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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2022

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THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

CIVIL MISCELLANEOUS APPEAL NOS.1143 AND 1144 OF 2017

AND

C.M.P.NOS.5658, 5659, 5660, 5661 & 7554 OF 2017

C.M.A.No.1143/2017:

R.Adhikesavalu

... Appellant/
Petitioner

Vs.

C.Krishna Kumar

...Respondent/
Respondent

C.M.A.No.1144/2017:

R.Adhikesavalu

... Appellant/
Respondent

Vs.

C.Krishna Kumar @ C.K.Kumar

...Respondent/
Petitioner

C.M.A. No.1143 of 2017:

The Civil Miscellaneous Appeal filed under Order 43, Rule 1 of CPC read with Section 47 of the Guardian and Wards Act, 1890, against the Judgment and Decree passed in G.W.O.P.No.1 of 2014, dated 17.02.2017, by the District Judge, Tiruvannamalai.

C.M.A. No.1144 of 2017:

The Civil Miscellaneous Appeal filed under Order 43, Rule 1 of CPC read with Section 47 of the Guardian and Wards Act, 1890, against the Judgment and Decree passed in G.W.O.P.No.7 of 2014, dated 17.02.2017, by the District Judge, Tiruvannamalai.



For Appellant :

Mr. S. Seenuvasan
in both the appeals

For Respondent :

Mr.S.Babu
in both the appeals

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COMMON JUDGMENT

Both the Civil Miscellaneous Appeals had been filed questioning the common judgment and decree dated 17.02.2017 passed in G.W.O.P.No.1 of 2014 and G.W.O.P.No.7 of 2014 by the District Court at Thiruvannamalai.

2. By the said Common Judgment and decree, the aforementioned District Court, Thiruvannamalai had allowed the G.W.O.P.No.7 of 2014 and had dismissed G.W.O.P.No. 1 of 2014.

3. Both G.W.O.P.No.1 of 2014 and G.W.O.P.No.7 of 2014 had been filed with respect to the custody of a minor child viz., Gowshik.

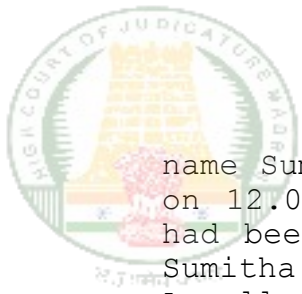
4. The petitioner in G.W.O.P.No.1 of 2014 is the maternal grand father of the minor child and the respondent is the father of the minor child.

5. The petitioner in G.W.O.P.No.7 of 2014 is the father of the minor child and the respondent is the maternal grand father of the minor child.

6. The mother of the minor child had unfortunately expired. The custody of the minor child is now the subject matter of a lis between the father and the maternal grand father. By a common judgment dated 17.02.2017, the custody of the minor child had been granted to the father. Questioning that findings, the maternal grand father had filed the present two Civil Miscellaneous Appeals.

G.W.O.P.No.1 of 2014:

(a) This petition has been filed by the maternal grand father under Section 12 of the Guardian and Wards Act, seeking to permit him to have the custody of the minor child. It had been very specifically stated that the child had been born through the respondent and the daughter of the petitioner by



name Sumitha. They had married on 20.02.2009. The child was born on 12.04.2011. It is claimed that the entire delivery expenses had been borne by the petitioner. It had been later found that Sumitha was suffering from Cancer and she was admitted to Appollo Hospital, Chennai. Substantial amounts had been spent towards her medical treatment and it is claimed that he had spent the money but the bills had been handed over to the respondent to seek medical reimbursement of the amounts spent. She was later discharged from the Appollo Hospital, Chennai during October 2012. She again suffered from discomfort, and was again admitted at Brain and Spine Hospital at Chennai during July 2013. She died in the hospital on 11.08.2013. It was claimed that the respondent came to the hospital only then. It was further claimed that the respondent never cared about the child. It had been further claimed that Sumitha had written a letter in her handwriting stating that the child should be handed over only to the petitioner or her elder sister and should not be handed over to the respondent. It had been stated that the child had been living with the petitioner and there had also been allegations that the respondent was interested only with the money. It was therefore stated that the custody of the minor child should be handed over to the petitioner.

(b) The respondent/father filed a counter denying all these allegations. He claimed that he had spent the money for the medical expenses of his wife Sumitha. It was also stated that he was taking care of the minor child. It was also stated that the petitioner was not profitably employed and was actually a retired pensioner and it would not be possible for him to look after the child. It was stated that since he was the natural guardian, custody of the child has to be handed over to him and it was therefore stated that the petition has to be dismissed.

G.W.O.P.No.7 of 2014:

(a) This petition has been filed by the father under Section 25 of the Guardian and Wards Act, seeking to put the minor child Gowshik in custody of the petitioner. In that petition, it had been stated that, he had married Sumitha/daughter of the respondent on 20.02.2009. A boy who was born on 12.04.2011. Unfortunately, his wife suffered from medical ailments, requiring long term treatment and it is claimed that the petitioner spent a sum of Rs.17 lakhs for her medical treatment. However, his wife unfortunately died due to advance stage of Brain Tumor and Cancer on 11.08.2013, leaving behind the petitioner and the minor child. It was stated that owing to the expenses involved in the treatment, the petitioner had incurred



debts and had go to Bangalore to get a better employment. It was stated that he was looking after his child. It was also stated that during "Mahalaya Amavasai" in 2013, he came to Chennai with his mother and the minor child in October to perform the rituals of his wife. At that time, the respondent informed that his elder daughter Sathya Priya had also come to Chennai and that she would like to take the child for a casual visit. However, the child which was taken was not brought back. He therefore filed H.C.P.No.3394 of 2013. The Division Bench of this Court had granted visitation rights. Whenever he went to visit the child, he was not received properly. He claimed that he alone was entitled for the custody of his son/minor Gowshik. He therefore sought such right by filing the petition.

(b) In the counter, the respondent/maternal grand father, however denied all the allegations. It was stated that this Court had granted visitation rights to the petitioner and stated that he can come to Thiruvannamalai to meet the child every Saturday and Sunday between 10.00 a.m., and 01.00 p.m., and that the arrangements will continue from 11.01.2014. It was stated that the petitioner and his mother visited the minor child only on 11.01.2014 and did not come after that particular date. It was stated that the child is studying in a school and it was also stated that arrangements have been made to give him proper education. It was also stated that he is possessed of properties. It was also stated that the petition should be dismissed.

7. The learned District Judge, Thiruvannamalai had taken up for consideration both G.W.O.P.No.1 of 2014 and G.W.O.P.No.7 of 2014 and the following points were framed for consideration:

(1) Whether the petitioner/Natural father of minor child is entitled for the custody of minor Gowshik as prayed for in G.W.O.P.No.7 of 2014?

(2) Whether the respondent/maternal grand father of minor child is entitled for the custody of minor Gowshik as prayed for in G.W.O.P.No.1 of 2014?

8. Both the parties were invited to graze the witness box and adduce evidence. The petitioner in G.W.O.P.No.7 of 2014/father of the minor child was examined as P.W.1 and he marked Exs.P1 to P7. Among the documents marked, Ex.P1 was the Marriage Invitation, dated 20.02.2009; Ex.P2 was the Medical Report and Medical Bills for the treatment of Sumitha; Ex.P3 dated 11.08.2013, was the Copy of Death Certificate of Sumitha; Ex.P4 dated 06.01.2014 was the Certified copy of order in H.C.P.No.3394 of 2013 and Ex.P6 and P7 were the Statement of Accounts relating to an account in savings account.



9. On the side of the respondent two witnesses were examined. R.W.1 was the maternal grand father and R.W.2 was the elder sister of Sumitha. They marked Exs.R1 to R.11. Ex.R1 was the Marriage Invitation Card; Ex.R4 dated 19.08.2012, was the Investigation Report of Apollo hospital, Chennai; EX.R5 was Death Summary of Sumitha issued by Brain and Spine Hospital, Chennai; Ex.R6 was a letter written by Sumitha.

10. On consideration of the pleadings, oral and documentary evidence, the learned District Judge, proceeded to determine both petitions and the points framed for consideration. The learned District Judge examined the documents and the entire evidence and had extracted the cross examination of RW1/maternal grand father who stated that he was earning a pension of Rs.714/- and had not produced any documentary evidence to prove his income. The learned District Judge also extracted the portion of the evidence of P.W.1, in which he had stated he had spent a sum of Rs.17 lakhs towards medical expenses of Sumitha and that owing to the debts incurred for Sumitha's treatment he had to go to Bangalore for better employment.

11. The learned Judge finally referred to the Judgment reported in 2008 (4) CTC 425 [Nil Ratan Kundu and another vs. Abhijit Kundu] wherein, it had been stated that while deciding the issue of appointment of a guardian, the Court is not bound by statutes or by strict rules of evidence or procedure or precedents. It was stated that the paramount consideration is the welfare and well being of the minor child.

12. I must however point out that the learned Judge had extracted only the head notes of the said Judgment and had not extracted the facts of the case or the ratio laid down. The head notes, as is well known had been prepared by the Editor of the journal and not a reflection of the Judgment. After that, the learned District Judge, had decided the custody of the child, holding as follows:

"In the light of the above said ruling, a perusal of records on hands, the Court decided on a considered view that the above said proposition of law laid down by the Hon'ble Supreme Court of India is also squarely applicable to the given case. Hence the Court decided on a considered view that the



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guardianship to the minor child Gowshik. The plea of the respondent was not at all acceptable one to the given case. Hence, it is decided that the guardianship of the child Gowshik be given to the petitioner namely Krishnakumar. Accordingly it is ordered."

13. Finally, after holding as above, the learned District Judge had allowed G.W.O.P.No.7 of 2014 and had appointed the father C.Krishnakumar, as guardian of the minor child.

14. In view of that particular order, the learned District Judge had dismissed G.W.O.P.No.1 of 2014 filed by the maternal grand father.

15. Questioning the reasons given in the Judgment, the present two appeals have been filed by the maternal grand father/the petitioner in G.W.O.P.No.1 of 2014 and respondent in G.W.OP.No.7 of 2014.

16. Heard arguments advanced by Mr.S.Seenuvasan, learned counsel for the appellant and Mr.Babu, learned counsel for the respondent for Mr.P.V.Sudhakaran.

17. When the appeals had come up for admission, the custody of the child was with the appellant herein, who was directed to continue to have custody of the child. Thereafter, on 23.02.2022, in order to ascertain the views of both the parties, I had invited the appellant and the elder daughter who are looking after the child and the child to be present before this Court. Similarly, the respondent herein, was also requested to come over to this Court. I had a discussion with them in the chambers jointly and independently. It must be mentioned that the respondent has now remarried and has two very young infants and both the two children were also brought to the chambers along with the wife. It was also informed that the child whose interest is agitated in the present appeals is studying in a reputed school, Balalok Matriculation Higher Secondary School at Virugambakkam, Chennai.

18. It is the contention of the learned counsel for the



appellant, that the minor child has been continuously under his guardianship. The appellant herein/maternal grandfather also pointed that the child referred to his maternal aunt who was examined as R.W.2/Sathya Priya as his own mother since she had been taking care of him from a very tender age of 2 ½ years and even earlier during the hospitalisation of his mother. As a matter of fact, during the interaction in the chamber, it was also informed by the learned counsel that the child is under the impression that his maternal aunt is his mother. He also referred to her as his mother.

19. It is to be noted that the child has no specific affection for his own father owing to the closeness and affection extended by his mother's elder sister and the mother's father with whom he has been and is now residing.

20. The learned counsel therefore stated that it would only be appropriate that such custody is continued in the welfare of the child. It was also pointed out by the learned counsel that the child is now studying in a reputed school as aforementioned and it would not be proper that the child is forced to discontinue his studies and to shift some where. It was therefore stated that taking into consideration all circumstances, it would only be appropriate that the custody of the child is retained with the appellant.

21. The learned counsel for the respondent however disputed the aforementioned contentions. It is the stand of the learned counsel for the respondent that the respondent being the father is the natural guardian and that this fact cannot be denied or disputed. The mother has unfortunately died. The only blood near relation of the child is the respondent/father. There cannot therefore be a better alternate than the father to whom the custody of the child has to be handed over. It was stated that even though a Habeas Corpus petition was filed, permission was granted for visitation rights. When the father actually visited the child he was abused and was not treated properly and therefore, it was impossible for him to continue to visit the child.

22. During the interaction, the father of the child also stated that he had invested a sum of Rs.1 lakh for the benefit of the child and was interested in ensuring proper education to the child. He also stated that he had married and he came to the



chambers with his wife and the two young children and stated that the members of his family are ready and willing to support the young child Gowshik and stated that the welfare of the child required that he accompanies the father, which companionship had been denied all these years. The learned counsel therefore stated that the appeal should be dismissed and the Judgment passed by the learned District Judge, Thiruvannamalai, should be confirmed and upheld.

23. I have given my careful consideration to the arguments advanced and also perused the material records.

24. This is an unfortunate lis between the father and maternal grandfather, fighting over the custody of a young child who was born in the year 2011 and who lost his mother in the year 2013. As on date, he does not realise who his actual mother is and does not also has no knowledge as to who his actual father is. He has been brought up under the care and custody of his maternal aunt and he is under the impression that the said lady, is his mother. This factor forces consideration of the rival claim from a different aspect than is normally done, whenever a lis is brought about for the custody of a young child. As between the father and the maternal grandfather, it is normal that it would be expected that the scales should tip in favour of the father owing to the particular special relationship of a father and a young son.

25. The fact whether the medical bills towards the treatment of the mother who suffered from Brain Cancer and died after prolonged treatment was borne by the appellant herein or by the respondent herein is a fact that had not been established during trial. The respondent was examined during the course of trial as R.W.1. He produced the copies of the medical bills as Ex.R5 series and though they were marked during the course of trial, as Ex.P2 series, there is no specific finding that he had borne the medical expenses or whether he had been reimbursed, by his office with the amount spent.

26. It is the contention of the learned counsel for the appellant that he took care of his daughter and had handed over the medical bills to the respondent herein so that the respondent could claim the said expenditure from his office. Further it is stated that the respondent had not incurred expenses for the treatment of the deceased wife and he had to go



to Bangalore to earn more money to wipe out the debts which he had incurred. It is thus clear, that neither of the parties had come out with a true and honest account with respect to the medical expenses incurred for the treatment of the deceased mother.

28. But there is one further fact and that is his status as on date vis a vis as father of the child who custody is under consideration of this Court.

29. Before the Tribunal, in his pleadings, he had very categorically stated that there no attempt had been made by him to re-marry. But over the years his thought process had probably deviated and I must state that he has actually remarried. He is, from the conversation I had with him, very happy with his wife and his two young children.

30. The question which now has to be addressed is whether in the light of the expanded family of the respondent, the child now under consideration/Gowshik would be fit in that family or would be an addition to an already expanded family.

31. In (1973) 1 SCC 840 [Rosy Jacob vs. Jacob a.Chakramakkal], which is one of the earlier cases visiting the factors to be considered by a Court while examining contentions raised for the custody of a minor child, the Hon'ble Supreme Court had occasion to examine the question of the welfare of the minor with respect to the right of a father to be the guardian and the relevant factors to be considered which would have bearing on the welfare of the minor child.

32. The Hon'ble Supreme Court had also examined the provisions under Section 25 of the Guardian and Wards Act, and it must be kept in mind that G.W.O.P.No.7 of 2014, had been filed by the respondent herein under Section 25 of the Guardian and Wards Act, 1890 and the Hon'ble Supreme Court, considered the scope and applicability of the said provision. The Hon'ble Supreme Court also observed that merely because it is held out that the father loves his child, it cannot necessarily lead to a conclusion that the welfare of the child would be better prompted by granting custody to him.



33. The aforementioned statements would reflect that the Hon'ble Supreme Court had balanced all factors while considering grant or otherwise of a child to the father under Section 25 of the Guardian and Wards Act, 1890 even while considering the welfare of the child and balancing it with the right of the father to seek custody.

34. In that particular Judgment, the dispute was between a mother and a father over the custody of their children. The appeals went from the Madras High Court to the Hon'ble Supreme Court. There were three children to be considered in that particular case, and after weighing the relative scales, the mother was granted the custody of the two minor children, negating the legal right asserted by the father as natural guardian.

35. The scope of Section 25 of the Guardian and Wards Act, 1890 was discussed and it was held as follows:

"13. For determining the question of competence of the husband's application under Section 25 of the Guardians and Wards Act (18 of 1890) it is necessary to examine the scheme of that Act as also the relevant provisions of the Indian Divorce Act. The Guardians and Wards Act was enacted in order to consolidate and amend the law relating to Guardian and Ward. But as provided by Section 3, this Act is not to be construed, inter alia, to take away any power possessed by any High Court. According to Section 4, which is the definition Section, a "minor" is a person who, under the provisions of the Indian Majority Act, 1875 is to be deemed not to have attained his majority. Under Section 3 of that Act this age is fixed at 18 years, except for those, for whose person or property or both a guardian has already been appointed by a Court of Justice (other than a guardian for a suit under Chapter XXXI, C.P.C) and for whose property, superintendence has been assumed by a Court of Wards, for whom it is fixed at 21 years. A "ward" under this Act means a minor for whose person or property or both there is a guardian and "guardian" is a person having the care of the the person of a minor or of his



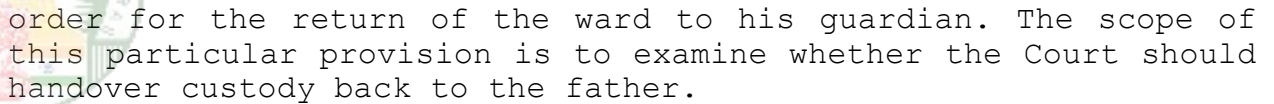
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property or of both. Chapter II of this Act (18 of 1890), consisting of Sections 5 to 19 (Section 5 applicable to European British subjects has since been repealed), deals with the Appointment and Declaration of Guardians. Section 7 empowers the Court to make orders as to guardianship where it is satisfied that it is for the welfare of the minor that an order should be made appointing his guardian or declaring a person to be such guardian. Section 7(3) places certain restrictions with respect to cases where guardians have been appointed by will or other instrument or appointed or declared by Court. Section 8 provides for persons entitled to apply under Section 7: they include Collectors as specified in clauses (c) and (d). Sections 9 to 11 provide for jurisdiction of Courts, form of applications and procedure on admission of applications. Section 12 provides for interlocutory orders subject to certain restrictions.

...

14. Now it is clear from the language of Section 25 that it is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Court is empowered to make an order for the return of the ward to his guardian if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian. The Court is entrusted with a judicial discretion to order return of the ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words "ward" and "guardian" leave little doubt that it is the guardian who, having the care of the person of his ward, has been deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law."

36. It had been held that Section 25 of the Guardians and Wards Act is attracted only if the child is removed from the custody of the guardian. Then the Court is empowered to make an



37. In the instant case, G.W.O.P.No.7 of 2014 had been filed by the father, under Section 25 of the said Act. Therefore, when that petition was filed seeking custody, the child was not with the father and therefore Section 25 of the Guardians and Wards Act, had to be invoked seeking to handover back the custody to the father.

39. Very unfortunately, the extracted portion above is the only discussion of the learned District Judge. There had been no weighing of scales between the relative benefits. The only factor which was in the mind of the learned District Judge was with respect to the pension income earned by the maternal grand father and thereafter the statement in chief by the father that he had incurred expenses towards medical expenses of his wife and that he had to go to Bangalore owing to debts incurred had been stated. The cross examination on that aspect was not extracted by the learned Trial Judge. This reasoning cannot be the basis to give any finding on the welfare of the child. Therefore, even though the parties and on appeal, this Court has to examine the facts as a Court of first instance. The facts are established.

1. The child has been in the continuous custody of the appellant and the elder daughter of the appellant from the date of death of his mother.
2. At the time of death of his mother the child was hardly 2 years old.
3. The child has identified his maternal aunt as his mother.
4. The father has complained that he has been denied a proper reception while exercising his rights to visit the child as directed by the Court. But, to the knowledge of this Court has not filed any formal application complaining violation of that particular privilege given to him.



5. The father has however, taken a conscious decision to get remarried which again naturally means the commitments to his new family has to be recognised by this Court and through such marriage also has two children.

6. He continues to live with his wife and his two children.

40. In view of the above aforementioned facts, this Court will have to determine whether it would be advantages to the child to be secreted away from his place of residence and be handed over to a family who are viewed by him as strangers. As on date, the child is nearly about 11 years old. He was born in the year 2011. He has acquired a small impression in his mind as to who his family are. It may not be a right impression but still such impression is deeply embedded in the mind of the child. At the tender age of 11, it has to be further examined whether the mind of the child can be further burdened by introducing him to a new family and calling upon him to adjust his life with a family with whom he has not been living.

41. I hold that it would only be appropriate that the custody continuous with the appellant herein. At the same time, the child must realise that his father is the respondent herein. A duty is case on the appellant herein to inform the child as to who his mother was and who his father is. That is a primary duty which the appellant has to discharge. The child cannot live or be brought up in a world of ignorance of his actual parents. It might lead, at a later age, to a catastrophic situation if he realises that the persons who were living around with him were not his actual parents and that he had been removed the companionship of the father.

42. Therefore, balancing all these aspects, leaving aside the financial aspect, I would set aside the common judgment in G.W.O.P.No.1 of 2014 and G.WO.P.No.7 of 2014 dated 17.02.2017 passed by the District Court at Thiruvannamalai and allow the present appeals but with the following directions:

1. The child shall continue to be in the custody of the appellant.
2. The appellant should engage himself with the respondent herein on a one to one basis and both the appellant and the respondent should undertake any corrective course with the assistance of an expert to determine how they would be of better advantage of the child instead of looking on the



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child as a chattel for custody and possession.

3. This requires that the appellant and the respondent must reconcile their differences. If they do so, then, alone can the respondent get the benefit of the custody of the child.
4. However, let the custody of the child continue to remain with the appellant and the respondent, may be permitted to visit the child and since there had been a complaint that the house of the appellant was not a conducive place to visit the child, the respondent may be permitted to visit the child in the Legal Services Authority Building at Chennai, initially on the first Saturday of every month in the presence of the appellant.
5. The visits may be scaled upwards on proper application being filed by both the parties jointly.
6. Individual applications filed complaining about either of the appellant or of the respondent, would not be entertained.
7. A joint application must always be made by both the appellant and the respondent for any modification of the order of custody or visitation rights.

43. This formality to file a joint application is made compulsory to encourage the appellant to recognise the respondent as the husband of his late daughter. It must be kept in mind that the daughter of the appellant died not because of any conduct of the respondent but because she suffered from cancer, the cause of which can never be attributed to the respondent. The parties must also accept the reality that the appellant is only a maternal grandfather and his elder daughter is only a maternal aunt of the child and they can never substitute and be the parents of the child. This can never happen and should not be permitted.

44. This particular arrangement should be continued and thereafter a mutual application may be filed by both the parties seeking modification of this particular order on the terms which they mutually agree and which they honestly think would be for the welfare of the child.

45. The appeals are allowed and the custody will remain with the appellant and visitation rights as aforementioned must be by



the respondent on every Saturday at the Legal Services Authority Building, High Court, Chennai.

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46. If any change in the venue is required, again, the pre-condition is that the appellant and the respondent must file a joint affidavit. The practice of filing independent affidavits, and blaming each other should not be resorted to and if it is done no further orders will be passed in favour of either side. The first visit by the father in the aforementioned manner should commence from the first Saturday of June 2022.

47. With the above observation, both the Civil Miscellaneous Appeals are allowed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1. The District Judge,
Tiruvannamalai.
2. The Secretary,
Legal Service Authority, High Court,
Chennai.

C.M.A.Nos.1143 and 1144 of 2017

SR(CO)
PM/25/05/2022