

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.04.2023

Coram

The Hon'ble Mr. Justice **M.SUNDAR**

and

The Hon'ble Mr. Justice **M.NIRMAL KUMAR**

Crl.A.No.401 of 2023

&

Crl.M.P.No.5071 of 2023

in

Crl.A.No.401 of 2023

Ziyavudeen Baqavi

... Appellant/Accused No.3

-vs-

Union of India

Rep. By

The Inspector of Police

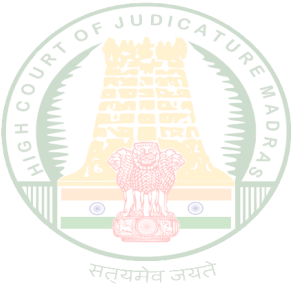
National Investigating Agency

Chennai

(R.C.No.08/2021/NIA/DLI)

... Respondent

Criminal Appeal filed under Section 21(4) of National Investigation Agency Act, 2008 to set aside the order passed in Crl.M.P.No.738 of 2022 dated 09.02.2023 in Spl.S.C.No.26 of 2022 on the file of Hon'ble Special Court under the National Investigation Agency Act, 2008, Sessions Court for Exclusive Trial For Bomb Blast Cases, Chennai at Poonamallee, Chennai as illegal.



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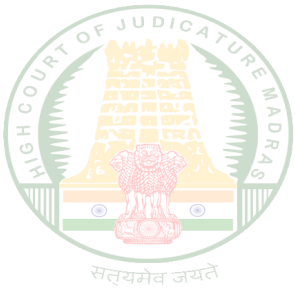
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For Appellant .. Mr.I.Abdul Basith
For Respondent .. Mr.R.Karthikeyan
Special Public Prosecutor for NIA Cases

JUDGMENT

[Judgment of the Court was made by M.SUNDAR, J.]

Captioned Criminal Appeal i.e., Crl.A.No.401 of 2023 has been filed under Section 21 of the 'National Investigation Agency Act, 2008 (Act 34 of 2008)', which shall hereinafter be referred to as 'NIA Act' for the sake of brevity, convenience and clarity, assailing an order dated 09.02.2023 made in Crl.M.P.No.738 of 2022 in Spl.S.C.No.26 of 2022 vide C.C.No.2 of 2021 (CNR No.TNCH06-00743-2022) on the file of Special Court under the NIA Act (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee. This 09.02.2023 order shall be referred to as 'impugned order' and the Court which made the impugned order shall be referred to as 'trial Court', both for the sake of convenience and clarity.



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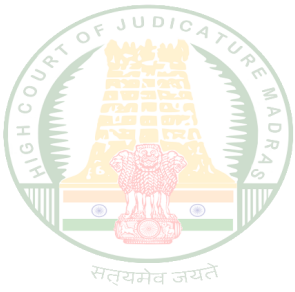
2. Appellant filed aforementioned Crl.M.P.No.738 of 2022 in the trial

WEB COURT *inter alia* under Section 227 of 'The Code of Criminal Procedure, 1973 (2 of 1974)' [hereinafter 'Cr.P.C' for the sake of brevity and clarity] seeking discharge from all the charges levelled against him in the charge sheet. It is necessary to record that according to the charge sheet, the charges levelled against the appellant are for alleged offences under Sections 120-B, 124-A, 153-A, 153-B, 505(1)(b), 505(1)(C) and 505(2) of 'Indian Penal Code, 1860 (Act 45 of 1860)' ['IPC' for brevity] and Section 13(1)(b) of 'The Unlawful Activities (Prevention) Act, 1967' [hereinafter 'UAPA' for the sake of brevity, convenience and clarity].

3. The discharge petition was resisted by the prosecution and the trial Court framed four points for consideration and the relevant portion of the impugned order capturing the four points reads as follows:

'The point for consideration is

- 1. Whether the Prosecution has obtained sanction under Section 45(1) of U.A(P).Act, 1967?*
- 2. Whether the Acts of committed by the Petitioner would fall under the Definitions UA(P) Act, 1967 and NIA Act, 2008?*
- 3. Whether there is sufficient ground to proceed with the case?*
- 4. Whether the application can be allowed?'*

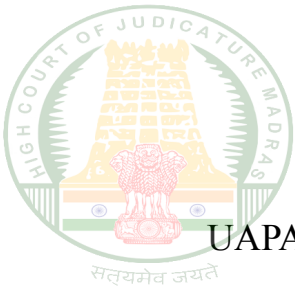


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4. While Point No.1 was answered separately in Paragraph VII of the impugned order, Points 2 to 4 were answered together in one go vide paragraph VIII of the impugned order. There shall be more elaboration on this elsewhere infra in this order.

5. In and by the impugned order the discharge petition filed by the appellant was dismissed and that has given raise to the captioned appeal as already alluded to supra.

6. Mr. I. Abdul Basith, learned counsel for appellant submitted that the impugned order relies on Wikipedia and arrived at a conclusion about the aim and objective of an entity; that the case laws pressed into service by the appellant have not been considered and have been brushed aside in one go by saying that the facts are completely different without any discussion or elaboration much less dispositive reasoning; that the statement of some witnesses (LWs 4, 8, 9 and 10) were not supplied to the accused and the right of fair trial has been infringed but this point has not been considered by saying that they are protected witnesses within the meaning of UAPA and NIA Acts; that the charge against the accused for alleged offence under



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UAPA is Section 13(1)(b) of UAPA but the impugned order has referred to

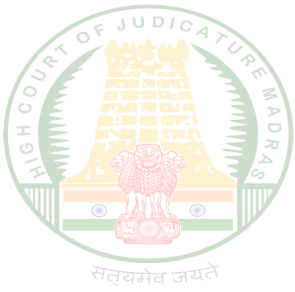
Section 15, which is a Chapter IV proceedings and serious in nature in complete contrast qua Section 13(1)(b) which is a Chapter III proceedings.

7. This Bench issued notice and Mr.R.Karthikeyan, learned Special Public Prosecutor for NIA Cases accepted notice for the respondent.

8. At the outset we notice that it is a case of certain points not being considered and reliance being placed on extraneous material and therefore, with the consent of both sides, the main appeal itself was taken up.

9. Before proceeding further we make it clear that four points canvassed by the learned counsel for appellant which have been captured supra *inter-alia* turn on non-consideration of case laws, relying on extraneous material which is forbidden vide ratio laid down by Hon'ble Supreme Court. There are several other grounds that have been urged on merits but in the light of the order which we propose to make we have not captured those points and we would be leaving those questions open.

10. We now proceed to set out our discussion and dispositive reasoning as regards the four points that have been captured supra.



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11. With regard to reliance on Wikipedia, the submission of learned

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counsel is indisputable as paragraph 9 of the impugned order of the trial Court explicitly relies on Wikipedia for a definition/description to presume and assume that the objective and aim of a particular entity is as set out therein. We refrain from setting out the same as categoric and certain sole reliance on Wikipedia is indisputable. In this view of the matter, learned Prosecutor really does not have much of a say as it is a matter of record and part of the case file before us. As regards placing reliance on Wikipedia two cases laws of Hon'ble Supreme Court are significant. One is *Acer India* case [*Commissioner of Customs, Bangalore Vs. M/s.Acer India Pvt. Ltd.*, reported in (2008) 1 SCC 382] rendered on 12.10.2007 and the other is *Hewlett Packard / Lenevo* case law [*Hewlett Packard India Sales Pvt. Ltd., (Now HP India Sales Pvt. Ltd., Vs. Commissioner of Customs (Import), Nhava Sheva/Lenevo (India) Pvt. Ltd., Vs. Commissioner of Customs (Import), Nhava Sheva* reported in 2023 LiveLaw (SC) 43] rendered on 17.01.2023. As regards *Acer India* and *Hewlett Packard / Lenevo* cases, they pertain to classification under Customs Act but the principle nonetheless can certainly be applied to the case on hand as the



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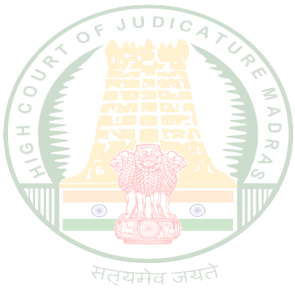
ratio laid down by Hon'ble Supreme Court is generic i.e., Wikipedia is
WEB COM based on a crowd-sourced user-generated editing model and therefore is not

completely dependable in terms of academic veracity and can promote misleading information. To this extent, the principle laid down by Hon'ble Supreme Court in *Acer India* and *Hewlett Packard / Lenevo* case laws can certainly be applied to the case on hand though the two case laws on facts pertain to classification of the imported goods under Customs Act.

12. In *Acer India* case, the question was, whether a micro-computer is different from a laptop or a PDA. After extracting what the Wikipedia says on this, it was held by Hon'ble Supreme Court that it is an online encyclopaedia and information can be entered therein by any person and as such it may not be authentic. Relevant paragraphs are paragraphs 16 and 17, which read as follows:

'16. It is, thus, evident that in common parlance a desktop or a microcomputer is different from a laptop or PDA. The distinction between a laptop and a desktop computer would further be evident from the history of Wikipedia wherein inter alia it is stated:

“Laptops' upgradeability is severely limited, both for technical and economic reasons. As of 2006, there is no industry wide standard form factor for laptops. Each major



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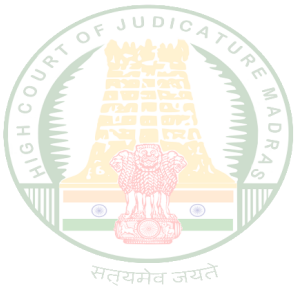


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laptop vendor pursues its own proprietary design and construction, with the result that laptops are difficult to upgrade and exhibit high repair costs. With few exceptions, laptop components can rarely be swapped between laptops of competing manufacturers, or even between laptops from the different product lines of the same manufacturer. Standard feature peripherals (such as audio, video, USB, 1394, WiFi, Bluetooth) are generally integrated on the main PCB (motherboard), and thus upgrades often require using external ports, card slots, or wireless peripherals. Other components, such as RAM modules, hard drives, and batteries are typically user-upgradeable.

Many laptops have removable CPUs, although support for other CPUs is restricted to the specific models supported by the laptop motherboard. The socketed CPUs are perhaps for the manufacturer's convenience, rather than the end-user, as few manufacturers try new CPUs in last year's laptop model with an eye towards selling upgrades rather than new laptops. In many other laptops, the CPU is soldered and non-replaceable. [7]

Many laptops also include an internal mini PCI slot, often occupied by a WiFi or Bluetooth card, but as with the CPU, the internal slot is often restricted in the range of cards that can be installed. The widespread adoption of USB mitigates I/O connectivity to a great degree, although the user must carry the USB peripheral as a separate item.



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NVidia and ATI have proposed a standardised interface for laptop GPU upgrades (such as an MXM), but again, choices are limited compared to the desktop PCIe/AGP aftermarket.”

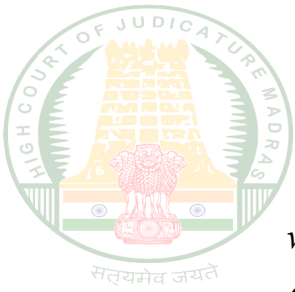
17. We have referred to Wikipedia, as the learned counsel for the parties relied thereupon. It is an online encyclopædia and information can be entered therein by any person and as such it may not be authentic. However, it is not disputed that a laptop and a desktop are differently known in commercial parlance. Furthermore, we are required to determine this issue on interpretation of the relevant entries contained in the Schedule of the Customs Tariff Act. '

(underlining made by this Court for ease of reference)

13. Thereafter, in ***Hewlett Packard / Lenevo*** case law, Hon'ble Supreme Court reiterated the aforementioned ratio in ***Acer India*** and held that such online platforms can promote misleading information as already alluded to and delineated supra in this order.

14. To be noted, ***Hewlett Packard / Lenevo*** also on facts is a case regarding customs goods classification but principle laid down as regards Wikipedia is generic and there is allusion supra in this regard. The most relevant paragraph as regards what we are concerned with is paragraph 14 and the same reads as follows:

'14. At the outset, we must note that the adjudicating authorities



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while coming to their respective conclusions, especially the Commissioner of Customs (Appeal) have extensively referred to online sources such as Wikipedia to support their conclusion. While we expressly acknowledge the utility of these platforms which provide free access to knowledge across the globe, but we must also sound a note of causation against using such sources for legal dispute resolution. We say so for the reason that these sources, dispute being a treasure trove of knowledge, are based on a crowd-sources and user generated editing model that is not completely dependable in terms of academic veracity and can promote misleading information as has been noted by this Court on previous occasions also..... '

15. Therefore, it is clear that Hon'ble Supreme Court has put in a caveat and caution against use of such sources (Wikipedia) in legal dispute resolution. ***Acer India*** and ***Hewlett Packard / Lenevo*** principles make it clear that on this score, the trial Court fell in error i.e., fell in error in relying on Wikipedia and therefore, the matter has to go back to trial Court to consider the matter afresh *de hors* Wikipedia keeping in mind the caveat put in place by Hon'ble Supreme Court in ***Acer India*** as well as ***Hewlett Packard / Lenevo*** cases.

16. The next point turns on case laws. This again is a point which is clear from the records as paragraph 21 of the impugned order of the trial



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Court reads as follows:

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'21. *The Counsel for Petitioner relied on the following judgments Nazir Khan and Ors Vs.State of Delhi reported in (2003) 8 SCC 461, AIR 2003 SC 4427, Kedar Nath Singh Vs. State of Bihar, reported in 1962 AIR 955, 1962 SCR Supl(2) 769. Shreya Singhal V.s Union of India reported in (2015) 5 SCC 1: AIR 2015 SC 1523 dealt with Article 19 of the Constitution – Righth to Freedom of speech and Expression are not applicable to the case on hand since here the facts are completely different.'*

17. There is no discussion whatsoever about the facts of the case laws that have been relied upon or pressed into service. We express no opinion on the applicability or merits of the case laws that have been pressed into service but we only proceed on the celebrated and time-honoured oft-quoted ***Padma Sundara Rao Vs. State of Tamil Nadu*** case rendered by a Hon'ble Constitution Bench and reported in ***(2002) 3 SCC 533: 2002 SCC OnLine SC 334. Padma Sundara Rao*** is an authority for the proposition as to how a precedent cited has to be dealt with by a Court. ***Padma Sundara Rao*** having been rendered by a Constitution Bench is not merely a ratio but it is a declaration of law. In ***Padma Sundara Rao*** case, the issue is whether



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after quashing of the notification under Section 6, fresh period of limitation

was available to the State Government to issue another notification under

Section 6. The principle which we are concerned with is articulated in paragraph 9 of ***Padma Sundara Rao*** and the same reads as follows:

'9.Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'

Therefore, on this point also the matter has to go back to the trial Court for the learned trial Court to look into the case laws pressed into service as the case laws pressed into service by the petitioner before the trial court / appellant herein, are renderings of Hon'ble Supreme Court and they have been side stepped in one go saying the facts are different without saying how and why. If a case law is distinguished on facts, there should be some



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discussion on how facts are different though it can be terse or epigrammatic

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18. This takes us to the third point. A careful perusal of the impugned order and more particularly paragraph 13 thereof makes it clear that the appellant raised the point regarding statement of witnesses (LWs 4, 8, 9 and 10) not being supplied to the appellant and appellant has also predicated this argument on violation of right to fair trial traceable to Article 21 of Constitution of India. This has been captured in Paragraph 13 of impugned order. However the trial Court while answering this point has held as follows:

'2. The LWs 4, 8, 9,10 are all protected witnesses and their names and identity are blocked. This Court has passed an order in C.M.P.No.120/2022 dated 24.03.2022 wherein LW 4,8,9,10 are being declared as Protected witnesses.'

19. In this regard, we deem it appropriate to clarify that protected witnesses is a concept, which is covered by Section 44 of UAPA and Section 17 of NIA Act. There is no disputation, contestation or disagreement before us that these two provisions are *in pari metria*.



Therefore, we deem it appropriate to reproduce Section 44 of UAPA which

reads as follows:

'44. Protection of witnesses.—

(1) *Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the court so desires.*

(2) *A court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.*

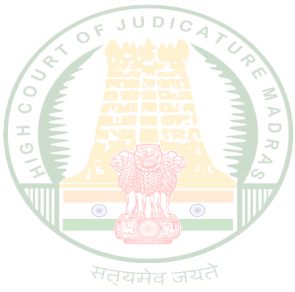
(3) *In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a court may take under that sub-section may include—*

(a) the holding of the proceedings at a place to be decided by the court;

(b) the avoiding of the mention of the name and address of the witness in its orders or judgments or in any records of the case accessible to public;

(c) the issuing of any directions for securing that the identity and address of the witness are not disclosed;

(d) a decision that it is in the public interest to order that all or any of the proceedings pending before



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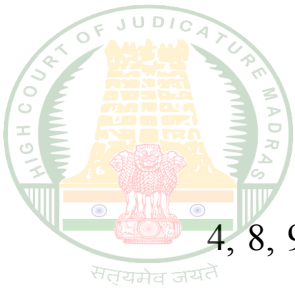
such a court shall not be published in any manner.

(4) Any person, who contravenes any decision or direction issued under sub-section (3), shall be punishable with imprisonment for a term which may extend to three years, and shall also be liable to fine.'

20. A careful perusal of Section 44 makes it clear that all this pertains to protecting the identity of the witnesses who make the statement and it really has nothing to do with supply of the statements to the accused.

21. In this context, we also deem it appropriate to remind ourselves that as regards Section 227 of Cr.P.C, which is captioned 'Discharge', a trial Court while entering upon a legal drill of examining a discharge plea should go by the record of the case and the documents submitted therewith. In the case on hand, it is therefore imperative that statements of LWs 4, 8, 9 and 10 have to necessarily be looked into nay imperative.

22. In this case, there is yet another strong reason for remand and that is because of an order by trial Court post impugned order. There is no disputation that the trial Court post impugned order in and by an order dated 28.03.2023 made in Crl.M.P.No.282 of 2023 moved under Section 207 of Cr.P.C directed the statements of the aforementioned witnesses, namely LWs



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4, 8, 9 and 10 to be furnished to the accused. This means that a re-look at

the impugned order becomes imperative. In this regard, we also deem it

appropriate to record that learned counsel for appellant submits on

instructions that the statements are yet to be supplied. Let the statements be

supplied and then there be a re-look.

23. This takes this order to the last point which turns on extraneous

material. In this regard, the most relevant paragraph is paragraph 12 of the

impugned order and the same reads as follows:

'12. The establishment of Islamic State in India would definitely promote enmity between two groups on the basis of religion and thereby the Section (ii) and 153A, Section 153B of the Indian Penal Code are attracted

[15. Terrorist act – 4[(1)] whoever does any act with intent to threaten or likely to threaten the unity, integrity, security 5[economic security,] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,-'

24. It will be clear from the allusion and narrative supra that as

regards charge under UAPA (excluding the charges under IPC) only charge

against the appellant before us, who is A3 before the trial Court, is under



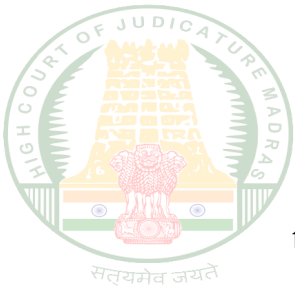
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Section 13(1)(b) of UAPA which finds its slot under Chapter III captioned 'OFFENCES AND PENALTIES' but Section 15 captioned 'Terrorist Act' finds its slot under Chapter IV captioned 'PUNISHMENT FOR TERRORIST ACTIVITIES'. Therefore, placing of reliance on Section 15 of UAPA by the trial Court in the impugned order for negating the discharge plea of the appellant is clearly flawed besides being reliance on extraneous material and material which is not relevant to the case on hand.

25. As already alluded to supra, very similar to Point No.1, as Points 2 to 4 also turn on records, learned Prosecutor really does not have much of a say in terms of arguments.

26. In the light of the narrative, discussion and dispositive reasoning thus far, we make the following order:

a) The impugned order i.e., order dated 09.02.2023 made in Crl.M.P.No.738 of 2022 in Spl.S.C.No.26 of 2022 by the Special Court under the National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, Chennai is set aside. We make it clear



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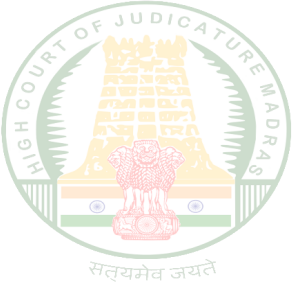
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that the impugned order of the trial Court is set aside on the aforementioned limited grounds so as to provide for remand by this Court and re-look at the order by the trial Court;

b) The trial Court shall now take up the discharge plea of the appellant post supply of statements of LWs 4, 8, 9 and 10 pursuant to order dated 28.03.2023 made in Crl.M.P.No.282 of 2023 and dispose of the discharge plea afresh as expeditiously as the business of the trial Court would permit;

c) We make it clear that at the time of re-look post remand, the aforementioned observations shall be borne in mind but as regards merits of the discharge plea, we make it clear that legal drill of the trial Court will be uninfluenced and untrammelled by this order;

d) It is open to the appellant as well as prosecution to raise additional or new grounds qua discharge and though obvious, it will be open to the trial Court to consider the same on its own merits and in accordance with law.



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Captioned Criminal Appeal is disposed of in the aforesaid manner.

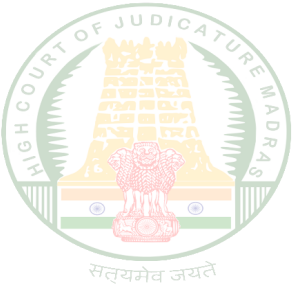
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(M.S.,J.) (M.N.K.,J.)
13.04.2023

Index: Yes
Speaking order
Neutral Citation: Yes
gpa

To

1. The Sessions Court for Exclusive Trial
For Bomb Blast Cases, Chennai
Poonamallee, Chennai
2. The Public Prosecutor
Madras High Court, Chennai



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M.SUNDAR, J.,
and
M.NIRMAL KUMAR, J.,

gpa

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