

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.04.2019

DATE OF DECISION : 30.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.455 of 2018
and
A.Nos.4273 and 4274 of 2018

Consulting Engineering Services
(India) Pvt. Ltd.,
2nd Floor, Platinum Tower,
Plot No.184, Udyog Vihar,
Phase I, Gurgaon-122 016
Haryana, India.

.. Petitioner

Vs.

The Project Director,
Tamil Nadu Road Sector Project II,
No.171, South Kesava Perumal Puram,
Chennai-600 028,
India.

.. Respondent

This Arbitration original petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 30.01.2018 passed by the Arbitral Tribunal and to pass such other order / orders as this Hon'ble Court may deem fit and expedient in the facts and circumstances of the case.

For Petitioner : Mr.Murari, Senior counsel
for Ms.Preeti Mohan of Phoenix Legal

For Respondent : Mr.Vijay Narayan, Advocate General
assisted by
Mr.M.Sricharan Rangarajan, Spl.G.P.(CS)

ORDER

Instant 'Original Petition' ('O.P' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity), seeking to set aside an 'Arbitral Award dated 30.01.2018' (hereinafter 'impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a Sole Arbitrator.

2 Instant O.P has been filed under section 34 of A and C Act. 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.

3 Nucleus of the instant lis is a contract dated 18.6.2003 between petitioner in instant O.P., i.e., 'Consulting Engineering Services (India) Private Limited' (hereinafter 'CES' for brevity) and Project Director of Tamil Nadu

Road Sector Project II (respondent in instant O.P). This court is informed that Tamil Nadu Road Sector Project is part of Highways Department of Government of Tamil Nadu and it has been described as 'Implementing Agency'. Therefore, it would be appropriate to refer to this Contracting entity as 'RSP' for the sake of convenience and clarity. In other words, reference to RSP is a reference to sole respondent in instant O.P before this Court.

4 In this contract dated 18.6.2003 between CES and RSP (hereinafter 'said contract' for the sake of brevity), the subject reads as follows:

“Consultancy Services for Detailed Engineering Design, Preparation of Cost Estimates and Bid Documents for Ramanathapuram Bypass Road.”

5 The scope of the work as can be culled out from the annexure to the said contract reads as follows :

“3.0 Scope of Service

- a)Route finalisation including local public consultation;
- b)Identify the terrain, landuse, drainage condition and the proximity of trees, buildings, etc.;
- c)Conduct topographical survey;
- d)Conduct subgrade investigation;
- e)Construction of RoB across the Railway lines and getting approval of Southern Railway;
- f)Prepare detailed engineering design together with computer based longitudinal and cross section drawings, structural drawings, etc. on par with the detailed engineering design prepared by the PCC; and

g)Prepare detailed estimate with bill of quantities, inclusive of cost assessment of land acquisition, etc.”

6 There is no dispute or disagreement before this Court that dispute resolution clause in the said contract provides for arbitration. As would be evident from the scope of the work, in very simple terms, the work entrusted to CES was to provide design and drawings for the said work. It is not in dispute that the work which is the subject matter of the said contract in all respects was completed on 31.01.2011. It is also not in dispute that the defect liability period is 12 months.

7 RSP, alleging that it was noticed during defect liability period that retaining walls began to yield slightly towards outside, that due to such yielding of retaining wall, cracks developed on the approach road and that road pavement was also affected at many places, took up the matter with authorities concerned. According to RSP, as per suggestion of World Bank, Geo-technical and design calculations of retaining wall were referred to 'Indian Institute of Technology-Madras' ('IIT-M' for brevity) for review. Based on reports received from IIT-M, RSP raised an arbitrable dispute stating that CES had failed qua adequacy in design resulting in loss to RSP. It is also RSP's case that one Sheladia Associates Inc. ('Sheladia' for brevity) is supervision consultant for the work under the said contract. From hereon, work under the said contract shall be referred to as 'said work' for the sake of convenience and clarity.

8 RSP also alleged that Sheladia has also failed to fulfil its duty by not carrying out design review for pavements and structures in the project road. When RSP raised an arbitrable dispute, it was its stated position that its claim has to be borne equally by CES and Sheladia on 50 : 50 ratio. Saying so, RSP made claims which as can be culled out from the case file placed before me reads as follows :

Claim No.1		
1.	Towards the cost of remedial works for retaining wall in ROB approaches	-Rs.7,53,96,206/-
2.	Towards the cost of Consultancy Service to IITM and IISc	-Rs.28,04,266/-
3.	Towards the cost of Tender Advertisement	-Rs.4,76,544/-
4.	Petty payments such as work done to prevent the ingress of rain water into the embankment of ROB approaches	-Rs.4,40,000/-
5.	Towards the cost of Supervision and Establishment	-Rs.45,93,900/-
Claim No.2		
1.	Due to non usage of road	Rs.7,36,46,250/-
	Total amount in Claim Nos.1 & 2	Rs.11,55,01,708/-

9 AT was constituted by an order made by the then Hon'ble Chief Justice of this Court vide order dated 25.09.2015 in O.P.No.541 of 2015. CES and RSP completed pleadings and after full-fledged hearings, impugned award came to be passed by AT, wherein and whereby, serial Nos.1 and 2 under claim No.1 were allowed in full by awarding 50% in favour of RSP against CES, Serial Nos.3, 4 and 5 of claim No.1 were rejected and claim

No.2 was rejected in its entirety. Resultantly, impugned award is against CES to the extent of a sum of Rs.3,91,00,736.00 with future interest at 18% per annum.

10 Before this Court proceeds further, it is necessary to record the undisputed obtaining position before this Court. With regard to said work, RSP invoked arbitration clause, proceeded against Sheladia by issuing show cause notice dated 17.04.2015, that culminated in arbitral award being passed by sole arbitrator as part of institutional arbitration by 'Indian Council of Arbitration' ('ICA' for brevity). That arbitral award is dated 09.02.2017 and Sheladia has filed an O.P being O.P.No.538 of 2017 against that award and O.P.No.538 of 2017 is also before this court. The contractor for said work being one J.S.R. Constructions Pvt. Ltd. ('JSR' for brevity) invoked arbitration clause by issuing notice dated 11.04.2012, that culminated in arbitral award dated 23.11.2013 being passed by a Three member arbitral tribunal, against which RSP has filed an O.P under section 34 of A and C Act, that O.P is O.P.No.228 of 2014 and that is also before this court. In other words, with regard to said work, RSP has entrusted design consultant work to CES vide said contract, construction work to JSR vide contract dated 23.6.2008 and supervision consultancy work to Sheladia vide separate contract dated 02.03.2009. Therefore, there are three separate contracts with three different entities. The first is said contract dated 18.6.2003 with CES, which is described as 'Design consultant', the second is construction contract dated 23.6.2008 with JSR which is described as 'Contractor' and third is contract dated 02.03.2009 with Sheladia which is described as 'Supervision

Consultant'. There are three contracts and three arbitral awards including impugned award by three different Arbitral Tribunals. As contracts are different, nature of work qua contractor concerned is different, there are three different arbitral proceedings and as they are three different arbitral awards by three different arbitral tribunals, notwithstanding the overlap, the three O.Ps (including instant O.P) arising out of three arbitral awards are dealt with separately and independent of each other. However, factual overlap is inevitable and wherever it is necessary, the same is being referred to. To be noted, when each of the three O.Ps were heard out, counsel in the other O.Ps were present before this Court. Ultimately, each of these O.Ps are being decided on their own merits. In this view of the matter, independent orders are being pronounced in the other two O.Ps also. To be noted, though orders in the other two O.Ps are also being pronounced on the same day, they are independent orders which have been made on the basis of the merits of respective O.Ps.

11 To be noted, even in instant O.P, claim of RSP is by way of 50 : 50 apportionment between CES and Sheladia which has been alluded to supra.

12 Reverting to impugned award, Mr.R.Murari, learned senior counsel instructed by Ms.Preeti Mohan and Ms.Ranjana Jain of Phoenix Legal (Law Firm) on behalf of CES and learned Advocate General assisted by Special Government Pleader Mr.Sricharan Rangarajan on behalf of RSP were before this Court.

13 Learned senior counsel leading the counsel on record for CES, submitted that his challenge to the impugned award is two pronged. Learned senior counsel submitted that his two pronged attack is as follows:

(a) The claim made by RSP before AT is barred by limitation and impugned award erred in holding that it is not time barred. This according to learned senior counsel is in conflict with public policy as law of limitation is founded on public policy;

(b) Impugned award made by AT is vitiated by patent illegality as it does not adhere to the determinants which constitute section 73 of the Contract Act, namely breach, fixation of liability and quantification. This according to learned senior counsel is breach of section 28(1)(a) of A and C Act and is therefore, patent illegality.

14 With regard to limitation, learned senior counsel submitted that RSP issued show cause notice dated 24.6.2014 in which arbitration clause was invoked. This can be taken as date of commencement of arbitration within the meaning of section 21 of A and C Act. In the considered opinion of this Court, a reading of the language in which section 21 of A and C Act is couched makes it clear that the date of commencement of arbitration is not the date of such notice invoking arbitration clause, but the date on which such a notice making request for arbitration is received by the noticee / addressee

in such a notice. To be noted, the term 'respondent' occurring in section 21 is being referred to as noticee / addressee. When this was pointed out, learned senior counsel in its usual fairness submitted that 24.06.2014 will not qualify as date of commencement of arbitral proceedings within the meaning of section 21 of A and C Act, but pointed out that it certainly cannot be prior to 24.6.2014 as that is the date of letter itself and it obviously could not have been received prior to this date. Saying so, learned senior counsel submitted that taking 24.6.2014 as date of commencement of arbitral proceedings would be assuming the worst against him and that said submission was made on this basis. In the considered opinion of this court, there cannot be any concession against a statute, but at the same time, RSP does not dispute the notice dated 24.6.2014. Therefore, submission that this notice could not have been received by CES prior to 24.6.2014 and therefore, taking 24.6.2014 as reckoning date is assuming the worst against CES cannot be dislodged. To be noted, though RSP issued notice, RSP also was unable to produce the acknowledgement and give the actual and exact date of receipt of notice by CES from its file. Therefore, in the considered opinion of this Court, there cannot be a concession by either of the parties against a statute. Be that as it may, 24.6.2014 is taken as the notional date of commencement of arbitration, though it might not be the actual date of commencement of arbitral proceedings within the meaning of section 21 of A and C Act. In any event, as there is no dispute or disagreement before this Court that CES could not have received the notice prior to 24.6.2014, limitation is being tested taking this notional date.

15 Furthering his submission on limitation, learned senior counsel for CES submitted that the sole arbitrator who constituted AT was appointed on 25.9.2015 vide an order made by then Hon'ble Chief Justice of this Court. Be that as it may, learned senior counsel also submitted that limitation has been raised as defence before AT and an issue has been framed in this regard, namely issue No.1, which reads "Is the claim barred by limitation?"

16 It was submitted that, before AT, with regard to limitation, four different scenarios were projected, but before this Court, submissions are restricted to two (of the four) scenarios. Scenario No.1 is the date for computing limitation should read as 30.05.2009 which is the date on which JSR reported certain shortcomings. Scenario No.2 is the date on which communications were exchanged between JSR and RSP regarding defects. These communications without dispute are dated 04.05.2011, 14.5.2011 and 01.06.2011. It was pointed out that even if 14.05.2011 is taken as cut off date, arbitral proceedings commenced only on 24.6.2014 and therefore, it is clearly time barred being beyond three years. There is no dispute before me that three years is the period of limitation in view of Article 55 of the Limitation Act, 1963. However, a perusal of the impugned award of AT reveals that AT has construed preliminary report from IIT-M dated 03.11.2011 and final report from IIT-M dated 24.2.2012 being Exs.R3 and C.6 respectively as date on which cause of action accrued in favour of RSP and on that basis, AT has returned a finding that commencement of arbitral proceedings on 24.6.2014 is well within the time and is not time barred.

17 There is no dispute with regard to aforesaid dates qua the two scenarios. With regard to Exs.R3 and C6 also, there is no dispute about dates. Therefore, the question of limitation is narrowed down and it boils down to whether Exs.R3 and C6 constitute cause of action in favour of RSP for initiating arbitration proceedings.

18 AT has held that though certain shortcomings and though certain defects in the said work surfaced (considering the nature of work in this case, 'surfaced' in every sense of term), that by itself does not give cause of action in favour of RSP as RSP would be able to proceed against CES (obviously Sheladia also) only after receipt of preliminary and final reports of IIT-M, to which the issue was referred to pursuant to World Bank's recommendation.

19 No elucidation or elaboration is required to say that the term 'cause of action' is not defined in any statute and it is not a term of art. Therefore, the term 'cause of action' is, at best, in the considered opinion of this Court is described, but not defined. It is described by judicial pronouncements. This court deems it appropriate to refer to a judgment of Hon'ble Supreme Court in **Nawal Kishore Sharma v. Union of India** reported in **(2014) 9 SCC 329** for description of the term 'cause of action'. Relevant paragraph in **Nawal Kishore Sharma** case is paragraph 10 and the same reads as follows:

“10. In *State of Rajasthan v. Swaika Properties* [(1985) 3 SCC 217] , the fact was that the respondent Company

having its registered office in Calcutta owned certain land on the outskirts of Jaipur City, was served with notice for acquisition of land under the Rajasthan Urban Improvement Act, 1959. Notice was duly served on the Company at its registered office in Calcutta. The Company, first appeared before the Special Court and finally the Calcutta High Court by filing a writ petition challenging the notification of acquisition. The matter ultimately came before this Court to answer a question as to whether the service of notice under Section 52(2) of the Act at the registered office of the respondent in Calcutta was an integral part of cause of action and was it sufficient to invest the Calcutta High Court with a jurisdiction to entertain the petition challenging the impugned notification. Answering the question this Court held: (*Swaika Properties case* [(1985) 3 SCC 217] , SCC pp. 222-23, paras 7-8)

“7. Upon these facts, we are satisfied that the cause of action neither wholly nor in part arose within the territorial limits of the Calcutta High Court and therefore the learned Single Judge had no jurisdiction to issue a rule nisi on the petition filed by the respondents under Article 226 of the Constitution or to make the ad interim ex parte prohibitory order restraining the appellants from taking any steps to take possession of the land acquired. Under sub-section (5) of Section 52 of the Act the appellants were entitled to require the respondents to surrender or deliver possession of the lands acquired forthwith and upon their failure to do so, take immediate steps to secure such possession under sub-section (6) thereof.

8. The expression ‘cause of action’ is tersely defined in *Mulla’s Code of Civil Procedure*:

‘The “cause of action” means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.’

In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. The mere service of notice under Section 52(2) of the Act on the respondents at their registered office at 18-B,

Brabourne Road, Calcutta i.e. within the territorial limits of the State of West Bengal, could not give rise to a cause of action within that territory unless the service of such notice was an integral part of the cause of action. The entire cause of action culminating in the acquisition of the land under Section 52(1) of the Act arose within the State of Rajasthan i.e. within the territorial jurisdiction of the Rajasthan High Court at the Jaipur Bench. The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Article 226(2) of the Constitution must depend upon the nature of the impugned order giving rise to a cause of action. The Notification dated 8-2-1984 issued by the State Government under Section 52(1) of the Act became effective the moment it was published in the Official Gazette as thereupon the notified land became vested in the State Government free from all encumbrances. It was not necessary for the respondents to plead the service of notice on them by the Special Officer, Town Planning Department, Jaipur under Section 52(2) for the grant of an appropriate writ, direction or order under Article 226 of the Constitution for quashing the notification issued by the State Government under Section 52(1) of the Act. If the respondents felt aggrieved by the acquisition of their lands situate at Jaipur and wanted to challenge the validity of the notification issued by the State Government of Rajasthan under Section 52(1) of the Act by a petition under Article 226 of the Constitution, the remedy of the respondents for the grant of such relief had to be sought by filing such a petition before the Rajasthan High Court, Jaipur Bench, where the cause of action wholly or in part arose.”

20 In the light of what cause of action is and in the light of the articulation in paragraph 10.7 of the impugned order which reads as follows :

“10.7.....The arbitration notice dated 24-06-2014 is well within time whether we take Ex.R.3 or Ex.C-6 as the starting point. It is here that IIT certifies that,

“The geotechnical design calculations for all the retaining wall sections were found to be inadequate against overturning and sliding. The influence of ground

water table was not considered in the Final Design Report submitted by M/s.Consulting Engineering Services (I) Pvt. Ltd. to Tamil Nadu Road Sector Project. Two different ground water table scenarios were analysed, and for almost all cases, the factor of safety against overwhelming and sliding are not confirming the design criteria stipulated by IS 14458 (Part 2): 1997. Moreover, the soil undergoes tension at the heel end of the retaining wall sections, which is not acceptable.

Structurally, the stem sections were found to be inadequate in flexural and shear capacities for both the dry and submerged conditions. The deflections at the top of the stems were high. This can further increase due to cracking and creep of the concrete.”

It is only then that the Claimant had the cause of action to initiate arbitration proceedings.”

this Court has no difficulty in concluding that there is no patent illegality and the view taken by AT is clearly both a possible and a plausible view, it certainly does not qualify as patent illegality. Therefore, the impugned order cannot be said to be in conflict with public policy and it is not vitiated by patent illegality on the limitation ground of attack.

21 The next ground of attack is with regard to causation. It was submitted that section 28(1)(a) of A and C Act makes it clear that AT shall decide the dispute submitted to it in accordance with the substantive law for time being in force in India and substantive law for time being in force in India relevant in instant case according to learned senior counsel is section 73 of the Contract Act, 1872.

22 It was submitted that section 73 of the Contract Act mandates that there should be breach followed by fixation of liability and quantification for a claim of this nature to be answered in the affirmative. Pointed submission was made saying that violation qua impugned award is with regard to fixation of liability determinant in section 73 of the Contract Act. With regard to fixation of liability, it was argued that AT vide impugned award has mulcted CES with liability without adequate materials in this regard.

23 Two reports of IIT-M being preliminary report dated 03.11.2011 and final report dated 24.02.2012 were marked as Exs.R3 and C6 respectively before AT. AT has adverted to these two exhibits. Issue No.2 pertains to breach, issue No.3 pertains to shortfalls in said work and issue No.4 pertains to whether there was any loss or damage as pleaded. In this regard, it is to be noted that reports of IIT-M have not been disputed. All that was argued is, it is not clear as to whether the same design which was given by CES was used. Sheladia, as would be evident from the order in O.P.No.538 of 2017, has contended that it had not made any review of design given to it in its capacity as Supervisory consultant. In fact, the complaint against Sheladia which has been mulcted with 50% of the claim, is that it did not review the design. This flattens the submission that it is not clear as to whether the same design that was given by CES was used. In any event, this is too far-fetched argument on facts to be raised in a petition under section 34 of A and C Act.

24 Based on these exhibits in juxtaposition with other exhibits,

which were there before AT, AT has returned a finding that CES is liable with regard to serial Nos.1 and 2 of claim No.1 and obviously to the extent of 50% of the amount set out therein, as it is the stated position of RSP that CES and Sheladia should share the same on 50 : 50 ratio.

25 To be noted, no oral evidence was let in by both sides. However, 20 documents on the side of RSP as claimant being Exs.C.1 to C.20 and 16 documents on the side of CES as sole respondent being Exs.R.1 to R.16 were marked. This makes it clear that all exhibits were marked by consent. A perusal of AT also reveals that there has been no serious dispute about exhibits. There has been detailed analysis of evidence before AT in this regard as is evident from the articulation of the same in the impugned order.

26 **Hodgkinson** principle as laid down in the age old **Hodgkinson Vs. Fernie** case reported in **140 ER 712** is to the effect that arbitrator is the sole and final judge of the quantity and quality of evidence before it. This **Hodgkinson** principle has been referred to and explained by Hon'ble Supreme Court in oft quoted **Associate Builders Vs. Delhi Development Authority** case reported in **(2015) 3 SCC 49**.

27 Obviously, impugned award is not assailed on any of the grounds which are exceptions culled out in **Hodgkinson** principle. Further more, instant O.P is under section 34 of A and C Act and section 34 of A and C Act has been held to be a summary procedure 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

has been explained by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in **(2018) 9 SCC 49** and while so explaining, it has been held by Hon'ble Supreme Court that Fiza developers principle is a step in right direction.

28 Therefore, it follows as an indisputable and inevitable sequitur that impugned award of AT has to be tested within the contours and confines of section 34 of A and C Act, more so, as a summary procedure. No elucidation is required to say that instant O.P or proceedings under section 34 of A and C Act is not an appeal. Therefore, it follows that appreciation of evidence by AT cannot be examined again in detail or at great length.

29 This Court also reminds itself that minimum judicial intervention is one of the pillars of 'Alternate Dispute Resolution mechanism' ('ADR mechanism' for brevity) while applying Fiza developers principle to test the impugned award by perambulating within the limited contours and confines of section 34 of A and C Act. Therefore, detailed discussion touching upon exhibits (besides Exs.R.3 and C.6, being preliminary and final reports of IIT-M) would tantamount to travelling beyond the scope of section 34 of A and C Act and is also clearly impermissible in a summary procedure.

30 This leads us to the conclusion that owing to all that have been set out supra, petitioner has not made out a case calling for judicial intervention in the impugned award made by AT.

31 O.P.No.455 of 2018 is dismissed. Considering the nature of matter, parties are left to bear their respective costs. Consequently, connected applications are closed.

30.04.2019

Speaking order

Index : Yes/No

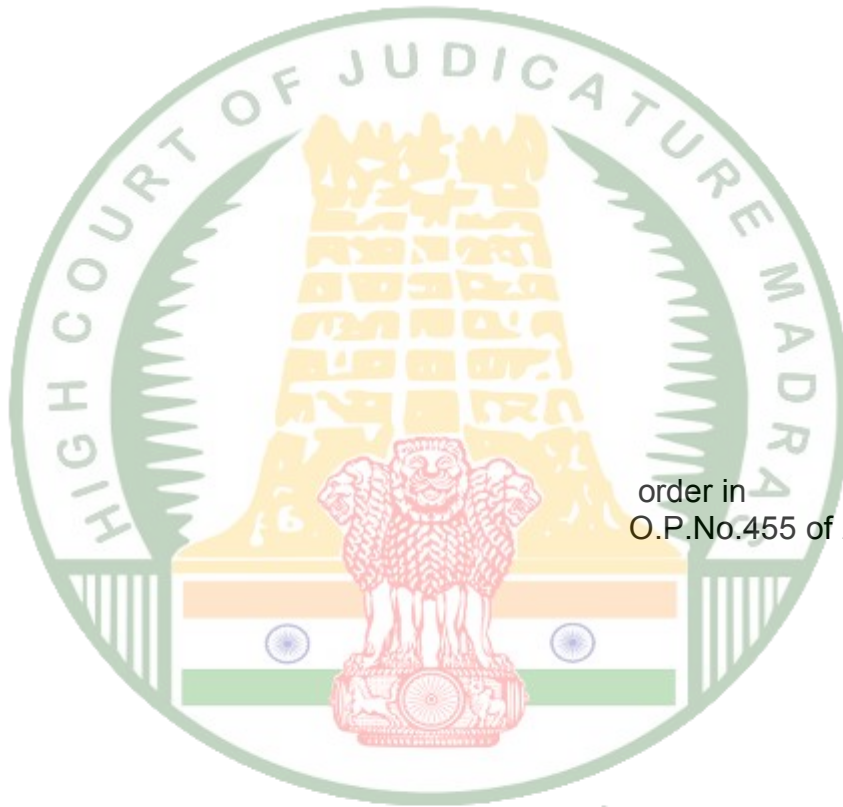
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M.SUNDAR, J.

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order in
O.P.No.455 of 2018

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