

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE Tmt.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A. No.2704 of 2017

The Commissioner of Central Excise
Chennai II Commissionerate
No.692, MHU Complex, Anna Salai
Nandanam, Chennai - 600 035

.. Appellant

versus

1.M/s.Mount Mettur Pharmaceuticals Limited
Plot C-2 SIPCOT Industrial Complex
Gummidipoondi - 601 201

2.The Customs, Excise and
Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe
1st Floor, No.26, Haddows Road,
Chennai - 600 006

.. Respondents

Civil Miscellaneous Appeal filed under Section 35(G) of the Central Excise Act, 1944 against the Final Order No.879/08 dated 08.08.2008 in Appeal No.E/89/2007 on the file CESTAT, South Zonal Bench, Chennai and appeal against the order of the Commissioner of Central Excise Chennai II, Commissioner 692 Annasalai Nandanam Chennai-35 Original No.57/2006/C.No.V/15/39/2006-CX.Adj dated 19/12/2006 and appeal against the show cause notice 49/2006 dated 05/06/2006.

For Appellant : Mr.A.P.Srinivas

JUDGMENT

(Delivered by S.MANIKUMAR, J.)

Challenge in this appeal is to the Common Final Order No.879/08 dated 08.08.2008 in Appeal No.E/89/2007, on the file of CESTAT, Madras Bench, by which, the Tribunal, has set aside the demand along with penalty, but directed the appellant therein to pay, interest at the appropriate rate. Appellant therein, has not challenged the final order, directing interest to be paid.

2. Short facts leading to the appeal are that M/s.Mount Mettur Pharmaceuticals Limited, namely, the 1st respondent herein, is engaged in the manufacture of dutiable products like "medicaments" falling under Chapter 30 of the Central Excise Tariff Act, 1985 and non-dutiable products like, 'I.V. Fluids', during the period from 16th May 2005 to 31st March 2006.

3. Material on record further discloses that from 05/2005 to 03/2006, the first respondent herein, had availed duty credit on 'Furnace Oil', used for generation of steam and subsequently for sterilising I.V. fluid containers, used both dutiable and exempted products. Under Rule 6(2) of the Cenvat Credit Rules, 2004, the 1st respondent/assessee is bound to maintain separate accounts for receipt, consumption and inventory of inputs/input services, in the manufacture of dutiable/exempted goods. The 1st respondent/assessee has failed to maintain separate accounts for such inputs/input services, and consequently, they are bound to pay 10% of the value of the exempted goods cleared, as per Rule 6(3)(b) of the Cenvat Credit Rules, 2004. On the above grounds, the Revenue initiated proceedings for demand of an amount equal to 10% of the value of the exempted goods, in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A (2) of the Central Excise Act, 1944 and for imposing a penalty, under Rule 15 of Cenvat Credit Rules, 2004, for the above period and accordingly an order in Original No.57/2006 dated 19.12.2006 has been passed:

" I confirm and demand from M/s.Mount Mettur Pharmaceuticals Ltd., Gummidipoondi, the sum of Rs.1,27,16,888/- (Rupees One Crore twenty seven lakhs sixteen thousand eight hundred and eighty eight only) being 10% of total price of the exempted final products cleared by them during the period from 16.05.2005 to 31.03.2006 under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A (2) of the Central Excise Act, 1944.

I hold that M/s.Mount Mettur Pharmaceuticals Ltd., Gummidipoondi are liable to pay interest on the above determined sum under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944,

I appropriate the sum of Rs.13,06,636/- (Rupees thirteen lakhs six thousand six hundred thirty six only) already paid by M/s.Mount Mettur Pharmaceuticals Ltd., vide GAR 7 Challan No.006/06-07 dated 22.8.2006 and adjust the same towards the demand made above.

I impose a penalty of Rs.10,00,000/- (Rupees ten lakhs only) on M/s.Mount Mettur Pharmaceuticals

Ltd., Gummidipoondi under Rule 15 of Cenvat Credit Rules, 2004."

4. Being aggrieved by the decision of the Commissioner, Office of the Commissioner of Central Excise, Chennai Commissionerate, Chennai-35, M/s.Mount Mettur Pharmaceuticals Limited, Gummidipoondi, has preferred an appeal to CESTAT, Chennai, contending inter alia that the demand is liable to be set aside, inasmuch as the entire credit (credit taken on common input in one case and credit taken on common input service in the other) stood reversed. Reliance was also made on the decision of the CESTAT, Madras, in Pepsico Holdings Pvt. Ltd. vs. Commissioner of Central Excise, Pondicherry reported in 2008-TIOL-59-CESTAT-MAD and other decisions of Coordinate Benches of CESTAT, Madras.

(i) Final Order No.A/2211/WZB/AHD/2007 dated 29.08.2007 in Appeal No.E/2982/2003 [Commissioner of Central Excise, Surat-I T/s Gujarat Guardian Ltd.]

(ii) Final Order No.588/2007 dated 14.05.2007 in Appeal No.E/1109/2006 [Ruchi Soya Industries Commissioner of Central Excise, Mangalore]

(iii) Final Order No.1181/2007 dated 17.10.2007 in Appeal No.C/178/2007 [Ruchi Infrastructure Ltd. Vs Commissioner of Central Excise, Visakhapatnam].

5. M/s.Ruchi Soya Industries Ltd. v. Commissioner of Central Excise, Mangalore (RSIL in short), also challenged a similar order, passed against the company.

6. After hearing both the parties, CESTAT, Madras, at Paragraphs 4 to 6 in the common Final Order No.879, 880/08, held as follows:

4. After examining the cited case law, we find that the principle applied in those cases is that MODV AT/ CENVAT credit taken and subsequently reversed is as good as not taken. In all cases, the assessee had taken credit on common inputs/input services which were used in the manufacture of dutiable and exempted final products and separate accounts were not maintained in respect of such inputs/input services vis-a-vis the two streams of final products. In all cases, the department demanded 100/0 of the value of the exempted products (less taxes) under Rule 6(3)(b) of the CENVAT Credit Rules, 2004. In all cases, the credit in question was reversed, prior to issuance of show-cause notice in some cases and after issue of show-cause notice in the other. The quasi-judicial authorities of the department confirmed the demand. This Tribunal consistently relied on the ratio of the Supreme Court's judgement in Chandrapur Magnet Wires (P) Ltd

Vs Collector of Central Excise Nagpur 1996 (81) E.L.T 3 (S.C.) and the Allahabad High Court's judgement in Hello Minerals Water (P) Ltd. Vs Union of India [2004 (174) E.L.T 422 (AIL)] and held that the demand under Rule 6(3)(b) was not sustainable inasmuch as the credit in question had been reversed. It appears, the case law cited before us today by the learned counsel was not available to the learned Commissioner in the present cases and that the apex Court's decision in Chandrapur Magnet Wires (supra) was distinguished.

5. In the case of M/s.RSIL, we find that input service tax credit of Rs.3.91 lakhs had been taken by them on services received prior to 01.03.2005, during which period their entire production was cleared on payment of duty only. Prima facie, this credit was admissible to the Credit of Rs.3.62 lakhs had been taken on a variety of input services which are claimed to be services specified under sub-rule (5) of Rule 6 of the CENVAT Credit Rules, 2004, in respect of which there was no bar on availment of credit on the ground of exempted final products having been cleared along with dutiable final products. We find that the claim of the assessee for the benefit was not considered by the Commissioner. Therefore the question whether the input service tax credit of Rs.3.91 lakhs and Rs.3.62 lakhs are admissible to the assessee as claimed by them requires to be carefully examined by the adjudicating authority. As regards the balance credit, we find that the learned Commissioner has acknowledged that the same had been reversed and interest thereon paid. It is also noted that the aforesaid credits of Rs.3.91 lakhs and Rs.3.62 lakhs were also reversed and interest paid thereon. On these facts, which are not in dispute, we set aside the Commissioner's order against M/ s.RSIL and remand the case to him for the limited purpose of deciding on the question whether the aforesaid credits of Rs.3.62 lakhs and Rs.3.91 lakhs are admissible to the party. Such decision shall be rendered after giving the party a reasonable opportunity of being heard. In view of our decision, the impugned demand gets set aside along with penalty. The appeal of M/ s.RSIL is accordingly disposed of.

6. In the appeal of M/s.MMPL, we note that, though the entire credit in question was reversed, interest thereon was not paid. The learned counsel for the appellants submits that this interest will also be paid at the applicable rate if so directed. We direct them to pay this interest at the appropriate rate, at the earliest, in any case within

30 days from the date of receipt of a certified copy of this order. Subject to such payment of interest, we set aside the impugned demand along with penalty and allow the appeal of M/s.MMPL."

7. Being aggrieved, Commissioner of Central Excise, Chennai II Commissionerate, has filed the instant Civil Miscellaneous Appeal on the following substantial questions of law.

i) Whether in the facts and circumstances of the case, the Tribunal was right in setting aside the impugned Order In Original even though the appellant had reversed the cenvat credit taken and attributable to the goods cleared free of duty after the removal of goods from the factory when the ratio in the Apex court judgment in Chandrapur Magnet Wires Vs. CCE, Nagpur is in favour of the Board's circular for reversal before removal of exempted goods?

ii) Whether the Tribunal is right in setting aside the order of the Appellant herein even though the 1st respondent /assessee has admittedly contravened the mandatory requirement under Rule 6 (2) of the CENVAT Credit Rules, 2004 and consequently liable to pay duty amount as contemplated under Rule 6 (3) (b) of the said Rules.

iii) Whether the Tribunal is justified in its order when the 1st respondent/assessee, admittedly, had not reversed the CENVAT credit taken and attributable to the goods cleared from the factory, which is a mandatory requirement to claim exemption from payment of duty?

iv) Whether the Tribunal has not erred in law in setting aside the order in original, without applying its mind to the Board's Circular No. 2/8/86 dated 10-4-1986 which states that the credit taken should be reversed prior to the removal of the goods and such direction is once again reinforced by the Board's subsequent circulars No. 232/6/96 -CX dated 25-7-1996 and 737/55/2003-CX dated 28-08-2003?

v) Whether or not the Tribunal has erred in applying the decision of the Hon'ble Supreme Court in the case of M/s Chandrapur Magnet Wires (P) Ltd., Vs. CCE, Nagpur reported in 1996 [81] ELT 3-SC to accept the case of the 1st respondent/ assessee by totally ignoring the fact that the said decision is distinguishable on the sole ground that the reversal of credit was made in that case well before the removal of such goods from the factory premises, whereas in the present case, admittedly, it had taken place only after

removal of the goods from the factory?

8. Supporting the above, Mr.A.P.Srinivas, learned counsel for the appellant, contended that the Tribunal has failed to note that the 1st respondent/assessee had utilized CENVAT Credit paid inputs for the manufacture of exempted goods, and cleared the same, without reversing an amount equivalent to 10% of the value of such goods under Rule 6(3) of the CENVAT Credit Rules, 2004; that the Tribunal ought to have seen that the mandatory requirement to be performed by the 1st respondent/assessee under the said Rules, is to reverse the credit, well before the removal of such goods from the factory. According to him, admittedly, in this case, reversal of credit has not taken place before the removal of such goods and therefore, proceedings initiated by the department, is perfectly in order and within the scope of the said Rules, and that the 1st respondent is liable to pay the duty demand, as well as the interest, penalty etc; that the Tribunal failed to note that the case law relied on by the 1st respondent, in the case of M/s Chandrapur Magnet Wires (P) Ltd., Vs CCE Nagpur reported in 1996 (81) ELT 3 SC, is not applicable to the facts and circumstances of the case on hand, since the 1st respondent has not reversed the credit taken and attributable to the goods cleared free of duty, before the removal of such goods from the factory; that the Tribunal ought to have taken note of the Board Circular dated 22/8/86 and 10-04-1986, wherein, it has been categorically stated that the credit taken, should be reversed prior to the removal of the goods and such direction has once again, reinforced by the Board's subsequent circulars No.232/6/96-CX dated 25-7-1996 and 737/55/2003-CX dated 28-8-2003.

9. Heard Mr.A.P.Srinivas, learned counsel for the appellant and perused the materials available on record.

10. The Tribunal has found that the entire credit in question has been reversed. On the facts and circumstances of the case, as to whether the Tribunal was right in directing M/s.Mount Mettur Pharmaceuticals Limited, to pay only interest at the appropriate rate, we deem it fit to consider a decision of this court in Commissioner of Central Excise, Chennai - 4 vs. Sundaram Fasteners Limited reported in 2014 (304) ELT 7, wherein, one of the issues, which came up for consideration, before a Hon'ble Division Bench was, whether the assessee therein is liable to pay interest under Rule 14 of the CENVAT Credit Rules, 2004 read along with Section 11AB of the Central Excise Act, 1944. At paragraph 8, the Hon'ble Division Bench, discussed the issue, as hereunder:

"8. The said issue came up for consideration before the Hon'ble Supreme Court in the case of Union of India vs. Ind-Swift Laboratories Ltd., reported in 2011 (265) ELT 3 (SC). In the said

case, the High Court read down the Rule to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly and interest should not be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. The assessee's case in this appeal is that the credit has been reversed. Therefore, mere wrong availment will not attract payment of interest as reversal of credit would amount to "no credit" being taken. The Hon'ble Supreme Court held that the High Court misread and misinterpreted Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. It further pointed out that a statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal and Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service and the issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the said High Court. Further, the Hon'ble Supreme Court, reading the provision as a whole found that there was no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or has been erroneously refunded as the word "AND". It was further held that on the happening of any of the three circumstances viz., credit taken or credit utilized wrongly or credit has been erroneously refunded, then such credit becomes recoverable along with interest. Further, the Hon'ble Supreme Court held that so far as Section 11 AB of the Act is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, it observed that the High Court in the said case erroneously held that the interest can be claimed from the date of wrongful availment of CENVAT Credit and it should only be payable from the date when CENVAT Credit is wrongly utilized."

Though other decisions were relied by the assessee therein, at paragraphs 11 and 12 in Sundaram Fasteners' case, the Hon'ble Division Bench held as hereunder:

11. The one and only decision which concerns about Rule 14 is the decision reported in 2011 (265) ELT 3 (SC), where the Hon'ble Supreme Court in paragraph No.17 has clearly pointed out that on the happening of any of the three situations viz., credit taking credit, utilizing it wrongly or erroneously refunding the credit, becomes recoverable along with interest. In paragraph Nos.16 and 17 of the said Judgment, the Hon'ble Apex Court has observed as follows:-

"16.A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature of provision of Section 11AB would apply for effecting such recovery.

17. We have very carefully read the impugned order and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of

reading it down as has been done by the High Court. If the aforesaid provision is read as a whole, we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or 'has been erroneously refunded' as the word "AND". On the happening of any of the three circumstances such credit becomes recoverable along with interest".

12. In the light of the above findings of the Hon'ble Apex Court, particularly with regard to Rule 14 of the Act, we do not find any justifiable ground to accept the plea of the assessee based on the decisions relied on by the assessee reported in 1996 (81) ELT 3 (SC), 2004 (174) ELT 422 (All.), and 2012 (279) ELT 209 (Kar.)

In the light of the decision in Sundaram Fasteners Case, levy of interest is valid and it is also to be noted that the respondent herein, has not challenged that portion of the final order of CESTAT, Madras, confirming interest.

11. As regards the obligation to maintain separate books of accounts, reversal of credit, and whether the CESTAT, Madras was right, in setting aside the demand, at paragraph 13, the Hon'ble Division held as follows:

"13. The learned counsel for the assessee submitted his notes on the contention that interest being compensatory and that question of payment of interest would arise only where the principal is due. To that contention, by placing reliance on the decision reported in 1996 (88) ELT 12 (SC) (Prathiba Processors vs. Union of India as well as the decision reported in 2007 (215) ELT 3 (CCE v s. Bombay Dyeing), the learned counsel for the assessee contended that, when credit has been reversed before utilization, the same did not amount to taking credit."

12. On the facts and circumstances of the case, on the next question as to whether CESTAT, Madras was right in setting aside demand and penalty, it is worthwhile to consider a decision of the Hon'ble Division Bench in Commissioner of Central Excise, Puducherry vs. CESTAT, Chennai reported in 2015 (323) ELT 323 Madras, wherein, it was the case of the department that the respondent had used the common cenvat credit availed inputs in the manufacture of dutiable aerated water and duty exempted slice, but did not follow the procedure contemplated under Rule 57CC (9) by maintaining separate inventory and accounts in the receipt and use of inputs, viz., filter paper, activated carbon,

caustic soda, industrial washing products and sugar. Further, in respect of furnace oil used as fuel, the respondent did not reverse the credit equal to the furnace oil said to have been used in the manufacture of exempted Slice. Therefore, the department contended that the assessee/respondent was liable to pay an amount equal to 8% of the value of exempted produce under Rule 57CC. Therefore, a show cause notice was issued on the assessee therein/respondent demanding payment of duty. A reply was given by the assessee therein/respondent to the show cause notice stating that they had reversed the entire credit on the common inputs used in the manufacture of dutiable as well as exempted goods and, therefore, no demand should be made. However, the said submission was rejected by the adjudicating authority, who in his original order of adjudication, confirmed the demand of duty at 8% of the value of clearance. Against the said adjudication order, the assessee preferred an appeal before the Commissioner (Appeals), who dismissed the appeal. On further appeal, the Tribunal reversed the order of the Commissioner (Appeals) placing reliance on the decision of the Allahabad High Court in Hello Mineral Water Pvt. Ltd. Vs Union of India (2004 (174) ELT 422 (All.)) which was passed on the basis of the Apex Court's decision in Chandrapur Magnet Wires Pvt. Ltd. Vs Collector (1996 (81) ELT 3 (SC)). Aggrieved against the said order, the appellant therein/Revenue filed appeal.

12.1. During the course of hearing in Commissioner of Central Excise, Puducherry's case, attention of this court had been drawn to an amendment made to Rule 6 under Section 73 of the Finance Act, 2010, which was given retrospective effect from September 2004. Sub Rule (6) to Rule 6, taken note of by the Hon'ble Division Bench in CCE, Puducherry vs. CESTAT, Chennai, is reproduced.

S. No.	Provisions of Cenvat Credit Rules, 2004 to be amended	Amendment सत्यमेव जयते	Period of effect of amendment
1	2	3	4

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S. No.	Provisions of Cenvat Credit Rules, 2004 to be amended	Amendment	Period of effect of amendment
	Rule 6 of the Cenvat Credit Rules, 2004 as published vide Notification Number G.S.R. 600 (E), dated the 10th September, 2004 [23/2004-CENTRAL EXCISE (N.T.), dated the 10th September, 2004]	In the Cenvat Credit Rules, 2004, in Rule 6, after sub-rule (6), the following sub-rule shall be inserted, namely : "(7) Where a dispute relating to adjustment of credit on inputs or input services used in or in relation to exempted final products relating to the period beginning on the 10th day of September, 2004 and ending with the 31st day of March, 2008 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President, then, notwithstanding anything contained in sub-rules (1) and (2), and clauses (a) and (b) of sub-rule (3), a manufacturer availing Cenvat credit in respect of any inputs or input services and manufacturing final products which are chargeable to duty and also other final products which are exempted goods, may pay an amount equivalent to Cenvat credit attributable to the inputs or input services used in, or in relation to the manufacture of, exempted goods before or after the clearance of such goods : Provided that the manufacturer shall pay interest at the rate of twenty-four per cent, per annum from the due date till the date of payment of the said amount. Explanation : For the purpose of this sub-rule, "due date" means the 5th day of the month following the month in which goods have been cleared from the factory.	10th day of September, 2004 to the 31st day of March, 2008 (both days inclusive).

12.2. While confirming the order of the CESTAT, Madras, setting aside demand of duty, the Hon'ble Division Bench in CCE, Puducherry's case followed an earlier decision of this court in Commissioner of Central Excise vs. ICMC Corporation Ltd. reported in 2015 (315) ELT 388 (Mad.), wherein, after considering the above amendments, this court held that, as per Section 73 sub-section (2) of the Finance Act, 2010, the assessee has to make an application to the Commissioner of

Central Excise along with documentary evidence and a Certificate from the Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods within a period of six months from the date on which the Finance Bill, 2010 received the assent of the President. Considering the fact that assessee had reversed the credit even prior to the amendment and the order of the Tribunal was in fact no different from what is contemplated under the Finance Act, 2010, this court held against the Revenue.

13. Decision in Commissioner of Central Excise, Puducherry vs. CESTAT, Chennai reported in 2015 (323) ELT 323, squarely applies to the case on hand.

14. In the light of the above decisions, we are of the view that there is no manifest error, in the final order of the CESTAT, Madras, in setting aside the demand, and restricting the same only to interest. On the facts and circumstances of the instant case, substantial questions of law, raised in the instant appeal, are answered against the revenue.

Civil Miscellaneous Appeal, is dismissed. However, there shall be no order as to cost.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

asr

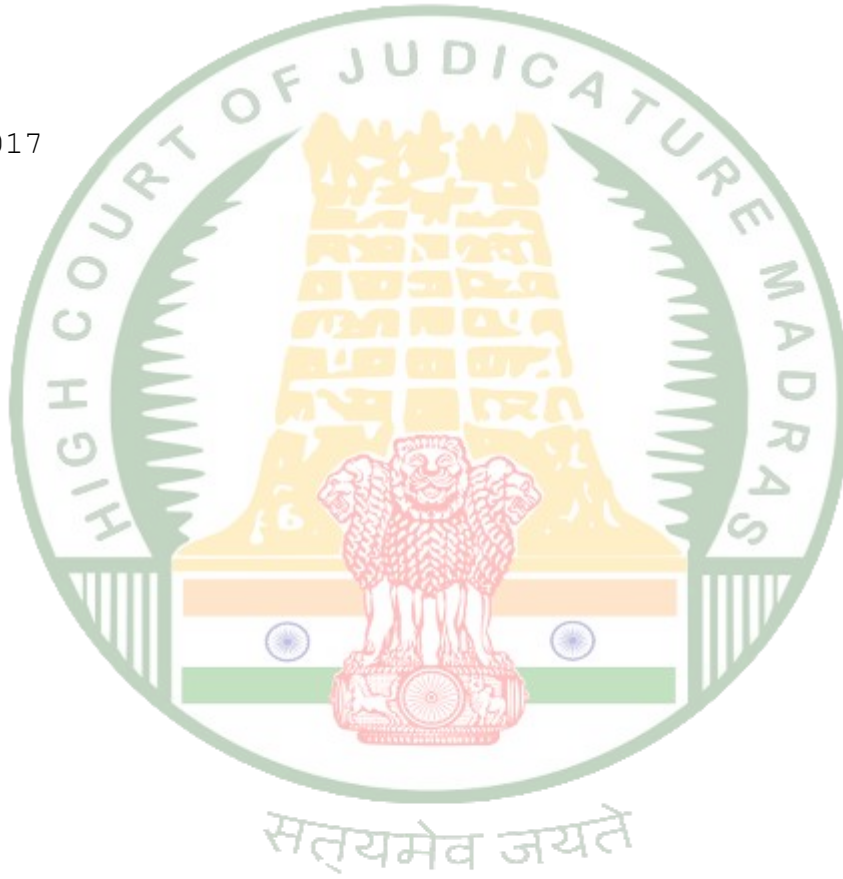
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