

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED: 06.01.2020

CORAM

**THE HONOURABLE Ms. JUSTICE P.T. ASHA**

**O.P.No.549 of 2019**

**&**

**A.No.4849 of 2019**

M/s.Resurgent Power Projects Limited  
(formerly M/s.Enmas GB Power  
Systems Projects Limited,  
at IV Floor, Guna Building Main,  
No.443, Anna Salai,  
Teynampet, Chennai - 600 018).

Presently having office at  
Old No.484 - 485, New No.28-30, 2nd Floor  
Pantheon Plaza, Pantheon Road,  
Egmore,  
Chennai - 600 008

Rep. by its Director  
Mr.N.K.Gopinath

... Petitioner

Vs

M/s.ABB India Limited,  
Rep. by its Authorized Signatory  
Shri.Rahul Agarwal,  
Office at 21st Floor, World Trade Centre,  
Brigade Gateway,  
26/1, Dr.Rajkumar Road,  
Malleshwaram West,  
Bengaluru - 560 055

... Respondents

**Prayer:** Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 23.10.2017 passed by the learned sole Arbitrator.

For Petitioner : Mr.Umasudan  
for Mr.T.R.Sundaram

For Respondent : Mr.P.J.Rishikesh

**ORDER**

The respondent in the Claim Petition is the petitioner in the above petition filed under Section 34 of the Arbitration and Conciliation Act, 1996,(hereinafter called the Act) challenging the award passed by the sole arbitrator in A.F.No.93 of 2015 dated 23.10.2017. It is necessary to briefly allude to the facts preceeding the passing of the award in order to morefully appreciate the grounds on which the respondent before the arbitral tribunal seeks to challenge the award dated 23.10.2017.

A preliminary objection has been raised by the Claimant that the petition under Sec.34 is barred by limitation.

2. The parties are referred to in the same array as before the arbitral tribunal. The claimant who is a leading global name in power and automation technologies had entered into an agreement with the respondent who is in the field of Design, Engineering, Procurement, Supply, Erection and commissioning of Thermal Power projects, Turnkey execution of Boiler, Turbine island and balance of plants to various customers in India and abroad. The respondent was awarded with the project of Design, Supply, Erection, Testing and commissioning of EBOP package for a 1X40 MW CPP by M/s.ISMT, Pune (end customer) and the respondent in turn had awarded work to the claimant vide their Letter Of Intent, herein after referred to as LOI, dated 27.04.2009 which has been followed by Supply Contract dated 01.07.2009 between the claimant and the respondent.

3. The contract price which was fixed at a sum of Rs.10,60,00,000/- under the LOI was later reduced to a sum of Rs.10,18,35,000/- under the Supply Contract. The parties had also agreed that all disputes amongst them would be resolved through arbitration. The agreement further fixed the commencement date as 27.04.2009 and supplies were to be completed within a period of 12 months from the date of LOI and synchronizing of the plant was to be done within 16 months from the date of LOI. The claimant would submit that they had expended considerable time, energy and money towards the fulfilment of their obligations whereafter they had come across several hurdles and none of these could be attributable to the claimant.

4. The claimant would further submit that the respondent had failed to fulfil the obligations cast upon them under the agreement like providing the EPCG license, issuance of HT load list etc. The claimant was therefore constrained to seek an

extension in the month of November 2011. The claimant had also completed the project and handed over the works in line with the requirements as stipulated in the LOI. The respondent in turn handed over the plant to the end customer, M/s ISMT, Pune, who had started functioning full load. The respondent had also issued a commissioning certificate dated 09.10.2012. Since the respondent was highly irregular in making payments there was huge outstanding of Rs.2,64,95,645/-, in addition to a sum of Rs.14,045,342.99/- towards sales tax dues.

5. The claimant had sent an e-mail dated 11.02.2013 claiming the above sum as also a sum of Rs.1,21,34,285/- on account of the additional scope of work, idle charges etc. The claimant was also entitled to get back the retention amounts due against each invoices. The respondent had submitted a reply dated 12.02.2013 inter alia admitting that there was a delay in making the payments but, had for the first time, raised the issue regarding the non supply by the claimant and for the first time

refused to accept the extra claims raised by the claimant. There was a series of exchange of letters between the respondent and the claimant. Though the respondent did not deny the performance and completion of the project by the Claimant, however, they did not acknowledge the quantum of their liability or release the payment, instead had issued debit notes for the delay.

6. The claimant would submit that despite exchange of letters, as the Respondent had not come forward to make payments they had issued a legal notice dated 26.07.2014. Since there was no positive response from the respondent, the claimant had come forward with an application for appointment of the arbitrator as per the terms of the Supply Contract by filing an application under Sec.11 of the Act in O.P.No.699 of 2014 before this court and by an order dated 23.04.2015 the Sole Arbitrator was appointed. The claimant has made four claims which are summarised herein below:

a) Outstanding dues for the work done to the tune of Rs.2,64,95,645/- along with compound interest at 18% pendent lite and future payment till realization on all sums.

b) To furnish TDS certificates and C forms for an amount of Rs.80,731/- and Rs.1,40,45,342.99/- respectively along with compound interest at 18% per annum plus applicable penalty for non-issuance of TDS certificates and C forms along with applicable interest and penalty.

c) Claim towards additional supply and erection services of Rs.64,94,082/- referred to in claimant's letter dated 13.08.2013 and interest presently amounting to sum of Rs.1,58,66,648.80."

Besides the above claim, the claimant had also demanded additional cost towards arbitration legal fees, travel costs etc.

7. The respondent had filed their counter, wherein, they

would submit that the claimant had not adhered to the schedule for delivery as given in the agreement and had consequently pushed back the entire project considerably. The respondent would further attribute the delay in releasing the payments to the delay in payments by the end customer. The respondent would further dispute the claim made by the claimant and would contend that the amounts were kept unpaid on account of the fact that the handing over of the plant to the end user was delayed. According to them only a sum of Rs.33,66,130/- was due and payable to the Claimant. The respondent would submit that the C Forms had already been despatched by them. The completion certificate, according to the respondent, was issued by the claimant though the work had not been completed by the Claimant. The respondent would submit that in view of the delay caused by the Claimant in executing the project the Respondent had suffered huge losses under the heads of short supply, sub-standard supply, interest on Project Finance and loss on profit on the total investment. Therefore, they contended that there was

no amounts payable by them to the Claimant, on the contrary it was the Claimant who had to compensate the Respondent for the above losses. This stand was once again reiterated in the meeting held between the Claimant and the Respondent. In the replies sent by the respondent the same has been explained in detail. The respondent would further submit that they have been put to great hardship on account of the delay by the claimant. The Respondent had therefore raised a counter claim for a sum of Rs.3,78,00,000/-.

8. The claimant has filed a rejoinder denying the averments contained in the statement of defense/counter.

9. The sole arbitrator had framed the following issues:

*"i) Whether the claimant completed the work in terms of contract and handed over the possession of CPP to the respondent?*

*ii) Is the claimant entitled to the amount alleged*

*to be outstanding being sum of Rs.2,64,95,645/- with interest?*

*iii) Have not the respondent furnished TDS certificate for a sum of Rs.80,731/- and C forms for a sum of Rs.1,40,45,342.99 as demanded by the claimant? And if not whether the liable to pay said sum with interest at 18% per annum with applicable penalty for non issuance?*

*iv) Have the claimant proved additional supply and erection services for sum of Rs.64,94,082/- with interest?*

*v) Is not claimant liable to pay liquidated damages for delay in completion, short supply and sub-standard quality of supply?*

*vi) Is claimant liable to pay interest on project finance of Rs.8.11 Crores?*

*vii) Is not the claimant liable to pay loss of profit on total investment of the respondent?*

*viii) Whether the claimant is entitled for counter claim as prayed for?*

*ix) To what other reliefs are parties entitled to?"*

Each of these issues have been dealt in great detail and depth by the Tribunal.

10. The Sole Arbitrator vide his award dated 23.10.2017, had granted the Claimant only the retention amount of Rs.2,10,98,917/-. From out of this amount the sum of Rs.64,81,751/- due to the respondent towards liquidated damages and the cost of non supply of items was to be adjusted and the respondent was directed to pay the claimant a sum of Rs.1,46,17,161/- together with interest at 9 % per annum from the date of award till date of payment.

11. Aggrieved by the award the respondent has come forward with the above petition under Section 34 of the Arbitration and Conciliation Act.

12. The claimant had not challenged the award and had agreed to submit themselves to the said award.

13. A Preliminary objection had been raised with reference to the delay since the appeal had been filed nearly one and a half years after the award was pronounced. The award was pronounced on 23.10.2017 and the Original Petition under Section 34 has been filed by the respondent only on 14.02.2019. The respondent had contended that they had received the order copy from the arbitrator only under cover of his letter dated 17.11.2018 and therefore the petition filed by them was well within time. The Original Petition was directed to be numbered and the issue of limitation was kept open.

14. Mr.Umasudan, learned counsel for the respondent would make the following submissions regarding the contention of the Claimant that the petition filed by the Respondent challenging the

Award is barred by limitation. He would submit that under Section 31 (5) of the act, the arbitral tribunal should deliver the signed copy to each party and if the procedure contemplated under Section 31 (5) is not complied with it would not amount to the award being received by the party. In support of the arguments he would rely upon the following Judgements:

- i) **Union of India Vs. Tecco Trichy Engineers and Contractors** reported in **(2005) 4 SCC 239.**
- ii) **State of Maharashtra and others Vs. ARK Builders Private Limited** reported in **(2011) 4 SCC 616.**
- iii) **Benarsi Krishna Committee and others Vs. Karmyogi Shelters Pvt. Ltd** reported in **2012 (9) SCC 496.**
- iv) **Sukanya Priya Vs. Reliance Capital Ltd** reported in **2018 (4) CTC 747.**

He would strongly rely upon the Judgement reported in **2012 (9) SCC 496,** hereinafter referred to as **Benarsi Krishna's case.,** in support of his argument that the petition filed by the Respondent challenging the Award is well within time.

15. The counsel would submit that the Honourable Supreme Court in this Judgement has observed that if the signed copy of the award is not directly delivered to the party then such a delivery would not be in compliance with the provisions of Section 31 (5) of the Act and therefore limitation would start running only from the date the signed copy is delivered to the parties concerned. The counsel would therefore contend that in the instant case there is nothing to show that the award had been delivered to the respondent and that despite receipt of the award the respondent had omitted to file the Section 34 petition. On the contrary, the letter from sole arbitrator dated 17.11.2018 would clearly indicate that the copy of the order was obtained only on 17.11.2018 and immediately within the three months period provided under Section 34 (3) of the Act the petition came to be filed. He would therefore contend that the petition is very much in time.

16. The next argument advanced by the counsel on behalf of the respondent is that the arbitral Tribunal after having observed that the claimant had caused the delay in the execution of the project, ought to have rejected their claim in toto and allowed the counter claim made by the respondent which is the natural follow up on account of the delay on the part of the claimant. He would therefore contend that the award in question suffers from perversity since the learned arbitrator had not taken into consideration the terms of the agreement entered into between the parties which, according to him, would also amount to a patent illegality warranting interference of this Court under Section 34 of the Act.

17. Per contra, Mr.P.J.Rishikesh, learned counsel for the claimant/respondent would contend that the application for setting aside the arbitral award has been filed with an inordinate delay and considering the language of Section 34 (3) along with its proviso, the petition deserves to be dismissed in limine. As

regards the merits, he would submit that the arbitral tribunal has taken into consideration the fact that the respondent has also contributed to the delay and has compensated them by awarding liquidated damages for the delay as well as the cost for the items not supplied.

18. He would further argue that the Tribunal has rightly come to the conclusion that the claimant was entitled to the retention money and it is only retention money that has been awarded to the claimant. The liquidated damages and the cost for non supply of items that has been awarded to the Respondent was to be deducted from this amount. He would submit that the arbitrator has taken into consideration not only the terms of the agreement but also the evidence put forward by both the parties and has passed a well-considered award. Therefore, the award does not suffer from perversity or from a patent illegality and therefore the same cannot be set aside.

19. Heard the counsel on both sides and perused the documents.

20. The points for consideration in this petition are:

a) Whether the challenge to the award has been made beyond the period contemplated under Section 34 (3) read with its proviso?

b) Whether the Arbitration Tribunal was right in rejecting the counter claim filed by the respondent despite holding that the claimant was guilty of delay?

21. Before delving into the issue of limitation, it is necessary to first chronicle the dates and events from the date of the passing of the Award upto the filing of the Petition under Sec.34 of the Act.

| <i>Dates</i>      | <i>Events</i>                                                                                                                                                                                                                                                     |
|-------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>23.10.2017</b> | The Award pronounced by the Arbitral Tribunal.                                                                                                                                                                                                                    |
| <b>24.10.2017</b> | Original awards handed over to the respective counsels who have endorsed their signatures.                                                                                                                                                                        |
| <b>01.05.2018</b> | The claimant issued a demand notice under the Insolvency and Bankruptcy code, 2016. The claimant enclosed a copy of the arbitral tribunal along with the notice.                                                                                                  |
| <b>17.05.2018</b> | The respondent acknowledges receipt of the notice and contends that though they have a case for an appeal, however, they wish to settle the matter by paying Rs.5,00,000/- per month from June 2018 with interest at 9% per annum till amount is fully satisfied. |
| <b>28.05.2018</b> | The claimant responds that they are happy that the respondent is willing to settle                                                                                                                                                                                |

| <i>Dates</i>      | <i>Events</i>                                                                                                                                                                                                                         |
|-------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                   | the issue after perusing the award. However the claimant had submitted that they were not willing to accept the payment schedule put forward by the respondent and contended that the balance should be paid on or before 30.09.2018. |
| <b>20.06.2018</b> | The respondent acknowledges the above correspondence and agrees to settle the amount by 30.09.2018. However, the assurance was observed in the breach.                                                                                |
| <b>29.10.2018</b> | The claimant moves the NCLT                                                                                                                                                                                                           |
| <b>14.02.2019</b> | The respondent filed the present petition O.P.No.549 of 2019.                                                                                                                                                                         |
| <b>March 2019</b> | Written proposal for settlement given by the respondent to pay the sum of Rs.1,52,74,938/- in twenty equated monthly                                                                                                                  |

| <i>Dates</i>      | <i>Events</i>                                                                                                                                                                 |
|-------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                   | instalments of Rs.7,63,746/- commencing from 25.04.2019. The respondent had also filed his objections regarding the maintainability of the application moved before the NCLT. |
| <b>09.04.2019</b> | The claimant gives the counter proposal                                                                                                                                       |
| <b>01.07.2019</b> | Notice of the filing of the present Original Petition is served on the Claimant by the respondent.                                                                            |

22. In order to arrive at a conclusion regarding the issue of limitation it is necessary to first analyse the provisions of Sec. 31(5) and Sec.34 (3) read with the proviso to this section of the Act. They are hereinbelow reproduced:  
Section 31 (5) of the act would read as follows:

*"31. (5) After the arbitral award is made, a signed copy*

*shall be delivered to each party."*

Section 34 (3) of the act would read as follows:

*"34. (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*

*Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*

23. From the above narration it is clearly evident that a copy of the award has come into the possession of the Respondent on 09.05.2018 when the Respondent acknowledges the demand notice dated 01.05.2018 sent by the Claimant under the Insolvency and Bankruptcy Code, 2016. In the letter dated 17.05.2015 the Respondent after acknowledging receipt of the letter

dated 01.05.2018 has undertaken to repay the money in equated monthly instalments. Therefore, having come into the possession of a copy of the award on 17.05.2018, the respondent ought to have filed the petition under Section 34 of the Act on or before 16.09.2018. However, the petition has been filed only on 14.02.2019 much beyond the period of limitation.

24. The counsel for the Respondent would contend that even according to the records, the award had been given only to the counsel for the respondent and not to the respondent himself which is not the mode of the delivery contemplated under Section 31 (5) of the act. He would submit that it was only on 17.11.2018 that the arbitrator had handed over the arbitral award to the respondent. Therefore, it was only from 17.11.2018, that limitation has to be calculated and if so done the petition filed on 14.02.2019 is well within the period of limitation.

25. In the Benarasi Krishan's case the Arbitral Tribunal had handed over the duly signed award to the counsel on 13.05.2004. The Petition to set aside the award was filed on 03.02.2005 after the party received the award copy on 15.12.2004. There is nothing to show in the judgement that the counsel for the Petitioner in that case had handed over the copy of the award to the Petitioner nor was there any material to show the the Petitioner therein had knowledge of the passing of the award prior to 15.12.2004.

26. In TECCO Trichy, the Hon'ble Supreme Court has held that in a huge organisation like the Railways the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the award and take a decision in the matter of moving an application either under sub-section 1 or 5 of Sec.33 or under Sec.34(1) of the Act. The copy of the award in this case had been delivered to the General Manager's office on

12.03.2001 and the Hon'ble Supreme Court held that the General Manager is not the person who is directly connected with or involved in the proceedings and therefore delivery of the Arbitral Award on him would not be in compliance of the requirement under Sec.31(5) of the Act. The delay in filing the petition under Sec.34(1) of the Act was therefore condoned. Even in the above case there is nothing to show that the department head, viz; the Chief Engineer had knowledge about the award prior to 19.03.2001 when he had received the copy of the award from the Tribunal. The petition under Sec.34 was filed on 10.07.2001.

27. The case of ARK Builders Pvt Ltd was a case where the Arbitrator had not provided a copy of the award dated 20.03.2003 to the Appellant Board and copy of the award was given to them by the Claimant on 29.03.2003 and thereafter a proposal to challenge the award was submitted. The Appellant had sent a messenger on 17.01.2004 after a decision to challenge was taken and the Arbitrator had handed over the

same to the messenger on 19.01.2004 and the petition was filed on 28.01.2004. The Hon'ble Supreme Court relying on the judgement of TECCO Trichy held that Sec.31 (5) of the Act contemplated the delivery of the copy of the award duly signed by the members of the Arbitral Tribunal and therefore the Sec.34 application was held to be in time.

The case of TECCO and ARK Builders involved challenge by Governmental bodies.

28. The case on hand stands on a different footing on facts. It is no doubt true that the signed copy of the award had been delivered to the respective advocates and not directly to the parties. However on 17.05.2018 the respondent has come into possession of a copy of the award forwarded by the claimant along with his demand notice dated 01.05.2018 issued under the Insolvency and Bankruptcy Code. Despite having knowledge of the said award and perusing the same, the respondent had not taken any steps whatsoever to approach the Arbitrator with a

request to give him a fresh copy of the award so as to enable them to challenge the same by filing the petition under Sec.34 of the Act. On the contrary , the Respondent has informed the claimant that they wanted to settle the demand. This contention was once again reiterated in their letter dated 20.06.2018 and it is only on 07.11.2018 that the respondent had taken steps to obtain a copy of the award from the arbitrator and thereafter filed the application on 14.02.2019.

29. An issue as to whether Xerox copy or an e-mail copy would be in compliance of the provisions of Section 31 (5) of the Act came up for consideration before the Division Bench of the Delhi High Court in an unreported Judgement in **Dusib Vs. Lakhwinder Singh**, the Division Bench after relying on the Judgements in *State of Maharashtra and others Vs. ARK Builders Private Limited* reported in (2011) 4 SCC 616, *Hindustan Construction Company Ltd., Vs. Union of India* reported in AIR 1967 SC 526, *Union of India Vs. Tecco Trichy Engineers and*

*Contractors reported in (2005) 4 SCC 239, Continental Telepower Industries Ltd. Vs. Union of India reported in ILR (2009) Supp. (7) Delhi 310 and referring to the UNCITRAL model law, has held as follows:*

*"Moreover, the impugned award, as well as, the award sent to DUSIB on 14.03.2016 sufficiently qualify as a „signed copy" within the meaning of [Section 31\(5\)](#); the mere technicality that it is not in the handwriting of the arbitrator will not disqualify it from the meaning of a „signed copy". The legislative intent behind the Section is to ensure authenticity of the award and from the facts of the present case, the impugned award satisfies such intent.*

*23. For the above reasons, the copy of the award sent to the Appellant in March, 2016 (and received by it a few days later) and the copy of the award (sent on 26.05.2016), both suffice the requirements of [Section 31\(5\)](#) of the Act. The Appellant's petition under [Section 34](#)*

*of the Act was filed beyond the period of limitation specified under [Section 34\(3\)](#) of the Act."*

30. In the instant case also the respondent has received a copy of the award on 17.05.2018 and the respondent after perusing the said award had initially decided to settle the issue by paying the award amount. In their letter dated 17.05.2018 they have stated that on receipt of the Claimant's notice dated 01.05.2018 though there were grounds for contesting the award they did not intend to challenge the same but was in the process of settling the claim. It is therefore clear that on 17.05.2018 the Respondent had, after perusing the award taken a decision not to contest the same. Therefore the contention of the respondent that the period of limitation would start from the date on which they got the second authenticated copy from the arbitrator on 07.11.2018 cannot be countenanced.

31. The purport and object of Sec.31(5) of the Act appears

to be that the parties must be put on notice about the award as it sets in motion the period of limitation for challenging the award as also for correction of an award under Sec.33 of the Act. However, in the instant case the respondent was fully aware of the passing of the award and inspite of the same did not initiate steps to get a signed copy of the award from the Arbitral Tribunal at the earliest point of time. He cannot therefore take advantage of his lapse and postpone the period of limitation on the pretext that he had not received the signed copy of the award. If delivery on the party is alone counted as the starting point of limitation in respect of challenge to the Award, unscrupulous parties despite being aware of the award or coming into possession of a copy of the award would wait eternally to challenge the award and seek to condone the delay by putting forward the argument that they had not personally received the copy of the award from the Arbitrator. This would defeat the very object and purpose of a time limit for challenge being provided under Sec.34 (3) read with it's proviso. The facts of each case has to be examined

independently to verify as to whether the party challenging the award has been kept in the dark about the passing of the award or the contents of the same. A bonafide litigant would immediately, on coming to know about the passing of the award, approach the Arbitrator with a request to provide him with a copy so as to enable him to take a decision on challenging the same or satisfying the award.

32. Since this Court is dismissing the petition on the ground of limitation, the discussion on the second point for consideration becomes purely academic. However, with reference to the same, it is seen that by letter dated 15.11.2011, Ex.C.3 the claimant had sought for an extension of time for completion of the project upto November 2011 and synchronizing by December 2011. The respondent had not given a reply to the said letter, but they have however, permitted the claimant to proceed with the work. If the respondent was aggrieved by the delay it was well open to them to exercise the rights conferred upon them under Article 10 of the

Supply Agreement dated 01.07.2009. Having failed to invoke the said clause and after permitting the claimant to proceed with the work the respondent cannot now question the dismissal of their counter claim. The arbitrator taking note of the delay has imposed liquidated damages on the claimant which has not been challenged by them.

33. Considering the fact that the petition is barred by limitation and as there is no patent illegality or perversity in the order passed by the arbitral tribunal this Court exercising Jurisdiction under Section 34 of the Arbitration and Conciliation Act, does not find any ground for interference. The Original Petition stands dismissed. Consequently, connected Application is also closed. No costs.

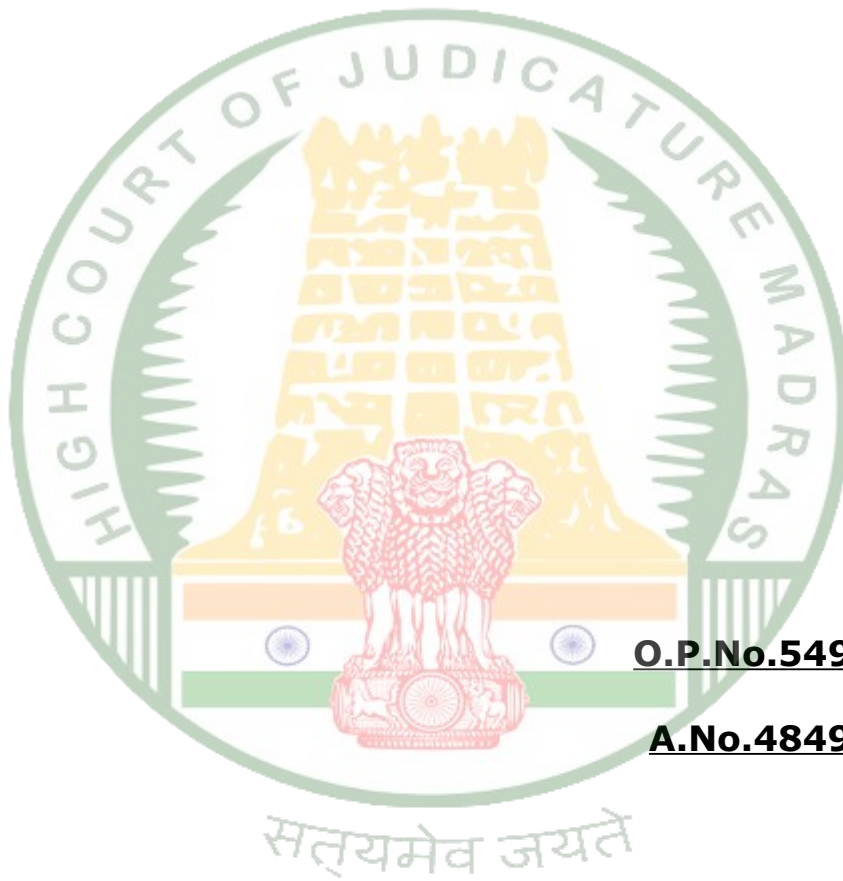
**WEB COPY 06.01.2020**

kan  
Index : Yes/No  
Speaking order/non-speaking order

31/33

**P.T.ASHA, J.,**

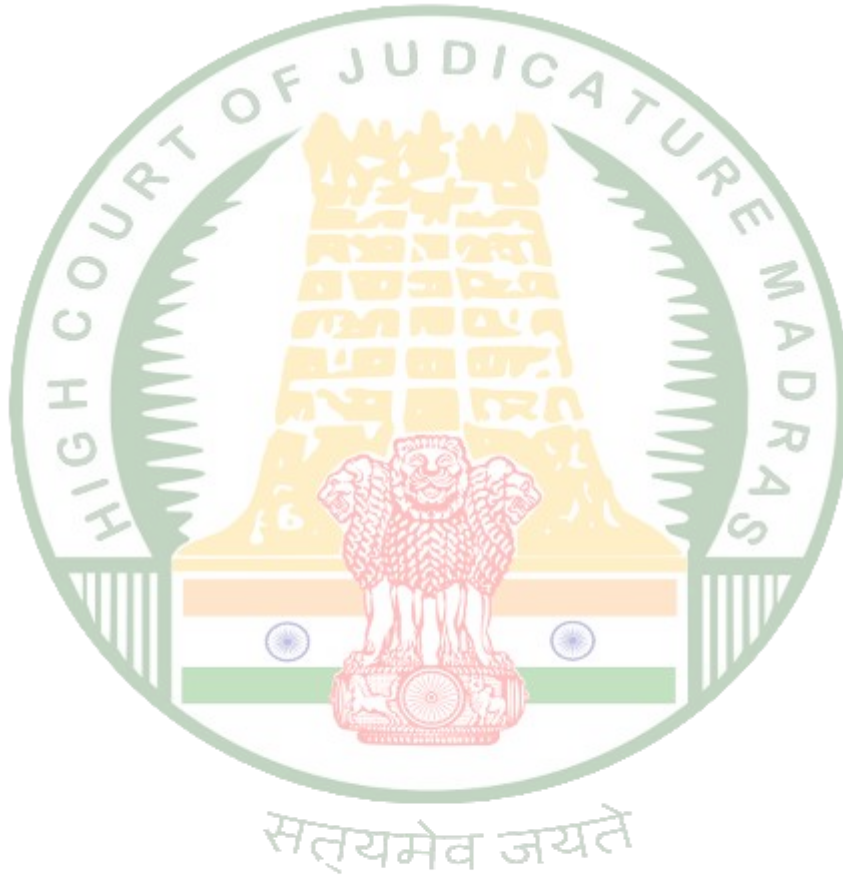
kan



**O.P.No.549 of 2019**  
**&**  
**A.No.4849 of 2019**

WEB COPY

**06.01.2020**



WEB COPY