

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.09.2021

CORAM

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mr.Justice SATHI KUMAR SUKUMARA KURUP

Tax Case (Revision) Petition Nos.16 to 22 of 2021

Tvl. Shriram City Union Finance Ltd.,
No.4, Lady Desikachary Road,
Mylapore, Chennai – 600 004.

...Appellant in all Cases

-VS-

State of Tamil Nadu represented by
The Joint Commissioner (CT),
Chennai (East) Division,
Chennai.

...Respondent in all Cases

Appeals under Section 60(1) of Tamil Nadu Value Added Tax Act, 2006
praying to set aside the common order of the Sales Tax Appellate Tribunal,
Main Bench in T.A. Nos.85 to 91 of 2016 dated 05.02.2021 on the file of the
Tamil Nadu Sales Tax Appellate Tribunal, Main Bench, Chennai.

For Appellant : Mr. R. Sivaraman (in all cases)

For Respondent : Mr. M.Venkateswaran (in all cases)
State Government Counsel

COMMON JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

These tax case (revision) petitions have been filed under section 60(1) of the Tamil Nadu Value Added Tax, 2006 ('the TNVAT' for short) challenging the common order dated 05.02.2021 passed by the Tamil Nadu Sales Tax Appellate Tribunal, Chennai ('Tribunal') dismissing the appeals filed by the petitioner and holding them to be dealers and liable to pay Value Added Tax.

2. The petitioner has raised the following substantial questions of law:-

(1) Whether, on the facts and in the circumstances of the case, the Hon'ble Appellate Tribunal was right in law in stating that the Petitioner/Appellant would fall within the ambit of "dealer" as per section 2(15) of the TNVAT Act, 2006?

(2) Whether, on the facts and in the circumstances of the case, the Hon'ble Appellate Tribunal was right in law in stating that sale of repossessed vehicle on behalf of the defaulter by the Petitioner/Appellant would be liable to pay taxes under VAT Act on the sale of the Hypothecated Motor Vehicles?

(3) Whether, on the facts and in the circumstances of the case, the

Hon'ble Appellate Tribunal was right in law in stating that the Petitioner/Appellant is a dealer even though the contractual agreements specifically states the Petitioner/Appellant is not the owner of the Vehicle?

(4) Whether, on the facts and in the circumstances of the case, the Hon'ble Appellate Tribunal was right in law in stating that Resale of Plant and Machinery, Furniture and Fittings and Fixed Asset by the Petitioner/Appellant which is used for the purpose of own business would fall within the meaning of sale and subject to VAT as per the TNVAT ACT, 2006?

(5) Whether, on the facts and in the circumstances of the case, the Hon'ble Appellate Tribunal was right in law in confirming the additions made to sale of Plant Machinery, Fixture, Furniture, air conditioner and gold/gold jewellery as part of business activity of the assessee?

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3. We have heard Mr. R.Sivaraman, Learned counsel for the petitioner and Mr. M.Venkateswaran, Learned State Government Counsel, who accepts notice on behalf of the respondent in all cases.

4. It is not in dispute that the identical questions of law were considered by the Division Bench of this Court, in which one of us (TSSJ) was a party, in the case of ***Cholamandalam Investment -vs- The State of Tamil Nadu*** [decided on 25.09.2019 in T.C. Revision Nos. 2 to 9 of 2019]. Wherein, the identical contentions were raised by the said petitioner, who was also a non-banking finance company. The Tax Case Revisions were dismissed by a common order dated 25.09.2019. The operative portion of which reads as follows:-

“ 22.We have heard the elaborate arguments put forth by Mr.N.Sriprakash, followed by the submissions made by the learned Special Government Pleader on several dates. In our view the learned Special Government Pleader has rightly crystallized the arguments made on either side and has framed questions/issues, which are required to be answered by us in these revision petitions. The four questions/issues, which required our consideration are hereunder:

(i)Whether the assessee is a dealer as defined under Section 2(15) of the TNVAT Act and liable to pay sales tax on the sale of the repossessed vehicles?

(ii)Whether the decision in ***HDFC Bank Ltd.***, would apply to the case of the assessee?

(iii)Whether the assessee when acts as an agent of the borrower is liable to pay sales tax?

(iv)Whether the liability of the agents is not co-extensive with that of the Principal?

23. When we heard the case at the first instance, the learned Special Government Pleader appearing for the respondent submitted that the issues raised in these revision petitions are clearly covered by the decision in **HDFC Bank Ltd.**, Mr.N.Sriprakash submitted that the Tribunal erred in applying the decision in **HDFC Bank Ltd.**, to the case of the assessee, who is the non-banking finance company. Therefore, we are to test the applicability or otherwise of the decision in **HDFC Bank Ltd.**, For such reason, we propose to test question No.(ii) at the first instance and the necessity to answer the other three questions will be subject to the decision we take on question No.(ii).

24. In **HDFC Bank Ltd.**, the revision petition was filed before this Court questioning the correctness of the order of the Sales Tax Appellate Tribunal, which held that the Bank is liable to pay sales tax. The assessment under the TNVAT Act was revised by the Assessing Officer on the ground that the bank had not reported the sale of repossessed vehicle from defaulting customers in their return and not paid taxes thereon. As in the case on hand, the appeals filed before the first appellate authority as well as the Tribunal were dismissed. The question, which was framed for consideration by the Division Bench was whether the bank, which holds the hypothecation of vehicles in their favour would be a 'dealer' within the definition under Section 2(15) of the TNVAT Act, merely because, the bank seized and repossessed the hypothecated vehicle and brings it to sale. In the said case, the Tribunal took note of the expression 'business', 'dealer' and 'sale' respectively under Sections 2 (10), 2(15) and

2(33) of the TNVAT Act. The Tribunal also took note of Sections 6 and 8 of Banking Regulations Act, 1949 and came to the conclusion on the basis of the decision of the Hon'ble Supreme Court in **Federal Bank Ltd., v. State of Kerala [(2007) 6 VST 736]** that the Bank would come within the expression 'dealer' under Section 2(15) of TNVAT Act.

25. The Division Bench noted the type of transaction done by HDFC with its borrower, which empowers it to repossess the vehicle in the event of default and to direct the vehicle to be sold on public auction or by private negotiations without even involving the owner of the vehicle. The Division Bench also took note of the direction issued by the Hon'ble Supreme Court in the case of **Manager, ICICI Bank Ltd., v. Prakash Kaur [(2007) 136 Comp Cas 327 (SC)]**, wherein the arbitrary seizure and sale of hypothecated vehicles by the financial institutions was depreciated and also the fact that after the said decision, the banks started invoking the provisions of the Arbitration and Conciliation Act, 1996, seeking appointment of an Advocate Commissioner instead of collecting agents to seize and repossess the vehicle. The Division Bench pointed out that it is not as though the sale of the hypothecated vehicle is arranged by the banks and finance institutions for and on behalf of willing vendor. These sales effected by the Bank are in the nature of compulsory sales for realization of debts due to the financial institutions. Therefore, it was held that to say that the banks sold the hypothecated goods only as an agents of the owners may not be true completely. After noting the Explanation III to Section 2(15),

*it was held to be exhaustive. Identical contentions as raised before us were raised before the Division Bench in **HDFC**. While dealing with the said contentions, the Court pointed out that the contention that the bank does not become the owner of the property and that too for the forms TM29 and TM 30 handed over by the owners, the banks cannot even sell the property, may be technically right, but Explanation III to Section 2(15) includes even the disposal of goods that are unclaimed and in respect of unclaimed goods, the seller does not claim ownership but he exercises the right to dispose of the goods. Thus, it was held that if Explanation III to Section 2(15) of the Act covers the sale of even unclaimed goods, the contention of the seller (bank) must be in a position to pass on title, may not stand.*

*26. With regard to the distinction, which was sought to be drawn to the decision in **Federal Bank**, it was pointed out that though the Hon'ble Supreme Court was concerned with the exercise of a statutory right of sale and the exercise of the contractual right to bring the hypothecated property to sale could not be excluded on that account Explanation III to Section 2(15) covers even the sale of unclaimed goods and if sale of unclaimed goods can be included within the purview of Explanation III, the distinction sought to be drawn between the statutory right of sale and a contractual right of sale, cannot stand.*

*27. The first contention raised by Mr.N.Sriprakash, learned counsel for the petitioner is that **HDFC** case cannot be applied to the case on hand on the ground that the assessee is a NBFC and*

*not a person or body falling within Explanation III of Section 2(15). It is true that the assessee in the **HDFC** was a bank, falling within clause (ix) under Explanation III to Section 2(15) of the TNVAT Act. However, the nature of transaction done by the **HDFC** and that of the assessee are identical. Both **HDFC** and the assessee enter into agreements with the borrower and the agreement empowers the lender to repossess the vehicle in the event of default by the borrower without the express written consent of the borrower. As pointed out earlier, Banks and NBFC had used the service of collecting agents because they had to repossess the vehicle and in most cases after much resistance by the borrower. When the Hon'ble Supreme Court came down heavily on the manner in which repossession was done, the Banks and financial institutions like the petitioner started exercising their right under the loan agreement by filing application before the High Court under Section 9 of Arbitration and Conciliation Act, 1996 for appointment of an Advocate Commissioner to seize and repossess the vehicle and also seeking permission for sale of the vehicle. These applications are being allowed by orders of this Court and this has been the consistent practice, though in certain cases the Court appointed one of the Officers of the financial institutions to carry out the process of repossession and sale at their cost. Considering the modus adopted by the assessee if they are acting on behalf of the borrower as its agent, it presupposes that there is valid consent of the borrower, which is never the case, at least in the case which are subject matter of the impugned assessments. If the assessee is the agent of the borrower effect repossession and consequent sale, there would never arise a need*

to approach the Court to obtain orders to effect repossession and seizure of the vehicle and put it for sale. That apart, when the vehicle is put up for sale through auction, invariably it is by negotiation with the prospective purchaser either directly or through dealers. Undoubtedly, it is done without involving the owner of the vehicle. In many cases, along with main agreement and other documents the borrower's signature is obtained in statutory forms prescribed under Motor Vehicles Act to enable the lender to transfer the certificate of registration in favour of the purchaser without bringing the borrower in the scene. In the event, there is a resistance by the borrower, the situation is taken care by appropriate amendments to Motor Vehicles Act, which empowers the lender to approach the appropriate authority and execute the transfer of ownership without consent of the borrower. Therefore, the right exercisable by the assessee is under a contract.

*28.This issue was also considered by the Division Bench in **HDFC**, wherein a distinction was sought to be drawn to the decision of the Hon'ble Supreme Court in **Federal Bank** and the distinction was not accepted and the Court pointed out that the exercise of statutory right of sale and exercise of contractual right to bring hypothecated property to sale, both, could not be excluded and would be covered in Explanation III as the explanation is widely couched.*

*29.While on this issue, we wish to refer to an identical situation, which was considered in **Cholamandalam Investment &***

Finance Co., Ltd., Coimbatore v. The Chief Secretary to Govt. and others [2014-4-L.W. 240] and while considering an identical type of transaction as done by the assessee, it was pointed out that in an agreement of hire purchase, the purchaser remains merely a trustee/bailee on behalf of the financier/financial institution. To this effect, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Anup Sharmah vs. Bhola Nath Sharma & Ors. [(2013) 1 SCC 400]**. In the said case (Cholamandalam), the NBFC sought for a direction to quash a Government Order and to return the vehicle. The NBFC, who had financed the vehicle, had a valid hypothecation. However, the vehicle was confiscated by the Government under the provisions of Tamil Nadu Protection of Interest of Depositors (in Financial Establishment) Act, 1997. The NBFC moved the Special Court praying that they should be granted interim custody of the vehicles. The petitions were dismissed, against which Criminal Revision was filed before the High Court. The Writ Petition, challenging the Government Order of confiscation and the Criminal Revision Case, challenging the order of the Special Court rejecting the prayer for interim custody were clubbed together and heard by this Court. This Court by interpretation of hire purchase agreement and taking note of the decision of the Hon'ble Supreme Court, it was held that the respondent in the said case viz., the borrower was only hirer of the vehicle and in the light of the valid deed of hypothecation executed in favour of NBFC, they retained the ownership and the same remains with them till the hypothecation is revoked. With this reasoning the Special Court was directed to consider the case of NBFC.

30.In *Indian Oil Corporation v. NEPC India Ltd., and Others [(2006) 6 SCC 736]*, it was pointed out that the deed of hypothecation created a charge over the hypothecated asset with right to take possession in the event of default. Thus, on a conjoint reading of the above decisions and the modus operandi of the assessee, which in our considered view, is no different from that of the modus operandi adopted in the case of *HDFC*. Therefore, we are necessarily conclude that the decision in *HDFC*, would squarely apply to the case of the assessee.

31.Mr.N.SriPrakash took stenuous efforts to distinguish *HDFC*. It was pointed out that the registration certificate stands in the name of the borrower, this being a vital feature, the ownership of the vehicle vests with the borrower. We are to note that though the hire purchaser was branded as owner, nothing falls out of the same as the Hire Purchase Act continuous to remain a legislation on paper as it has not been notified. Conscious of the increase in the number of financial agreements by NBFCs and Banks for purchase of vehicles, the provisions of the Motor Vehicles Act were suitably amended. Therefore, we are required to examine in the instant case what is the nature of the contract between the assessee and the borrower.

32.The decision in the case of *Federal Bank (supra)* was distinguished by contending that it was case of pledge not a hypothecation and in the case of a bank, power under the Banking Regulations Act, 1949 is invoked. We do not accept the said submissions for the reason that nature of the activity done by the

Bank and the NBFC like the assessee are identical. It may be true that the banks are covered by the Banking Regulations Act, 1949. Nevertheless, the test to be applied is as to whether assessee is liable to payment of sales tax and is to be done by examining the nature of transaction and not by taking note of the statute under which their business is regulated. If this exercise is done, the nature of transactions being identical, hardly makes a difference as to whether the assessee is a NBFC or a Bank.

*33.The contention that the assessee takes the role of agent of the borrower, when he brings the property for sale cannot be fully right because on facts it has been found that the assessee was entitled to act independently without the express consent by the borrower to effect sale of the hypothecated vehicle. This aspect was noted in **HDFC**. Therefore, we respectfully agree with the observations/findings in **HDFC** that the sales are in the nature of compulsory sales for realization of debts due to the financial institutions and to say that the assessee sold the hypothecated goods only as agents of the owner is not completely true.*

34.Various statutory provisions, which were referred to by Mr.Sriprakash, learned counsel appearing for the petitioner have been set out by us in the preceding paragraphs and in addition there to, we need to refer to a few more provisions which will bring better clarity as to whether the agent would be also liable. Section 2(41) of the Act defines turnover to mean aggregate amount for which goods are brought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in

clause (33), by a dealer either directly or through another, on his own account or on account of others whether for cash or for deferred payment. Therefore, this provision clearly indicates that turnover will include aggregate amount of net sales effected by the seller on his account or on account of others. Therefore, assuming the contentions raised by the Mr.Sriprakash is acceptable and that the assessee is acting as an agent of the borrower is wholly true, yet the turnover assessee should include the aggregate amount of the goods sold on his account or on account of others.

35.Next, we turn on to the definition of dealer as defined under Section 2(15) of the TNVAT Act. The definition is exhaustive and would encompass agent to bring him within the tax umbrella. If we look at the definition of sale as defined under Section 2(3), it is a very wide definition.

36.The arguments of Mr.N.Sriprakash, learned counsel appearing for the petitioner is that Explanation III to Section 2(33) will not be attracted to the assessee because the assessee is not a person or body referred to in Explanation III to clause 15 of Section 2. In the earlier paragraph of our order we have held that the assessee would be liable to sales tax, by examining the nature of the transaction. Even assuming that the assessee would not fall within Explanation III to Section 2(33), nevertheless Explanation IV to Section 2(33) would stand attracted.

37.Mr.N.Sriprakash, learned counsel appearing for the petitioner referred to the decision of the Hon'ble Supreme Court in **Indian Oil Corporation v. NEFC India Ltd. & Ors (SC) [(2006) 6 SCC 736]**, to explain as to whether there is entrustment in the hypothecation. In our considered view, we need not go into this aspect to examine the correctness of the impugned order passed by the Tribunal. We have taken note of all the decisions, which have interpreted identical agreements and are of the firm view that the assessee is liable for payment of sales tax.

38.The decision **Syed Abdul Khader v. Rami Reddi & Ors. (SC) [(1972) 2 SCC 601]** was pressed into service to explain as to who is the agent. We have examined the facts of the assessee and also the scheme of the Act and held that considering the nature of contract entered into between the assessee and borrower, the assessee will continue to be liable for sales tax even if its claim of agent is accepted. The agent is also liable to pay tax as held by us *supra*.

39.The decision in the case of **Seth Loon Sethiya v. Ivan E. John and Others [AIR 1969 SC 73]** would have no application to the case for the reason that the question which arose for consideration there was whether the power of attorney is a power coupled with interest; if it is so, whether the same is revocable? No dispute of that nature arises in the instant case and the transaction between the assessee and the borrower is quite distinct and different from what was examined by the Supreme Court in the said case.

40.The decision of the Delhi High Court in **Citi Bank v. Commissioner of Sales Tax (Del.) [88 VST 246]** was relied by Mr.N.Sriprakash, learned counsel appearing for the petitioner to support his case that the assessee was acting on behalf of the borrower and therefore, the liability, if at all should be fastened on the borrower which also shall not be done because borrower is not a dealer as defined under the Act. This decision also refers to the decision **HDFC and Federal bank**, which were noted by this Court and we have already held that even accepting the case of the assessee to be that of a agent, the assessee exercises the right under the contract and bringing for sale the vehicle without the express consent of the borrower would make them fully liable for payment of sale tax.

41.We may take a slightly different view point, while interpreting the terms and conditions of the Loan Agreement. Clause 8 of the loan agreement deals with Security and Clause 8 (c) deals with the Certificate of Registration issued under the Motor Vehicles Act and shall contain the endorsement of hypothecated with the assessee company and in terms of clause (d) as long as the asset is hypothecated with the assessee, the borrower shall not sell or create any other hypothecation, charge, mortgage, pledge, lien or encumbrance over the Asset without prior approval of the assessee. The borrower has executed a demand promissory note in favour of the assessee, for the security as required in clause 8(f). In terms of clause 8 (g) the hypothecation shall remain until the assessee issues a certificate discharging the security created. Any change in status of the

borrower will not affect the hypothecation in terms of 8(h). In terms of 8(j) the assessee is entitled to direct the borrower to furnish additional security including guarantees from any third parties. Clause 11 of the agreement deals with possession, termination and company's other rights.

42. We, may also refer to a few more clauses. A reading of clause 11(c)(ii) makes abundantly clear that the sale by the assessee of the hypothecated asset is without the consent of the borrower. The borrower has no right to question the value at which the asset was sold and sale will be done by the assessee without accountability to the borrower and the guarantor and the assessee will not be liable for loss or damage or diminution in value of asset/ security on account of exercise or non exercise of rights by the assessee and the borrower/guarantor will not be entitled to raise any claim against the assessee on the ground that a large sum of amount might have been received or dispute their liability for the remaining dues under this agreement. Clause 11(c)(iii) empowers the assessee to initiate legal proceedings against the borrower and entitled to appoint third parties to carryout its functions rights and powers. Clause 13 of the agreement deals with Covenants and representations of the borrowers and the guarantors. Clause 13(b) empowers the assessee to sell, assign or transfer the assessee's right and obligations under the agreement to any person. There are many such clauses in the agreement, which clearly elucidate that theory as propounded by the assessee that the sale is effected by them as an agent of the borrower has to necessarily fall. For all the above

reasons, no ground is made for interference of the order of the Tribunal.

43. Accordingly, the Tax Cases (Revision) are dismissed and the substantial questions of law framed for consideration are decided against the assessee. No costs."

5. Thus, following the above decision, the Tax Case Revisions are dismissed.

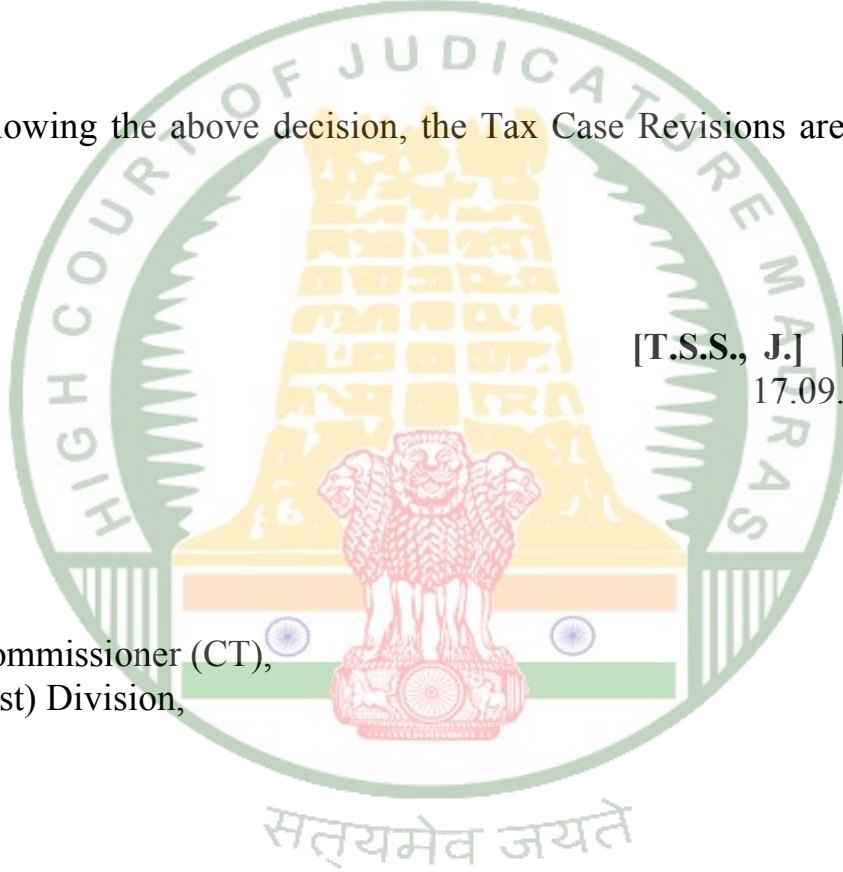
No costs.

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To

The Joint Commissioner (CT),
Chennai (East) Division,
Chennai.

[T.S.S., J.] [S.S.K., J.]
17.09.2021

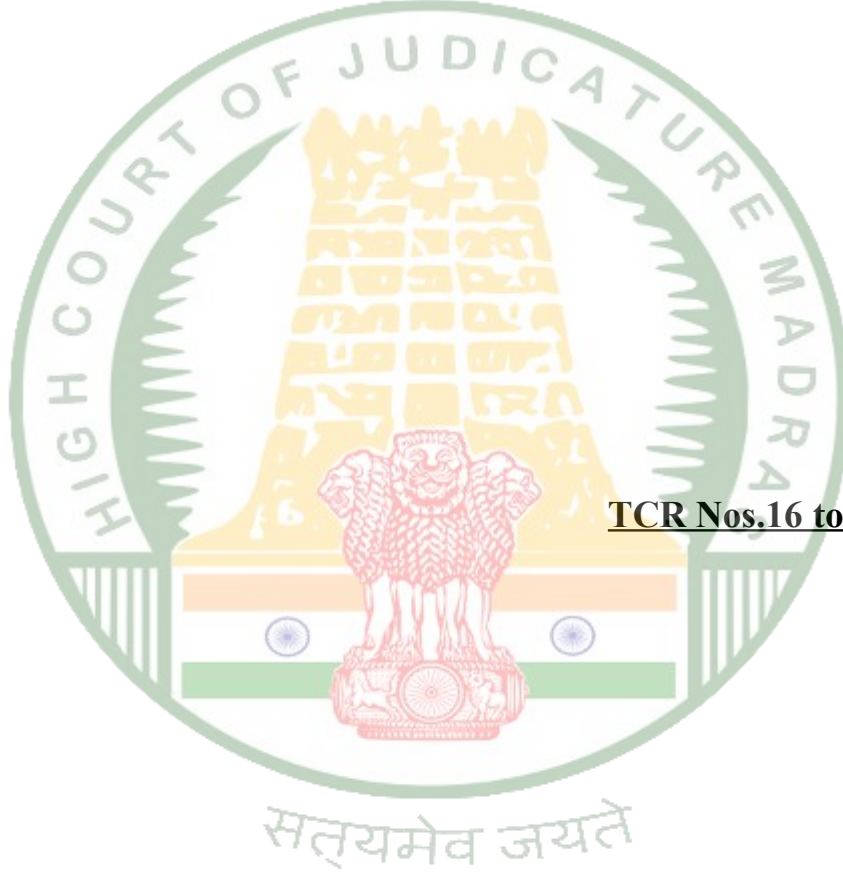


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T.C.(R)Ptn. Nos.16 to 22 of 2021

T.S.Sivagnanam, J.
and
Sathi Kumar Sukumara Kurup, J.

(Maya)



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