

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
30.11.2017	07.12.2017

Coram

The Hon'ble Mr.Justice T.S.Sivagnanam

**Writ Petition Nos.22630 to 22636 of 2017
and
W.M.P.Nos. 23733 to 23739 of 2017**

W.P.No.22630 of 2017

Schwing Stetter Pvt. (India) Ltd.,
rep. by its General Manager,
Holder, Mr. K. Sethuraman

...Petitioner

Vs.

1. The Assistant Commissioner (CT)
Sriperumbudur Assessment Circle,
Varadrajapuram - 602 103.
2. Authority for Clarification and Advance Ruling,
viz., the Commissioner of Commercial Taxes,
O/o the Commissioner of Commercial Taxes,
Ezhilagam, Chennai - 600 005.

(R-2 impleaded as per order, dated 18.09.2017 in
W.M.P.Nos.24327 to 24333 of 2017, of these W.Ps.)

...Respondents

Prayer in W.P.Nos.22630 of 2017 :-

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for the records of the impugned order, bearing CST No.722138/2007-08, dated 19.06.2017, passed by the first respondent, and to quash the same.

For Petitioner : Mr C.Natarajan, Senior Counsel
for Mr.Karthik Sundaram

For Respondents : Mrs.S. Narmadha Sampath
Special Government Pleader

COMMON ORDER

Since the common issue arises in all these Writ Petitions, they were heard together and disposed of by this common order.

2. The petitioner has filed these Writ Petitions, challenging the orders passed by the first respondent/Assessing Officer, directing the petitioner to pay the differential amount of tax at the rate of 8.5%, on the sale of construction machinery, treating them as capital goods upon payment of tax at 4% as interstate sales at higher rate, which was not accepted.

3. In the impugned notices, the first respondent has stated that, notices were issued to the petitioner/dealer in 2010, and the petitioner had filed Writ Petitions before this Court, challenging the vires of Section 2 (11) of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter, referred to as 'TNVAT Act') as well as the consequential notices issued by the first respondent for the relevant assessment years. The Writ Petitions were dismissed by the Division Bench, by a common order, dated 05.04.2016, and therefore, a notice was issued to the petitioner, giving them opportunity to file their objections. In response to the such notice, the petitioner informed the first respondent that, they are in the process of filing Review Petitions against the common order, dated 05.04.2016. Though such contention was raised by the petitioner/dealer, since no orders (staying the operation of the order, dated 05.04.2016) produced by them before the first respondent, the impugned demand notices have been issued, claiming the differential tax at 8.5%.

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4. The following facts would be relevant for the purpose of disposal of these Writ Petitions;-

i) The petitioner is engaged in the manufacture of sale of various goods, such as concrete mixing (batching) plants, pipelines, concrete mixers, concrete pumps and spares, and also makes sale of such constructions, in the course of interstate trade or commerce.

ii) The petitioner has challenged the impugned proceedings on the ground of violation of principles of natural justice, as no reasons have been assigned in the impugned orders, and, no opportunity of personal hearing was granted, prior to passing the impugned orders. Further, it is submitted that the impugned orders have been passed, in violation of Section 8 (2) of the Central Sales Tax Act, 1956 (CST Act).

iii) It is further stated that, the petitioner was making payment of CST at 4% on batching plants sold in the course of interstate trade, or commerce, without 'C' Form under Section 8 (2) of the CST Act, on the basis that, such goods were in the nature of capital goods, which attracted rate of tax at 4% under Section 2 (11) read with Serial No.25 of Part B of the first schedule to the TNVAT Act.

iv) The first respondent issued notices, dated 29.03.2010, seeking to levy CST at 12.5% instead of 4% on the basis that, batching plants will not qualify as capital goods, as they are not used within the State of Tamil Nadu, as required under Section 2 (11) of the TNVAT Act. This necessitated the petitioner to challenge the validity of Section 2 (11) of TNVAT Act along with the consequential notice, proposing to impose higher rate of tax. The Writ Petitions were entertained by the Division Bench, and an order of interim stay was granted, and consequently, the Revenue proceeded with the assessment with a right to re-open the assessment, subject to the result of the Writ Petitions. Ultimately, the Writ Petitions filed by the petitioner along with batch of other cases were dismissed by the Division Bench, by common order, dated 05.04.2016, upholding the constitutional validity of Section 2 (11) of TNVAT Act. The Special Leave Petitions filed against the order of the Division Bench, dated 05.04.2016, were dismissed by the Hon'ble Supreme Court on 17.10.2016.

v) It is stated that the petitioner has filed Review Petitions as against the common order passed by the Division Bench, and the matter is pending. After the dismissal of the Writ Petitions, the first respondent issued a notice, dated 07.02.2017, directing the petitioner to pay the differential amount of tax at 8.5%, after giving credit to 4% of the tax already paid by the petitioner. The petitioner filed elaborate objections to the said notice, and specifically sought for an opportunity of personal hearing, and the first respondent, without affording opportunity of personal hearing, rejected the petitioner's claim by passing the impugned orders.

5. On noting the above submission made by Mr. C. Natarajan, the learned Senior Counsel for the petitioner, this Court, while entertaining these Writ Petitions on 24.08.2017, granted an interim order, directing the first respondent not to initiate any coercive action against the petitioner till the learned Special Government Pleader obtains proper instructions from the first respondent, and adjourned the cases to 29.08.2017. Thereafter, when the Writ Petitions were taken up for hearing, the learned Special Government Pleader has produced the counter affidavit filed by the first respondent. During the pendency of the Writ Petitions, the petitioner filed

Miscellaneous Petitions, for impleading the Authority for Clarification and Advance Ruling, as party respondent in the Writ Petitions, which were ordered by this Court, by order, dated 18.09.2017 .

6. The learned Senior Counsel, while referring to the factual matrix of the case, which have been set out in the preceding paragraphs, submitted that the issue, which was subject matter of consideration before the Division Bench, in the batch of cases, which were dismissed on 05.04.2016, pertains only to the constitutional validity of Section 2 (11) of the TNVAT Act on the ground that, it is an encroachment by the State Law into the field occupied by the Central legislation. The Division Bench considered the submissions and dismissed the Writ Petitions, by common order, dated 05.04.2016, and while doing so, specifically pointed out in para No.82 (i) that the challenge to the validity of Section 2 (11) of TNVAT Act was rejected, and the prayer sought for declaration was dismissed. Further, in para No.82 (ii), the Division Bench noted that, since in many of the Writ Petitions, the challenges were not only to the validity of Section 2 (11) but also the individual assessment orders, 30 days time was granted to the assesseees to file their statutory Appeals. After the orders were pronounced,

it was mentioned by the learned counsel appearing for the petitioners that, some of the Writ Petitions arose out of the revision notices, (as in the case of the petitioner), insofar as those dealers are concerned, the Division Bench granted time limit of 15 days to submit their objections, and thereafter, the Assessing Officers were directed to follow the procedure prescribed by law. Therefore, it is submitted that, when objections are submitted, the Assessing Officers were bound to consider the same and cannot issue notice of recovery without dealing with the objections, when the subject matter dealt with by the Division Bench was with regard to the constitutional validity of Section 2 (11) of the TNVAT Act.

7. Further, it is submitted that the reason for impleading the Authority for Clarification and Advance Ruling, in these Writ Petitions is on account of the observations made by the Division Bench, in para Nos. 80 and 81 of its common order, dated 05.04.2016. In the said paragraphs, the Division Bench noted that, some of the petitioners placed reliance on the order passed by the said Authority, dated 22.07.2014. The Division Bench observed that, any Ruling or Clarification issued by the Authority for Clarification and Advance Ruling (the second respondent herein) cannot go

contrary to the statutory provisions, and under Section 48 A (1) of the TNVAT Act, the second respondent is entitled only to clarify any point concerning the rate of tax. It was further pointed out that the dispute before the Division Bench is not with regard to rate of tax, but with respect to the validity of the expression "in the State", appearing in Section 2 (11), on account of which, the expression "capital goods" gets circumscribed. Therefore, the Division Bench observed that, reliance placed upon the Ruling is not of any assistance to the petitioner.

8. Further, it is submitted that, in the case of **R G E Digital Imaging Solutions (P) Ltd., Vs. Assistant Commissioner (CT) Kelambakkam Assessment Circle and another**, in **W.P.No.19493 of 2017**, dated **31.07.2017**, it was observed by this Court that, similarly placed assessee cannot be treated differently and correct rate of tax has to be collected from the dealer, and ordered that the petitioner be assessed at the rate of 5% on plant and machinery until the revision of clarification, dated 22.07.2014 is completed, and directed the petitioner therein to file Review Petition as against the clarification, dated 22.07.2014. It is submitted that the petitioner, being similarly placed assessee, they cannot be subjected to

higher rate of tax till the completion of the review in the clarification, dated 22.07.2014. Therefore, the petitioner reserved their right and liberty, if granted, to file a Petition for reviewing the clarification, dated 22.07.2014, under Section 48-A (4) of the TNVAT Act to be dealt with along with pending matters.

9. Further, it is contended that the first respondent has failed to appreciate that, Section 8 (2) of the CST Act is only a provision to determine the appropriate rate of tax in an interstate sale, and the expression 'shall be at the rate applicable to the sale or purchase of such goods inside the appropriate State under the sales tax law of that State', appearing in Section 8 has to be understood as the applicable rate, if similar goods were sold within the State of the selling dealer. In this regard, reliance was placed on the decision of the Hon'ble High Court of Gujarat, in the case of **State of Gujarat Vs. Reliance Industries Ltd.**, reported in **Manu/GJ/2376/2016**. Elaborating further, the learned Senior Counsel has drawn a comparison between various stages with regard Section 8 of CST Act, 1956 and sought to emphasize the points canvassed before this Court.

10. Mrs.S. Narmada Sampath, the learned Special Government Pleader for the respondents submitted that the Writ Petitions are liable to be dismissed, as the Division Bench took note of the aspect relating to the capital goods, and considered all the contentions raised by the petitioner and rendered the verdict on 05.04.2016, and the present attempt of the petitioner is nothing but to reopen the settled issue, which is not permissible. Further, it is submitted that the notice, dated 07.02.2017, whereby, the petitioner has been directed to pay the differential amount of tax at 8.5%, after giving credit to 4% of the tax already paid by the petitioner, is an offshoot of the order passed by the Division Bench, which has been referred to in the impugned notices.

11. Further, it is submitted that, in the objections filed by the petitioner, dated 06.04.2017, the contentions, which were raised before the Division Bench and rejected, were onceagain raised and the first respondent was fully justified in issuing the impugned notices, claiming differential rate of tax at the rate of 8.5%. It is further submitted that the petitioner has only sought for quashing the impugned orders, dated 19.06.2017, and they

cannot now seek to canvass on the validity of the advance ruling or such other matters. Thus, the Division Bench, having considered all the issues and held the same against the petitioner, the first respondent cannot be expected to consider the aforesaid decision of the Division Bench once again, and pass orders. Therefore, it is submitted that the orders impugned herein does not call for interference.

12. In reply, the learned Senior Counsel for the petitioner contended that, the present Writ Petitions are maintainable, since the earlier round of litigation was challenging the vires of the Section 2 (11) of the TNVAT Act, wherein, the Division Bench permitted the dealers concerned to file objections to the revision notices and the petitioner is entitled to challenge the impugned orders as not in consonance with the settled legal principles or for such other matters, and the question in the present Writ Petitions was neither directly, nor was canvassed constructively as issue in the earlier Writ Petitions filed by the petitioner. In support of such contention, reliance was placed on the decisions of the Hon'ble Supreme Court, i) in the case of **Kunwar Ram Nath and others Vs. Municipala Board, Pilibhit**) reported in **AIR (1983) S.C. 930** and ii)

Industrial Cables India Ltd., Vs. Collector of Central Excise Chandigarh reported in (2003) 12 S.C.C. 426.

13. Heard Mr. C.Natarajan, the learned Senior Counsel for Mr.Karthik Sundaram, the learned counsel for the petitioner and Mrs.S.Narmadha Sampath, the learned Special Government Pleader for the respondents and perused the materials placed on records.

14. The petitioner, in the earlier round of litigation, had filed four categories of Writ Petitions. i) W.P.Nos.37604 and 37605 of 2007, were filed, challenging the clarification issued by the Commissioner of Commercial Taxes, dated 11.04.2007, and to direct the respondents to treat the concrete mixing (batching) plant sold by the petitioner as capital goods under Section 2 (11) of the TNVAT Act, 2006. ii) In W.P.Nos.8758 of 2010, the petitioner sought for issuance of a writ of declaration, to declare Section 2 (11) of the TNVAT Act as ultravires of the Constitution of India. iii) In W.P.Nos.8759 to 8762 of 2010, the notice issued by the Assessing Officer, dated 29.03.2010, proposing to levy tax at 12.5% on the interstate of ready made concrete mixing were challenged. iv) In W.P.Nos.30064 to

30066 of 2013, the petitioner challenged the notices issued by the Assessing Officer, dated 03.06.2013, proposing to assess the sale of concrete mixing (batching) plant effected by the petitioner at 12.5%. Thus, the petitioner had approached this Court on the earlier occasion with four sets of prayers. The Division Bench, by common order, dated 05.04.2016, disposed of all the above Writ Petitions and the connected matters. The operative portion of the order is extracted herein below:-

" 82. Therefore, in fine, all the writ petitions are disposed of to the following effect:

(i) The challenge to the validity of Section 2(11) of the Tamil Nadu Value Added Tax Act, 2006, is rejected and the prayer of the writ petitioners for declaration that Section 2(11) is ultra vires and unconstitutional, is dismissed.

(ii) Since many of the writ petitions challenge not only the validity of Section 2(11), but also the individual orders of assessment, we give a time limit of 30 days shall commence from the date of issue of a copy of this order.

(iii) Until the expiration of a period of 30 days from the date of issue of a copy of this order, the respondents shall not take coercive steps.

(iv) In respect of petitioner who deal with capital goods used in the State but who are not extended the benefit of the concessional rate of tax, on account of a lack of proper understanding of the definition of the expression 'manufacture' appearing in Section 2(27), the appellate authority shall take note of the observations that we have made in paragraphs 74 to 77, while deciding their appeals.

(v) While dealing with the appeals of the petitioners, the Appellate Authorities shall note of the second proviso to Section 42(3).

All the writ petitions are disposed of to the above effect. There shall be no order as to costs. Consequently, all connected M.Ps are closed.

After we pronounced orders, it was mentioned by Mrs. R. Hemalatha, learned counsel for the petitioners that some writ petitions also arise out revision notices.

2. In so far those dealers are concerned, they are given a time limit of 15 days from the date of issue of a copy of this order to submit their objections. Thereafter, the Assessing Officers shall follow the procedure prescribed by law and pass orders of assessment."

15. Thus, while upholding the validity of Section 2 (11), the Division Bench directed that, wherever assessments were made, the concerned dealers have to file statutory Appeals, and wherever the dealers had approached the Court challenging the revision notices, objections were directed to be filed by them within 15 days. Though the petitioner specifically prayed for setting aside a clarification issued by the Commissioner. The Division Bench did not grant such relief. That apart, the Division Bench did not pass any prohibitory order, not to assess the sale of concrete batching plant at 12.5%. In para No.80 of the order, dated 05.04.2016, the Division Bench observed that, some of the petitioners placed reliance on the order passed by the Authority for Advance Ruling and Clarification issued under Section 48-A (4) of the TNVAT Act, dated 22.07.2014. To be noted, in the Writ Petitions, which were heard by the Division Bench, none of the dealers had challenged the proceedings of the Authority for clarification, dated 22.07.2014, but, the same appears to have been pressed into service during the course of hearing. While dealing with the said clarification, the Division Bench observed that, any Rule or Clarification issued by such an Authority cannot go contrary to the statutory provisions under Section 48-A (1) of the Act and the said Authority is

entitled to clarify any point concerning the rate of tax, and the dispute before the Court was not with regard to the rate of tax, and it was with respect to the validity of the expression "in the State", appearing in Section 2 (11) of the TNVAT Act. Therefore, it was held that, reliance placed upon the Advance Ruling, dated 22.07.2014, is not of any assistance to the petitioner. The Special Leave Petitions filed against the order of the Division Bench were dismissed. Though it is stated that the Revision Petitions have been filed before the Division Bench, against the order, dated 05.04.2016, there is nothing on record to show that Revision Petitions have been entertained or any interim orders has been passed thereon, staying the operation of the order, dated 05.04.2016.

16. Thus, the oral prayer sought for by the petitioner before this Court, seeking liberty to go before the Advance Ruling Authority/second respondent by filing Review Petition, if acceded to, then, it would amount to granting the relief, which the petitioner was not able to secure in the earlier Writ Petitions, which were heard by the Division Bench.

17. The decision rendered by this Court, in the case of **R G E Digital Imaging Solutions (P) Ltd., (supra)** cannot be of any assistance to the case of the petitioner, as the issues and the facts thereunder were not akin to the facts in the batch of cases, which were heard by the Division Bench. Having steered clear of this position, it has to be seen as to whether the first respondent is justified in passing the impugned orders, purportedly, to be consequence upon the decision of the Division Bench, dated 05.04.2016. Unfortunately, the Assessing Officer failed to note that the Division Bench has only decided the constitutional validity of the Section 2 (11), and with regard to other issues, granted liberty to the dealers to submit their objections, if they have approached at the stage of the revision notices, as in the petitioner's case.

18. Thus, the first respondent was bound to consider the objections filed by the petitioner, and pass a speaking order. It would be incorrect on that part of the first respondent to state that, merely because, vires of Section 2 (11) has been upheld, the petitioner will not heard on merits and are required to remit the differential rate of tax. If this is the interpretation given by the first respondent, it would run contrary to the decision of the

Division Bench, dated 05.04.2016, wherein, liberty was granted to file objections to revision notices. This liberty is not an empty formality. Therefore, the Assessing Officer, the first respondent is bound to consider the objections. However, this Court would add a word of caution that, if the petitioner seeks to canvass the very same grounds, that were raised before the Division Bench, while challenging the vires of Section 2 (11), it would be well open to the Assessing Officer to reject such contentions, as has already been considered by the Division Bench and rejected. In any event, the Assessing Officer is bound to say so, as he is the statutory Authority, vested with power of assessment. In the instant cases, the petitioner specifically sought for an opportunity of personal hearing, which has not been afforded. The Division Bench, in several decisions has observed that, in the absence of specific prohibition under the statute, for affording an opportunity of personal hearing, the Assessing Officer could afford such personal hearing, as it would help the Assessing Officer to complete the assessment in a proper manner.

19. Thus, this Court is satisfied that the impugned orders have been passed in violation of the principles of natural justice. As pointed out

earlier, the oral prayer sought for by the petitioner, seeking leave of this Court to file Review Petitions before the second respondent cannot be acceded to, in the light of the facts noted above and observations made thereon.

20. Therefore, for the reasons stated above, the Writ Petitions are allowed, the impugned orders are set aside and the first respondent is directed to consider the objections filed by the petitioner, dated 06.04.2017, afford an opportunity of personal hearing to the authorized representative of the petitioner and pass a speaking order on merits and in accordance with law. As stated above, if the first respondent is of the view that the petitioner is attempting to re-argue the points canvassed before the Division Bench, it is well open to the first respondent to say so and reject the objections. The first respondent is expected to consider the other factual issues, which may be canvassed by the petitioner by way of objections, dated 06.04.2017. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

07.12.2017

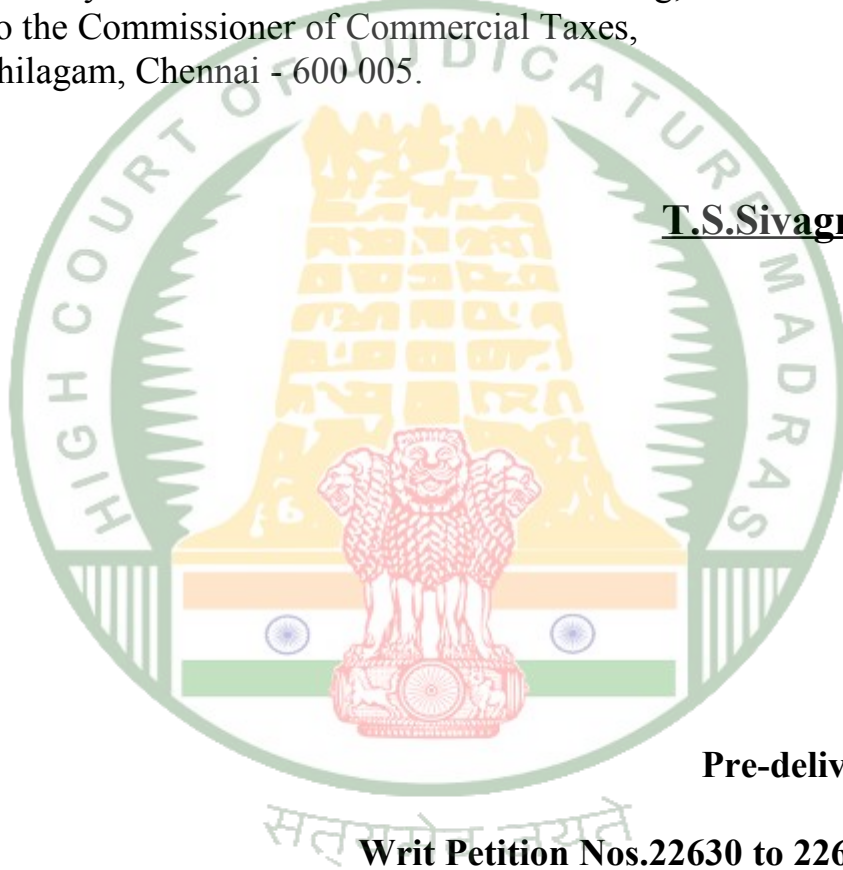
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To

1. The Assistant Commissioner (CT)
Sriperumbudur Assessment Circle,
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2. Authority for Clarification and Advance Ruling,
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T.S.Sivagnanam, J.

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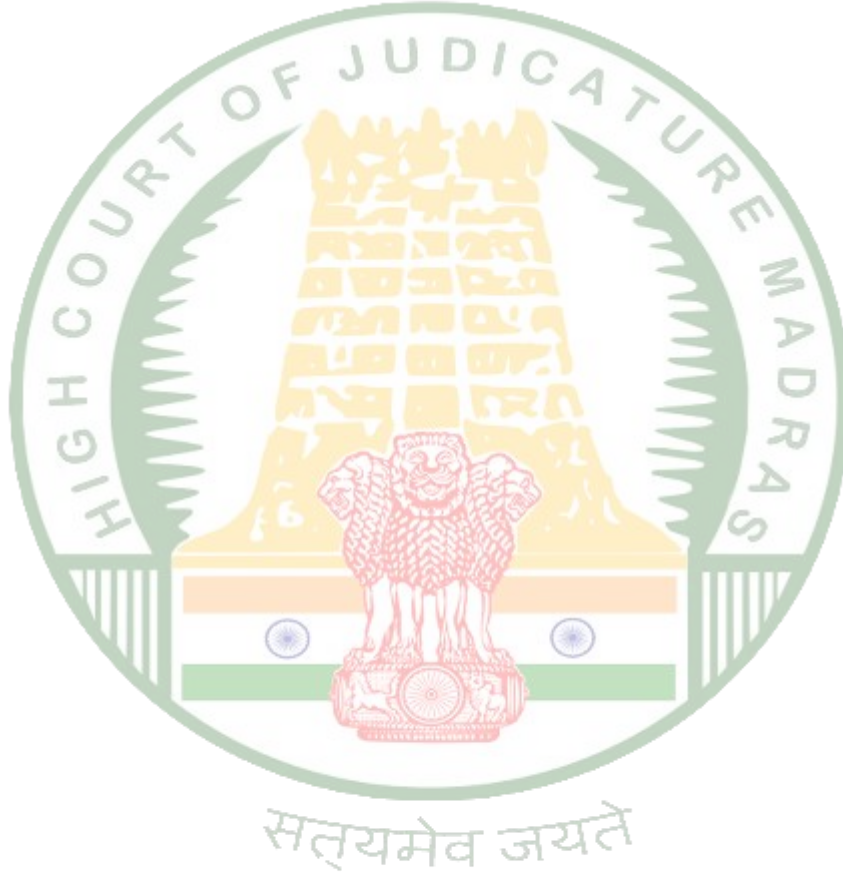


**Pre-delivery orders
in**

Writ Petition Nos.22630 to 22636 of 2017

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