

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :27.02.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.93 of 2019

1.Ms.N. Indumathi,
Wife of Mr.K.Nagarajan,
No.6/191 A1, Kudi Street,
Marurpatti,
Namakkal - 637 019.

2. Mr.K.Nagarajan,
Son of A. Kulanda Gounder,
No.6/191 A1, Kudi Street,
Marurpatti,
Namakkal - 637 019.

.. Petitioners

vs.

1.M/s. Sundaram Finance Limited,
No.21, Patullos Road,
Chennai - 600 002.

... Respondents

Original Petition filed under Section 34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996, to set aside the award dated 17.10.2018 passed by the learned Sole Arbitrator in Arbitration Case No.SSP/SF/225 / 2018.

For Petitioners : Mr.C.Jagadish

For Respondents : Mr.R.Umashankar
of M/s.Sri & Shankar Associates

ORDER

There are two petitioners and a sole respondent in the instant

<http://www.judis.nic.in> 'Original Petition' (hereinafter 'OP' for brevity). Instant OP has been filed

under Section 34(2)(a)(iii) of 'The Arbitration and Conciliation Act' (hereinafter 'A & C Act' for brevity) seeking to set aside an 'arbitral award dated 17.10.2018' (hereinafter 'impugned arbitral award' for brevity) made by an Arbitral Tribunal constituted by a Sole Arbitrator.

2. Before proceeding further, it is necessary to make it clear that in A & C Act, with regard to recourse against arbitral award, a legal proceeding for setting aside an arbitral award has been referred to as 'application' in Section 34 of A & C Act. However, such a legal proceeding assailing arbitral awards under A & C Act are being given the nomenclature 'Original Petition' in this Registry and therefore, I am referring to the instant proceedings as 'OP' for the sake of convenience and clarity.

3. As mentioned supra, instant OP is one under Section 34(2)(a)(iii) of A & C Act, assailing the impugned arbitral award.

4. A thumb nail sketch a facts (sans unnecessary particulars/details) need to be given for better appreciation of this order.

5. The two petitioners before me are spouses. The two petitioners as borrower and guarantor availed a loan of Rs.28,00,000/- (Rupees Twenty Eight Lakhs Only) from the respondent towards purchase of

a 'lorry bearing Registration No.TN-88-A-9055' (hereinafter 'said truck' for clarity). To be noted, Rs.28,00,000/- (Rupees Twenty Eight Lakhs Only) is the principal sum borrowed and the value of the loan agreement is 35,89,502/- (Rupees Thirty Five Lakhs Eighty Nine Thousand Five Hundred and Two only). The loan which is for purchase of said truck was agreed to be repaid in '59 Equated Monthly Instalments' ('EMIs' for brevity). First EMI is Rs.61,072/- and the remaining EMIs i.e., 2 to 59 EMIs are Rs.60,835/- each.

6. There is no dispute or disagreement before me that there was delay and default in payment of EMIs. It is also not in dispute before me that said truck continuous to be in the possession of the petitioners before me, even as of today. In other words, for the purpose of abundant clarity, there is no factual dispute that respondent, which this Court is informed is a 'Non-Banking Financial Company' ('NBFC' for brevity) has not repossessed the said truck.

7. Delay/Default in payment of EMIs, resulted in respondent invoking the arbitration agreement between the parties. To be noted, arbitration agreement being arbitration agreement within the meaning of 7 of A & C Act between the petitioners and sole respondent is in the form of a clause/covenant in the loan agreement. The arbitration clause is Article 22. It is captioned 'Law, Jurisdiction, Arbitration' and the same reads as follows:

'ARTICLE 22

22(a) All disputes, differences and/or claim

arising out of this Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provision of the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to the sole Arbitration of an Arbitrator nominated by the Managing Director of the Lender. The award given by such an Arbitrator shall be final and binding on the Borrower to this Agreement. It is a term of this agreement that in the event of such an arbitrator to whom the matter has been originally referred dying or being unable to act for any reason, the Managing Director of the Lender, at the time of such death of the arbitrator or of his inability to act as arbitrator, shall appoint another person to act as arbitrator. Such a person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

(b) The venue of arbitration proceedings shall be at Chennai.

(c) The arbitrator so appointed herein above, shall also be entitled to pass an Award on the hypothecated asset and also on any other security furnished by or on behalf of the Borrower.'

8. To be noted, there is no dispute or disagreement before me about the aforesaid arbitration clause i.e., arbitration agreement between petitioners and respondent within the meaning of Section 7 of A & C Act.

9. Pursuant to aforesaid arbitration clause, a sole arbitrator (Former District and Sessions Judge as can be seen from the impugned award) entered reference and commenced arbitration.

10. It is the case of the petitioners that on receipt of notice from the Arbitral Tribunal, they met the officials of the respondent and sought for six months time to repay the pending EMIs. To be noted, the petitioners refer to a communication from the Arbitral Tribunal directing them to appear on 04.10.2018. It is the further case of the petitioners that the officials of the respondent NBFC orally agreed to grant time as prayed for and assured that they will intimate the Arbitral Tribunal and seek six months adjournment. According to petitioners, as can be culled out from the instant OP placed before me, the petitioners believing the words of the officials of the respondent NBFC did not appear before the Arbitral Tribunal. It is alleged that the official of the respondent NBFC did not honour their word (to be noted alleged oral assurance) and that resulted in an *ex-parte* award being passed on 17.10.2018 which is the impugned arbitral award in the instant OP.

11. As mentioned supra, the impugned arbitral award is being assailed under Section 34(2)(a)(iii) of A & C Act and said provision reads as follows:

'Section 34. Application for setting aside arbitral award

(1).....

(2) An Arbitral award may be set aside by the Court only if_

(a) The party making the application furnishes proof that_

(i).....

(ii).....

(iii). *The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'*

12. A perusal of the aforesaid provision reveals that it is the case of the petitioners that they were not given proper notice about the appointment of the Arbitrator and they did not receive adequate notice from the Arbitral Tribunal.

13. I summarize the submissions made by Mr.C.Jagadish, learned counsel on record for the petitioners and set out the same. In other words, summary infra is the basis on which the instant OP is predicated. The submissions are two folds and they are follows:

a) The petitioners have not received notice from the respondent invoking the aforesaid arbitration clause.

b) A perusal of the award reveals that the petitioners have claimed interest on interest, which is impermissible.

14. Mr.R.Umashankar of M/s.Sri & Shankar Associates (Law Firm) on behalf of the respondent submitted that both the submissions made by the petitioners are incorrect.

15. With regard to the first submission, it was pointed out that the

respondent has sent a notice dated 08.09.2018 to the petitioners invoking

the arbitration clause and it has been duly received by the petitioners. Learned counsel also pointed out that this notice has been marked as an exhibit before the Arbitral Tribunal and it is Ex.A4. It was, therefore, submitted that it is incorrect to say that notice invoking arbitration i.e, notice within the meaning of Section 21 of A & C Act was issued, is learned counsel's say.

16. With regard to interest on interest being charged and the same being impermissible, learned counsel submitted that the claim made before the Arbitral Tribunal has been set out in a tabular column in the impugned arbitral award itself. Learned counsel drew my attention to the claim as can be culled out from the impugned arbitral award and the same reads as follows:

Amount outstanding	17,25,554	00
ADD		
<i>Additional Interest</i>	87,571	00
<i>Bank Charges</i>	500	00
<i>Sub-total</i>	18,13,625	00
LESS:		
<i>Rebate</i>	81,985	19
<i>Additional Interest Received</i>	59,985	00
TOTAL AMOUNT DUE	16,71,654	81

17. Adverting to the aforesaid claim, learned counsel pointed out that the ground of interest being levied on interest, which is impermissible, can at best refer only to additional interest of Rs.87,571/- . Adverting to

this, learned counsel submitted that this is not interest on interest, but is a claim under Article 14.1 (A) Sub-clause (c) of the loan agreement. For the purpose of convenience and clarity, I deem it appropriate to extract the entire Article 14.1 of the undisputed loan agreement, which reads as follows:

'14.1 (A) Upon occurrence of any/all of the aforesaid events of default, the Borrower and/or Co-Borrower shall be liable to pay the following to the Lender within 10 days from the date of receipt of notice from the Lender:

(a) Arrears of instalments;

(b) Instalments for the remaining period, which would have been payable by the Borrower, if the agreement had run to its full term;

(c) Additional interest at the rate specified in the first schedule on the principal outstanding and on the other amounts due;

(d) all other sums and charges of whatsoever nature, including, but not limited to interest on account of default in payment of insurance premi, and on account of other taxes.'

(Underlining made by Court to supply emphasis)

18. It is the specific submission of learned counsel for respondent that additional interest has been claimed under Article 14.1(A)(c) of loan agreement and therefore it is certainly not interest on interest, but it is a claim strictly in accordance with a covenant in the loan agreement.

19. This takes us to the legal submissions that were made before me.

20. Learned counsel for petitioners pressed into service a judgment of this Court reported in (2018) 2 Mad LJ 1 being **S.A.Fasludeen vs. Siyauddin**. Learned counsel drew my attention to paragraph 26 of the said judgment, wherein there is a reference to Section 34(2)(iii) of A & C Act and where it has been set out that lack of proper notice of appointment of an Arbitrator or that of arbitral proceedings are grounds available to a petitioner assailing an arbitral award.

21. This judgment does not help the petitioners for more than one reason. To put it otherwise, this judgment i.e., S.A.Fasludeen case does not help the petitioners for atleast two reasons. First reason is, a perusal of the impugned arbitral award reveals that aforesaid notice dated 08.09.2018, which is described as the notice invoking the arbitration clause, has been marked before the Arbitral Tribunal and this has been articulated by the Arbitral Tribunal in the impugned arbitral award in internal page 4 of the impugned arbitral award. The relevant paragraph reads as follows:

'Under Article 22 of the said loan agreement, the parties to the agreement have agreed that the disputes, differences / claims will be settled by arbitration having the

venue at Chennai. Therefore, the Claimant has addressed to its Managing Director for nomination of Arbitrator to adjudicate upon the claim arising under the said loan agreement marking, copies to the Respondents. The Copy of the above mentioned letter dated 08/09/2018 is Ex.A.4. The Managing Director has also sent e-mail letter to the Arbitrator and the copy of e-mail dated 08/09/2018 is Ex.A5. Ex.A.6 is the Computerized working sheets showing Additional interest and Ex.A7 is the Computation Statement of Account. The transaction being a commercial one the claimant claims interest at 24% per annum on the claim amount till its realisation along with cost.'
(underlining made by Court to supply emphasis/highlight)

22. Therefore, there is a notice and that notice has been marked before the Arbitral Tribunal. The Arbitral Tribunal has also alluded to the same. Therefore, S.A.Fasludeen case is clearly distinguishable on facts and it does not help the petitioners in the instant case. In my considered opinion, S.A.Fasludeen case is an authority for the proposition that the mandate of an arbitral award comes to an end by reason of /event of death of one of the three arbitrators. In other words, it is a case where the Arbitral Tribunal is a three member Arbitral Tribunal and one of the members of the Arbitral Tribunal died pending proceedings. S.A.Fasludeen case is an authority for the proposition that in such an eventuality, Arbitral Tribunal becomes functus officio. It is also an authority for the proposition that after the death of third member of the Arbitral Tribunal, though a draft may have been prepared while the third arbitrator was alive, the

award cannot be made after the demise of one of the three arbitrators. Learned counsel for petitioners pressed into service another reported judgment of this Court reported in (2017) 4 Mad LJ 374 (Naveen G Rolands Vs. M/s.Cholmandalam DBS Finance Ltd., and Ors) and drew my attention to paragraph 22 of the said judgment, wherein it has been laid down by the Hon'ble Judge that it is incumbent upon an arbitrator to undertake an exercise to examine the documents stated to be placed before the Arbitral Tribunal and then render a finding on the claim.

23. I carefully perused the facts of this case being Naveen G.Rolands case. A perusal of the facts in Naveen G.Rolands case reveals that it is a case where protagonist of the petition assailing the arbitral award in that case submitted that it is not clear whether the claim is based on a promissory note or a loan agreement, as there is reliance on promissory note obtained from the petitioner which are all blank formats. It was also submitted by the protagonist therein that the claim itself is not valid. Furthermore, the protagonist in Naveen G.Rolands case raised a plea that the statement of accounts reveal that the amount due will be only Rs.4 lakhs, whereas the claim statement filed before the Arbitral Tribunal is a phenomenal amount of Rs.33 lakhs. In other words, it was a case where non-application of mind was argued. This factual aspect of the matter is clearly captured by the Hon'ble Judge in paragraph 5 of Naveen G.Rolands

case and the relevant portion reads as follows:

'5.....It is further submitted that it is not clear whether the claim is based on a promissory or loan agreement, as the 1st respondent has relied upon promissory notes obtained from the petitioner, which are all blank formats. As such, the claim itself is not valid. Regarding the Statement of Accounts, it is submitted that even going by the said Statement of Accounts, the total amount due will be only Rs.4 lakhs and the claim statement filed before the learned Arbitrator for a phenomenal amount of Rs.33 lakhs is unsustainable. Further, it is submitted that the award is vitiated on the ground of total non-application of mind, as there are several factors, which show that the Arbitrator has not taken into consideration the facts, which are necessary and entertained the claim petition, well before, she being nominated as an Arbitrator. To demonstrate that, the preamble portion of the award was referred to, which states that the claim statement was filed on 03.07.2012, whereas the 2nd respondent was appointed as an Arbitrator only on 06.07.2012.....'

24. A further perusal of paragraph 5 also reveals that it is a case where the sole arbitrator has stated that the claim statement was filed on 03.07.2012 when the arbitrator itself was appointed only on 06.07.2012. It is in the light of such glaring non-application of mind and in the absence of there being no discussion at all with regard to the statement of accounts, the finding was rendered. There are no such issues in the instant case. Therefore, Naveen G.Rolands case is also clearly distinguishable on facts, as rightly pointed out by learned counsel for respondent and I have no

difficulty in accepting the submissions of learned counsel for respondent.

25. Learned counsel for respondent pressed into service, a judgment of Hon'ble Supreme Court in **Sudarsan Trading Co vs Govt. of Kerala & Anr.** reported in **AIR 1989 SC 890** and submitted that the decision of the arbitrator, on certain amounts awarded, if it be a possible view, the award cannot be re-examined by the Court. It was also pointed out by relying on **Sudarsan Trading Company** case that a Court exercising powers under Section 34 of A & C Act cannot substitute the view of the arbitrator with its own view. There is no difficulty in accepting this proposition.

26. Thereafter learned counsel for respondent pressed into service, a judgment of this Court in **M/s. Jeypore Sugar Company vs. M/s. Laxmi Organic Industries Ltd.** (unreported judgment dated 06.07.2015) wherein the principles governing testing of an award have been set out. Those principles have been laid down in **Sudarsan Trading Company** case. There is no difficulty in this regard. This judgment also refers to **K.R.Raveendranathan vs. State of Kerala** and **P.V.Subba Naidu others vs. Government of A.P and Ors** case in paragraph 31. Learned counsel submitted that **K.R.Raveendranathan** case is reported in **(1996) 10 SCC 35** and **P.V.Subba Naidu** case is reported in **(1998) 9 SCC 407**. **K.R.Raveendranathan** case is a short one, whereas in **P.V.Subba Naidu** case, the principle in **Hindustan Construction Company Ltd. Vs.State of J & K**

case has been reiterated. **Hindustan Construction Company Ltd.** Case is reported in **AIR 1992 SC 2192**. The principle therein is that an award is a non-speaking order when it contains no reasoning. The scope of the court's jurisdiction to interfere with an award has been held to be extremely limited.

27. In my considered view, the aforesaid judgments pressed into service by learned counsel for respondent are only reiteration of time honoured principles regarding limited scope of proceedings under Section 34 of A & C Act. However, what is of relevance is **Fiza Developers vs. Amei (I) P. Ltd and anr.** reported in (2009) 17 SCC 796. Referring to Fiza Developers and particularly to paragraph 11 therein, learned counsel for respondent submitted that grounds for setting aside the award are specific and that a petitioner who files an petition assailing an arbitral award has to necessarily set out and make out a case qua ingredients of any of the grounds mentioned in Sub-Section (2) of Section 34. In the instant case, it was pointed out by learned counsel for respondent that issue of non-receipt of notice invoking arbitration clause has not been raised by the petitioners in the instant OP. However, without delving further into those aspects, I have examined the ground and is put to rest in the light of Ex.A4.

28. In the light of the narrative supra, both the grounds raised by

the petitioners are put to rest.

29. Notwithstanding this position, I perused and examined the impugned arbitral award, which has been placed before me. A perusal of the impugned arbitral award reveals that the Arbitral Tribunal has given as many as two notices of hearing to the petitioners and these two notices are dated 17.09.2018 and 20.09.2018 for hearings on 27.09.2018 and 04.10.2018 respectively. This is articulated in internal page 5 of the impugned arbitral award and the same reads as follows:

'Accordingly, the Managing Director of the lender company in his letter dated 08/09/2018 nominated me, the under-signed as the sole arbitrator to arbitrate upon the dispute and also requested for my acceptance. Since to the best of my knowledge, there exists no justifiable cause for my showing my favour or partiality while adjudicating, I signified my acceptance for the said nomination as arbitrator and issued. The 1st notice dated 17/09/2018, for the first hearing on 27/09/2018 at Chennai which was received by 1st and 2nd Respondents. On the date of 1st hearing the Claimant was present. The Respondent were not present. On 20/09/2018, the Claimant filed the Claim Statement and relevant documents relief upon by him. On 20/09/2018, 2nd Notice was sent along with copies of Claim Statement fixing the final date of hearing on 04/10/2018 at Chennai which was received by 1st and 2nd Respondents. The Respondents were not present either in person or through pleader on 04/10/2018 and 11/10/2018, the day fixed for final hearing.'

30. More particularly, the petitioners themselves in instant OP, particularly in sub-paragraph (iii) of paragraph 3 have specifically stated that they have received notice dated 20.09.2018 from the Arbitral Tribunal calling upon them to appear on 04.10.2018 and the relevant portion of sub-paragraph (iii) of paragraph 3 in the instant OP reads as follows:

'iii.....After seeing the letter, the petitioners approached the Respondent immediately and sought for six months time to repay the pending EMIs.....'

31. The petitioners have also averred that they responded to the same. It is not the petitioners' case that they have not received the second notice dated 20.09.2018 for appearing on 04.10.2018.

32. Be that as it may, the petitioners merely say that on receipt of this notice they went before the officials of the respondent company and sought six months time to pay the pending EMIs. This notice dated 20.09.2018, which was admittedly received by the petitioners, who are noticees is in September 2018. We are now in the last week of February 2019, which itself has consumed five months. Even according to the petitioners, they sought six months time for paying the pending EMIs. Though 5 months have rolled by, nothing has happened, notwithstanding couple of adjournments that have been granted in the instant OP. This is only to set out the trajectory of the hearing before me though this may not

Section 34 or in other words within the contours of Section 34 of the A & C Act.

33. Be that as it may, in my considered view, *Fiza Developers* case pressed into service supra, i.e, reported in **(2009) 17 SCC 796**, is an authority for the proposition that proceedings under Section 34 of A & C Act are one issue summary procedures. This Fiza Developers Principle i.e, that proceedings under Section 34 of A & C Act are one issue summary procedures was reiterated by the Hon'ble Supreme Court in a very recent judgment in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in **(2018) 9 SCC 49**. While reiterating the Fiza Developers principle Hon'ble Supreme Court held that Fiza Developers principle is a step in the right direction for expeditious disposal of a petition under Section 34 of A & C Act. This is more so, in the light of the time frame that has been fixed by the statute itself in Sub-Section (6) of Section 34.

34. In another recent judgment of the Hon'ble Supreme Court in *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in **(2018) 9 SCC 472**, it was held that courts hearing petitions under Section 34 of A & C Act, shall make every endeavour to adhere to the time line stipulated/adumbrated in Sub-Section (6) of Section 34 of A & C Act. To be noted, Bhumi Vikas Bank case is an authority for the principle that notice

contemplated under Sub-Section (5) of Section 34 is directory and not mandatory. The aforesaid observation of the Hon'ble Supreme Court that every endeavour shall be made for expeditious disposal of petitions filed under Section 34 of A & C Act has to be taken serious note of.

35. Furthermore besides Fiza Developers principle, no further elucidation is required to highlight that a petition under Section 34 should perambulate strictly within the contours of Section 34 and specific Sub-Sections laid down therein. Instant OP as mentioned supra, is under Section 34 of A & C Act. On a careful analysis and reading of the impugned arbitral award, I am unable to convince myself that the impugned award is vitiated by non-issue of notice or any one of the conditions / situations adumbrated under Sub-clause (iii) of Sub-clause (a) of Sub-Section (2) of Section 34. In other words, 34(2)(a)(iii). To be noted, Section 34(2)(a)(iii) of A & C Act has been extracted and reproduced supra and the principles governing the same have also been alluded to.

36. In the light of the narrative supra, before concluding, this Court deems it appropriate to remind itself that the salutary principle and sublime philosophy underlying the scheme of A & C Act and more particularly, provisions such as Section 34 of A & C Act are 'minimum judicial intervention'. This has been repeatedly reiterated by the Hon'ble Supreme Court in several case laws. It is this court's understanding that it is

the salutary principle and sublime philosophy underlying not only A & C Act, but the entire 'Alternate Dispute Resolution Mechanism' ('ADR Mechanism' for brevity).

Owing to all that have been set out supra, instant OP is dismissed. Considering the nature of the submissions and trajectory of the hearing, I leave the parties to bear their respective costs.

27.02.2019

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Speaking order/Non-speaking order

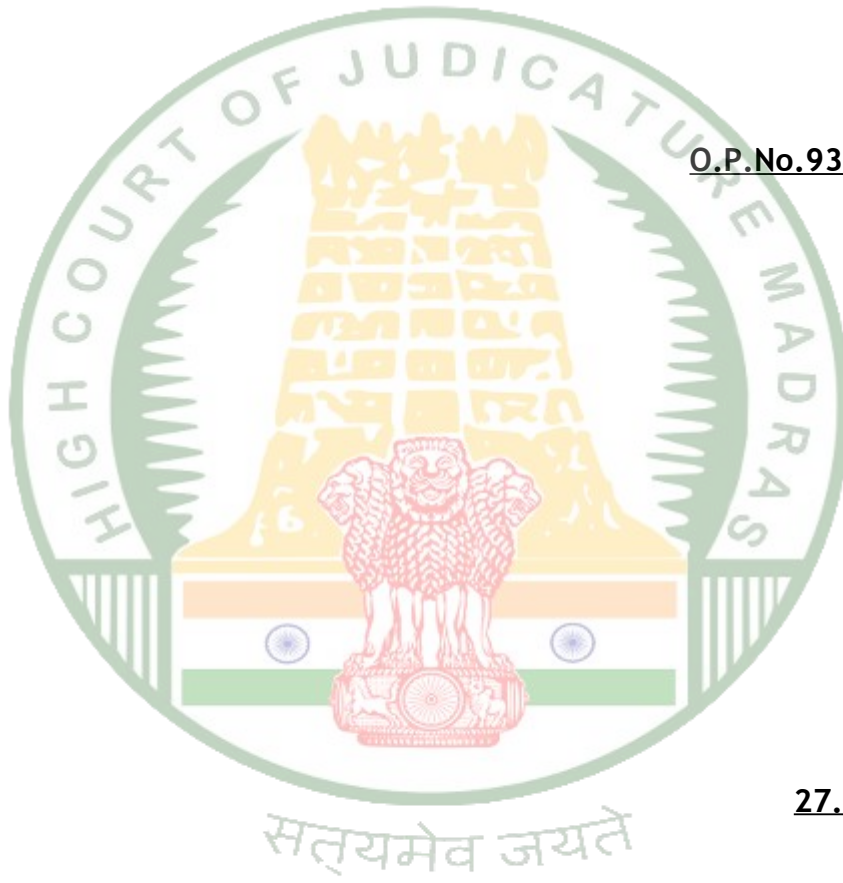
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M.SUNDAR.J.,

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O.P.No.93 of 2019

27.02.2019

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