

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.04.2019

DATE OF DECISION : 30.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.679 of 2010

Gammon India Limited,
having its Registered office at
"Gammon House", Veer Savarkar Marg,
P.O. Box No.9129, Prabhadevi,
Mujmbai-400 025.

.. Petitioner

Vs.

1.Chennai Metropolitan Water Supply and
Sewerage Board,
No.1, Pumping Station Road,
Chindadripet, Chennai-600 002.

2.Prof. T.Senthilnayagam,
Presiding Arbitrator,
1/15, South Mada Street (Rams)
Srinagar Colony,
Saidapet, Chennai-600 015.

3.Er.S.Srinivasan,
Arbitrator,
Former Engineering Director, CMWSSB,
Old No.3B, New No.6, Jeevarathnam Nagar,
Adyar, Chennai-600 020.

4.Er.M.Velu,
Arbitrator,
36/3, Santhose Gardens,
Church Road, Mogappair (East),
Chennai-600 037.

.. Respondents

This original petition is preferred under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 17.5.2010 passed by respondents 2 to 4 herein and thus render justice and this Hon'ble Court may be pleased to pass any such further orders as it may deem fit and proper.

For Petitioner : Ms.Hema Srinivasan
for Ms.K.P.Indira

For Respondent : Mr.N.Ramesh for R-1

ORDER

'Supply and laying of clear Water Transmission Main of size 1875mm Dia mild steel (MS) pipes for a length of about 94km from Ongur river to Vandalur, supply and laying of clear water transmission main from Vandalur to Porur of size 1500 mm Dia M.S. pipes for a length of about 20km., supply and providing necessary appurtenances in the pipeline and also O&M of these installations for a period of 5 years', is the description of the work which forms subject matter of the instant original petition and the same shall hereinafter be referred to as 'said work' for the sake of brevity, convenience and clarity.

2 'Original Petition' shall hereinafter be referred to as 'O.P' for the sake of convenience and clarity. Instant O.P has been filed assailing an arbitral award dated 17.05.2010 (hereinafter 'impugned award' for the sake of brevity) made by a 'Three member Arbitral Tribunal' ('AT' for brevity).

3 Instant O.P has been filed under section 34 of 'The Arbitration and Conciliation Act, 1996' (hereinafter 'A and C Act' for brevity). In the scheme of A and C Act, Section 34 is slotted under Chapter VII captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 also reveals that recourse to a Court against an arbitral award under section 34 of A and C Act may be made by an 'application'. Also to be noted, caption to section 34 itself reads 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. Be that as it may, a legal proceeding which is in the nature of recourse against an arbitral award, is being assigned the nomenclature 'Original Petition' in the Registry of this Court and therefore, instant proceedings are being referred to as 'O.P', for the sake of convenience and clarity.

4 Petitioner before this Court in the instant O.P is 'Gammon India Limited' and the same shall hereinafter be referred to as 'GIL' for brevity. First respondent in the instant O.P is 'Chennai Metropolitan Water Supply and Sewerage Board', which shall hereinafter be referred to as 'CMWSSB' for the sake of brevity. To be noted, respondents 2 to 4 in the instant O.P are three individuals, who constituted AT that made the impugned award, which, as mentioned supra, is a Three member Arbitral Tribunal.

5 It is not in dispute before me that CMWSSB issued notice inviting tenders for said work. This tender floated by CMWSSB inter-alia included 'Invitation for Bids' ('IFB' for brevity), 'Instructions to Bidders' ('ITB' for brevity), 'Forms of Bid and Qualification Information' ('BQR' for brevity),

Conditions of Contract, Contract data, Forms of securities, Specifications, 'Bill of Quantities' ('BOQ' for brevity) and Drawings.

6 GIL submitted its bid, GIL was successful and a Letter of Acceptance dated 31.10.2002 signed by both parties, i.e., GIL and CMWSSB came to be executed followed by an agreement dated 15.11.2002. To be noted, in this agreement dated 15.11.2002, it was clearly set out that CMWSSB has accepted the bid of GIL for execution and completion of said work which includes remedying of defects therein all at a cost of Rs.335,68,88,700.00. In other words, value of said contract for said work is little over Rs.335.68 Crores.

7 There is no dispute or disagreement that said work was completed. There is no complaint about the quality or execution of said work. There is no complaint touching upon the time for completion / execution of said work, but the dispute is with regard to price escalation. It is the case of GIL that there was price escalation with regard to two products qua said work, i.e., (a) 'Petroleum Oil and Lubricants' ('POL' for brevity) and (b) Steel or in other words Steel component. GIL claimed Rs.516,492,898.00 with regard to steel component and Rs.41,474,195.00 towards POL component, totalling Rs.557,967,093.00 in all on the ground of price escalation. In other words, GIL claimed little over Rs.55.79 Crores towards price escalation. CMWSSB took the stand that the said contract is a fixed price contract and therefore, price variation / price escalation is not admissible. This is the crux and gravamen of the arbitrable dispute between parties.

8 Considering that instant O.P is under section 34 of A and C Act, suffice to say that AT was constituted, AT entered upon reference and there was full contest qua arbitrable disputes before AT. After full contest, AT made the impugned award, which is by a 2 : 1 majority. In other words, while Presiding Arbitrator and one Arbitrator dismissed the claim of GIL holding that said contract is a fixed price contract, one Arbitrator wrote a separate dissenting award holding that said contract is silent about price escalation and when contract is silent about price escalation, a claim of this nature is admissible and on that basis, the claim of GIL was held to be valid and held to be one that deserves to be acceded to.

9 It is made clear that this Court exercising powers under section 34 of A and C Act is not going into the question as to whether the award made by the majority or the lone dissenting award is correct. What is before this Court is one impugned award made by the AT which is not a unanimous award, but an award made by a 2 : 1 majority in a Three member AT. The question before this Court is whether this Award, i.e., impugned award is liable to be set aside under section 34. Therefore, any reference to majority award or dissenting award shall not be construed as this Court embarking upon an exercise of testing correctness of one of the views, as this Court is only testing the correctness of impugned award (as it is before this Court) obviously within the contours and confines of section 34 of A and C Act.

10 The entire matter turns on a very narrow compass.

11 Ms.Hema Srinivasan, learned counsel representing the counsel on record for GIL (petitioner before me) and Mr.N.Ramesh, learned Standing Counsel for CMWSSB [contesting first respondent], were before this Court.

12 The entire arbitrable dispute has been captured and encapsulated in a nutshell in one pithy paragraph in the impugned award and the same reads as follows:

“The thrust of the Claim Statement is for compensation in respect of the increase (Para 18 of Claim Statement) in the price of steel and POL. As the Claimant has thus questioned this basic contention of the Respondent that this is not a FPC, the discussion on the dispute will be governed substantially by the single issue – whether the contract is a Fixed Price Contract or otherwise. If the Tribunal takes a view that Price Variation is admissible within the provisions of the Agreement as entered into between the two parties then the Tribunal will look into the reasonableness of the claim and the quantum. If the tribunal takes a view that this is a Fixed price contract, then no further discussion is required.”

13 There is no dispute or disagreement before this Court that aforesaid one paragraph very pithily articulates the crux and gravamen of the arbitrable dispute between parties.

14 This Court now proceeds to examine the rival submissions made in the instant O.P.

15 Learned counsel for GIL submitted that this being a petition under section 34 of A and C Act, which is not an appeal, challenge to the

impugned award is predicated on the ground that impugned award is in conflict with public policy of India and this ground of being in conflict with public policy of India is in turn predicated on the plea that impugned award is in contravention with fundamental policy of Indian law.

16 Advancing submissions on aforesaid basis and elaborating on aforesaid ground on which challenge to impugned award is predicated, learned counsel for GIL submitted that in addition to one paragraph in impugned award (which has been extracted supra), which articulates the crux and gravamen of the arbitrable dispute, it can also be put in a nutshell and stated that in terms of covenants, CMWSSB relies on clause 13.4 of ITB which reads as follows :

“13.4 The rates and prices quoted by the bidder shall be fixed for the duration of the contract and shall not be subject to adjustment on any account.”

In contrast, GIL relies on Clause 4 of said agreement dated 15.11.2002 which is an adumbration of documents which form part of said agreement and clause 4 of said agreement dated 15.11.2002 reads as follows:

“4.The following documents shall be deemed to form and be read and construed as part of this Agreement, viz.:

- i)Letter of Acceptance and all subsequent correspondences.
- ii)Notice to proceed with the works;
- iii)Contractor's Bid;
- iv)Contract Data;
- v)Conditions of Contract (General and Special);
- vi)Specifications (General and Special)

- vii) Drawings;
- (viii) Bill of Quantities; and
- (ix) Any other document listed in the Contract Data and all the Addendum issued as forming part of the contract.
- (x) Safety and preventive measures (CMWSSB)”

17 It is the specific say of learned counsel for GIL that aforesaid adumbration of 10 different documents in clause 4 of said agreement does not include ITB and therefore, CMWSSB cannot rely on clause 13.4 of ITB.

18 Articulating on this aspect of the matter, learned counsel for GIL referred to ***Dresser Rand S.A. v. Bindal Agro Chem Ltd.***, reported in (2006) 1 SCC 751 which was reiterated in ***Bharat Sanchar Nigam Ltd. Vs. Telephone Cables Ltd.*** Reported in (2010) 5 SCC 213. Relying on ***Dresser Rand*** and ***Bharat Sanchar Nigam Ltd.*** Cases, learned counsel submitted that it is not open to a party to a contract to fall back on tender conditions on pre-contract covenants, once tender has fructified into contract, which is admittedly governing the parties. Specific reference was made to paragraphs 27 and 32 of ***Dresser Rand*** case which read as follows :

“27. The tender document or the invitation to bid of BINDAL (containing the “instructions to bidders” and the “General Conditions of Purchase”), by itself, is neither an agreement nor a contract. The instructions to bidders informed the intending bidders how the bid should be made and laid down the procedure for consideration and acceptance of the bid. The process of bidding or submission of tenders would result in a contract when a bid or offer is made by a prospective supplier and such bid or offer is accepted

by BINDAL. The second part of the invitation to bid consists of the “General Conditions of Purchase”, that is, the conditions subject to which the purchase order will be placed or offer will be accepted. The “General Conditions of Purchase” were made available as a part of the invitation to bid, so as to enable the prospective suppliers to ascertain their obligations and formulate their offers suitably.

32. Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed, is not the same as placing a purchase order. A prelude to a contract should not be confused with the contract itself. The purpose of Revision 4 dated 10-6-1991 was that if and when a purchase order was placed by BINDAL, that would be governed by the “General Conditions of Purchase” of BINDAL, as modified by Revision 4. But when no purchase order was placed, neither the “General Conditions of Purchase” nor the arbitration clause in the “General Conditions of Purchase” became effective or enforceable.”

19 By relying on ***Dresser Rand*** case, learned counsel submitted that tender document or invitation to bid by itself does not constitute an agreement or a contract. The process of bidding or submission of tenders would result in a contract when a bid or offer is made by a prospective supplier and when such bid or offer is accepted by the entity which issued notice inviting tenders, parties agreeing upon the terms of the contract will be governed by the same when made. Furthering her submissions in this direction, learned counsel submitted that said contract is completely silent about price escalation or price variation. Pitching herself on this submission,

learned counsel pressed into service judgements of Hon'ble Supreme Court in ***Tarapore and Company Vs. Cochin Shipyard Ltd.*** reported in **(1984) 2 SCC 680**, ***P.M.Paul Vs. Union of India*** reported in **1989 Supp (1) SCC 368** and ***Food Corporation of India Vs. A.M. Ahmed and Co.*** reported in **(2006) 13 SCC 779** to buttress her plea that price escalation is permissible when the contract is silent in this regard.

20 Responding to aforesaid submissions, learned Standing Counsel for CMWSSB submitted that IFB, ITB, BQR, BOQ and drawings also form part of the contract, as the very bid by GIL itself is based on the premise that it is a fixed price contract. Clause 13.4 of ITB which has been extracted and reproduced supra, makes it clear that price quoted by bidder shall be fixed for the duration of the contract and shall not be subject to adjustment on any account. GIL, having bid on this premise and having concluded the contract, cannot now canvass that contract is silent about price escalation / price variation and therefore, it is entitled to make a claim on the ground of price escalation. Adverting to clause 4 of the agreement dated 15.11.2002, it was submitted that it is untenable to contend that ITB will not operate as it does not form part of the adumbration of components of agreement in clause 4.

21 This Court carefully analysed the rival submissions in this regard.

22 This Court is clear that **Dresser Rand** principle is to the effect that a prelude to the contract should not be confused with the contract itself. In the instant O.P, it is nobody's case that post bid and more particularly, post ITB, there were negotiations between GIL and CMWSSB, post such negotiations, ultimately, when the contract / agreement was concluded on 15.11.2002, contracting parties agreed that this will not be a fixed price contract. If that had been the case and if there had been a covenant to that effect in the agreement / contract, the scenario would have been very different. Having said this, it is made clear by this Court that it should have not only been the case that there was negotiation post bid and contracting parties agreed to be governed by a term, which is contrary to or completely different from the premise on which the bid was made, there should also be a covenant to this effect in the contract / agreement. In other words, if there had been a covenant in the agreement providing for price escalation, then clause 13.4 of ITB would have certainly become otiose. The fact that agreement is silent leaves one hazarding a guess / surmise as to whether it is a fixed price contract at all or whether it provides for price escalation.

23 Therefore, this Court decided to proceed further and embarked upon the exercise of examining whether price escalation is permissible when the contract is silent on this aspect of the matter.

24 As alluded to supra, learned counsel for GIL relied on case laws of Hon'ble Supreme Court, namely **Tarapore and Company** case, **P.M.Paul** case and **A.M.Ahmed and Co.** case in this regard. According to learned counsel for GIL, the principle in these three case laws support the proposition

that price escalation claims are permissible when contract is silent on this aspect and when there is nothing to show that the contract was a fixed price contract.

25 Responding to this submission by learned counsel for GIL, it is submitted by learned Standing Counsel for CMWSSB that **P.M.Paul** case is distinguishable on facts, as that was a case where the dispute was not price escalation simplicitor, but it was a dispute which was intertwined with an issue about delay in handing over the site. While contractor contended that site was not handed over to him as agreed upon and therefore, the work could not either be commenced or completed as stipulated and when the contractor alleged obstructionist tactics also on the part of the State, it was denied by the State stating that such claims are imaginary excuses to gain time and put forward various demands for extension of time. It was also contended by State that if the work was not completed within the stipulated time, the contractor may ask for extension of time, but that by itself does not entitle the contractor to claim difference in price. It was argued that there are no such issues in the instant case which is price escalation simplicitor. After careful perusal of **P.M.Paul** case, this Court is inclined to accept the submission of learned standing counsel for CMWSSB that **P.M.Paul** is distinguishable on facts.

26 With regard to **Tarapore and Company** case, it was submitted by learned standing counsel for CMWSSB that it is also distinguishable on facts. It was pointed out that **Tarapore and Company** case was a contract

for construction of building dock at Cochin and that works of such complexity and magnitude had not been undertaken by any Indian contractor until that point of time. It was pointed out that this was recorded by tender committee and the relevant portion in ***Tarapore and Company*** case reads as follows :

“2.....The Tender Committee taking note of the poor response to the invitation to tender and costly affair decided to accept the tender of the appellant inter alia for the reasons (i) that works of such complexity and magnitude have not been undertaken before by any Indian contractor, (ii) that the plant and equipment required for the work are not available indigenously, (iii) that if the contractor is to procure the specialised equipment required for this work, there is hardly any assurance that after these works are over, he would find any substantial use for the same, (iv) that excavation and subsequent construction involve de-watering which introduces considerable amount of uncertainty and that during the discussions, the apprehension of the tenders of this kind was voiced and noticed by the Committee, and (v) that RCC Piling also requires highly skilled and complex technical operations and it involves a large element of risk and uncertainty in the work.”

27 Be that as it may, it was pointed out that in ***Tarapore and Company*** case, one of the equipments required for execution of the work, namely, pile driving equipment including the technical know-how against what is known as Eleventh Japanese Yen Credit unexpectedly became unavailable. Therefore, an entity in Holland being International Foundation Group ultimately provided the equipment after receiving requisite clearance from the Government of India, all of which consumed time. In the

interregnum, the entire imported equipment which was received in four consignments ending up in huge upward price variations owing to change in rate of exchange and costs of foreign exchange. The customs duty also consequently went up. This according to learned standing counsel for CMWSSB is clearly an unexpected / unforeseen development, there are no such issues in the case on hand and therefore, **Tarapore and Company** case is also clearly distinguishable on facts. After carefully considering the submissions, this Court is inclined to accept the submissions that **Tarapore and Company** case is distinguishable on facts qua the case on hand.

28 With regard to third case law that was pressed into service by learned counsel for GIL, namely, **A.M.Ahmed and Co.** case, it was argued that this is also distinguishable on facts. It is also a case which is not price escalation simpliciter. In this case, there was unforeseen / unexpected statutory change. Statutory obligations changed resulting in sudden wage increase which was drastically higher wages higher than what prevailed at the time of tender. Statutory obligation to pay higher wages by the contractor arose owing to a notification made by Government. Further more, it was pointed out that post contract, Tuticorin Port was declared as major port entailing the labour there to higher wages on par with wages being paid to dock labour in other major ports. This is another change in circumstance. It was pointed out and argued that there are no such unexpected change in circumstance much less statutory changes in the instant case.

29 A careful perusal of **A.M.Ahmed and Co.** case reveals that these were certainly grounds that were raised by the contractor. The arguments made by learned counsel for the contractor have been captured in one paragraph and relevant portion of that paragraph in **A.M.Ahmed and Co.** case reads as follows :

“7.Mr Anand Padmanabha, learned counsel, made the following submissions by way of reply to the arguments advanced by the appellant's counsel:

1. x x x x x x x x

2. The claim for escalation is justifiable on the ground that the claimant could never have anticipated the sudden wage increase and other statutory obligations imposed by the Government under any stretch of imagination while tendering for the work as early as February 1981. It is further submitted that the claimant had quoted for the work based on the then prevailing wages at the time of tender (*sic*) who by providing them with a marginal increase for feasibility of execution.

3. The statutory obligation to pay higher wages arose under the notification published in the Tamil Nadu Gazette (Extraordinary) published in Part 6 Section 3-a dated 1-9-1981 marked as Exhibit C-5.

4. The above claim of unawareness of increase in wages consequent to Tuticorin being declared as a major port entailing higher wages on a par with wages being paid to dock labour in other major ports.”

30 Therefore, this Court has no difficulty or doubt in its mind in

accepting the submissions that all three case laws, namely, **Tarapore and Company** case, **P.M.Paul** case and **A.M.Ahmed and Co.** case are clearly distinguishable on facts. It follows as a sequitur that the proposition canvassed by counsel for GIL, i.e., proposition that contractor will be entitled to claim price escalation when contract is silent does not carry GIL any further in its campaign against impugned award in instant O.P.

31 Furthering his submissions, learned Standing Counsel for CMWSSB pressed into service following five case laws:

- (i) **Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engineering Enterprises and another** [(1999) 9 SCC 283];
- (ii) **Oil and Natural Gas Corporation Vs. Wig Brothers Builders and Engineers Private Limited** [(2010) 13 SCC 377];
- (iii) **Travancore Devaswom Board Vs. Thanath International** [(2004) 13 SCC 44];
- (iv) **Union of India Vs. Varindera Constructions Limited and others** [(2018) 7 SCC 794]; and
- (v) **Union of India Vs. Ramnath International Construction Pvt. Ltd.** [2003 (I) CTC 4].

All these are cases where there was express bar in the contract and they turn on complaint of arbitrator having overlooked such express bar qua price escalation. Therefore, this Court has no difficulty in holding that these cases have no application to the instant case on hand.

32 Learned Standing counsel for CMWSSB also pressed into service a judgment of Hon'ble Division Bench of Delhi High Court made in

Union of India vs. M/s.Bhardwaj Enterprises reported in **CDJ 2009 DHC**

1598. This case rendered by a Division Bench of Delhi High Court was penned by Hon'ble Mr. Justice Sanjay Kishan Kaul (as Judge of Delhi High Court as His Lordship then was). In this case, the issue of interpreting certain terms of contract pertaining to price variation clause and extensions fell for consideration. However, what is of relevance is, in this Division Bench judgment of Delhi High Court, the factual position that in **A.M.Ahmed and Co.** case, there was upward revision of wages, this upward revision is statutory and therefore, it stands on different footing has been noticed. To this limited extent, this case helps the respondent CMWSSB. To be noted, as alluded to supra, this court has already accepted the submission of learned Standing counsel for CMWSSB that **A.M.Ahmed and Co.** case is distinguishable on facts.

33 By way of reply, learned counsel for GIL pressed into service the oft-quoted **Associate Builders** case, being **Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49** in an attempt to buttress the submission that the impugned award has given a go-by to **A.M.Ahmed and Co.** principle and should therefore be construed to be in contravention with fundamental policy of Indian law. It was also argued that it has been held in **Associate Builders** case that disregarding judgments of higher courts is a ground to have an arbitral award set aside under section 34 of A and C Act.

34 In the light of discussions supra, wherein this Court has accepted the submission of learned standing counsel for CMWSSB to the effect that case laws pressed into service by GIL are clearly distinguishable

on facts qua case on hand, the question of AT disregarding judgments of superior courts or the impugned award being in contravention with fundamental policy of Indian law does not arise.

35 Further, as part of reply, learned counsel for GIL referred to force majeure clause. This court is unable to persuade itself to believe that force majeure clause will have any application to the instant case on hand, as force majeure clause is in a completely different realm altogether as it deals with natural calamities. Therefore, this court considers it unnecessary to go into the force majeure clause.

36 Instant O.P being one under section 34 of A and C Act has to necessarily be examined by perambulating within the contours and confines of section 34 of A and C Act. No elucidation or elaboration is required to highlight the obtaining position that an application under section 34 of A and C Act, i.e., proceedings in the nature of instant O.P, are summary procedures as laid down by Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796. ***Fiza Developers*** principle is to the effect that section 34 proceedings are one issue summary procedures. This ***Fiza Developers*** principle was subsequently explained in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in (2018) 9 SCC 49 and while so explaining, Hon'ble Supreme Court held that ***Fiza Developers*** principle is a step in the right direction towards expeditious disposal of such legal recourse which are in relation to arbitral proceedings. Though this is not of great relevance for

ultimate conclusion that is being arrived at, this is being mentioned only to highlight that instant case turns on a very narrow compass and also to articulate the scope of instant O.P.

37 Owing to all that have been set out supra, instant O.P fails and the same is liable to be dismissed, as no case has been made out warranting judicial intervention qua impugned award under section 34 of A and C Act.

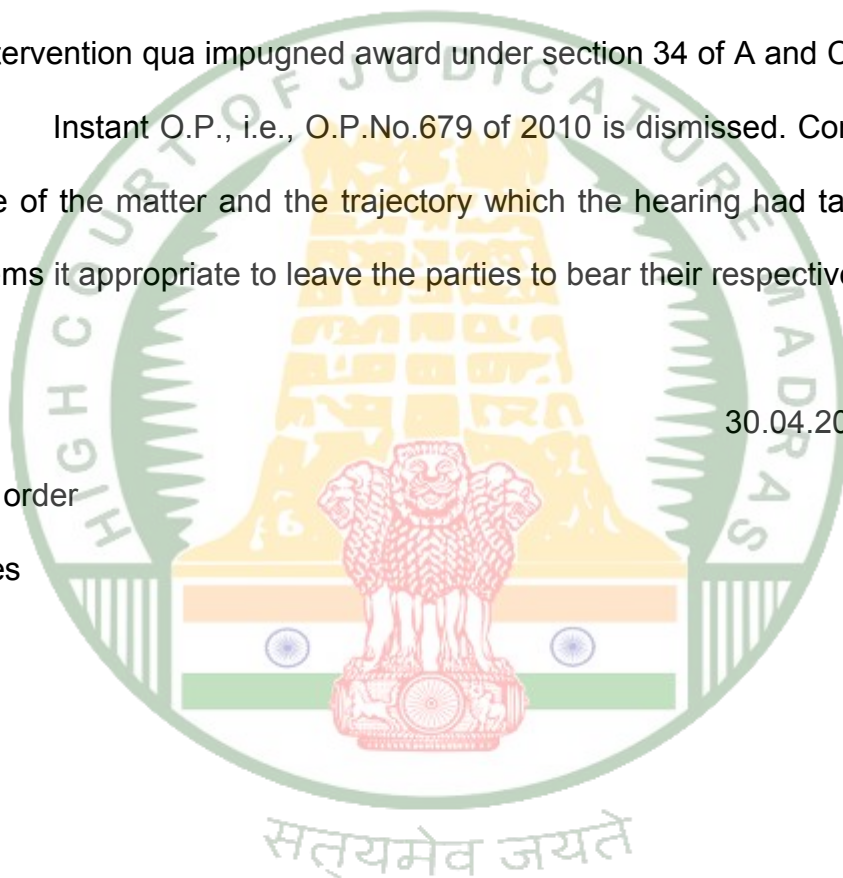
38 Instant O.P., i.e., O.P.No.679 of 2010 is dismissed. Considering the nature of the matter and the trajectory which the hearing had taken, this Court deems it appropriate to leave the parties to bear their respective costs.

30.04.2019

Speaking order

Index : Yes

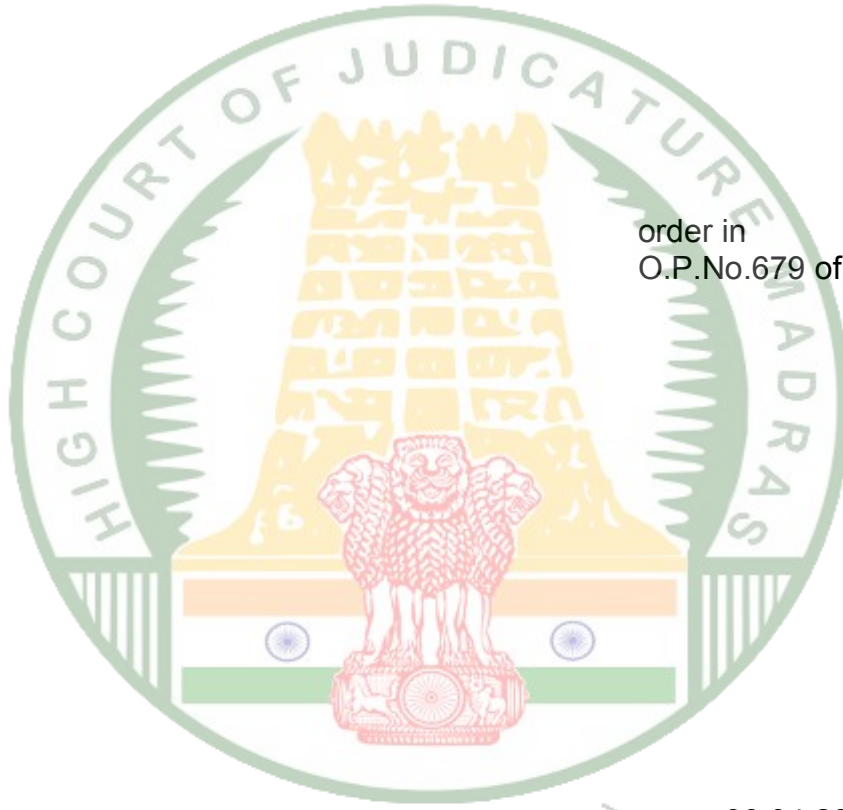
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M.SUNDAR, J.

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order in
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