

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.03.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.124 of 2021 and
Crl.M.P.No.3353 of 2021

Mohamed Hussain

... Appellant

-Vs-

The state of Puducherry U.T rep.by
The Inspector of Police,
Thirubuvana Police Station,
Nettapakkam Circle,
Puducherry UT.

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, to allow the appeal herein and set aside the judgment and the order of conviction dated 11.02.2021 passed in Special S.C.No.8 of 2018 on the file of the Principal Session and Special Judge under the POCSO Act, 2012 at Puducherry UT convicting the appellant under Section 342, 376 of IPC and Section 6 of POCSO Act, 2012 of IPC and acquit him from the charges of the offence.

For Appellant : Mr.V.Rajendran

For Respondent : Mr.D.Bharatha Chakravarthy,
Public Prosecutor (Pondicherry)

JUDGMENT

This Criminal Appeal has been filed against the Judgment of conviction and sentence passed by the learned Special Judge (Under the POCSO Act, 2012) Principal Sessions Judge, Puducherry in Special S.C.No.8 of 2018, dated 11.02.2021.

2.The respondent Police have registered a case in Crime No.109 of 2017, for offence under Section 6 of the Protection of Children from Sexual Offence Act, 2012 (Hereinafter called as 'POCSO Act') against the appellant on the complaint (Ex.P2) given by PW2. After completing investigation, the respondent police laid a charge sheet before the learned Special Judge (Under the POCSO Act, 2012) Principal Sessions Judge, Puducherry and the same was taken on file as Special S.C.No.8 of 2018.

3.After completing the formalities under Section 207 Cr.P.C., since there was a prima facie material to frame charges against the appellant, the learned Special Judge framed charges under Section 6 of POCSO Act, 2012 and Sections 342 and 376 of IPC.

4. After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the trial Judge found the appellant guilty for offence punishable under Sections 342, 376 and Section 6 of POCSO Act, 2012 and convicted and sentenced him as follows:-

- For offence under Section 342 IPC, the appellant shall undergo one year Rigorous Imprisonment.
- For offence under Section 376 IPC, the appellant shall undergo ten years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo 3 months Rigorous Imprisonment.
- For offence under Section 6 of POCSO Act, 2012 the appellant shall undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo 3 months Rigorous Imprisonment.

5. Challenging the above said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

6. The learned counsel appearing for the appellant would submit that during trial, no independent witness was examined on the side of the prosecution and no eye witness to the occurrence in this case. The evidence of the victim girl (PW.1) has not corroborated the Medical Evidence (PW.4, PW.5 and PW.9) and documents (Exs.P6, P7 & P8). The learned counsel would further submit that the mother of the victim girl (PW.2) in order to take vengeance on the previous motive, had foisted a false case against the appellant and there was money transaction between the two families. The learned Special Judge failed to appreciate same and also the defence taken by the appellant. सत्यमेव जयते

7. The learned counsel for the appellant would further submit that the victim child (PW.1) was found to have been tutored and well tuned by her mother (PW.2), since she has enmity with the appellant. Except the deposition of the victim child (PW.1), no other direct evidence to find the guilt of the appellant. During examination before the trial Court, the victim child (PW.1) was found happy and in the relaxed mood of having come for shopping with her parents and she was not disturbed by any emotional incident. The medical reports (Exs.P6 & P8) of the victim girl did not support the case of the prosecution which are diagonally opposite to the deposition of the victim child (PW.1). The Doctors (PW.5 and PW.6), who had medically examined the girl, had reiterated their above report and they had clearly deposed ruling out the possibility of the girl being subjected sexual harassment in the recent time, which is completely against the story set up

by the prosecution. In such cases, the accused ought to have been acquitted from the charges against him.

8.The learned counsel for the appellant would further submit that if the medical evidence is in the nature of complete negation to the oral evidence without any room to accommodate such oral evidence of the witnesses, then the principle that ocular evidence shall prevail over the medical evidence as well it is only corroborative in nature, not conclusive, is not applicable to the present case. Further, in the present case, the victim girl is of immature age, her deposition, shall not be relied upon without corroboration of any other witness or without support of medical evidence. The trial Court has totally misconstrued the word "Congestion" used in Ex.P6. In fact, the Doctor (PW.5) based on the word came to the right conclusion and deposed that there was congestion in the private part of the victim girl measuring about 2 mm and no recent evidence suggestive to forceful vaginal/anal intercourse, which neither reflects nor confirm forceful intercourse/assault. As per Oxford Dictionary, the meaning of the word "Congestion" is "the state of part of the body being blocked with mucus". Mucus means a thick liquid that is produced in the part of the body. As alleged by the prosecution, if there was any forceful penetration, the vulva of the vagina, would have loosen and there would be no congestion in the vagina. Based on the congestion in the vagina, the Doctor had rightly given opinion against the prosecution case. The trial Court based on the evidence of PW.4 and PW.9, had miserably failed to ensure the mandatory compliance by such Doctors as required by the provision of POCSO Act.

9.The learned counsel for the appellant would further submit that there is no material evidence on record, except the solidary evidence of the victim child (PW.1) which is being opposite to the medical reports of the Doctors which is confirmed by them in their deposition. Though the conviction can be based on sole testimony of the victim of rape, the trial Court must be satisfied that implicit reliance can be placed on the testimony of such sole witness and the same must be free of blemish and capable to be relied upon without insisting upon corroboration. The testimony of the witness must be one which must inspire confidence of the Court and leave no doubt in the mind of the Court about its truthfulness. The Child Line Advisor did not make any mention in the statement about the physical and mental condition of the victim child during her examination by the Police and therefore, the deposition of the victim child (PW.1) is highly suspicious and not trustworthy. The statement in Ex.P5 and the deposition of PW.3 have not evidentiary value since it is of hearsay evidence as that of PW.2 and they are not eye witnesses to the occurrence. The statements recorded under Section 164 Cr.P.C., (Exs.P1, P3 & P5) remain not proved since it were not marked through the concerned Judicial Magistrate.

The accused was denied reasonable opportunity for cross examination of the prosecution witnesses with regard to the physical and mental condition, emotional attitude and disturbed behaviour of the victim child (PW.1).

10.The learned counsel for the appellant would further submit that the trial Court failed to consider the plea of the accused that the statements in Exs.P1, P3 & P5 have no much evidentiary value than the statement recorded under Section 161 Cr.P.C., and further, it is well settled that these statements are not substantiate piece of evidence to convict the appellant. The trial Court wrongly invoked the presumption under Section 29 of the POCSO Act without ensuring whether basic facts requiring to invoke the same stood established. Further, the accused need not examine any witness to rebut the presumption of offence drawn against and to rebut the said presumption, it is not necessary for the accused to enter into the witness box nor to examine any witness in support of his innocence. The said presumption can be rebutted though the document, deposition and other circumstances of the case. Even while questioning under Section 313 Cr.P.C., the appellant had totally denied his complicity with the offence. The trial Court convicted the appellant under Section 6 of POCSO Act and Section 342 IPC, and also strangely convicted under Section 376 of IPC which is contrary to Section 42 of POCSO Act. Further, the recovered material objects neither subjected to chemical analysis, nor received any report, which fatal to the case of the prosecution.

11.Therefore, the trial Court failed to appreciate the evidence and also failed to follow the mandatory provisions of the POCSO Act and wrongly came to the conclusion that the appellant has committed the offence, which warrants interference of this Court.

12.Mr.D.Bharatha Chakravarthy, Public Prosecutor (Pondicherry) appearing on behalf of the respondent Police would submit that the charges framed against the appellant are substantiated by the prosecution through oral and documentary evidence. In order to substantiate the charges framed against the appellant, the prosecution has totally examined 17 witnesses, out of which the victim child was examined as PW.1. The learned Public Prosecutor would further submit that the victim child (PW.1) has clearly narrated the entire events happened and the evidence of the Doctors (PW.4 and PW.5) are supported the case of the prosecution and corroborated the evidence of the victim child (PW.1). A combined reading of the evidence of the victim girl (PW.1) as well as the evidence of the Doctors (PW.4 and PW.5), amply proved that the victim child (W1) was subjected to sexual intercourse by the appellant. Even the Doctor (PW.4) has clearly stated that the victim child (PW.1) was medically examined on the same day of

the occurrence and there was oozing in her private part and also stated that his female Assistant cleaned it and applied ointment and instructed them to go to Rajiv Gandhi Government Hospital. Thereafter, on 25.11.2017, at about 07.10 p.m., the victim child (PW.1) was produced before the Doctor (PW.5) in Rajiv Gandhi Government Hospital. The Doctor (PW.5) has stated that she examined the victim child (PW.1) and opined that "there was congestion in the private part of the victim girl measuring about 2 mm and no recent evidence suggestive to forceful vaginal/anal intercourse, which neither reflects nor confirm forceful intercourse/assault". Though the Doctor (PW.5) has stated that there was no sexual intercourse, she opined that there was congestion in the private part of the victim girl measuring about 2 mm.

13.The learned Public Prosecutor (Puducherry) would further submit that during investigation, the victim child (PW.1) was produced before the learned Judicial Magistrate for recording the statement under Section 164 Cr.P.C. Though it is not a substantiate piece of evidence, it can be used for corroboration. Further, the evidence of the victim child (PW.1) are corroborated the statement recorded under Section 164 Cr.P.C., (Ex.P1) and the Doctors evidence, who gave treatment to her. Therefore, the trial Court rightly appreciated the evidence and materials and convicted the appellant and there is no merit in the appeal and the appeal is liable to be dismissed.

14.Heard the learned counsel appearing for the appellant and the learned Government Advocate [Crl. Side] appearing for the respondent and also perused the materials available on record.

15.The case of the prosecution is that on the date of occurrence, the victim child was a minor, aged about 8 years and she was studying 3rd std. On 24.11.2017, at about 05.30 p.m., after returning from the school, the victim girl was playing near her house. The victim girl went to the house of one Vicky situated near her house at about 05.00 p.m., to see whether her brother is there, it was stated that her brother was not there. When she returning back to home, the appellant informed that her brother is in his house and asked her to come. When the victim child went inside the room and the appellant locked the door and removed his pant and her panties, then forcefully inserted his penis into the vagina of the victim child and she shouted. Then the appellant went and closed all the doors of the house and came back again, inserted his penis into the vagina of the victim child and on hearing the child shout, closed her mouth and again inserted his penis into her vagina and left her. Thereafter, the victim child (PW.1) went to her house and narrated the happenings to her mother (PW.2). In turn, her mother (PW.2) informed the happenings to her husband and after his return, she went along with him to the hospital for treatment. Thereafter, the respondent Police and Child Line People came

to hospital and asked about the happenings and the mother of the victim child (PW.2) gave a complaint (Ex.P2).

16. Based on the complaint (Ex.P2) given by the mother of the victim child (PW.2) an FIR in Crime No.109 of 2017 was registered for offence under Section 6 of POCSO Act, 2012. After completing investigation, the respondent police laid a charge sheet before the Special Judge (Under the POCSO Act, 2012) Principal Sessions Judge, Puducherry and the same was taken on file as Special S.C.No.8 of 2018.

17. During the trial, in order to prove the case of the prosecution, on the side of the prosecution, as many as 18 witnesses were examined as PW1 to PW18 and 16 documents were marked as Exs.P1 to P16 and 7 material objects were exhibited. After completing the evidence of prosecution witnesses, when incriminating circumstances were culled out from the prosecution witnesses put before the accused, he had denied the same as false. On the side of the defence, no oral and no documentary evidence was produced.

18. After considering the evidence on record and hearing the arguments advanced on either side, the learned Special Judge (Under the POCSO Act, 2012) Principal Sessions Judge, Puducherry vide judgment dated 11.02.2021 in Special S.C.No.8 of 2018, convicted and sentenced the appellant as stated above.

19. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding and accordingly, this Court also perused the entire materials placed and the judgment of the trial Court.

20. As against the appellant, during trial, charges were framed under Section 6 of the POCSO Act and Section 342 & 376 of IPC. In order to substantiate the charges framed against the appellant, the prosecution has examined totally 18 witnesses, out of which the victim child was examined as PW1.

21. A reading of the evidence of the victim child (PW1), she has clearly narrated that on 24.11.2017, at about 05.30 p.m., after returning from the school, she was playing near her house. She went to the house of one Vicky situated near her house at about 05.00 p.m., to see whether her brother is there, it was stated that her brother was not there. When she returning back to home, the appellant informed that her brother is in his house and asked her to come. When the victim child (PW.1) went inside the room and the appellant locked the door, then he removed his pant and her panties, then forcefully inserted his penis into the vagina of the victim child and she shouted. Then the appellant went and closed all the doors of the house and came back again, inserted his penis into the vagina of the victim child and on hearing the child shout, closed her mouth and again inserted

his penis into her vagina and left her. Thereafter, the victim child went to her house and narrated the happenings to her mother.

22.PW.2 and PW.3 are mother and father of the victim girl (PW.1). Though their evidence are in the nature of hearsay, soon after the occurrence the victim child (PW.1) informed the happenings to them and also identified the house of the appellant. The occurrence is said to have taken place on 24.11.2017, at about 05.00 p.m., and the victim child (PW.1) was brought to the Doctor (PW.4) on the same day at about 06.00 p.m. The Doctor (PW.4) was informed by the mother of the victim child (PW.2) that her daughter was raped by a person. The Doctor (PW.4) asked the female Assistant to see the private part of the victim child (PW.1), then the Assistant saw her private part and found blood was oozing from her private part. Since the victim child (PW.1) was suffered stomach pain, the Doctor (PW.4) gave medicine and advised to give a complaint and also to go to Rajiv Gandhi Government Hospital. Thereafter, the victim child (PW.1) was brought to the Rajiv Gandhi Government Hospital for further treatment on 25.11.2017, at about 07.10 p.m., where the Doctor (PW.5) examined the victim girl and stated that there was measuring 2 mm congestion on her private part and in this regard, she gave report Ex.P6.

23.The learned counsel for the appellant submitted that as per Oxford Dictionary, the meaning of the word "Congestion" is "the state of part of the body being blocked with mucus". Mucus means a thick liquid that is produced in the part of the body. As alleged by the prosecution, if there was any forceful penetration, the vulva of the vagina, would have loosen and there would be no congestion in the vagina. Based on the congestion in the vagina, the Doctor had rightly given opinion against the prosecution case. The Doctor (PW.5) clearly stated that if there is penetrative sexual assault, there would be possibility of such injury. The learned counsel for the appellant made a suggestion that during cross examination, there was no effective cross examination was made in this regard. The Doctor (PW.4) has stated that the mother of the victim girl informed someone raped her daughter and he asked his female Assistant to look into the private part of the victim child and she saw blood was oozing and she cleaned it and administered ointment. Subsequently, on the next day i.e., on 25.11.2017, the victim child (PW.1) was produced before the Doctor (PW.5) attached to Rajiv Gandhi Government Hospital. The Doctor (PW.5) examined the victim child (PW.1) and opined that there was congestion of 2mm on her private part. As per Oxford dictionary, the word congestion means "a study of a part of the body being blocked with blood or mucus". When the victim child (PW.1) was examined by the Doctor (PW.4), there was oozing of blood in her private part and her female Assistant cleaned it and administered ointment. hence, naturally, there was some congestion in the private

part of the victim child (PW.1) and there is possibility of penetrative sexual intercourse.

24. Even assuming that as stated by the learned counsel for the appellant there was no injury on the private part of the victim child, the victim girl has clearly stated that the appellant is the person, who had committed penetrative sexual assault and the Doctors (PW.4 and PW.5) have also stated that the victim girl was subjected to penetrative sexual assault. Therefore, a combined reading of the evidence of victim child (PW.1) and evidence of Doctors (PW.4 and PW.5), this Court comes to the conclusion that the victim child (PW.1) was subjected to penetrative sexual assault by the appellant.

25. PW2 and PW3 are the parents of the victim child (PW.1). The mother of the victim girl (PW.2) has stated that immediately soon after the occurrence, her daughter informed about the occurrence and also the father of the victim girl (PW.3) has stated that when he asked her daughter, she identified the appellant and also his house.

26. The offence like this nature, no eye witness can be expected. The culprit will always wait for the chance and also for aloofness. The victim child (PW.1) has clearly stated that the appellant dragged her by pulling her inside the house and laid on her and put his private part into her private part and pressed her breast. The evidence of the Doctors (PW.4 & PW.5) are corroborated the evidence of the victim child (PW.1). Merely because there is no eye witness in this case, the evidence of the victim child (PW.1) cannot be ignored simply. Though the learned counsel for the appellant vehemently contended the collected material objects did not send for chemical analysis, it is not fatal to the case of the prosecution. It is settled law that the defective in investigation would not amount to disbelieve or discard the evidence of the prosecution.

27. The learned counsel for the appellant vehemently contended that the victim child was tortured and well tuned by her parents. Admittedly, PW.1 was examined in chief on 04.01.2019 and she was cross examined on 24.01.2020. Though PW.1 was examined in chief after 3 years from the date of occurrence and cross examination was done after one year from the chief examination, she may not be in the same position as she was on the date of occurrence. Therefore, the contention raised by the learned counsel for the appellant is meaningless.

28. Even though the learned counsel for the appellant vehemently contended that no opportunity was given to lead defence evidence, after questioning under Section 313 Cr.P.C., the appellant neither informed the trial Court to examine defence witness nor filed any list of witness or petition

under Section 315 Cr.P.C. In the absence of the same, the counsel for the appellant cannot say that the appellant was given no opportunity to lead defence evidence. The trial was commenced on 04.01.2019 and the victim child (PW.1) was examined in chief on 04.01.2019 and she was cross examined on 24.01.2020 and the chief examination of the last witness was completed on 20.03.2020 and the defence counsel completed the cross examination on 22.03.2020. Therefore, after passing the judgment, the appellant cannot say that no opportunity was given to lead the defence evidence and the appellant should have expressed the same before the trial Court or should have filed any petition under Section 315 Cr.P.C.

29.The learned counsel for the appellant contended that the non examination of the learned Judicial Magistrate, who recorded the statements of the victim child, her mother and her father (Exs.P1, P3 & P5) under Section 164 Cr.P.C., would fatal to the case of the prosecution. During trial, the victim child (PW.1) was examined as PW.1 and she has stated that she gave the statement under Section 164 Cr.P.C., before the learned Judicial Magistrate. Though the statement under Section 164 Cr.P.C., is not a substantive evidence, it can be treated as previous statement and can be used for corroboration. Therefore, mere non examination of the learned Judicial Magistrate, who recorded the statement of the victim girl under Section 164 Cr.P.C., is not fatal to the case of the prosecution. The Birth Certificate of the victim child (PW.1) was marked as Ex.P9. As per Ex.P9, the age of the victim child is only 8 years. The prosecution has relied on the statement recorded under Section 164 Cr.P.C., by the Judicial Magistrate (Ex.P1) for corroboration of the evidence of the victim child (PW.1). A reading of the evidence of the victim child (PW.1) and the statement recorded under Section 164 Cr.P.C., (Ex.P1), both the evidence of the victim child (PW.1) and Ex.P1 are corroborated.

30.Therefore, a combined reading of the evidence of the victim girl (PW.1), her mother (PW.2), her father (PW.3) and the Doctors (PW.4 & PW.5) and also the documents (Exs.P1, P2, P3, P4, P5, P6, P8, P9 & P10), the prosecution has substantiated the charges framed against the appellant and therefore, the appellant has committed the offence under Section 6 of POCSO Act.

31.Regarding the conviction and sentence rendered by the trial Court, the learned counsel for the appellant submitted that the appellant was convicted under Section 6 of the POCSO Act. As per Section 42 of the POCSO Act, the appellant should not have been convicted under Section 376 IPC, which is against law. For better appreciation, Section 42 of POCSO Act is extracted hereunder:-

"42.Alternate punishment.—Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B,

354C, 354D, 370, 370A, 375, 376, 2[376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

42A. Act not in derogation of any other law.—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

32.A combined reading of Sections 42 and 42(a) of POCSO Act, it is absolutely improper to convict the appellant under Section 376 of IPC as per Section 42 of POCSO Act, since the appellant was convicted and sentence under Section 6 of POCSO Act. Therefore, the conviction and sentence passed against the appellant for offence under Section 376 of IPC are liable to be set aside and the same are set aside.

33.Since the appellant committed penetrative sexual assault on a victim child below twelve years, the offence falls under Section 5(m) of POCSO Act and therefore, he was convicted for offence punishable under Section 6 of POCSO Act. Since the occurrence is said to have taken place in the year 2017, that is 24.11.2017, before the Amendment of the year 2019, the minimum sentence of imprisonment is 10 years and the trial Court has rightly awarded the minimum sentence. Therefore, the conviction and sentence passed for offence under Sections 6 of POCSO Act and Section 342 of IPC are confirmed.

34.With the above modification, this Criminal Appeal stands dismissed. Consequently, the connected Criminal Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

/TRUE COPY/

Sub-Assistant Registrar

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To

1.The Special Judge (Under the POCSO Act, 2012)
Principal Sessions Judge,
Puducherry.

2.The Inspector of Police,
Thirubuvanai Police Station,
Nettapakkam Circle,
Puducherry UT.

3.The Public Prosecutor,
High Court, Madras.

4.The Public Prosecutor,
Pondicherry.

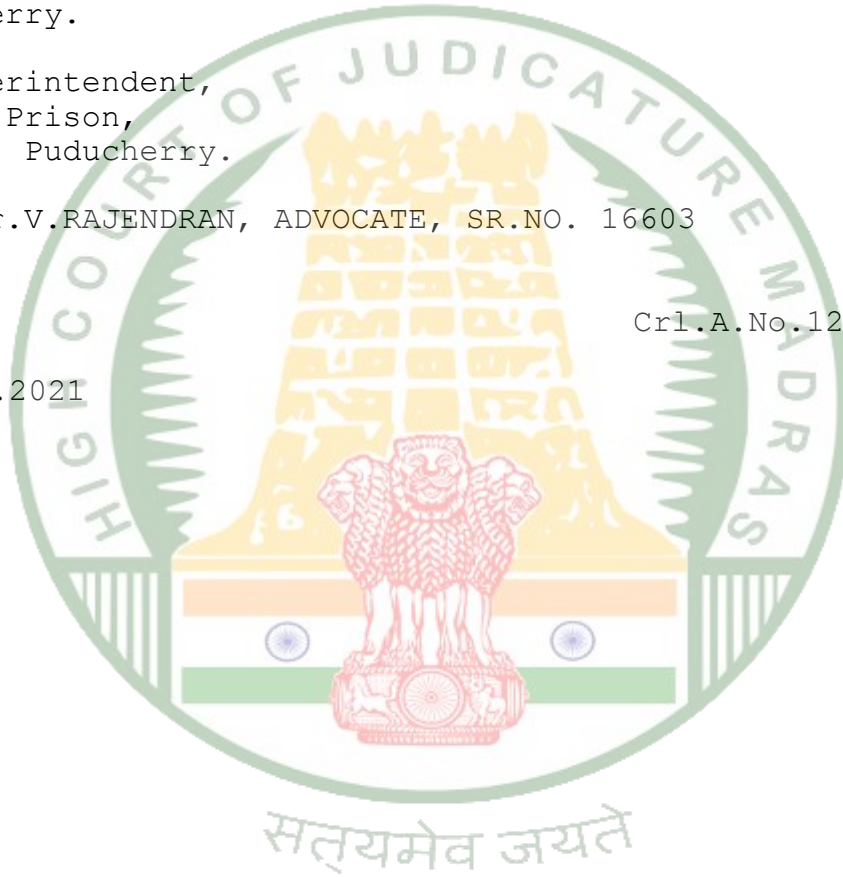
5.The District Collector,
Pondicherry.

6.The Superintendent,
Central Prison,
kalapat, Puducherry.

+lcc to Mr.V.RAJENDRAN, ADVOCATE, SR.NO. 16603

AJB (CO)
KKN 30.04.2021

CrI.A.No.124 of 2021



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