-21/2017 on the file of the Principal Special Judge (NDPS Cases), City Civil Court, Chennai and set aside the order dated 19.12.2017 passed by the Principal Special Judge (NDPS Cases), City Civil Court, Chennai in Crl.M.P. No.3437 of 2017 and allow the Criminal Original Petition.

For Petitioners in both
Crl.R.C. & Crl.O.P.

Mr. V.S. Venkatesh

For Respondent in both
Crl.R.C. & Crl.O.P.

Mr. N.P. Kumar
Special Public Prosecutor for NCB Cases

COMMON ORDER

In view of commonality of the issue and also parties involved, both the criminal revision case and criminal original petition are considered and decided by this common order.

2 To appreciate the contentions raised by the petitioner in these petitions, it may be apropos to allude to the facts of the case in brief.

2.1 Based on intelligence, on 15/16.06.2017, the sleuths of the Directorate of Revenue Intelligence, (for short "the DRI"), Chennai, searched three premises, viz., (i) JSM Warehouse, Survey No.332/2, Sothupakkam Road, Budhur Village, Budhur Road, Red Hills, Chennai 600 066, (ii) Godown at Star Exports, No. 108, School Road, Mangadu, Chennai and

(iii) Residence of A. Rehman (aged 50 years), S/o Abdul Razaak, residing at Flat No.5, II Floor, Remo Apartments, Gandhi Street, Anna Nagar, Chennai 600 040 and found that drugs falling under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") were being manufactured in the factory and the godown premises. With their Field Test Kit, they tested the seized product and it answered positive for Methamphetamine/Pseudo Ephedrine. The petitioners were arrested and produced before the jurisdictional Court on 16.06.2017 and were remanded to custody. Their remands were periodically extended by the Special Court for NDPS Act Cases, Chennai (for short "the Special Court").

2.2 By virtue of Section 36-A(4) of the NDPS Act, the remand can be extended for a maximum period of 180 days to facilitate the Investigating Agency to complete the investigation and file final report/complaint. In this case, the 180th day was 13.12.2017. In other words, on the failure of the DRI to complete the investigation on or before 13.12.2017 and file a complaint, the petitioners/accused would have been entitled to be released on statutory bail on 14.12.2017.

2.3 While that being so, on 06.12.2017, the Investigating Officer of the DRI filed an application under proviso to Section 36-A(4) of the NDPS Act seeking grant of further period of 180 days for filing the complaint. On 11.12.2017, the Special Public Prosecutor for the DRI filed a report under proviso to Section 36-A(4) of the NDPS Act for extending the period of investigation. The Special Court directed service of notice on the petitioners/accused.

2.4 Here, there appears to be some differences in the assertion of the defence counsel and the Special Public Prosecutor, inasmuch as, it is the case of the defence counsel that the DRI attempted to serve notice on the accused in the prison in the petition filed by the Investigating Officer and not the report filed by the Special Public Prosecutor for the DRI, which is refuted by the Special Public Prosecutor.

2.5 Be that as it may, the fact remains that the petitioners/accused who were in prison, refused to receive any paper from the DRI. Ergo, the prosecution prayed to the Special Court for production of the petitioners/accused physically before the Court.

2.6 On the orders of the Special Court, presumably under Section 267 Cr.P.C., the petitioners/accused were produced physically before the Special Court on 13.12.2017, on which date, the petitioners/accused filed an application under Section 167(2) Cr.P.C. read with Section 36-A(4) of the NDPS Act, seeking default bail, which was numbered as CrI.M.P.No.3271 of 2017. The petition and report filed by the Special Public Prosecutor for extension of time was numbered as CrI.M.P. No.3437 of 2017.

2.7 Seemingly, the Special Judge insisted that the application filed by the prosecution should be taken up first and only thereafter, the application for default bail filed by the petitioners/accused could be taken up for hearing. The counsel for the petitioners/accused differed with the view expressed by the Special Judge and insisted upon arguing the default bail application first.

2.8 Therefore, the Special Judge heard the counsel for the petitioners/accused and the Special Public Prosecutor in Crl.M.P. No.3271 of 2017, *i.e.*, the default bail application and dismissed the same on 15.12.2017 on the short ground that the Special Public Prosecutor has already filed his report seeking extension of time under Section 36-A(4) of the NDPS Act and before taking any decision on that, the Court cannot pass orders releasing the petitioners/accused on default bail. Thereagainst, the petitioners filed Crl.R.C.No.16 of 2018 before this Court and this Court, by order dated 06.02.2018, set aside the order of the Special Court and remanded the petition for fresh consideration after giving notice to both parties and further directed the Special Court to pass appropriate orders on merits. Pursuant to the said order passed by this Court, the Special Court re-heard Crl.M.P. No.3271 of 2017 and by order dated 28.03.2018, dismissed the petition for default bail, aggrieved by which, the petitioners have preferred Crl.R.C. No.660 of 2018.

2.9 The Special Judge took up hearing of Crl.M.P. No.3437 of 2017 filed by the Special Public Prosecutor qua extension of time for investigation and after hearing either side, passed final orders on 19.12.2017, extending the time for completion of investigation by one year commencing from 16.06.2017.

2.10 Assailing the correctness of the order dated 19.12.2017 passed in Crl.M.P.No.3437 of 2017, the accused have preferred Crl.O.P. No.220 of 2018.

3 On the orders of the Hon'ble Chief Justice, both the criminal original petition and criminal revision case were posted before this Court for hearing.

4 Heard Mr. V.S. Venkatesh, learned counsel for the petitioners/accused and Mr. N.P.Kumar, learned Special Public Prosecutor for NCB Cases.

5 Mr. V.S. Venkatesh, learned counsel for the petitioners, formulated the following submissions:

- The Special Judge should not have acted upon the petition dated 06.12.2017 filed by the Investigating Officer, because, the proviso to Section 36-A(4) of the NDPS Act contemplates only report of the Public Prosecutor and not the request of the Investigating Officer.
- The Special Judge ought not to have insisted upon hearing the default bail application along with the report of the Special Public Prosecutor for extension of time and should have first heard the default bail application and should have granted bail, since the complaint was not filed on 13.12.2017.
- Even in the worst scenario, the Special Court should have completed the entire process of hearing the petitioners/accused and passing final orders on the report of the Special Public Prosecutor ahead of the expiry of the 180th day and the Special Court cannot take up the hearing beyond the 180th day.
- Neither in the request petition filed by the Investigating Officer nor in the report of the Special Public Prosecutor, the progress of the investigation and the reasons for

the detention of the petitioners/accused have been spelt out and hence, the orders passed by the Special Judge stand vitiated.

- Initially, the prosecution took the stand that the petitioners/accused were manufacturing Methamphetamine/Pseudo Ephedrine and thereafter, they have taken a stand that the seized substance is Ketamine Hydrochloride; not satisfied with the result, they have asked for sending the samples to the Central Forensic Science Laboratory, Hyderabad and Tamil Nadu State Forensic Science Department, Chennai, for second opinion; on this ground, the Trial Court should not have granted extension of time.

6 To buttress his contentions, the learned counsel for the petitioners/accused placed reliance on the following judgments:

- **Hitendra Vishnu Thakur vs. State of Maharashtra [1994 AIR SC 2623]** – Paragraph nos.22,33 and 40
- **Sanjay Kumar Kedia @ Sanjay Kedia vs. Intelligence Officer, Narcotic Control Bureau and another [AIR 2010 SC (Supp) 744]** – Paragraph nos.11,14 and 17
- judgment of the Kerala High Court in **T.A. Mohammed vs. State of Kerala [2011 (263) ELT 202]** – Paragraph no.10
- **Uday Mohanlal Acharya vs. State of Maharashtra [AIR 2001 SC 1910]**
- **Rakesh Kumar Paul vs. State of Assam [2017 AIR (SC) 3948]** – Paragraph nos.33,73 and 74
- **Sayed Mohd. Ahmed Kazmi vs. State (Government of NCT of Delhi) and others [(2012) 12 SCC 1]** – Paragraph nos.20 and 25 and
- **Achpal @ Ramswaroop and another vs. State of Rajasthan [2018 (4) KLT 664]**

7 *Per contra*, Mr. N.P. Kumar, learned Special Public Prosecutor for NCB Cases made the following submissions:

- At the time of seizure, the officers of the DRI had tested the substance with their Field Test Kit and the substance answered positive for Methamphetamine/Pseudo Ephedrine; the result of the test is only for arriving at a reasonable belief that the seized contraband falls within the ambit of the NDPS Act; it is only the test by the Scientific Officer and his report which would have legal validity in a Court of law and not the result obtained through the Field Test Kit.
- The last remand extension of the accused was done on 05.12.2017 and the remand was extended upto 18.12.2017 by the Special Judge; it is true that on 06.12.2017, the Investigating Officer filed an application for extension of time; the Special Public Prosecutor has signed in that; however, the Special Public Prosecutor also filed a report on 11.12.2017 setting out the progress in investigation and praying for extension of time; the 180th day was 13.12.2017; therefore, the Special Public Prosecutor has filed his report ahead of 13.12.2017, i.e. on 11.12.2017.
- the investigation was completed and the complaint was filed on 27.03.2018. Even after the complaint was filed, the DRI have arrested two persons and have arraigned them as co-accused in this case.

8 In support of his contentions, Mr. N.P. Kumar placed reliance on the following judgments:

- **Sanjay Dutt vs. State through the CBI, Bombay** – Constitution Bench judgment [1994 3 Crimes (SC) 344]
- **Rambeer Shokeen vs. State of NCT of Delhi [(2018) 4 SCC 405]** and
- judgment of this Court in **Thiruselvem and others vs. State represented by the Deputy Superintendent of Police, N.I.A., Hyderabad, Camp at Puducherry [2018-2-LW (Cri.) 79]**

9 This Court gave its anxious thought to the rival submissions.

10 It is beyond cavil that the 180th day fell on 13.12.2017, because, the first remand was on 16.06.2017. It is true that the DRI had not completed the investigation as on 13.12.2017. However, the Investigating Officer had filed an application for extension of time on 06.12.2017, in which, the Special Public Prosecutor has also signed. Perhaps, realising the mistake that the petition should not have been filed by the Investigating Officer, the Special Public Prosecutor himself filed a report on 11.12.2017.

11 In **Hitendra Vishnu Thakur** (supra), the Supreme Court has held that though Section 20 of the Unlawful Activities (Prevention) Act does not specifically provide for issuance of notice to the accused, yet, issuance of such a notice must be read into the provisions. The default bail provisions in the Terrorist and Disruptive Activities (Prevention) Act (for short “the TADA”) and Unlawful Activities (Prevention) Act are all *in pari materia* with the provisions of Section 36-A(4) of the NDPS Act and therefore, the law laid down in **Hitendra Vishnu Thakur** (supra) would apply to a case under the NDPS Act as well. However, the Constitution Bench of the Supreme Court in **Sanjay Dutt** (supra), has considered **Hitendra Vishnu Thakur** (supra) and has held as follows:

“50(2)(a) The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the Court informing

him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.”

In this case, when the accused refused to receive the notice in prison on the petition filed by the Investigating Officer, the Special Judge had the accused brought before him on 13.12.2017 by issuing P.T. warrant under Section 267 Cr.P.C. for the purpose of serving notice on them. In the meantime, on 11.12.2017, the Special Public Prosecutor had also filed his detailed report under Section 36-A(4) of the NDPS Act. The petitioners/accused were furnished with all the petition and report and were given a full hearing by the Special Judge, which, actually, was not required in view of **Sanjay Dutt** (supra). On 13.12.2017, the petitioners/accused filed the default bail application and insisted that the Court should hear the said petition first and only thereafter, hear the time extension report of the Special Public Prosecutor. The Special Judge was perfectly justified in saying that he would take up both the matters together, because, dictates of common sense state that, if once a default bail application is taken up for hearing and bail granted on the ground that the prosecution have failed to complete the investigation and file the final report/complaint, then, the time extension report of the Special Public Prosecutor would be rendered otiose.

12 Mr. Venkatesh’s contention that the entire exercise of granting or refusing to grant extension of time should have been completed by the Special Judge before the expiry of 180th day, does not cut much ice with this Court. Supposing, in a given case, the Investigating Agency completes the investigation to the best of their endeavour and when they are about to file the final report/complaint on the 179th day and on that day, they incidentally stumble upon evidence, either implicating the accused who are already on remand or showing the involvement of their handlers and masterminds elsewhere, would it

be possible for the Special Judge to complete the entire exercise within 180 days? The answer to this question is an emphatic “No”.

13 Even in this case, the remand extension of the petitioners/accused was made on 05.12.2017 and it was extended for a further period of 15 days upto 18.12.2017. The 180th day was to expire at 12.00 midnight of 13.12.2017. Had the Special Public Prosecutor not filed the extension Report or the complaint, the accused would have been entitled to be released on default bail only on 14.12.2017 on their coming forward to furnish bail, even though they may be physically absent before the Court.

14 Let us take a worst case. On the date when the Special Public Prosecutor files a report under proviso to Section 36-A(4) of the NDPS Act, seeking extension of time on the 179th day, if the Special Judge is on medical leave, will the statutory right of the prosecution to seek extension of time stand extinguished? When the Special Judge is on such leave, the regular Sessions Judge would be empowered to deal only with regular extension of remand of prisoners, be it under Section 167 Cr.P.C. or under Section 309 Cr.P.C. and no other duty will be assigned to the in-charge Sessions Judge. The in-charge Sessions Judge will not even know the facts of the case for him to decide on the report of the Special Public Prosecutor whether to grant or refuse to grant extension of time. After the categorical pronouncement of the Supreme Court in **Rambeer Shokeen** (supra), any further discussion on this subject is only academic. The relevant paragraphs of the said judgment are as under:

“26. It is thus clear that no right had accrued to the appellant before filing of the charge-sheet; at best, it was an inchoate right until 8-3-2017. Resultantly, the question of granting statutory bail after filing of charge-sheet against the appellant and more so

during the pendency of report/application for extension of time to file charge-sheet was impermissible. In other words, the application for grant of statutory bail filed by the appellant on 2-3-2017, even if pending, could have been taken forward only if the prayer for extension of period was to be formally and expressly rejected by the Court.

(emphasis supplied)

27. As held by the Constitution Bench of this Court, the consideration of application for grant of statutory bail in a situation, as in the present case, was dependent on rejection of prayer of the Additional Public Prosecutor for extension of time. When such prayer is made, it is the duty of the court to consider the report/application for extension of period for filing of the charge-sheet in the first instance; only if it was to be rejected could the prayer for grant of statutory bail be taken forward. In no case, the hearing on statutory bail application precede the consideration of prayer for extension of the period for filing of the charge-sheet made by the Additional Public Prosecutor.

(emphasis supplied)

34. In the present case, however, the prayer for extension of period for filing charge-sheet was moved by the Additional Public Prosecutor before the statutory period had lapsed, but the same remained pending until 8-3-2017, when charge-sheet was filed in court. Until the said request was formally and expressly rejected by the competent court, in view of the exposition in *Sanjay Dutt [Sanjay Dutt v. State, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433]*, the court concerned could not have assumed jurisdiction to consider the prayer for grant of statutory bail of the appellant. The request made by the Additional Public Prosecutor was formally disposed of as infructuous on 8-3-2017, after filing of the charge-sheet against the appellant. That was not an order of rejection of the request of the Additional Public Prosecutor as such. The High Court has examined this aspect and, in our opinion, rightly answered the issue against the appellant for the reasons recorded in paras 75 to 77 of the impugned judgment, including by explicitly extending the time to file charge-sheet till 8-3-2017. We affirm the said view of the High Court. Therefore, even this decision relied upon by the appellant will be of no avail in the fact situation of the present case.

15 Coming to the contention of Mr. Venkatesh that the Report of the Special Public Prosecutor contains nothing but the averments contained in the petition filed by the Investigating Officer, this Court is of the view that the form can never extinguish the substance. What is to be taken note of is, whether there was substance in the report of the Special Public Prosecutor for seeking extension of time under proviso to Section 36-A(4) of the NDPS Act. In the first three paragraphs, the Special Public Prosecutor has given a précis of the investigation done by the DRI. In paragraphs 4 and 5, which read as follows, he has stated that the investigation agency requires some more time to examine the mahazar

witnesses, conduct search of the residential premises of the petitioners/accused and record the corroborative statements of certain witnesses:

"It is respectfully submitted that the complainant/petitioner has conducted investigation involving various aspects of the case such as examining the mahazar witnesses, search of the residential premises of the accused involved, corroborative statement from other persons, etc. It is respectfully submitted that the complainant/petitioner is yet to receive crucial documents pertaining to the investigation in the above case which require detailed analysis of the said documents requiring further investigation and that follow up searches are required to be conducted. The complainant filed petition for extension of 180 days for investigation and to file the complaint and that may be read as part and parcel of this report.

It is submitted that the investigation is in progress to find out the other persons who are involved in this offence and the test report has to be obtained and the samples has to be taken from the factory and to send the same to State Forensic Science Department, Chennai for testing. Hence further period is required for complete the investigation. Hence, it is prayed further period of 180 days may be given by extended further period of 180 days to complete the investigation and to file the complaint and the accused persons may be remanded in judicial custody for further period and thus render justice."

16 In this background, would it be open to the Special Public Prosecutor to reveal the contents of the case diary or the case file in his Report under Section 36-A(4) of the NDPS Act? If he does that, will it not alert the suspects, over whom, surveillance would have been mounted by the Investigating Agency? In this case, samples which were drawn were sent by the Special Court to the Customs Laboratory, Chennai and the report dated 26.07.2007 received from said laboratory showed that the samples answered positive for Ketamine Hydrochloride, which substance also falls within the ambit of the NDPS Act. It should be borne in mind that the DRI officials have cracked down a manufacturing unit where production of a psychotropic substance has been going on clandestinely. They have arrested ten persons and were on the look out for others. The department had made a request to the Special Judge for sending the samples to the Central Forensic Science Laboratory, Hyderabad and Tamil Nadu State Forensic Science Department, Chennai and

accordingly, the Special Court had sent the samples to these two premier laboratories and their reports were awaited. Had the reports from these two laboratories been to the effect that the samples do not fall within the ambit of the NDPS Act, the benefit of it would have gone to the accused indubitably. In the facts and circumstances of this case, it cannot be stated that the Report of the Special Public Prosecutor under Section 36-A(4) of the NDPS Act is perfunctory or it does not satisfy the requirements of law.

17 Now, coming to the rulings relied upon by the learned counsel for the petitioners/accused, in **Hitendra Vishnu Thakur** (supra), the Supreme Court has, in fact, held as follows:

“28. . . . In this view of the matter, it is immaterial whether the application for bail on ground of ‘default’ under Section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail.....”

18 In **Sanjay Kumar Kedia** (supra), the Supreme Court has extracted the contents from the petition filed by the Investigating Officer and has held that it does not indicate even remotely, any application of mind on the part of the Public Prosecutor. In this case, after the Investigating Officer filed a petition on 06.12.2017, in which the Special Public Prosecutor has signed, a separate Report has been filed by the Special Public Prosecutor on 11.12.2017, wherein, the necessary facts for grant of extension of time have been pleaded.

19 In **Uday Mohanlal Acharya** (supra), the issue was whether the default bail application filed by the accused can be kept in abeyance so as to give an opportunity to the

default bail. In this case, the accused/petitioners would have been entitled to default bail only on 14.12.2017, in the event of the Special Public Prosecutor not filing the Report under Section 36-A(4) of the NDPS Act or for non-filing of the complaint. In this case, the Special Public Prosecutor has filed the Report on 11.12.2017 well ahead of 14.12.2017.

20 In **Sayed Mohd. Ahmed Kazmi** (supra), the accused therein was entitled to be released on default bail on the 90th day and the prosecution had not filed any application for extension of time before that. However, the accused had filed an application for default bail. In those circumstances, the Supreme Court held that the accused would be entitled to be released on default bail. In the instant case, the application for extension of time was filed by the Special Public Prosecutor on 11.12.2017 well ahead of 14.12.2017.

21 In **Achpal** (supra), final report was filed by a non gazetted officer on 05.07.2018 in violation of the specific directions of the High Court that the investigation should be completed by a superior gazetted officer. Therefore, the Magistrate returned the papers to the Investigating Officer. The statutory period expired on 03.07.2018 itself. In those circumstances, the Supreme Court granted default bail to the accused therein. In the case at hand, the Special Public Prosecutor filed his Report on 11.12.2017 well ahead of 14.12.2017.

22 In **T.A. Mohammed** (supra), the Trial Court had ignored the ruling of the Supreme Court and had refused to grant statutory bail to the accused therein and in those circumstances, the Kerala High Court frowned upon the act of the Trial Court and released the petitioner therein on bail.

In the ultimate analysis, the orders passed by the Special Court, assailing the correctness of which, these two petitions are filed, are upheld and as a sequitur, the criminal revision and the criminal original petition stand dismissed as being bereft of merits.

01.02.2019

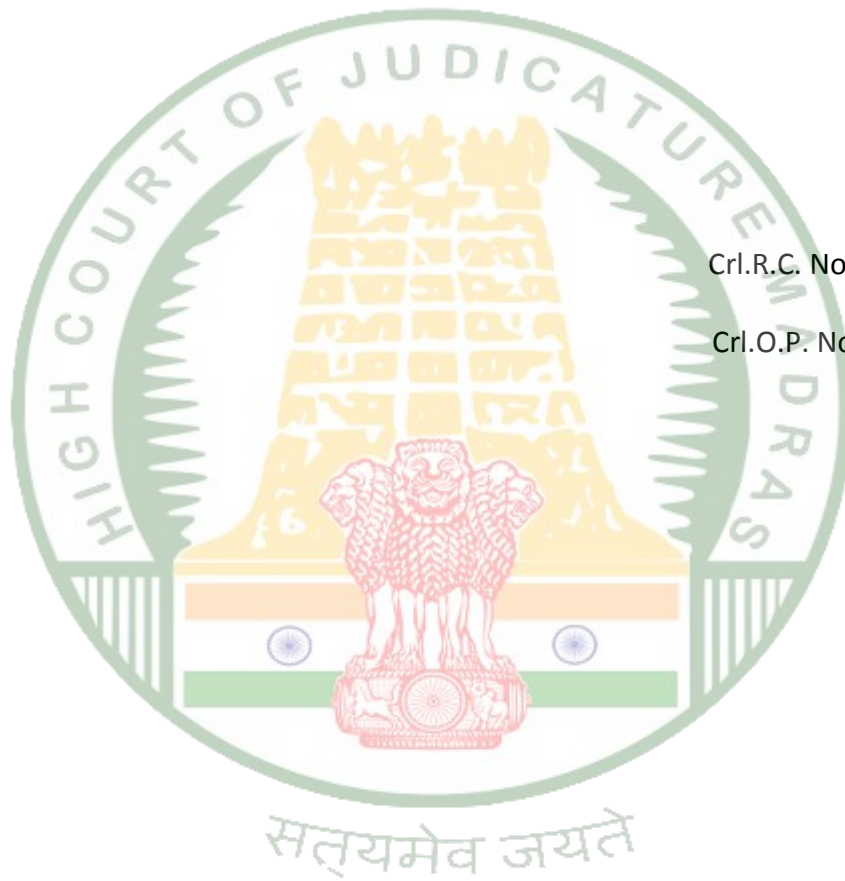
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To

- 1 The Intelligence Officer
Directorate of Revenue Intelligence
No.27, G.N. Chetty Road
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Chennai 600 017
- 2 The Principal Special Judge (NDPS Cases)
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Chennai
- 3 The Public Prosecutor
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