

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 10.09.2018

Orders Pronounced on : 10.01.2019

CORUM

THE HON'BLE MR.JUSTICE R.SUBBIAH
and
THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.No.34305 of 2004

and

W.M.P.No.41434 of 2004 and W.M.P.No.25148 of 2017

S.V.Sivalinga Nadar & Sons,
a firm by Partner S.V.Sivalinga Nadar,
444, Pandit Jawaharlal Road,
Villupuram-605 602. ... Petitioner

Vs.

1.The Joint Registrar of Trade Marks,
Trade Mark Registry, Rajaji Bhavan,
'D' Wng, II Floor, Besant Nagar,
Chennai-600 090.

2.S.V.Chandra Pandian

3.S.V.Ramachandran

4.S.V.Kasilingam

5.The Registrar,
Intellectual Property Appellate Board,
Annexure-1, 2nd Floor, Guna Complex,
443, Anna Salai, Teynampet,
Chennai-600 018.

... Respondents

Writ Petition has been filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari, calling for the impugned order of the Intellectual Property Appellate Board dated 03.09.2004 passed in TA/32/2003/TM/CH/3354 confirming the order of the Joint Registrar of Trade Mark, dated 05.02.2001, relating to the application of the petitioner No.479367 B dated 05.10.1987 advertised in the Trade Mark Journal No.1148, dated 01.04.1997, and to quash the order dated 03.09.2004.

Appearance:-

Mr.V.Selvaraj, for petitioner

Mr.K.Srinivasa Moorthy, Standing Counsel for R1

Mr.P.H.Arvind Pandiyan, Senior Counsel
for Gladys Daniel, for R2 to R4

Mr.T.V.Krishnamachari, for R5

* * * * *

ORDER

(Judgment of the Court was delivered by R.SUBBIAH, J.,)

This writ petition has been filed praying to quash the impugned order dated 03.09.2004 passed by the Intellectual Property Appellate Board in TA/32/2003/TM/CH/3354, confirming the order dated 05.02.2001 passed by the Joint Registrar of Trade Mark (1st respondent herein) relating to the application of the petitioner No.479367 B dated 05.10.1987 advertised in the Trade Mark Journal No.1148, dated 01.04.1997.

2.The brief facts of the case of the petitioner are as follows:-

2-1.One S.V.Sivalinga Nadar being eldest brother of his family consisting of himself, his five brothers and a sister namely, S.V.Harikrishnan, S.V.Chandrapandian, S.V.Kasilingam, S.V.Ramachandran, S.V.Natesan and Mrs.Kanthimathi Ammal, constituted a partnership firm on 18.09.1968 trading under the name and style of "S.V.S.Oil Mills" at No.8, T.H.Road, Chennai, and were manufacturing and marketing edible refined oil and adopted the Trade Mark 'S.V.S.', consisting of the three letters placed above an inverted triangle. In the year 1981, when there was difference of opinion among the partners, the dispute was referred to the arbitration by a letter dated 08.10.1981 and the Arbitrators passed an Award on 09.07.1984 bifurcating the various assets belonging to the family in respect of the firms "S.V.S.Oil Mills", "S.V.Sivalinga Nadar & Bros etc.". The said Award came into effect on 14.07.1984.

2-2.The letters "S.V.S." denotes the name 'S.V.Sivalinga Nadar'. He filed a petition in O.P.No.247 of 1984 before this Court to set aside the Award dated 09.07.1984 passed by the Arbitrators. Similarly, the respondents 2 to 4 have filed a petition in O.P.No.230 of 1984 to pass a decree in terms of the Award.

2-3.By an order dated 17.11.1988, this Court dismissed O.P.No.247/1984 filed by S.V.Sivalinga Nadar and allowed O.P.No.230 of 1984 filed by the respondents 2 - 4 and passed a decree in terms of the Arbitration award. S.V.Sivalinga Nadar thereafter filed an appeal in O.S.A.No.191/1988, which was allowed by a Division Bench of this Court setting aside the Award of the Arbitrators on the ground that the award was not registered.

2-4.Aggrieved over the same, the respondents 2 to 4 had filed an S.L.P. before the Hon'ble Supreme Court. While granting leave, by an order dated 11.01.1993, the Hon'ble Supreme Court remanded the case back to the Hon'ble Division Bench of this Court to decide OSA afresh, ignoring the non-registration of the Award. After remand, the Division Bench of this Court, by its judgment dated

27.10.1993, dismissed the appeal in O.S.A.No.191/1988 and confirmed the decree passed in O.P.No.230/1984, which was later confirmed by the Hon'ble Supreme Court on 19.11.1998.

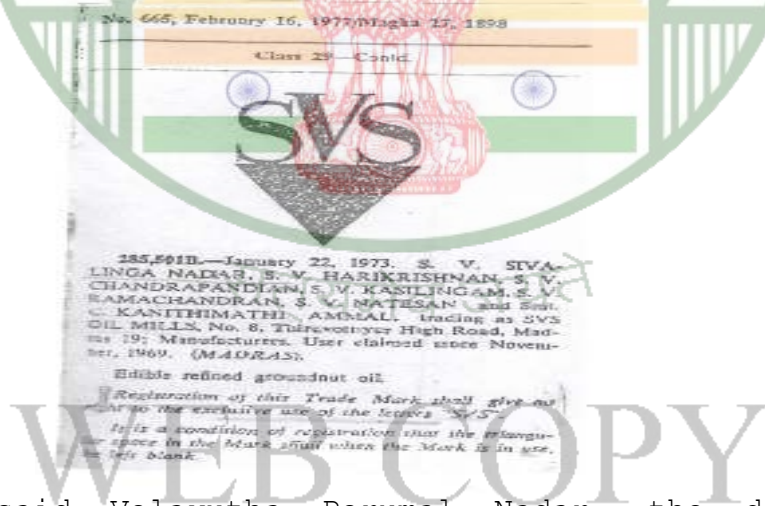
2-5. In the meantime, even prior to passing of the arbitration award, S.V.Sivalinga Nadar, along with his sons S.V.S.Senthilkumar, S.V.S.Velkumar, S.V.S.Rajakumar and S.V.S.Vasanthkumar started trading as S.V.Sivalinga Nadar and Sons at 444, Pandit Jawaharlal Nehru Road, Villupuram, as manufacturers and merchants of refined edible oil and filed an application claiming user since July 1987, vide Application T.M.No.479367B dated 05.10.1987, which was published in the Trade Mark journal on 01.04.1997 under the provisions of Section 20(1) of the Trade and Merchandise Marks Act 1958 as 'advertised before acceptance'. The application was for registration of a label mark consisting of logo with the letters SVS. The 2nd respondent representing as a Partner of the erstwhile 'S.V.S.Oil Mills' filed a Suit before this Court in C.S.No.1016 of 1997 praying for an injunction and other relief on the allegation that the mark which was used since July 1987 by the petitioner was deceptively similar to the previous mark, for which Award was passed by the Arbitrators and the proceedings for settlement of Accounts were pending. Later the 2nd respondent withdrew the said suit and the same was dismissed on 24.02.1997 as withdrawn. However, liberty was given to file a fresh suit. However, no such suit was filed by the 2nd respondent.

2-6. While so, one Mr.D.Rajkumar representing as Trade Mark Agent of 'S.V.S. Oil Mills' has filed an application dated 12.11.1999 under Section 19 of the Trade and Merchandise Marks Act 1958, before the 1st respondent, the Joint-Registrar of Trade Marks, praying for rejection of the Trade Mark Application filed by the petitioner in Application No.479367 B, dated 05.10.1987, advertised in Trade Mark Journal No.1148, dated 01.04.1997. According to the petitioner, Section 21 of the Trade and Merchandise Marks Act 1958 prescribed a time limit of raising Objection against the Trade Mark Publication as three months from the date of advertisement. In the instant case, the application under Section 20(1) was made by the petitioner on 05.10.1987 and advertised on 01.04.1997, but the objection was filed on 12.11.1999, after a lapse of more than two and half years from the date of the advertisement; however, the 1st respondent has entertained the objection and issued a notice dated 28.04.2000, proposing to withdraw the acceptance of the application and directed the petitioner to file a reply within 30 days. The petitioner has also filed his reply dated 16.10.2000 clearly making out that the Objection was not maintainable.

2-7. The 1st respondent passed an order dated 05.02.2001 withdrawing the acceptance of Application No.479367 B and refused to register the trademark, on an improper appreciation of fact and law. Aggrieved by the

said order of the 1st respondent dated 05.02.2001, the petitioner had preferred an appeal under Section 109 of the Trade and Merchandise Act 1958 in T.M.A.No.4/2001 before this Court, which was subsequently transferred to the Intellectual Property Appellate Board (for brevity 'IPAB') under the Trade Mark Act 1999 established with effect from 15.09.2003. The said appeal was renumbered as TA/32/2003/TM/CM/3354 before IPAB. The IPAB, which is a Tribunal as per Section 2(ze) of the Trade Marks Act 1999, by the impugned order dated 03.09.2004, communicated by the Board in the letter dated 08.09.2004 received by the petitioner on 13.09.2004, dismissed the appeal and confirmed the order passed by the 1st respondent. Aggrieved over the same, the present writ petition has been filed by the petitioner.

3.The learned counsel appearing for the petitioner submitted that on 24.03.1969, S.V.Sivalinga Nadar, S/o.S.Velayutha Perumal Nadar, being the eldest brother of his family consisting six brothers and a sister, constituted a Partnership Firm under the name and style of "S.V.S. Oil Mills" at No.8, T.H.Road, Chennai, manufacturing and marketing edible refined ground-net oil and adopted the Trade Mark label "SVS" consisting of three alphabets placed above an inverted triangle. The said trade mark was registered vide T.M.No.285501B. Details of the trademark journal as advertised is extracted hereunder:- However, in view of dispute between the sons and daughter



of the said Velayutha Perumal Nadar, the dispute was referred to an Arbitration. The Arbitrators passed an award on 09.07.1984 bifurcating the various assets belonging to the family in S.V.S. Oil Mills, and S.V.Sivalinga Nadar and Brothers etc. The said Award attained finality before the Hon'ble Supreme Court.

4.Even before the Award was passed by the Arbitrators, S.V.Sivalinga Nadar along with his sons started trading as S.V.Sivalinga Nadar and Sons, as manufacturers and Merchants of refined edible oil claiming user since July 1987, and filed application No.479367B dated 05.10.1987, which was published in the Trade Mark Journal on 01.04.1997

under Section 20(1) of the Trade and Merchandise Marks Act 1958 as 'advertised before acceptance'. The advertisement made in the Trade Mark Journal is extracted hereunder:-



5.A complaint was filed on behalf of "S.V.S.Oil Mills" on 12.11.1999, before the Registrar of Trade Marks under Section 19 of the Trade and Merchandise Marks Act, 1958, alleging that the application of the petitioner for registration should be rejected on the ground that by the Award dated 09.07.1984 passed by the Arbitrators, the business of the firm in the name of 'S.V.S. Oil Mills' and its assets used in the course of the business were allotted to respondents 2-4 and S.V.Natesan.

6.It is stated that on the basis of the Award dated 09.07.1984, as decreed on 17.11.1988 and confirmed by the Hon'ble Supreme Court later, a separate partnership firm was formed on 15.07.1984 and was registered with the Registrar of Firms on 25.07.1984. By virtue of the said decree, with effect from 15.07.1984, the joint proprietors acquired the business of the erstwhile firm S.V.S.Oil Mills, along with the goodwill of the business. Therefore, the description 'original SVS' used in the label by the petitioner amounts to false trade description under the Act. The respondent 2-4 sought for rejection of the application filed by the petitioner under Section 19 of the Act.

7.In this regard, the learned counsel appearing for the petitioner has also submitted that the 1st respondent herein has entertained the said objection/complaint and issued notice on 28.04.2000 to the petitioner, purposing to withdraw the acceptance of the application and directing the petitioner to file reply within 30 days.

8.The petitioner filed a reply 16.10.2000 clearly stating that the objection/complaint is practically resorted as a substitute for an opposition, which was never filed and it is also a ruse to evade filing a rectification after registration of the mark. But, inspite of the same, the acceptance of Application No.479367B was withdrawn and the application for registration was refused by the 1st

respondent, on an improper appreciation of facts and law. The IPAB has also confirmed order of the 1st respondent, on an erroneous reasoning.

9. Assailing the orders of the 1st respondent as well as IPAB, the learned counsel for the petitioner submitted that award passed by the Arbitrators has been misinterpreted by the respondents 2 - 4 and the claim that the goodwill of erstwhile 'S.V.S. Oil Mills' and trademark were allotted to respondent 2 - 4 is incorrect. Under the Award, the trademark 'SVS' was not allotted to any one of the parties.

10. Therefore, the main issue that arises for consideration in this case is whether the Arbitrators had allotted the label SVS with inverted triangle registered as trade mark No.285501B to the respondents 2 - 4 and whether the goodwill of the erstwhile SVS Oil Mills was also allotted to respondents.

11. In this regard, the learned counsel for the petitioner further submitted that it is not in dispute that late S.V.Sivalinga Nadar and his brothers were jointly doing business and that on account of difference of opinion, they jointly agreed for settlement of the disputes before the Arbitrators. Under the Award of the Arbitrators, after dissolving the firms M/s.Sivalinga Nadar & Bros and M/s.S.V.S.Oil Mills, A-schedule property was allotted to S.V.Sivalinga Nadar, B-Schedule property to S.V.Hari Krishnan, C-schedule property to S.V.Chandra Pandian, D-schedule property to S.V.Kasilingam, E-Schedule property to S.V.Ramachandran and F-schedule property to S.V.Natesan.

12. However, the trademark 'SVS' was not allotted to any one of them to the exclusion of the others. The Award of the Arbitrators also does not deal with intangible property namely goodwill of the firms 'S.V.Sivalinga Nadar & Bros.,' and 'S.V.S. Oil Mills'. There is also no reference to the trade mark No.285501B in the Award. It is also not in dispute that the trade mark registered on 22.01.1973 under trademark application No.285501BB was jointly owned by S.V.Sivalinga Nadar, his brothers and sister. So far as his sister Kanthimathi Ammal is concerned, she filed a suit and received money towards her claim and this is also reflected in para 28 of the Award.

13. In this regard, the learned counsel for the petitioner has also invited the attention of this Court to Section 24 of Act 43 of 1958, which deals with jointly owned trademarks. Sub-Section 2 to Section 24 makes it clear that the joint owners of the trademark have to use the trademark jointly as if the rights were vested in a single person. In the event of any dispute among the joint proprietors, none of them can claim ownership of the trademark to the exclusion of others. Therefore, in the

instant case, when S.V.Sivalinga Nadar and his sons applied for registration of trademark, respondents 2 to 4 are not entitled to object the registration of the trade mark on the ground that they have become the owners of trademark No.285501B by transmission. In this regard, the learned counsel for the petitioner has also relied upon the judgment reported in AIR 1991 Bombay 407 (Ratansi Muli Vs. Vinod Ratilal Gandhi and another).

14.Further, the learned counsel for the petitioner submitted that a reading of the Award of the Arbitrators would demonstrate that the Arbitrators, namely an eminent lawyer and two well known Chartered Accountants, have consciously not allotted the goodwill of the businesses and the registered trade mark in T.M.No.285501B to any of the disputants. The dissolution of the firms put an end to the firms. In this regard, the learned counsel for the petitioner has also relied upon the decisions reported in 1974(2) SCC 642 (Saligram Ruplal Khanna Vs. Kanwar Ranath) and AIR 1972 (Allahabad) 1 [Narendra Bahadur Singh Vs. Chief Inspector of Stamps, U.P.].

15.It is further contention of the learned counsel for the petitioner that after the dissolution of the firms, a new firm 'S.V.S. Oil Mills' was formed on 15.07.1984 by respondent 2 to 4 and S.V.Natesan. The goodwill of the erstwhile firm 'S.V.S.Oil Mills' was not allotted to any of the disputants. Obviously, considering the assets of the partnership firms, the Arbitrators in their wisdom did not deal with the goodwill of the partnership firms and the registered trademark No.285501B. Para 26 and 27 of the Award have been misinterpreted by respondents 2 to 4, as if they were permitted to use the name 'SVS' to the exclusion of the others. But, actually para 27 of the Award says that the respondents 2-4 shall be entitled to use the name of 'S.V.S. Oil Mills' as SVS represents S.Velayudha Perumal Sons.

16.Further, the learned counsel for the petitioner has also invited the attention of this Court to Chapter V of the Trade and Merchandise Marks Act, 1958, which deals with assignment and transmission. Under Section 37 of the said Act, a registered trade mark is assignable with or without trade mark. Section 38 deals with unregistered trade mark. There is distinction between good will and trade mark. In this regard, the learned counsel for the petitioner has also relied upon the decision of a Division Bench of Madhya Pradesh High Court reported in AIR 2009 Madhya Pradesh 84 [Kale Khan Mohd.Hanif Vs. Mohd.Iqbal] and submitted that the trade mark and good will are different. The respondents 2 - 4 claimed that they applied for registration of transmission and they were registered as subsequent owners. Only in the event goodwill is transferred or allotted, the respondents 2 - 4 can claim right over the trade mark. In fact, the petitioner has already applied for removal of the trademark under Section

47 of the Trade Marks Act 1999. But, the petitioner's application for registration of a trademark was rejected on the ground that there is transmission of Trade Mark No.285501B in favour of respondents 2 - 4.

17.The trademark No.285501B was not allotted to any of the disputants by the Arbitrators. Therefore, the use of the trademark No.285501B by the respondents 2 - 4 was illegal and they are liable to compensate the other disputants for misuse of trademark. The non-registration of the petitioner's mark by the 1st respondent on the ground that the trade mark was already allotted to the respondents 2 - 4 is totally misconceived. The IPAB without appreciating the facts has wrongly confirmed the order of the 1st respondent. Thus, the learned counsel for the petitioner sought for setting aside the impugned order passed by the IPAB.

18.Countering the submissions made by the learned counsel for the petitioner, it is contended by the learned senior counsel appearing for the contesting respondents viz., respondents 2 - 4, by inviting the attention of this Court to the Award of the Arbitrators, that under the Award the respondents 2 - 4 and S.V.Natesan were allotted the Business, current assets, Fixed Assets, Plant and Machinery of the erstwhile firm 'S.V.S. Oil Mills'. Under Clause 27 of the Award, the Arbitrators reiterated that the respondents 2 - 4 shall be entitled to use the name 'S.V.S. Oil Mills'. Without any dispute, the business along with the trade mark has been allotted to the respondents 2 - 4 and S.V.Natesan.

19.Subsequently, the said S.V.Natesan retired from 'S.V.S. Oil Mills' on 22.02.2001. The learned senior counsel for the contesting respondents submitted that the plant includes trademark and brand name and when the plant was allotted to the respondents 2 -4, it included the trade mark 'SVS' also. In this regard, the learned senior counsel for the contesting respondents has also placed reliance on the decision of the Hon'ble Supreme Court in the case of Mangalore Ganesh Beedi Works Vs. Commissioner of Income Tax, Mysore and ors., dated 15.10.20015, Manu/SC/1172/2015, wherein it has been held as follows:-

"31.The question is, would intellectual property such as trademarks, copyrights and know-how come within the definition of 'plant' in the 'sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it'? In our opinion, this must be answered in the affirmative for the reason that there can be no doubt that for the purposes of a large business, control over intellectual property rights such as brand name, trademark etc. are absolutely necessary. Moreover, the acquisition of

such rights and known-how is acquisition of a capital nature, more particularly in the case of the Assessee. Therefore, it cannot be doubted that so far as the Assessee is concerned, the trademarks, copyrights and know-how acquired by it would come within the definition of 'plant' being commercially necessary and essential as understood by those dealing with direct taxes."

By relying upon the above said decision, the learned senior counsel for the contesting respondents submitted that when a party is entitled to the Firm name or the trading style, the opponent cannot contend that only the Firm name or trading style was allotted and not the trade mark.

20. Further, the learned senior counsel for the contesting respondents submitted that after the matter culminated at the Hon'ble Supreme Court of India, S.V.Natesan retired from the firm 'S.V.S. Oil Mills' on 22.02.2001 and was paid with an amount of Rs.77,57,248.40. After retirement, S.V.Natesan adopted and used the trademark 'SVS' as a part of the company name and also a trade mark. Hence, a suit in C.S.No.433 of 2001 was filed before this Court seeking to restrain the said use. In O.A.No.505/2001 in C.S.No.433 of 2001, this Court granted an Interim Injunction after contest by order dated 27.06.2001. After being injuncted by this Court, S.V.Natesan adopted the trademark 'SVN', as a company name and the same color scheme, get-up and lay out as that of the respondents 2 - 4. The Division Bench of this Court granted an injunction once again against the use of the color scheme, get-up and lay out by its order dated 28.06.2004 in O.S.A.No.392/2003. The said S.V.Natesan filed an SLP No.14319 of 2004 before the Hon'ble Supreme Court of India and the said SLP was dismissed. S.V.Natesan also tried to use the trademark 'SVS' in respect of the company name SVS Agro Refineries Private Limited'. The Regional Director of Company Affairs by order dated 10.08.2001 struck off the name 'SVS' from the company name, holding it to be undesirable under the provisions of the Companies Act, 1958. The said S.V.Natesan challenged the said order by way of writ petition in W.P.No.18332 of 2001 before this Court and the said writ petition was also dismissed by this Court on 06.11.2001, clearly holding that under Clauses 12, 14, 26 & 27 of the Award of the Arbitrators, the respondents 2 - 4 alone have the right to the Trademark 'SVS'. The learned senior counsel for the contesting respondents has also invited the attention of this Court to the relevant portions in the said order of this Court, which was reported in 2003 (27) PTC 399 (MAD) [S.V.S. Agro Refineries Pvt. Ltd. Vs. Union of India (UOI) and ors], which reads as follows:-

"The contention of the petitioner is

that he is entitled to use the name since he is also the owner/proprietor of the trademark. However, this argument did not take into account the fact that if the trademark is jointly owned by others, consent of the other owners of the trademark also has to be produced by the promoters. Therefore, the objection of the counsel for the 3rd respondent that even assuming, without conceding the claim of the petitioner that S.V.Natesan is a Joint Proprietor of SVS Trademark, his consent alone does not constitute the consent of the owner. The three partners of SVS Oil Mills, who are all registered proprietors of SVS Trademark, have neither consented to the use of the SVS trademark by the petitioner company nor have they given any no objection certificate and hence, Guideline No.17 has been clearly violated. This aspect was considered by the 2nd respondent in the following words:-

"Therefore, the name SVS Oil Mills cannot be given to the other party without their no objection certificate, which was not produced to the Registrar of Companies."

The argument of the learned counsel that Guideline No.17 was not in the minds of the 2nd respondent, therefore, cannot be accepted. Assuming it is so, there is no dispute on this question that the 3rd respondent has not given consent or no objection certificate and the claim of the petitioner is that it is only a joint ownership and therefore, there is no escape from Clause 17."

Similarly, when one of the sons of S.V.Sivalinga Nadar viz., S.V.S.Raj Kumar claimed to have a right to use the trademark SVS, this Court by its order dated 20.07.2001 rejected the claim of the said S.V.S.Raj Kumar, for use of the trademark 'SVS' and the said decision has been reported in 2002 (24) PTC 330 [S.V.S. Oils Mills rep by its Partners S.V.Chandrapandian Vs. S.V.S.Rajkumar, trading as Agro Foods and S.V.S. Oil Mills), wherein it has been observed as follows:-

"6.The disputes between the parties are resolved by the Award passed by the Arbitrator, which was ultimately confirmed by the Apex Court. In Clauses 26 & 27 of the Award it has been held as follows:-

"26.The name of 'S.V.Sivalinga Nadar' shall not be used by any of the parties except

Sivalinga Nadar himsel as business name. Similar restriction shall also apply to the various firewood depots, Ambica Oil Mills, Maligai Stores, Shakti Oil Mills, hitherto run by the firm of Sivalinga Nadar & Bros.

27. Disputants 3, 4, 5 and 6 shall be entitled to use the name of S.V.S.Oil Mills as it is represented to us that SVS represents S.Velayudha Perumal Sons. The S.Velayudhaperumal representing the name of the father of the disputants."

7.The learned Senior Counsel for the appellant argued that the said two clauses 26 & 27 made it clear that the respondents herein have no right whatsoever to use the trade name of S.V.S.

14.Already I have pointed out that in the Award it was held that the respondent is not entitled to use the name 'S.V.S'. "

Thus, the learned senior counsel for the contesting respondents submitted that in the above said decision, this Court has held that the respondents 2 - 4 are entitled to use the trade mark 'SVS'. In support of his contention, relying upon Clause 12 of the Award, the learned Senior counsel for the contesting respondents submitted that plant & machinery of erstwhile 'S.V.S.Oil Mills' were allotted to the respondents 2 - 4 in equal shares. The plant and machinery includes trademark and copyright know-how acquired by it. In support of his contention, he relied upon the decision reported in MANU/SC/1172/2015 (Mangalore Ganesh Beedi Works Vs. Commissioner of Income Tax, Mysore and ors., dated 15.10.20015) and submitted that the trademarks both registered and unregistered along with the goodwill have been allotted to respondents 2 - 4 and S.V.Natesan and presently stand in the name of the respondents 2 - 4.

21.The learned senior counsel for the contesting respondents would further submit that under Section 17 of the Trade and Merchandise Marks Act 1958, the existence of disclaimer does not give an entitlement to a third party to use the same. Proviso to Section 17 of the Trade and Merchandise Marks Act, 1958 clearly states that the Proprietor of a Registered Trademark with a disclaimer is entitled to take action on the disclaimed portion of the mark under a passing off action. In other words, the disclaimed portion of a Registered Trademark is an Unregistered Trademark. The learned senior counsel for the contesting respondents drew the attention of this Court to

Section 17 of the Trade and Merchandise Marks Act 1958, which reads as follows:-

"17.Registration of trademarks subject to disclaimer - if a trademark_

Provided that no disclaimer shall affect any rights of the proprietor of a trademark except such as arise out of the registration of the trademark in respect of which the disclaimer is made."

It was submitted that the 'SVS' device with the inverted triangle was registered with a disclaimer on the letters 'SVS' under application No.258801. Therefore, the letters 'SVS' were an Unregistered Trademark as on the date of the Arbitration Award. In these circumstances, when the plant was allotted to Respondents 2 - 4, the Trademark was also transmitted to them. Moreover, the disclaimer, even if available to third parties, will not be available to S.V.Sivalinga Nadar and his family members because while deciding the rights of parties inter-se in the Arbitration Award, there is a specific allotment of the name 'SVS' to Respondents 2 - 4 and S.V.Natesan, but no allotment of the name was made in favour of the S.V.Sivalinga Nadar and S.V.Harikrishna Nadar or Kanthimathi. In fact, S.V.Sivalinga Nadar has been permitted to use the name 'S.V.Sivalinga Nadar' alone in Clauses 26 & 27.

22.Further, the learned senior counsel for the contesting respondents submitted that under Section 38 of the Trade and Merchandise Marks Act 1958, the goodwill of a business cannot be separated from the unregistered Trademark. Section 38 reads as follows:-

"38. Assignability and transmissibility of unregistered trademarks:- (1) An unregistered trademark shall not be assignable or transmissible except along with the goodwill of the business concerned."

Thus, the learned senior counsel for the contesting respondents submitted that the goodwill of the business is the property of the firm 'S.V.S. Oil Mills'. In support of his contention, the learned senior counsel for the contesting respondents drew attention to Section 14 of the Partnership Act, 1932, which reads as follows:-

"14.The property of the firm - subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the

business."

The learned senior counsel submitted that the goodwill has been transmitted along with the Trademark to respondents 2 - 4 and S.V.Natesan, when the plant was allotted to them and that the petitioner no longer has a right to the goodwill.

23.It is further contended by the learned senior counsel for the contesting respondents that the allotment given to the respondents 2 - 4 and S.V.Natesan under the Award dated 09.07.1984 was brought into the Partnership firm 'S.V.S.Oil Mills' on 15.07.1984, which was done in accordance with Clause 14.b of the Award.

24.Further, the learned senior counsel for the contesting respondents submitted that the 1st respondent has passed an order on 27.04.2000 on a request dated 15.11.1991 to recognize respondents 2 - 4 and S.V.Natesan as the subsequent proprietors of the Registered Trademark No.285501B in Class 29. The said order has not been challenged for a period of 18 years. Rectification petitions have been instituted at a belated stage and after a lapse of 18 years and are therefore not maintainable. The 1st respondent has recognized the respondents 2 - 4 as the subsequent Proprietors of the Registered Trademark No.258801 along with S.V.Natesan, on the basis of the orders passed by the various courts in the Arbitration proceedings. The petitioner S.V.Sivalinga Nadar has no right to use his own name, since it is not bona fide. S.V.Sivalinga Nadar was a party to the Arbitration Award. Under Clause 26 of the Award, he was only allotted the name S.V.Sivalinga Nadar and he was not allotted the initials 'SVS'.

25.The learned senior counsel for the contesting respondents has finally submitted that in exercise of the powers of the High Court under Article 227 of the Constitution of India, the scope of interference with the orders of the Intellectual Property Appellate Board is very limited. In this regard, he has also placed reliance on the decision reported in MANU/TN/1351/2008 (World Wide Brands Inc. Vs. Dayavanti Jhamnadas Hinduja and Ors), wherein it has been held as follows:-

"21.The Superintendence power of the High Court under Article 227 of the Constitution of India, over all Courts and Tribunals is basically to keep the subordinate Courts/tribunals/appellate authorities constituted under statutes within their bounds and not for correcting mere errors. The exercise of power is limited to want of jurisdiction, errors of law, perverse findings, gross violation of principles of natural justice and like the one. It may be exercised, if it is shown

that grave injustice has been done to the person, who has invoked the jurisdiction with such grievance, the Court does not act as an appellate authority to reappraise the evidence and come to a different conclusion. Even if two views are possible, in exercise of power, the Court would not be justified in substituting its own reason for the reasons of the subordinate courts/tribunals or appellate tribunals/boards. Of course, the power of this court is not taken away, where the statutory appellate tribunal/board brushes aside the evidence on conjunctures and without giving cogent reasons, which would result in error apparent on the face of the records. Unless the errors questioned are apparently error, perverse and the findings are not supported by any materials, the exercise of power under article 227 of the Constitution to interfere with in such orders may not be available."

Thus, the learned senior counsel for the contesting respondents submitted that absolutely there is no infirmity in the order passed by the IPAB and the writ petition is liable to be dismissed.

26. Heard the submissions made on either side and perused the materials available on record. As we have dealt with the factual matrix of the case in detail, We refrain from dealing with the same any further. However, certain facts which are absolutely germane and necessary are dealt with by us for disposal of this writ petition.

27. Since the entire issue revolves on the Arbitration Award, the core question that has to be decided in this case is whether the goodwill and trade mark of the erstwhile firm 'SVS Oil Mills' registered under application No.285501B was allotted to the respondent 2 - 4 by the Arbitrators by award dated 09.07.1984? If this question is decided, that would suffice to dispose of this writ petition.

28. According to the respondents 2 - 4, they have become owners of the erstwhile 'SVS Oil Mills' and its goodwill and registered mark 'SVS', by virtue of Clauses of the Arbitration Award. In view of this submission, the relevant clauses in Arbitration Award viz., Clauses 12, 13, 14, 14(b), 26 and 27 are extracted hereunder:-

"12. S.V.S. Oil Mills: We direct that the books of account of the Mills be closed at the close of business on 14th July 1984 and the firm dissolved. The Mills owns by way of Fixed assets,

Plant and Machinery besides go-downs and Drying yards in the free hold land belonging to S.V.Sivalinga Nagar & Bros., and Drying Yard and Godowns in the leasehold lands. All the Fixed Assets and the leasehold rights shall be written off to the accounts of the partners at book values. These have been allotted by us to S.V.Chandrapandian, S.V.Kasilingam, S.V.Ramachandran and S.V.Natesan in equal shares. The business and current assets and liabilities of S.V.S. Oil Mills shall also be taken over by S.V.Chandrapandian, S.V.Kasilinga, S.V.Ramachandran and S.V.Natesan in equal moieties subject to monetary adjustments to square up accounts among the disputants.

13.Should thereby any fixed assets pertaining to the firms of S.V.Sivalinga Nadar & Bros., and S.V.S. Oil Mills, not allocated by us in the various schedules they shall stands allocated at book values at the disputant or disputants to whom the business unit or units have been allocated by us either singly or jointly and their respective accounts shall be debited at book values of such assets.

14.a) If it be found on the dissolution of Firms of S.V.Sivalinga Nadar & Bros., S.V.Oil Mills and Sivalinga Nadar & Bros., Rent account that one or more of the parties are due and one or more of the parties are to receive certain sums, these shall be settled between the parties by actual payment by those who are due, to those who are to receive within a period of three months from these presents, failing which interest at 18% p.a. shall also be paid till the date of actual of payment.

14.b) Pending final settlements between the disputants, soon after obtaining inventory of stock in to trade, consumable stores, spare parts, tools etc. The Fixed Assets if any not allocated by us in the various schedules, the various business units may start functioning under new ownerships to whom they have respectively been allotted either singly or jointly.

....
26.The name of "S.V.Sivalinga Nadar" shall not be used by any of the parties except Sivalinga Nadar himself as business name. Similar restriction shall also apply to the various firewood depots, Ambika Oil Mills, Maligai Stores, Shakti Oil Mills hitherto run by the firm of S.V.Sivalinga Nadar & Bros.

27.Disputants 3, 4, 5 and 6 shall be entitled to use the name of "S.V.S. Oil Mills" as it is represented to us that "S.V.S." represents "S.Velayudha Perumal Sons", S.Velayudha Perumal representing the name of the father of the disputants.

28. In the firm of S.V.S. Oil Mills, the amount due to the erstwhile partner Smt.C.Kanthimathi has been paid to her through her lawyer during the hearing of a suit by her, for settlement of her account. Should however it be found that in the distant chance of any further sum awarded to her by the Court, such liability shall be borne by all the disputants in equal moiety."

A reading of the above clauses in the Award of the Arbitrators, it could be seen that it was not specifically stated by the Arbitrators that the Goodwill was allotted to the respondents 2 - 4 and absolutely there is no mentioning with regard to the Goodwill. Therefore, it is only the question of interpreting the clauses in the Award at this length of time.

29. According to the learned senior counsel for the contesting respondents that under Clause 12 of the Award, the plant & machinery of 'S.V.S. Oil Mills' were allotted to the respondents 2 - 4. The respondents 2 - 4 are entitled to use the name 'S.V.S. Oil Mills'. According to the learned senior counsel for the contesting respondents, the plant includes the trademark and brand name. In support of this contention, he has also placed reliance on the decision reported in MANU/SC/1172/2015 (Mangalore Ganesh Beedi Works Vs. Commissioner of Income Tax, Mysore and ors).

30. But, as contended by the learned counsel for the petitioner, the Award of the Arbitrators does not deal with intangible property namely Goodwill of the firms "S.V.Sivalinga Nadar & Bros.," and "S.V.S.Oil Mills" and trade mark. Even absolutely there is no reference to trademark No.285501B in the Award. It is also not in dispute that the trademark registered on 22.01.1973 under trademark application No.285501B was jointly owned by S.V.Sivalinga Nadar, respondents 2 - 4, S.V.Natesan and Smt.Kanthimathi Ammal. Therefore, under the registration of the trademark under application No.285501B, no exclusive right to use the letters 'SVS' was given to anyone and the letters 'SVS' can be used only jointly by the above said persons. In this regard, it would appropriate to look into Section 24 of the Act 43 of 1958, which deals with the jointly owned trademarks. Section 24 reads as follows:-

"24. Jointly owned trade Marks. (1) Save as provided in sub-section (2), nothing in this Act shall authorise the registration of two or more persons who use a trade mark independently, or propose so to use it, as joint proprietors thereof.

(2) Where the relations between two or more persons interested in a trade mark are such that no one of them is entitled as between himself and the other or others of them to use it except_

(a) on behalf of both or all of them; or

(b) in relation to an article with which both or all of them are connected in the course of trade; those persons may be registered as joint proprietors of the trade mark, and this Act shall have effect in relation to any rights to the use of the trade mark vested in those persons as if those rights had been vested in a single person."

A reading of the provisions under Sections 24 of the Act would show that the joint owners of the trade mark have to use the trade mark jointly as if the rights were vested in a single person. In view of Section 24, in the event of any dispute among the joint proprietors, none of them can claim ownership of the trade mark to the exclusion of others. If there is no assignment or transmission, the trade mark remains the joint property of the disputants and none of them can use it excluding others. According to the learned counsel for the petitioner, there is no assignment or transmission of goodwill of the business in favour of the respondents 2 - 4.

31. It is contended by the learned senior counsel for the contesting respondents that an unregistered trademark could be transferred under Section 38 of the Act 43 of 1958 along with the goodwill only and therefore, under the Award of the Arbitrators, the goodwill and the unregistered trademark stand allotted to respondents 2 to 4.

32. Per contra, it is the submission of the learned counsel for the petitioner that there is no provision for registration of assignment or transmission of an unregistered trademark. Under Section 44 of the Act 43 of 1958, application can be filed for registration of assignment or transmission only in respect of registered trademarks.

Section 2(1)(a) of the Act defines 'assignment' as follows:- "assignment" means an assignment in writing by act of the parties concerned.

Section 2(w) defines 'transmission' as follows:- 'Transmission' means transmission by operation of law, devolution on the personal representative of a deceased person and any other mode of transfer, not being assignment.

33. In the instant case, absolutely there is no assignment or transmission of the trademark in favour of respondent No. 2 to 4 or to Natesan to the exclusion of Sivalinga Nadar. In this regard, a reference could be placed in the decision reported in AIR 1991 Bombay 407 (Ratansi Mulji Vs. Vinod Ratilal Gandhi and another), wherein it has been held as follows:-

"20. It is necessary to refer to the

definition of the term 'transmission' as appears in Mack's Law Dictionary, Fifth Edition, Page 1344, which reads as follows:-

"Transmission". In the civil law, the right which heirs or legatees may have of passing to their successors the inheritance or legacy to which they were entitled, if they happen to die without having exercised their rights."

It is very clear from this definition that the term "transmission" by operation of law presupposes the class of cases as are set out in the definition, namely, that as a result of orders passed in judicial proceedings, or as a result of survivorship, or any other such case, a trade mark can be said to devolve on another person by operation of law. In the present case, in the absence of any specific provision in the Take-over Act, it will not be possible to uphold the contention that the trademarks in question have devolved on the National Textile Corporation by operation of law. A further reference to Section 44 of the Trade and Merchandise Marks Act, 1958 will indicate that even as far as the assignments and transmissions are concerned, for such assignments or transmissions to be legally enforceable, the Trade and Merchandise Marks Act 1958 specifies a certain procedure....."

From a reading of the above decision, it is clear that the transmission should be a result of the order passed in judicial proceedings. In the instant case, there is no order with regard to transmission of the trademark. On the other hand, it is the only interpretation of the clauses in the Award of the Arbitrators, by the respondents stating that the plant & machinery includes the trade mark and since the Award has become decree, there is transmission of goodwill and the trade mark in favour of the defendants 2 - 4. But, such contention cannot be accepted. The transmission of the goodwill should be specifically a result of the orders passed in judicial proceedings. Further more, the dissolution of the firms puts an end to the firms. In this regard, useful reference could be placed in some of the decisions. In 1974(2) SCC 642 (Saligram Ruplal Khanna Vs. Kanwar Rajnath), wherein the Hon'ble Supreme Court has observed as follows:

"31.The proposition, in our opinion, cannot

be disputed that after dissolution, the partnership subsists merely for the purpose of completing pending transactions, winding up the business, and adjusting the rights of the partners; and for these purposes, and these only, the authority, rights, and obligations of the partners continue (see page 573 of Halsbury's Laws of England, 3rd Ed., Vol. 28). We would, therefore, hold that the consent given by the respondent on November 13, 1957 to the award of Mr. Desai would not detract from the conclusion that the firm of the parties stood dissolved on the expiry of the fixed period of partnership, viz., August 30, 1971."

In the decision reported in AIR 1972 ALLAHABAD 1 (Narendra Bahadur Singh Vs. Chief Inspector of Stamp, UP), it has been held by a Full Bench of the Allahabad High Court as follows:-

"11. The first question was framed on the basis that the document was an instrument of release, in addition to being a deed of dissolution. It is true that one partner can release or relinquish his share in the firm. A partner can, however, release or relinquish his share in a firm, only so long as the firm is alive. On dissolution, the partnership becomes a deadened entity. Whatever a partner obtains in liquidation proceedings, is paid to him in satisfaction of the firm's liability to repay the advances made by him, the capital advanced by him and his share in the residue of the firm's assets. A partner does not give up any right for these repayments. His pre-existing rights are satisfied. On liquidation being completed, the firm is extinguished. The shares of the partners vanish. There are no co-owners. Nothing can be released or relinquished by one in favour of other co-owners."

From a reading of the above said decisions, it could be seen that by dissolution of the firm, nothing can be released or relinquished by one in favour of other co-owners. Therefore, in the instant case, a reading of the arbitration award would show that it absolutely does not reveal that there is an intention on the part of the Arbitrators to allot the goodwill of the erstwhile firm 'S.V.S. Oil Mills' to the respondents 2 - 4.

34. It is yet another submission of the learned senior counsel for the respondents 2 - 4 that under para 27 of the Award, the Arbitrators held that the respondents 2 - 4 shall be entitled to use the name "S.V.S. Oil Mills" as it is represented that 'S.V.S' represents "S. Velayudha Perumal Sons". According to the learned senior counsel for the respondents 2 - 4, since the respondents 2 - 4 were permitted to use the name 'S.V.S. Oil Mills', they only are

entitled to use the trademark 'SVS' and not the petitioner.

35. But, a careful reading of the Award of the Arbitrators would show that only business name alone was permitted to be used and not the trade mark. Paragraphs 26 & 27 of the award have to be understood in the context of Sections 2(f), 2(k) and Section 14 of the Trade and Merchandise Marks Act 1958, which read as follows:-

Section 2 (1)(f):- "false trade description" means

(i) to (iv)

(v) Any false name or initials of a person applied to goods in such manner as if such name or initials were a trade description in any case where the name or initials

(a) & (b)

(c) is or are either the name or initials of a fictitious person or of some person not bona fide carrying on business in connection with such good;

and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act;

Section 2(k):- "name" includes any abbreviation of a name;

Section 14:- Use of names and representations of living persons or persons recently dead. "Where an application is made for the registration of a trade mark which falsely suggests a connection with any living person, or a person whose death took place within twenty years prior to the date of application for registration of the trade mark, the Registrar may, before he proceeds with the application, require the applicant to furnish him with the consent in writing of such living person or, as the case may be, of the legal representative of the deceased person to the connection appearing on the trade mark, and may refuse to proceed with the application unless the applicant furnishes the Registrar with such consent."

As contended by the learned counsel for the petitioner, clause 27 of the Award has been wrongly interpreted by the contesting respondents. It merely enables the respondents 2 - 4 to use the name of "S.V.S. Oil Mills", on the basis that 'SVS' represents "S.Velayuthaperumal Sons" and any other interpretation will be contrary to the intention and object of the Award.

36. It is yet another submission of the learned senior counsel for the contesting respondents that when Trade Mark

No.285501B was advertised, there was a disclaimer of the mark "SVS" and therefore, it should be treated as an unregistered trade mark. It was further contention of the learned senior counsel that an unregistered trade mark could be transferred under Section 38 of the Act 43 of 1958, along with the goodwill only and therefore, under the Award the goodwill and the unregistered trademark stand allotted to respondents 2 - 4.

37. But, as observed earlier, the assignment should be only by way of document and transmission should be by way of judicial proceedings. Further more, under Section 44 of the Act 43 of 1958, application can be filed for registration of assignment or transmission only in respect of registered trade marks. In this regard, it would be appropriate to place reference in the decision rendered by the Hon'ble Supreme Court in the case of Amritdhara Pharmacy Vs. Satya Deo Gupta (AIR 1963 SC 449), wherein it has been held as follows:-

"8. We agree that the use of the word "dhara" which literally means "current or stream" is not by itself decisive of the matter. What we have to consider here is the overall similarity of the composite words, having regard to the circumstance that the goods bearing the two names are medicinal preparations of the same description. We are aware that the admission of a mark is not to be refused, because unusually stupid people, "fools or idiots", may be deceived. A critical comparison of the two names may disclose some points of difference, but an unwary purchaser of average intelligence and imperfect recollection would be deceived by the overall similarity of the two names having regard to the nature of the medicine he is looking for with a somewhat vague recollection that he had purchased a similar medicine on a previous occasion with a similar name. The trade mark is the whole thing-the whole word has to be considered. In the case of application to register "Erectiks" (opposed by the proprietors of the trade mark "Erector") Farwell, J., said in William Bailey (Birmingham) Ltd. Application (1935) 52 RPC 137:

"I do not think it is right to take a part of the word and compare it with a part of the other word; one word must be considered as a whole and compared with the other word as a whole.... I think it is a dangerous method to adopt to divide the word up and seek to distinguish a portion of it from a portion of the other word."

In the light of the decision referred to supra, We are of the opinion that in the instant case, no one can claim exclusive right over the mark 'SVS' stating that it was assigned to them. Absolutely the Award of the Arbitrators does not give any meaning and interpretation as made by the learned senior counsel for the contesting respondents. Hence, the submissions made by the learned senior counsel for the contesting respondents in this regard, cannot be accepted.

38. Further more, when the Arbitrators have not specifically chosen to allot the mark 'SVS', it cannot be claimed by the contesting respondents that they only are entitled to use the mark 'SVS' and the petitioner is not entitled to use the mark 'SVS'. If really there is an intention in the minds of the Arbitrators to allot the trade mark 'SVS' in favour of the contesting respondents, they would have specifically stated the same in the Award. But, no such statement was available in the Award of the Arbitrators. Therefore, the interpretation made by the learned senior counsel for the contesting respondents based on the Clauses 27 & 28 in the Award, cannot be accepted by this Court.

39. It is further contended by the learned senior counsel for the contesting respondents that subsequent to the Award, the mark 'SVS' was registered by them in respect of several other products. But, the said contention cannot be countenanced as it is represented by the learned counsel for the petitioner that the applications have been filed before the Registrar of Trade Marks for rectification under Section 57 of the Trade Marks Act, 1999 for the removal of the said registration.

40. For the foregoing reasons, the writ petitioner is allowed as prayed for and the impugned order passed by the IPAB is set aside. Consequently, connected Miscellaneous Petitions are closed. No costs.

Sd/-
Assistant Registrar (CS iii)

//True Copy//

Sub Assistant Registrar

ssv

To,

1. The Joint Registrar of Trade Marks,
Trade Mark Registry, Rajaji Bhavan,
'D' Wing, II Floor, Besant Nagar,
Chennai-600 090.

2.The Registrar,
Intellectual Property Appellate Board,
Annexure-1, 2nd Floor, Guna Complex,
443, Anna Salai, Teynampet,
Chennai-600 018.

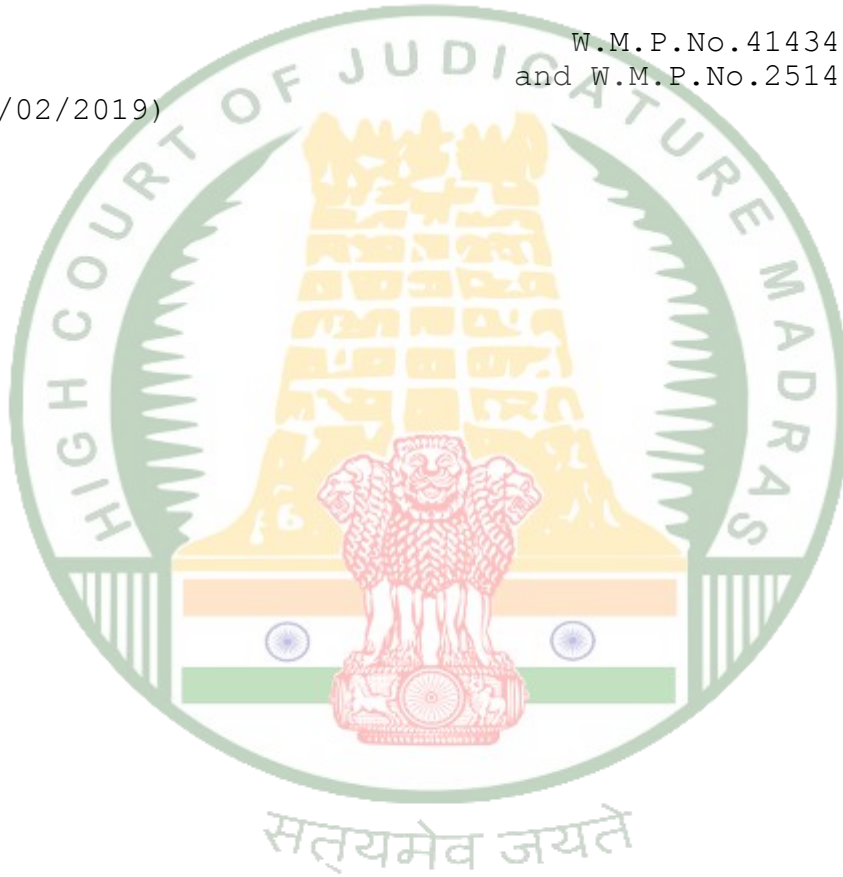
+1cc to Mr.K.Srinivasa Moorthy , Advocate SR.No. 2078

+1cc to Mr.DANIEL AND GLADYS, Advocate SR.No. 3008
(07/02/2019)

W.P.No.34305 of 2004
and

W.M.P.No.41434 of 2004
and W.M.P.No.25148 of 2017

A.SK (06/02/2019)



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