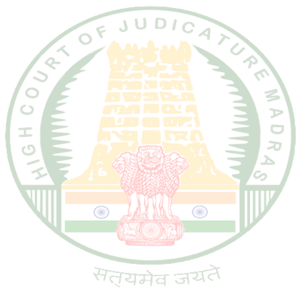
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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	24.11.2022
Pronounced On	11.01.2023

CORAM

THE HON'BLE **MR.JUSTICE C.SARAVANAN**

W.P.No.35688 of 2019

Mohammed Rafi ... Petitioner

Vs.

1.The State of Tamil Nadu,
Secretary to Government,
Backward Classes &
Minority Welfare Department,
Fort St.George, Chennai – 600 009.

2.The Shariat Council, (Reg. No.333/2003)
Tamil Nadu Towheed Jamath,
No.25, Aarmenian Street,
Mannady, Chennai – 600 001.

3.Sayeedha Begum ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the second respondent pertaining to the impugned Khula Certificate dated 21.06.2017 and quash the same as illegal.

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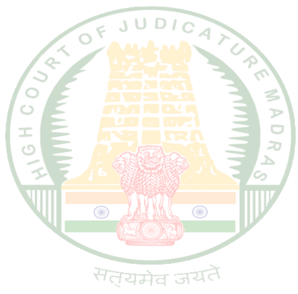
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For Petitioner : Mr.R.Abdul Mubeen

For R1 : Mr.S.Ravikumar
Special Government Pleader

For R2 : M/s.J.Antony Jesus

For R3 : No appearance

O R D E R

This Writ Petition has been filed for issuance of a Writ of Certiorari, to call for the records of the second respondent pertaining to the impugned Khula Certificate dated 21.06.2017 and quash the same as illegal.

2. The petitioner was married to the third respondent on 18.08.2013. Out of the wedlock, a male child was born to them on 21.10.2015. It appears that the third respondent left the matrimonial home on 03.09.2016. The third respondent appears to have decided to dissolve the marriage under the Muslim Personal Law (Shariat) by way of "Khula".

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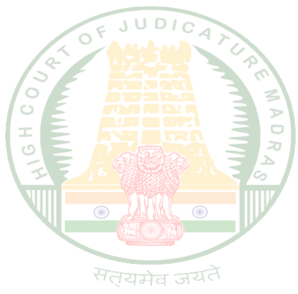
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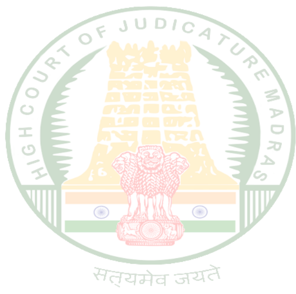
3. Under these circumstances, the third respondent approached the second respondent Shariat Council registered under the provisions of the Tamil Nadu Societies Registration Act, 1975, to declare the dissolution of marriage under the Muslim Personal Law (Shariat) by way of "Khula". The second respondent Shariat Council has granted Khula Certificate dated 21.06.2017 to the third respondent, against which, the present Writ Petition has been filed by the petitioner.

4. The facts on record indicates that while the proceedings were pending before the second respondent Shariat Council, the petitioner had filed O.S.No.145 of 2017 for "Restitution of Conjugal Rights. The suit is said to have been decreed as *exparte*.

5. In this Writ Petition, the third respondent has chosen to remain absent. The petitioner had also filed another Original Petition in O.P.No.23 of 2018 under the Guardians and Wards Act, 1890 which was subsequently allowed. As on date, E.P.No.180 of 2022 is pending before the I Additional Family Court for execution of Decree.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6. The petitioner has relied upon the decision of the Hon'ble Supreme Court in **Vishwa Madan Lochan** Vs. **Union of India and others** (2014) 7 SCC 707. A specific reference was made to para 13 from the said decision wherein it has been held that whatever may be the status of "fatwa" during Mogul or British Rule, it has no place in independent India under our Constitutional Scheme. The Court there held that "fatwa" has no legal sanction and cannot be enforced either by the Dar-ul-Qaza or by any other person. The Court held that "*The person or the body concerned may ignore it and it will not be necessary for anybody to challenge it before any court of law. It can simply be ignored. In case any person or body tries to impose it, their act would be illegal. Therefore, the grievance of the petitioner that Dar-ul-Qazas and Nizam-e-Qaza are running a parallel judicial system is misconceived.* "

7. The learned counsel for the petitioner has also relied upon an order dated 19.01.2017 of the Hon'ble First Bench of this Court in PIL, in **Abdur Rahman** Vs. **The Secretary to Government, Home Department, Government of Tamil Nadu, Fort St.George, Chennai -9**

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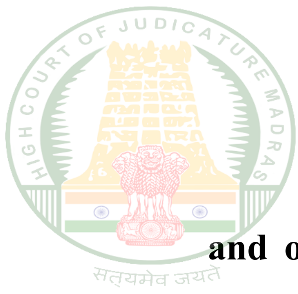

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and others in W.P.No.33059 of 2016, filed for issuance of a Writ of Mandamus to restrain the fourth respondent therein namely, Makka Masjid Shariat Council and other similar organizations from functioning as adjudicating body. A specific reference is made to para 13 of the above order, wherein, this Court concluded that impression which is conveyed to the public at large is of a Court functioning. Taking note of the fact that persons visiting the mosque may be from different social status and strata and in so far as the less educated persons may be concerned or women who are vulnerable, certainly the Board would give an impression as if some forum in the nature of a judicial forum is working.

8. The learned counsel for the petitioner submits that an interim order was passed by the Hon'ble Division Bench of this Court in **Bader Sayeed** Vs. **Union of India**, 2017 SCC OnLine Mad 74, assailing declarations which are sought to be issued by 'Kazis' in India, particularly in Tamil Nadu, allegedly certifying a Talaq and to consequently forbear them from issuing certificates and other documents certifying or approving Talaq. Despite the same, the second respondent has now

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issued the impugned Certificate. As far as the jurisdiction of this Court, to entertain the Writ Petition against the second respondent, it is submitted that the second respondent is not a kazi within the meaning of Section 4 of the Kazis Act, 1880. That apart, it is submitted that under the provisions of the Muslim Personal Law (Shariat) Application Act, 1937, a specific provisions has been provided in Tamil Nadu. In Section 2 of the aforesaid Act, the parties are to be governed by the respective personal law, which has to be in consequences with the provisions of the Dissolution of Muslim Marriages Act, 1939.

9. The learned counsel for the petitioner has also placed reliance on the decision of the Hon'ble Supreme Court in **Shayara Banu** Vs. **Union of India and others** (2017) 9 SCC 1. It is submitted that the kazi certificate issued by the second respondent gives an impression as if the marriage between the petitioner and the third respondent stood dissolved and it is an extra judicial mechanism under the law.

10. He further submitted that a muslim person can divorce his wife by pronouncing Talaq in three regular intervals and is not required to

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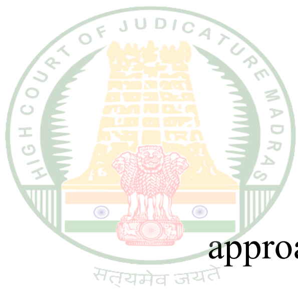
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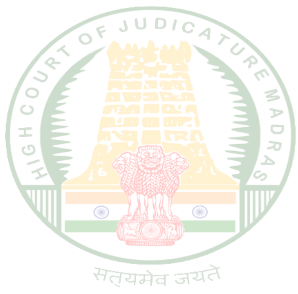
approach the Court as long as such announcement of Talaq are in public and in accordance with a provisions of the Muslim Personal Law and should be preceded with the mediation. It is submitted that as far as khula is concerned, the very nature of khula has always been recognised as a mode of divorce on a no-fault basis.

11. Opposing the prayer, the learned counsel for the second respondent Shariat Council has placed reliance on the decision of the Kerala High Court rendered on 28.10.2020 in R.P.No.936 of 2021 in Mat.Appl.No.89 of 2020 2022 Live Law (ker) 559 : 2022 SCC OnLine Ker 5512, wherein the right of a muslim women to resort to the extra judicial divorce of khula, allowing her to terminate her marriage. It is submitted that the Writ Petition is not maintainable.

12. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the second respondent Shariat Council and the learned Special Government Pleader for the first respondent.



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13. An important question arises for consideration in this Writ Petition. The first question to be answered is whether this Writ Petition is maintainable against the Shariat Council, the second respondent which is a private body. *Prima facie*, it is not a State within a meaning of Article 12 of the Constitution of India. Therefore, it is not amenable to jurisdiction under Article 226 of the Constitution of India. However, the scope of power under Article 226 of the Constitution of India has been widened by several decisions of the Hon'ble Supreme Court. Private body exercising the power as that of the public body has been made amenable to the jurisdiction under Article 226 of the Constitution of India.

14. The second respondent Shariat Council is a society registered under the provisions of the Tamil Nadu Societies Registration Act, 1975. It exercises overwhelming the power over the members of the Jamath. It seems to give a impression as that of a public body. Therefore, this Court is inclined to exercise the jurisdiction under Article 226 of the Constitution of India against the second respondent Shariat Council. Therefore, this Court is of the view that this Writ Petition as against the

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second respondent Shariat Council is maintainable. Having answered the preliminary issue, I shall now refer to the relevant law.

15. A Muslim Woman has an inalienable rights to dissolve her Marriage. This is recognized under the provisions of the Muslim Personal Law (Shariat) Application Act, 1937.

16. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 starts with a *non-obstante clause*. It makes it clear that notwithstanding any customs or usage to the contrary, in all questions relating to the instances specified therein, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

17. Under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other

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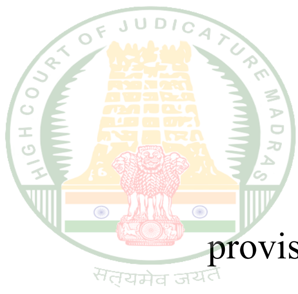
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provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

18. In Tamil Nadu, there is a slight amendment to Section 2 of the Central Act vide Muslim Personal Law (Shariat) Application (Tamil Nadu Amendment) Act, 1949. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 as in the Central Act and as per amendment applicable to the State of Tamil Nadu reads as under:-

Section 2 (applicable to Central)	***Section 2 (applicable to Tamil Nadu)***
Application of Personal law to Muslims.— Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law,	**Application of Personal Law to Muslims**.— Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of

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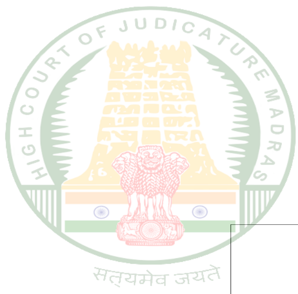
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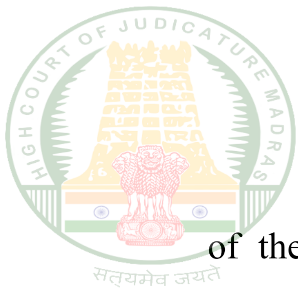
Section 2 (applicable to Central)	***Section 2 (applicable to Tamil Nadu)***
marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).	marriage, including Tallaq, Ila, Zihar, Lian, Khula and Mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

19. Section 5 of the Muslim Personal Law (Shariat) Application Act, 1937 had conferred the jurisdiction with the District Judge to dissolve a marriage on any ground recognised by the Muslim Personal Law (Shariat) from a petition made by a Muslim married woman. However, Section 5 of the above Act was repealed with the enactment of the Dissolution of Muslim Marriages Act, 1939 with effect from 17.03.1939.

20. The statement of objects and reasons for the Muslim Personal Law (Shariat) Application Act, 1937 records that the status of the Muslim Women under the so called customary law is simple disgrace. A reading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of the above makes it clear that the Muslim Personal Law (Shariat) Application Act, 1937 exists in the form of a veritable code and is too well known to admit any doubt or to entail any great labour on the sape of research, which is the chief feature of customary law. It is further stated that introduction of muslim personal law will automatically raise muslim women to the position to which they are naturally entitled.

21. When the Dissolution of Muslim Marriages Act, 1939 was enacted with effect from 17.03.1939, several grounds for decree for dissolution of marriage were statutorily recognized under Section 2 of the Dissolution of Muslim Marriages Act, 1939. Section 2(i) to (viii) of the said Act contains grounds for dissolution of marriage on fault basis. Section 2(ix) of the Act deals with residuary clause, under which, a married Muslim Woman is entitled to obtain a decree for dissolution of marriage on any other grounds which is recognized as a valid for the dissolution of marriages under Muslim Law. Thus, Khula which is recognized under the personal law is now statutorily recognized under the provisions of the Dissolution of Muslim Marriages Act, 1939.

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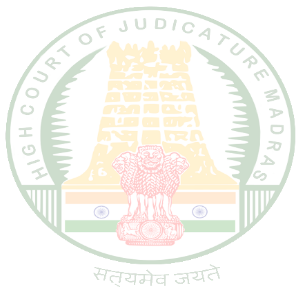
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22. While exercising the power to grant leave to a married Muslim Woman under Section 2 of the Dissolution of Muslim Marriages Act, 1939, the Courts are not exercising any extra-judicial power to grant divorce. The Courts will be governed by the Muslim Personal Law (Shariat) Application Act, 1937 which is supposed to be veritable code recognized under the religious text governing the Muslim Personal Law (Shariat) Application Act, 1937.

23. The question that arises for consideration in this Writ Petition is whether the married Muslim Women can obtain Khula Certificate from any persons like the second respondent Shariat Council a registered society under the Tamil Nadu Societies Registration Act, 1975?

24. The Division Bench of the Kerala High Court, in its judgment dated 28.10.2022, in a review petition in R.P.No.936 of 2021 in Mat. Appeal No.89 of 2020 etc., which is reported in 2022 SCC OnLine Ker 5512, held that it is acknowledged by Islamic law that the Muslim wife has the right to demand termination of marriage.

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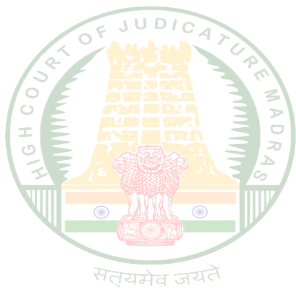
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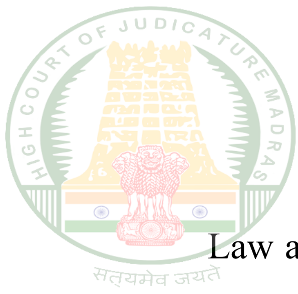
25. On a review from the above order dated dated 09.04.2021 of the Division Bench of the Kerala High Court in Mat. Appeal No.89 of 2020 etc which is reported in 2021 SCC OnLine Ker 2054 : (2021) 3 DMC 297 has held as stated above.

26. In the above case, decree of divorce was granted by the Family Court. Before the Family Court, the wife had initiated divorce proceedings on fault basis under Section 2(v) and (viii) of the Dissolution of Muslim Marriages Act, 1939, i.e. impotency and cruelty of the husband. The orders of the Family Court were thus challenged before the Division Bench of the Kerala High Court in Mat. Appeal No.89 of 2020 etc.

27. By the common order dated 09.04.2021 in Mat. Appeal No.89 of 2020 etc which is reported in 2021 SCC OnLine Ker 2054 : (2021) 3 DMC 297, the Division Bench has passed the detailed order.

28. The Division Bench of the Kerala High Court referred to four major forms of dissolution of marriage as recognized under the Islamic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Law and protected under the Muslim Personal Law (Shariat) Application Act, 1937 at the instances of the wife namely, (i) Talaq-e-tafwiz, (ii) Khula, (iii) Mubara'at, and (iv) Faskh.

29. As far as the issue relating to Khula, with which this Court is concerned herein, the Division Bench of the Kerala High Court has observed as under:-

> **20. Khula**: Khula is the form of divorce conferred upon wife similar to talaq conferred upon the husband. The recognition of Khula as a form of divorce is directly available from the Holy Quran. In Chapter II Verses 228-229, Quran confers rights on both husband and wife to unilaterally divorce the spouse. It is apposite to refer to verses 228-229:
>
> C.II V.228 : Women who are divorced shall wait, keeping themselves apart, three (monthly) courses. And it is not lawful for them that they should conceal that which Allah hath created in their wombs if they are believers in Allah and the Last Day. And their husbands would do better to take them back in that case if they desire a reconciliation. And they (Women) have rights similar to those (of men) over them in kindness, and men are a degree above them. Allah is Mighty, Wise.
>
> C.II.V229. Divorce must be pronounced twice and then (a woman) must be retained in honour

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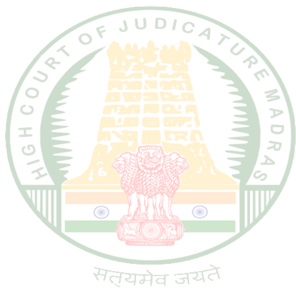
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> or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself. These are the limits (imposed by) Allah. Transgress them not. For whoso transgresseth Allah's limits : such are wrongdoers.

30. The Division Bench of the Kerala High Court dealt with the "absolute right" conferred on the married Muslim women and no specific reasons are required to invoke it.

31. It further observed that if the husband refuses, she has to move the Court in absence of any other method prevalent in this country and the Court is neither called upon to adjudicate nor called upon to declare the status, but simply has to pronounce termination of marriage on behalf of the wife.

32. The Division Bench of the Kerala High Court in the above case has concluded as follows:-

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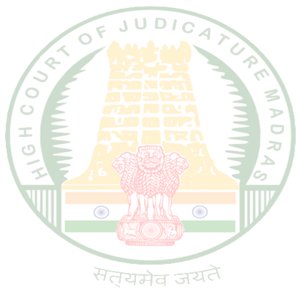
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> **81.** In the absence of any secular law governing khula, we hold that khula would be valid if the following conditions are satisfied:
>
> (i). A declaration of repudiation or termination of marriage by wife.
> (ii). An offer to return dower or any other material gain received by her during marital tie.
> (iii). An effective attempt for reconciliation was preceded before the declaration of khula.

33. The Courts are empowered under Section 7(1)(b) of the Family Courts Act, 1984 read with Section 2 of the Dissolution of Muslim Marriages Act, 1939 and Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 to pass a decree to dissolve a marriage.

34. The private bodies such as the Shariat Council, the second respondent herein cannot pronounce or certify dissolution of marriage by Khula. They are not Courts or Arbitrators of disputes. The Courts have also frowned upon such practice as mentioned above. This Court has also granted an interim stay *vide* order in **Bader Sayeed** Vs. **Union of India**, 2017 SCC OnLine Mad 74. It has restrained the bodies such as

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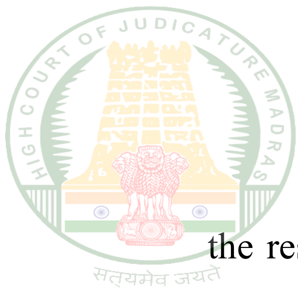

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the respondents therein (Kazis) from issuing such Certificates certifying dissolution of marriage by Khula.

35. Thus, while it is open for a Muslim Woman to exercise her inalienable rights to dissolve the marriage by Khula recognized under the Muslim Personal Law (Shariat) Application Act, 1937 by approaching a Family Court, it cannot be before a self declared body consisting of few members of Jamath. Therefore, the petitioner has made out the case for interference in this Writ Petition. Thus, the impugned Khula Certificate dated 21.06.2017 issued by the second respondent Shariat Council is liable to be quashed and is accordingly quashed. The petitioner and the third respondent are directed to approach the Tamil Nadu Legal Services Authority or a Family Court to resolve their disputes.

36. This Writ Petition stands allowed with the above observations. No cost.

11.01.2023

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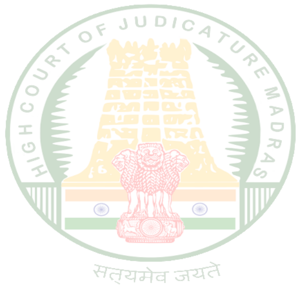

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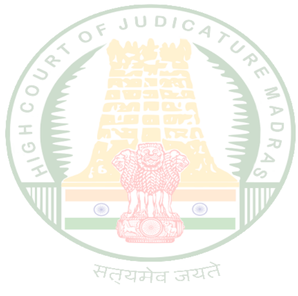
To

The Secretary,
Backward Classes & Minority Welfare Department,
The State of Tamil Nadu,
Fort St.George, Chennai – 600 009



C.SARAVANAN, J.

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Pre-Delivery Order in
W.P.No.35688 of 2019

11.01.2023