

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16.07.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P No.325 of 2020

NOISE AND GRAINS ENTERTAINMENT

A Partnership Firm

Rep. By its Partners

Mr.P.Srinivasan

Mr.C.Karthikeyan

Mr.A.Mahaveer

127, Yadaval Street

Padi, Chennai – 600 050

...Petitioner

- Vs -

Mr.M.Ravishankar

Prop. AKR Events Inc

13/16, 8th Street

Dr.Subbaraya Nagar

Kodambakkam

Chennai – 600 024

... Respondent

Original Petition filed under Section 34 (2)(b)(ii) and 34(2A) of the Arbitration and Conciliation Act, 1996, to set aside the impugned award dated 21.02.2020.

For Petitioners : Mr.R.Yashod Vardhan, Senior Advocate
for Ms.SP.Arthi

For Respondent : Mr.K.V.Babu

ORDER

Instant application, which has been given the nomenclature 'Original Petition' ('OP' for brevity), has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C' Act for brevity, assailing an 'arbitral award dated 21.02.2020' (hereinafter 'impugned award' for brevity made by an 'Arbitral Tribunal' ('AT' for the sake of brevity), which was constituted by a sole Arbitrator, who is a former Hon'ble Judge of this Court.

2. Nucleus of instant *lis* is constituted by two agreements dated 20.11.2015 and 03.01.2006 pertaining to live concerts of Allah-Rakha Rahman alias A.R.Rahman, a music composer and Performer in Chennai on 16.01.2016 and in Coimbatore on 23.01.2016 respectively. These two agreements shall hereinafter be collectively referred to as 'said agreements' and wherever necessary '20.11.2015 agreement' shall be referred as 'Chennai agreement' and '03.01.2006 agreement' shall be referred to as 'Coimbatore agreement'.

3. If said agreements collectively constitute the nucleus of this lis, the epicentre of this lis lies in interpretation of what is 'performance' qua said agreements and there will be elaboration on this infra in this order. Before I proceed further, it is necessary to set out that the petitioner herein had preferred another OP in O.P(D) No.45086 of 2020 (Filing Number), which was closed as not pressed, preserving the right of the petitioner to canvass his challenge pertaining to Coimbatore agreement also in instant OP. Order made in O.P(D) No.45086 of 2020 reads as follows:

'Instant application, which has been given the nomenclature 'Original Petition' ('OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act for brevity', has been filed assailing an arbitral award dated 21.02.2020 ('impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator, who was a former Hon'ble Judge of this Court.

2.Today Ms.SP.Arthi, learned counsel on record for petitioner led by Senior Advocate Mr.R.Yashod Vardhan and Mr.K.V.Babu, learned counsel for Caveator (sole respondent in instant OP who has lodged a caveat) are before me in this

web-hearing on a video-conferencing platform i.e., virtual hearing.

3. Another application under Section 34 of A and C Act i.e., O.P.No.325 of 2020 has been filed by the same petitioner assailing the same impugned award made by AT.

4. There is no dispute or disagreement before me that impugned award is a common award qua two agreements dated 20.11.2015 and 03.01.2016 for events in Chennai and Coimbatore respectively. There is also no dispute or disagreement that the parties before AT by consent let-in common evidence, advanced common arguments and agreed for passing a common award. More importantly, I am informed by both sides without any dispute that AT was appointed by an order dated 09.10.2017 made by a Hon'ble single Judge of this Court in O.P.No.476 of 2017 in exercising powers under Section 11 of A and C Act and that this order provides for the AT to resolve all disputes arising between the parties i.e., disputes arising out of both agreements.

5. Furthermore, there is also no dispute that petitions in instant OP as well as O.P.No.325 of 2020 are ad-verbatimim the same with the lone exception of the concluding paragraph wherein in instant OP there is a reference to 03.01.2006 agreement for the Coimbatore event whereas in O.P.No.325 of 2020, there is a reference to 20.11.2016 agreement, which is for Chennai event.

6. In the aforesaid backdrop, a request was made on behalf of the petitioner to close the instant OP as not pressed albeit with a caveat that the grounds raised being common may be considered in O.P.No.325 of 2020 with regard to 03.01.2016 agreement for Coimbatore event also.

7. In the light of the narrative thus far, without expressing any opinion on maintainability of instant OP, the request made on behalf of the petitioner is acceded to, preserving the rights of the petitioner in the aforesaid manner.

Instant petition is closed as not pressed. No costs.'

4. The aforesaid order is self-explanatory. Therefore, I now proceed to examine the impugned award qua said agreements i.e., Chennai agreement and Coimbatore agreement. To be noted, impugned award is undisputedly a common award.

5. This matter was listed under the caption 'ADJOURNED ADMISSION'. Mr.R.Yashod Vardhan, learned Senior Counsel instructed by Ms.S.P.Arthi, learned counsel on record for petitioner and Mr.K.V.Babu, learned counsel for caveator (sole respondent) are before me in this web-hearing on a video-conferencing platform i.e., virtual hearing.

6. Both sides agreed to have the main matter heard out as the caveator was before the Court. Therefore, elaborate and detailed submissions on both sides were heard out.

7. Mr.R.Yashod Vardhan, learned senior counsel for petitioner submitted that challenge to impugned award is posited on two provisions namely Clause (ii) of Explanation 1 of Section 34(2)(b)(ii) and Section 34(2A) of A and C Act. In other words, the two slots under Section 34 in which the impugned award is sought to be fitted for being dislodged are a)the impugned award is in conflict with public policy of India or being in contravention of fundamental policy of Indian law; and b) impugned award is vitiated by patent illegality. It is also necessary to mention that learned senior counsel submitted with absolute professionalism that the two slots qua on which the challenge to impugned award are posited would be argued on the basis of amended Section 34 of A & C Act as it exists in the statute book today and therefore, it is not necessary to dilate further on this aspect of the matter.

7. Both the slots qua on which impugned award is sought to be set aside / dislodged were predicated on one ground and that one ground is as follows:

'The term 'performance' is defined in said agreements and the Arbitral Tribunal has committed patent illegality in interpreting the term 'performance' on the teeth of definition of the term 'performance' in said agreements, which are Exs. C1 and C2 before AT.'

8. Furthering his submissions on these lines, learned senior counsel invited my attention to a portion of Paragraph 53 of the impugned award, which reads as follows:

'The bone of contention between the Claimant and the Respondent herein is as to whether the word 'performance' would merely mean the procurement of dates from Mr.A.R.Rahman for his performance in the live concerts or that it would also mean and include all the arrangements to be made for a successful and effective performance of Mr.A.R.Rahman at the live concerts, including the payment for the other artists, choreography, stage arrangements, lighting, sound system arrangements, providing of security, travel expenses, food and accommodation and the obtaining of permissions from the various authorities etc. From a simple reading of the

Agreements and by a normal interpretation to be given to the term 'performance' or the words 'to ensure performance', it could be understood only as the obtaining of the dates from Mr.A.R.Rahman for the live concerts to be performed at Chennai and Coimbatore. It is not for this Tribunal to add a new meaning to the words used in the Agreements beyond what had been stated therein, as would have been normally understood by the parties to the Agreements. The contentions raised on behalf of the Respondent that the Claimant had drafted the Agreements and that the Respondent had been made to sign on the dotted lines, cannot hold water.'

9. After taking me through the aforementioned portion of the impugned award, learned senior counsel drew my attention to the relevant covenant in said agreements qua 'performance' and the same reads as follows:

'Whereas the First Party is desirous of organising, managing and conducting a live concert Performance on the 16th Day of January 2016 at Chennai, Tamil Nadu (Hereinafter referred to as the Performance) and purchasing Television TV License of the said Performance (Hereinafter referred to as the TV License) of Mr.Allah-Rakha Rahman alias Mr.A.R.Rahman, the world famous music composer and Performer, Grammy and Academy Award Winner (Hereinafter referred to as the

Performer).'

10. It was submitted that the aforementioned covenant (which is ad-verbatimim the same in Chennai agreement and Coimbatore agreement) in said agreements is the definition of the term 'performance'. In other words, it was submitted that the term 'performance' is a term of art qua said agreements, there was patent illegality in the manner in which the same was interpreted and the same is opposed to fundamental policy of Indian law, as a sequitur of which it is in conflict with public policy of India.

11. To support this contention, my attention was drawn to an 'electronic mail' ('e-mail' for brevity), which forms part of Ex.R3 (series) and this e-mail dated 23.12.2015 forming part of Ex.R3 (series) mentions about how Rahman functions, that stage, sound, lights, venue and all other requirements of artists should be taken care of. To be noted, there is a series of correspondence exchanged between the parties in this regard.

12. In an endeavour to buttress this submission further, it was pointed that in paragraph 56 of the impugned award, there is a reference to 'Be There

On Stage' (BTOS) and my attention was also drawn to Question No.96 put to Mr.Ravishankar (CW1) and his answer to the same. The question and answer read as follows:

'Q.96: Would you have any clue on the different facets involved in the programme?

Ans: Yes. Stage, sound, lights, venue, artists, infrastructure, etc.

13. Adverting to the above, it was submitted that the respondent in a question to what are the different facets involved in the programme answered “.....stage, sound, lights, venue, artists, infrastructure, etc.”. Thereafter, two recent orders of Hon'ble Supreme Court being order dated 11.05.2020 in Civil Appeal No.673 of 2012 in **South East Asia Marine Engineering and Constructions Ltd. (SEAMEC Ltd.) Vs. Oil India Limited.**, [2020 SCC OnLine SC 451] and order dated 22.05.2020 in SLP(C)Nos.3584-85 of 2020 in **Patel Engineering Ltd. Vs. North Eastern Electric Power Corporation Ltd. (NEEPCO)**, [2020 SCC OnLine SC 466] were pressed into service. It was argued that **South East Asia Marine** case and **Patel Engineering** principle would help to advance the case of the

petitioner that there has been patent illegality in interpretation of the term 'performance'.

14. In response to the above mentioned pointed submission made by learned senior counsel, Mr.K.V.Babu, learned counsel for Caveator who accepted notice for the respondent, submitted that what the respondent undertook is only artist management and not event management. Learned counsel drew my attention to one of the e-mails exchanged between the parties, being e-mail dated 20.12.2015 and submitted that it was the responsibility of the petitioner to absorb the cost qua arrangements for the event. Learned counsel for respondent also drew my attention to deposition i.e., cross-examination of CW1 Mr.Ravishankar. Learned counsel drew my attention to Question Nos.3 and 7, answers to the same, which read as follows:

'Q.3: You have, in your proof affidavit, mentioned that you are an entrepreneur of your own. What do you do?'

Ans: I do Artist Management.

Q.7: What are the artists arranged for?

Ans: For getting call sheets for movies, for fixing live events.'

15. Adverting to the above, it was emphasized that the contractual obligations of the respondent is limited, namely artist management, fixing call sheets, fixing live events. It was nothing more nothing less, is learned counsel's argument. Further on specifics, it was submitted that the sum agreed to be received by the artist for Chennai event under the Chennai agreement is Rs.5 Crores + 40% of the profits and Rs.28 lakhs for the choreography. For the Coimbatore event qua the Coimbatore Agreement, learned counsel submitted that while artist received Rs.3.25 Crores, only Rs.25 lakhs has been received for the Chennai event. It was also emphasised that the artist did not insist on the 40% share in the profits component. It is in this backdrop that arbitration agreement was triggered and AT entered upon reference is learned counsel's say.

16. I now proceed to examine the rival contentions, set out my discussion on the same and give my dispositive reasoning.

17. As would be evident from the narrative thus far, the entire matter turns on what the term 'performance' means. The petitioner contends that

the term 'performance' is a term of art qua said agreements as the same has been defined. To be noted, relevant covenant, which was adverted to has been extracted and reproduced supra. On a careful reading of the covenant one thing that is close to the mind of this Court is that it is at the highest a description and not a definition. It is also to be noted that learned counsel for respondent adverting to the covenants in Exs.C1 and C2 submitted that the role of the respondent was to ensure performance of the artist for the above performance. That covenant reads as follows:

'Whereas the Second Party is an entrepreneur in his own right and is connected to the above mentioned Performer being a relative and is able procure his date, obtain his consent, secure his availability and ensure his performance for the above said Performance and TV.'

18. A careful/close reading of what according to the petitioner is definition of 'performance' i.e., the covenant, leaves this Court with the considered view that at the highest it is a broad description of the term and the contractual obligations have otherwise been set out. In this regard, this Court also reminds itself that there is a world of difference between the terms 'description' and 'definition'. This Court reminds itself of the famous

and celebrated legal position that terms like 'goodwill' are easy to describe but difficult to define. It may not be necessary to dilate more on these aspects of the matter. It was also urged on behalf of the petitioner that they have incurred about Rs.11.07 Crores towards expenses. It is not necessary to go into those numbers. What I need to look into is, as to whether there is perversity qua interpretation of said contracts and whether the perversity is so shocking that it warrants an interference qua impugned award under Section 34 of A and C Act. Those portions of the award, which interpret 'performance' to which the attention of this Court was drawn, have already been extracted and reproduced supra, but to avoid this order becoming verbose, I am not extracting and reproducing the same here again.

19. As already delineated and alluded to supra, it was submitted that amended Section 34, as obtaining today in the statute book, is what the instant OP is predicated on. Patent illegality is contained in Section 34(2A). There is a proviso to Section 34(2A) and there are two limbs to this proviso. One limb is to the effect that mere erroneous application of law cannot qualify as a ground to set aside an arbitral award as being vitiated by patent illegality. The other limb is while testing patent illegality, this Court cannot

embark upon the exercise of re-appreciation of evidence. This Court bears this in mind. With regard to conflict with public policy of India ground and with regard to arguments that the impugned award is in contravention with fundamental policy of India law, the same was posited on perversity.

20. I carefully examined whether **South East Asia Marine** principle and **Patel Engineering** principle (case laws details of which have already been set out supra) would apply to the case on hand. With regard to **South East Asia Marine** case law, it was a case pertaining to price variation and it was a case where it was categorically held that the interpretation placed by the AT in that case is not even a possible view and this is articulated in Paragraph 30 of **South East Asia Marine** case, which reads as follows:

'30. From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into

margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.'

21. With regard to **Patel Engineering**, that is a case where vital evidence was completely ignored and again the Court had come to the conclusion that it is not even a plausible view. Relevant paragraphs are Paragraph 25 and 26, which reads as follows:

'25. The High Court in paragraph (52) came to the finding that the findings in the award suffer from the vice of irrationality and perversity, and held as follows:-

“52. The Arbitral Awards and the findings of the learned Arbitrator suffer from the vice of perversity. The learned Arbitrator has taken into account various factors irrelevant in coming to the decision and has ignored vital clauses of the tender documents like Clause 2 and various Sub-clauses i.e. Sub-clauses 2.1 to 2.8.7 under Clause 2 and Clause 3 and various Sub-Clauses i.e. Sub-clauses 3.1 to 3.7 under Clause 3 of the BoQ, Clause 2 and various Sub-clauses i.e. Sub-clause 2.1 to 2.17.7 under Clause 2 and Clause 3 and various Sub-clauses i.e. Sub-clause 3.1 to 3.10.5 under Clause 3 of “Particular Technical Specifications”, Vol. 2, Part II. The learned Arbitrator has taken into consideration an irrelevant

fact that while making provisional payment, the initial lead of 3.0 km has been deducted and that this shows that Clause 2.7 and 3.4 of the BoQ are applicable. The provisional payment was an interim arrangement and was preceded by meetings dated 07.12.2012 and 08.12.2012 wherein it was specifically agreed between the parties that HoP, NEEPCO would take steps for referring the dispute to arbitration and that till the arbitral award, the payment would be made as per the prevailing provisional rate without any escalation and that final rate payable for transportation of sand and boulder shall be done on implementation of the arbitral award. As such the fact that provisional payment was made by deducting initial lead of 3.0 km was an irrelevant fact for deciding the issue. The findings of the learned Arbitrator having been arrived at by taking into account irrelevant factors and by ignoring vital clauses, the same suffers from vice of irrationality and perversity. It must be borne in mind that the Arbitral Awards in question are Declaratory Arbitral Awards and involved interpretation of Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract and the learned arbitrator was required to interpret the same in accordance with the

established rules of interpretation. The findings of the learned Additional Deputy Commissioner (Judicial), Shillong while upholding the arbitral awards of the learned Arbitrator also suffer from the similar vice. We are, therefore, of the considered view that that the common order dated 27.04.2018 passed by the learned Additional Deputy Commissioner (Judicial), Shillong in Arbitration Case No. 5 (T) 2016, Arbitration Case No. 6 (T) 2016 and Arbitration Case No. 7 (T) 2016 as well as the 3 (three) Arbitral Awards dated 29.03.2016 passed by the learned Arbitrator warrant interference in these appeals under Sec. 37 of the Arbitration and Conciliation Act, 1996.

53. There are additional reasons for interfering with order dated 27.04.2018 passed by the learned Additional Deputy Commissioner (Judicial), Shillong and the Arbitral Awards dated 29.03.2016 passed by the learned Arbitrator. As the learned counsel for the appellant has submitted, the potential effect of the Arbitral Award on public exchequer is that the appellant, which is a public sector undertaking, will have to pay a sum of about Rs. 3.56 Lakh for every truckload of 10 cubic metre of sand or boulder (travelling for 100 km) and the total potential effect

would be about Rs. 1,000 Crore. We are of the considered view that payment of Rs. 3.56 Lakh per truck (10 Cubic Metre) of sand or boulder (100 km distance) is definitely a case of unjust enrichment which is contrary to the Fundamental Policy of Indian Law. Unjust enrichment being contrary to the Fundamental Policy of Indian Law is a ground for interference with an Arbitral Award under Sec. 34(2) of the Act. The Bombay High Court in Angerlehner Structural and Civil Engineering co. v. Municipal Corporation of Greater Mumbai has recognized unjust enrichment of a party at the cost of public exchequer as being against the fundamental policy of Indian law. The Bombay High Court has held:

“If the argument of the Contractors is accepted, it lead to them blatantly enriching themselves over and above what they are entitled. Such completely unjust enrichment, that too at the cost of public funds, is abhorrent under the fundamental policy of Indian Law. The award in AJECT, which permits such blatant enrichment is therefore is also vitiated on the ground that it is against the fundamental policy of Indian Law.” We are also of the considered view that the Arbitral Award which would potentially result in unjust enrichment of the respondent to the extent of

about Rs. 1,000 Crores is against the fundamental policy of Indian law and, therefore, warrant interference on this count as well.

Though this court is not sitting in appeal over the award of the arbitral tribunal, the presence of grounds under [Section 34](#)[2] of the Act and the satisfaction arrived at by this Court in this regard, warrants interference more so, as the Arbitral Awards in question are Declaratory Arbitral Awards and involved interpretation of Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract and the learned arbitrator was required to interpret the same in accordance with the established rules of interpretation and in line with the fundamental policy of Indian law.” (emphasis supplied)

26. Even though the High Court in paragraph (44) of the judgment referred to various judgments, including Western Geco (supra) [which is now no longer good law], the case has been decided on the ground that the arbitral award is a perverse award and on a holistic reading of all the terms and conditions of the contract, the view taken by the arbitrator is not even a possible view. The High Court has rightly followed the test set out in paragraph (42.3) of Associate Builders (supra), which

was reiterated in paragraph (40) of the Ssangyong Engineering judgment (supra).'

22. To be noted, in paragraph 25, Paragraph 52 of the High Court order, which was carried to Hon'ble Supreme Court in Patel Engineering, has been extracted. In the instant case, it is clear as daylight that vital evidence has not been ignored. The evidence has certainly been looked into and an interpretation, what according to me is description of a term has also been made by AT i.e., description of the term 'performance'. The description of the term 'performance' and the obligation placed upon the parties leave me with the considered view that this cannot fall into the category of the AT having taken a view which is not a possible view at all. It certainly does not fall in the category of an interpretation, which no reasonable person would take resulting in shocking the conscience of the Court.

23. In this view of the matter, **South East Asia Marine and Patel Engineering** principles do not help the petitioner in advancing their case in instant OP on hand.

24. Learned counsel for respondent submitted that certain exhibits

marked before the AT form part of impugned award and wanted to take me through the same.

25. I am afraid that I am not sitting in appeal qua the impugned award. In this regard, I remind myself of the *Fiza Developers* principle laid down by Hon'ble Supreme Court being *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 in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in (2018) 9 SCC 49 and reiterated again recently in *M/s. Canara Nidhi Limited vs M. Shashikala* reported in 2019 SCC Online SC 1244. The principles in these three case laws is to the effect that proceedings under Section 34 are summary proceedings. This is a summary proceeding. Therefore, I am of the view that this Court is not sitting in appeal qua the impugned award and this Court which is hearing instant application under Section 34 of A and C Act within its limited contours and confines would not enlarge the scope of challenge, more particularly when the petitioner has very professionally argued within the scope of Section 34 of A and C Act. In this regard, one has to remind oneself that Section 34 of A and C Act is a delicate balance

between the sacrosanct philosophy attached to judicial review and the sanctus nature of finality of an arbitral award and an application under Section 34 is neither an appeal nor a review and it is a mere challenge to an arbitral award within the contours of Section 34.

26. Owing to all that have been set out thus far, I am left with the considered view that the impugned award is neither in conflict with public policy of India as being in contravention of fundamental policy of Indian law nor vitiated by the vice of patent illegality tested within the scope of sub-section 2(A) of Section 34.

27. In the result, instant OP is dismissed and there shall be no order as to costs.

सत्यमेव जयते

16.07.2020

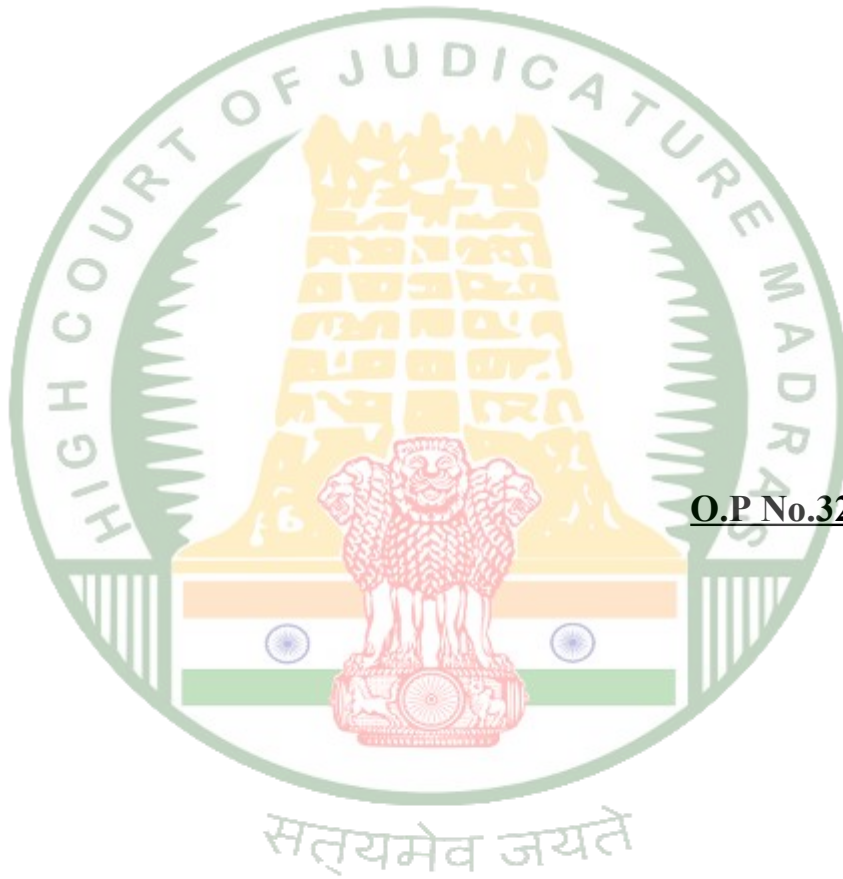
Speaking order: Yes
Index: Yes
gpa/kmi

WEB COPY

O.P.No.325 of 2020

M.SUNDAR.J.,

gpa/kmi



O.P No.325 of 2020

WEB COPY

16.07.2020