

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :05.02.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.852 of 2018

1.Dr.J.Saravana Moorthy
2.Sarasa Kavitha

... Petitioners

vs.

1.Kotak Mahindra Bank Limited
1st Floor, Ceebros Centre
39, Montieth Road, Egmore
Chennai - 600 008

2.C.Prasana Venkatesh
The Sole Arbitrator
Chennai

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 20.06.2018 passed by the 2nd respondent herein in respect of Arbitration proceedings between the petitioners and the 1st respondent.

For Petitioner : Mr.M.Velmurugan

For First Respondent : Mr.M.Arunachalam

ORDER

There are two petitioners and two respondents in this petition.

2. Mr.M.Velmurugan, learned counsel on record for the two petitioners and Mr.M.Arunachalam, learned counsel on record for the first respondent are before this Court. The second respondent is the sole Arbitrator who constituted the Arbitral Tribunal. Though the address of the second respondent Arbitrator has been given in the Arbitral Award dated 20.06.2018, which has been challenged in the instant petition, address of the sole Arbitrator has not been set out both in the short and long cause titles of the petition. Therefore, notice was issued only to the first respondent, who was duly served. First respondent entered appearance through a counsel and as mentioned supra, Mr.M.Arunachalam, learned counsel on record for the first respondent is before this Court.

3. Considering the position that this is a petition under Section 34 of the 'Arbitration and Conciliation Act, 1996' ('A & C' Act for brevity) viewed in conjunction with the grounds that have been raised by the petitioners in their challenge to the aforesaid award dated 20.06.2018 made by the second respondent (hereinafter 'impugned award' for brevity), presence of the second respondent is not necessary for disposal of this 'Original Petition' (hereinafter 'OP' for brevity).

4. A perusal of the case file that has been placed before me reveals that this petition has not been admitted. It has been presented on 18.09.2018 and

notice has been issued on 08.10.2018. As mentioned supra, first respondent alone was served, as no address of the second respondent sole Arbitrator was given in the short and long cause titles of the instant OP. Therefore, this shall be treated as notice regarding admission.

5. In other words, this petition is being tested for admission post service of notice on the first respondent, who is represented by a counsel before this Court.

6. Before the Arbitral Tribunal, the first respondent, who this Court is informed is a Bank i.e, Kotak Mahindra Limited, is the claimant. Petitioners 1 and 2 herein are Respondents 1 and 2 respectively before the Arbitral Tribunal. Considering the narrow scope of the OP being one under Section 34 of A & C Act, it will suffice to set out short facts, which are imperative for appreciating this order. To be noted, the scope of the OP is narrow as it is not an appeal, revision or review and it is mere a challenge to the award i.e., impugned award. This Court is of the view that scope of this OP is very narrow by drawing inspiration from principles laid down by Hon'ble Supreme Court in **Fiza Developers & Inter - Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.** reported in **(2009) 17 SCC 796**, wherein Hon'ble Supreme Court held that petitions under Section 34 of A & C Act are single issue summary proceedings under a special

enactment providing for a special remedy which have to be dealt with expeditiously. Subsequently in *M/s.Emkay Global Financial Services Ltd., Vs. Girdhar Sondhi [2018 (10) Scale (15)]*, Hon'ble Supreme Court observed that Fiza Developers principle is a step in the right direction and reiterated that Section 34 petitions are to be disposed of by adopting a summary procedure.

7. There is a loan agreement dated 09.04.2018 under which the first respondent Bank has given a loan of Rs.30 Lakhs to the petitioners. To be noted, the petition states that the loan agreement is dated 09.04.2018, but the first respondent adverting to the loan agreement submits that it is dated 10.02.2016 and the date of execution is 02.02.2016. However, considering the narrow scope of this petition under Section 34 of A & C Act coupled with the obtaining and factual position that there is no dispute regarding loan agreement, it may not be necessary to delve into this aspect of the matter. This Court is informed that this loan of Rs.30 lakhs is to be repaid in 48 'Equated Monthly Instalments' ('EMIs' for brevity) and the EMI is Rs.80,500/-, obviously per month. It is also submitted that the payment of EMIs commenced on 05.03.2015 and is scheduled to be completed by 5th February 2020. Even according to the OP file that has been placed before me in this loan agreement dated 09.04.2018, the first petitioner is the borrower and the second petitioner has been arrayed as co-borrower though it has been averred

that second petitioner (wrongly typed as second respondent in Paragraph 3 of OP) has not signed the loan agreement.

8. For the purpose of this loan, a 'Demand Promissory Note' ('DPN' for brevity) was executed and several other documents were also executed.

9. It is the case of the petitioners that EMIs were paid regularly upto March 2018. It is submitted that 22 out of 23 EMIs (due as on that date) have been paid regularly. It unfurls from the OP file placed before me that the first petitioner fell sick and was diagnosed with brain cancer after an attack on 08.04.2018. As a consequence the first petitioner had suffered stroke/epilepsy/ brain cancer, he was hospitalized and was treated for the same. It also unfurls from the OP that first petitioner was discharged from hospital on 12.04.2018, but had to continue treatment at home.

10. According to learned counsel for petitioner, the first petitioner, who is a medical doctor by profession (anaesthetist, this Court is informed), cannot continue his profession. As mentioned supra, second petitioner is first petitioner's spouse. Though not averred in the OP placed before me, learned counsel for petitioner submits that the second petitioner is a dental surgeon.

11. With regard to 22 EMIs that have been paid, it is submitted by learned counsel for petitioner that as of March 2018, 23 EMIs were due, but 22 EMIs were paid, though some EMIs were paid with some delay/default.

12. There is no dispute or disagreement before this Court that there is an arbitration agreement between the parties, which is by way of a clause (11.16) in the loan agreement between the parties. Clause 11.16 reads as follows:

'11.16. Unless the same falls within the jurisdiction of the Debts Recovery Tribunal established under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 any and all claims and disputes, arising out of or in connection with this Agreement or its performance shall be settled by arbitration by a single Arbitrator to be appointed by the Bank. The arbitration shall be in Chennai in accordance with the provisions of the Arbitration and Conciliation Act, 1996.'

13. That there was a loan agreement, that the loan amount is Rs.30 lakhs, that it is scheduled to be repaid in 48 EMIs of Rs.80,500/- each and that only 22 EMIs were paid are all undisputed facts. In the above said backdrop, first respondent invoked the aforesaid extracted clause being Clause 11.16 in the loan agreement and commenced arbitration *inter alia* by contending that the second respondent is the sole Arbitrator.

14. Sole Arbitrator entered upon the reference and ultimately passed an award dated 20.06.2018, which is the impugned award in the instant OP.

15. A perusal of the impugned award reveals that petitioners 1 and 2 herein are Respondents 1 and 2 respectively before the sole Arbitrator / Arbitral Tribunal, did not choose to go before the Arbitral Tribunal in spite of being served with notices and therefore, the sole Arbitrator proceeded on the basis of available records / deposition of one Soundaravalli, Authorized Signatory of first respondent Bank and 4 exhibits, which were marked through her. Vide impugned award, first respondent bank's claim of Rs.19, 27, 372.70 with 3% monthly interest on the said sum till the date of award was acceded to.

16. Future interest of 12% per annum on the sum of Rs.19,273,72.70 from the date of award till the date of realization was also ordered besides a sum of Rs.2,000/- towards Arbitrator's fee and expenses.

17. In the instant petition under Section 34 of A & C Act, Mr.M.Velmurugan, learned counsel argued that the entire petition is essentially predicated on the sub-clauses (i) and (iii) of Clause (a) of Sub-Section (2) of Section 34 of A & C Act. In other words, it is his specific say that instant

petition is predicated on grounds under Section 34(2)(a)(i) and 34(2)(a) (iii). While Section 34(2)(a)(i) provides for an Arbitral Award being setting aside when a party is under some incapacity, Section 34(2)(a)(iii) provides for setting aside of an Arbitral Award when proper notice is not given to a party appointment of Arbitrator or about the arbitral proceedings or when the party was otherwise unable to present his case. In this backdrop, the impugned award was examined.

18. A perusal of the impugned award shows that Sole Arbitrator has held that enough opportunities had been given to both the respondents, but they had gone before the Arbitral Tribunal, but for a letter dated 25.05.2018 sent by the first petitioner to the sole Arbitrator. In this letter dated 25.05.2018, the first petitioner has mentioned about his aforesaid illness and has stated that he was not able to see the Arbitrator's communication to him, that he was able to see the same only after being discharged from the hospital and made a request to stop all further proceedings on humanitarian grounds. I deem it appropriate to extract the contents of the letter dated 25.05.2018 from the first petitioner to the sole Arbitrator, which reads as follows:

'I availed the above loan and been repaying the loan till now. On 08.04.2018 mid night unexpectedly /suddenly I fell sick due to stroke /Epilepsy/ Meningioma (Brain Tumour) and was hospitalized in ICU and treated. I was discharged on 12.04.2018 with advice to continue

treatment; and now I am under treatment for Epilepsy/meningioma (Brain Tumour).

As I was hospitalized and bed ridden. I was not in a position to go through your letter communications to me. Yesterday I saw your letter and replying back to you and I was not in a position to attend the arbitration proceeding before you.

And I have already informed the bank through email, register post and bank persons who met me in person regarding my health issue and my inability to repay the loan. With this letter I am sending you a copy of email communications and register post letter sent to bank by me for you reference and action.

I am affected in health and couldn't do my profession as Doctor Anaesthesia as I was advised to stop my profession as doctor. So I couldn't repay my loan with the bank. As I have taken loan cover insurance I prefer to claim insurance to close the said bank loan account.

So I kindly request you to coordinate with the insurance company which has give loan cover insurance as per the company procedure; and sent me claim forms to submit, process insurance claim and there by close the said loan account though the insurance claim proceeds/amount.

So now I request you to fix and inform me another arbitration date which will give me an opportunity to present myself in front of you and produce you the supporting documents regarding my health condition.

I humbly request you on humanitarian grounds to stop all further proceeding and help me in this regards. '

19. A perusal of the same reveals that the first petitioner has stated that he does not dispute the loan being taken. In fact, he does not even dispute that he could not repay the loan fully. However, his ultimate plea to the sole Arbitrator was to stop all further proceedings.

20. In the light of the time frame being fixed for Arbitral proceedings itself now under the A & C Act, it is clearly impossible for the Sole Arbitrator/Arbitral Tribunal to stop the Arbitral proceedings. The sole Arbitrator held that it is not possible to accede to this request.

21. This is articulated in Paragraphs 1 and 2 of the impugned award. Relevant portion of Paragraph 1 reads as follows:

' 1..... Enough opportunity having been given to appear either in person or through counsel hence the request was denied. The hearing dates on which the case was taken up is as follows: 26.04.2018, 17.05.2018, 31.05.2018, 14.06.2018, 20.06.2018.'

22. Relevant portion of Paragraph 2 reads as follows:

'2. All the notices were sent to the last known addresses of the Respondents by Registered Letter Acknowledgement Due, which constitute sufficient service. Respondents failing to appear were called absent and set exparte and this tribunal decided to proceed further in his absence with the available evidence. As per Section 3 of the Arbitration & Conciliation Act, 1996 “ a written communication is deemed to have been received if it is sent to the addressee's last

known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it". Further as per Section 25(C) of the said Act, which reads as follows: " a party fails to appear at an oral hearing or to produce documentary evidence the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it".

23. Though incapacity plea has been raised, it is pitched with Section 34(2)(a)(iii) also as mentioned supra. A perusal of the petition under Section 34 reveals that there is no pleading whatsoever in the petition that notices from the Sole Arbitrator were not served on the petitioners.

24. In other words, there is no plea in the petition that the petitioners have not received the notices sent by the Sole Arbitrator. This puts an end to this plea.

25. The second plea that was projected before me is that the second petitioner is not a borrower and she has not signed the loan agreement.

26. A perusal of the loan agreement reveals that the second petitioner has been shown as a co-borrower. There is no explanation whatsoever as to what prevented the second petitioner from responding to the notices from the

sole Arbitrator, going before the Arbitral Tribunal and raising this plea.

27. Second petitioner was not in any incapacity as mentioned supra. There is no plea in the instant Section 34 petition that notices from the Arbitrator were not served on the petitioners. As mentioned supra, in the hearing, it came to light that second defendant is a Dental Surgeon (though this factum has not been set out in the petition).

28. The third point that was projected by the petitioners is covered in the answer to the plea that the second petitioner is not a co-borrower. The third point that was raised is with regard to an insurance policy which has been taken by the second petitioner. Mr.Velmurugan, learned counsel advertng to an Insurance Policy taken by the second petitioner, which provides for Insurance cover for terminal illness, submitted that the first respondent bank insists that the customers, who approach them for loan, should take such an insurance policy and therefore, this Insurance Policy was taken. Learned counsel also emphatically submitted that this Insurance Policy if at all ought to have been taken in the name of the first petitioner, who is the borrower and if it had been taken in the name of the first petitioner, it would have protected the first petitioner, as according to him he is terminally ill in the circumstances alluded to supra in this regard. If the second petitioner, who is

the spouse of the first petitioner and who is also a clinician (dental surgeon), had nothing to do with the loan transaction, there is no need whatsoever for the second petitioner to take such an insurance policy at the instance of the bank.

29. Be that as it may, there is nothing to show that she was under any incapacity, particularly when the aforesaid notices have been sent by the Arbitrator and when there is no plea in the petition that the notices from the Arbitrator were not received.

30. Furthering his submissions, learned counsel for petitioners pressed into service a judgment of the Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority** reported in (2015) 3 SCC 49. Learned counsel referred to Paragraphs 28 to 30 of the said judgment, which read as follows:

' 28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

"35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include

all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy

of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223; (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the

fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The Audi Alteram Partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34 (2) (a) (iii) of the Arbitration and Conciliation Act. These Sections read as follows:

"18. Equal treatment of parties.- The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

34. Application for setting aside arbitral award.- (1) * * *

(2) An arbitral award may be set aside by the Court only if -

(a) the party making the application furnishes proof that-

* * *

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'

31. Associate Builders case is an authority for the proposition that three

distinct and fundamental juristic principles which have been understood to be part and parcel of fundamental policy of Indian law as recognized in the **ONGC Ltd., V. Western Geco International Ltd.**, reported in **(2014) 9 SCC 263** stood further recognized. It also dealt with what the judicial approach should be. While there can be no two opinions about the well settled Associate Builder case principle, that does not help the petitioners in the instant case in the light of there being absolutely no plea that the notices from the Arbitrator / Arbitral Tribunal were not served on the petitioners.

32. As a final effort, as part of his persuasive advocacy, learned counsel pressed into service a judgment of Hon'ble Supreme Court in **Prakash Narain Sharma Vs. Burmah Shell Cooperative Housing Society Ltd.**, reported in **(2002) 7 SCC 46**. Prakash Narain Sharma case, in my considered opinion, is a case law, which is an authority for the principle that it will be a dangerous proposition to be laid down as one of law that any individual or authority can ignore an order of a civil Court by assuming authority upon itself to decide that the order of the civil Court is one by coram non judice. In other words, Prakash Narain case is an Authority for the principle that it is not for any other authority to hold that an order made by a civil Court is coram non-judice. However, learned counsel very fairly submitted that this judgment is being pressed into service only in an attempt to draw an analogy and say that the

Arbitrator should have given an opportunity.

33. In the light of the narrative supra, the Arbitral Tribunal could not at all have stopped the proceedings as sought for by the first petitioner in his letter dated 25.05.2018 as the Arbitrator himself has to adhere to strict time lines that have been drawn post amendment to A & C Act on and with effect from 23.10.2015. In other words, post amendment to A & C Act on or with effect from 23.10.2015, the moment the Arbitration commenced under Section 21 and moment Arbitrator/Arbitral Tribunal enters upon reference, the arbitration proceedings have to be concluded expeditiously and within a well laid down time frame, which has been adumbrated *inter alia* in Section 29-A of amended A & C Act.

34. Therefore, the sole Arbitrator, definitely could not have stopped the arbitral proceedings.

35. It was submitted by learned counsel for first respondent Bank that on a demurrer, even if the petitioners have participated in the arbitral proceedings before the Arbitral Tribunal, no serious grounds much less tenable grounds could have been raised.

36. In the light of the specific stand, particularly the letter dated

25.05.2018 written by the first petitioner to the Arbitrator, I am unable to disagree with this submission made by learned counsel for first respondent bank.

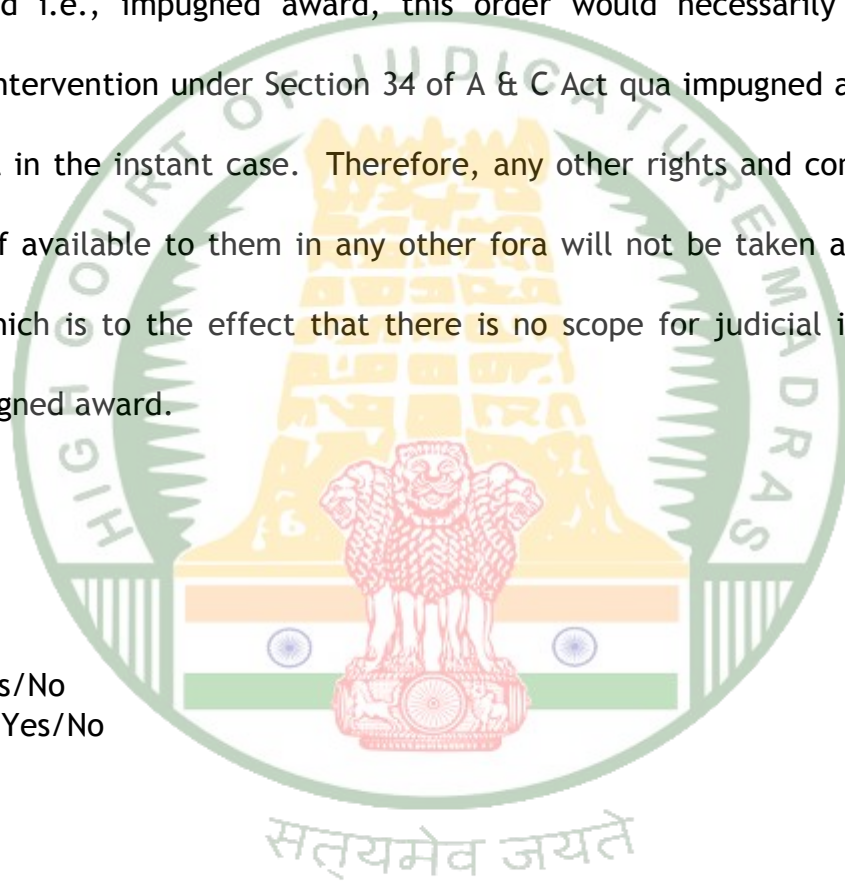
37. To be noted, there is a time frame even for petitions under Section 34, which has been adumbrated in sub-section (6) of Section 34 of A & C Act and the desirability of endeavouring to adhere to the same was emphasised by the Hon'ble Supreme Court in the ***State of Bihar & Ors. Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** and reiterated by Hon'ble Supreme Court in ***M/s.Emkay Global Financial Services Ltd., Vs. Girdhar Sondhi [2018 (10) Scale (15)]***, which were rendered on 30.07.2018 and 20.08.2018 respectively. It is also to be borne in mind that Hon'ble Supreme Court in ***Fiza Developers & Inter-Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.*** reported in ***(2009) 17 SCC 796*** held that petitions under Section 34 of A and C Act are one issue summary procedures being a special remedy under a special enactment. This was reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Limited Vs. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49***, by saying that ***Fiza Developers*** principle is a step in the right direction for expeditious disposal of such petitions.

38. Owing to all that have been set out supra, this petition under

Section 34 of A & C Act fails and the same is dismissed. Considering the nature of the matter, the parties are left to bear their respective costs in this petition. Though obvious, it is made clear that this being a petition under Section 34, which is not an appeal, revision or review and a mere challenge to the award i.e., impugned award, this order would necessarily mean that judicial intervention under Section 34 of A & C Act qua impugned award is not made out in the instant case. Therefore, any other rights and contentions of parties, if available to them in any other fora will not be taken away by this order, which is to the effect that there is no scope for judicial intervention qua impugned award.

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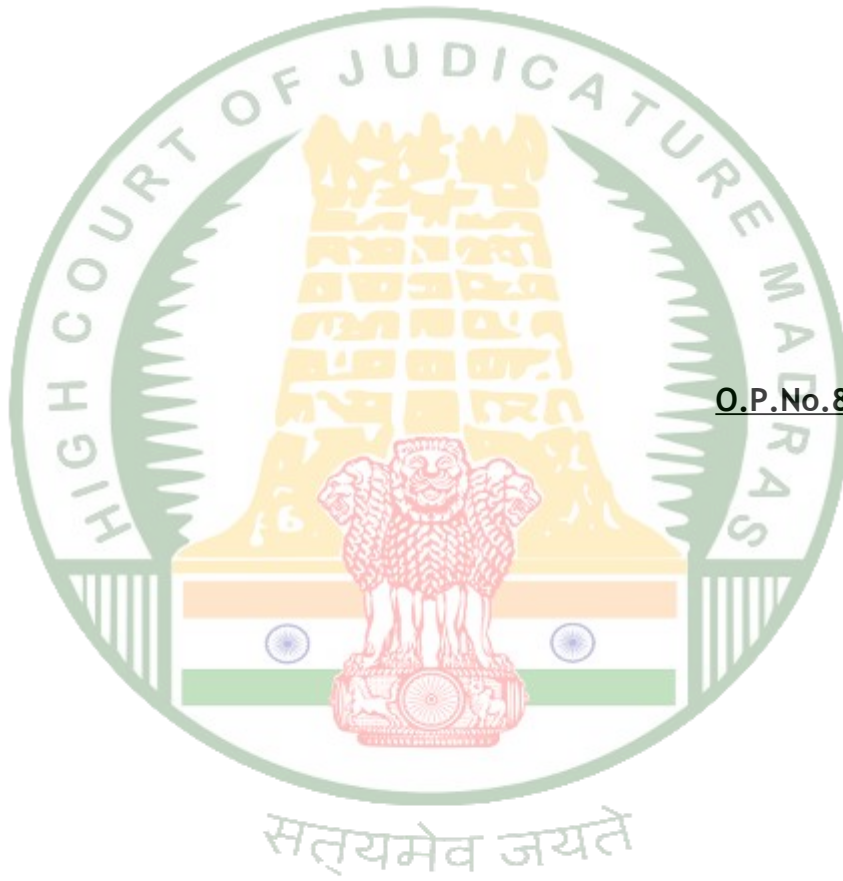
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O.P.No.852 of 2018

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