IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.06.2019

PRONOUNCED ON: 17.06.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.4 of 2016

and

C.M.P.No.173 of 2016

T.Shantha ... Appellant

Vs.

1. Sri Valimurugan Financiers rep. by.
Its Managing Partner,
Mrs. S.K.Lakshmi Devi,
No.52, Sanjeevirayan Koil Street,
Old Washermenpet, Chennai - 600 021.

2. N.Kalanidhi

3. M/s. Balaji & Co.
Auctioneers and Estate Agents,
No.160, Thambu Chetty street,
II Floor, Chennai - 600 001. ... Respondents

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 12.02.2015 made in A.S.No. 285 of 2012 on the file of the learned XVIth Additional Judge, City Civil Court, Chennai against the Judgment and decree dated 11.01.2012 made in O.S. No.12887/2009 on the file of the learned VII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.S.Jeevanantham

For Respondents : No appearance - Set exparte vide order dated 07.06.2019

J U D G M E N T

In this second appeal challenge is made to the judgment and decree dated 12.02.2015, passed in A.S.No. 285 of 2012, on the file of the XVIth Additional Judge, City Civil Court, Chennai confirming the judgment and decree dated 11.01.2012, passed in O.S. No.12887/2009, on the file of the VII Assistant Judge, City Civil Court, Chennai.

2. For the sake of convenience, parties are referred to as per their rankings in the trial Court.

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3. Suit for redemption of mortgage, declaration and permanent injunction.

4. The case of the plaintiff is that she is the owner of the suit property and she had availed loan of a sum of Rs.3,00,000/- from the first defendant and the daughters of the Managing Partner of the first defendant and executed three mortgage deeds, vide Document Nos. 370/2002, 371/2002 and 372/2002 and she had settled the entire amount due in respect of the mortgage deeds, vide Document Nos.371/2002 and 372/2002 and the mortgage deed vide Document No.370/2002 has been executed for a sum of Rs.1,75,000/- and the plaintiff had been very regular in the payment of the principal amount as well as the monthly installments and altogether, paid a sum of Rs.7,37,975/- till date towards interest and principal amount and the second defendant is the husband of the managing partner of the first defendant company and the first defendant had issued receipts for the amount paid and at times, she had also evaded to give receipts for the sums paid by the plaintiff and despite repeated requests, the first defendant as well as the second defendant had been evading to issue the receipts for the sum paid by the plaintiff and accordingly, the plaintiff had insisted the defendant to produce the statement of accounts in respect of the suit mortgage and after which, the defendants 1 and 2 had acknowledged that the total sum due for the mortgage is only Rs.2,25,000/- and the plaintiff had paid a sum of Rs.1,00,000/- on 13.03.2007 and deducting the same in the statement of accounts, the balance amount is only Rs.1,25,000/-. Subsequently, the plaintiff received the auction notice of the suit property from the auctioneer, the third defendant and approached the defendants 1 and 2 and expressed her difficulties in repaying the amount and on 07.08.2008, the plaintiff and the first defendant arrived at an amicable settlement and the same was reduced into writing and as per the letter dated 07.08.2008, the total amount due was fixed at 1,40,000/- and on the same date, the plaintiff also paid a sum of Rs.75,000/- to the defendants and the second defendant has acknowledged the receipt of the said amount and accordingly, a sum of Rs.65,000/- alone remains to be settled by the plaintiff in respect of the suit mortgage and the plaintiff had been always ready and willing to pay the abovesaid amount and settle the mortgage and the defendants had been evading to receive the same and postponed the discharge and subsequently, the plaintiff received the auction notice again in respect of the suit property and in such view of the matter, the plaintiff was necessitated to lay the suit against the auction in O.S. No.255/2009, on the file of the VIII Assistant Judge, City Civil Court, Chennai, forbearing the defendants from bringing the suit property for sale in the auction and the plaintiff was granted the relief of interim injunction on the payment of Rs.50,000/- and pursuant to the

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abovesaid order, the plaintiff had paid Rs.50,000/- to the defendants and the injunction order was made absolute and thereafter, the plaintiff is required to pay only a sum of Rs.15,000/- to the defendants towards the mortgage debt and the plaintiff is thereby entitled to redeem the mortgage on the payment of Rs.15,000/- and hence, the defendants are not entitled to bring the suit property for sale by way of auction and hence, according to the plaintiff, she had been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The defendants 1 and 2 resisted the plaintiff's case contending that the plaintiff had availed the sum of Rs.3,00,000/- from the defendants and others by executing three mortgage deeds and the plaintiff had settled the mortgage vide Document Nos.371/2002 and 372/2002. However, the plaintiff had failed to discharge the mortgage debt in respect of the mortgage deed vide Document No.370/2002, which had been executed by the plaintiff for availing the loan of Rs.1,75,000/-. The plaintiff had been very irregular in the payment of the principal and interest amount as agreed and recited in the mortgage deed and it is false to state that the first defendant is evading to issue receipts in respect of the payments made by the plaintiff. It is false to state that the plaintiff had paid Rs.7,37,975/- towards interest and principal amount in respect of the suit mortgage and the first defendant had given due credit to the amount paid by the plaintiff in respect of the mortgage deeds and despite repeated reminders and requests made by the first defendant, the plaintiff failed to settle the mortgage deed vide Document No.370/2002 and hence, left with no other alternative, the first defendant had taken steps to bring the suit property for sale through the auctioneer, namely, the third defendant and accordingly, the third defendant fixed the auction date and with a view to prevent the conduct of the auction, the plaintiff has levied the suit in O.S.No.255 of 2009, on the file of the VIII Assistant Judge, City Civil Court, Chennai and the Conditional order had been passed in the said suit, directing the plaintiff to pay Rs.50,000/- and the said conditional order was complied by the plaintiff and the defendants had given credit to the said payment towards the interest under the mortgage deed and the plaintiff did not prosecute the abovesaid suit and left it go for dismissal for default and suppressing the same, the plaintiff had come forward with the present false suit as if the suit in O.S.No.255 of 2009 is still pending. The first defendant had filed the statement of accounts along with the written statement. No letter of understanding dated 07.08.2008 had been executed as alleged in the plaint. On 07.08.2008, the plaintiff approached the first defendant and offered to settle the matter for a sum of Rs.1,40,000/- but, the same was rejected by the first defendant and insisted the plaintiff to pay the entire amount due and payable under the suit mortgage and

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thereafter, the plaintiff paid a sum of Rs.75,000/- towards the part payment of the mortgage debt and agreed to pay the balance amount of Rs.6,69,064.08/- however, failed to pay the said amount and on the other hand, the plaintiff has come forward with the false suit without settling the mortgage debt as promised and hence, the plaintiff is not entitled to seek the reliefs prayed for and prayed for the dismissal of the plaintiff's suit.

6. In support of the plaintiff's case, PWs 1 and 2 were examined, Exs.A1 to A5 were marked. On the side of the defendants, DWs 1 and 2 were examined, Exs. B1 to B3 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to dismiss the plaintiff's suit. Impugning the same, the present second appeal has been preferred.

8. The second appeal has been admitted on the following substantial questions of law:

> 1. Whether the courts below were right in dismissing the suit by applying Order 2 Rule 2 of CPC., in the absence of any pleading in the written statement filed and also in the absence of any issue on this aspect? And
>
> 2.Whether the courts below were right in dismissing the suit by simply believing Ex.B.1 and by rejecting the oral evidence of P.W.1 and the documents exhibited by the plaintiff to show the subsequent payments made?

9. It is not in dispute that the suit property belongs to the plaintiff. It is also not in dispute that the plaintiff had mortgaged the suit property with the first defendant and two others and obtained a sum of Rs.3,00,000/- by way of three mortgage deeds, vide Document Nos. 370/2002, 371/2002 and 372/2002. As regards the mortgage deeds vide Document Nos.371/2002 and 372/2002, it is admitted that the plaintiff had discharged the abovesaid mortgage dues. It is also not in dispute that the plaintiff had mortgaged the suit property for a sum of Rs.1,75,000/- vide Document No.370/2002 and the present suit has been levied only in respect of the abovesaid mortgage.

10. The plaintiff claims that she has been paying the principal amount as well as the interest amount in respect of the suit mortgage i.e.,Document No.370/2002 regularly and according to the plaintiff, in toto, she has paid Rs.7,37,975/-

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towards interest and principal amount and it is also the case of the plaintiff that the first defendant is not in the habit of issuing the receipts promptly for the payment of the amounts made by the plaintiff in respect of the suit mortgage and evading to issue receipts one way or the other and further, according to the plaintiff, at one point of time, the first defendant, through the second defendant had acknowledged that the total amount due under the suit mortgage is only Rs.2,25,000/- and according to the plaintiff, she has paid Rs.1,00,000/- on 13.02.2007 and it is pleaded by the plaintiff that the sum of Rs.1,25,000/- alone remains to be paid under the suit mortgage. Further, the plaintiff has also pleaded that the plaintiff and the first defendant had arrived at an amicable settlement in respect of the amount due under the suit mortgage and accordingly, it is stated that the parties had agreed that the total payable due amount is only Rs.1,40,000/- by way of a letter dated 07.08.2008 and according to the plaintiff, as she has paid Rs.75,000/- on 07.08.2008 and pursuant to the order of the Court in O.S.No.255 of 2009, she has paid a sum of Rs.50,000/- and the balance amount remains to be paid in respect of the suit mortgage is only Rs.15,000/- and though she had been always ready and willing to pay the amount and get the suit mortgage discharged, the defendants had been evading the same for some reasons or the other and on the other hand, inasmuch as they had endeavored to bring the suit property for sale through auction, according to the plaintiff, she has been necessitated to lay the suit against the defendants for appropriate reliefs.

11. The first defendant, in particular, disputed the abovesaid case of the plaintiff and contended that the plaintiff had not been regular in the payment of the interest as well as the principal amount towards the suit mortgage and accordingly contended that, on the failure of the plaintiff to settle the amount due under the suit mortgage, the first defendant had taken steps to bring the suit property for sale through auction and with a view to restrain the same, the plaintiff had levied the suit in O.S.No.255/2009 and following the interim order passed in the said suit, it is stated that the plaintiff had paid Rs.50,000/- which has been given due credit to and even thereafter, according to the first defendant, as per the working sheet enclosed along with the written statement in respect of the suit mortgage, as on 11.02.2009 a sum of Rs.7,28,731.10/- is due and the plaintiff has failed to settle the said amount and admitted the payment of Rs.75,000/- by the plaintiff and accordingly contended that inasmuch as the plaintiff had failed to pay the amount due under the suit mortgage, it is putforth by the first defendant that she had taken appropriate steps as per the powers conferred under the mortgage deed to bring the suit property for auction through the auctioneer and prayed for the dismissal of the suit of the plaintiff.

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12. As above noted, the suit mortgage has been executed in respect of the suit property for a sum of Rs.1,75,000/-. On a perusal of the suit mortgage marked as Ex.A2, it is found that the plaintiff had agreed to repay the mortgage amount with interest and also agreed to pay the penal interest in case of the failure to pay the amount promptly due under the mortgage. The abovesaid recitals are not in dispute. The plaintiff's claim of the payment of Rs.7,37,975/- towards the mortgage, both towards interest and principal is being disputed by the first defendant. Despite the abovesaid position, there is no acceptable and convincing materials placed on the part of the plaintiff evidencing that she has paid a sum of Rs.7,37,975 /- towards interest and principal due under the suit mortgage. In such view of the matter, in the absence of any material evidencing the payment of the abovesaid sum, as claimed in the plaint, as rightly determined by the Courts below, we cannot accept the case of the plaintiff ipse dixit that she had paid the abovesaid sum towards the suit mortgage sans any reliable materials pointing to the same.

13. The plaintiff would aver that the first defendant had not been prompt in issuing the receipts for the payment in respect of the suit mortgage. However, with reference to the abovesaid case of the plaintiff, it has not been clearly averred and established as to when the amount due under the mortgage deed had been paid by her and for which payment the first defendant had failed to issue receipts and what further steps had been taken by the plaintiff with reference to the same etc., According to the first defendant, she had been issuing receipts in respect of the payment made by the plaintiff and also giving due credit to the same. If really, as alleged by the plaintiff, the first defendant had failed to issue receipts for the alleged payment of amount made by the plaintiff, as a prudent person, the plaintiff would have resorted to further course of action as per law. On the other hand, the case of the plaintiff that the first defendant had been postponing the issuance of the receipts one way or the other for the payments alleged to have been made by her towards the mortgage, as such, cannot be believed sans proof of the same, particularly when the said case of the plaintiff has been stoutly resisted and repudiated by the first defendant.

14. The first defendant has filed statement of accounts along with the written statement in respect of the suit mortgage. On a perusal of the same, as rightly determined by the Courts below, the plaintiff is found to be liable to pay a sum of Rs.7,28,731.10 /- as on 11.02.2009 towards the suit mortgage. As above noted, the claim of the plaintiff that she has so far paid Rs.7,37,975/- is not borne out by any acceptable proof.

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15. The plaintiff would plead that she has paid a sum of Rs.1,00,000/- on 13.03.2007 and in this connection, placed reliance upon the receipt marked as Ex.A3. By way of Ex.A3, the plaintiff projects the case, as if, the first defendant, through the second defendant had admitted that only a sum of Rs.2,25,000/- is due towards the suit mortgage. However, as rightly determined by the Courts below, on a perusal of the document marked as Ex.A3, it is found that none of the parties had signed in the same, particularly, the first defendant having not affixed its signature in Ex.A3 and the first defendant had only acknowledged the receipt of Rs.1,00,000/- made by the plaintiff on 13.03.2007, in such view of the matter, the case of the plaintiff by way of Ex.A3, the first defendant had acknowledged the amount due under the suit mortgage at only Rs.2,25,000/-, as such, cannot be believed and accepted. As abovenoted, when Ex.A3 has not been signed by the parties to the suit, particularly, the first and second defendant as the case may be, no reliance at all could be placed upon Ex.A3 document for sustaining the case of the plaintiff that the first defendant had acknowledged that only a sum of Rs.2,25,000/- is due under the suit mortgage. In the light of the above position, the Courts below are found to be wholly justified in not placing reliance upon Ex.A3 document for upholding the case of the plaintiff that the first defendant has acknowledged the sum due under the suit mortgage at Rs.2,25,000/- and as abovenoted, by way of Ex.A3, the first defendant has only acknowledged the payment of Rs.1,00,000/- made by the plaintiff on 13.03.2007 and given due credit to the same.

16. Now, according to the plaintiff, after Ex.A3, the parties had arrived at a settlement in respect of the amount due under the suit mortgage and it is pleaded by the plaintiff, on 07.08.2008, the first defendant had acknowledged that the amount due under the suit mortgage is only Rs.1,40,000/- and hence, according to the plaintiff, as she had made a payment of Rs.75,000/- on 07.08.2008, it is pleaded by her that only Rs.65,000/- is due under the suit mortgage. In this connection, the letter dated 07.08.2008, marked as Ex.A4, is relied upon by the plaintiff. According to the first defendant, by way of Ex.A4 letter, it had only acknowledged the payment of Rs.75,000/- made by the plaintiff and not acknowledged the liability of the suit mortgage as only Rs.1,40,000/- as projected by the plaintiff. On a perusal of the Ex.A4 letter, as rightly determined by the Courts below, the same could only be construed as an acknowledgment of the first defendant for the receipt of Rs.75,000/- and the said letter cannot at all be construed as an acknowledgment made by the first defendant that a sum of Rs.1,40,000/- alone is due under the suit mortgage. When the contents found in the said letter are not admitted and acknowledged by the first defendant as such, other than the

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receipt of Rs.75,000/-, in such view of the matter, the claim of the plaintiff that the parties had arrived at a settlement in fixing the amount due under the suit mortgage by way of Ex.A4 letter cannot be countenanced and the same has been rightly analyzed and assessed by the Courts below and in such view of the matter, the claim of the plaintiff that a sum of Rs.1,40,000/- had been acknowledged to be the amount due under the suit mortgage by the first defendant by way of Ex.A4 letter had been rightly disallowed and declined by the Courts below and no interference is called for in the abovesaid determination of the Courts below.

17. As abovenoted, the first defendant has filed the statement of accounts due under the suit mortgage marked as Ex.B1 and the Courts below had analyzed the same and found that, as per the statement of accounts, a sum of Rs.16,33,836.10 is liable to be paid towards the mortgaged debt and when the plaintiff had failed to establish the payment of the amount due under the suit mortgage as pleaded by her other than the payments admitted to be made by the first defendant and when the first defendant has come forward clearly, during the course of his evidence as regards the payments made by the plaintiff towards the suit mortgage and acknowledged it clearly and apart from the abovesaid sums, when there is no material placed on the part of the plaintiff evidencing the payment due under the suit mortgage and when it is admitted by the plaintiff that the plaintiff is liable to pay interest on the suit debt as well as penal interest in case of failure to pay the amount promptly, as recited in the mortgage deed and apart from the payment of Rs.75,000/- on 07.08.2008, when it is found that the plaintiff is due and liable to pay the huge sum as set out in the statement of accounts towards the suit mortgage, the case of the plaintiff that she has paid the substantial amount towards the suit mortgage and only a sum of Rs.15,000/- remains to be paid cannot at all be countenanced in any manner, particularly, when there is no proof on the part of the plaintiff evidencing the payment of the substantial amount towards the suit mortgage as alleged in the plaint as well as during the course of evidence. If really, the payments had been made by the plaintiff towards the substantial amount under the suit mortgage, necessary documents pointing to the same would have been placed by the plaintiff for consideration. As abovenoted, the plaintiff cannot take umbrage on the plea that the first defendant had been not regular in the issuance of the receipts in respect of the payments alleged to have been made by her towards the suit mortgage. If the abovesaid case of the plaintiff has any semblance of truth, as abovenoted, the plaintiff would have resorted to the appropriate action in accordance with law and on the other hand, it is found that whenever the first defendant is endeavoring to bring the suit property for sale, only

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thereafter, the plaintiff is found to be making the payments and stalling the auction process by laying civil action one way or the other.

18. As determined by the Courts below, when it is found that the first defendant has given due credit to the payments made by the plaintiff towards the suit mortgage and when as per Ex.B1, a sum of Rs.16,33,836.10 is payable towards the mortgage deed and when the plaintiff has failed to establish the substantial payment alleged to have been made by her towards the suit mortgage, in such view of the matter, when the first defendant is entitled to bring the suit property for sale without notice as per law on the failure of the plaintiff to settle the mortgage deed and when it is found that the plaintiff has been very irregular in the payment of the amount as undertaken to be repaid by her under the suit mortgage, in such view of the matter, it is found that the case of the plaintiff that she is liable only to pay a sum of Rs.15,000/- towards the suit mortgage and thereby, entitled to seek the relief of redeeming the mortgage, as such, cannot be believed and accepted and in such view of the matter, the Courts below are found to be totally justified in not accepting the plaintiff's case for the plea of redemption and rightly determined that the plaintiff had been adopting delay tactics of stalling the auction process initiated by the first defendant through the third defendant by laying civil action and when it is further seen that the civil action laid by the plaintiff in O.S.No.255/2009 has not been prosecuted further and the plaintiff had left the matter to go for dismissal, in such view of the matter, the plaintiff is found to be not entitled to the reliefs prayed for in the suit as determined by the Courts below. Consequently, the second substantial question of law is accordingly answered against the plaintiff and in favour of the defendants 1 and 2.

19. The Courts below had also rejected the plaintiff's case by applying Order 2 Rule 2 of the Civil Procedure Code to the case at hand, on the footing that the plaintiff having failed to seek the relief of redemption in O.S.No.255/2009, which is very much available to the plaintiff at that point of time and accordingly, proceeded to hold that the plaintiff's suit is also barred under Order 2 Rule 2 of the Civil Procedure Code. However, as rightly contended by the plaintiff's counsel, though the defendants had pleaded about the institution of O.S.No.255/2009 by the plaintiff for stalling the auction process initiated by the first defendant on 17.01.2009, however on a reading of the written statement wholly, it is found that no specific plea has been taken by the first defendant that by way of the abovesaid suit in O.S.No.255/2009, the present suit laid by the plaintiff is barred by Order 2 Rule 2 of the Civil Procedure Code. Accordingly, it is also further seen that no

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specific issue had also been framed by the trial Court qua the bar of the plaint under Order 2 Rule 2 of the Civil Procedure Code. In such view of the matter, when the parties had proceeded with the trial without any plea as regards the bar of the plaintiff's present suit under Order 2 Rule 2 of the Civil Procedure Code in the light of O.S.No.255/2009 and no specific issue has also been formulated by the Courts below, in particular, by the trial Court, in such view of the matter, the abovesaid plea encompassing both questions of fact and law, sans plea and proof with reference to the same, in my considered opinion, the Courts below are not justified in rejecting the plaintiff's suit as barred under Order 2 Rule 2 of the Civil Procedure Code. In the light of the above said position, the contention projected by the plaintiff's counsel that the Courts below are wrong in dismissing the plaintiff's suit as barred under Order 2 Rule 2 of the Civil Procedure Code, in the absence of any plea in the written statement and in the absence of any issue on the said aspect merits acceptance and the first substantial question of law formulated in the second appeal is accordingly answered in favour of the plaintiff and against the defendants.

20. In the light of the abovesaid reasons, inasmuch as the plaintiff has failed to establish that she is liable to pay only Rs.15,000/- towards the suit mortgage and thereby entitled to seek the redemption of the mortgage and seek the other reliefs and on the other hand, when as determined by the Courts below rightly, the plaintiff is due towards the suit mortgage a huge sum of Rs.16,33,836.10 upto June 2011 and when the plaintiff has failed to establish the payment of the abovesaid sum due under the suit mortgage and when the statement of accounts projected by the first defendant marked as Ex.A1 is not shown to be incorrect or erroneous by the plaintiff and from the abovesaid statement of accounts as well as the materials placed on record when it is found that the first defendant had given due credit towards the payment made by the plaintiff towards the suit mortgage and when as per the proof affidavit of DW1, as determined by the Courts below, the plaintiff is found due to pay a sum of Rs.18,08,836.10/- as on 25.07.2011, the contention of the plaintiff that she is liable to pay only a sum of Rs.15,000/- towards the suit mortgage does not at all merit acceptance in any manner and the case of the plaintiff, as seen wholly, as determined by the Courts below, it is seen that the plaintiff only with a view to stall the auction process initiated by the first defendant has come forward with the suit falsely without any basis and in such view of the matter, the Courts below are found to be totally justified in declining the reliefs prayed for by the plaintiff. Accordingly, as above pointed out, the second substantial question of law formulated in the second appeal is answered in favour of the defendants and

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against the plaintiff and no interference is called for in the judgment and decree of the Courts below dismissing the plaintiff's suit.

21. The counsel for the plaintiff, in support of his contentions, placed reliance upon the decision reported in CDJ 2012 MHC 5305 (Saroja Ramanathan Vs. Park Town Benefit Fund Ltd., Represented by its Managing Director Chennai & Others). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

22. In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Asst.Registrar (CS V)

/true copy/
Sub Asst. Registrar

sli
To
1. The XVIth Additional Judge,
City Civil Court,
Chennai.

2. The VII Assistant Judge,
City Civil Court, Chennai.

3. The Section Officer,
VR Section,
High Court, Madras.

+1 cc to Mr.S.Jeevanantham Advocate sr49632

+2 cc to Mr.C.Prabakaran Advocate sr49357(30/01/2020)

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