



C.R.P.Nos.1565 & 1566 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on 21.04.2023

Delivered on 29.09.2023

CORAM:

THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

C.R.P. Nos. 1565 & 1566 of 2020

K.S. Ramasami

.. Petitioner in both CRPs

-Vs-

k.Rajendran (Died)

1.Susheela

2.Roopa

3.Minor Kaviraj

..Respondents in both CRPs

Prayer in C.R.P.No.1565 of 2020:- Civil Revision Petition filed under Section 115 of CPC, to set aside the order dated 19.11.2019 made in E.P. No. 26 of 2018 in O.S. No. 638 of 2000 on the file of the learned Subordinate Judge, Palladam.

Prayer in C.R.P.No.1566 of 2020:- Civil Revision Petition filed under Section 115 of CPC, to set aside the order dated 12.11.2019 made in E.A.No.41 of 2019 in E.P.No.26 of 2018 on the file of the learned Subordinate Judge, Palladam.

For Petitioner
in both C.R.Ps'

: Mr. M. Guruprasad

For Respondents
in both C.R.Ps'

: Mr. Valliappan, Senior Advocate
for by Mr. T. Deeraj



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COMMON ORDER

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The Plaintiff in O.S. No. 638 of 2000 on the file of the Subordinate Judge, Tiruppur, is the Revision Petitioner in these Civil Revision Petitions. Aggrieved by the order dated 19.11.2019 made in E.P. No. 26 of 2018 in O.S. No. 638 of 2000 as well as the order dated 12.11.2019 made in E.A. No. 41 of 2019 in E.P. No. 26 of 2018, both on the file of the learned Subordinate Judge, Palladam, had preferred these Civil Revision Petitions.

2.The Plaintiff has instituted the suit in O.S. No. 638 of 2000 for recovery of a sum of Rs.1,53,783/- being the principal and interest due on two promisory notes dated 10.11.1997 and 09.12.1997 executed by the sole Defendant by name Rajendran in his favour for Rs.55,000/- and Rs.50,000/- respectively repayable with interest at 24% per annum.

3.In the suit, on notice, the sole Defendant Rajendran entered appearance by engaging Counsel but he did not file the written statement. Therefore, the Defendant was set *ex parte* on 12.01.2001. On coming to know about the *ex parte* decree, the sole Defendant filed an application to set aside the *ex parte* order through his counsel. However, he did not prosecute even that application for setting aside the *ex parte* decree. Therefore, on



09.12.2002, *ex parte* evidence was recorded in which the Plaintiff has marked

Exs. A1 to A5 in support of the suit claim. On the same day viz., 09.12.2002, the suit was decreed *ex parte*. In order to execute the *ex parte* decree, the Plaintiff had filed E.P. No. 82 of 2004 before the learned Subordinate Judge, Tiruppur for attachment of the property set out in the schedule of the Execution Petition. Subsequently, the Execution Petition No. 82 of 2014 was transferred to Subordinate Court, Palladam on its constitution and re-numbered as E.P. No. 26 of 2018.

4. When the Execution Petition was taken up for hearing, the sole Defendant Rajendran died. Therefore, his legal heirs namely his wife, daughter and son were brought on record as Respondents in the Execution Petition. On notice, the second Respondent, who is the wife of the deceased sole Defendant Rajendran, filed a counter statement contending *inter alia* that the property in Survey No. 426/2 and 426/2A, which are sought to be attached in the execution proceedings, was purchased by her through a sale deed dated 26.08.2013 from the power of attorney agent of her husband Rajendran. Therefore, it was contended that her husband Rajendran has no right over the property which was purchased in her name and consequently, the property cannot be attached in execution of the *ex parte* decree.



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5. In view of the above specific stand taken by the second Respondent in EP No. 26 of 2018 being the wife of the deceased sole Defendant, the Plaintiff has taken out E.A. No. 41 of 2019 in EP No. 26 of 2018 contending that the properties sought to be attached are the estate of the deceased sole Defendant. The second Defendant in EP No. 26 of 2018 is his wife and therefore, she cannot feign ignorance of the decree passed against her husband. Further, the second Respondent, knowing fully well about the execution proceedings, alienated the properties by way of two sale deeds 22.08.2013 and 26.08.2013. Therefore, he prayed to reopen the execution application for the purpose of amendment of the execution petition appropriately.

6. A counter statement was filed by the second Respondent in E.A. No. 41 of 2019 contending that the Petitioner has no right to amend the Execution Petition and to proceed against the Respondents 3 to 4 or to substitute the properties originally sought to be attached. In any event, the properties sought to be attached are not the properties of the sole Defendant (since deceased) and the Respondents are exercising right over the properties in the execution petition. Therefore, the second Respondent sought for dismissal of EA No. 41 of 2019.



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7.The learned Subordinate Judge, Palladam, dismissed the Execution Application No. 41 of 2019 by concluding that the suit was decreed on 09.12.2002 and the Execution Petition was filed on 23.09.2014. The Judgment debtors are the absolute owners of the properties sought to be attached by virtue of Exs. R1 and R2 and therefore, the properties could not be attached in execution of the decree especially when the properties are conveyed in favour of the Respondents in the year 2013 much prior to the filing of the Execution Petition in the year 2014. Aggrieved by the order dated 12.11.2019 made in E.A. No. 41 of 2019 in E.P.No.26 of 2018, CRP No.1566 of 2020 is filed.

8.Subsequently, the Execution Petition in EP No. 26 of 2018 was taken up for consideration. By order dated 19.11.2019, the Subordinate Judge, Palladam, had even dismissed the Execution Petition by concluding as follows:-

".....It is also seen that the suit is of the year 2000 and the same was decreed in the year 2002. The Respondents have marked a sale deed dated 22.08.2013 - Ex.R1 (by consent). As per the recitals of the sale deed, the Judgment Debtor K. Rajendran became entitled to the said property by virtue of a settlement deed, dated 31.08.1994, which is prior to the borrowal. Admittedly, the alienation is much prior to the suit. By no stretch of imagination the property could be included for attachment in EP filed after the execution of the settlement deed in 1994 itself.



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.....The property is the separate property of 2nd Respondent with all rights to dispose it at her will and volition. Thereby the title passed on the second Respondent cannot be sought to be attached by the decree holder."

9.This order dated 19.11.2019 is assailed by the Plaintiff in CRP No. 1565 of 2020.

10.Mr.M.Guru Prasad, learned counsel for the Revision Petitioner would contend that the *ex parte* decree passed against the deceased Defendant remains to be in force. The Respondents 2 to 4 have not taken any steps to set aside the *ex parte* decree dated 09.12.2002 passed in the suit. The Execution Petition has been filed to execute the decree by attaching the property of the sole Defendant. Since the Defendant died, his legal heirs were brought on record. On notice in the Execution Petition, the Respondents 2 to 4, legal heirs, have successfully alienated the property sought to be attached to avoid execution of the decree. The second Respondent is none other than the wife of the sole Defendant (since deceased) and the Respondents 3 and 4 are the children of the deceased sole Defendant. Therefore, the alienation in favour of the second Respondent/wife can very well be attached to satisfy the decree passed against her husband. Curiously, the property was settled in favour of the second Respondent by the power of attorney agent of the deceased



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Defendant and it would only shows that the conveyance in favour of the second Respondent is to avoid the property from being attached in execution.

In any event, the property, which was the subject matter of the suit, was conveyed in favour of the second Respondent on 26.08.2013 and as on that date, the *ex parte* decree dated 09.12.2002 was in force. Therefore such conveyance in favour of the second Respondent is hit by the principles of *lis pendence*. As wife of the late sole Defendant, the second Respondent is amenable to the jurisdiction of execution proceedings and the property conveyed in her favour can be attached to satisfy the decree. This is more so that the property was acquired from the sole Defendant by the second Respondent herein. The debt incurred by the sole Defendant can be realised from his wife, the second Respondent herein by way of attaching the property. Therefore, the Execution Petition was maintainable. The learned Subordinate Judge, Palladam, had dismissed the Petition on the erroneous view that the property cannot be attached, as it is self-acquired property of Susheela, wife of Late. Rajendran, in which late M.Rajendran had no interest in the sale. The court below is not correct in holding that the property which is sought to be attached is the independent property of the second Respondent and it cannot be attached to satisfy the decree. The learned counsel therefore prayed for setting aside the order of the court below and to allow the Civil Revision



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11.Per contra, Mr.P.Valliappan, learned Senior Counsel for the Respondents would only submit that the *ex parte* decree was passed in the suit on 09.12.2002. After a long lapse of time, to execute the decree, EP No. 82 of 2014 was filed during September 2014. In the meantime, the property which is sought to be attached has been conveyed in favour of the second Respondent by means of a registered sale deed dated 26.08.2013 and another sale deed dated 22.08.2013 in favour of one Lakshmidevi. From the date of such purchase, the second Respondent has been in possession and enjoyment of the said property. The said property was purchased by the second Respondent out of her self-acquired funds over which her husband, the sole Defendant in the suit, has no right, title or interest. Therefore, for the debt incurred by the deceased sole Defendant, the property of the second Respondent cannot be subjected to any attachment. In any event, the filed has filed the Execution Petition just before expiry of 12 years period. Therefore, the Plaintiff, as Decree Holder, was lackadaisical in executing the decree passed in the suit filed by him by which time, property right was created in favour of the second Respondent. Taking note of the above, the orders, which are impugned in these Civil Revision Petitions, were passed by the learned



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Subordinate Judge, Palladam and it does not warrant any interference by this Court.

12.The learned Senior counsel further submitted that since the Plaintiff has filed the Execution Petition after 11 years and above, the sole Defendant though it fit and alienated the property in question in favour of his wife and she is in possession of the said property. The second Respondent is a bona fide purchaser of the property for valuable consideration and she was not aware of the suit or the execution proceedings initiated by the Plaintiff. Before purchasing the property, the second Respondent had obtained Encumbrance Certificate which do not disclose any encumbrance and therefore, as a prudent purchaser, she proceeded to purchase it. In other words, the attachment before judgment did not find a place in the encumbrance certificate and mandatory provisions contemplated under Order 38, Rule 11 (b) and order 21, Rule 58A of the Code of Civil Procedure were not complied with. In support of his submission, the learned Counsel for the Respondents relied on the decision of the this Court in ***Sri Krishna Chit Funds Vs. R.S.Pillai*** (Civil Misc. S.A. No. 5 of 2000 dated 28.04.2000) **MANU/TN/0142/2000** wherein it was held thus:-

11. In Muthiah Chetti v. Palaniappa Chetti, AIR 1928 P.C. 139, Their Lordships have held that merely passing an order of



attachment is not enough. Their Lordships have also held that no property can be declared to be attached unless firstly order for attachment has been issued; and secondly, in execution of that order the other things prescribed by the rules in the Code have been done. It is clear from the said decision that mere passing of an order is not sufficient and the other rules have to be strictly complied with in order to enforce the order of attachment.

12. In Keshvlal v. Bibi Soghra MANU/BH/0097/1934 : AIR 1934 Pat 619, the Division Bench has held that mere order to make an attachment does not amount to an actual attachment, and that the attachment is not complete until it has been effected in the manner prescribed by the rules.

13. In Monoharlal Banerjee v. Bengal Immunity Co. MANU/WB/0022/1944 : AIR 1945 Cal 308, the Division Bench of Calcutta High Court has held that an attachment to render a subsequent alienation invalid under Section 64 must be made in the manner prescribed by law. It has been also held that no property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed have been done. Their Lordships have further held that this principle applies with equal force and precision whether the attachment is in execution of a decree or is an attachment before judgment and whether the mode and manner in which it is to be effected are those contained in the Civil Procedure Code or those prescribed by the rules of the original side of the High Court.

14. In Pokhpal Singh v. Kanhaiya Lal MANU/UP/0015/1946 : AIR 1946 All 438, the Division Bench of Allahabad High Court has held that attachment is not made within the meaning of Section 64 of the Code by the mere making of an order for attachment. In virtue of sub-rules (1) and (2) of Order 21. Rule 54 an attachment cannot be said to have been made unless and until the provisions of both sub-rules have been complied with.

15. In Murugappa Chettyar v. Thirumalai Nadar and others MANU/TN/0118/1947 : AIR 1948 Mad 191, after considering Order 21, Rule 54. Rajamannar, J., (as His Lordship then was) has held as follows:-

The fact that an order for attachment has been pending is not sufficient to establish the factum of attachment. An attachment cannot be said to have been made unless and until the provisions of both sub-rules of Order 21, rule 54, civil Procedure, have been complied with, that is to say there must first be an order prohibiting the judgment-debtor from transferring or charging the property in any way and



secondly the order must be proclaimed by beat of torn near the property and copies of the prohibitory order must be affixed on a conspicuous part of the property, on a conspicuous part of the Court house and where the property is land paying revenue to the Government in the office of the collector of the District in which the land is situate. Where several properties are sought to be attached in pursuance to an order of attachment there must be proof of affixture on every one of the properties.

13. For the same proposition, reliance was placed on the decision of this Court in the case of ***Humbi Hema Gooda Vs. The Tamil Nadu State Transport Corporation (CBE) Ltd.,]*** (Civil Miscellaneous Appeal No. 1144 of 2011 dated 30.09.2011) MANU/TN/4276/2011

“11. It is pertinent to state that on 31.01.1999, there was an order of attachment. On 24.06.1992, there was an order to furnish security, which was passed subsequent to the purchase made by the appellant. Therefore, the order dated 24.06.1992 has no significance in this case. Further, Rule 38 Rule (11) says that the order of attachment has to be communicated to the registering officer. But, in the instant case, it has not been done so, which is evident from the encumbrance certificate produced by the appellant pertaining to the years from 1.1.1987 to 11.11.2009. I find that the order of attachment was communicated only in the year 2003 i.e. after 12 years from the date of purchase by the appellant. Rule 11-B of Order 38 is extracted hereunder:

11-B. Order of attachment to be communicated to the Registering Officer: Any order of attachment passed under Rule 5 or 6 of this Order raising the attachment passed under Rule 9 of this order shall be communicated to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order, is situate.”

13. The principles enunciated in the said decision would show that communicating the order of attachment to the concerned registering officer is mandatory under Order 38 Rule 11-B and in the absence of communication, the order of attachment has no force. Under these circumstances, I am of the opinion that since the order of attachment itself is void, the submission made by the learned counsel for the 1st Respondent, relying upon section 64 cannot be countenanced.

Under these circumstances, I hold that the appellant trust is a bona fide purchaser of the property from the 4th Respondent since the mandatory provisions, namely, Order 38 Rule (4) and Rule (6)



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C.P.C. were not complied with by the court below and the order was not communicated to the Registering Officer, as required under Rule 11-B C.P.C. Hence, the impugned order passed by the court below is set aside. E.A. No. 12 of 2010 in E.P. No. 17 of 2009 in O.S. No. 128 of 2002 on the file of Additional District Judge, Fast Track Court No. III, Coimbatore, filed by the appellant trust is ordered as prayed for and the civil miscellaneous appeal is allowed; however, the first Respondent is at liberty to take action against the 4th Respondent for recovery of the amount by attaching the other properties owned by the 4th Respondent. No costs."

14. Further, the learned Senior counsel for the Respondents relied on the decision of this Court in **[Nataraja Naidu and Ors. Vs. Soundararajan and Ors.] (Second Appeal No. 604 of 2008 dated 28.06.2019) MANU/TN/7826/2019** wherein it was held as follows:-

"6.1. Turning to the question whether Ext. A1 sale deed is made in violation of the order of attachment before judgment in I.A. No. 684/99 in O.S. No. 272/99 concerned, it is not just the date on which it is effected, that matters. While the Plaintiff says it was effected on 15.08.1999, i.e., couple of days after Ext. A1 sale deed (13.08.1999), according to the first Defendant, it was effected on 12.8.1999, a day prior to Ext. A1. Under Order 38 Rule 11(B), the order of attachment passed under Order 38 Rule 5, "shall be communicated to the Registered Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order, is situate". Interpreting this provision, this Court in Tmt. R. Umayal Vs. R.S. Pillai [MANU/TN/0142/2000 : 2000 (2) CTC 524], Humba Hema Goods Vs. Tamil Nadu State Transport Corporation (CBE) LTD. [MANU/TN/4276/2011 : 2012 (1) CTC 407, both of which are relied on in Vellapandi (died) & Others Vs. K.S. Maheswari & another [CDJ 2017 MHC 2886] has held that the procedural compliance under Order 38 Rule 11B is mandatory for effecting attachment, and that a default in complying with Order 38 Rule 11B requirement would save all alienations made by the Defendants. This view apply squarely to the facts of this case as there is nothing on record to indicate that the Order of attachment was communicated to the Sub Registry even if it were to be presumed that the Court has passed the said order on 12-08-1999, a day prior to the Plaintiff had obtained Ext. A1, sale deed on 13.08.1999. Therefore, as to the first leg of Respondents/Defendants' resistance, the appellants succeed."



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WEB COPY 15. Heard the learned counsel for the Revision Petitioner and the learned Senior counsel for the Respondents and perused the materials on record.

16. When these Civil Revision Petitions are taken up for hearing on 23.03.2023, it was brought to the notice of this Court that the parties are likely to settle the dispute among themselves. Therefore, on 23.03.2023, this Court granted an adjournment and directed the matter to be posted for further hearing on 30.03.2023. However, when the case came up for hearing on 21.04.2023, the learned Counsel for the Revision Petitioner submitted that the settlement talks did not fructify. Therefore, this Court proceeds to dispose of these Civil Revision Petitions on merits.

17. It is an admitted fact that the Plaintiff has instituted the suit for recovery of money. Even along with the suit, an application in I.A. No. 1746 of 2000 was filed by the Plaintiff for attaching the property of the sole Defendant. The sole Defendant entered appearance through his counsel but for the reasons best known, he did not contest the suit. Therefore, on 12.01.2001 the Defendant was set *ex parte* and on 09.12.2002, an *ex parte* decree was passed. It is necessary to state that till this date, the *ex parte*



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decree dated 09.12.2002 is in force and it was not set aside in a manner known to law.

18. One of the contentions urged before this Court is that the Execution Petition was filed two months before the period of limitation to file it. It is contended by the learned Senior counsel for the Respondents that in the meantime, the deceased sole Defendant conveyed the property in favour of his wife by executing a sale deed dated 26.08.2013. It is also sought to be projected by the learned Senior counsel for the Respondents that the second Respondent is a bona fide purchaser and she feigns ignorance about the pendency of the suit or the *ex parte* decree passed against her husband, the sole Defendant. The second Respondent is having an independent right over the property in question and it cannot be permitted to be attached for the purpose of executing the decree passed against her husband. This contention of the learned Senior counsel for the Respondents deserves only rejection. The second Respondent is none other than the wife of the sole Defendant and she cannot feign ignorance either about the institution of the suit against her husband or the debt incurred by him. In fact, it is glaringly evident that only to evade the property from being attached, the sole Defendant thought it fit to execute a sale deed dated 26.08.2013, just prior to the filing of EP No. 82 of



2014 by the Plaintiff, thereby, the second Respondent herein had stepped into the shoes of her husband. Even though the learned Senior counsel for the Respondents argued that the Plaintiff has filed the Execution Petition just before the expiry of 12 years period contemplated for filing it, it is noteworthy to state that even till then, the sole Defendant did not take steps to set aside the *ex parte* decree suffered by him. Further, after the death of the sole Defendant, the Respondents 2 to 4 herein have also did not take any steps to set aside the *ex parte* decree. Rather, the second Respondent has filed a counter statement in EP No. 82 of 2014 and questioned the validity of the execution proceedings. Thus, the *ex parte* decree passed against the sole Defendant is a bar for execution of the sale deed dated 26.08.2013. Even otherwise, at the time of filing of the suit itself, the Plaintiff has filed an application for attaching the property. However, since the suit has not been contested by filing a written statement, an *ex parte* decree itself was passed on 09.12.2002. Therefore, it is futile on the part of the Respondents to contend that on the date of filing of the Execution Petition, the property mentioned in the Execution Petition was not vested with late M.Rajendran rather, it was the property of the second Respondent. At the risk of repetition, it is to be stated that the second Respondent is none other than the wife of the deceased sole Defendant. The debt incurred by the sole Defendant can very well be



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recovered from his legal heirs especially when they have exhibited a lackadaisical attitude in not taking any steps to set aside the *ex parte* decree dated 09.12.2002. Therefore, this Court is of the view that the second Respondent cannot be regarded as a bona fide purchaser of the property in question and such property is very well amenable for being attached to satisfy the decree passed in the suit.

19. In cases of this nature for recovery of money, the liability for payment of money is shifted on the legal representatives on the death of the Defendant/judgment debtor. If they are in enjoyment of the property left by the Judgment Debtor, it cannot be regarded as their independent property or that property cannot be attached to satisfy the decree. Here the property in the name of the husband/sole Defendant was transferred in the name of the wife/second Respondent. It can be presumed that it was done only to defeat the recovery of money through execution proceedings. In the ordinary course of normal human conduct the husband can settle the property or gift to his wife by executing a settlement deed. In this case, the property was sold to the wife by the husband through a power of attorney agent. Therefore, suspicion arises about the manner in which the sale deed came to be executed in favour of the second Respondent. Therefore, this Court is of the view that the debt



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incurred by the sole Defendant has to be settled by the second Respondent as his wife. The learned Subordinate Judge had ignored those principles and dismissal of the Execution Petition as though there is no property in the hands of the Judgment Debtor. The Court has to analyze it. The Court has to draw adverse inference from the conduct of the late Defendant. By the time the Execution Petition was filed, the Defendant was alive. After the death of Defendant his legal representatives were impleaded. The conduct of the Defendant in executing the sale deed through a Power of Attorney Agent in favour of the wife of the Judgment Debtor would give rise to an impression that such sale deed was executed to defeat the Plaintiff from enjoying the fruits of the decree. In such circumstances, the Court below ought to have drawn an adverse inference against the Respondents/Judgment Debtors, but it failed to draw an adverse inference, thereby misdirected itself and committed a grave error in dismissing the Execution Petition as well as the Execution Application.

20. In the light of the above discussion, the order dated 19.11.2019 made in E.P. No. 26 of 2018 in O.S. No. 638 of 2000 as well as the order dated 12.11.2019 made in E.A. No. 41 of 2019 in E.P. No.26 of 2018 on the file of the learned Subordinate Judge, Palladam are to be set aside.



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WEB COPY In the result, both the **Civil Revision Petitions are allowed.** The order

dated 19.11.2019 made in E.P. No. 26 of 2018 in O.S. No. 638 of 2000 as well as the order dated 12.11.2019 made in E.A. No. 41 of 2019 in E.P. No.26 of 2018 on the file of the learned Subordinate Judge, Palladam, are set aside. Taking note of the fact that the suit was filed in the year 2000 in which an *ex parte* decree was passed on 09.12.2002, the trial court is directed to wrap up the entire execution proceedings and dispose it of in accordance with law, within a period of six months from the date of receipt of a copy of this order.

No costs.

29.09.2023

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Index : Yes/No

Speaking/Non-speaking order

Neutral Citation : Yes/No



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To

- 1.The Subordinate Judge, Palladam.
- 2.The Subordinate Judge, Tiruppur.



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SATHI KUMAR SUKUMARA KURUP, J.,

cda

**Common Order in
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