

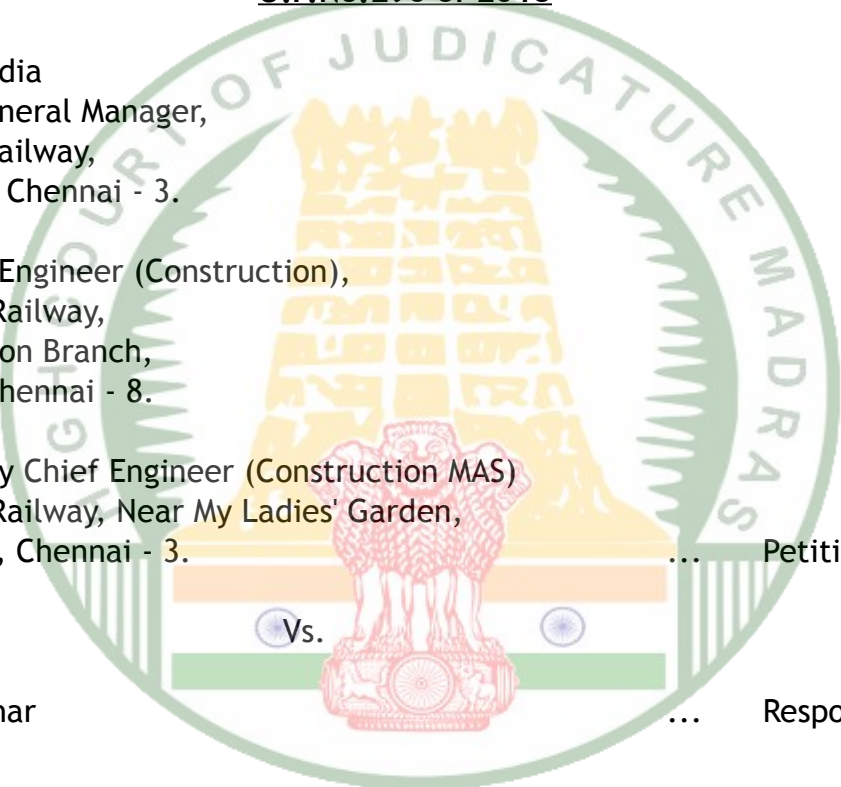
IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.08.2019

CORAM

THE HONOURABLE Mr.JUSTICE N.SATHISH KUMAR

O.P.No.290 of 2018

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1. Union of India
Rep. by General Manager,
Southern Railway,
Park Town, Chennai - 3.
2. The Chief Engineer (Construction),
Southern Railway,
Construction Branch,
Egmore, Chennai - 8.
3. The Deputy Chief Engineer (Construction MAS)
Southern Railway, Near My Ladies' Garden,
Park Town, Chennai - 3. Petitioners
- Vs.
- G.A. Sridhar ... Respondent

Prayer:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Arbitral award, passed by the Arbitrator in the matter of Agreement No.17/DyCE/CN/MAS/06 dated 18.5.2006.

For Petitioner : Mr.V.Radhakrishnan, Sr. Counsel
for M/s.P.T.Ramkumar
For Respondent : Mr.Amalraj S.Penkilpatti

ORDER

Challenging the award passed by the Arbitrator, dated 18.5.2006, the

2. Brief facts leading to filing of this petition are as follows:

(i) Claimant's Case:

The respondent/Southern Railway called for tenders by notification, dated 15.7.2005 for "Earth Work in forming bank/cuttings, filling sand, extension of minor Bridge No.45 as 2 x 6 10M RCC BOX etc. from KM 15/950 to 18/800 in Chennai - Gudur Section - as part of the Third line between Korukkupet and Attipattu stations" and letter of acceptance was issued vide letter No.W 496/KOK-AIP/14/CN/Vol No.II (6539) dated 15.12.2005. The total value of the contract is Rs.4,11,70,610/-. Subsequently, agreement No.17/Dy Chief Engineer/CN/MAS/06, dated 18.05.2006 was entered into between the parties. Inspite of careful execution of the works, an accident occurred on 27.4.2007 at the worksite causing death of two passengers, hence, the work was stopped by the proceedings of the Railway Safety officer, for a considerable time. There was severe tidal action in creek area and this retarded and even prevented the execution of work. There were heavy rain that lasted the area which rendered the worksite utterly unworkable since the soil condition was clayey and almost like a big quagmire. Hence, the claimant could not ply his earth laden heavy vehicles to the worksite. When the arrangement was made for progressing the work, suddenly, Salt department stopped all vehicles of the claimant in the area inspite of Railway department issuing necessary requisition letters dated 5.2.2007, 10.3.2007, 14.3.2007, etc. The claimant was informed that the Salt Commissioner at Jodhpur is the authority to grant permission to the Railway Contractor. The claimant was

even prevented from harnessing his own temporary sheds erected by him in the Salt department lands. All of a sudden, the respondents issued 7 days' notice on 23.1.2008, then 48 hours' notice on 8.2.2008 and finally termination notice on 12.2.2008. Claimant filed Appeal before the High Court in Appeal No.3222 of 2008 and obtained an order of stay of the Railway's intended recovery proceedings. The claimant was arrested along with subsequent contractor by the C.B.I. under the provisions of the Prevention of Corruption Act for their criminal conduct of corrupt practices. The claimant issued notice on 9.2.2009 to the respondents to finalise the contract without any liability on his side, to pay adequate compensation, to appoint arbitrators and refer the dispute for adjudication. Whereas Railway claimed more than Rs.5,40,27,301/- towards 'risk and cost' counter claim threatening to recover the same by withholding the final bill of Rs.19,20,388/- This Court by its order, dated 15.2.2009 directed the respondent to constitute Arbitral Tribunal comprising three Railway officials with a direction to adjudicate the disputes within six months. In the meantime, the C.B.I. Court, Chennai by judgment, dated 23.12.2014 in C.C.No.31 of 2009 convicted the Deputy Chief Engineer (A1) and the new contractor to rigorous imprisonment for 2 years after finding them guilty of offences punishable under various provisions of The Prevention of Corruption Act. The Arbitral Tribunal constituted by the General Manager, Southern Railway deliberately protracted the arbitration proceedings in view of the conviction of the Railway official and this led to the claimant to file another O.P.No.418 of 2016 before this Court for abrogation of the former tribunal

and to appoint an independent Arbitrator in its place. This Court vide order, dated 9.9.2016 was pleased to terminate the former Tribunal and Justice David Christian was appointed as Arbitrator to adjudicate the dispute. The total value of the claimant's contract is Rs.4.11 Crores whereas the value of the 'New Contract' for the balance work is more than Rs.21 Crores. The only new item of work in the RISK & COST contract is "Piling for stability of Embankment". The counterclaims made by the Railway are exorbitant and illegal. The claimant filed claim seeking declaration that the contract is frustrated due to mismanagement by the Railway and that the Railway cannot initiate any penal proceedings whatsoever including under clause 62 of General Conditions of contract along with the following reliefs:

1. A direction to the respondent to return the original BG Bonds and the FDR furnished by the claimant towards Security Deposit and EMD totalling Rs.10,00,000/-
2. To direct the respondents to pay Rs.15,00,000/- towards cash deposits in the form of security deposit and E.M.D.
3. To direct the respondents to pay Rs.10,00,000/- by way of extra rates for the works executed in the extended period.
4. To direct payment of Rs.10,00,000/- towards escalation of costs for the works executed in the extended period
5. To direct the respondents to pay Rs.5,00,000/- to the claimant towards damages for idling and underutilization of labour
6. To direct the respondents to pay Rs.15,00,000/- to the claimant towards damages for idling and underutilization of the machinery, lorry etc.
7. To direct the respondents to pay Rs.20,00,000/- to the claimant as damages for loss of anticipated profits due to unlawful termination of the contract by the respondent

8. To direct the respondent to pay a sum of Rs.20,00,000/- towards payment of final bill and cost of unbilled and unmeasured work done by the claimant.
9. The claimant has also prayed for interest and costs. The total claim made by the contract is Rs.1,10,00,000/-.

Finally, the claimant prayed for a declaration that the termination order is illegal and unjustified and prayed for an award of a total sum of Rs.1,10,00,000/- with interest and cost.

(ii) Respondent Case:

The letter of acceptance was issued to the claimant on 15.12.2005 for a value of Rs.4,11,70,610/-. The claimant has to complete the contract work within a period of 12 months, i.e. on or before 14.12.2006. The work was not progressing as per programme and the contractor has failed to cope up with progress of work. The currency was first extended by 10 months and secondly, for 5 months, as such, totally, 15 more months time extended to complete the works i.e. the claimant ought to have completed the work on or before 31.3.2008. Despite the contractor was given enough opportunities to complete the works, he could show progress of work only 40% of total value, within a period of 27 months. Therefore, the contractor was given 7 days notice on more than one occasion inspite of which the contractor has not come forward to complete the works or to carry out the instructions regarding safety aspects which finally resulted in the termination order passed on 12.2.2008. The claimant has not taken due precautionary safety measures during the execution of works which resulted in an accident causing death of two passengers. This was due to gross negligence on the

part of the contractor. The claimant was advised to take necessary precautionary measures and one such letter is dated 29.3.2007. This was not followed by the contractor. The claimant was advised to provide barricade near the existing running line and not to ply vehicles near the line during night time. Accident was occurred because of the claimant's failure to take the precautionary measure as advised by the administration. The claimant was instructed to commence works immediately after providing safety measures. Penalty was imposed by the respondent as per the General Conditions of Contract (GCC). Considering the severe tidal action in the creek area, extension of time was granted on two occasions for a total period of 17 months inspite of which the claimant has not completed the works. Railways have taken necessary efforts addressing the Salt Commissioner for facilitating the progress of the works. It is not correct to state that the Railway has made belated payments for the works done by the Contractor. It is also not correct to state that the Contractor was deliberately made to suffer loss by the officials. The payment made by the Railway to the Contractor during the relevant period is as follows:

<i>SL.No</i>	<i>Bill No.</i>	<i>Date</i>	<i>Amount in Rs.</i>
1.	CC 1 + Part	10/06/2006	25,91,687
2.	CC 2 + Part	07/07/2006	26,49,250
3.	CC 3 + Part	12/09/2006	39,98,250
4.	CC 4 + Part	31/01/2007	19,35,250
5.	CC 5 + Part	30/03/2007	18,44,303
6.	CC 6 + Part	30/07/2007	31,85,142
		Total	1,62,03,882

The time granted for completion of work is 12 months as per the contract. It can

be seen from the above that the first payment was made on 10.6.2006 for a sum of Rs.25,91,687/- which indicates that he has carried out work for an extent of 6.3% only during the period of six months when he was supposed to complete the work about 50%. The Bills have been given frequently even for a smaller value of work done. The payments have been duly made depending upon the progress of the work. In spite of issuance of 4 seven days notices served on the claimant, dated 1.4.2006, 18.5.2007, 18.10.2007 and 23.1.2008, claimant has shown only 40% of work. Therefore, the Railway administration has issued 48 hours notice on 8.2.2008 and termination notice was issued on 15.2.2008 i.e. 27 months after the issuance of Letter of Acceptance. The arrest of the then Deputy Chief Engineer is not related to this case. The allegations with regard to Arbitral Tribunal consisting of Railway officials are not true. There are excepted matters mentioned in clauses 8, 18, 22(5), 39, 43(2), 45(a), 55 A5, 57, 57A, 61(1) and 62(1) to XIII(B) of General conditions of Contract and they are deemed to be non arbitrable. Therefore, the matters falling under Clause 62(1) of the General Conditions of Contract are not arbitrable being excepted matters. Therefore, the claims of the claimant shall not be entertained by the Tribunal. During the first week of April 2007, the CE/CN/ East/MS has instructed the claimant on his site inspection to take up the extra work immediately so that the formation work of entire area can be matched with non-creek area. Since the contract has been terminated under clause 62 of General Conditions of Contract, the claimant is not entitled to return of Security Deposit and Earnest Money deposit. The claimant is not entitled to

extra rate for the additional works during the extended period. The claimant has undertaken not to claim any extra rate at the time of asking for extension of currency. The claimant has not mobilised men, materials, etc. in appropriate time and therefore, no compensation is permissible to the contractor. There is no mismanagement of the contract on the part of the Railway. The contract was terminated vide CE/CN/East/MS letter dated 12.02.2008 and the Contractor was advised by the Executive Engineer in his letter reference EN/CN/MAS/No.148, dated 17.3.2008 to be present at the site on 25.3.2008 for recording the final measurements but he did not turn up. The claimant was also informed by letter, dated 26.3.2008 that the final measurements have been recorded as per clause 45 (c) of General Conditions of Contract and it is open for him to see and verify it. No interest amount is payable to the contractor as per clause 16(3) and 64(5) of General conditions of Contract. The Railway has made the following counter claims as given in their counter claim statement:

<i>Sl.No.</i>	<i>Description of claim</i>	<i>Amount in Rs.</i>
a.	Risk and Cost amount for tentative risk and cost of terminated contractor	5,40,27,301/-
b.	Additional expenditure incurred by Railway towards supervision charges of work due to failure of the contractor , 36 months x Rs.50,000/- per month	18,00,000/-
c.	Compensation towards idling of capital investment in the project due to delay in completion of the work by the contractor in time	To be quantified
d.	Interest at the rate of 18% for counter claim No.(a) + (b) above	To be quantified
	Total	5,58,27,301/-

3. The learned arbitrator upon perusal of records, has framed the

following issues:

1. Whether the agreement entered between the parties was frustrated due to the mismanagement on the part of the Railway administration ?
2. Whether the contract has become impossible of performance due to inherent defect in planning the works envisaged by the Railway ?
3. Whether the project was delayed by justifiable reason and cause?
4. Whether the claimant is entitled to foreclosure of the contract without any liability on his part ?
5. Whether the claimant is entitled to Refund of Security Deposit and final bill amount for the work done by him till the termination of the contract ?
6. Whether the claimant is entitled to extra rates or escalation of costs for works done during the extended period ?
7. Whether the claimant is entitled to any amount towards damages for idling and under utilisation of labour, lorries, machineries, etc.
8. Whether the claimant is entitled to damages towards idling and under utilization of establishment and overheads ?
9. Whether the claimant is entitled to damages towards loss of anticipated profits?
10. Whether the respondents/Railway are entitled to Rs.5,40,27,301/- towards the higher amount paid to the new contractor for doing balance work left by the claimant ?
11. Whether the respondents are entitled to additional expenditure incurred by the Railway towards supervisory charges of works due to failure of the contractor to do the works in time ?
12. Whether the respondents are entitled to any compensation towards

idling of investment made in the project due to delay caused by the contractor ?

13. Whether the respondents are entitled to interest of 18% on the claim amount ?
14. What is the order as to reliefs and costs of arbitration ?

4. Out of 9 claims, the learned Arbitrator allowed 4 claims including return of security deposit.

5. Challenge has been made against the award before this Court is only with regard to the amount awarded on the head, loss towards anticipated profit for a sum of Rs.20 lakhs.

6. The learned counsel appearing for the respondents/petitioners herein would submit that the learned Arbitrator has not considered the fact that the subject matter of the contract is 2.850 K.M. In this length, the creek area occupies an extent of 0.85 K.M. This creek area is lying touching the existing embankment of the 2nd line and back waters from the sea. Despite extension of time granted, evacuation work has not been completed. It is the contention of the petitioner that the reason for delay is attributable not to the railways but for the accident caused due to the negligent act of the claimant. Despite extension of time granted on two occasions for a total period of 17 months, the work has not been completed. The first payment was made on 10.6.2006 for a sum of Rs.25,91,687/- which indicates that the Contractor has carried out work only to the extent of 6.3% only during the period of six months when he was supposed to complete the work of about 50%. The payments have been duly made depending

upon the progress of the work. Hence, it is the contention of the respondents/petitioners herein that the learned Arbitrator has not considered the fact properly and allowed compensation towards loss in anticipated profits for a sum of Rs.20,00,000/-. Hence, the award is liable to be set aside. In support of his submission, the learned counsel for the respondents/petitioners herein also relied upon the judgment in **BHARAT COKING COAL LTD. VS. L.K.AHUJA [(2004)5 SCC 109]** and submitted that in the absence of evidence to show damages, the Arbitrator could not award any amount on loss towards anticipated profit. Hence, the arbitrator has not considered the above facts in proper perspective.

7. On the contrary, the learned counsel appearing for the claimant/respondent herein would submit that the learned Arbitrator factually found that the contract was frustrated and terminated deliberately only for the purpose of awarding contract to some other business five times more than that of value of the claimant's contract. It is factually found that in non creek area, more than 90% of evacuation work was already completed and there was no delay. As far as creek area is concerned, there is delay due to various reasons attributable to the Railway, resulting in the contract was frustrated. This aspect was considered elaborately by the learned Arbitrator, on the basis of documents produced by Railway. Hence, it is submitted that the amount awarded by the Arbitrator on loss towards anticipated profits which is less than that of 10% of the value of the remaining work and therefore, the same is reasonable. The learned Arbitrator factually found that the agreement entered into between the parties

was frustrated due to mismanagement on the part of the Railway administration. Therefore, the award cannot be interfered with and the petition is liable to be dismissed.

8. Heard the learned counsel appearing for the respondents/ petitioners herein and the learned counsel appearing for the claimant/respondent herein and perused the materials available on record and the decision cited.

9. On 15.2.2005, petitioner awarded contract to the claimant/ respondent herein for "Earth Work in forming bank/cuttings, filling sand, extension of minor Bridge No.45 as 2 x 6 10M RCC BOX etc. from KM 15/950 to 18/800 in Chennai - Gudur Section - as part of the Third line between Korukkupet and Attipattu stations" The agreement came to be executed on 18.5.2006 for the value of Rs.4,11,70,610/-. Originally, 12 months time from the date of tender acceptance viz., 15.12.2005 was granted to complete the contract work. Thereafter, two extensions were granted, upto 31.3.2008. On a perusal of the award shows that the Contractor has completed 40% of the total contract value of Rs.411.71 lakhs and remaining 60% of the work unexecuted. Further, it is the contention of the claimant that due to various factors and circumstances under which contract had become impossible to perform and finally, the contract was terminated abruptly on 12.2.2008. To complete the balance work, contract was awarded to some other Contractor at the rate of Rs.21 Crores which is more than 5

times of the claimant's contract. It is also recorded by the Arbitrator in the finding that the contract was terminated much prior to the final measurement, dated 26.3.2008. Subsequent to the awarding of the contract to another Contractor to tune of Rs.21 Crores, criminal proceedings have been initiated by C.B.I. and the above contract was also terminated subsequently.

10. The learned Arbitrator in Issue Nos.1 and 2, in paragraph 62, 198, considering various documents produced by railways, factually found that the contract has become impossible to perform due to inherent defect in planning the work envisaged in the contract and that the agreement entered between the parties was frustrated due to mismanagement on the part of the Railway administration. Similarly, in issue No.3, whether the project was delayed by justifiable reason and cause, in paragraphs 199 and 242, the learned Arbitrator factually found that it is apparent that the contract earth work, for digging, excavation, filling with sand and formation of bank in creek area has become impossible of performance due to lack of proper planning and study of soil stability and dismissed the counterclaim and accordingly, the issue was answered against the Railway.

11. Now, the only challenge before this Court is that award of Rs.20,00,000/- on the head of "loss towards anticipated profits" in issue No.9.

Since the termination of the contract is not valid, breach of contract is contrary to

law and the terms of agreement, the Arbitrator found reasonable to award such amount for loss towards anticipated profits. In support of his findings, the learned Arbitrator relied upon the judgment in **M/s.A.T.BRIJ PAUL SINGH AND OTHER VS. STATE OF GUJARAT [1984 SCC 59]**. Considering various other judgments, the Arbitrator found that the erring party is legally bound to compensate the other party to the agreement. In that case, 10% value of the work was awarded as compensation towards loss of anticipated profits. The learned Arbitrator by relevant provisions of contract, factually found that termination is not valid, the contract has become impossible to perform and the contract was frustrated due to mismanagement on the part of the Railway. Therefore, since the Arbitrator based on the factual matrix passed the award, this Court under Section 34 of the Act cannot re-appreciate the entire matter.

12. Judgment relied upon by the petitioners herein do not apply to the present case, wherein it is held that in the absence of any evidence, the Arbitrator could not have awarded the said relief, whereas in the case in hand, Arbitrator analysed the entire facts and law, passed the reasoned award which cannot be interfered with under Section 34 of the Arbitration and Conciliation Act. Therefore, I do not find any merit in the petition.

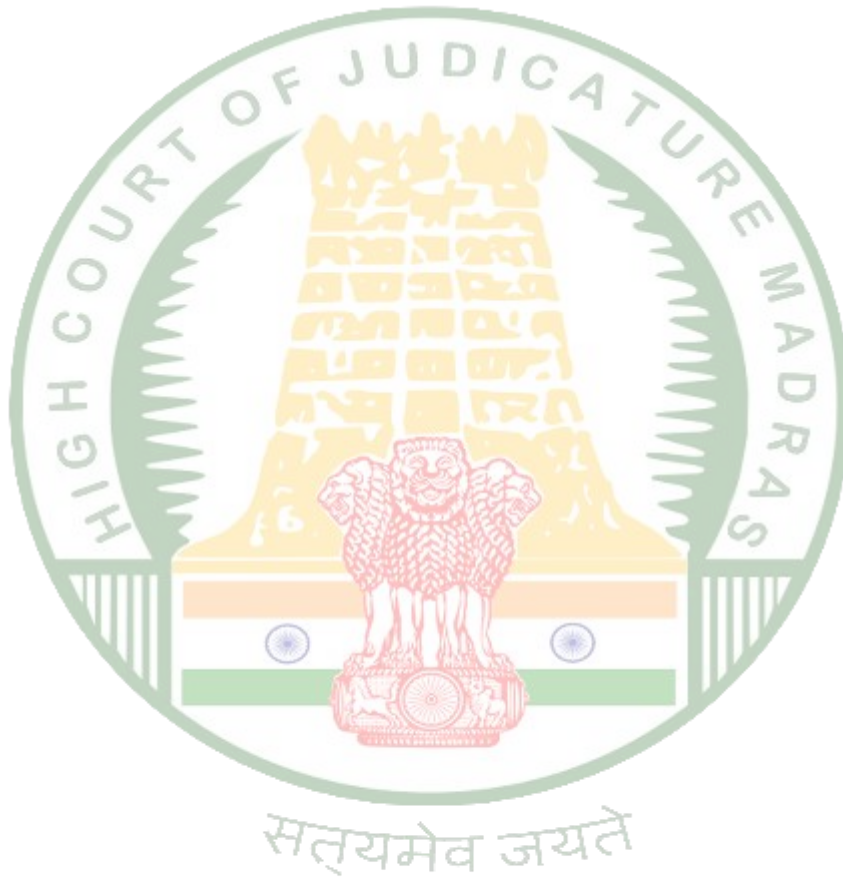
In view of the same, the original petition is dismissed. No costs.

21.08.2019

Speaking/Non Speaking order

Index: Yes/No

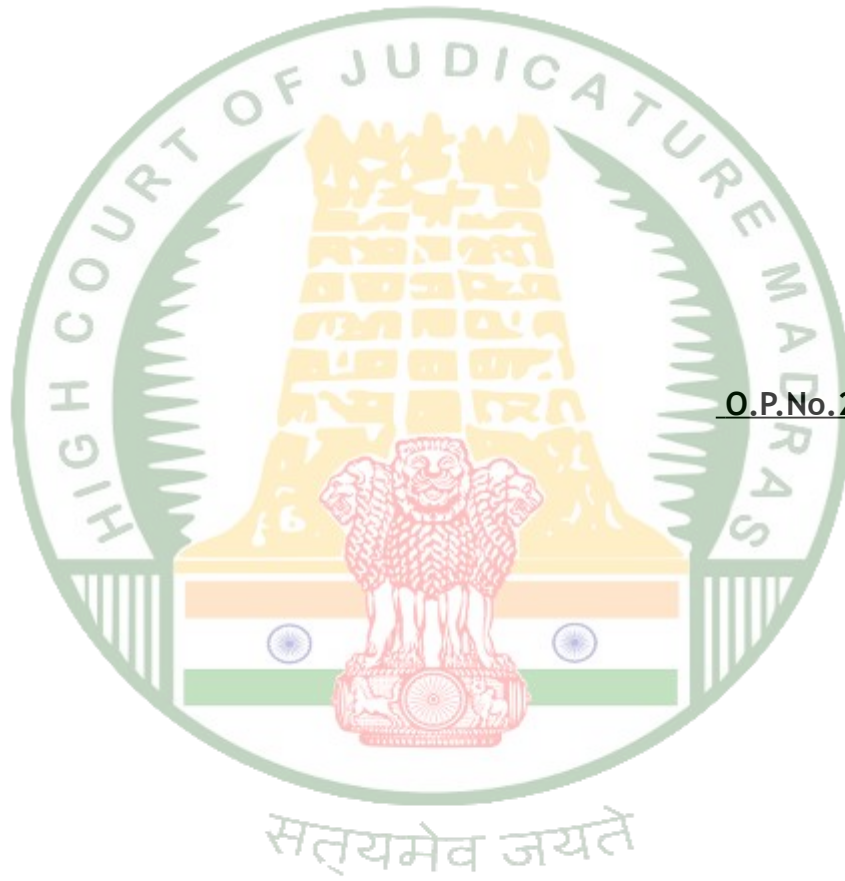
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N.SATHISH KUMAR, J.

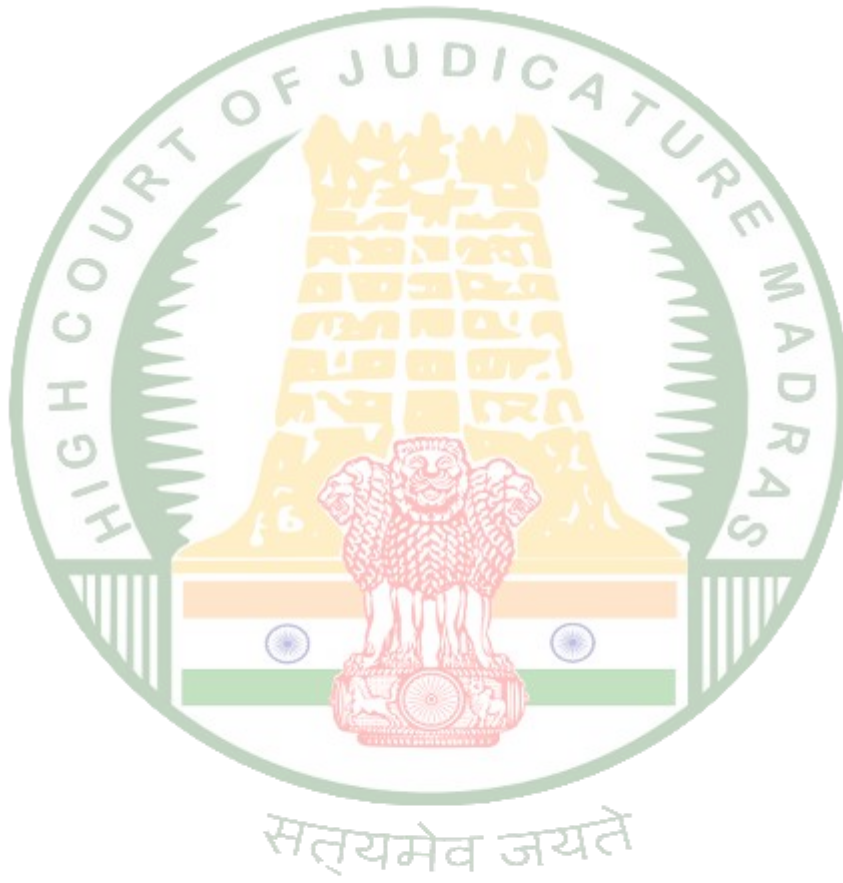
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