

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.03.2019

PRONOUNCED ON : 25.03.2019

CORAM

THE HON'BLE Mr. JUSTICE M.VENUGOPAL
And

THE HON'BLE Mr. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.2949 of 2018

P.Mahalakshmi

.. Petitioner

V.

1.The Accounts Officer,
Office of the Accountant General
(Accounts & Entitlements),
Tamil Nadu, No.361, Anna Salai,
Teynampet, Chennai - 600 018.

2.The Registrar General,
High Court Madras,
Chennai - 600 104.

3.The Hon'ble District Judge - Cum
The Chief Judicial Magistrate,
Udhagamandalam, The Nilgiris.

.. Respondents

[RR 2 and 3 impleaded vide order dt.31.08.2018
made in WMP.No.25946/2018)

Prayer: Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records pertaining to the proceedings of the respondent vide Pen 2/I/Pt 12188/2016-17 dated 28.02.2017 and quash the same as illegal, incompetent the proceedings of the District Judge Cum Chief Judicial Magistrate, Ootacamund dated 31.01.2017 and pay all consequential benefits within a time frame.

For Petitioner : Ms.R.Shase

For 1st Respondent : Mrs.Hema Muralikrishnan

For Respondents 2 & 3 : Mr.M.Santhanaraman

O R D E R

M.VENUGOPAL, J.

Heard both sides.

2.The Petitioner joined as Copyist in District Munsif Court, Kulithalai, Karur District on 13.03.1989. She was transferred from Karur to Coonoor as per order of the Learned District Judge, Udhagamandalam as per proceedings dated 21.10.1992 and joined duty on 13.11.1992. She was promoted to the post of 'Typist' at Sub Court, Udhagamandalam. Later, she was promoted to the post of Assistant on 22.11.1995 at the District Munsif Court, Coonoor.

3.The stand of the Petitioner is that she was promoted to the post of Head Clerk (Criminal Court in Pay Band 29300-34800+Rs.4200) at District Munsif cum Judicial Magistrate Court, Kotagiri and Judicial Court, Coonoor from 03.09.2007 to 18.12.2009. She was directly promoted to the post of Head Clerk (Civil Court in Pay Bank 29300-34800+Rs.4800) in Sub Court, Ooty and District Munsif Court, Coonoor, without crossing the post of Bench Clerk in Sub Court, Ooty (viz., Grade II Bench Clerk in Pay Band 29300-34800+Rs.4300). She served as Head Clerk, Civil court (in Pay Band 29300-34800+Rs.4800) from 21.12.2009 to 08.02.2015.

4.The Petitioner was promoted to the post of Central Nazir at District Court, Udhagamandalam and joined duty on 09.02.2015 by an order in A.No.67/2015, she was transferred from District Court, Udhagamandalam to Fast Track Mahila Court, Udhagamandalam. Later, on 31.03.2016 she was transferred to the post of Serishtadar at Sub Court, Udhagamandalam. She was promoted as Grade I Bench Clerk to Fast Track Mahila Court, Udhagamandalam in A.No.67/2017 dated 24.03.2017 and joined duty on 24.03.2017 Afternoon. After serving in the said post with utmost sincerity and without any blemish, she retired from service on 31.03.2017 on superannuation.

5.The stand of the Petitioner is that one K.Krishnadas was appointed as Copyist and joined duty on 05.03.1993 in District Munsif Court, Coonoor. Subsequently, he was promoted to the post of Typist, later as Assistant and Criminal Court Head Clerk and then Grade II Bench Clerk, Civil Court Head Clerk in various Courts. Presently, he is working as Central Nazir in District Court, Udhagamandalam. In this connection, the plea of the

Petitioner is that K.Krishnadas joined service three years later than her, but currently he is drawing a pay higher than her and that too in the post of Central Nazir. In short, the said Krishnadas is getting a higher pay scale than her from 01.04.2013, i.e. her pay on 01.04.2013 as Civil Court Head Clerk was Rs.14520 + 4800GP and Krishnadas's pay was Rs.15410 + 4800GP.

6.The Learned Counsel for the Petitioner contends that even though the Petitioner is working on the same post and being 'Senior' to the said Krishnadas in service, she received a lesser pay than her Junior, which is an improper and incongruous one.

7.The Learned Counsel for the Petitioner submits that the Petitioner was directly promoted to the post of Civil Court Head Clerk without getting promoted to the post of Grade II Bench Clerk and as such, the promotional increment which she ought to have obtained through Grade II Bench Clerk was not given to her. Because of loss of increment in her pay, she had sent a representation to the 1st Respondent/Accounts Officer, Office of the Accountant General (A & E), Chennai seeking to revise her pay and fix the pay on par with said K.Krishnadas so that it would be useful for her to receive 'Retirement Benefits'. Furthermore, as per the Fundamental Rules of the Government of Tamil Nadu, when a Junior is paid higher than a Senior, then, the Senior has right to seek pay on par with his/her Junior.

8.The core contention advanced on behalf of the Petitioner is that while she was promoted from Criminal Court Head Clerk to Civil Court Head Clerk and the said Krishnadas was promoted from Criminal Court Head Clerk to Grade II Bench Clerk, which is a newly created post. As such, when a post is newly created and when the Petitioner was promoted to the post of Head Clerk, earlier to the creation of that new post in Grade II and therefore, there is no fault on her side and also because of the administrative actions. Moreover, when the said Krishnadas was promoted to the newly created post, he secured one additional promotion increment and she had submitted a representation in detail to the 3rd Respondent /District Judge-cum-Chief Judicial Magistrate, Ootacamund, Nilgiris on 20.10.2016 and the 3rd Respondent passed an order on 31.01.2017 re-fixing her pay and directed to step up her pay from Rs.19320 to Rs.20,210/- in Pay Band 9300-34800+GP 4800 and also determined the date of her next increment on 01.04.2014.

9.The Learned Counsel for the Petitioner brings it to the notice of this Court that the Petitioner had submitted a representation to the Subordinate Judge, Udhagamandalam and the said Judge by his proceedings dated 04.02.2017 sanctioned her fixation of her and allowed one increment in advance with 3% with effect from 31.03.2017. But the Respondent by his

proceedings dated 28.02.2017 had inter alia observed that only certain posts were upgraded as per G.O.(Ms)No.329, Home (Cts.V) Department, dated 23.04.2009 and this upgradation could not be taken as criteria for pay anomaly and directed the re-fixation entry to be made by duly cancelling the pay anomaly entry in Service Book of the Petitioner, whereas the pay fixation of the said K.Krishnadas was in order.

10.The Learned Counsel for the Petitioner contends that an act of the 1st Respondent in passing an order derogating the order of the 3rd Respondent/District Judge-cum-Chief Judicial Magistrate, Ootacamund is an erroneous and illegal one.

11.The Learned Counsel for the Petitioner comes out with a plea that due to the fault of the Respondents, the Petitioner should not be penalised without proper pay/pension and the impugned order dated 28.02.2017 of the 1st Respondent is unreasonable and an arbitrary one. Hence, the order dated 28.02.2017 of the 1st Respondent is liable to be set aside in the interest of Justice. Further, the Petitioner has also sought for an order from this Court in directing the 3rd Respondent/District Judge-cum-Chief Judicial Magistrate, Ootacamund to implement his order dated 31.01.2017 and pay all consequential benefits within the time to be fixed by this Court.

12.The Learned Counsel for the Petitioner refers to the decision in K.Meganathan V. State of Tamil Nadu, rep. By its Principal Secretary to Government, Home (Cts.V) Department, Chennai and others, (2014) 7 MLJ 43, at special pages 46 to 48, wherein at paragraphs 8, 10, 11 and 12, it is observed and held as follows:

"8 Thereafter, the second respondent was requested to send necessary proposals to the Government. Accordingly, the second respondent, by order in ROC No.1163/ 2003/G2 dated 07.10.2009, directed the Principal District Judges, District Judges/ Presiding Officers/ concerned appointing authorities to take further steps in this regard in accordance with the provisions of the Tamil Nadu Judicial Ministerial Service Rules, based on the principles of seniority-cum-merit and suitability. In the said order, it was further observed that in the matter of upgradation and re-deployment in each Court of the District/Unit, every care should be taken that they are given effect to, in accordance with the sanctioned strength of the post of Assistant in respect of each Court. The Principal Judge, City Civil

Court, Chennai, by communication dated 14.10.2009 to the second respondent, expressed the difficulty in implementing the order on account of the fact that in Chennai, there were so many Subordinate Courts and so many appointing authorities and as such, no consolidated seniority list of all the staff employed in all the Courts was maintained. It was further stated that if the system, as prevailing in Mofussil Courts, is extended to Chennai, the said anomaly will go away, however, Rule 6(b) would become obsolete. The Principal Judge has also recommended amendments accordingly in the TNJMS Rules.

10. It is not a case of promotion wherein a comparative merit and selection is involved. The Memo has accorded upgradation to the existing Assistants on the basis of seniority, as is evident from the perusal of the Memo. Thus, consideration subsequently after the petitioner had got superannuated on 31.03.2011, cannot be denied.

11. The Supreme Court of India, in the matter of Bharat Sanchar Nigam Limited vs. R. Santhakumari Velusamy and Others reported in (2011) 9 SCC 510, after having considered all the cases decided earlier, laid down the principles relating to promotion and upgradation as under:

"29. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge :

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both—that is advancement to a higher position and advancement to a higher pay scale - are described by the common term 'promotion', does not mean that they are the same. The

two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not

amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation."

12 There is no gain-saying that the similarly-situated Assistants posted in Mofussil Courts have been granted benefits on the basis of their seniority, however, the same was denied to the petitioner as the authorities could not consider the case of the petitioner and other similarly situated employees in various Courts situated in Chennai, in time. As held supra, it was a case of upgradation of post and not promotion and as such, the employee was entitled to the benefit of upgradation from the date on which the other similarly-situated Assistants in other Districts and Mofussil Courts have been granted the benefit."

13. The Learned Counsel for the Petitioner cites the decision in G. Victoria V. The State of Tamil Nadu and others, 2015 Writ L.R. 1014 at special pages 1015 & 1016, wherein at paragraphs 2 to 5, it is observed as under:

"2 An identical issue came up for consideration in the matter of K.Meganathan Vs. State of Tamil Nadu and others, whereunder, the petitioner working as Assistant (Selection Grade) filed the petition, seeking the benefits as available under G.O.Ms.No.329 dated 23rd April, 2009. The respondents therein clearly in their response submitted that the benefit available under the said G.O was granted to all employees working in other District Courts and Mofussil courts, except in various courts in Chennai.

3 A Division Bench of this court, vide order dated 22nd January, 2014 allowed the writ petition, holding as under :

12 There is no gain-saying that the similarly-situated Assistants posted in Mofussil Courts have been granted benefits on the basis of their seniority, however, the same was denied to the petitioner as the authorities could not consider the case of the petitioner and other similarly situated employees in various Courts situated in Chennai, in time. As held supra, it was a case of upgradation of post and not promotion and as such, the employee was entitled to the benefit of upgradation from the date on which the other similarly-situated Assistants in other Districts and Mofussil Courts have been granted the benefit.

13 For the reasons afore-stated, the impugned order dated 02.05.2012 is set aside and the respondents are directed to consider the case of the petitioner with effect from the date on which the benefit was given to the other similarly-situated Assistants in other Districts. The petitioner shall also be entitled to the benefit of re-fixation of his pension on the basis of the pay scale granted to him at the time of his retirement. The aforesaid exercise shall be completed within a period of four months from the date of receipt of a copy of this order. The present petitioner is also similarly situated.

4 The fourth respondent has filed a counter affidavit, in response to the

notice, wherein it is inter-alia stated as under :

12.I submit that a list of retired employees between the two cut off dates i.e. 13.10.2009 and 10.05.2012, numbering 91 (including the Writ Petitioner and the said Thiru.K.Meganathan) is herewith filed along with the Counter Affidavit. If the principle as indicated in the Order of this Hon'ble Court, dated 22.01.2014 in W.P.No.14398/2012 is taken as basis to extend the benefit of the G.O.Ms.No.329, Home (Courts V) Dept., dt. 23.04.2009 to other similarly placed persons as that of Thiru.K.Meganathan, all the 90 persons (List annexed herewith) are also to be considered, as these persons also are similarly placed comparing with the said Thiru K.Meganathan.

13.I submit that, in view of the above stated facts and circumstances, it is respectfully prayed that a suitable order may be passed so as to take a comprehensive decision administratively for the benefits of all similarly placed employees (retired) within the said two cut off dates i.e. w.e.f. 13.10.2009 to 10.05.2012, and thus render justice.

5 Having regard to the aforestated categorical stand taken by the respondents that the employees working in various courts in Chennai were denied benefit of the said circular, we are of the considered view that all employees are entitled to the said benefits. Accordingly, we allow the writ petition, directing the respondents to consider the cases of all similarly situated Assistants and grant benefits to them by refixation of pension, on the basis of pay scale granted to them at the time of their retirement. The entire exercise shall be completed within a period of four months from the date of receipt of copy of this order."

14.Per contra, it is the submission of the Learned Counsel for the 1st Respondent that the Petitioner joined the services on 13.03.1989 as Copyist in the Judicial Department and retired as Senior Sherishtadar on 31.03.2017 and that the Pensionary

benefits were authorised as per Pension Payment Order No.R 0220427 together with the remarks that anomaly with her Junior K.Krishnadas is not in order.

15.The Learned Counsel for the 1st Respondent proceeds to point out that as the Junior is getting more pay because of the implementation of G.O.(Ms).No.329, Home (Cts.V) Department, dated 23.04.2009 in which certain posts were upgraded and the Junior was promoted from the post of upgraded post as Bench Clerk Grade II as per G.O.(Ms)No.329 dated 23.04.2009 and the anomaly as projected by her, was not admitted by the 1st Respondent Office.

16.The Learned Counsel for the 1st Respondent draws the attention of this Court to the Ruling (2) of Fundamental Rule 22 (B) of the Government of Tamil Nadu which enjoins that for setting right the anomaly of a Senior with a Junior, the undermentioned conditions should be fulfilled:

(i)Both the Senior and Junior should belong to the same cadre and the post in which they have been promoted or appointed should be identical and in the same cadre;

(ii)The scales of pay of the lower and higher posts in which they are entitled to draw pay should be identical;

(iii)The anomaly should be a direct one as a result of the application of Fundamental Rule 22(B).

17.The Learned Counsel for the 1st Respondent refers to the comparative statement in respect of both Senior and Junior Pay, furnished by the Department as per proceedings dated 31.01.2017 which runs as under:

Senior Smt.Mahalakshmi (Promoted as Civil Court on 21.12.2009 Head Clerk from the post of Criminal Court Head Clerk)	Junior Shri K.Krishnadas (Promoted as Criminal Court Head Clerk)
Rs.12870+4800=Rs.17670 Rs.13950+4800 = Rs.17670 Rs.13950+4800=Rs.18750 on 1.3.2012	Rs.12690+4200=Rs.16890 Rs.14270+4300=Rs.18750 (promoted as Bench Clerk Grade II as per G.O.329)
Rs.14520+4800=Rs.19320 on 1.4.2013	Rs.15410+4800=Rs.20210 (Promoted as Civil Court Head Clerk on 31.1.2013 and Option on 1.4.2013)

18.By referring to the aforesaid Comparative Statement, it is the submission of the Learned Counsel for the 1st Respondent that K.Krishnadas was promoted to the post of Civil Court Head Clerk on the date of anomaly on 01.04.2013 from the post of Criminal Court Head Clerk on 21.12.2009. Since both the

Petitioner and the said Krishnadas were promoted to the different Lower posts, it is forceful plea of the 1st Respondent that the Petitioner (P.Mahalakshmi - Senior) is not eligible for the anomaly as claimed by her on 01.04.2013, by virtue of the Ruling F.R.22(B) of the Tamil Nadu Government.

19.Expatiating her submission, it is represented on behalf of the 1st Respondent that the Fundamental Rule 27(2) of the Government of Tamil Nadu relates to grant of 'premature increment' to a 'Government Servant'.

20.It is the submission of the Learned Counsel for the 2nd and 3rd Respondents that K.Krishnadas, who is Junior to the Petitioner, was promoted as per proceedings dated 28.02.2012 from the post of Head Clerk, Judicial Magistrate Court to the post of Grade II Sub Court, Udhagamandalam and in fact, he had the opportunity to secure an additional promotional increment for serving in the post of Grade II Bench Clerk. That apart, the said Krishnadas gave an option to determine the pay for three promotions after getting due increment in the lower post (1) Criminal Court Head Clerk (2) Grade II Bench Clerk (3) Civil Court Head Clerk thereby obtained two increments together for each of the aforesaid three promotions which resulted in getting higher pay than his Senior viz., the Writ Petitioner.

21.The Learned Counsel for the 2nd and 3rd Respondents brings it to the notice of this Court that as per 3rd Respondent's proceedings dated 31.01.2017, the pay of the Petitioner was stepped up from Rs.19,320 (Rs.14,520 + GP 4800) to Rs.20,210 (15,410 + GP 4800) with effect from 01.04.2013 and a copy of the said proceedings was sent to the 1st Respondent's Office.

22.The Learned Counsel for the 2nd and 3rd Respondents refers to the order of the 1st Respondent dated 28.02.2017 wherein it was mentioned among other things that '.... It may be noted that only certain posts were upgraded as per GO.329 dated 23.4.2009 and this upgradation cannot be taken as criteria for pay anomaly entry in Service Book of Smt.P.Mahalakshmi where as the pay fixation of Shri.K.Krishnadas is in order' and as instructed, the order of Stepping up of pay of the Petitioner (erstwhile Sherishtadar, Sub Court, Udhagamandalam from Rs.19,320/- to Rs.20,210/- with effect from 01.04.2013 was cancelled as per 3rd Respondent's Proceedings dated 13.03.2017 and her pay was determined at pre-revised rate of Rs.19,320/- with effect from 01.04.2013.

23.It is to be pointed out that in G.O.(Ms)No.329, Home (Cts.V) Department, dated 23.04.2009, there is a reference to the effect that while considering the 52 recommendations of the Hon'ble Justice Shetty Commission (the Report of the First

National Judicial Pay Commission), the Government had issued orders on certain recommendations of the said Commission in G.O. (Ms)No.730, Home (Courts V) Department, dated 18.08.2006, G.O. (Ms)No.40, Home (Courts V) Department, dated 11.01.2008 and G.O. (Ms)No.761, Home (Courts V) Department dated 10.07.2008. Insofar as the recommendations relating to Perks, Allowances etc. payable to the Non-Judicial Staff Members of the Subordinate Courts in Tamil Nadu, out of 19 recommendations classified separately by the Hon'ble Justice Shetty Commission in its recommendations, five recommendations were fully accepted by the State of Tamil Nadu and accordingly orders issued as per G.O. (Ms)No.730, Home (Courts V) Department, dated 18.08.2006 and G.O. (Ms)No.40, Home (Courts V) Department, dated 11.01.2008 respectively.

24. On a careful consideration of respective contentions and also taking note of the vital fact that the Writ Petitioner was promoted to the post of Civil Court Head Clerk from the post of Criminal Court Head Clerk on 21.12.2009 and that her Junior K.Krishnadas was promoted to the post of Civil Court Head Clerk on the date of anomaly on 01.04.2013 from the post of Bench Clerk Grade II, it is crystalline clear that the Petitioner and her Junior K.Krishnadas were promoted from the different Lower post and hence, the Petitioner is ineligible for the anomaly as claimed on 01.04.2013 especially in the teeth of ingredients of the Ruling F.R.22(B) of the Government of Tamil Nadu. In the present case, it cannot be gainsaid that the 1st Respondent, in his letter dated 28.02.2017, had categorically observed that only certain posts were upgraded as per G.O. (Ms)No.329, Home (Cts.V) Department dated 23.04.2009 and this upgradation could not be taken as Criteria for pay anomaly and directed the refixation entry to be made duly cancelling the pay anomaly entry in the Service Book of the Petitioner and further observed that the pay fixation of K.Krishnadas was in order. Resultantly, the impugned order of the 1st Respondent dated 28.02.2017 in Proceedings No.Pen 2/I/Pt 12188/2016-17 is free from any Legal infirmities.

25. In fine, the Writ Petition is dismissed. No costs.
Sgl

Sd/-
Assistant Registrar (CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Accounts Officer,
Office of the Accountant General
(Accounts & Entitlements),
Tamil Nadu, No.361, Anna Salai,
Teynampet, Chennai - 600 018.

2.The Registrar General,
High Court Madras,
Chennai - 600 104.

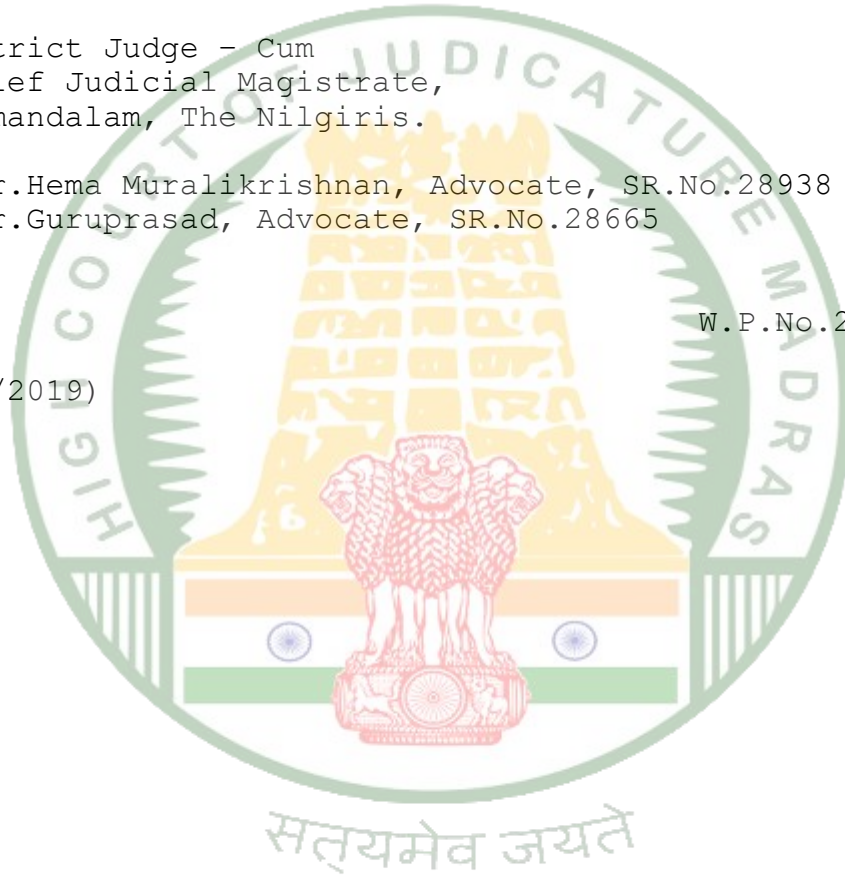
3.The District Judge - Cum
The Chief Judicial Magistrate,
Udhagamandalam, The Nilgiris.

+lcc to Mr.Hema Muralikrishnan, Advocate, SR.No.28938

+lcc to Mr.Guruprasad, Advocate, SR.No.28665

W.P.No.2949 of 2018

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