

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:03.08.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No150 of 2015

Poornima Enterprises ... Petitioner

A micro Enterprise
Having Office at
No.45, Perambur High Road
Chennai – 600 012
Represented by its Manager
Mr.T.N.Udaya Shankar

Vs.

1. The Deputy Chief Materials Manager/Consumables
Office of the Controller of Stores
Southern Railways, Ayanavaram
Chennai – 600 023

2.The Deputy Chief Materials Manager
Carriage Works, Perambur
Southern Railways, Chennai – 60 023

3.Mr.Sam Koshy
Sole Arbitrator
Deputy Chief Materials Manager/Sales
Office of the Controller of Stores
Southern Railway
Ayanavaram
Chennai – 600 023

...Respondents

(Third respondent deleted in and by this order)

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside an arbitral award dated 22.01.2014 passed by the third respondent.

For Petitioner : Mr.Niranjan Rajagopalan
of M/s.G.R.Associates (Law Firm)

For Respondents : Mr.P.T.Ramkumar
Standing Counsel for Railways

ORDER

Instant 'Original Petition' ('OP' for brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of convenience and clarity.

2. Instant OP has been filed with a prayer to set aside an 'arbitral award dated 22.01.2014 made by a sole Arbitrator' (hereinafter 'impugned award' for the sake of brevity) regarding arbitrable disputes that had arisen between the sole petitioner and Respondents 1 / 2 vide 'Purchase Order dated 21.05.2009 bearing No.40/08/0267/1/01618' (hereinafter 'said PO' for clarity). To be noted, Respondents 1 and 2 shall be collectively referred to as 'Southern Railways' for the sake of

convenience and clarity. Sole Arbitrator, who made the impugned award, has been arrayed as third respondent. In the light of submissions made today, in my view, this was not necessary. Therefore, third respondent will stand deleted in and by this order.

3. Said PO is effectively an agreement between the parties and there is no dispute about the existence of an arbitration agreement between the parties being an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

4.As already mentioned supra, instant OP is an application under Section 34 of A and C Act and therefore, factual matrix in a nutshell or in other words, short facts imperative for appreciating this order will suffice. This is because of two reasons. One reason is, scope of an application under Section 34 is very limited. It is neither an appeal nor a revision and it is not even a full-fledged judicial review. It is a mere challenge to an arbitral award under 8 slots adumbrated under Sub-section (2) of Section 34 and expositions/elucidation of facets of same made by Hon'ble Courts. Therefore, embarking upon facts in great detail or to dilate upon facts with particulars is not imperative in an application under Section 34 of A and C Act. The second reason is, an application

under Section 34 is a summary procedure as held by Hon'ble Supreme Court in *Fiza Developers* case [*Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in (2009) 17 SCC 796], which was reiterated as a step in the right direction by Hon'ble Supreme Court in *Emkay Global* case being *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in (2018) 9 SCC 49. To be noted, this *Fiza Developers* principle was further reiterated recently by Hon'ble Supreme Court in *Canara Nidhi Limited* case [*M/S. Canara Nidhi Limited vs M. Shashikala* reported in 2019 SCC Online SC 1244]. Owing to these two reasons, I deem it appropriate to set out short facts shorn of unnecessary particulars and they are as follows:

a) Said PO is the fulcrum of lis between parties before 'Arbitral Tribunal' ('AT' for the sake of brevity). Under said PO the petitioner had supplied certain chemical cleaning kits for cleaning roller bearing to Southern Railway. To be noted, 13 sets of such kits were supplied to Trichy and 12 sets were supplied to Perambur;

b) 12 sets of chemical cleaning kits, supplied by the petitioner to Southern Railway for Perambur, stood rejected

by Southern Railway vide Rejection Order dated 09.03.2010.

This rejection by the Southern Railway was contested by the petitioner and that led to the crux of the arbitrable disputes;

c) To be noted, rejection by Southern Railway was on the basis that the bearing cleaning was not satisfactory, there was residual grease all over, precipitated coating was formed over the bearing and there was skin irritation owing to the highly alkaline nature of the product supplied, though safety gloves were used; other grounds for rejection are emission of pungent smell and difficulty in breathing experienced by the employees. In sum and substance, ground for rejection was that the performance of the product was not satisfactory.

d) Petitioner contested the above rejection by saying that 12 kits supplied by them adhered to specifications and therefore, it cannot be gainsaid that there can be rejection on the basis of unsatisfactory performance.

e) A pre-arbitration application under Section 9 of A and C Act was filed by the petitioner vide A.No.2270 of 2010 and the same came to be disposed of by this Court vide an

order dated 30.09.2010 *inter alia* directing the parties to
embark upon arbitration.

5. From factual matrix as set out in a nutshell supra, it will be clear that the entire matter turns on a very narrow compass. This Court has already described that said PO is the fulcrum of lis qua parties before AT. If the said PO is the fulcrum, rejection order dated 09.03.2010 is the epicentre of this lis.

6. Parties went before the AT constituted by a sole Arbitrator, who was arrayed as third respondent in instant OP and who now stands deleted by this order. AT, after embarking upon the exercise of adjudication i.e., after entering upon reference and after detailed hearing i.e., after full contest, made the impugned award vide which the petitioner's claim was negated and the counter claim of Southern Railway was sustained. To be noted, petitioner in instant OP was claimant before AT and Southern Railway was respondent before AT. Contending that the impugned award is liable to be set aside under Section 34 of A and C Act, instant OP has been filed.

7. Mr.Niranjan Rajagopalan, learned counsel representing the counsel on record for petitioner made submissions, summation of which is as follows:

a) Impugned award is based on no evidence, as no evidence was let-in before AT to demonstrate that the performance of the product was unsatisfactory.

b) Clause 1502 of 'Indian Railway Standard Conditions of Contract' (hereinafter after 'IRS conditions' for brevity) provides for rejection within 90 days in cases of pre-inspection and instant rejection on 09.03.2010 is beyond 90 days. As an extension of this ground, attention of this Court was also drawn to Clause 1309 of IRS conditions to highlight what all could have been done at the time of inspection.

c) It was argued that order dated 30.09.2010 made by this Court in A.No.2270 of 2010 being an application under Section 9 of A and C Act is one where the rejection order has been set aside and therefore, the same would prevail.

d) As a common submission in encompassing the aforesaid three points, a legal submission was made that legal

submission is to the effect that impugned award is being assailed on two grounds, namely conflict with public policy and patent illegality. It was also made clear that both these grounds of attack are predicated and posited on perversity.

8. Responding to the aforesaid submissions, Mr.P.T.Ramkumar, learned Standing Counsel for Southern Railway made submissions, summation of which is as follows:

a) IRS conditions would apply and going by the IRS conditions, there is provision for warranty and Southern Railway can certainly look into performance of the product. To support this argument, reliance was placed on sub-section (3) of Section 28 of A and C Act;

b) Attention of this Court was drawn to Clauses 3201, 3202 and 3204 under 3200 captioned Warranty/Guarantee of the IRS conditions to say that warranty is available for 30 months after the delivery or 24 months from the date of placement in service, whichever shall be sooner.

c) It was pointed out that the rejection is bonafide and not lacking in genuine grounds as contended by the petitioner, as Southern Railways had not rejected the 13 kits supplied to Trichy under the same said PO.

d) Legal submission of patent illegality and public policy grounds predicated on perversity are untenable as a party predicating a challenge to an arbitral award on these grounds should be able to demonstrate that AT has taken an implausible view.

9. I now embark upon the exercise of carefully considering the rival submissions, discussing the same and giving my dispositive reasoning for arriving at a conclusion in the instant OP.

10. With regard to the first submission of no evidence for rejection, a perusal of the claim statement, as placed before me as part of the case file, reveals that petitioner has filed a detailed list of documents vide a separate volume. Though these documents have not been marked as exhibits and though no oral evidence has been let-in, the relevant documents are not in dispute and therefore, the question of appreciation

of evidence does not arise in this matter. The only point that has to be considered with regard to 'no evidence' plea is whether the Southern Railway should have gone only by the specifications for rejection or was it open to Southern Railways to reject the product on the basis of unsatisfactory performance. The answer to this lies in aforementioned clause 3200 (3201 to 3204) of IRS conditions read with condition numbers 17 and 18 of instructions to tenderers, which without any dispute forms part of the contract governing the parties. These clauses read as follows:

'3200 Warranty/Guarantee:-

3201. The Contractor /Seller hereby covenants that it is a condition of the contract that all goods/stores/articles furnished to the Purchaser under this contract shall be of the highest grade, free of all defects and faults and of the best materials, quality manufacture and workmanship throughout and consistent with the established and generally accepted standards for materials of the type ordered and in full conformity with the contract specification, drawing or sample, if any and shall, if operable, operate properly.

3202. The Contractor also guarantees that the said goods stores articles would continue to conform to the description and quality as aforesaid for a period of 30 months after their delivery or 24 months from the date of placement in service

whichever shall be sooner, and the warranty shall survive notwithstanding the fact that goods/stores/articles may have been inspected/accepted and made by the Purchaser.

3203. If during the afore period, the said goods/stores/articles be discovered not to confirm to the descriptions and quality aforesaid or have deteriorated, otherwise than by fair wear and tear the decision of the Purchaser in that behalf being final and conclusive than the Purchaser will be entitled to reject the said goods/stores/articles or such portions thereof as may be discovered not to confirm to the said description and quality. On such rejection, the goods/stores/articles will be at the Seller's risk. If the Contractor/Seller so desires, the rejected goods may be taken over by him or his agents for disposal in such manner as he may deem fit within a period of 3 months from the date of such rejection. At the expiry of the period, no claim whatsoever shall lie against the Purchaser in respect of the said goods/store/articles, which may be disposed of by the Purchaser in such manner as he thinks fit. Without prejudice to the generality of the foregoing, all the provisions in the Indian Railways Standard Conditions of Contract relating to the "rejection of stores" and "failure" and 'termination' add and clause 3100-02 above shall apply.

3204. The Contractor/Seller shall, if required, replace the goods or such portion thereof as have been rejected by the Purchaser, free of cost, at the ultimate destination, or at the option of the Purchaser, the Contractor/Seller shall pay to the Purchaser, the value thereof at the contract price and such

other expenditure and damage as may arise by reason of the breach of the conditions herein before specified. Nothing herein contained shall prejudice any other rights of the Purchaser in that behalf under the contract or otherwise.'

'Condition No.17. Marking of Material Supplied

The tenderer should indicate the Manufactures Name/Month and Year of Manufacturing / Purchase Order Number/tamping/etching/embossing to identify the suppliers for premature failurers of the materials in actual use. The location of these identification should be such that they do not get obliterated on wear and tear and without affecting the functional utility and structural stability of the components/materials.

'Condition No.18.Quality of Material

1.Material peculiar to Railway such as parts and fittings of rolling stock except raw material, which have been found rectified during inspection and which could not be rectified, are required to be defaced by the inspecting authority to avoid recycling of such rejected material and to avoid ultimate failures of assets. All such rejected materials peculiar to Railways should be mechanically defaced to prevent sale to Railways again.

2. In case the firm fails to offer the material for inspection against inspection call issued to inspection agency or the material have to be re-inspected due to

rejection of the material at firm premises by inspecting agency or due to on-despatch of material within validity of inspection certificate, then 50% of the inspection charges applicable for the offered quantity subject to maximum of Rs.5,000/- and actual test charges incurred will be paid by the supplier to the inspecting agency.

3.Dealers while quoting, should enclose the Authorised Dealership Certificate from the original manufacturers. They should also confirm the inspection of material at the manufacturers premises. They should clearly indicate whether the Purchase Order to be placed on them or on their manufacturer.

11. A careful perusal of the aforementioned covenants ,which are not disputed, puts an end to the 'no evidence' plea of rejection and as it is clear that Southern Railways, can certainly reject on the basis of unsatisfactory performance.

12. This takes us to the second plea, rejection not being within 90 days as this is a case of pre-inspection. This takes us to Clause 1502 of IRS conditions which reads as follows:

'1502.Consignor's Right of Rejection – Notwithstanding any approval which the Inspecting Officer may have given in respect of the stores or any materials or other particulars or the

work or workmanship involved in the performance of the contract (whether with or without any test carried out by the Contractor or the Inspecting Officer or under the direction of the Inspecting Officer) and notwithstanding delivery of the stores where so provided to the interim consignee, it shall be lawful for the consignee, on behalf of the Purchaser, to reject the stores or any part, portion or consignment thereof within a reasonable time after actual delivery thereof to him at the place or destination specified in the contract, if such stores or part, portion or consignment thereof is not [in all respect in conformity with the terms and conditions of the contract whether on account of any loss, deterioration or damage before dispatch or delivery or during transit or otherwise howsoever.

Note: In respect of materials pre-inspected at the firm's premises the consignee will issue rejection advice within 90 days from the date of receipt.'

13. In the instant case, a chronicle (of events) have to be looked into for the purpose of clinching this issue. It is not in dispute that the date of supply is 22.07.2009, but on 22.10.2009 Railways has written a letter to the petitioner regarding the unsatisfactory performance. To be noted, the inspection was on 19.08.2009. With regard to what could have been done during inspection predicated on clause 1309, I find that there is no plea to this effect in the claim petition and therefore, it may not be fair to embark upon the exercise of testing the impugned arbitral

award on this basis. Be that as it may, as the Railways has written on 22.10.2009, second plea predicated on clause 15.02 also does not carry the petitioner any further in its campaign against the impugned award.

14. This takes us to the third point, which turns on the order made by this Court being order dated 30.09.2010 in A.No.2270 of 2010. There is no dispute or disagreement before me that this order came to be made in an application under Section 9 of A and C Act and this Section 9 application is a pre-arbitral application which was made by the petitioner. The most relevant part of this order is Paragraphs 4 and 5, which read as follows:

4. In view of the above stated position, I am inclined to set aside the second respondent's Rejection Advice dated 09.03.2010 and to pass the following order:-

(i) The respondents shall take earnest steps in appointing an Arbitrator to decide the dispute arose between the applicant and the respondents.

(ii) The Arbitrator shall be appointed by the respondents within a period of fifteen days from the date of receipt of a copy of this order.

(iii) The Arbitrator concerned shall decide the issue after giving sufficient opportunity to the applicant as well as respondents and pass orders within 90 days from the date of

appointment.

(iv) The applicant as well as respondents shall co-operate with the Arbitrator in finalizing the matter.

(v) The property that has been offered as a collateral security by the applicant shall not be alienated or encumbered by the applicant in any manner whatsoever.

5.The application is ordered on the above terms. I hope, the respondents will settle all the bills of the applicant at the earliest, however, within one month from the date of receipt of a copy of this order.'

15. A careful perusal of Paragraphs 4 and 5 make it clear that the purport of the order is that the rejection order will be in abeyance till AT decides the matter one way or the other. Otherwise, sub-paragraphs 2 and 3 of paragraph 4 would not have been put in. Therefore, the plea that there was a blanket setting aside of the rejection order and one need not look any further is clearly unacceptable. This argument is unacceptable for one other reason. The other reason is, as rightly pointed out by learned Standing Counsel for Railways, the prayer of the petitioner before AT (to be noted, the petitioner before me was the claimant before AT, as mentioned supra), more particularly, second limb of the prayer contained in sub-paragraph (2) of Paragraph 27 of the claim petition,

which reads as follows:

'(ii) Declaring the Rejection Advice dated 09.03.2010 bearing reference 28/41/REJ/0285, issued by the 2nd Respondent as illegal invalid and unsustainable in law and consequently set aside the same'

16. Therefore, it is clear that the petitioner has also understood the order of this Court in the manner which has been delineated supra. In fact, both parties have understood the order in the same manner. This is apparently the reason why both parties have given legal quietus to the matter and have gone before AT. Furthermore, Section 9 is clearly an interim measure and this is in the pre 23.10.2015 regime when the scope and ambit of Section 17 of A and C Act was not made expansive as it was done on and from 23.10.2015. In other words, Section 9 application is an interim measure and in this order, this Court has made it clear that the parties have to settle all the disputes by going before AT. For all these reasons, I am unable to convince myself or agree with the petitioner with regard to the argument that there is a blanket setting aside of the rejection order in Section 9 order of this Court and that one need not look any further. This is a case where it is not even a case of looking further. It is a case of both parties having gone further without any

demur inviting the impugned award from AT. I also see from the impugned award that such a point was never raised before AT and in fact, if this was the position, the parties should not have gone before AT at all. To be noted, the petitioner is claimant before AT. The petitioner could have very well said that the rejection order has been set aside and made its claim for the goods supplied without going to AT. As the claimant having understood the order in a particular manner and having gone before AT, the petitioner cannot now be heard to contend that there is a blanket setting aside of rejection order dated 09.03.2010. In any event, 09.03.2010 rejection order has been set aside or in other words kept in set aside state (obviously temporarily) as an interim measure only for the purpose of facilitating the parties to go before AT so that the matters are not precipitated pending proceedings before AT. After all Section is an interim measure.

17. This takes us to the legal plea predicated on conflict with public policy and patent illegality grounds. As already delineated supra, both these grounds on which the impugned award is sought to be dislodged /set aside were posited on perversity by learned counsel for petitioner. In this regard, I noticed that instant OP has been presented in

this Court on 21.04.2015, which is prior to 23.10.2015. Be that as it may, Hon'ble Supreme Court has rendered two case laws which serve as a good working test for perversity. One is **Gopi Nath** Case [**H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons** reported in **1992 Supp (2) SCC 312**] and the other is **Kuldeep Singh** case [**Kuldeep Singh Vs. Commissioner of Police** reported in **(1999) 2 SCC 10**]. Relevant paragraph in Gopinath and Kuldeep Singh cases are Paragraph 7 and Paragraph 10 respectively and the same read as follows:

*"Paragraph 7 in **Gopi Nath's** case:*

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

*Paragraph 10 in **Kuldeep Singh** case:*

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be

treated as perverse and the findings would not be interfered with."

18. What is of utmost significance is, Hon'ble Supreme Court in Paragraph 32 of the celebrated Associate Builders case [***Associate Builders Vs. Delhi Development Authority*** reported in (2015) 3 SCC 49] has referred to these two case laws, namely ***Gopi Nath*** case, ***Kuldeep Singh*** case and has held them to be a good working test for perversity plea qua challenge to arbitral awards. Paragraph 32 of Associate Builders case reads as follows:

'32. A good working test of perversity is contained in two judgments. In H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312 at p. 317, it was held:

"7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 at para 10, it was held:

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on

record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.'

19. As already delineated supra, this is not a case of no evidence. This is not a case of irrelevant evidence or finding which outrageously defies logic so as to suffer from the vice of perversity.

20. This takes us to the plea raised by learned Standing Counsel for Southern Railways with regard to sub-section (3) of Section 28 of A and C Act. The same was overhauled on and from 23.10.2015. Therefore, sub-section (3) of Section 28 as in the statute book prior to 23.10.2015 is of relevance and the same reads as follows:

'28(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.'

21. In the light of Clause 3200 of IRS conditions read with clauses 7 and 8 of the instructions to tenderers, Section 28(3) plea made by the learned counsel for Southern Railway deserves to be sustained. To be noted, the second plea is predicated on Clause 3200 of IRS conditions.

The same has been discussed and dealt with supra. It stands sustained in favour of the Railways.

22. The last submission was that Southern Railways had not rejected the 13 kits supplied to Trichy and therefore, they have acted fairly. This may at best be a buttressing submission, but considering the limited scope of Section 34, I deem it appropriate to refrain myself from expressing any view of this plea.

23. Before concluding, it is made clear that I have reminded myself that the contours of Section 34 are so limited that a petitioner can succeed only if the petitioner is able to demonstrate that the petitioner's case fits in nay snugly fits into one of the 8 pigeon holes adumbrated under sub-section (2) of Section 34 or exposition of facets of same made by Hon'ble Courts. If it fits in, the award can be dislodged and if that not so, the award should be sustained. This Court makes it clear that it reminded itself about the observation made by Hon'ble Supreme Court in ***Bhumi Vikas Bank*** case being ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in (2018) 9 SCC 472. Though ***Bhumi Vikas Bank***

case is an authority for broad proposition that sub-section (5) of Section 34 is directory and not mandatory, observation made by Hon'ble Supreme Court in Paragraph 26 therein needs to be taken serious note of. The observation of Hon'ble Supreme Court in Paragraph 26 reads as follows:

'26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act'.

24. Therefore, the one year time line under sub-section (6) has sanctity. Pre-application notice under sub-section (5) has been held to be directory. The reckoning date should be the date of presentation of an application assailing an arbitral award. In the instant case, as mentioned supra, instant OP was presented in this Court on 21.04.2015. That

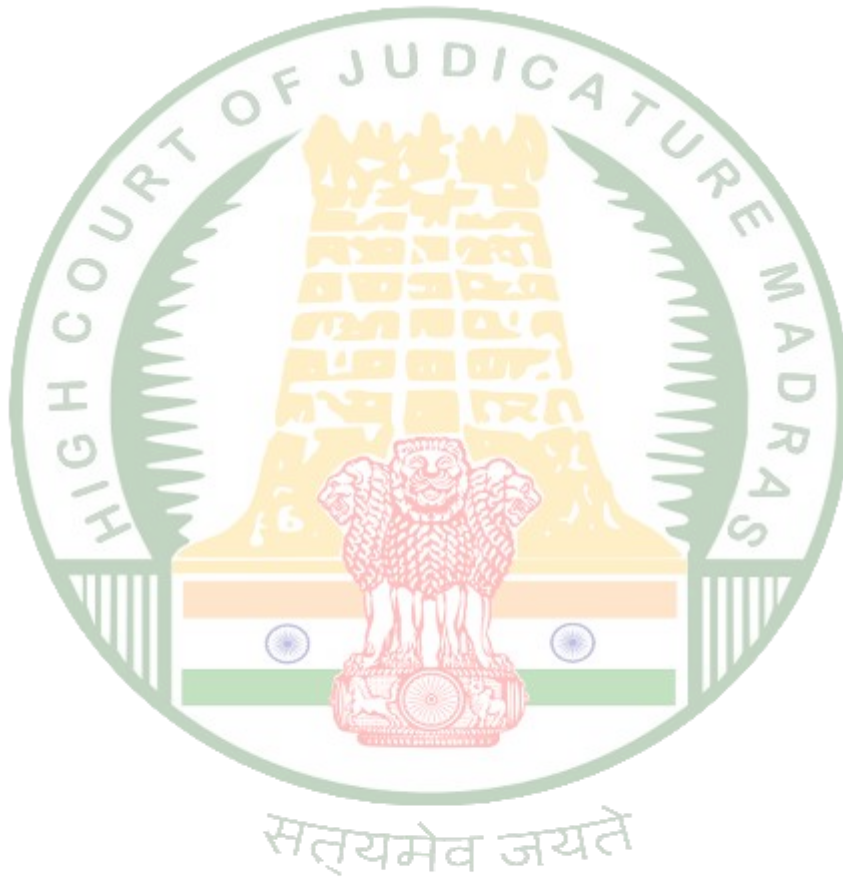
instant OP is pre 23.10.2015 regime will not relieve it of the expeditious disposal need though the rigour of sub-section (6) had not kicked in on the date of presentation. Therefore, instant OP is more than 6 years old in this Court and is therefore a vintage OP in every sense of the term. This Court has also reminded itself that besides the contours of Section 34 being very limited and Section 34 being a summary procedure, this entire exercise under Section 34 of A and C Act itself is a very delicate balance between sublime philosophy underlying minimum judicial intervention ingrained in Section 5 of A and C Act read with sanctity of finality of arbitral award ingrained in Section 35 of A and C Act on one side and the sacrosanct philosophy/salutary principle of judicial review in substantive due process of law.

I find that the petitioner has not been able to fit its case into any one of the pigeon holes, much less the two pigeon holes chosen by the petitioner (notwithstanding pleadings in the OP) and therefore as a sequitur, instant OP fails and the same is dismissed. There shall be no order as to costs.

03.08.2020

Speaking Order: Yes/No

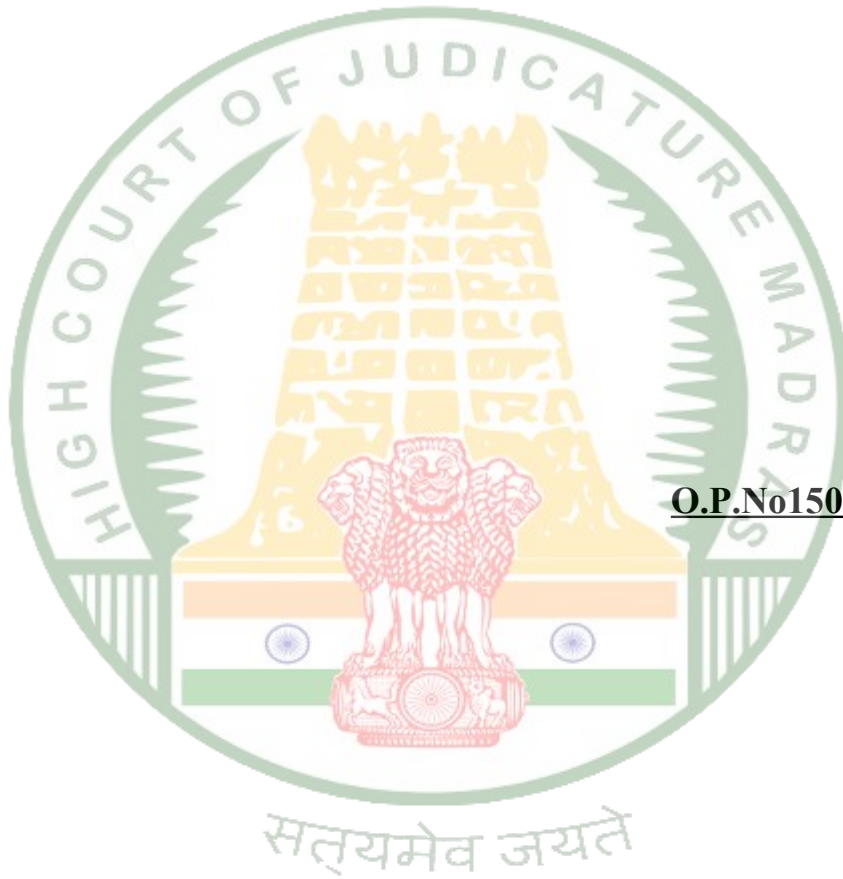
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M.SUNDAR, J.

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