

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
28.02.2019	29.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

O.P. No.656 of 2018

M/s.Indo Asia Finance Ltd (IAF)
Formerly known as M/s.Indo Asian Finance Ltd.,
Represented by its Authorized Signatory
N.Srikanth
No.15 New Giri Road
G.N.Chetty Road, T.Nagar,
Chennai - 600 017.

... Petitioner

Vs.

M/s.Shriram Transport Finance Company Ltd.,
Represented by its Authorised Signatory
Mookambika Complex, 3rd Floor,
No.4 Lady Desika Road
Mylapore
Chennai.

... Respondent

Prayer: Petition filed to appoint an Arbitrator to terminate the mandate of the sole Arbitrator previously appointed and to appoint any Retired Judge of this Court to be the Sole Arbitrator in the place of the Sole Arbitrator appointed by the respondent to adjudicate the disputes arising between the petitioner and the respondent pursuant to the Arbitration Clause 13 of the agreement dated 29.06.2010.

For Petitioner : Mr.K.Ravi

For Respondent : Mr.K.S.Ramakrishnan

ORDER

The prayer sought for herein is to terminate the mandate of the sole Arbitrator appointed and to appoint any retired Judge of this Court to be the sole arbitrator to adjudicate the dispute arising between the petitioner and the respondent pursuant to the arbitration clause 13 of the agreement dated 29.06.2010.

2.The necessary facts, which are to be noticed for the disposal of this Original Petition, are as follows:

The petitioner, ie., M/s.Indo Asia Finance Limited is a company having office at T.Nagar, Chennai 600 017 and it is in the business of vehicle financing and accordingly, have substantial clientele base.

2.1. The respondent M/s.Shriram Transport Finance Company limited is a registered Company under the Indian Companies Act 1956, having registered office at Mylapore, Chennai 600 004 and the respondent is also in the business of financing. However, its financial activities is not restricted only to vehicle finance, but also in other areas.

2.2. Since both the petitioner and the respondent have been in the similar business of vehicle financing, they wanted to have a joint venture. Accordingly, both entered into a franchisee agreement dated 27.03.2006. By virtue of the said agreement, the respondent would finance for all the vehicles purchased by the third parties introduced by the petitioner and it is the obligation of the petitioner to collect the dues payable by the third party purchaser and the account to that effect also be maintained by the petitioner. In order to undertake the aforesaid work, the petitioner will be paid a portion of the collected money as remuneration/fees by the respondent.

2.3. Since the said arrangement have been successfully gone for some time, the parties entered into some more subsequent agreements. Accordingly, they entered into a joint venture agreement dated 01.06.2008, revenue sharing agreement dated 01.03.2010, loan agreement dated 03.05.2010 and revenue sharing agreement (privileged status) dated 29.06.2010.

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2.4. Among the aforesaid agreements, the revenue sharing agreement dated 29.06.2010, would be the latest one and the said agreement is the subject matter in the present Original Petition. Therefore, the agreement dated 29.06.2010 entered into between the parties, which

consisting of an arbitration clause would be hereinafter called as “Arbitration Agreement”.

2.5. Under clause 13 of the Arbitration Agreement under the heading “Arbitration”, the parties have agreed upon as follows:

“13.ARBITRATION

13.1 All disputes, differences, claims and questions whatsoever which shall either during the continuance of the agreement or afterwards either between the parties hereto or their representatives touching these presents or the construction or application thereof, or any clause or thing therein contained, or any account or liability between the parties hereto, or as to any act, deed or omission of any hereto in any way relating to these presents, shall be referred to the sole arbitrator to be nominated and appointed by FRSP. During the course of arbitration the sole arbitrator so appointed for any reason becomes incapacitated or not willing to continue with the arbitration, FRSP shall nominate and appoint another arbitrator and the Arbitrator newly appointed shall continue the Arbitration proceedings from the stage where it was left by his predecessor. Such arbitration shall be in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment thereof for the

time being in force.”

2.6. Under the said arbitration agreement, the petitioner is called as “ORSP” (Other Revenue Sharing Party) and the respondent is called as “FRSP” (First Revenue Sharing Party).

2.7. With these background, since there has been a business dispute as there was a claim and counter claim for the amount payable by each other, the petitioner, on 11.04.2018, sent a communication to the respondent requiring to pay a sum of Rs.14,27,75,335/-, which, according to the petitioner is receivable by the petitioner from the respondent Company.

2.8. In response to the said letter of the petitioner, dated 11.04.2018, the respondent, in his reply cum counter claim dated 17.04.2018, while denying the due payable by the respondent to the petitioner, as claimed by the petitioner in his letter dated 11.04.2018, also demanded by way of counter claim a total sum of Rs.5,43,20,741/-. In the very said reply letter dated 17.04.2018 issued by the respondent, it has further stated that, in case, the petitioner failed to make the payment as demanded by the respondent by way of counter claim, the respondent will have no other option except to refer the matter for the sole arbitrator Mr.V.Paul Das, Civil Judge, Senior Division

(Retired), having office at No.87/106 Perambur High Road, Jamalia, Chennai - 600 012. On receipt of the said reply dated 17.04.2018 from the respondent, the petitioner, on 28.04.2018, sent a letter by way of rejoinder to the respondent, where, the petitioner had reiterated and demanded the respondent, the settlement of the amount to the extent of Rs.14,27,75,335/- within a period of seven days and it has further been stated therein that, there was no need for approaching the Arbitrator, as that was not arising if the respondent properly appreciate the actual facts and settle the rightful claim of the petitioner.

2.9. Thereafter the petitioner directly received notice from the said Arbitrator mentioned in the letter of the respondent dated 17.04.2018, where, the Arbitrator has stated that, he had been appointed as Sole Arbitrator by the Claimant, ie., the respondent as per the terms of the agreement entered into between the claimant and the respondent, ie., the respondent and the petitioner herein and the said dispute claimed to have been referred by the claimant, ie., the respondent herein, was for recovering a sum of Rs.5,43,20,741/- as on 24.05.2018, therefore, the matter stands posted on 09.06.2018 at his office and accordingly, the petitioner was directed to appear. The said notice dated 24.05.2018 sent by the Arbitrator, having been received by the petitioner, he had responded on 08.06.2018 addressed to the

respondent and copy to the said Arbitrator stating that, the petitioner intended to approach this Court to terminate the mandate of the Arbitrator, as the petitioner had objection regarding the appointment of Arbitrator made by the respondent unilaterally. The said letter of the petitioner dated 08.06.2018 expressing its intention before terminating the mandate of the Arbitrator, has been responded by the respondent on 13.06.2018 to state that, as per the Arbitration agreement, the respondent i.e., FRSP is empowered to appoint an Arbitrator, accordingly, it appointed the Arbitrator and therefore, the petitioner cannot have any grievance over such appointment. Only in that circumstances, for terminating the mandate of the said sole Arbitrator appointed by the respondent and to appoint a new Arbitrator, i.e., a Former Judge of this Court to the choice of this Court, the present Original Petition has been filed by the petitioner with the aforesaid prayer.

3. I have heard the learned counsel for the petitioner and the learned counsel for the respondent and have perused the materials placed before this Court.

4. The learned counsel for the petitioner would submit that, even though Clause 13 of the Arbitration Agreement empowered the respondent to appoint the sole arbitrator, no definite appointment of Arbitrator has been

made, as in the letter dated 17.04.2018, the respondent only stated that, the petitioner shall pay the amount within 10 days, as claimed by the respondent and in case of failure, the respondent will have no option except to appoint a sole arbitrator. Thereafter, the petitioner had given a detailed reply/rejoinder, where, it reiterated its stand that, only the respondent had to pay a sum of Rs.14 crores and more to the petitioner and therefore, there was no need to appoint an Arbitrator. Unfortunately, without even informing the petitioner, as on which date, the respondent, invoking Clause 13 of the Arbitration Agreement, had appointed the sole arbitrator was not made known to the petitioner, straight away, the Arbitrator, vide his communication dated 24.05.2018 sent to the petitioner, stating that, he has been appointed as sole Arbitrator by the respondent, ie., the claimant. Therefore, the petitioner had never been taken into confidence before appointing the Arbitrator by the respondent, even though it is empowered to do so within the meaning of clause 13 of the Arbitration Agreement.

5. The learned counsel for the petitioner would also submit that, the sole Arbitrator, even in the very first hearing, when the petitioner appeared, did not record any minutes and within few seconds, he completed the hearing, that too, orally and no communication as to the minutes whatsoever had been communicated or given to the petitioner. There is no secretarial or assisting

staff to record the proceedings at the arbitration place. That apart, according to the learned counsel for the petitioner, the said sole Arbitrator had been the Arbitrator, on permanent basis, for the respondent company for several other arbitrations and therefore, within the meaning of Section 12, especially, Section 12(b) of the Arbitration and Conciliation Act 1996 (hereinafter referred to as 'the Act'), the said sole Arbitrator lost its credentials towards impartiality and therefore, the petitioner has got every right to express its genuine doubt about the impartiality over the sole arbitrator. Therefore, on that ground also, the petitioner is entitled to seek an order from this Court to terminate the mandate of the Arbitrator and therefore, to appoint a former Judge of this Court, as a sole arbitrator, to resolve the dispute between the parties.

6. I have also heard the learned counsel for the respondent, who would submit that, Clause 13 of the Arbitration Agreement is very clear and unambiguous, under which, the FRSP, ie., the respondent can refer the matter to a sole Arbitrator, who shall be nominated and appointed by FRSP. Even during the course of arbitration, if the sole arbitrator, so appointed, for any reasons, become incapacitated or not willing to continue the arbitration, again, the FRSP, ie., the respondent shall nominate and appoint another Arbitrator and who shall continue the arbitration proceedings from the stage, where it was left by his predecessor. When there is such a clear and

unambiguous provision available under the Arbitration Agreement between the parties, which is in writing and has been signed by both the parties, the petitioner cannot take any exception to the said arbitration Clause and therefore, the petitioner cannot find fault with the respondent, who appointed the said sole Arbitrator to resolve the issue between the parties. Moreover, the learned counsel for the respondent submits that, the petitioner has not made out any case, making any personal bias or allegation against the sole Arbitrator so appointed and merely because in the first hearing, the Sole Arbitrator failed to record the minutes and give the proceedings to the petitioner, it cannot be construed that, the Sole Arbitrator will, for the whole arbitration proceedings, act like that, by not recording the proceedings in writing and issue the minutes and on that pretext, the petitioner cannot seek termination of the mandate of the Arbitrator.

7. The learned counsel would also submit that, the grounds stated in the Fifth schedule, within the meaning of Section 12 of the Act, are not at all available to the petitioner to invoke and therefore, without any plausible reason or ground to be urged in this regard, the petitioner cannot seek indulgence of this Court to terminate the mandate of the Arbitrator, who has been duly appointed by exercising the power vested with the respondent under Clause 13 of the Arbitration Agreement.

8. Therefore, the learned counsel for the respondent would submit that, the mandate of the Sole Arbitrator, who had already commenced the proceedings before the petitioner approaches this Court by filing this Original Petition, need not be terminated and there is no need for appointing a former Judge of this Court as sole Arbitrator, as claimed by the petitioner and therefore, this Original Petition can be dismissed as devoid of merits.

9. I have considered the said rival submissions made by the learned counsel appearing for the parties and have perused the materials placed before this Court.

10. The uncontroverted fact is that, there has been agreements right from 2006 between the parties and number of such agreements, as has been mentioned above, entered into between the parties in the years 2006, 2008, 2010 respectively and ultimately, on 29.06.2010, the parties entered into an agreement called Revenue Sharing Agreement (Privileged Status) and in that agreement, there is a clear Clause under Clause 13 with the title "Arbitration", where, it has been made clear that, the respondent, who is otherwise called as "FRSP", would have the right to appoint a sole Arbitrator and once the sole Arbitrator become incapacitated or not willing to continue with the arbitration, again, a new Arbitrator will also be appointed only by

FRSP and such newly appointed Arbitrator will continue the proceedings, where, it was left by his predecessor.

11. The said Arbitration Agreement dated 29.06.2010 is in writing and both parties have signed it. Therefore, as per the settled legal proposition under the Act, since there has been a written Arbitration Agreement between the parties signed by both of them and there is a clear arbitration clause and if such clause is invoked by any one of the party, as has been contemplated in the clause itself, the same cannot be found fault with.

12. But, at the same time, here in the case in hand, the petitioner raised a preliminary issue as to whether there has been a validly appointed Arbitrator within the meaning of Clause 13 of the Arbitration Agreement, inasmuch as the respondent, vide the reply dated 17.04.2018, while requiring the petitioner to pay a sum of Rs.5,43,20,741/-, has further stated that, in case of failure of payment of such amount, the respondent will have no option except to refer the matter for the sole arbitrator and named the person also.

13. Thereafter, direct communication was received by the petitioner from the sole Arbitrator, vide notice dated 24.05.2018, in between on what date the said sole arbitrator was appointed by the respondent, had not been

communicated to the petitioner and as has been claimed by the learned counsel for the petitioner, the petitioner had not been taken into confidence or had been kept informed as to on which date, by which communication or order or mandate, the respondent, having invoked Clause 13 of the Arbitration Agreement, had appointed the sole arbitrator.

14. Be that as it may, while the said sole Arbitrator sent a communication on 24.05.2018, he has also annexed a statement required under Section 12(1)(b) of the Act, wherein, he has stated that, number of ongoing arbitration is 50 and above and in respect of circumstances disclosing any past or present relationship with or interest in any of the parties, the Arbitrator has stated only "Nil". However, it is pertinent to be noted that, during the hearing, an order seems to have been passed by this Court, on 29.06.2018, directing the respondent to file an affidavit giving the details of the number of cases being handled by the Arbitrator.

15. Pursuant to the said directive issued by this Court, the respondent has filed an affidavit dated 09.10.2018, wherein, the following information has been disclosed:

"2.I submit that as per the direction of this
Hon'ble High Court I am here by providing the details of

arbitrators who are in the panel of respondent company for Chennai district.

- a. Mr.K.Balasubramanian, B.A., B.L., Registrar General High Court of Madras (Retd)
- b. Mr.P.Rosaiah, B.Sc, M.L. District Judge (Retd)
- c. Mr.Ganesan M.A.B.L., District Judge (Retd)
- d. Mr.V.Pauldas B.A.B.L., Civil Judge Senior Division (Retd)
- e. Mr.S.S.Mariappan B.Com.B.L., Sub Judge (Retd)

S. No	Name of the Arbitrator	No. of cases against borrower and guarantor	No. of cases against Franchisee/ Joint Venture Agreement/ Revenue Sharing Agreement
1	Mr.K.Balasubramanian,B.A.B.L., Registrar General (Retd)	65	1
2	Mr.P.Rosaiah, B.Sc,M.L. District Judge (Retd)	70	1
3	Mr.Ganesan M.A.B.L., District Judge (Retd)	72	
4	Mr.V.Pauldas B.A.B.L., Civil Judge Senior Division (Retd)	63	2
5	Mr.S.S.Mariappan B.Com. B.L., Sub Judge (Retd)	75	

16. In the aforesaid averments made in the affidavit filed by the respondent, it has disclosed that, among other persons, the sole Arbitrator, now had been appointed, is one of the panel Arbitrator of the respondent Company and in that capacity, there are 65 number of arbitrations had already been entrusted to him.

17. Whereas the said sole Arbitrator, in his statement sent as Annexure along with his communication dated 24.05.2018 issued to the petitioner, has only stated that, number of ongoing arbitration is 50 and above and in respect of column, where, the past or present relationship with or interest in any of the party is concerned, he stated "Nil".

18. In this context, it is to be further noted that, Section 12 of the Act under the Heading, "Grounds for Challenge" made certain things very clear and specific. The relevant portion of Section 12 is extracted hereunder:

"12.Grounds for challenge: - [(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, -

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.- The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.- The disclosure shall be made by such person in the form specified in the Sixth Schedule.”

19. Under Clause 12(1)(b), two explanations have been given as extracted hereinabove, where, explanation 1 makes it clear that, what are all the grounds given in the Fifth Schedule, which shall guide in determining the circumstances whether exist, which gives rise to justifiable doubts as to the independence or impartiality of the Arbitrator.

20. In tune with or in support of the said explanation-1 referred to above, the Fifth Schedule given in this regard, has enumerated 34 such grounds or circumstances, out of which, ground Nos.22 and 24 are relevant, which are extracted hereunder:

THE FIFTH SCHEDULE [See section 12(1)(b)]

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

ARBITRATOR'S RELATIONSHIP WITH THE PARTIES OR COUNSEL

.....

22.The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or on affiliate of one of the parties.

....

24.The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.”

21. The ground No.22, provided that, within the past three years, where the Arbitrator had been appointed as an Arbitrator on two or more occasions by anyone of the parties and in ground No.24, provided that, if an Arbitrator currently serves or has served within the past three years as an Arbitrator in any arbitration related to the issue involving one of the parties.

22. Here, in the case in hand, the aforesaid affidavit filed by the respondent abundantly discloses that, the Sole Arbitrator is one of the panel Arbitrator of the respondent Company and with that capacity, he had already been entrusted with 65 (63 + 2 = 65) arbitrations and that is the reason why in the statement given by the Arbitrator, he has stated that, the current arbitration handled by him is 50 and above and at the same time, in the

column mentioned therein, as to whether any relationship with any of the party with regard to the present or past relationship with or interest in any of the party, the Arbitrator has given the answer “Nil”, thereby, the sole Arbitrator, so appointed in the case, has suppressed that, he has been one of the panel Arbitrator of the respondent Company and with that capacity, he has already been entrusted with number of arbitration works and the same are being handled by him.

23. The aforesaid facts would make it clear that, ground Nos.22 and 24, as enumerated in the schedule V referred to above, are very well available against the present sole Arbitrator. Further, the said factor has been purposely suppressed by the sole Arbitrator in his statement made to that effect under Section 12 (1)(b) of the Act along with his communication dated 24.05.2018 made to the petitioner.

24. These circumstances would unambiguously make it clear that, the sole Arbitrator, so appointed or claimed to have been appointed by the respondent, cannot be treated as an Arbitrator not covered under any of the grounds enumerated under Schedule V. Moreover, the Sole Arbitrator is already having 65 arbitrations and he himself disclosed that, he is currently having 50 and above. Therefore, it is highly doubtful for him to complete this

arbitration, where there is a huge claims and counter claims more than 15 Crore is involved, within 12 months period. That apart, since the sole Arbitrator has purposely suppressed the past relationship with one of the party, ie., the respondent, despite the fact that, he being one of the panel Arbitrator for the respondent Company, it gives rise a doubt about his independency and impartiality.

25. That apart, the petitioner also claimed that, in the very first hearing, where the petitioner appeared, the Arbitrator has not recorded any minutes and nothing has been served on the petitioner.

26. Moreover, the respondent also has not given any written communication, as to by which proceedings and from which date, the respondent Company appointed the sole Arbitrator. In this regard, since there is no other communication except the reply letter, dated 17.04.2018, where the respondent had only expressed his intention to appoint a sole arbitrator, provided, the petitioner failed to make the payment and the same also had been subsequently replied by way of rejoinder by the petitioner, where there has been a huge claim to the extent of more than 14 crores, this Court is also not in a position to consider that, there has been a clear appointment of an Arbitrator by taking into confidence the other party ie., the petitioner, by the

respondent by invoking Clause 13 of the Arbitration Agreement.

27. Apart from this procedural aspects, certainly, ground Nos.22 and 24 under Schedule V of the Act very well would be attracted in the case of sole Arbitrator, besides his suppression of material facts. Therefore, there is every justification on the part of the petitioner to express doubt about the independence and impartiality of the Arbitrator and therefore, on these grounds, certainly, the petitioner can seek indulgence of this Court under Sections 13 and 14 of the Act read with Section 12.

28. In that view of the matter, this Court has no hesitation to hold that, the sole Arbitrator, so appointed by the respondent or claimed to have been appointed, cannot be said to be an independent and impartial Arbitrator in view of the peculiar facts that, the said sole Arbitrator, being one of the panel Arbitrator of the respondent company has already been entrusted with 65 and more number of arbitrations to that effect by the respondent company. Hence, his mandate can very well be terminated.

29. Even though under Clause 13 of the Arbitration Agreement, the respondent Company, being the FRSP, can nominate a fresh Arbitrator, such an invocation of Clause 13 of the Arbitration Agreement for the FRSP ie., the

respondent, in the opinion of this Court, would no more be available in view of the past conduct, whereby, panel Arbitrator of the respondent company had been appointed, without taking the petitioner into confidence and therefore, this Court feels that, while invoking Section 14 and 15 of the Act, this Court is empowered to appoint a new Arbitrator and accordingly, while terminating the mandate of the sole Arbitrator, this Court wish to appoint a new Arbitrator.

30. In the result,

(1) the mandate of the sole arbitrator, namely, V.Paul Das, Civil Judge Senior Division (Retired), Chennai, in the arbitration case between the petitioner and the respondent arising out of the Arbitration Agreement, otherwise called as "Revenue Sharing agreement (Privileged status)" dated 29.06.2010, is hereby terminated.

(2) Consequently, this Court appoints Hon'ble Mr. Justice D.Murugesan, former Judge of this Court, and former Chief Justice of Delhi High Court, as sole arbitrator.

(3) The learned Arbitrator may enter into the reference forthwith and resolve the dispute by way of arbitration between the parties ie., the petitioner and the respondent in accordance with law;

(4) The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses, which shall be borne by both the parties equally.

31. With this order of appointment of Arbitrator, this Original Petition is ordered. However, there shall be no order as to costs.

29.08.2019

Index : Yes

Speaking order

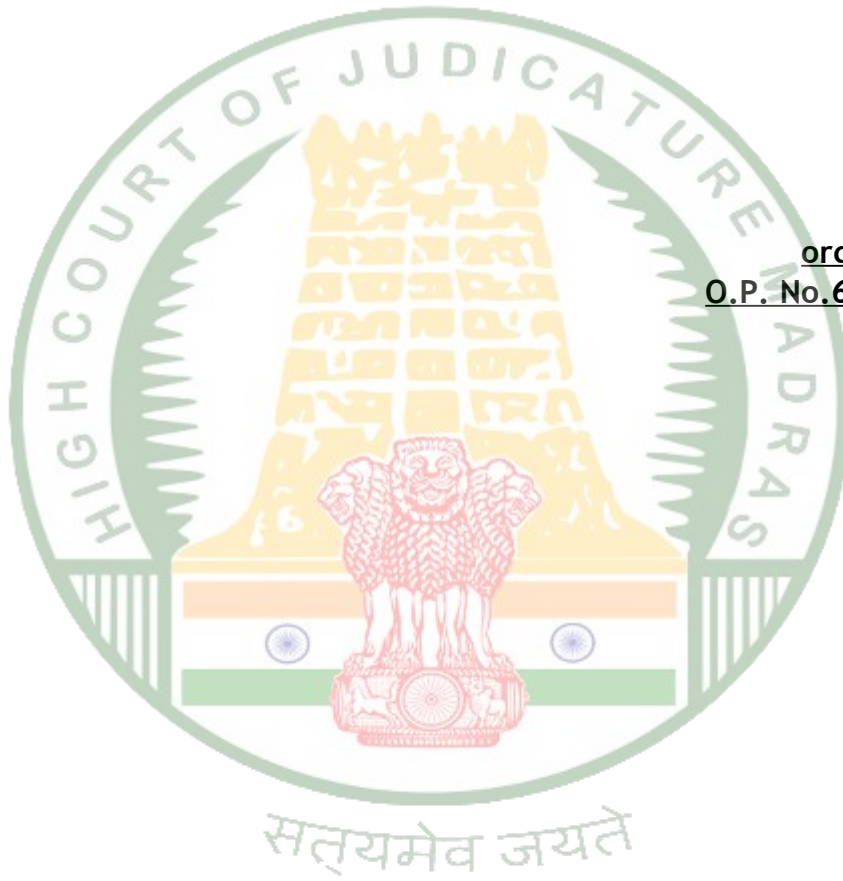
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R.SURESH KUMAR, J.

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order made in
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29.08.2019