

Crl.O.P.Nos.23906 of 2023 etc batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on : 06.12.2023

Pronounced on : 12 .12.2023

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Crl.O.P Nos.23906, 23908, 23910, 23912, 23915, 23918 & 23922 of 2023

and

Crl.M.P.Nos.16626, 16628, 16630, 16632 to 16638, 16640, 16641, 16644 & 16646 of 2023

Crl.O.P.No.23906 of 2023

Subrata Monindranath Maity,
S/o.Monindranath Maity,
Occupier,
Bhatia Coke Energy Limited,
Ketnamalle Village,
Gummidipoondi Taluk,
Thiruvallur District-601 201.

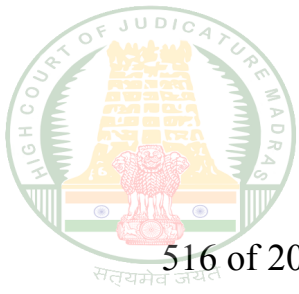
... Petitioner

/versus/

The State Represented by
Deputy Director,
Industrial Safety and Health-II,
S.F.No.47/1, Block 6,
Thiru Vi.Ka.Industrial Estate,
Guindy, Chennai-600 032.

... Respondent

Common Prayer: Criminal Original Petitions have been filed under Section 482 Cr.P.C., to call for the records and quash the complaint in C.C.Nos.510 to



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516 of 2022, on the file of the learned Chief Judicial Magistrate, Tiruvallur.

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For Petitioner : Mr.S.Ravi, Senior Counsel
for Mr.A.Venkatesh Kumar [all Crl.O.Ps]

For Respondent : Mr.Leonard Arul Joseph Selvam
Government Advocate (Crl.Side)

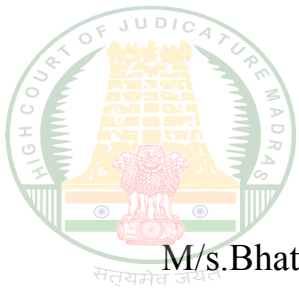
COMMON ORDER

These seven Criminal Original Petitions are filed under Section 482 of Cr.P.C., to quash the criminal proceedings initiated against the petitioners for the offences punishable under Section 92 of the Factories Act.

2. The petitioner herein is the 'occupier' of M/s.Bhatia Coke Energy Limited. Against the petitioner, the complaints, otherwise than the police report, filed by the Deputy Director, Industrial Safety and Health-II, taken cognizance by the Chief Judicial Magistrate, Tiruvallur for the offence under Section 92 of the Factories Act in C.C.Nos.510 to 516 of 2022.

3. The petitioner herein was appointed by NCLT as the 'resolution

professional' and nominated to be the 'Occupier' of the factory run by



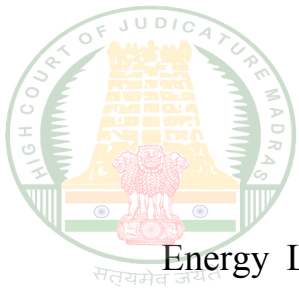
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M/s.Bhatia Coke Energy Limited. He is before this Court claiming that the complaints filed by the respondent suffers material infirmity. The petitioner is not the Director of the company, but Resolution Professional appointed by the NCLT under the IBC, 2016. Therefore, he could not be deemed to be the 'occupier' of the factory as defined under Section 2(n) of the Factories Act. The Resolution Professional appointed under IBC, 2016 will not fall within the ambit of duties and responsibilities caused on the “occupier” under the Factories Act. Under Section 233 of the IBC, 2016, action done or taken in good faith by the Resolution Professional is protected. M/s.Bhatia Coke Energy Limited which was inspected by the respondent on 22.01.2021 is the 'Corporate Debtor' managed by the Resolution Professional/Petitioner herein as per the orders passed by the NCLT. He functions in the capacity of the officer of the Court. Therefore, the petitioner cannot have the burden with the liability of being incarcerated of paying fine out of his pocket.

4. The learned Senior Counsel appearing for the petitioner submitted

that the petitioner took charge as Resolution Professional of M/s.Bhatia Coke



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Energy Limited on 30.12.2019 and continued till 09.05.2022. While he was

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managing the affairs of the company as per the IBC Code, the factory was inspected on 22.01.2021. A report prepared on the same day listing out the violations found in the factory premises of the Corporate Debtor. The show cause notice dated 16.02.2021 was served on the petitioner seeking his response, 7 days time was granted for reporting compliance. Since the petitioner was suffering from serious medical ailment and admitted in the Apollo Hospital on 29.01.2021 and coronary angiography, angioplasty (PTCA) done, he was not able to forward the compliance report immediately, but sent it with delay. The deficiencies and violations mentioned in the show cause notice were all in existence even before the petitioner took charge as Resolution professional. However, after the receipt of the show cause notice, the defects and the violations pointed out were rectified and the compliance report dated 17.04.2021 was sent to the respondent. Meanwhile, the respondent after obtaining sanction to prosecute had filed the complaint. The date of sanction for prosecution is 12.04.2021. The date of filing the complaint is 20.04.2021 which



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compliance report before filing the complaint. Likewise, the Chief Judicial Magistrate ought to have applied his mind before taking cognizance of the offence. The mechanical acceptance of the complaint and cognizance taken by the Chief Judicial Magistrate by 'rubber stamp order' is contrary to law and hence the complaint is liable to be quashed.

5. The contention of the petitioner is three fold. Firstly, as Resolution Professional appointed under IBC by order of the NCLT, he is not deemed to be the occupier of the factory. Under the Factories Act only a Director of the Company be nominated as Occupier. Secondly, the actions taken by the Resolution Professionals are protected from criminal prosecution under section 233 of the Code. Besides, he as Resolution Professional of the Corporate Debtor, the moratorium and protection from all proceedings under section 14 of the Code covers him. Lastly, the compliance report submitted ought to have been considered before filing the complaint. Omission to consider the compliance report after receipt of the show cause notice renders the complaints



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6. In support of his arguments, the learned counsel relied upon the judgment in ***K.Masthan Rao Vs. State*** reported in ***2014(3) MLJ(Crl) 523*** and few other judgements of this court which has referred and followed ***Masthan Rao*** case for the principle that the reply/rectification report submitted by the occupier ought to have been placed before the authority granting sanction and it should have been mentioned in the complaint. Non consideration of the reply/rectification letter and omission to mention about the reply to Show cause notice will render the prosecution bad. The judgement in ***D.Sanjivi Kumar -vs- State of Tamil Nadu*** reported in ***MANU/TN/1789/2023*** relied for the dictum that 'rubber stamp' order for taking cognizance of a case is indication of non application of mind. The judgment in ***S.M.S.Pharmacueticals Ltd -vs- Neeta Bhalla reported in [2007] INSC 174*** to emphasis that a Director in a Company who is not a functional director or who is not responsible for the day to day administration of the company's affair cannot be held vicariously liable for the default of the company. The judgment rendered in ***J.K.Industries -vs- Chief Inspector of Factories and Boiler*** reported in ***MANU/SC/1295/1896*** is relied to buttress the point that responsibility and duty of an occupier of the factory

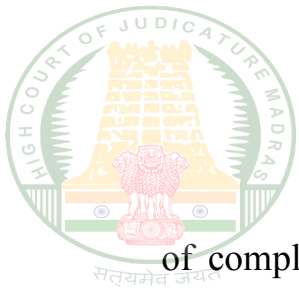


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cannot extend for criminal liability where the criminal intention is essential.

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7. Per contra, the Learned Government Advocate(Crl.Side) appearing for the respondent submitted that the seven complaints against the erred factory, for which the petitioner was the occupier, are strictly in compliance with the law. The company is liable to be prosecuted for the violations and omissions mentioned in the show cause notice. The inspection and show cause notice was issued when the petitioner was the occupier of the factory. Resolution Professionals appointed under the IBC not given any immunity from prosecution for violation of statutory obligations. The limited immunity from all proceedings is only in respect of debts and not for criminal liability connected with the violation or breach of statutory obligations of the factory in respect of safety measures and welfare scheme for the workmen. Sub-section (3) of Section 14 and the explanation thereunder specifically excludes the personal action of directors or representatives of a Corporate Debtor from the moratorium provided under section 14(1) of the Code. Likewise, Section 233 of the Code also will not applicable to the facts of the case, since the subject matter



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of complaint is not in respect of the action taken by the occupier/Resolution

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Professional in the course of discharging the duty, it is the inaction of not rectifying the violations and defects mentioned in the show cause notice issued after conducting inspection.

8. According to the Government Advocate, the sanction to prosecute and the cognizance of the offence are in order and not in violation of any rule or dictum of the Courts. The judgments referred regarding failure to consider the reply will not applicable to the facts of the case, since the reply was admittedly sent, much after the time granted to give reply and only after the complaint presented. It is not an omission as in the *Masthan Rao case* or other judgments cited which has followed the dictum of *Masthan Rao case*.

9. The Learned Government Advocate (Crl.Side) further submitted that a Resolution Professional though appointed by NCLT, he is neither a public servant nor an officer of the Court to claim any immunity under section 197 of



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all powers to administer the factory and equally he is responsible for the maladministration. Statutory obligations particularly, violation or omission to provide the safety measures mandated under the Act, ought to be rectified once brought to the notice and in case of failure, the person responsible is liable to be prosecuted. This is not a case of prosecuting a wrong person or person clothed immunity from being prosecuted under the Factories Act or IBC or any other statutes. This is also not a case of prosecuting without affording opportunity. Section 25 of IBC enlist the duties of Resolution professional. He is duty bound to preserve and protect the assets of the Corporate Debtor which includes the continued business operations of the corporate debtor in accordance to the law.

10. Heard the Learned Counsel for the petitioner and the Learned Counsel for the respondent.

11. Under the scheme of IBC, on initiation of a corporate insolvency resolution process under section 7 or 9 of the Code, the adjudicating authority declare moratorium under section 13 of the Code and will appoint interim



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resolution professional. Also under Section 14 he shall by order declare moratorium prohibiting certain actions mentioned thereunder. The moratorium is not a absolute one but subject to provisions of sub-section (2) and (3) and qualified with the explanation. For better understanding, Section 14 of IBC is extracted below: -

Section 14: Moratorium

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--

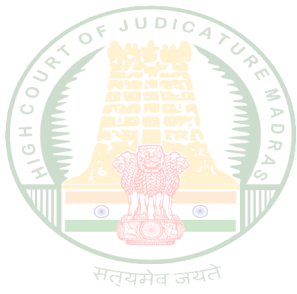
(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[Explanation.--*For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other*



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authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified;]

[(3) The provisions of sub-section (1) shall not apply to--

[(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.].

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”



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12. It is to be noted that the above explanation to section 14(1) was inserted through amendment dated 13/03/2020 w.e.f 28/12/2019. The insertion of the explanation is to make clear that the insolvency process and moratorium should not affect a running concern and its regular functioning provided, the payment of current dues are paid for the use or continuation of license, permit, concession etc., granted by State or Central Government, local bodies or sectoral regulators or any other authority constituted under any other law.

13. The other provision which speaks about protection is Section 233 of IBC which reads as below:-

“No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government, or the Chairperson, Member, officer or other employee of the Board or an insolvency professional or liquidator for anything which is in done or intended to be done in good faith under this Code or the rules or regulations made thereunder.”

14. The protection to the resolution professional given under the



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good faith under the code. The failure or omission to provide safety measures in the factory cannot be stretched to inaction.

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15. As pointed out by the learned Government Advocate, the IBC had enumerated the responsibilities of the Resolution professional in Section 25 of IBC which reads as below:-

“Section 25: Duties of Resolution Professional.

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section(1), the resolution professional shall undertake the following actions, namely:—

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

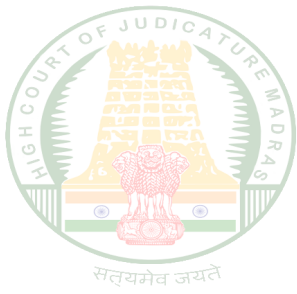
(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;



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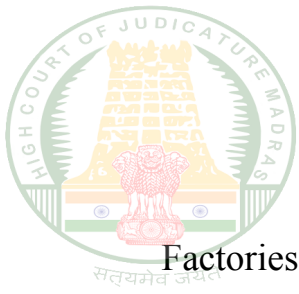
[(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.].

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.”

16. The resolution professional thus on appointment takes control of the property and business of the corporate debtor. He after taking incharge of the company as Resolution Professional, had got nominated himself as the occupier of the factory. Under section 17 of the Code, from the date of appointment of the interim resolution professional the management of the affairs of the corporate debtor vest in the intereim professional. The power of the Board of Directors of the corporate debtor stands suspended and and be exercised by the resolution professional. Thus, for all purpose the petitioner is the occupier of the factory and he cannot abdicate his duties and responsibility of providing necessary safety measures in the factory as mandated in the



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Factories Act.

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17. Occupier is defined under Section 2(n)(i) of The Factories Act,

1948 as below:

2(n)(i) “occupier” of a factory means the person who has ultimate control over the affairs of the factory

(i) in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;”

18. During the inspection the omission and defects noted were

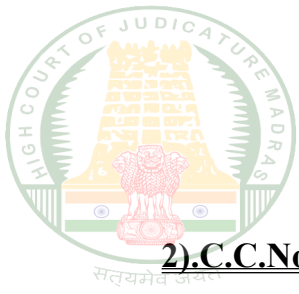
intimated to the petitioner but he did not respond within the time prescribed.

Hence, the below seven complaints under section 92 of the Factories Act

launched for the below mentioned violations.

1). C.C.No.510 of 2022:

Sl.No.	Count	
1.	Section 6(1) Rule 3 (5)(a)	Fire Hydrant - Firefighting arrangements
2.	Section 7(1) Rule 12B(3)(4)	Certificate of Stability
3.	Section 41 Rule 61-K(1)(2)(3)(4)	Eye Vision and Colour Blindness-Check for Worker



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2).C.C.No.511 of 2022

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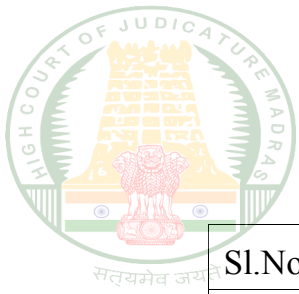
Sl.No.	Count	
1.	Section 21(1) (iv)(b)	No safety Guard – Transmission Machinery
2.	Section 38 Rule 61 (12)(c)	No – Mock drill conducted once in every 2 month
3.	Section 41 Rule 61- R	No – Speed Breakers

3). C.C.No.512 of 2022

Sl.No.	Count	
1.	Section 41 Rule 61-O	Fire retardant & heat retardant Clothing with Heat resistant gloves, Metal Gloves, Steel-toe-Cap Safety Shoes, Goggles-Not provide
2.	Section 21(2) Rule 53 Schedule XI Part A Item 2(2)	No safety Guard – Belt conveyor
3.	Section 21(2) Rule 53 Schedule XI Part A Item 3(1)	Not Close under – Belt conveyor

4). C.C.No.513 of 2022

Sl.No.	Count	
1.	Section 2(cb) Schedule-I Item 4 & 5 Section 7A(3) Section 41C(c) Section 112 Rule 62-N(1)	No-periodical examinations to Workers and Recorded in Form No.39 & 17
2.	Section 2(cb) Schedule-I Item 4 & 5 Section 7A	On-site Emergency Plan – Not submitted



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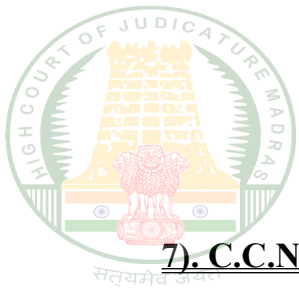
Sl.No.	Count	
	Section 41B(4)	

5). C.C.No.514 of 2022

Sl.No.	Count	
1.	Section 21(2) Rule 53 Schedule XI Part A Item 2(8)(c)	Belt Conveyor – Not periodical examinations
2.	Section 41 Rule 61E	Fire Hydrant Pump Diesel – not arrange Low-Level Alarm
3.	Section 41 Rule 61E	Not arrange Secondary Containment to avoid leaked Diesel

6). C.C.No.515 of 2022

Sl.No.	Count	
1.	Section 41 Rule 61E	Fire Hydrant Pump Lighting Facilities not connected with Uninterrupted Power Supply
2.	Section 87 Rule 95 Schedule – XVI Part II Clause 8	Explosive Proof or Flame proof light fittings – not provided to chemical storage
3.	Section 87 Rule 95 Schedule – XXI Clause 10	Corrosive chemicals (sulphuric acid-1.5 Ton & HCL – 0.5 Ton) Not stored in a separate room



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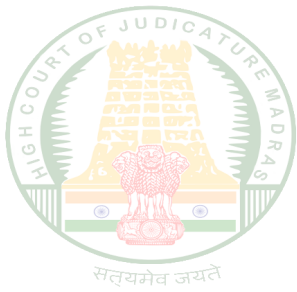
7). C.C.No.516 of 2022

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Sl.No.	Count	
1.	Section 87 Schedule – XXI Clause 4	Fountain eye washer not provided on corrosive chemicals ((sulphuric acid-1.5 Ton & HCL – 0.5 Ton) Work place
2.	Section 41 Rule 61E	View Mirror and Amber LED Safety Strobe light not arranged in payload Machine

19. The expression used in section 17 of the Code explicitly say that the resolution professional is the person who is vested with absolute control of the Corporate Debtor company. While so, for the violation or omission in the factory premises, Resolution Professional is responsible for the Proceedings if any, initiated against Resolution Professional under the Factories Act in his capacity as occupier. The said proceedings will not be covered under section 14 or 233 of the Code.

20. The last point for consideration is whether non consideration of the reply by the respondent will vitiate the trial.



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21. Opportunity of hearing is undoubtedly a right vest to the person

which cannot be deprived even if the statute does not explicitly provides for hearing.

22. The right of hearing is the foundation of natural justice principle.

Masthan Rao case judgment is based on the said principle. In the case in hand, the petitioner admits that he received notice but could not rectify the defects immediately due to his hospitalization. By the time he rectified the deficiencies and defect and intimated to the respondent, the sanction to prosecute has already been obtained. Therefore, this is not a case of denial of right but failure to avail the right. It is stated by the Learned Counsel for the petitioner that the petitioner is no more the resolution professional of the company/'Corporate Debtor'. This subsequent event is also a matter to be brought to the trial Court for necessary action.

23. Therefore, for the above said reasons, though it is not a case to



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rectification/compliance report of the petitioner dated 17/04/2021 for appreciation of the charge. Also the subsequent events need not be ignored for the reason they are not referred in the complaint or the sanction order.

24. With the above observation, the petitions are disposed of. The personal appearance of the petitioner during the hearing dates is dispensed except for the hearing dates for which his personal appearance is necessary or summoned to appear by the trial Court.

25. Accordingly, these ***Criminal Original Petitions*** are ***disposed of*** with the above direction. No order as to costs.

12.12.2023

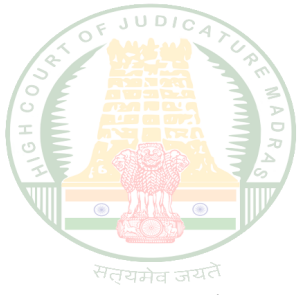
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Speaking order/non speaking order
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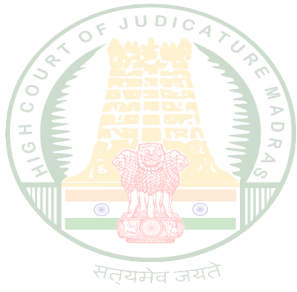
1.The Chief Judicial Magistrate, Tiruvallur.



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2.The Deputy Director,
Industrial Safety and Health-II,
S.F.No.47/1, Block 6, Thiru Vi.Ka.Industrial Estate,
Guindy, Chennai-600 032.

3.The Public Prosecutor, High Court of Madras, Chennai.



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Dr.G.JAYACHANDRAN,J.

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Pre delivery common order made in

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