



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 05.03.2021

PRONOUNCED ON : 17.03.2021

CORAM :

**The Hon'ble Mr. SANJIB BANERJEE, THE CHIEF JUSTICE**  
**The Hon'ble Mr. JUSTICE M.M. SUNDRESH**  
AND  
**The Hon'ble Mr. JUSTICE R. SUBRAMANIAN**

W.A.(MD) Nos.281 and 331 of 2019 and  
CMP(MD).Nos.2297 and 2622 of 2019

W.A.(MD) No.281 of 2019:

- 1.The District Collector,  
Collectorate Office,  
Sivagangai District.
- 2.The District Employment Officer,  
O/o. The District Employment Office,  
Sivagangai, Sivagangai District.
- 3.The Tahsildar,  
Ilayankudi,  
Sivagangai District. .. Appellants/Petitioners/Respondents

Vs.

1. N.Udayappan
2. Jaya Lakshmi .. Respondents/Respondents/Petitioners

W.A.(MD) No.331 of 2019:

R.Ramar .. Appellant / Petitioners

Vs.

- 1.The District Collector,  
O/o. District Collectorate,  
Sivagangai District.



2.The District Employment Officer,  
O/o. District Employment Officer,  
Sivagangai District.

3.The Tahsildar,  
Ilayankudi Taluk,  
Sivagangai District.

.. Respondents/Respondents

PRAYER in W.A.(MD) No.281 of 2019 - Appeal filed under Clause 15 of the Letters Patent against the order dated 02.01.2019 passed in Review Application (MD) No.75 of 2018 in W.P(MD).No.19696 of 2014.

PRAYER in W.A.(MD) No.331 of 2019 - Appeal filed under Clause 15 of the Letters Patent against the order dated 28.01.2019 passed in W.P (MD).No.24948 of 2018.

Prayer in REV.APLW(MD). 75 of 2018 :

Review Application filed under order 47 Rule 1 and 2 r/w 114 of Civil Procedure Code, praying to set aside the order dated 05.03.2018 in WP(MD) No.19696 of 2014.

Prayer in WP(MD). 19696 of 2014 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus, directing the 3rd respondent to appoint the petitioner as Village Assistant at Vijayankudi Revenue Village taking into account of the petitioner Employment seniority and other qualifications and in the light of the interview call letter dated 16.06.2014 issued by the 3rd respondent within the period that may be stipulated by this Honourable Court.

Prayer in WP(MD). 24948 of 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus, directing the respondents herein to consider petitioners candidates for the appointment to the post of Village Assistant of Vijayangudi Village Panchayat on the basis of the interview held on 23.06.2014 by considering his representation dated 19.09.2018 within the stipulated time.

For Appellants in  
W.A.(MD) No.281/2019  
and Respondents in  
W.A.(MD) No.331/2019

: Mr.Sricharan Rangarajan,  
Additional Advocate General,  
Assisted by  
Mrs.J.Padmavathi Devi,  
Special Government Pleader



For Appellant in  
W.A.(MD) No.331/2019

: Mr.T.Lajapathy Roy

For Respondents in  
W.A.(MD) No.281/2019

: Mr.M.Ajmal Khan,  
Senior Counsel  
for M/s. Ajmal Associates

Intervenor

: Mr.V.Lakshmi Narayanan  
Advocate

**COMMON JUDGMENT**

**The Hon'ble The Chief Justice**

The moot question that arises for consideration in this reference is whether upon a review petition being entertained in proceedings under Article 226 of the Constitution of India and the matter being reconsidered and the original order being retained, such an order is amenable to an appeal.

2. The questions referred by a Division Bench order of February 19, 2021 are, however, more elaborate and it is necessary that the incidental aspects on the periphery be also conclusively dealt with at this level. The questions of law referred to this Full Bench are as follows:

"(1) Is the appeal filed against the order of review maintainable sans a challenge to the order passed in the writ petition;

(2) Is the appeal maintainable when the earlier order was passed without going into the merits of the case giving liberty to file a review;

(3) If the appeal is maintainable, what is the scope and ambit, meaning thereby the issue, which is dealt with by the learned Single Judge in the writ petition can be gone into or not.

(4) Whether the order passed in the review petition would amount to deemed merger of the order passed in the writ petition.

(5) Is the review maintainable in a case, where the appeal filed against the order of the learned single Judge is dismissed and therefore, the order in the writ petition stands. If so, what is the scope of the review petition and appeal.



(6) Is a review of a judgment of the learned Judge akin to a review under the Code of Civil Procedure.

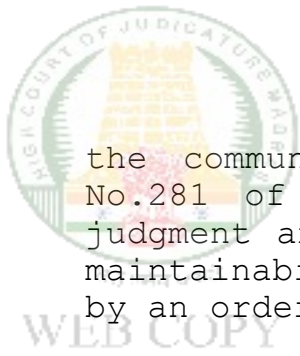
(7) Is a decision rendered in a review on a new issue can be stated to be appealable as against the re-agitation of the same issue.

(8) Whether the issue of principle of res judicata would apply, when an issue was not considered and decided by the learned single Judge and in which case, the review decided by him would be appealable or not."

3. It is necessary to recount the facts as the law is never discussed in vacuum but always against the backdrop of the facts of the case. In May, 2014, the Tahsildar, Ilayangudi, requested the District Employment Officer to sponsor eligible candidates for the post of Village Assistant for three revenue villages in Ilayangudi Taluk. An interview call letter was addressed to the writ petitioner by the Tahsildar on June 16, 2014. The interview was scheduled to be held on June 23, 2014 and was duly held. By a letter of October 15, 2014 the writ petitioner requested the District Collector to appoint the writ petitioner at Vijayangudi village. Around the same time, one Jaya Lakshmi was appointed as Village Assistant in Aranaiyur village. In November, 2014, the writ petitioner instituted W.P. (MD).No.19696 of 2014 seeking appointment as Village Assistant in Vijayangudi village. By an order dated March 5, 2018 the writ petition was allowed on three principal grounds: that the writ petitioner was the only eligible candidates for Vijayangudi village; that interview had been conducted on June 23, 2014; and, the post remained vacant as Jaya Lakshmi had been appointed elsewhere. Consequently, the Tahsildar, Ilayangudi was directed to appoint the writ petitioner as Village Assistant in Vijayangudi village.

4. In April, 2018 the official respondents to the writ petition preferred an appeal on the ground that the post had not been filled up since the communal roster had not been followed; and, if the communal roster had to be implemented, the writ petitioner would not be eligible. It was also asserted that there were other eligible candidates called for the interview. Since the grounds urged in appeal were found not to have been canvassed before the Single Bench, the writ appeal was disposed of with liberty to the appellants to carry a review before the Single Bench as the grounds on which the appeal was preferred had not been disclosed by way of any affidavit prior to the writ petition being allowed.

5. Accordingly, Review Application (MD) No.75 of 2018 came to be filed in December, 2018. By a judgment and order of January 2, 2019, the Single Bench considered the matter on review and dismissed the same. It was, *inter alia*, held in course of such exercise that



the communal mis-match could be rectified in future. W.A. (MD) No.281 of 2019 came to be filed by the appellants against the judgment and order of January 2, 2019. Upon an objection as to the maintainability of the appeal being raised, the reference was made by an order of February 19, 2021 as noticed above.

6. It is now necessary to delve into the order impugned dated January 2, 2019. The Single Bench recorded that the writ petitioner participated in the interview for the post of Village Assistant in June, 2014 and followed it up by instituting a petition under Article 226 of the Constitution in 2014 that was allowed by an order of March 5, 2018, against which an appeal was preferred but the appeal was "dismissed ... by giving liberty to the appellants therein to file a review application."

7. At paragraph 3 of the impugned judgment and order of January 2, 2019, the Single Bench recorded that the post in question had been earmarked for "General Turn - Destitute Widow - Non-priority" and the writ petitioner did not belong to such category. However, the Single Bench held as follows thereafter:

"4. I am unable to accept the aforesaid stand of the learned Additional Government Pleader appearing for the review applicants. It is true that this review application has been filed in terms of the liberty given by the Hon'ble Division Bench, but then, the only concession given by the Hon'ble Division Bench was that the review applicant need not file any condone delay petition. This Court cannot ignore the settled principles underlying Order 47 of C.P.C. The review applicants have filed a typed set of papers. In page-1 of the typed set of papers, communication dated 09.05.2014, issued by the Tahsildar, has been enclosed. The Tahsildar has categorically stated that the post in question will fall under MBC (GL) Non-priority category. That is why, the employment exchange sponsored the writ petitioner Udayappan. Even though the learned Additional Government Pleader brought to my notice that subsequently, the very same Tahsildar, while calling upon the employment exchange, to sponsor the candidates, had indicated that the post in question for Vijayangudi would fall under "General Turn - Destitute Widow - Non-priority category. But then, as rightly pointed out by the learned Senior Counsel appearing for the respondent herein, in the press release given by the employment exchange, the post in question had been once again mentioned as falling under MBC (General) Non-priority category.

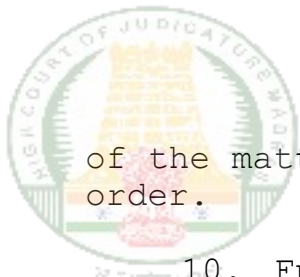


"5. The writ petition was filed way back in the year 2014. It was taken up only in March 2018. The matter that has now been made the ground for review, was very much within the knowledge of the authorities. It is not a case, as if, even after the exercise of due diligence, it could not be produced at that time, when the order was made. Therefore, the order passed by this Court cannot be said to be suffering on account of mistake apparent on the face of record. Before the Hon'ble Division Bench, it was specifically contended that the earlier interview was cancelled on the ground that the roster was not followed. This Court called upon the learned Additional Government Pleader to produce the proceedings, by which, the earlier interview was cancelled. The learned Additional Government Pleader instructed by an official could only produce a communication whereby on the advice of the District Collector, further process in the matter was put on hold. There is nothing on record to indicate that the earlier interview was cancelled.

"6. The parameters required for maintaining the review application are clearly not satisfied in this case. The review application cannot be treated as an appeal in disguise. If the roster was not (*sic*) disturbed, it is always open to the authorities to set right the same at the time of next recruitment."

8. Ordinarily, review petitions are dealt with in a rolled-up manner by taking up the grounds of review and dealing with both the grounds of review and the merits of the matter in the same breath. Oftentimes, as in this present case, it may not be clearly discernible as to whether the Court has rejected the review petition on the ground that the reasons preferred for seeking review were unworthy or that upon reviewing the matter by taking into account fresh material, there was no scope to alter the result or modify or reverse the original order.

9. Generally, upon a review petition being filed there are three possibilities. First, the review petition may be rejected *in limine*, so to say, upon the grounds urged for review being found to be unmeritorious. In the second scenario, the grounds may be found to be worthy for the matter to be reconsidered, whereupon the matter is taken up for reconsideration immediately or such reconsideration postponed to a future date after taking on record the new material which is sought to be relied upon. After reconsidering the matter by taking into account the new material cited, the Court may maintain the previous order. The third scenario is when, upon reconsideration



of the matter, the Court varies or modifies or reverses the original order.

10. Fundamentally, when the Court entertains the grounds for review and decides to reconsider the matter, the finality of the original order is lost and the matter becomes *sub judice* once again. If the Court entertains the review petition and postpones the reconsideration to a future date, the original order does not vanish but, in effect, it remains in suspended animation. If, upon reconsideration, the original order is maintained, the same revives; or, if the original order is reversed, the same stands eclipsed and substituted by the order of reversal. It is equally possible that the original order is modified or tweaked to a certain extent, where again the original order stands eclipsed and replaced by the later order.

11. Several grounds of objection as to the maintainability of the appeal in the present situation have been urged on behalf of the writ petitioner. According to the writ petitioner, the review petition has to be seen to have been instituted under Section 114 of the Code of Civil Procedure, 1908 read with Order XLVII thereof and the review petition was so intituled. The writ petitioner asserts that since the order impugned in the present case maintained the original order without interfering therewith, it is the original order which stands. The writ petitioner maintains that since the appeal against the original order dated March 5, 2018 has been dismissed by an appellate order of September 5, 2018, albeit such order affording the present appellants the liberty to prefer a review from the original order, a second round of appeal against the same order is inconceivable.

12. At any rate, the writ petitioner says that the order impugned in the present case is not one covered by Order XLIII Rule 1 of the Code and, in any event, the appeal is expressly prohibited by Order XLVII Rule 7 of the Code.

13. The writ petitioner has relied on several judgments to emphasise that the appeal is not maintainable. A judgment reported at (2012) 6 SCC 782 (*DSR Steel v. State of Rajasthan*) is first cited to assert that the present appeal is governed by the third scenario illustrated therein: when a review is dismissed simpliciter without altering the original order, no appeal lies therefrom. The judgments reported at (2016) 4 SCC 696 (*Bussa Overseas & Properties v. Union of India*); (2020) 9 SCC 815 (*Municipal Corporation of Delhi v. Yashwant Singh Negi*); and (2012) 12 SCC 378 (*Vinod Kapoor v. State of Goa*) have been brought for the perceived comparable situation covered by the dictum that when a previous special leave petition was withdrawn before the Supreme Court with liberty to apply for review of the order against which the special leave petition was



carried, the subsequent special leave petition against the original order was not maintainable upon the review petition being dismissed by the High Court on the ground that two special leave petitions from the same order could not be entertained. A more recent judgment reported at (2020) 9 SCC 92 (*T.K.David v. Kuruppampady Service Co-op. Bank Ltd.*) has also been placed for similar effect along with a judgment reported at (2006) 8 SCC 555 (*Kumaran Silks Trades (P) Ltd. v. Devendra*). Finally, the writ petitioner has relied on a Constitution Bench judgment reported at (2004) 11 SCC 672 (*R.Sathappan v. Andhra Bank Limited*) rendered in the context of Section 104(2) of the Code to contend that the analogy would hold good in the present context.

14. In *DSR Steel*, the matters before the Supreme Court were appeals under Section 125 of the Electricity Act, 2003 which are maintainable before the Supreme Court only on the grounds specified in Section 100 of the Code. Paragraph 24 of the report indicates the question that was addressed by the Supreme Court in that case: "whether an order passed by the Tribunal in appeal merges with an order by which the Tribunal has dismissed the application for review of the said order ..." and, in such context, paragraph 25 of the report has been relied upon by the writ petitioner:

"25. Different situations may arise in relation to review petitions filed before a Court or Tribunal.

"25.1. One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the review petition.

"25.2. The second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for purposes of a further appeal, if any, maintainable under law.



"25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition."

15. With respect, there appears to be some anomaly in the last sentence in paragraph 25.2 quoted above. What such sentence implies is that the modified or reversed decree would be appellable if an appeal in the original situation is provided for. Such sentence cannot be read to imply that the original order, which has been vacated or reversed or modified upon hearing the review petition, is amenable to appeal. Such a construction would lead to an absurdity since the original order is eclipsed as a result of it being vacated or reversed or modified. However, what is of relevance for the present discussion is the first of the three situations envisaged by the Supreme Court in that case: a scenario where the matter is reheard and a fresh decree or order is passed. Such a scenario must be juxtaposed against the third situation enumerated in the judgment: where the review petition is simply dismissed. Though the result is the same in both cases, in the situation where the matter is reconsidered, the considerations for passing the second order are different; whereas, in the other case, the considerations do not change. This distinction, despite the effect of both the situations being the same, is the key.

16. In *Bussa Overseas and Properties*, the Supreme Court observed that when a prayer for review is dismissed, the original order does not merge in the order of dismissal of the review. The writ petitioner here seeks to rely on paragraph 29 of the report in an attempt to give it a twist that cannot be seen to be the implication or the dictum rendered by the Supreme Court:

"29. Needless to state that when the prayer for review is dismissed, there can be no merger. If the order



passed in review recalls the main order and a different order is passed, definitely the main order does not exist. In that event, there is no need to challenge the main order, for it is the order in review that affects the aggrieved party."

The writ petitioner in this case seeks to establish that the very dismissal of the review petition, irrespective of whether it is without considering the grounds of review or upon reconsideration on the basis of the additional material carried to the Court, precludes an appeal from the resultant order. Clearly, the *ratio decidendi* in that case does not lay down such proposition.

17. In *Vinod Kapoor*, the special leave petitioner before the Supreme Court had challenged an order of the High Court in a previous special leave petition, but had withdrawn the same. The Supreme Court reasoned that since the special leave petitioner before it had withdrawn the previous special leave petition against an order with only liberty to pursue his remedy by way of review before the High Court and without obtaining any liberty from the Supreme Court to challenge the same order "afresh by way of special leave petition in case he did not get relief in the review application, he is precluded from challenging the order ... by way of special leave to appeal under Article 136 of the Constitution."

18. The *DSR Steel* dictum was followed in the judgment of *Yashwant Singh Negi* in a scenario where the High Court had refused to entertain the review petition and had dismissed the same.

19. In *T.K. David*, a High Court judgment was initially questioned by the petitioner before the Supreme Court by way of a special leave petition which was dismissed. Such party thereafter sought a review of the High Court order. Upon the rejection of the review petition, the original order was sought to be assailed afresh by way of a subsequent special leave petition. The Supreme Court held, in such context, that the subsequent special leave petition was not maintainable since an earlier special leave petition directed against the same order had been dismissed.

20. In *Kumaran Silks Traders*, the first of the petitions for special leave to appeal was against an order of the High Court refusing to review its earlier decision. The Supreme Court refused to entertain the matter in view of the bar as recognised in Order XLVII Rule 7 of the Code. Though it may not be relevant in the present context, but the judgment in *Bussa Overseas* clarified that merely a bar under Order XLVII Rule 7 of the Code could not curtail the plenary jurisdiction of the Supreme Court under Article 136 of the Constitution, but the dictum as to such bar must be confined to a scenario where the original judgment is not assailed, but the rejection of the review is assailed and, in such a case, the Supreme



Court "is obliged not to entertain such special leave petition".

21. In *Sathappan*, it was held that the Letters Patent being a subordinate legislation had the force of law but was subject to any Act of Parliament. Such a finding was rendered in the context of Section 104(2) of the Code that prohibits a further appeal from an appeal already preferred under Section 104(1) of the Code. However, the Supreme Court did not interfere with the independent avenue of appeal under the Letters Patent despite Section 104 of the Code not expressly providing for an appeal. Indeed, Section 104 of the Code preserves the right of appeal under the Letters Patent in the use of the expression "and save as otherwise expressly provided in the body of this Code or by any law for the time being in force".

22. In other words, Parliament by legislation may curb the right of appeal in certain situations where orders may previously have been amenable to an appeal, but unless it expressly prohibits a class of appeals, appeals which are founded exclusively on Clause 15 of the Letters Patent continue to remain maintainable. An example may be taken by referring to Section 13 of the Commercial Courts Act, 2015 where the right of appeal in commercial matters has been confined to the right as conferred by the Code and the additional avenue of appeal under the Letters Patent has been blocked.

23. In support of the appeal, the Full Bench judgments of the Andhra Pradesh High Court reported at (1992) 3 ALT 1 (*M.Srinivas v. Jawaharlal Nehru Technological University, Hyderabad*) and (2002) 5 ALT 103 (*B.F. Pushpaleela Devi v. State Of A.P*) have been placed to suggest that the right of appeal under Clause 15 of the Letters Patent remains if the order impugned can be regarded as a judgment within the meaning of the word used in such provision as understood in the context of a century of case-law thereon, culminating in the synthesis of such meaning in the judgment rendered at (1981) 4 SCC 8 (*Shah Babulal Khimji v. Jayaben D. Kania*). In addition, the old judgments reported at (1882-83) 10 IA 4 (*Hurrish Chunder Chowdry v. Kali Sundari Debia*) and at (1912) 35 MAD 1 (*T.V.Tuljaram Row v. M.K.R.V.Alagappa Chettiar*) have been carried by the appellants to indicate how the word 'judgment' as appearing in Clause 15 of the Letters Patent has been interpreted to mean. For similar purpose, a more recent judgment reported at (2002) 3 LW 743 (*Jayaraman v. Kumaran & Ors.*) has been placed. A short, six-paragraph, order of the Supreme Court passed on February 17, 2011 has also been relied upon.

24. In *M.Srinivas*, the question arose whether the order of a Single Bench refusing to review an order of dismissal of a writ petition was a judgment within the meaning of Clause 15 of the Letters Patent and an appeal thereagainst was maintainable notwithstanding Order XLVII Rule 7 of the Code. In the context of



the writ rules of the Andhra Pradesh High Court specifying that the provisions of the Code would apply to writ petitions and writ appeals insofar as they were not inconsistent with the writ rules, a three-Judge Bench of that Court held that when an order refusing to review amounted to a judgment within the meaning of Clause 15 of the Letters Patent, the bar under Order XLVII Rule 1 of the Code would not stand in the way.

25. A more elaborate discussion on the aspect is found in the later five-Judge Full Bench judgment of the Andhra Pradesh High Court in *Pushpaleela Devi*. The first paragraph of the report sets out the legal issue that fell for consideration: "Whether an appeal under Clause 15 of the Letters Patent filed against an order passed by learned single Judge in a review petition declining to review the order is maintainable ...". The Full Bench referred to the full complement of cases ranging from the celebrated case reported at (1872) 8 Beng. LR 433 (*The Justices of the Peace for Calcutta v. The Oriental Gas Company*) to the cases of *Hurkish Chunder Chowdry*; *T.V. Tuljaram Row* and settling with the dictum in *Shah Babulal Khimji*. After quoting the much-noticed interpretation of what the word 'judgment' in Clause 15 of the Letters Patent means from *The Justices of Peace for Calcutta* case, it also referred to the efficacy tests as formulated in *T.V. Tuljaram Row*. It is inconceivable to not quote the exact words from the two celebrated judgments that have held the field for well over a century and more:

"We think that 'judgment' in Clause 15 of the Letters Patent means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole case or suit, a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

(*The Justices of Peace for Calcutta v. Oriental Gas Company*)

"The test seems to mean to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If it effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or the proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if it effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication of an application which is nothing more than step towards obtaining a final adjudication in the



suit is not, in my opinion, a judgment within the meaning of the Letter Patent."

(*T.V.Tuljaram Row v. M.K.R.V.Alagappa Chettiar*)

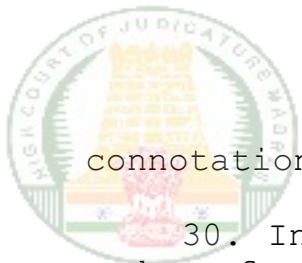
26. The *ratio decidendi* in *Pushpaleela Devi*, as far as it is applicable to the present case, is evident from the following passage in paragraph 54 of the report:

"54. .... In our opinion the order of the Court rejecting the application (*for review*) shall not be appealable but an order granting the application may be objected to at once by an appeal from the order granting the application. When the Court rejected the application and refused to order the party may still has (*sic*) have a remedy to appeal against the original order. At the same time, an order granting an application would amount to determining the rights of the parties and, therefore, in our opinion, the same is appealable. In other words, no appeal lies under the Code from an order rejecting an application for review unless it is qualified to be a 'Judgment' as per the tests laid down in *Khimji's* case ..."

27. On facts, however, the order impugned in that case was found not to be appellable as the Single Judge "found no error apparent on the face of the record or any clerical mistake warranting review of the order." It was held that such an order would not amount to a judgment and "the only remedy available to the appellant is to appeal against the original order in accordance with law."

28. The authoritative pronouncement on appellability pertaining to interlocutory orders in *Khimji* rendered the word 'judgment' to be wider than the constricted meaning given to it in *The Justices of the Peace for Calcutta* and narrower than the expansive meaning given to it in *T.V.Tuljaram Row*. At paragraph 120 of the report, some principles which would guide a Division Bench while deciding an intra-court appeal were laid down as illustrative and not exhaustive. However, paragraph 125 of the report reveals that *Khimji* did not express any opinion on the issue of appellability pertaining to petitions under Article 226 of the Constitution.

29. In *Hurrish Chunder Chowdry*, a rather wide meaning was given by the Privy Council to what would amount to a judgment in observing that whether or not an order was passed in any ministerial proceeding, "if a judicial discretion is exercised thereunder, it may amount to a judgment ... so that an appeal will lie. If in such exercise of judicial discretion a Judge usurps jurisdiction that alone would be a valid ground of appeal". However, such a protracted



connotation has now been tempered by the dictum in *Khimji*.

30. In *Jayaraman*, a Division Bench of this Court found that an order of remand was a judgment within the meaning of Clause 15 of the Letters Patent. However, that view was taken upon discovering that the matter had not been remitted without giving any finding but "at least in two places, the learned single Judge gave a finding, which certainly touches what is called the merits of controversy."

31. The appellants have placed considerable reliance on an order dated February 17, 2011 passed by the Supreme Court in Civil Appeal No.44 of 2007 (*Khaja Sheriff v. BHEL, Hyderabad*). The first three paragraphs of the order may be relevant for the present purpose:

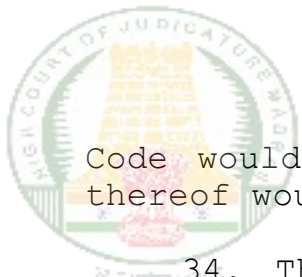
"The short question which arises for consideration in this appeal is that in view of the judgment of the Andhra Pradesh High Court in *B.F.Pushpaleela Devi v. State of Andhra Pradesh, Education Dept. and Ors* (2002) 5 ALT 103 LB, the writ appeal is maintainable or not."

"Learned Counsel for the appellants has drawn our attention to paragraph 53 of the aforesaid judgment in which it is mentioned that "if the order has redetermined the valuable rights of the parties to the proceedings, whether without issuing any notice or after issuing any notice, it is a judgment as per the tests laid down in *Khimji's* case".

"In the present case, the learned single Judge by an elaborate judgment has dismissed the review petition. Therefore, against the said order, the writ appeal was maintainable and the High Court ought to have given a reasoned order. In this view of the matter, we set aside the impugned judgment and remit the matter to the High Court to decide the writ appeal in accordance with law."

32. On behalf of the appellants, the judgment in *DSR Steel* has been relied upon as, according to the appellants, the present case is covered by the first scenario indicated at paragraph 25.1 of the reported case. The appellants have also referred, in passing, to Section 4(1) of the Code and to Article 372 of the Constitution.

33. The essence of the submission on behalf of the appellants is that the right of review may be inherent in a High Court and for such right the Code need not be brought into play. The corollary to such argument is that it is the character of the order impugned, as to whether it can be regarded as a judgment within the meaning of Clause 15 of the Letters Patent, that will be the only relevant consideration in assessing whether it is appellable; and, since the



Code would not apply, the perceived bar under Order XLVII Rule 7 thereof would also have no manner of application.

34. The alternative argument on behalf of the appellants is that even if the authority to carry a review against the order passed in the writ jurisdiction has to be traced to the Code and Section 114 and Order XLVII thereof, once a review is entertained in the sense that the Court seeks to address the merits of the matter on the basis of the additional materials cited or the further grounds urged, the resultant order, even if it is not a departure from the original order, is amenable to an appeal if an appeal lay from the original order itself.

35. Mr.V.Lakshmi Narayanan, Advocate has been permitted to intervene at his request to contribute to the discussion on the important aspect that falls for consideration in the reference. According to him, the larger Bench decisions of the Andhra Pradesh High Court are of no relevance in the present context since the rules of that High Court expressly incorporated the application of the Code to proceedings under Article 226 of the Constitution; whereas the rules of this Court applicable to writ petitions do not so provide. Counsel refers to the recent rules pertaining to writ petitions published by this Court in 2013, but which have been kept in abeyance.

36. Counsel next draws the Court's attention to Section 141 of the Code and the Explanation thereto. It is necessary to see Section 141 of the Code in its entirety.

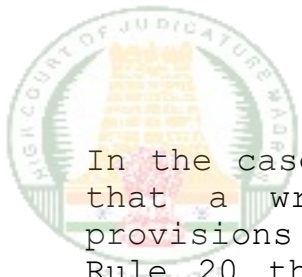
**"141. Miscellaneous Proceedings:-** The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

*Explanation.-*In this section, the expression

"proceedings" includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution."

37. Counsel claims that the Royal Charter of 1865 has been preserved by the Constitution and Clause 7 of the Letters Patent of 1865 as applicable to this Court would reveal that this Court was conferred the same powers as the King's Bench, which was inherently a court of record. Counsel contends that, as a result, this Court has always been regarded as a court of record and it inheres in every court of record to review its orders.

38. Counsel refers first, to a Division Bench judgment of this Court reported at (2007) 2 LW 919 (*Villupuram Market Committee v. K.Sekar*) and, next, to a Full Bench judgment of the Calcutta High Court reported at AIR 1999 Cal 29 (*Ratanlal Nahata v. Nandita Bose*).



In the case of *Villupuram Market Committee*, the Division Bench held that a writ petitioner could not be permitted to invoke the provisions of the Code to maintain a cross-objection under Order XLI Rule 20 thereof since the Code "is wholly inapplicable to such a writ appeal." The Bench also observed that even though an appeal under Clause 15 of the Letters Patent had to be regarded as an appeal, "the Appellate remedy as against (an order passed under Article 226 of the Constitution) is nothing, but continuation of the very Constitutional remedy, which was available to the writ petitioner under Article 226 of the Constitution ... (and that) ... an appeal before the Division Bench as provided under Clause 15 of the Letters Patent cannot be held to be an independent proceedings of the remedy, which was invoked by the writ petitioner under Article 226 ..."

39. In the five-Judge Bench decision of the Calcutta High Court in *Ratanlal Nahata*, the Court read into Article 226 itself an implied power of review in view of the plenary authority that such provision conferred upon a High Court. The following passage from paragraph 58 of the report is of significance:

"58. However, Article 226 of the Constitution of India having conferred a plenary power upon the High Court to exercise its jurisdiction thereunder, a power of review is implied in the said provision itself..."

40. The Full Bench of the Calcutta High Court went on to notice the dictum in a judgment reported at (1963) SC 1909 (*Shivdeo Singh v. State of Punjab*), where the Supreme Court held that "there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it."

41. In the light of the erudite assistance rendered on all sides, the matter may be seen at three levels: whether, in the absence of the express incorporation of the provisions of the Code to petitions under Article 226 of the Constitution in this High Court, there exists a power of review; whether the substantial provisions in the Code, as juxtaposed to the procedural requirements, may apply to proceedings under Article 226 of the Constitution; and, whether, in any event, an order entertaining a review petition and reconsidering the matter on merits but leaving the original order unaltered would give rise to an independent cause of action to appeal.

42. There can be no doubt that the exercise of the jurisdiction under Article 226 is of the widest import. Even though the remedy under Article 226 is, ordinarily, regarded as a public law remedy, in extraordinary situations such provision may be invoked to address



any injustice subject to territorial considerations.

43. Further, Article 215 of the Constitution makes every High Court a court of record and recognises that a High Court shall have all the powers as a court of record, including the power to punish for contempt of itself. Article 225 of the Constitution preserves the authority of the existing High Courts at the time of the commencement of the Constitution, except in such manner as is expressly restricted.

44. Historically, Chartered High Courts have always been regarded as courts of record. In addition, the *suprema lex* confers such recognition of High Courts being courts of record and it is elementary that it inheres in a court of record to review its orders, if only to preserve the purity of its records and to prevent miscarriage of justice and correct palpable errors.

45. Like an appeal, which is a creature of statute, the power to review does not inhere in any adjudicatory body unless it is conferred or it has historically enjoyed the same and the history in such regard is preserved. Since both the history pertaining to this Court and the recognition conferred by the Article 215 of the Constitution permit this Court to be regarded as a court of record, the power of review comes along with it. In addition, the authority to review orders passed under Article 226 of the Constitution may be found in such constitutional provision itself.

46. It must also be noticed that the Civil Procedure Code is not merely a handbook of procedure. It has substantive provisions and covers procedural aspects also. The right of appeal is a substantive provision just as a right of review is also a substantive provision. There are other substantive provisions which deal with matters of public policy like *res judicata* and the finality of judgments. To the extent that the Code contains substantive provisions and captures principles of public policy that have universal application, the Code cannot be seen or said to be merely procedural. The substantive provisions of the Code would have universal application and may apply, even without reference by express incorporation to proceedings under Article 226 of the Constitution. Section 141 of the Code refers to the "procedure provided in this Code" and the Explanation must be understood in such context as being applicable to the procedure and the procedural aspects not being extended to matters under Article 226 of the Constitution. Section 141 of the Code cannot be read or understood to imply that the substantive provisions of the Code or the matters of public policy incorporated therein would have no manner of application to proceedings under Article 226 of the Constitution.



47. Thus, even it is accepted that nothing in the Code applies to proceedings under Article 226 of the Constitution, the power of review has to be traced to both the plenary jurisdiction conferred by the Article 226 of the Constitution and the status of High Courts as courts of record as recognised in Article 215 thereof.

48. That is, of course, only the first aspect of the matter: that a review would lie against an order passed in proceedings under Article 226 of the Constitution. It is entirely a different kettle of fish as to how and whether an appeal would lie from an order made on a petition for review. Here again, as the authoritative precedents instruct, it is the nature of the order that determines whether it would be appellable or not. Upon a review of an order being sought, if the review is declined by observing that no ground for review has been made out and if the merits of the matter are not re-addressed, such an order cannot, ordinarily, be regarded as a judgment within the meaning of Clause 15 of the Letters Patent and the right of appeal has to be traced to the original order; the subsequent order being of no relevance in such context.

49. A word of caution needs to be added at this stage so that this judgment is not read to imply that when a prayer for review is altogether declined, such order would invariably not be appellable. It is possible that even an order of rejection to entertain the review may be construed as a judgment within the meaning of Clause 15 of the Letters Patent and an appeal maintained against the same.

50. The matter may be appreciated with an illustration. Say, an order is made on the basis of an admission as discerned from the relevant documents. A generic letter from the perceived debtor requesting all creditors to grant sufficient time to such debtor to repay its debts, when read in the context of a notice of demand detailing the debt due, may be construed as an admission of the indebtedness. However, if there are previous letters exchanged between the perceived debtor and the apparent creditor where the claim has been disputed on cogent grounds but such documents are inadvertently not produced or relied upon at the time of adjudication, a subsequent review petition may be filed to bring the necessary documents on record. If such documents are not looked into and the review petition not entertained altogether, the order of refusal may amount to a judgment capable of being appealed against. Thus, while the proposition will generally hold good that when a review is not entertained and the new material urged to be looked into are not looked at, such order of refusal may not be appellable; it cannot be an axiomatic proposition as, in an exceptional case, even such an order of refusal may be perceived as a judgment and, therefore, being amenable to an appeal.



51. But when the grounds of review are given credence and the matter is taken up for reconsideration, the resultant order will be appellable if the original order was amenable to an appeal. In other words, if an appeal lay from the original order, then the order passed upon review, whether maintaining the original order or tweaking it or reversing it, will also be appellable. This is because the nature of assessment involved in an appeal pertains not only to the order but also to the considerations that go into the making of the order impugned. When fresh material is entertained to reconsider the matter, the original considerations and the grounds indicated in support of the original order lose all meaning and significance and the subsequent order with the grounds in support thereof are what need to be assessed in appeal. Thus, upon a review being entertained, whether or not the original order is maintained or reversed or modified upon reconsideration of the matter, the resultant order has to be regarded as a judgment within the meaning of Clause 15 of the Letters Patent in matters under Article 226 of the Constitution. Such resultant orders would be appellable.

52. Section 114 and Order XLVIII of the Code are seen to be substantive provisions of universal application in civil matters that would apply to proceedings under Article 226 of the Constitution and, irrespective of the Code's express incorporation in the Rules of the relevant High Court pertaining to writ petitions, the same principle will hold good. The confusion happens since the feature of assessing whether to entertain a review or not and the distinct act of reconsideration may often be rolled up in a solitary exercise. In such a case, it has to be assessed from the relevant order passed on the review petition whether the grounds of review were allowed in part or full and some extent of reconsideration of the original *lis* is involved in the assessment upon review. If any element of reconsideration is evident from the order, it eclipses the original order and the assessment preceding it and supplants the original order and the considerations for making the original order.

53. The easiest scenario is when an order is modified or reversed upon review. An appeal obviously lies therefrom since the original order is no longer in place and has been substituted by the subsequent order.

54. There is no doubt that Order XLIII Rule 1 of the Code does not expressly confer a right of appeal consequent upon the same order being maintained after entertaining a review in respect thereof. Sub-rule (w) of Rule 1 of Order XLIII of the Code permits, in express terms, an order under Rule 4 of Order XLVII to be carried in appeal. The description of the nature of the order in the relevant sub-rule is "granting an application for review." Such expression, "granting an application for review" or the word



"granting" contained therein must not be understood as allowing an application for review by reversing the original order or modifying it. The word "granting" must be seen to imply the review being entertained for reconsideration of the matter and not the ultimate result of such reconsideration. Such interpretation is supported by Order XLVII Rule 7(1) of the Code and, more so, by Order XLVII Rule 8 thereof. The relevant provisions read as follows:

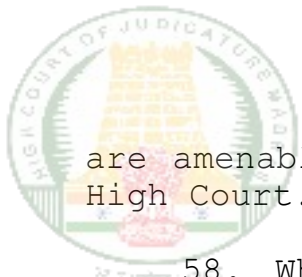
**"7. Order of rejection not appealable, Objections to order granting application.-** (1) An order of the Court rejecting the application shall not be appealable; but an order granting the application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit. ..."

**"8. Registry of application granted, and order for re-hearing. -** When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit."

55. The expression "order granting the application may be objected to at once by an appeal" conceives of a situation where the beneficiary of the original order is permitted a right of appeal merely by virtue of the Court having agreed to reconsider the matter. Such a party does not have to wait for the result of the reconsideration and may appeal against the very order to reconsider. The scope of such an appeal would be very limited and, per force, restricted to the grounds of review. The only consideration in the appeal would be whether the grounds for review were good enough for the order of reconsideration to be made. Oftentimes, such right is lost since the Court, even after agreeing to reconsider the matter, proceeds to reconsider the matter in the same breath and pronounces a combined order.

56. The two-stage process involved in a review is brought out succinctly by Order XLVII Rule 8 of the Code. Since the Court may re-hear the case or adjourn the re-hearing, it follows that there are two stages of assessment in a review: whether to entertain the grounds and decide to re-hear the matter; and, the consequent re-hearing, if the review is entertained.

57. The view expressed here is also in larger public interest and to avoid the manifest miscarriage of justice. When an order governed by the Code is not appellable, a revision may lie therefrom if the conditions under Section 115 of the Code are fulfilled; if not, a petition under Article 227 of the Constitution may be carried to the High Court to correct the perceived error. Thus, there is a safety net that would cover all orders that are not appellable but



are amenable to correction otherwise, at least at the level of the High Court.

58. When an order emanates in the High Court itself and no intra-court appeal is provided therefor, such an order may only have to be challenged before the Supreme Court. This is not an efficacious remedy in all cases as it may not be convenient to the aggrieved party to pursue such remedy. It is for such purpose that the provision for an intra-court appeal must be liberally construed for a correction mechanism to be provided within the High Court itself and to the extent the law permits.

59. It must also not be lost sight of that even Order XLVII Rule 1 of the Code has a residuary ground in its use of the expression "or for any other sufficient reason". Since the object of the exercise is to prevent a miscarriage of justice, the provisions are left open-ended as there could be myriad situations beyond imagination that may require the remedy. If only to prevent the manifest miscarriage of justice, it cannot be laid down as an absolute proposition that even if a court refuses to entertain the review petition and dismisses it *in limine*, no appeal therefrom would be permissible. To repeat, even such an order of refusal would be appellable if the order amounts to a judgment within the meaning of Clause 15 of the Letters Patent.

60. It is now left for the final conclusions to be recorded and for the questions of law referred to this Full Bench to be answered. The conclusions herein may be summarised thus:

(i) A petition for review of an order passed in proceedings under Article 226 of the Constitution would lie irrespective of whether the provisions of the Code have been made applicable in a High Court to proceedings in such High Court under Article 226 of the Constitution.

(ii) An appeal would lie against an order passed in a review of the order under Article 226 of the Constitution, even if the original order is retained, once the review petition is entertained and the additional material or grounds that are referred to or urged are considered or a further consideration on merits is evident from the order. In such a scenario, the original order, albeit being retained in substance, is eclipsed by the subsequent order as the considerations for making the subsequent order may be different.



(iii) An appeal against an order passed in a review petition in proceedings under Article 226 of the Constitution will lie if the original order is altered or modified or reversed. In such a scenario, the original order would stand substituted and lose all relevance.

(iv) Ordinarily, an order refusing to entertain a review against an order passed under Article 226 of the Constitution and, thereby, not entertaining the further material sought or grounds to be relied upon or reconsidering the original basis of the order, would not be appellable.

(v) However, even if an order is passed refusing to entertain a review petition or look into the additional material or grounds sought to be relied upon or reconsidering the matter, an appeal may lie therefrom if such order of refusal can be regarded as a judgment within the meaning of Clause 15 of the Letters Patent.

(vi) All the above would hold good even if the provisions of the Code were to apply or were expressly made applicable to proceedings under Article 226 of the Constitution in this Court.

61. Apropos the legal questions referred to this Bench, the same are answered as follows:

(1) This question has already been answered elaborately in the immediate preceding paragraph.

(2) When an appeal is preferred against an order and the appellate court does not enter into the merits of the appeal but permits a review to be carried therefrom, it amounts to the appeal not having been filed. The mechanical recording of the disposal or dismissal of the appeal in the order is of no relevance and it is the substance of the order that has to be seen. As to whether an appeal would be maintainable against the order passed on the review petition has already been addressed in the immediate preceding paragraph.

(3) This question has also been substantially answered in the immediate preceding paragraph. It may also be clarified that when the review petition is dismissed *in limine* and without going into the grounds urged for review, the original order may be appealed against, subject to limitation, and the propriety of the original order may be decided in accordance with law.



(4) An order declining to entertain a review petition and refusing to reconsider the matter would leave the original order unaffected as the question of merger would not arise. An order entertaining the review petition but maintaining the original order after reconsideration of the matter would eclipse the original order and be amenable to appeal in its own steam. Similarly, an order altering or modifying or reversing the original order upon entertaining a review petition would amount to the original order being substituted by the subsequent order and the original order losing all meaning and force.

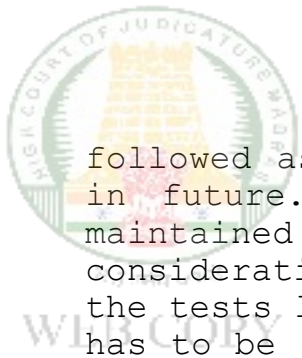
(5) When an order passed on a petition under Article 226 of the Constitution is appealed against and such appeal is dismissed, there is no scope for a review against the order of the Single Bench as the original order is merged in the order of affirmation in appeal.

(6) In proceedings under Article 226 of the Constitution in this Court as at present, the authority to seek a review of an order may not be traced to the Code as the provisions of the Code have not been made applicable to proceedings under Article 226 of the Constitution. Jurisprudentially, however, the power of review exercised in the writ jurisdiction would be substantially the same as under the Code.

(7) The question is substantially answered in the immediate preceding paragraph. To add, it may be said that when a new issue is considered upon the receipt of a review petition and the same order as in the original case is retained, the original order stands eclipsed and substituted by the new order since the considerations therefor are not the same. The resultant order, when passed in proceedings under Article 226 of the Constitution, is appellable.

(8) The principle of *res judicata* or constructive *res judicata* would, ordinarily, have no manner of application; and whether or not an appeal would lie would be governed by the rules enunciated in the immediate preceding paragraph.

62. In the present case, the new grounds urged in the review petition were taken into consideration in the course of the judgment and order rendered on January 2, 2019. Indeed, the Single Bench went on to observe that even though the communal roster would not be



followed as a consequence of the order, the malady may be remedied in future. Thus, it is evident that though the same order was maintained as originally passed on March 5, 2018, fresh considerations went into the subsequent assessment. In keeping with the tests laid down above, the judgment and order of January 2, 2019 has to be seen to be a fresh order which would replace the original order. Again, in tune with the principles enunciated above, such an order passed upon reconsideration of the matter would be appellable.

63. Accordingly, the merits of the appeal are taken up for consideration since the appeal against the impugned order of January 2, 2019 has been held to be maintainable.

64. There is no doubt that the appellant herein ought to have exercised a greater degree of diligence and referred to the appropriate material relevant for consideration when the writ petition was taken up originally on March 5, 2018. If such a course of action had been followed, the review would not have been necessary. However, once it was brought to the notice of the writ court that the writ petitioner was not eligible to be appointed as Village Assistant since the communal roster required otherwise, the writ court ought to have yielded to the requirements of the communal roster by, at best, ascertaining whether the requirements of the communal roster precluded the writ petitioner's appointment. Since there has been no argument on behalf of the writ petitioner that an erroneous or strained interpretation of the communal roster system has been sought to be given by the appellants to deny the post to the writ petitioner, it has to be accepted that the communal roster did not permit the writ petitioner to be engaged or appointed as Village Assistant since it was the turn of a member belonging to a community other than the one to which the petitioner belonged. When the communal roster rules do not permit an appointment, unless extraordinary grounds are urged, the writ court should adhere to the rules and not carve out an exception for the future arrangement of the communal roster to be thrown into disarray.

65. On merits, the judgment and order impugned dated January 2, 2019 cannot be sustained. As a consequence, the appeal, W.A. (MD) No.281 of 2019, is allowed and the judgment and order of January 2, 2019 stand set aside. W.P. (MD) No.19696 of 2014 is dismissed as a consequence. There will be no order as to costs. Connected C.M.P. No.2297 of 2019 is closed.

66. W.A. (MD) No. 331 of 2019 may have been erroneously referred to the Larger Bench as the two appeals may have been heard together before the relevant Division Bench. The legal issues in W.A. (MD) No.281 of 2019 do not arise in W.A. (MD) No.331 of 2019 though both matters pertain to the same post of Village Assistant in Vijayangudi village of Ilayangudi Taluk.



67. As a consequence, W.A. (MD) No.331 of 2019 is remitted back to the Division Bench now having jurisdiction to consider the appeal in accordance with law based on the findings rendered herein, particularly, the manner in which the other appeal has been disposed of on facts.

Sd/-

Assistant Registrar(T & P)

// True Copy //

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Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The District Collector,  
Collectorate Office, Sivagangai District.
- 2.The District Employment Officer,  
O/o. The District Employment Office,  
Sivagangai, Sivagangai District.
- 3.The Tahsildar,  
Ilayankudi Taluk, Sivagangai District.

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Common Judgment in  
W.A.(MD) Nos.281 and 331 of 2019  
17.03.2021

MJ(CO)

TR(25.03.2021) 25P 6C