

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.11.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.509 of 2020

&

A.No.2722 of 2020

M/s.Elysium Properties India Pvt. Ltd.,
No.699, Avinashi Road
Coimbatore – 641 037

... Petitioner

Vs.

M./s Potential Engineers and Contractors
Rep. By its Proprietor
Mr.B.Karthikeyan
No.A52, GRV Complex, 2nd Floor
Kamadhenu Layout
Bnarayanapura, Bangalore – 560 016

...Respondent

Original Petition filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 to set aside the award dated 04.08.2018 and 06.01.2020 passed by the learned sole Arbitrator, to direct the respondent to pay the excess payment of Rs.61,73,046/- received by it, to direct the responden to pay the appellant the debit note sum of Rs.64, 98,900/-.

For Petitioner : Mr.Sathish Parasaran
Senior counsel
for Mr.Vignesh Venkat

ORDER

Captioned 'Original Petition' ('OP' for the sake of 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. There is a sole petitioner and a lone respondent in the captioned OP, which has been filed assailing an arbitral award dated 04.08.2018 in which an application for correction was made under Section 33(1)(a) of A and C Act (negatived on 06.01.2020). Thereafter, a different/another request was made for correction of the cause title i.e., correction of address of one of the parties and this request was acceded to on 06.03.2020. To be noted, this award dated 04.08.2018 together with the 33(1)(a) order dated 06.01.2020 and the further order dated 06.03.2020' shall hereinafter be collectively referred to as 'impugned award' for the sake of convenience and clarity. Impugned award was made by a sole arbitrator, who constituted the 'Arbitral Tribunal' ('AT' for the sake of brevity) and the sole Arbitrator is a former Hon'ble Judge of

this Court. Before the AT, petitioner in captioned OP was the lone respondent and respondent in the captioned OP was the sole claimant. Therefore, for the sake of convenience, petitioner in the captioned OP shall be referred to as 'Elysium' and respondent in the captioned OP shall be referred to as 'Potential' hereinafter in this order.

3. As captioned OP is one under Section 34 of A and C Act, a short narrative containing essential facts imperative for appreciating this order will suffice. To be noted, this is owing to the limited legal landscape and short statutory perimeter of Section 34 within which the exercise of testing challenge to impugned award should perambulate. In this view of the matter, in terms of narration of facts, suffice to say that Elysium issued 'Notice inviting tender dated 15.11.2011' (NIT). This NIT is for Villa Plumbing Internal External works and Water proofing package for Elysium's proposed construction in the name and style of 'Flushing Meadows-Signature Villas at Coimbatore' (hereinafter 'said project' for the sake of convenience and clarity); that petitioner submitted its bid on 18.11.2011 pursuant to which contract was awarded to Elysium on 20.11.2011; that on the same day i.e, 20.11.2011, a contract styled

'Articles of Agreement / project agreement' came to be executed between Elysium and Potential (hereinafter 'said contract' for the sake of convenience); that there is no disputation or disagreement that said contract contains an arbitration clause, which serves as an arbitration agreement between Elysium and Potential being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that the value of said contract, is little over Rs.5.63 Crores (Rs.5,63,80,956/- to be precise); that the work had to be completed on or before 31.12.2012; that disputes i.e., arbitrable disputes erupted between Elysium and Potential regarding the payments touching upon the nature of construction and running account bills resulting in constitution of AT; that AT entered upon reference, adjudicated upon arbitrable disputes between the parties and made the impugned award vide which AT had held that Elysium is liable to pay a sum of Rs.84,08,269/- to Potential; that aggrieved by the impugned award, Elysium presented captioned OP in this Court on 20.08.2020; that captioned OP was listed before me in this web-hearing on a video-conferencing platform under the caption 'MOTION CASES'.

4. Mr.Satish Parasaran, learned senior counsel instructed by counsel on record for petitioner (Elysium) Mr.Vignesh Venkat was before me in this web-hearing on a video-conferencing platform.

5. Before proceeding further, it is to be noticed that the claim made by Potential before the AT was originally Rs.1,91,91.696/- and it was subsequently scaled down to Rs.1,72,50,669/- . Elysium had made a counter claim to the tune of Rs.1,78,98,834/-. While the claim of Potential was towards unpaid bills qua what according to Potential is for work done, the counter claim of Elysium was on account of damages to the tune of Rs.50 lakhs owing to alleged erroneous connection of rain water pipes and return of, what according to Elysium is, excess payment and debit notes.

6. Pleadings were completed before AT. To be noted, there was a claim statement, a reply and a rejoinder. On the rival pleadings, AT framed 7 issues, which are as follows:

'1. Whether the 8 RA Bills submitted by the Claimant are the final RA Bills or the alleged 29 interim RA Bills constitute final Bills as alleged by the Respondent?

2. Whether there is a delay in completion of the contract and if so whether it is attributable to the Claimant or to the

Respondent?

3. Whether the works of the Claimant was defective as alleged by the Respondent?

4. Whether the Claimant to entitled to the claim as raised in the claim statement?

5. Whether the Respondents are entitled for any counter claim?

6. Whether the parties are entitled for any interest?

7. Whether the parties are entitled for any costs of the proceedings?'

7. This Court is informed that no oral evidence was let in before AT. On behalf of Potential as claimant, 20 exhibits, namely Exs.C1 to C20 were marked and on behalf of Elysium as respondent before AT, 8 exhibits namely Ex.R1 to R8 were marked and Ex.R8 was marked subject to objection. This is the documentary evidence scenario before AT. All this is set out in the impugned award.

8. This Court also deems it appropriate to notice that captioned OP has been presented in this Court on 20.08.2020 and therefore, applying the ***Ssangyong*** principle or in other words, the law laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in (2019)

15 SCC 131, captioned OP will be governed by post 23.10.2015 regime of A and C Act. In other words (to put it differently), captioned OP will be governed by A and C Act as amended by Act 3 of 2016, which kicked in with retrospective effect on and from 23.10.2015. In terms of legal landscape of Section 34 of A and C Act also, captioned OP will obviously be governed by **Ssangyong** principle, which was rendered by Hon'ble Supreme Court on 08.05.2019 wherein law laid down by Hon'ble Supreme Court in **Western Geco** being the judgement of Hon'ble Supreme Court in **ONGC Ltd. v. Western Geco International Ltd.**, reported in **(2003) 5 SCC 705** rendered on 04.09.2014 and **Associate Builders** case [**Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**] rendered on aforementioned 25.11.2014 as impacted by the aforementioned 23.10.2015 amendment have been set out / articulated.

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9. This Court now proceeds to consider the submissions made by learned senior counsel.

10. Notwithstanding very many avements in the OP, focused submissions that were made by learned senior counsel can be

summarised as follows:

a) the primary aspect of the matter or in other words crux and gravamen of the lis before AT was as to whether the 8 running account bills submitted by Potential are the final bills or 29 interim running account bills constitute the final bills. To be noted, a perusal of the impugned award reveals that the contention was, the running account bills were originally raised for fiscal law compliance purpose. In this regard, it was submitted by learned senior counsel that appreciation of Ex.R8, which was marked subject to objection, is without any basis;

b) Attention of this Court was drawn to Paragraphs 28 and 29 of the impugned award and it was submitted that the contentious invoice has been completely misread by the AT. There will be little more elaboration on this infra in discussion.

c) Attention of this Court was drawn to Clause 1.6.11 of said contract captioned 'Final Account Bill' and it was submitted that the three months post final completion of the project, as certified by the Development Manager, has been

misread by the AT. It was also contended that after noticing the pleading in the reply statement/counter claim that the alleged final bill is not correct and the claimant (Potential) has not attached supporting documents, AT, vide the impugned award (in Paragraph 29), has held that Elysium has neither certified nor denied this amount. In other words, it was submitted that there is a finding notwithstanding the pleading that has been noticed.

11. This Court now proceeds to consider the submissions made by learned senior counsel, discuss the same and give its dispositive reasoning. Though in the summary, this Court has given the points raised by learned senior counsel, as an adumbration, it is deemed appropriate to deal with the discussion and dispositive aspect at one go together, as the submissions or the adumbration of the points are so intertwined owing to the facts and circumstances of this case.

12. A perusal of the case file placed before this Court reveals that the captioned OP has been filed invoking Section 34(2)(b)(ii) of A and C Act. Section 34(2)(b)(ii) of A and C Act deals with an award being

vitiated owing to being in conflict with public policy of India and it contains two explanations. Explanation 1 has three clauses and Explanation 2 makes it clear that an exercise or legal drill under Section 34(2)(b)(ii) does not entail a review on the merits of the dispute. Be that as it may, learned senior counsel submitted that this case on hand turns on Section 34(2A) too. This submission has also been taken note of. To be noted, sub-section (2A) of Section 34 is patent illegality ground and patent illegality ground is circumscribed by a two limbed proviso. This Court notices that one limb of the proviso is to the effect that under sub-section (2A) of Section 34 i.e., patent illegality ground, an arbitral award cannot be set aside merely on the ground of erroneous application of law and the second limb is to the effect that in a test qua sub-section (2A), re-appreciation of evidence is forbidden. In this view of the matter, as already alluded to supra, there is no oral evidence before the AT. There were eight exhibits on the side of one party and 20 exhibits on the side of the other. Only one of these exhibits was marked subject to objection. In the absence of oral evidence, what would appreciation of evidence mean becomes significant. What is appreciation of evidence was explained by this Court recently in ***14 Reels Entertainment Private***

Limited Vs.Eros International Media Limited reported in ***AIR Online***
2020 Mad 1447. Relevant paragraph is paragraph 27 and the same reads
as follows:

'27. Solely for the sake of illustration, let us take a case where the issue to be tested is whether jural relationship between two parties is that of lessor and lessee or licensor and licensee. Let us assume that a document i.e., contract between parties which is inter alia an adumbration of covenants and clauses between the contracting parties is available before the Adjudicating Authority and that both sides have let-in oral evidence. The witnesses are inter alia the contracting parties and that deposition of these parties to the document turn on jural relationship between the parties. Proceeding with this illustration, one has to bear in mind that a mere caption to a document on hand will not conclusively decide the jural relationship between the parties. Likewise, one should also bear in mind that the contents of the document by themselves do not prove a fact. In this backdrop, the Adjudicating Authority, which has the task of decoding and deciphering this document in the light of the document itself, which is an exhibit before it in conjunction with oral evidence, which is the deposition inter-alia of contracting parties to the document, examines at the question of whether there has been transfer of possession of demised portion from one party to the other, as this would be one of the extremely critical questions to decide whether the jural

relationship is one of lease or licence. Let us assume that the deposition is to the effect that the demised portion is part of a larger property and that the question as to who controls the ingress and egress to the demised property also forms part of deposition. Let us also assume that there are some other exhibits in the form of sketches / photographs besides a topography sketch, which describe these aspects of the matter and that witnesses, who are inter alia contracting parties to the contentious document, speak about all this. If the Adjudicating Authority deploys a clinical, forensic approach, sifts through, analyses / scrutinizes all these oral/documentary evidence and comes to the conclusion that the ingress and egress to the immovable property (of which the demised portion is a part) is controlled by one party and that there is no transfer of possession by this party to the other party qua demised portion, the Adjudicating Authority may come to the conclusion that the jural relationship between the contracting parties is a license and not a lease. If sifting and scrutiny of oral/documentary evidence leaves the Adjudicating Authority with a contrary conclusion, the Adjudicating Authority may hold that the jural relationship between the parties is that of a lease. In this illustration, when the matter is carried in appeal, it may well be possible for the protagonist of the appeal to point out certain inconsistencies in the oral evidence and contradictions qua evidence before the Adjudicating Authority. While sifting and scrutinizing of oral and documentary evidence by the original Adjudicating Authority to come to a conclusion about jural relationship between the contracting parties can be described as

'appreciation of evidence', the exercise of Appellate Authority going into the inconsistencies and contradictions in evidence pointed out by the appellant and having a clinical, forensic relook at the oral/documentary evidence before original Adjudicating Authority can be described as 're-appreciation of evidence'. This is a second bite at the cherry by the protagonist.'

13. In the light of the view taken by this Court with regard to what is appreciation of evidence, this Court is unable to find that appreciation of evidence aspect of the matter does not carry the petitioner towards issue of notice in captioned OP as admittedly there was no oral evidence before AT. What is more significant is, there is absolutely no scope for re-appreciation of evidence and this aspect gets multiplied manifold in the absence of oral evidence. To state it with clarity and specificity, in the case on hand with the exception of one document, all other documents have been marked by consent before AT. This is the reason why this Court is taking this view.

14. What is of greater significance is, the impact of 23.10.2015 amendment on the grounds available for challenging an arbitral award under Section 34 as explained by Hon'ble Supreme Court in **Ssangyong** case law. **Ssangyong** principle is clearly to the effect that owing to Explanation 2 to Section 34(2)(b)(ii) when there is a test of an arbitral

award under Section 34(2)(b)(ii), it does not entail a review on the merits of the dispute. In this view of the matter, Hon'ble Supreme Court vide **Ssangyong** principle, held that Paragraphs 28 and 29 of **Associate Builders** case law as well as Paragraphs 35 and 38 to 40 of **Western Geco** are now not available in the same form to a protagonist of a petition under Section 34 to challenge an arbitral award. To be noted, this Court has made it clear supra that owing to the presentation of instant OP in this Court on 20.08.2020, instant OP is governed by post 23.10.2015 regime. This aspect of the matter has been explained by Hon'ble Supreme Court in Paragraphs 34 to 36 of **Ssangyong** case law, which read as follows:

Paragraph Nos. 34 to 36 of Ssangyong case law:

'34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would

necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.'

15. Another interesting aspect of the matter is Hon'ble Supreme Court in **Ssangyong** case law adverting to Paragraphs 31 and 32 of **Associate Builders** had made it clear that perversity, as explained in **Associate Builders**, is no longer available as a ground qua Section 34(2)(b)(ii), but the same will be available as a patent illegality ground vide Section 34(2A). It is in this context that submission made by learned senior counsel that the captioned OP turns on Section 34(2A) is viewed. In this regard, it is to be noticed that patent

illegality was made available as a ground of challenge to an arbitral award even prior to 23.10.2015, but that was not by way of a statutory provision, but by way of judge made law being law laid down by Hon'ble Supreme Court in ***Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.***, reported in **(2003) 5 SCC 705** and the relevant paragraph is Paragraph 31 at Page 728 of ***Saw pipes***, which reads as follows:

Paragraph 31 of Saw Pipes case law

'31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.'

16. The significant difference is, Saw Pipes patent illegality will not be circumscribed by the two limbed proviso whereas sub-section (2A) of Section 34 patent illegality is circumscribed by the two limbed proviso. First limb of the proviso has already been explained supra. The second limb of the proviso to Section 34(2A) makes it clear that there can be no re-appreciation of evidence or in other words re-appreciation of evidence is forbidden. It is also to be noticed that AT is not bound either by 'The Code of Civil Procedure, 1908' ('CPC' for brevity) or by the 'Indian Evidence Act, 1872' ('Evidence Act' for brevity) . This is ingrained in sub-section (1) of Section 19 of A and C Act which reads as follows:

'19. Determination of rules of procedure.—

(1) The arbitral tribunal shall not be bound by the Code of Civil

Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872)'.

17. The AT, not being bound by CPC or Evidence Act, would certainly be entitled to examine the documentary evidence before it in a manner deemed appropriate to it, more so in the absence of oral evidence. This is in the context of **14 Reels** principle, which has been set out supra.

18. This takes us to a very interesting ground that has been articulated in captioned OP. This interesting ground is f(iii) at Page 9 of the OP, which reads as follows:

*'iii. Even assuming for a moment that the grounds stated in C to E above is disallowed by this Hon'ble Court and the findings of the learned Arbitrator accepted; it needs to be seen that the aforementioned computational mistake is a glaring error and the award of Rs.84,08,269/- is erroneous as it fails to deduct the debit balance of Rs.27,16,645/-. Thus the total award passed in favour of the respondent ought to have been **Rs.56,91,624/-**.'*

19. A perusal of ground f(iii) of OP reveals that the ground has been raised more in the nature of a demurrer though it has not been pleaded so explicitly. This demurrer ground raised in the OP, in the

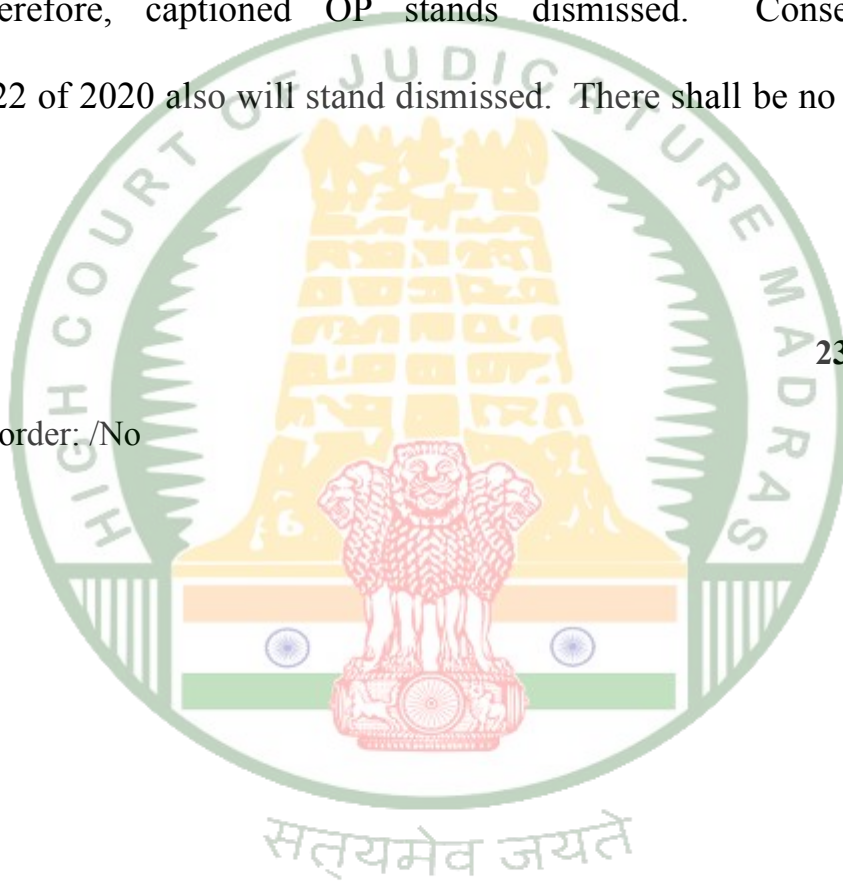
considered view of this Court, seals the fate for the protagonist of the captioned OP as the sequitur that flows from the discussion and dispositive reasoning or in other words, delineation of the obtaining position of law is that this Court is unable to find the view taken by AT in its answer to the issue No.1 to be an implausible view. To be noted, unlike a regular appeal under section 96 of CPC, unless the view taken by the AT is an implausible view, this Court cannot judicially intervene under Section 34. In other words, what may be available as a regular ground of appeal under Section 96, may well be clearly forbidden territory qua Section 34 of A and C Act. As this Court has no hesitation in coming to the conclusion that the view taken by AT in answering Issue No.1 (in the absence of oral evidence) as not implausible, there is no scope to intervene much less judicially intervene within the statutory perimeter of Section 34, qua the impugned award. As the nucleus of the entire matter turns on the answer to Issue No.1 (to be noted 7 issues have been extracted and reproduced supra), the submissions raised by the petitioner, as protagonist of the OP, does not find favour with this Court for notice being issued. Before concluding, this Court deems it appropriate to record that Mr.Aasim Shehzad, learned counsel had joined

the hearing stating that he has instructions to accept notice on behalf of Potential if this Court is inclined to issue notice. As that scenario did not unfurl, there is no necessity to state anything further in this regard.

Therefore, captioned OP stands dismissed. Consequently, A.No.2722 of 2020 also will stand dismissed. There shall be no order as to costs.

23.11.2020

Speaking order: /No
Index: No
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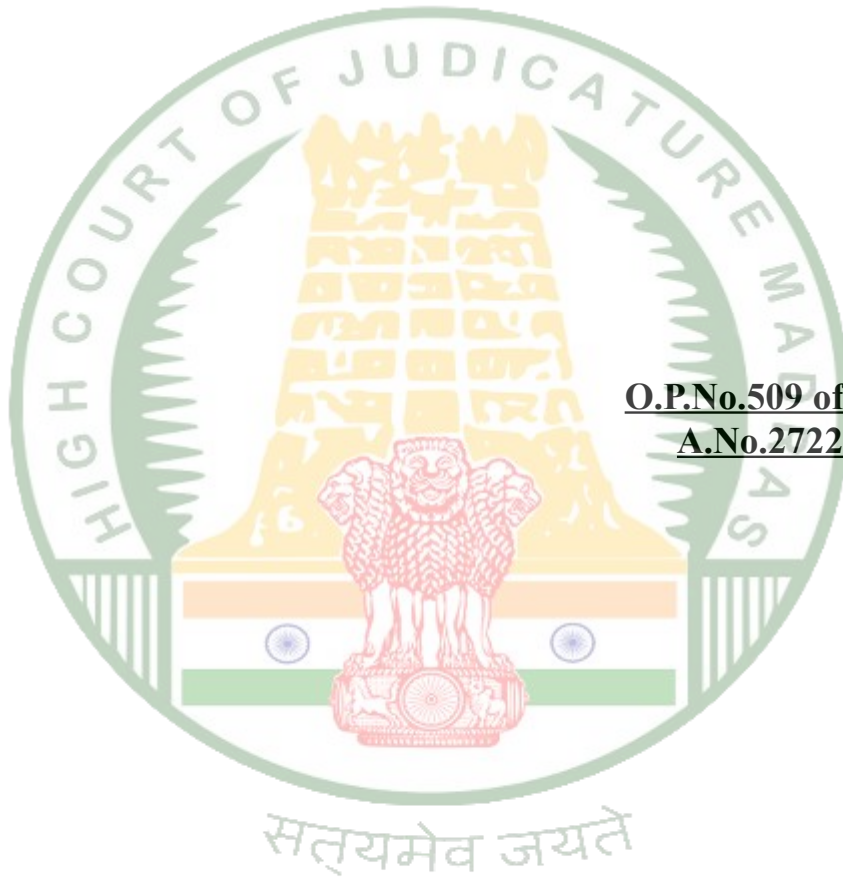


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