

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.04.2019

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.4125 of 2019

and

WMP(MD)No.3220 of 2019

1.Arunkumar

2.Sreeja

... Petitioners

Vs.

1.The Inspector General of Registration,
No.100, Santhome High Road,
Chennai – 600 028.

2.The District Registrar, Tuticorin & District.

3.The Joint Registrar No.II,
O/o.Joint Registrar No.II, Tuticorin & District.

4.The Secretary to Government,
Health and Family Welfare Department,
Government of Tamil Nadu.

5.The Director, Ambedkar Foundation,
(an autonomous Body under the Ministry
of Social Justice and Empowerment),
15, Janapath, New Delhi – 110 001.

... Respondents

(4th and 5th respondents are suo motu
impleaded vide court order dated 29.03.2019)

PRAYER : Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the order of proceedings of the third respondent in No.1/2018 Na.Ka.No.187/2018 dated 16.11.2018 and the order of proceedings of the second respondent in Na.Ka.No.5876/E2/2018 dated 28.12.2018 and quash the same as illegal and consequently directing the respondents to register the marriage which took place on Arulmighu Shangara Rameswara Temple, Tuticorin dated 31.10.2018.

For petitioners : Mrs.Sivasankari
for Mr.M.Krishnaveni
For Respondents 1 to 3 : Mr.M.Murugan,
Government Advocate

ORDER

A marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage in terms of Section 5 of the Hindu Marriage Act, 1955 and the Registrar of Marriages is bound to register the same. By holding so, this Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart.

2.Let us start with the facts first. The first petitioner Shri.Arunkumar got married to the second petitioner Ms.Srija on 31.10.2018 at Arulmighu Sankara Rameswara Temple, Tuticorin as per Hindu rites and customs. The village administrative officer has certified that this marriage was in fact performed and that it was not a bigamous one for either. The temple authorities though permitted the performance of the marriage declined to vouch for it. When the parties submitted a memorandum for registration of marriage under Rule 5 (1) (a) of the Tamil Nadu Registration of Marriages Rules in Form I before the third respondent, the third respondent refused to register the same. Questioning the said decision taken by the third respondent vide proceedings dated 16.11.2018, the petitioners herein filed an appeal before the second respondent. The second respondent also vide proceedings in Na.Ka.No.5876/E2/2018 dated 28.12.2018 confirmed the decision of the third respondent. Challenging the refusal to register their marriage, the petitioners have filed this writ petition.

3.The learned Government Advocate appearing for the respondents 1 to 3 submitted that Section 7 of the Tamil Nadu

Registration of Marriages Act, 2009 confers power to the Registrar of Marriages to refuse registration. He could do so if he is satisfied that the marriage between the parties was not performed in accordance with the personal laws of the parties, any custom or usage or tradition. As per Section 7 (1) (c) of the Act, if the documents tendered before the Registrar of Marriages do not prove the marriage status of the parties, he can refuse to register the marriage. In this case, the authorities of the temple, where the marriage between the parties was said to have been solemnized, had not issued any certificate indicating the performance of the marriage. He further contended that as per Section 5 of the Hindu Marriage Act, the bridegroom must have completed the age of 21 years while the bride must have completed the age of 18 years at the time of marriage. To understand the meaning of expression "bride", in the order impugned in this writ petition, Oxford Advance Learner's Dictionary of Current English was referred to. The term "Bride" can only refer to a "Woman on her wedding day". In the case on hand, the second petitioner Srija is a transgender and not a woman. Thus the statutory requirement set out in Section 5 of the Hindu Marriage Act, 1955 has

not been fulfilled. Therefore, the learned Government Advocate wanted this Court to sustain the orders impugned in this writ petition and dismiss the writ petition.

4.I am unable to agree with the stand of the learned Government Advocate appearing for the respondents 1 to 3. As rightly pointed out by the learned counsel appearing for the writ petitioner, the issue on hand is no longer *res integra*. In the decision reported in **(2014) 5 SCC 438 (National Legal Services Authority vs. Union of India)**, the Hon'ble Supreme Court upheld the transgender persons' right to decide their self identified gender. The central and State governments were directed to grant legal recognition of their gender identity such as male, female or third gender. This path breaking judgment has been cited with approval in the Nine Judges Bench of the Hon'ble Supreme Court in the decision reported in **(2017) 10 SCC 1 (Justice K.S.Puttaswamy vs. Union of India)** and again by the Constitution Bench in the decision reported in **(2018) 10 SCC 1 (Navtej Singh Johar vs. Union of India)**.

5. The Hon'ble Supreme Court in N.L.S.A Case noted that the existence of a third category outside the male - female binary has been recognised in the indigenous Hindu tradition. According to the renowned writer Devdutt Pattanaik in his book 'Jaya', in the great Mahabharata war, Aravan came forward to sacrifice himself to ensure the victory of Dharma. But, he insisted that he must have a wife who will weep for him when he died. In keeping with the rules of the ritual, it was mandatory to fulfil the last wish of the sacrificial victim. The Pandavas were obliged to get Aravan married but no woman was willing to be his wife. Who would want to marry a man doomed to die at sunrise? When all attempts to get Aravan a wife failed, Krishna rose to the occasion and transitioned himself into a female form known as Mohini and married Aravan. The next day when Aravan was beheaded at dawn, Krishna wept for him as a widow. This tale of Aravan's human sacrifice comes from north Tamil Nadu's oral traditions where Aravan is worshipped as Kuthandavar, a form of Shiva. Aravan's sacrifice is re-enacted each year ritually where he becomes the divine husband of all men who have womanly feelings.

Through Aravan's mythology the existence of those who call themselves Transgender is acknowledged, explained and validated.

6. Shikhandi is another important character in Mahabharata. She was born as a female but grew up to be a male. During the last year of exile, Pandavas had to hide their identity. Arjuna is said to have assumed the form of a transgender. Lord Iyappa is also a syncretic deity born of the union between Lord Shiva and Lord Vishnu who took the form of Mohini. Ramayana also talks of an encounter between Lord Rama and Transgenders. Rama is said to have specially blessed the community.

7. Now let us take a leap from mythology and traditional lore to modern neuroscience. Professor V.S. Ramachandran who has been lauded as “The Marco Polo of neuroscience” by Richard Dawkins has this to say in his book 'The Tell-Tale Brain' :

“TRANSEXUALITY : DOCTOR, I'M TRAPPED
IN THE WRONG KIND OF BODY !

The self also has a sex: You think of yourself as

male or female and expect others to treat you as such. It is such an ingrained aspect of your self-identity that you hardly ever pause to think about it—until things go awry, at least by the standards of a conservative, conformist society. The result is the “disorder” called transsexuality.

As with somatoparaphrenia, distortions or mismatches in the SPL can also explain the symptoms of transsexuals. Many male-to-female transsexuals report feeling that their penis seems to be redundant or, again, overpresent and intrusive. Many female-to-male transsexuals report feeling like a man in a woman’s body, and a majority of them have had a phantom penis since early childhood. Many of these women also report having phantom erections. In both kinds of transsexuals the discrepancy between internally specified sexual body image—which, surprisingly, includes details of sexual anatomy—and external anatomy leads to an intense discomfort and, again, a yearning to reduce the mismatch.

Scientists have shown that during fetal development, different aspects of sexuality are set in motion in parallel: sexual morphology (external

anatomy), sexual identity (what you see yourself as), sexual orientation (what sex you are attracted to), and sexual body image (your brain's internal representation of your body parts). Normally these harmonize during physical and social development to culminate in normal sexuality, but they can become uncoupled, leading to deviations that shift the individual toward one or the other end of the spectrum of normal distribution.

I am using the words "norma" and "deviation" here only in the statistical sense relative to the overall human population. I do not mean to imply that these ways of being are undesirable or perverse. Many transsexuals have told me that they would rather have surgery than be "cured" of their desire. If this seems strange, think of intense but unrequited romantic love. Would you request that your desire be removed? There is no simple answer."

8. Sex and gender are not one and the same. A person's sex is biologically determined at the time of birth. Not so in the case of gender. That is why after making an exhaustive reference to the human rights jurisprudence worldwide in this regard, the Hon'ble Supreme Court held that Article 14 of the Constitution of India which

affirms that the State shall not deny to “any person” equality before the law or the equal protection of the laws within the territory of India would apply to transgenders also. Transgender persons who are neither male/female fall within the expression “person” and hence entitled to legal protection of laws in all spheres of State activity as enjoyed by any other citizen of this country. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India. (Vide Para Nos.61 and 62 of the NLSA case). Article 19(1)(a) and Article 21 were expansively interpreted so as to encompass one's gender identity also. The following observations are particularly relevant :

“72. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected Under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which

reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community Under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.

73..... Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans.

74. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

75....Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed

Under Article 21 of the Constitution of India.”

9. In the case on hand, the second petitioner herein has chosen to express her gender identity as that of a woman. As held by the Hon'ble Supreme Court this falls within the domain of her personal autonomy and involves her right to privacy and dignity. It is not for the State authorities to question this self determination of the second petitioner herein.

10. The expression “bride” occurring in Section 5 of the Hindu Marriage Act, 1955 cannot have a static or immutable meaning. As noted in Justice G.P. Singh's Principles of Statutory Interpretation, the court is free to apply the current meaning of a statute to present day conditions. A statute must be interpreted in the light of the legal system as it exists today. Article 16 of the Universal Declaration of Human Rights reads as under:

“Article 16.(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

In (2018) 16 SCC 368 (Shafin Jahan vs. Asokan K.M. and Ors), the right to marry a person of one's choice was held to be integral to Article 21 of the Constitution of India.

11. In **(2017) 10 SCC 1 (Justice K.S. Puttaswamy vs. Union of India)**, the Hon'ble Supreme Court after referring to the legal position obtaining in USA, held as follows :

“194. In *Obergefell v. Hodges* 576 US - (2015), the Court held in a 5:4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy authored the majority opinion (joined by Justices Ginsburg, Breyer, Sotomayor and Kagan):

Indeed, the Court has noted it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with

respect to the decision to enter the relationship that is the foundation of the family in our society.”

12. In NLSA Case also, the right of the transgender person to marry was recognised. Paragraph No.119 of the said Judgment read as follows :

“119. Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on.”

13. For too long, the transgender persons/intersex people have been languishing in the margins. The Constitution of India is an enabling document. It is inviting them to join the mainstream. Therefore, it would be absurd to deny the transgenders the benefit of the social institutions already in place in the mainstream. In Karnataka, Akkai Padmashali, a transgender activist could officially

register her marriage with V.Vasudev and receive the certificate in the matter of few hours in January, 2017. V.Vasudev who is also is working with LGBTQI+ activists stated that they do not see Akkai as a transwoman but as a woman. But in State of Tamil Nadu which has been lauded and praised by the Supreme Court for its progressive measures in the NLSA judgement, there is a refusal by the authorities to recognise the validity of the marriage that has taken place between the petitioners herein.

14.Both the petitioners herein profess Hindu Religion. Their right to practice Hindu Religion is recognised under Article 25 of the Constitution of India. The Hindu Marriage Act is a personal law of the Hindus. When the right of the transgender persons to marry has been upheld by the Hon'ble Supreme Court, in the very nature of things, they cannot be kept out of the purview of the Hindu Marriage Act. One can have a civil marriage. One can also have a sacramental marriage. The petitioners' marriage was solemnized in a temple. Therefore, their fundamental right under Article 25 has also been infringed in this case.

15. Seen in the light of the march of law, the expression 'bride' occurring in Section 5 of the Hindu Marriage Act, 1955 will have to include within its meaning not only a woman but also a transwoman. It would also include an intersex person/transgender person who identifies herself as a woman. The only consideration is how the person perceives herself.

16. This Court must at this juncture place on record its gratitude to the intersex activist Gopi Shankar of Madurai. This Court had occasion to come across his work and it has been a humbling and enlightening experience. Beyond the man-woman binary, there are as many as 58 gender variants. Of course, we use the expression "transgender" as an umbrella term. When a child is born it is usually endowed with male genitalia or female genitalia. But there are children who are born with a genitalia that belongs to neither category. They are known as intersex children. They must be given their time and space to find their true gender identity. But the parents make the infant undergo sex reassignment surgery (SRS).

When Gopi Shankar took up the matter with NHRC, it forwarded the complaint to the Health Ministry. The reply from the Health Ministry makes a strange reading. It is worthwhile to extract it verbatim. It reads as under :

“F.No.Z-28015/15/2017-MH-1

Government of India

Ministry of Health & F.W

Directorate General of Health Services

Nirman Bhawan,

New Delhi – 110 108

Dated : 25.01.2017

To,

Shri Gopi Shankar M

Executive Director,

Srishti Madurai Student Volunteer Educational

Research Foundation,

Sri SaradaDham, Plot No.2, 4/413-A,

Bama Nagar, 2nd Street, Thapal Thanthi Nagar,

Madurai – 625017.

WEB COPY
Subject : Requesting the NHRC to ban the forced sex selective surgeries & medical abuse on Intersex babies in India & to recognise Intersex people's fundamental rights in India.

Sir,

I am directed to refer to your letter dated 07.11.2016 addressed to the Chairman, NHRC on the above noted subject and to convey that so far as your concerns regarding health are concerned, the medical fraternity is well aware of the existence of Intersex persons in the community as they study this subject as part of medical curriculum. Also, any kind of invasive medical procedure including sex reassignment surgeries are done only after thorough assessment of the patient, obtaining justification for the procedure planned to be conducted with the help of appropriate diagnostic test and only after taking a written consent of the patient/guardian. Further, medical fraternity is bound to provide medical services to all without any discrimination on any grounds whatsoever.

Any isolated case regarding lack of awareness, discrimination by a medical practitioner or unscrupulous act on the part of a medical practitioner may be brought to the notice of the appropriate authorities of the respective State Government for necessary action.

Rest of the issues raised in the representation are largely social in nature and may be taken up

with the Ministry of Social Justice & Empowerment.

Yours faithfully,

(Dr.Anil Sain)

Addl.Deputy Director General (AS)”

17.The consent of the parent cannot be considered as the consent of the child. Justice K.Chandru in the decision reported in (2007) 2 CTC 97 observed as follows :

“35.Ultimately, neither the father nor the mother can claim suzerainty over the child and in the ultimate analysis, the children are not the children of their parents. The said situation has been beautifully portrayed by Kahlil Gibran on The Prophet [Rupa & Co : 17th Edition : 2006],

"Your children are not your children.

They are the sons and daughters of Life's
longing for itself.

They come through you but not from you,
And though they are with you yet they belong
not to you.

You may give them your love but not your
thoughts,

For they have their own thoughts.

You may house their bodies but not their souls,

For their souls dwell in the house of tomorrow,
which you cannot visit, not even in your
dreams.

You may strive to be like them, but seek not to
make them like you.

For life goes not backward nor tarries with
yesterday.

You are the bows from which your children as
living arrows are sent forth.

Let your bending in the Archer's hand be for
gladness;"

18. The World Health Organization has published a report titled "Sexual Health, Human Rights and the Law". It calls for a deferment of intersex genital mutilation (IGM) until the intersex persons are old enough to make decisions for themselves. The following extract from the said report would speak for itself :

"Intersex people may face discrimination and stigma in the health system, in many cases being subjected to lack of quality of care, institutional violence and forced interventions throughout their lifetime....

A major concern for intersex people is that so-called sex normalizing procedures are often

undertaken during their infancy and childhood, to alter their bodies, particularly the sexual organs, to make them conform to gendered physical norms, including through repeated surgeries, hormonal interventions and other measures. As a result, such children may be subjected to medically unnecessary, often irreversible, interventions that may have lifelong consequences for their physical and mental health, including irreversible termination of all or some of their reproductive and sexual capacity. Medical procedures may sometimes be justified in cases of conditions that pose a health risk or are considered life-threatening. Such procedures, however, are sometimes proposed on the basis of weak evidence, without discussing and considering alternative solutions....

Increasingly, concerns are being raised by intersex people, their caregivers, medical professionals and human rights bodies that these interventions often take place without the informed consent of the children involved and/or without even seeking the informed consent of their parents..... Parents often consent to medical intervention for their children in circumstances where full information is lacking and without any discussion of

alternatives...

According to human rights standards, intersex persons should be able to access health services on the same basis as others, free from coercion, discrimination and violence.....Human rights bodies and ethical and health professional organizations have recommended that free and informed consent should be ensured in medical interventions for people with intersex conditions, including full information, orally and in writing, on the suggested treatment, its justification and alternatives...

These organizations have also recommended that medical and psychological professionals should be educated and trained about physical, biological and sexual diversity and integrity, and that they should properly inform patients and their parents of the consequences of surgical and other medical interventions and provide additional support... It has also been recommended that investigation should be undertaken into incidents of surgical and other medical treatment of intersex people without informed consent and that legal provisions should be adopted in order to provide remedies and redress to the victims of such treatment....”

19. In fact, the Hon'ble Supreme Court in NLSA case categorically stated that no one shall be forced to undergo medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. But, what is happening in reality is more in breach of this judgement given by the Hon'ble Supreme Court. Article 39 (f) of the Constitution of India reads as follows :

The State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

20. Since it has come to the notice of this Court that the mandate issued by the Hon'ble Supreme Court is not being honoured, this Court has to necessarily direct the Government of Tamilnadu to issue a Government Order enshrining the aforesaid mandate of the Hon'ble Supreme Court so as to effectively ban sex reassignment surgeries on intersex infants and children. The fourth respondent is directed to file a compliance report before the Registry

within a period of eight weeks from the date of receipt of a copy of this order.

21. Any intersex child is entitled to and must stay within the folds of its family. The running away from the family to the margins and beyond is a fatal journey that must be arrested. Time has come when they are brought back from the margins into the mainstream. This is because even though the transgender community is having its own social institutions, the stories we hear are horrendous. The parents must be encouraged to feel that the birth of an intersex child is not a matter of embarrassment or shame. It lies in the hands of the Government to launch a sustained awareness campaign in this regard. Recent Tamil Films such as “Peranbu” where Mamooty marries a transgender and “Super Delux” where Vijay Sethupathi plays the role of a transgender and is also a parent to the child he has fathered are encouraging trends.

22. It may not be out of place to mention here that the State of Malta has enacted the Gender Identity, Gender Expression and Sex

Characteristics Act, 2015. In the said Statute the following definitions can be seen :

"gender expression" refers to each person's manifestation of their gender identity, and/or the one that is perceived by others;

"gender identity" refers to each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and/ or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms;

"gender marker" refers to the identifier which classifies persons within a particular sex category;"

Section 3 (1) confers the right to gender identity and is as follows :

"3.(1) All persons being citizens of Malta have the right to - (a) the recognition of their gender identity; (b) the free development of their person according to their gender identity; (c) be treated according to their gender identity and, particularly, to be identified in that way in the documents

providing their identity therein; and (d) bodily integrity and physical autonomy.....

(3)The gender identity of the individual shall be respected at all times.

(4)The person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity.”

23. There is yet another aspect of the matter. Arunkumar, the first petitioner is a Hindu Kuravan. It is a notified scheduled caste community. The second petitioner belongs to Saiva Vellalar community. The Government of India has introduced a scheme known as Dr. Ambedkar Scheme for Social Integration through Inter-Caste Marriages to encourage intercaste marriages. As observed by Dr. B. R. Ambedkar in his speech in the Constituent Assembly delivered on 25th November, 1949 castes are antinational. Intercaste marriages alone will ultimately lead to social integration and fulfill the preambular promise of fraternity. The petitioners are clearly entitled

to get financial incentive as set out in the said scheme. The petitioners are permitted to submit an application to the fifth respondent who shall on being satisfied about the eligibility of the petitioners disburse the incentive amount to them.

24. The second petitioner appears to have been an intersex person at birth. In the affidavit filed in support of this writ petition, it has been mentioned that she was assigned as a female at birth. But, in the school records, the second petitioner has been described as a male by name Manthiramoorthy. In the Aadhar Card, her gender has been mentioned as "T" (Third Gender). A person who is in the Third Category is entitled to remain beyond the duality of male/female or opt to identify oneself as male or female. It is entirely the choice of the individual concerned.

25. Since this Court has held that the fundamental rights of the second petitioner guaranteed under Articles 14, 19(1)(a), 21 and 25 of the Constitution of India have been infringed, the orders impugned in this writ petition stand quashed and the third respondent is directed to register the marriage solemnized between the petitioners

on 31.10.2018 at Arulmighu Sankara Rameswara Temple, Tuticorin. The fourth respondent is directed to issue a G.O prohibiting the performance of sex reassignment surgery on intersex infants and children.

26.This writ petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

22.04.2019

Index : Yes / No

Internet : Yes / No

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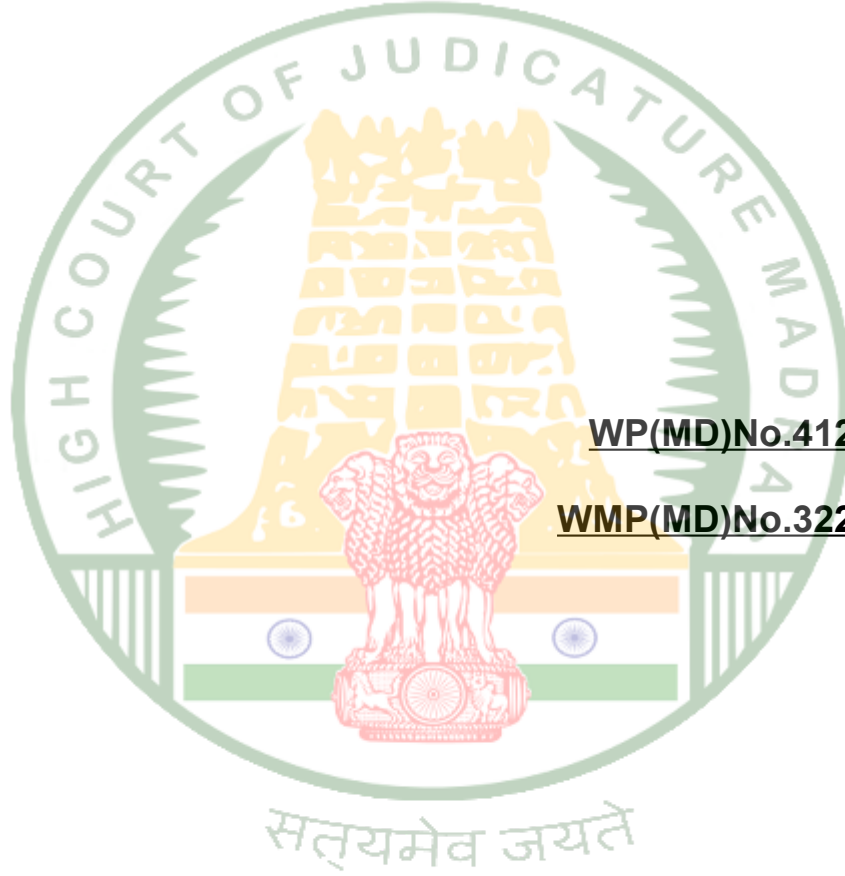
To

- 1.The Inspector General of Registration,
No.100, Santhome High Road,
Chennai – 600 028.
- 2.The District Registrar,
Tuticorin & District.
- 3.The Joint Registrar No.II,
O/o.Joint Registrar No.II,
Tuticorin & District.

सत्यमेव जयते
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G.R.SWAMINATHAN, J.

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WP(MD)No.4125 of 2019
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WMP(MD)No.3220 of 2019

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