

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.01.2020

CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

W.P.NO.13001 OF 2004
AND WMP NO.15132 OF 2004

R.Sadasivan

... Petitioner

Vs.

Oil and Natural Gas Corporation Limited
Represented by its Head - Asset Manager
Karaikal Asset, Neravy Complex,
Karaikal - 609 604.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus, directing the respondent to regularise the services of the petitioner in the post of Stenographer Grade III with effect from 01.08.1984, grant the consequential promotions as well as grant the arrears of pay and other benefits.

For Petitioner : Mr.R.Yashod Vardhan
Senior Counsel for Mr.M.Muthupandian

For Respondent : Mr.P.N.Radhakrishnan

O R D E R

The petitioner was appointed as Site Supervisor in the category of NMR Casual Labour on daily wages on Rs.14/- with effect from 01.08.1983 and was attached to Civil Engineering Section of the Cauvery Project Construction Division. He was given continuous employment with artificial breaks. The petitioner has passed Foundation Course II Year which is equivalent to Higher Secondary Course and also acquired Typewriting and Shorthand both in English and Tamil. Therefore, he applied for permanent post of Stenographer Grade-III and Store Keeper Grade-III and it was returned by the respondents without consideration. Again, in November 1984, he had also applied for the post of Assistant Time Keeper, which was also not considered. He had completed 242 days as NMR Casual Labour between 01.08.1983 and 31.07.1984. On 05.02.1985, his services

were stopped. Hence, he filed a writ petition in W.P.No.10702 of 1985 and this Court, by its order dated 12.01.1993, has held that denial of employment from 05.02.1985 was in violation of Section 25-F of the Industrial Disputes Act, 1947, and directed reinstatement in service with all attendant benefits and perquisites. The SLP filed by the Management in SLP (Civil) No.11190/1994 was also dismissed by the Hon'ble Supreme Court on 19.09.1994. The petitioner was reinstated in service as NMR Casual Labour. The respondent has allotted Contributory Provident Number in favour of the petitioner with effect from 30.07.1998. However, he was not regularised in service. According to the petitioner, for the post of Stenographer Grade - III, the qualification prescribed by the respondent organisation was a pass in the Matriculation examination with knowledge of typewriting and shorthand preferably with a speed of 30 and 80 words per minute. Even though the petitioner was fully qualified to hold the said post, he was not regularised in service and his request was not considered by the respondent and hence, he preferred this writ petition for regularisation of his service in the post of Stenographer Grade - III with effect from 01.08.1984 and for consequential benefits.

2. Denying the claim of the petitioner, the respondent filed a detailed counter affidavit. It is contended that the writ petition is not maintainable as it hit by delay and laches. Since the petitioner has been engaged as NMR Casual Labour for over ten years, he is not entitled to seek for regularisation in the post of Stenographer. Appointment in ONGC has to be made only in accordance with the R & P Regulations and Rules of the ONGC and through employment exchange. Since the petitioner is not qualified to hold the post of Stenographer Grade-III and there is no sanctioned strength of vacancy for the said post, the claim of the petitioner cannot be entertained and the writ petition has to be dismissed.

3. The petitioner having accepted the judgment of this Court that restoration of his service with all attendant benefits and perquisites as are permissible in law, it does not mean to convey any permanency of tenure or benefit not otherwise permissible in law. Once the petitioner has accepted that he is not entitled to permanency in law, now that after a period of ten years, he cannot file a writ petition seeking regularisation of service. When there are alternative relief available to the petitioner, to get his right established without exhausting the statutory remedies, he cannot approach this Court directly for regularisation and on that count itself, the writ petition is liable to be dismissed. It is also stated that notifications were issued for appointment of Stenographer by Regional Office in the year 1993 and by the Cauvery Asset at Karaikal in the

year 1999, the petitioner did not apply for the same. Having failed to avail the regular process of appointment, his attempt to get regularisation by filing writ petition is not sustainable and he is not entitled to regularisation as he was a NMR on daily wages basis. He has no right to seek any post in the respondent organisation. Since the petitioner was not performing the duties of a Stenographer but was engaged only as daily wagger pursuant to the orders of the Courts, his claim to regularise in the post of Stenographer Grade - III is not at all maintainable.

4. I have heard the rival submissions.

5. The learned Senior Counsel appearing for the petitioner would contend that it is an admitted fact that the petitioner was engaged in the year 1983 and permitted to retire from service on 31.03.2015 on attaining the age of superannuation. He has put in more than 27 years of service. Even after the order passed by this Court directing his reinstatement, the respondent has not taken any steps to appoint any other Stenographer in the regular capacity but continued to engage the petitioner and exploit him till 2015 on casual basis.

6. The judgment of the Hon'ble Supreme Court in SECRETARY, STATE OF KARNATAKA AND OTHERS VS. UMADEVI AND OTHERS [2006 (4) SCC 1] clearly distinguishes between the illegal appointment and irregular appointment. In so far as the petitioner is concerned, it is not an illegal employment, but it can be called as an irregular employment. Irregular employment can be regularised, as the petitioner has put in 27 years of service. Even though it is stated that there were two selections in the year 1993 and 1999, there was no proof that somebody was appointed in the place of the petitioner in regular capacity. The petitioner continued to work as Stenographer till his retirement and therefore, he is entitled to regularisation.

7. The judgment of the Hon'ble Supreme Court in SECRETARY, STATE OF KARNATAKA AND OTHERS VS. UMADEVI AND OTHERS [2006 (4) SCC 1] had been clarified in the judgment in SHEO NARAIN NAGAR AND OTHERS VS. STATE OF UTTAR PRADESH AND ANOTHER [2018 (13) SCC 432] wherein it is observed as under:

"6. Learned counsel appearing on behalf of the respondent has relied upon paragraph 44 of the decision in Uma Devi (Supra), so as to contend that it was not the case of irregular appointment but of illegal appointment; there was no post available on which the services of the appellants could have been regularized and appointment were in contravention of the reservation policy also; thus, termination order was rightly issued and, in no case, the

appellants were entitled for regularization of their services.

7. When we consider the prevailing scenario, it is painful to note that the decision in Uma Devi (Supra) has not been properly understood and rather wrongly applied by various State Governments. We have called for the data in the instant case to ensure as to how many employees were working on contract basis or ad-hoc basis or daily-wage basis in different State departments. We can take judicial notice that widely aforesaid practice is being continued. Though this Court has emphasised that incumbents should be appointed on regular basis as per rules but new devise of making appointment on contract basis has been adopted, employment is offered on daily wage basis etc. in exploitative forms. This situation was not envisaged by Uma Devi (supra). The prime intendment of the decision was that the employment process should be by fair means and not by back door entry and in the available pay scale. That spirit of the Uma Devi (supra) has been ignored and conveniently over looked by various State Governments/ authorities. We regretfully make the observation that Uma Devi (supra) has not be implemented in its true spirit and has not been followed in its pith and substance. It is being used only as a tool for not regularizing the services of incumbents. They are being continued in service without payment of due salary for which they are entitled on the basis of Article 14, 16 read with Article 34 (1)(d) of the Constitution of India as if they have no constitutional protection as envisaged in D.S. Nakara v. Union of India, AIR 1983 SC 130 from cradle to grave. In heydays of life they are serving on exploitative terms with no guarantee of livelihood to be continued and in old age they are going to be destituted, there being no provision for pension, retiral benefits etc. There is clear contravention of constitutional provisions and aspiration of down trodden class. They do have equal rights and to make them equals they require protection and cannot be dealt with arbitrarily. The kind of treatment meted out is not only bad but equally unconstitutional and is denial of rights. We have to strike a balance to really implement the

ideology of Uma Devi (supra). Thus, the time has come to stop the situation where Uma Devi (supra) can be permitted to be flouted, whereas, this Court has interdicted such employment way back in the year 2006. The employment cannot be on exploitative terms, whereas Uma Devi (supra) laid down that there should not be back door entry and every post should be filled by regular employment, but a new device has been adopted for making appointment on payment of paltry system on contract/adhoc basis or otherwise. This kind of action is not permissible, when we consider the pith and substance of true spirit in Uma Devi (supra).

8. Coming to the facts of the instant case, there was a direction issued way back in the year 1999, to consider the regularization of the appellants. However, regularization was not done. The respondents chose to give minimum of the pay scale, which was available to the regular employees, way back in the year 2000 and by passing an order, the appellants were also conferred temporary status in the year 2006, with retrospective effect on 2.10.2002. As the respondents have themselves chosen to confer a temporary status to the employees, as such there was requirement at work and posts were also available at the particular point of time when order was passed. Thus, the submission raised by learned counsel for the respondent that posts were not available, is belied by their own action. Obviously, the order was passed considering the long period of services rendered by the appellants, which were taken on exploitative terms.

9. The High Court dismissed the writ application relying on the decision in Uma Devi (supra). But the appellants were employed basically in the year 1993; they had rendered service for three years, when they were offered the service on contract basis; it was not the case of back door entry; and there were no Rules in place for offering such kind of appointment. Thus, the appointment could not be said to be illegal and in contravention of Rules, as there were no such Rules available at the relevant

point of time, when their temporary status was conferred w.e.f. 2.10.2002. The appellants were required to be appointed on regular basis as a one-time measure, as laid down in paragraph 53 of Uma Devi (supra). Since the appellants had completed 10 years of service and temporary status had been given by the respondents with retrospective effect in the 2.10.2002, we direct that the services of the appellants be regularized from the said date i.e. 2.10.2002, consequential benefits and the arrears of pay also to be paid to the appellants within a period of three months from today. "

8. It is also further clarified by the Hon'ble Supreme Court that the daily wages employees are entitled to minimum regular pay scales on account of their performing the same duties, which are discharged by those engaged on regular basis against the sanctioned post.

9. The Hon'ble Supreme Court SABHA SHANKER DUBE VS. DIVISIONAL FOREST OFFICER AND OTHERS [2019 (12) SCC 297] has observed as under:

"10. On a comprehensive consideration of the entire law on the subject of parity of pay scales on the principle of equal pay for equal work, this Court in Jagjit Singh (supra) held as follows:

" 58. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work cannot be paid less than another who performs the same duties and responsibilities. Certainly not, in a welfare State. Such an action besides being demeaning, strikes at the very foundation of human dignity. Anyone, who is compelled to work at a lesser wage does not do so voluntarily. He does so to provide food and shelter to his family, at the cost of his self-respect and dignity, at the cost of his self-worth, and at the cost of his integrity. For he knows that his dependants would suffer immensely, if he does not accept the lesser wage. Any act of paying less wages as compared to others similarly situate

constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation."

11. The issue that was considered by this Court in Jagjit Singh (supra) is whether temporary employees (daily wage employees, ad hoc appointees, employees appointed on casual basis, contractual employees and likewise) are entitled to the minimum of the regular pay scales on account of their performing the same duties which are discharged by those engaged on regular basis against the sanctioned posts. After considering several judgments including the judgments of this Court in Tilak Raj (supra) and Surjit Singh (supra), this Court held that temporary employees are entitled to draw wages at the minimum of the pay scales which are applicable to the regular employees holding the same post.

12. In view of the judgment in Jagjit Singh (supra), we are unable to uphold the view of the High Court that the Appellants-herein are not entitled to be paid the minimum of the pay sales. We are not called upon to adjudicate on the rights of the Appellants relating to the regularization of their services. We are concerned only with the principle laid down by this Court initially in Putti Lal (supra) relating to persons who are similarly situated to the Appellants and later affirmed in Jagjit Singh (supra) that temporary employees are entitled to minimum of the pay scales as long as they continue in service. "

10. The learned Senior Counsel for the petitioner would further contend that the petitioner, even after interference by this Court, was continued to be in employment, till he attain the age of superannuation. The respondent, who engaged the petitioner for a considerable period, cannot now turn around and say that he is not entitled to regularisation. The illegality of his employment and the illegal termination in contravention of labour welfare statute has been clearly set off

by the judgments of this Court as well as the Hon'ble Supreme Court. In such circumstances, the claim for regularisation of the petitioner cannot be denied.

11. The learned Senior Counsel for the petitioner would rely on a judgment of this Court in HINDUSTAN PETROLEUM CORPORATION LTD., VS. PRESIDING OFFICER, CENTRAL GOVERNMENT LABOUR COURT CUM INDUSTRIAL TRIBUNAL [2009 (1) LLJ 425 (MAD)] wherein it is observed as under:

"25. He also placed reliance upon the Constitution Bench judgment of the Supreme Court in Secretary, State of Karnataka v. Uma Devi (3) reported in 2006 (4) SCC 1 to reiterate the very same point. It must be noted that even in Uma Devi (3)'s case (cited supra), the Supreme Court in paragraph 45, had observed as follows:-

Para 45: "..... A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term...."

Therefore, it is not as if the Uma Devi (3)'s case (cited supra) has prohibited employment of workmen in contract or temporary and it only states that while making regularisation, proper norms will have to be followed consistent with Articles 14 and 16 of the Constitution.

....

33. Therefore, the present issue will have to be decided in the light of the parameters indicated by the latest decision of the Supreme Court in O.N.G.C. Case (cited supra) which had taken note of all the contentions raised by the learned Advocate General. The sum and substance of the decisions are that if it is established that the workmen were employed directly by HPCL, even on temporary basis, they are eligible for regularisation provided it is shown that they have not come through any back door. One such back door entry as indicated in the decisions of the Supreme Court in Uma Rani and Uma Devi (3)'s cases (cited supra) is not getting the names sponsored through the Employment Exchange.

34. Admittedly, the workmen were all either sweepers or scavengers or cleaners. Under Section 3 of the the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, any employment to do unskilled office work has been exempted from the purview of the said Act. It is also not shown that the workmen were not appointed by the appropriate authority.

35. A Division Bench of this Court in School Committee, Tilak Vidyalaya Higher Secondary School, Kallakurichi v. District Educational Officer, Tirunelveli [1991 TLNJ 1] has held that an Office Helper need not come through the Employment Exchange and his appointment cannot be considered to be in violation of the 1959 Act.

....
39. Therefore, the only point that will have to be decided in the present case is whether the findings of the CGIT in recording that the so-called contracts under which the workmen were engaged, were 'sham and nominal'. If the answer to the question is in the affirmative, then the workmen can have the benefit of the Award impugned in the writ petition.

40. As already stated, before the CGIT, a wealth of documents were filed by the workmen and oral evidence was also let in even by one of the so-called contractor, viz., the 10th respondent P.S. Irudayaraj, who had deposed that there was no contract between him and the HPCL and that he himself was rendering physical service to the HPCL. With regard to the other finding that the contract between the so-called

contractors and the HPCL was only sham and nominal, the CGIT has held that the workmen in Bombay and Vishakapattinam who were doing similar work in the HPCL, were absorbed in those areas. As found in the ONGC, Shilchar case, this is a violation of Article 14 of the Constitution by the HPCL.

41. In the present case, the workmen have been working from 1989 till 1998 without any break and they were not under the control of the so-called contractors. The HPCL was directly supervising their work. It also held that the work was perennial since for any establishment, the up-keep of the establishment is important even though under law, there was no requirement of holding any licence for a contractor, who supplies labour. In the present case, the issue is slightly different wherein the workmen were directly engaged by the HPCL, who supervised the work and controlled all their activities.

50. In the light of the above materials, the finding of fact rendered by the CGIT regarding the contract between the workmen and the HPCL being sham and nominal, the impugned Award is fully in consonance with the legal precedents referred to above. Further, the Tribunal, conscious of its power, had limited the backwages at 50% to be paid to the workmen.

51. But while ordering the regularisation only from the date of retrenchment, the CGIT did not keep in mind the relevant legal provisions, viz., the effect of the Tamil Nadu Act 46 of 1981, which guarantees permanency if a workman completes 480 days' of service within a period of 24 calendar months. Pending the adjudication of the regularisation issue, the HPCL could not have dispensed with the service of the workmen without getting prior approval from the CGIT under Section 33(2)(b) of the I.D. Act. Such violation by the HPCL will clearly make their non-employment void ab initio and the position of law in this regard has been well-settled by a Constitution Bench judgment of the Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and others [2002 (2) SCC 244]. In that case, the Supreme Court has held in paragraph 14 that the workman need not

challenge such a dispensation from service with any independent proceedings.

52. Therefore, the payment of salary for four months from 25.3.2004, viz., the date of receipt of the order of the Division Bench, cannot help the case of the HPCL. The Division Bench itself had stated that in the event of the workmen succeeding, the HPCL should abide by the Award. As held in the Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. case (cited supra), any termination pending the adjudication without approval under Section 33(2)(b) of the I.D. Act will become void ab initio. Therefore, the CGIT was wrong in directing regularisation only from the date of the retrenchment, viz., July 2004, and it should be in accordance with the mandate of Tamil Nadu Act 46 of 1981, which is applicable to HPCL."

12. The learned Senior Counsel also relied on a judgment of the Hon'ble Supreme Court in G.M. O.N.G.C., SHILCHAR VS. O.N.G.C. CONTRACTUAL WORKERS UNION [2008 (II) LLJ 1071 (SC)] wherein the Tribunal directed regularisation of employees of the respondent Corporation under Contract Labour (Regularisation and Abolition) Act, 1970. Therefore, it is not new that regularisation of Casual Labourers have been done in the respondent Corporation. Hence, the writ petitioner should be regularised in service with effect from 1984. Since, he hold the post of Stenographer, he sought regularisation as Stenographer or an equivalent cadre of Junior Assistant and monetary and attendant benefits to be paid.

13. Per contra, the learned counsel appearing for the respondent would reiterate the stand taken by the respondent in the counter affidavit and submit that the petitioner is not qualified to hold the post of Stenographer Grade-III where the requirement of typewriting and shorthand is 45 - 120 words per minute, whereas the petitioner is qualified to type only 30 -80 words per minute and that is why he is an unqualified person and his engagement cannot be termed as legal.

14. The learned counsel appearing for the respondent would rely on the judgment of the Hon'ble Supreme Court in SECRETARY, STATE OF KARNATAKA AND OTHERS VS. UMADEVI AND OTHERS [2006 (4) SCC 1] wherein it is held as under:

"Merely because a temporary employee or a casual worker is continued for a time beyond the terms of his appointment, he would not entitled to be absorbed in regular service or made permanent, merely on the strength of such

continuance, if the original appointment was not made following due process of selection as envisaged by the relevant rules."

15. The learned counsel for the respondent also relied on a judgment of the Hon'ble Supreme Court in MAHBOOB DEEPAK VS. NAGAR PANCHAYAT, GAJRAULA AND ANOTHER [2008 (1) SCC 575] wherein it is observed as under:

"8. Respondent is a Local Authority. The terms and conditions of employment of the employees are governed by a statute and statutory rules. No appointment can be made by a Local Authority without following the provisions of the recruitment rules. Any appointment made in violation of the said rules as also the constitutional scheme of equality as contained in Articles 14 and 16 of the Constitution of India would be a nullity.

9. Due to some exigency of work, although recruitment on daily wages or on an ad hoc basis was permissible, but by reason thereof an employee cannot claim any right to be permanently absorbed in service or made permanent in absence of any statute or statutory rules. Merely because an employee has completed 240 days of work in a year preceding the date of retrenchment, the same would not mean that his services were liable to be regularized."

16. He would also rely on a judgment of the Hon'ble Supreme Court in STATE OF MADHYA PRADESH AND OTHERS VS. YOGESH CHANDRA DUBEY AND OTHERS [2006 (4) MLJ 932 (SC)] wherein it is held as under:

"10..... Appointments to the posts must be made in terms of the existing rules. Regularisation is not a mode of appointment. If any recruitment is made by way of regularisation, the same would mean a back-door appointment, which does not have any legal sanction."

17. Admittedly, in the present case on hand, the petitioner was in continuous employment between 1983 and 2015, in spite of interference by this Court. Even as per the judgment in UMADEVI's case (cited supra) the people, who were in service for over ten years, are entitled to be regularised. It is declared therein that in future employments, Articles 14 and 16

should be strictly followed. In the present case, even before and after UMADEVI's case (cited supra) the petitioner was in employment for more than two decades. If at all the petitioner wanted to appoint him in regular capacity, the respondent should have conducted a proper recruitment process and ousted the petitioner from service. That is not that case in so far as this writ petition is concerned. Here, the petitioner was permitted to continue till he attained the age of superannuation. Even assuming that he was not performing the duties of Stenographer, it is very clear that he was in the employment of the respondent for more than two decades. As per the modified Recruitment and Promotion Regulations of the respondent, for the post of Junior Assistant, the qualification is Graduate with typing speed of 30 words per minute and shorthand at 80 words per minute along with the certificate or diploma in Computer Application for a minimum duration of six months in the office environment. There are other posts having qualification of matriculation. The respondent could have regularised the petitioner in any one of those posts or if they do not want his service, they should have ousted him from service in accordance with law. Having continued in service for the past 27 years, now, at this juncture, the respondent cannot take a stand that he is not entitled for regularisation, which will amount to unfair labour practice.

18. In such circumstances, this Court is inclined to grant the prayer as sought for by the petitioner. Accordingly, the respondent is directed to regularise the services of the petitioner in the post of Stenographer Grade - III with effect from 01.08.1984 and disburse all monetary and attendant benefits. This exercise shall be completed within a period of eight weeks from the date of receipt of a copy of this order.

19. The writ petition is disposed of with the above observation and direction. No costs. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar

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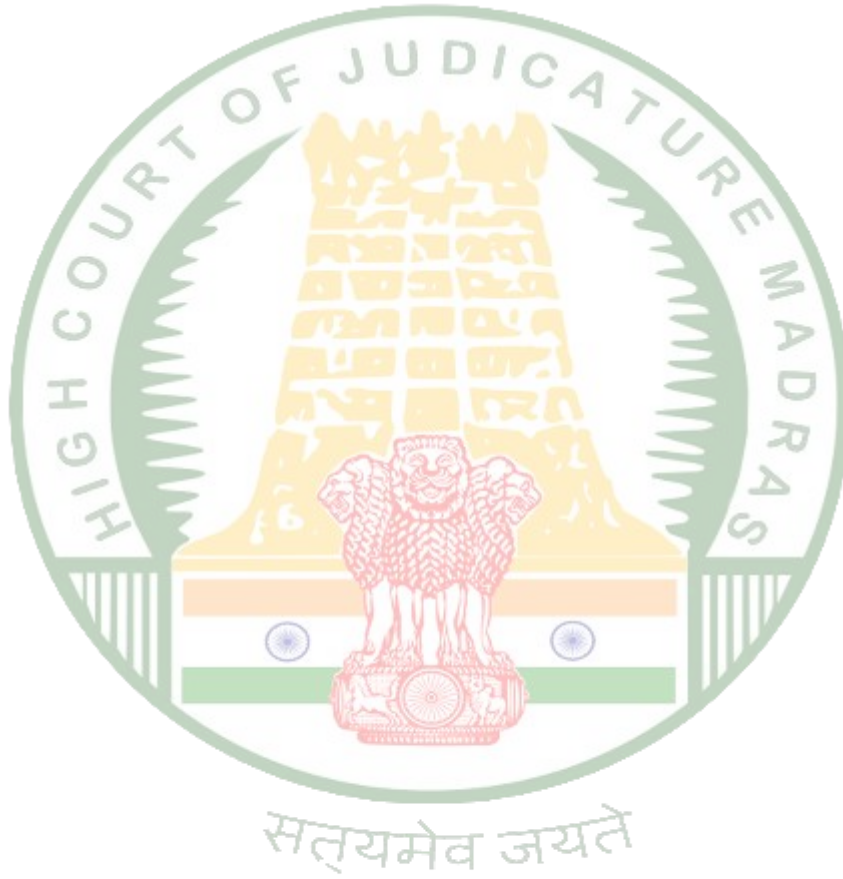
To

The Head - Asset Manager
Oil and Natural Gas Corporation Limited
Karaikal Asset, Neravy Complex,
Karaikal - 609 604.

+1cc to Mr.M.Muthupandian, Advocate SR.No.10165

W.P.NO.13001 OF 2004

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