

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 09.03.2018

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

ORIGINAL PETITION NO.894 OF 2017

and O.A.No.675 of 2017

Anantara Solutions Private Ltd.
Module#0104A, First Floor,
C Block South Tidel Park,
4, Rajiv Gandhi Salai
(previously Canal Bank Road),
Taramani,
Chennai – 600 113
Represented by its wholetime
Director, Sundararaj Subbarayalu .. Petitioner

-VS-

Vinculum Solutions Private Ltd.
Level 2, Elegance,
Mathura Road, Jasola
New Delhi - 110025
सत्यमेव जयते .. Respondent

Original Petition filed under section 11(5) of the Arbitration and Conciliation Act, 1996 praying to appoint a Sole Arbitrator to adjudicate the disputes between the petitioner and the respondent under the terms and conditions of the Business Partner Agreement dated 05.07.2014, the Delivery Partner Agreement dated 05.07.2016 read with the terms and conditions attached to the Purchase Orders with purchase order numbers STP/PO/024/2016-17, STP/PO/025/2016-17 and STP/PO/025/2016-17, dated

22.02.2017 respectively and direct the respondent to pay costs of this petition.

For Petitioner : Mr.T.K.Bhaskar
For Respondents : Mr.Ramakrishnan
Viraraghavan, SC
for Mr.C.Seethapathy

ORDER

This Original Petition is filed by Anantara Solutions Private Limited (in short 'Anantara') under Section 11 (6) of the Arbitration and Conciliation Act, (in short 'Act'), seeking the appointment of a sole Arbitrator to adjudicate upon disputes that have arisen between the parties under Business Partner Agreement dated 05.07.2014 and Delivery Partner Agreement dated 05.07.2016 read along with terms and conditions attached to various purchase orders dated 22.02.2017.

सत्यमेव जयते

2.The original application seeks an interim injunction restraining the respondent, Vinculum Solutions Private Limited, (in short 'Vinculum') from entering into any business arrangements either directly or indirectly with the clients of Anantara, including, but not limited to a specific client, E-Research Technology, GMPH, till the conclusion of arbitration proceedings.

3. Counter affidavits and affidavits of reply have been filed by both parties and the matter is taken up for hearing. The submissions of Mr.T.K.Bhaskar appearing for Anantara and Mr.Ramkrishnanan Viraraghavan, learned senior counsel appearing for Mr.Seethapathy for Vinculum have been heard. Both sides have also filed written synopsis that have been carefully perused.

4. This common order disposes both the Original Petition as well as application.

5. Anantara and Vinculum entered into a Business Partner Agreement (in short 'BPA') dated 05.07.2014 for a tenure of two years that was duly extended to 04.07.2017 by a Delivery Partner Agreement (in short 'DPA') dated 05.07.2016. In addition, three purchase orders had been placed on 22.02.2017. Under the Agreements, Anantara was to procure Information Technology and Conciliation Services from Vinculum for the purpose of incorporating the same into various business and I.T Solutions that it devised and supplied to third parties.

6. The BPA contains a clause for settlement of disputes reading thus:

'10.00: SETTLEMENT OF DISPUTES

In the event of any dispute arising under or by virtue of this Agreement or any difference of opinion between the parties concerning their rights and obligations under this Agreement, the parties shall use their best efforts to resolve such dispute or difference amicably by discussion and mutual accord. If the dispute cannot be resolved in this manner within fifteen (15) days, the

parties shall arrange a meeting between appropriate representatives designated by each party, who shall have an additional fifteen (15) days to resolve the dispute or difference. If the dispute or difference is not settled within the thirty (3) days period, then, unless the parties otherwise agree in writing, either party may serve written notice on days period, then, unless the parties otherwise agree in writing, either party may serve written notice on the other arty stating its intention to proceed to arbitration under the Arbitration Act, 1996.'

7. The two year tenure of the BPA stood extended by DPA till 04.07.2017. Thereafter purchase orders were executed between the parties as per the agreement which contained separate terms and conditions annexed thereto. Clause 36 of the terms and conditions provides for the settlement of disputes by alternate dispute resolution mechanism and is extracted below:

'36. SETTLEMENT OF DISPUTES:

In the event of any dispute arising under or by virtue of this Agreement or any difference of opinion between the parties concerning their rights and obligations under this Agreement, the parties shall use their best efforts to resolve such dispute or difference amicably by discussion and mutual accord. If the dispute cannot be resolved in this manner within fifteen (15) days, the parties shall arrange a meeting between appropriate representatives designated by each party, who shall have an additional fifteen (15) days to resolve the dispute or difference. If the dispute or difference is not settled within the thirty 30 days period, then, unless the parties otherwise agree in writing, either party may serve written notice on the other party stating its intention to proceed to arbitration. Any unresolved disputes shall be referred to arbitration consisting of a single arbitrator appointed by mutual agreement between the parties herein and shall be conducted in accordance with the provisions of the Indian Arbitration and conciliation Act, 1996 or such amendments. The venue of arbitration shall be Chennai. The award passed in such arbitration shall be final and binding on the parties. Such arbitration shall be the sole and exclusive remedy between the parties with respect to such dispute. This Agreement shall be governed by and construed in accordance with the law of India and the jurisdiction being Chennai only.'

8. It is in the background of the aforesaid documentation, specifically on the strength of the arbitration agreements contained in the BPA and POs that the prayers for appointment of arbitrator and ad interim relief are sought.

9. The first defence put forth by Mr. Ramakrishnan is that there is no valid arbitration agreement as between the parties. He would point out that the purchase orders as forwarded by Anantara were modified and the terms and conditions containing the arbitration agreement had been specifically eschewed. As such the arbitration clause in the purchase order does not satisfy the requirement of section 7 of the Act, which requires an Arbitration agreement as between the parties to be reduced to writing and signed by both parties. He relies in this regard, on the judgement of the Supreme Court in *Govind Rubber Ltd Vs. Louis Dreyfus Commodities Asia P. Ltd.*, (2014) (4) SCALE 92 and High Courts in *Saagrr Infra Limited vs. Pioneer Tools and Hardware* (2012(6) CTC 282), *Sai Wardha Power Ltd Hyderabad and others vs. Goyal Dhatu Udyog Pvt Ltd, Nagpur* (2016(2)MhLJ 356) and *Inspiration Cloths & U vs. Yash Traders* (MANU/WB/1031/2014).

10. He also places reliance on the decision of the United States Court of Appeals for the 2nd Circuit in *Kahn Lucas Lancaster, Inc., vs Lark International Ltd* (186 F.3d 210 (2nd Cir.1999)), wherein the Bench held as follows:

Having determined that the Convention requires that "an arbitral clause in a contract" be 'signed by the parties or contained in an exchange of letters or telegrams,' we turn to the application of the Convention to the facts of this case.

As noted above, the Arbitration Clauses were contained in the Purchase Orders which were signed by Kahn Lucas, and not by Lark. There is therefore no "arbitral clause in a contract... signed by the parties. "Further, Kahn Lucase does not contend that the Purchase Orders, even together with Lark's Confirmation of Order forms, represent "an arbitral clause in a contract.... Contained in an exchange of letters or telegrams." As a result, there is no "agreement in writing" sufficient to bring this dispute within the scope of the Convention.

11. Per contra, Mr. Bhaskar would point out that the purchase orders had been forwarded to Vinculum by e-mail dated 18.03.2016. Vinculum had originally struck off the terms and conditions including the arbitration clause as well as certain other clauses, signed the purchase orders and forwarded the same to Anantara vide e-mail dated 22.03.2016. The amendments were not acceptable to Anantara which replaced the clauses removed by Vinculum, reiterating the same, and re-issued the purchase orders as in the original form to Vinculum on 28.03.2016. No objections were thereafter raised by Vinculam and in fact both parties would agree that the contracts have been duly performed and concluded.

12. By way of reply, Mr. Ramakrishnan would state that the conduct of parties was irrelevant to determine the existence of an arbitration agreement. Statute requires the Arbitration Agreement to be in writing. He would refer to extracts from the '*Arbitration of Commercial Disputes – International and English Law and Practice*'

by Andrew Tewed and Caram Tewed (Oxford University Press), the New York Convention 1958 and a comparison of the UNCITRAL Model Law, both pre and post 1985 to bring home the point that an arbitration agreement under section 7 of the Act has to be reduced to writing and signed by the parties.

13. Attention is drawn to the following extracts to establish his stand. The following paragraph is highlighted from 'The Arbitration of Commercial Disputes - International and English Law and Practice':

4.10 The UNCITRAL Model Law does not include within its definition of 'agreement in writing' circumstances when an arbitration agreement is accepted by the conduct of the one of the parties. In such a case it would appear that there will be no presumption of an agreement in writing. Further, the definition of 'in writing' may not cover new developments in electronic communications such as portal sites where information is stored and can be inspected by the parties but is not exchanged in the sense that it is not sent to the respective parties.'

14. Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations Conference on International Commercial Arbitration) is extracted below:

Article II

'1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

15. A comparison of the UNCITRAL Model Law of International Commercial Arbitration is relied upon to show the difference pre and post the amendment in 1985 in the definition of 'Arbitration Agreement' and both clauses are extracted below.

'Pre 1985

Article 7: Definition and form of arbitration agreement

Arbitration Agreement: is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.'

Post Amendment in 1985

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION:

CHAPTER II

Article 7 - Definition and form of arbitration agreement (As adopted by the Commission at its thirty-ninth session, in 2006)

(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but

not Part One. UNCITRAL Model Law on International Commercial Arbitration 5 limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

16. Mr.Bhaskar relies, for his part, upon the judgements of the Supreme Court in *Trimax International FZE Ltd Dubai vs Vedanta Aluminium Ltd, India* (2010 (2) CTC 581), *Ganga Pollution Control Unit and Another vs. Civil Judge, Allahabad and others* (AIR 2001 All 149), *Great Offshore Ltd vs. Iranian Engineering and Construction Company* (2008 JT (9) SC 339), and *New Bihar Biri Leaves Co and others vs State of Bihar and ors* (AIR 1981 SC 679), decisions of this Court in O.P.No.109 of 2008 in the matter of *Sandler Wear vs Yash traders dated 31.01.2017* and *Saagrr Infra* (supra), the Delhi High Court in the case of *Scholar Publishing House Pvt. Ltd Vs. Modern Industrial Enterprises and others* and the Madhya Pradesh High Court in *Dr.S.Z.Jafrey vs. Modern Industrial Enterprises and others* (MANU/MP/0387/2005),

17. The provisions of section 7 of the Act define an Arbitration Agreement as follows:

'7 Arbitration agreement.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of Telecommunication (including communication through electronic means) which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.'

18. In the present case, there are two arbitration agreements, one in the BPA and the other in the PO and the intention of the parties to be bound by one, both or none has to be determined. The answer is found in the reply of the respondent to the legal notice issued by the applicant dated 14.08.2017 wherein, at paragraphs 2 and 3, the respondents eschew the terms and conditions of the purchase order, but reiterate that only the terms and conditions as agreed to by the parties in the BPA dated 5.7.2014 extended by DPA dated 5.7.2016, that includes the arbitration clause, would be applicable and binding.

19. At paragraphs 7 and 9 of the reply notice issued by the respondent to the petitioner, the respondent states:

'7. In reply to contents of paragraph 7, it is stated that your clients are making a false allegation that my clients do not have the intention to honour the terms of the Delivery Partner Agreement. It is stated that the terms and conditions of the Business Partner Agreement dated 05.07.2014 which were duly extended by the Delivery Partner Agreement are binding on my clients. It is reiterated that the terms and conditions of the purchase orders have not been agreed and are not binding on my clients. The said terms and conditions are also not signed as is the requirement of law.'

....

9. In reply to contents of paragraph 9, my clients deny that your clients are entitled to commence arbitration under clause 36 of the purchase orders. It is stated that the terms and conditions of the purchase orders have been agreed. Any resolution of the

disputes can only be in accordance with the terms and conditions of the Business Partner Agreement dated 05.07.2014.

....

20. In the light of the unequivocal admission of the respondent that the terms of the BPA, that contain an arbitration agreement at clause 10 thereof, are binding upon him, the argument of Mr. Ramakrishnan to the effect that there is no arbitration agreement as between the parties stands rejected. With the establishment of consensus ad idem between the parties as regards the arbitration agreement in the BPA, I need to go no further. However, since a legal issue has been raised in regard to the existence or otherwise of the arbitration agreement in the PO, I proceed to answer the same as well, for the sake of completion.

21. I am in agreement with the position that an agreement for arbitration in terms of section 7(4)(b) of the Act has to be one that is specifically reduced to writing and the mere fact that parties have acted upon a PO/Agreement cannot lead to the automatic assumption that the parties are ad idem as regards resorting to arbitration as a method of resolution of disputes. The concurrence of parties to a contract to adopt the methodology of ADR would have to be specifically referred to in the signed agreement itself or in other written documentation so as to constitute a valid arbitration agreement. This conclusion finds support from the well settled position that an arbitration clause is a separate agreement

by itself, an agreement within the main agreement, severable and independent.

22. Though judgments have been cited by Mr. Bhaskar wherein the Courts have proceeded on the conduct of the parties and ultimately concluded that the satisfaction of the contract would imply the existence of an arbitration clause, in arriving at the aforesaid conclusion, the Courts have been guided by existence of secondary evidence in the form of e-mails and other written communications that specifically reveal the written agreement of parties to arbitration.

23. The Nagpur Bench of the Bombay High Court, in *Sai Wardha Power Ltd* (supra), in confirming the existence of an arbitration agreement even in the absence of a written and signed agreement, has specifically taken into account and noted the express intention of the parties to take recourse to arbitration. Thus the conclusion has been arrived on the basis of the written secondary evidences available in that case and constitutes a conclusion on fact. This decision is thus distinguishable.

24. The Supreme Court, in *Govind Rubber* (supra) holds as follows:

' If it can be prima facie shown that the parties are at ad idem, then mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day of Ecommerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are

agreed upon. In such agreements, if the identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties. '

25. Thus, even in the context of virtual transactions that leave little or no written trail, the Supreme Court states that an arbitration clause will result only if the identity of parties and a 'record' of agreement that reveals the mind of the parties is established. Consensus ad idem is thus to be established expressly and not merely by conduct of parties.

26. In Saagrr Infra Limited, (supra) a learned single judge of this Court holds thus:

8. Therefore, a reading of [section 7](#) makes it clear that arbitration agreement must be in writing signed by both parties and if the reference in a contract to a document containing arbitration clause constitutes an arbitration agreement, that contract must be in writing signed by both parties. The invoices by which supply was made pursuant to the purchase order is signed by the respondent, it is not signed by the revision petitioner. The reference to purchase order is signed by the revision petitioner and not by the respondent. Therefore, though in the purchase order, there is an arbitration clause, it will not become the arbitration agreement as it was not signed by both parties. Therefore, the arbitration clause in the purchase order does not satisfy the arbitration agreement as defined in [section 7](#) of the Arbitration and Conciliation Act and when there is no arbitration agreement as stated in the said Act, the provisions of Arbitration and Conciliation act cannot be made applicable. This was properly appreciated by the court below and it was held that the clause in the purchase order will not enable the revision petitioner to refer the matter to arbitration or to invoke the provisions of Arbitration and Conciliation Act and rightly dismissed the applications and I do not find any reason to interfere with the order of the court below.

27. The above observation appears to have been made in the

<http://www.judis.nic.in> context of section 7(4)(a) of the Act and not 7(4)(b) with which

provision we are concerned in the present case. This case is thus of no assistance to the respondent.

28. The question whether the parties have in fact agreed upon arbitration as a methodology of dispute resolution is thus a question of fact, to be determined solely on the basis of the facts and circumstances arising in a particular case.

29. The Supreme Court in *Govind Rubber Ltd.* (supra) states at para 17 the following:

'17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it. On the principle of construction of a commercial agreement, Scrutton on Charter Parties (17th Edn., Sweet & Maxwell, London, 1964) explained that a commercial agreement has to be construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense (see Article 6 at p. 16). The learned author also said that the agreement has to be interpreted "in order to effectuate the immediate intention of the parties". Similarly, Russell on Arbitration (21st Edn.) opined, relying on Astro Vencedor Compania Naviera S.A v. Mabanft GmbH 1970 2 Lloyd's Rep 267, that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed. The learned author has also referred to another judgment in Paul Smith Ltd. v. H and S International Holdings Inc. 1991 2 Lloyd's Rep 127 in order to emphasise that in construing an arbitration agreement the court should seek to "give effect to the intentions of the parties.'

30. The Supreme Court in the case of *Trimax International FZE* (supra) extracts the entire email trail between the parties to conclude that the written communications revealed the inclusion of an arbitration clause in the agreement by one party. The mail forwarding the clause was received and in reply there was no objection taken by the other party to the said clause. The Court

thus concluded that the clause had been accepted by the other party and there was thus consensus ad idem as between the parties to resort to arbitration.

31. So too in the present case. The first email enclosing the POs was sent by Anantara on 18.03.16. The POs were forwarded back by Vinculum on 22.03.16 with several modifications including the deletion of the terms and conditions containing the arbitration clause. Subsequent emails exchanged between the parties contain a clash of words regarding the modifications effected and Vinculum, on 23.03.16 states '*....I am not agreeing to this..*' Had the exchange stopped there, I would have agreed with Vinculum to the effect that there was no arbitration clause since Vinculum had clearly disavowed the same.

32. However there is a subsequent email dated 28.03.16 from Anantara to Vinculum attaching the POs as originally forwarded with all terms and conditions including the arbitration clause. Admittedly the POs have not been counter signed by Vinculum. However the PO as forwarded by Anantara reinstates the terms and conditions that contain inter alia the arbitration clause as well and there is no rejection of the same by Vinculum. The receipt of email dated 28.03.16 along with the complete PO containing the arbitration clause by Vinculum is also accepted and there is no denial of the same either in the counter or in the arguments

word and I see that there is consensus as between the parties on the existence of an arbitration agreement.

33. In fine, in the present case, clearly, there is a meeting of minds as regards the reference of parties to arbitration in both the BPA as well as the POs and the argument of Vinculum to the contrary is rejected.

34. In the light of my conclusion on the existence of an arbitration agreement as between the parties, as admitted by the respondent as regards the BPA, I allow this Original Petition and appoint an arbitrator as prayed for. The learned counsel for Vinculum, upon instructions, concurs with the suggestion of Anantara in the appointment of Mr.Yashod Vardhan Senior Counsel for sole arbitrator, though without prejudice to the defenses raised with respect to the maintainability of this petition itself.

35. I thus appoint M.R.Yashod Vardhan Senior Counsel as Sole Arbitrator, to enter upon reference and adjudicate upon the disputes inter se the parties. He is requested to complete the process as expeditiously as possible. He is at liberty to fix his fee and schedule of expenses that will be borne by both parties equally.

36. As far as the prayer in O.A.No.675 of 2017 is concerned, an order of interim injunction has been granted restraining the respondents from entering into a business arrangement or engaging in any business either directly or indirectly with all clients

technology GMBH. Mr.Ramakrishnan would argue that clauses 4 of the BPA and 40 of the PO that provide for non-compete for a period of 36 months post termination of the agreements are void in terms of section 27 of the Contract Act.

37. He relies upon judgements of the Supreme Court in *Percept D'Mark (India) Pvt Ltd vs Zaheer Khan and another* (AIR (2006) SC 3426) and *Gujarat Bottling Co. Ltd and others vs Coca Cola Company and others* (AIR (1995) SC 2372) and the decision of this Court in *FL Smidth Pvt Ltd vs. Secan Investcast (India) Pvt. Ltd* (2013 (1) CTC 886) and the Delhi High Court in *Wipro Limited vs Beckman Coulter International S.A.* (MANU/DE/2671/2006), urging that the injunction be vacated with immediate effect. For his part Mr.Bhaskar, would point out that the clauses are really non-solicitation clauses though called non-compete clauses. He seeks to distinguish the cases relied upon by Vinculum.

38. Clause 4.0 of the BPA contains a non-compete covenant reading thus:

'While this agreement is in force, or so long as Anantara and the Business Partner engage on business not necessarily under this agreement, the Business Partner agrees not to approach any of Anantara's customers or prospects for a minimum period of 36 months after the cessation of business between them under this agreement or other arrangements, whichever is later, except with the express written permission of Anantara.'

39. Clause 40 of the PO reads similarly. In the light of the reference to arbitration as above, the question of interim relief is left open to be decided by the learned Arbitrator. The injunction

presently in force will continue for a period of four weeks from the date of the first hearing of the matter by the Arbitrator. The parties are at liberty to seek any interim relief as the parties may desire including the continuance or variance of the injunction presently in operation, in line with section 17 of the Act and in accordance with law.

40. The Original Petition and application are ordered accordingly. No costs.

09.03.2018

Index: Yes/No

Speaking Order/Non-speaking order

msr/sl

To

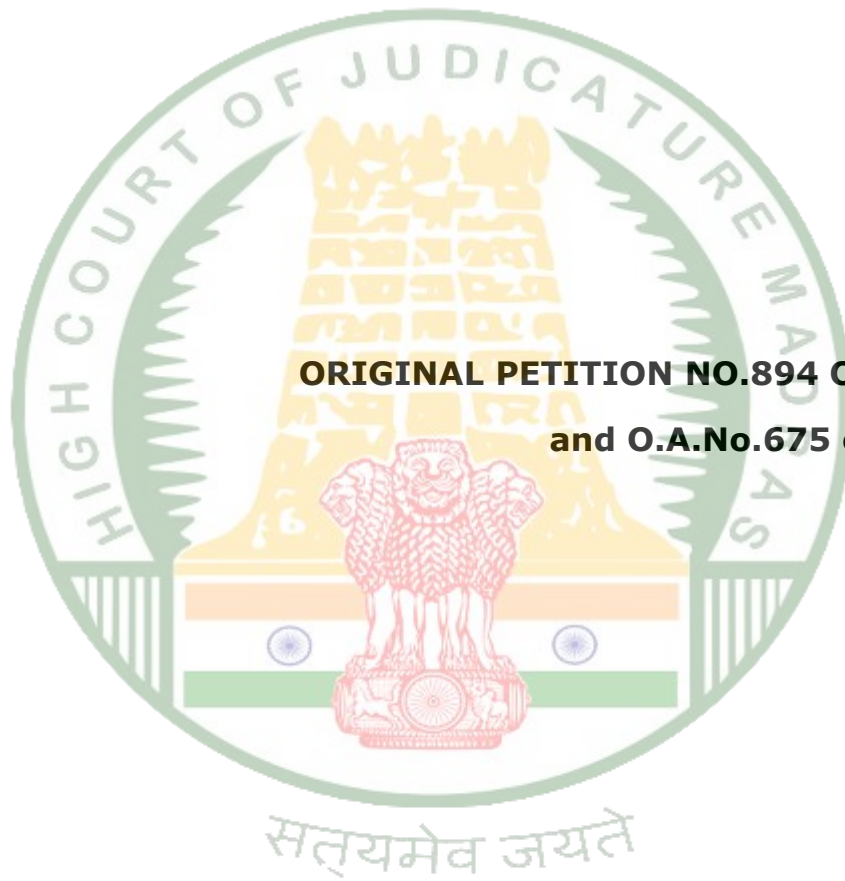
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Dr.ANITA SUMANTH,J.

msr/sl



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