

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.11.2019

CORAM:

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

CRL.A.Nos.470 of 2019 & 35 of 2011

CRL.A.No.470 of 2019

M/s.Williamson Magor and Company Limited
No.768, Anna Salai,
Chennai - 600 002
Rep. by their Authorised Representative
Mr.Kasi Viswanathan ... Appellant/
Accused No.1

Vs.

The Assistant Collector of Central Excise
Prosecution,
Office of the Collector
of Central Excise
Madras .. Respondent/
Complainant

Criminal Appeal filed under Section 374 (3)Cr.P.C.,
against the judgment dated 26.10.2010 in EOCC No.82 of 1994 on
the file of the Additional Chief Metropolitan Magistrate
Court, EO-1, Egmore, Chennai - 600 008.

For Appellant Mr.S.Arun Prasad

For Respondent Mr.N.P.Kumar
Special Public Prosecutor

Crl A.No.35 of 2011

The Deputy Commissioner of Central Excise
Prosecution
(O/o. The Commissioner of Central Excise
Chennai II Commissionerate
692, MHU Complex,
Anna Salai,
Nandanam
Chennai - 35

.. Appellant/Complainant

Vs.

1. M/s. Williamson Magor & Company Ltd.,
768, Annasalai, Chennai - 600 002
Rep. By Vice President
Shri.A.D.Nanaiya
2. M/s.Kilburn Electricals Ltd.,
10/8, III Main Road
Ambattur Industrial Estate, Chennai - 58
Rep. By its Managing Director
Shri.S.Srinivasan
3. Shri.S.Srinivasan
Vice President of M/s.M.M.Ltd.,
and Managing Director
of M/s.K.E.Limited
21, Visweswarapuram Street
Mylapore,
Chennai - 600 004 ... Respondents/Accused

Criminal Appeal filed under Section 377 (2) of the Code of Criminal Procedure against the sentence imposed in the order dated 26.10.2010 in E.O.C.C.No.82 of 1994 passed by the learned Additional Chief Metropolitan Magistrate, E.O.I, Egmore, Chennai - 600 008.

For Appellant Mr.N.P.Kumar
Special Government Pleader
For Respondents Mr.S.Arun Prasad

COMMON JUDGMENT

These criminal appeals are directed against the judgment and order of conviction and sentence dated 26.10.2010 passed by the Additional Chief Metropolitan Magistrate Court, (Economic Offences-1), Egmore, Chennai - 600 008 in E.O.C.C. No.82 of 1994.

2. Since both the criminals appeals emanate from the same judgment and order and FIR, they are considered and decided by this common judgment.

3. The facts, in brief, giving rise to the instant appeals are as under:

3.1 Macneill and Magor Ltd., Madras ("Macneill" for brevity) is a company incorporated under the Companies Act, 1956 and were into the manufacture of electrical circuits, starters, conductors, control panels, vacuum circuit breakers, etc. They had factories in several places in the country. For

the present, we are concerned with their factory at Door No.374, Kunoor High Road, Ayanavaram, Chennai ("the Ayanavaram Factory" for brevity) where they were manufacturing the aforesaid items. They were registered with the Central Excise Department.

3.2 One S.Srinivasan (A3) was the Vice-President of Macneill. Since Macneill was running into losses, S.Srinivasan (A3) and others left the company and floated a new company by name "Kilburn Electricals Limited" in 1987 for manufacturing the same items in their factory at No.18/8, 3rd Main Road, Ambattur Industrial Estate, Chennai-58 ("Kilburn's Ambattur Factory" for brevity).

3.3 As Macneill had a soft corner for Kilburn (A2), since the promoters of Kilburn were its (Macneill's) erstwhile employees, they both entered into a Memorandum of Understanding dated 18.03.1988, under which, Kilburn (A2) was permitted to take over the Ayanavaram factory of Macneill and run it.

3.4 While that being so, the officers of the Central Excise Department raided the Ayanavaram factory on 27.07.1989 and also Kilburn's Ambattur factory and collected various materials, which showed that finished items had gone out of both the factories without payment of Excise Duty for the period from March 1988 to July 1989.

3.5 Statements of staff members and employees of Kilburn (A2) were recorded and the documents produced by them were scrutinised by the Department officials. After that, the Department issued a show-cause notice to Macneill and Kilburn (A.2) under the Central Excises and Salt Act, 1944 ("the CESA" for brevity) and those proceedings were contested by the aggrieved in the Revenue fora. In the mean time, Macneill underwent changes and metamorphosed into "Williamson Magor and Company Limited" ("Williamson" for brevity).

3.6 The Department filed a complaint in EOCC No.82 of 1994 before the Additional Chief Metropolitan Magistrate, (E.O.-1), Chennai against Williamson (A1), Kilburn (A2) and S.Srinivasan (A3).

3.7 On appearance of the accused, copies of the complaint were furnished to them and pre-charge evidence under Section 244 Cr.P.C. was recorded, in which, the prosecution examined four witnesses (PW1 to PW4) based on which, the following charges were framed under Section 245 Cr.P.C.:-

Charges	Accused
Charge No.1	Against Williamson (A1), Kilburn (A2) and Srinivasan (A3): For removing excisable goods from 23.3.1988 to 30.03.1988 without payment of Excise Duty by Williamson to the tune of Rs.10,44,855.52 and from March 1988 to July 1989 without payment of Excise Duty by Kilburn to the tune of Rs.7,10,208.91 in contravention of Section 9(1) of the CESA r/w. Rule 173F of the Central Excise Rules, 1944 thereby punishable under Section 9(1)(b)(i) of the CESA.
Charge No.2	Against Williamson (A1), Kilburn (A2) and Srinivasan (A3): For failure to keep an account with the Commissioner of Central Excise separately for excisable goods and thereby contravening Rule 173G of the Central Excise Rules punishable under Section 9(1)(bbb)(i) of the CESA.
Charge No.3	Against Williamson (A1), Kilburn (A2) and Srinivasan (A3): For failure to file the declaration of goods manufactured in their factory thereby contravening Rules 173B, 173C and 226 of the Central Excise Rules punishable under Section 9(1)(c)(i) of the CESA (3 counts)

3.8 To prove the case, the prosecution examined 8 witnesses and marked 20 documents.

3.9 When the accused were questioned under Section 313 Cr.P.C on the incriminating circumstances appearing against them, they denied the same. On the side of the accused, 2 witnesses were examined and 6 documents were marked.

3.10 After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 26.10.2010 in EOCC No.82 of 1994, convicted A1 to A3 and sentenced them as under:

Accused	Provision under which convicted	Sentence
Williams on (A1)	S.9(1) (b) r/w 9(1) and R.173F punishable under S.9(1) (b) (i) of the CESA	Fine of Rs.10,000/-
	S.9(1) (bbb) r/w R.173G punishable under S.9 (1) (bbb) (i) of the CESA	Fine of Rs.10,000/-
	S.9(1) (c) r/w Rr.173B, 173C and 226 (3 counts) punishable under S.9(1) (c) (i) of the CESA	Fine of Rs.10,000/-
Kilburn (A2)	S.9(1) (b) r/w 9(1) and R.173F punishable under S.9(1) (b) (i) of the CESA	Fine of Rs.10,000/-
	S.9(1) (bbb) r/w R.173G punishable under S.9 (1) (bbb) (i) of the CESA	Fine of Rs.10,000/-
	S.9(1) (c) r/w Rr.173B, 173C and 226 (3 counts) punishable under S.9(1) (c) (i) of the CESA	Fine of Rs.10,000/-
S.Srinivasan (A3)	S.9(1) (b) r/w 9(1) of the CESA and R.173F	Imprisonment till rising of the Court and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for 6 months
	S.9(1) (bbb) r/w R.173G	Fine of Rs.10,000/-, in default to undergo simple imprisonment for 6 months
	S.9(1) (c) r/w Rr. 173B, 173C and 226 (3 counts) punishable under S.9(1) (c) (i) of the CESA	Fine of Rs.10,000/-, in default to undergo 6 months simple imprisonment each

3.11 Challenging the aforesaid conviction and sentences, Williamson (A1) formerly Macneill and Magor Ltd., filed an appeal in C.A.No.233 of 2010 before the Sessions Court,

Chennai. Kilburn (A2) and S. Srinivasan (A3) did not choose to file any appeal. However, the Department filed an appeal in C.A.No.35 of 2011 under Section 377 Cr.P.C. before this Court contending that S. Srinivasan (A3) ought to have been given the minimum sentence of 6 months imprisonment by the trial Court and the imposition of sentence till the rising of the Court was illegal.

3.12 Thereafter, on the orders of this Court, CrI.A.No.223 of 2010 was transferred from the file of the Sessions Court to this Court to be heard along with C.A.No.35 of 2011. Notice has not been served on S. Srinivasan (A3) till date and his whereabouts are not known.

4 Heard the learned counsel for Williamson (A1) and Mr.N.P.Kumar, learned Special Public Prosecutor for the complainant.

5 As alluded to above, the allegation against Williamson (A1) is that, though they had transferred the Ayanavaram Factory to Kilburn (A2), the transfer was only on paper, but, when the officers searched the premises, they found that the factory was being run by Williamson (A1). The charge against Williamson (A1) is that between 23.03.1988 and 30.03.1988, they had removed excisable goods worth Rs.10,44,855.52 from the Ayanavaram factory without payment of excise duty.

6 To prove the charge, the prosecution has placed strong reliance on Ex.P9 (series), a collection of gate passes. The trial Court has also relied on Ex.P9 and has convicted Williamson (A1) as stated above. Ex.P9 (series), the gate passes, have been marked in the trial Court through Venkatraman (PW3) Senior Intelligence Officer, Excise Department, who, in his evidence, has stated that he examined one Ramakrishnan, a person working in the Ayanavaram Factory and that while recording the statement, the said Ramakrishnan had given Ex.P9 series. The statement of Ramakrishnan was marked as Ex.P7. The prosecution has not examined Ramakrishnan to prove Ex.P.9 series.

7 Mr.N.P.Kumar, learned Special Public Prosecutor placed strong reliance on Sections 9D and 36A of the CESA and submitted that the statement of Ramakrishnan and the documents in Ex.P9 series can be treated as substantive evidence in the light of the said provisions. To appreciate his contention, it may be necessary to extract these two provisions, which read as follows:

"Section 9D. Relevancy of statements under certain circumstances.-- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence

under this Act, the truth of the facts which it contains,--

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) When the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

"Section 36A. Presumption as to documents in certain cases.-Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall--

(a) Unless the contrary is proved by such person, presume--

(i) the truth of the contents of such document;

(ii) That the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence."

8 Under our justice dispensation system, only substantive evidence for proving a fact in issue or a relevant fact would be admissible in a Court of law. In other words, a witness should testify about what he saw, heard, sensed and perceived and must offer himself for cross-examination by the

adversary and hearsay evidence is inadmissible, exceptions being res gestae evidence, admission against the interest of the maker which would include confessions and dying declarations. A previous statement of a person, per se, which does not fall within the above said categories, cannot be treated as a substantive piece of evidence and can be used either to corroborate his testimony in the Court under Section 157 of the Evidence Act or contradict him under Section 145, ibid. In fact, one cannot even use the statement recorded by a Magistrate under Section 164 Cr.P.C. of a witness as a substantive piece of evidence. A statement given by a witness to the police under Section 161(3) Cr.P.C. cannot even be used to corroborate his testimony in the Court, but, can be used only to contradict him. The law being thus, certain Revenue statutes like the CESA, etc. provide for a special rule of evidence for treating a statement of a person as a substantive piece of evidence. The Parliament, in its wisdom, reposed faith in the investigation of Revenue offences by Revenue officers and also was aware of the difficulties that would be faced by them while prosecuting a Revenue offender in a Court of law.

9 Section 9D, along with its analogous provisions, was inserted into the CESA vide clause 19 of the Customs, Gold (Control) and Central Excises and Salt (Amendment) Act, 1973 (Act 36 of 1973). This amendment was a consequence of the 47th report of the Law Commission of India on "Trial and Punishment of Social and Economic Offences" submitted to the Government of India in February, 1972. For the purpose of the discussion at hand, the observations of the Commission were as follows:

"Statements made in administrative adjudications: 14.1 Many of the Acts dealing with economic offences empower the enforcement officers to summon and examine witnesses. The statements made by these witnesses before such officers are not, however, admissible in evidence in the subsequent criminal prosecutions. We are of the view that these statements, if recorded by officers of sufficiently high status, to be determined by the Government should be admissible in such prosecutions, since they are very often the earliest officially recorded version of the facts.

14.2 Certain conditions and safeguards will, no doubt, be necessary. Reference in this connection may be made to the Evidence Act, which has a provision relating to the admissibility of a statement made in a previous judicial proceeding.

The relevant provision in the Evidence Act, is as follows:

"33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of

proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

14.3 We think that the safeguards mentioned in the proviso to Section 33 need not appear in the new provision which we contemplate. We are further of the view that the Court should have a discretion to admit the statement in evidence, if the circumstances of the case so require, even where the maker of the statement is a witness in the proceedings before the Court.

Though such a discretion is not very frequently met with in Indian statute law, in this case, it is necessary for obvious reasons.

Twenty years ago, Stone stressed the importance of excluding similar conduct evidence (even though it is relevant otherwise than via disposition), where its effect was too prejudicial, in these words-- "where the peg is so small and the linen so bulky and dirty that a jury will never see the peg, but merely yield to indignation at the dirt." Somewhat similar considerations make it desirable that the Court should have this power,

since the provision which we are recommending is itself new."

It is, therefore, obvious that the use of a statement made before a Central Excise officer of a gazetted rank under the CESA cannot be pressed in aid, if the conditions stated therein are not satisfied.

10 In this backdrop, if we analyse Section 9D of the CESA, extracted above, it can be inferred that a statement of a person recorded by any Central Excise officer of a gazetted rank can be treated as a substantive piece of evidence, without he being examined in the Court, provided the Department is able to establish the existence of the conditions set out in sub-section (a). The conditions set out in sub-section (a) are in pari materia with the ones set out in the first clause of Section 33 of the Evidence Act.

11 Ex hypothesi, the Department should first adduce evidence before the Court that the deponent is dead or cannot be found or is incapable of giving evidence, etc. as a condition precedent for treating his statement recorded under Section 9D(1) of the CESA as a substantive piece of evidence. Section 9D(2) of the CESA is a little different. In that, if the deponent turns hostile, the Court can rely upon his previous statement in the interests of justice. In this case, the Department has failed to prove the ingredients of Section 9D(1)(a) of the CESA. An endorsement by the Public Prosecutor or the complainant that he is giving up the examination of the witness on the ground that they are not able to trace him is not enough. An officer should testify in the Court about the conditions set out in Section 9D(1)(a) of the CESA and subject himself to the cross-examination of the defence. Otherwise, merely admitting such statements as substantive evidence on the ipse dixit of an endorsement made by the Prosecutor or the officer in the memorandum of evidence would lead to undue prejudice to the accused.

12 It is settled law that the condition precedent for the invocation of Section 33 of the Evidence Act must be proved strictly. The law in this regard was laid down by the Privy Council in Chainchal Singh vs. The King Emperor¹, where, Lord Goddard, speaking for a unanimous Board, observed as under:

"3. The Public Prosecutor, on that evidence, applied to have his statement made before the Magistrate transferred to the Sessions file and read under Section 33 of the Indian Evidence Act. It appears that counsel for the accused stated that he had no objection to this being done, and thereupon the learned Additional Sessions Judge admitted the statement. The material provisions of Section 33 are in these words:-

Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is incapable of giving evidence or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable.

4. Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court, and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence....." (emphasis supplied)

The provisions of Section 9D(1)(a) of the CESA being in pari materia with Section 33 of the Evidence Act, the principles governing the invocation of Section 33, *ibid.*, will apply to a case under Section 9D(1)(a) of the CESA as well.

13 At this juncture, it is essential to remind the trial Courts that, whenever they rely upon a statement under Section 9D of the CESA as a substantive piece of evidence or invoke the presumption under Section 36A of the CESA, the accused should be elaborately questioned on this, under Section 313 Cr.P.C. and his answer recorded.

14 In this case, the said Ramakrishnan was not examined and the Department also did not adduce evidence to show that he is dead or cannot be found or is incapable of giving evidence, etc. Therefore, the statement of Ramakrishnan (Ex.P.7) cannot be treated as a substantive piece of evidence against the accused.

15 Had Ramakrishnan been arraigned as an accused, then, such statement, if inculpatory, can be treated as an extra-judicial confession, since the officers of the Central Excise Department are not police officers within the meaning of Section 25 of the Evidence Act. In this case, Ramakrishnan is not an accused.

16 Coming to Ex.P.9 series, Venkataraman (P.W.3) has stated that Ramakrishnan produced Ex.P.9 series to him during enquiry. The presumption under Section 36A of the CESA about the truth of contents of a document can be raised only if the document had been produced by the person or seized from his custody in a prosecution against him. In this case, as alluded to above, Ex.P.9 series was produced by Ramakrishnan who is not an accused in the case. Had the Department seized the documents from the office of Macneill, then, the presumption under Section 36A will apply in a prosecution against Macneill and the co-accused. The conditions for invoking Section 36A of the CESA have, thus, not been met. Ex consequenti, Ex.P.9 series cannot be used as a substantive piece of evidence against A.1 to A.3 in this case.

17 Now, coming to the allegations against Kilburn (A2) and S.Srinivasan (A3), the charge states that excisable goods were sent out from the Kilburn's Ambattur factory between March 1988 and July 1989 without payment of excise duty of Rs.7,10,208.91. To prove this charge, the prosecution has placed reliance on the statement (Ex.P.11) of S.Srinivasan (A.3) to G.Srinivasan (PW 5), Senior Intelligence Officer. A reading of Ex.P.11 shows that it is not a confession statement. When S. Srinivasan (A.3) was asked about the removal of the goods, he has stated "I am not familiar". Thereafter, when he was confronted with some documents, he has stated that it is an inter-group Production Transfer Note. Thus, it is an exculpatory statement and not an inculpatory statement to qualify as a confession. Though all these documents including the statements of witnesses can be used in the adjudication proceedings as substantive evidence, the same cannot be put to use in a criminal trial, unless they pass the relevancy and admissibility tests laid down by the Evidence Act, read with the special rules of evidence under the CESA. Adjudication order under the CESA and the payment of penalty therein, cannot ipso facto prove the commission of the offence by the accused in a criminal prosecution. In the words of late lamented Professor Dr. V. Nageswara Rao, the celebrated author of the book "Indian Evidence Act - A critical commentary" (LexisNexis - II Edition-2015 - Page 17), 'absence of evidence of guilt is not evidence of absence of guilt'. Thus, the accused are acquitted only on the ground of "absence of evidence" and it is made clear that their acquittal will not, in any way, have bearing on the adjudication proceedings under the CESA.

18 In Dandulakshmi vs. State of Andhra Pradesh², the Supreme Court has stated that while dealing with the appeal of an accused, the appellate Court can also acquit the co-accused who has not filed any appeal.

19 Applying the said principle, the appeal in Crl.A.No.470 of 2019 is allowed and the judgment and order of conviction and sentence dated 26.10.2010 passed by the Additional Chief Metropolitan Magistrate Court, EO-1, Egmore, Chennai - 600 008 in EOCC No.82 of 1994 against A.1 to A.3 is set aside. All the accused, including Kilburn (A2) and S.Srinivasan (A3), who have not filed any appeal, are acquitted. Fine amount, if any, paid shall be refunded to the accused. As a sequitur, Crl.A.No.35 of 2011 filed by the Department is dismissed.

To sum up, Crl.A. No.470 of 2019 is allowed and Crl.A. No.35 of 2011 is dismissed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

gpa/cad

To

1. The Additional Chief
Metropolitan Magistrate Court
EO-1, Egmore, Chennai - 600 008
2. The Assistant Collector of Central Excise
Prosecution,
Office of the Collector of Central Excise
Madras
3. The Deputy Commissioner of Central Excise Prosecution
(O/o. The Commissioner of Central Excise
Chennai II Commissionerate
692, MHU Complex,
Anna Salai, Nandanam
Chennai - 35
4. The Public Prosecutor
Madras High Court
Chennai - 600 104

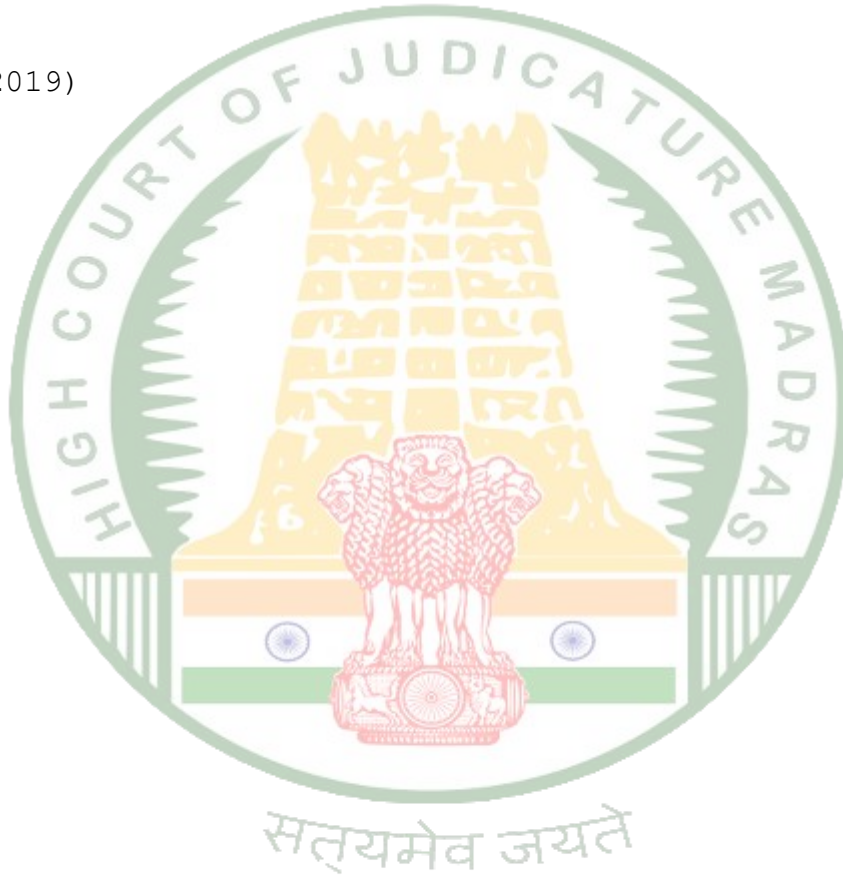
Copy To

The Section Officer,
Criminal Section, High Court,
Madras.

+1cc to Mr.C.Manishankar, Advocate, S.R.No. 94790

CRL.A.Nos.470 of 2019 & 35 of 2011

CP(CO)
GN(12/12/2019)



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