

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.12.2020

C O R A M

THE HON'BLE MR. A.P.SAHI, THE CHIEF JUSTICE
AND
THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.A.NO.934 OF 2016 AND W.P. NO.2684 OF 2020
& W.M.P.NO.3114 AND 3115 OF 2020

W.A.No.934 of 2016

The Superintending Engineer,
Kanchipuram Electricity Distribution Circle,
Tamil Nadu Electricity Board,
Anna Maaligai, Vellore Road,
Olimohampet, Kanchipuram. ...Appellant/Respondent

Vs

S.S.Minerals Limited,
Rep. By its Director Mr.M.Ganesan,
Neervalur Village, Kanchipuram Taluk,
Tamil Nadu. ...Respondent/Petitioner

W.P. No.2684 of 2020

M/s.Larsen & Toubro Ltd.,
Represented by its Power Agent, Mr.K.Shanmuganathan,
Construction, Power Transmission & Distribution,
Having its office at P.B.No.979,
Mount Poonamallee Road,
Manapakkam, Chennai-600 089. ...Petitioner

Vs

The Superintending Engineer,
Tamilnadu Generation and Distribution Corporation,
Kanchi, Electricity Distribution Circle,
Kanchipuram - 631 502 ...
Respondent

PRAYER in W.A.No.934 of 2016: Writ Appeal is filed under Clause 15 of Letters Patent, to set aside the order passed by the learned Judge in W.P.No.34001 of 2002 dated 07.06.2013 and allow the Writ Appeal.

WP 34001/2002 PRAYER:

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records of the respondent in Lr.No.SE/KEDC/KPM/RCS/A1/HT.SC.No.148/Tariff Concession/D.539/02, dated 27-07-2002 and quash the same.

PRAYER IN W.P.No.2684 of 2020 : Writ Petition is filed under Article 226 of the Constitution of India praying to issue a writ of Mandamus directing the respondent to grant the Petitioner with a High Tension Power Connection as sought for by them in the application dated 06.12.2019 in respect of the premises, without insisting on the payment of any amounts in terms of the communication dated 24.12.2019 or making any demands for an amount of Rs.98,94,257/- or any other amounts allegedly due from S & S Minerals to the respondent.

For Appellant in : Mr.P.Gunaraj
W.A. No.934 of 2016

For Respondent in : Mr.R.Murari, Senior Counsel for
W.A. No.934 of 2016 M/s.Aditi Ashok

For Petitioner in : Mr.Sathish Parasaran, Senior Counsel
W.P.No.2684 of 2020 :for M/s.Preeti Mohan

For Respondent in : Mr.P.Gunaraj
W.P.No.2684 of 2020

COMMON JUDGMENT

SENTHILKUMAR RAMAMOORTHY J.,

The Appellant in W.A. No.934 of 2016 is the Tamil Nadu Electricity Board (the TNEB). By order dated 07.06.2013 in W.P. No.34001 of 2002, the writ petition filed by the Respondent, S.S. Minerals Ltd. (S.S. Minerals) was allowed and the order dated 27.07.2002 of the TNEB was quashed. The said order is impugned in W.A. No.934 of 2016. W.P. No. 2624 of 2020 is filed by Larsen and Toubro Limited (L&T) for a mandamus to direct the TNEB to consider its application for a high tension power connection without insisting on the payment of the amounts claimed from the previous owner of the premises, S.S. Minerals, as a condition. L&T is stated to have acquired about 2.41 acres of land from S.S. Minerals by Sale Deed dated 26.02.2015 and, therefore, is the current owner of the premises previously used by S.S. Minerals. Therefore, the outcome of W.P. No.2624 of 2020 is largely contingent on the outcome of W.A. No.934 of 2016.

Consequently, both the cases were heard and are disposed of by this common judgment.

2. S.S. Minerals applied for a concessional high tension tariff under letter dated 18.01.1997 in terms of G.O. Ms.No.29, Energy (A2) dated 31.01.1995 (G.O. Ms. No.29), which was issued in exercise of power conferred by Section 4 of the Tamil Nadu Revision of Tariff Rates on Supply of Electrical Energy Act, 1978. As per the said amendment, a tariff concession was extended to new industries, as defined therein, subject to specified conditions. As regards non-metropolitan areas, the tariff concession was 60%, 70% and 80% of the high tension tariff for the first, second and third year, respectively. The relevant clause in G.O.Ms.No.29 is as under:

"Tariff concession for High Tension Industries coming under High Tension Tariff I:-

(a) In the case of new High Tension Industries to be set up in the areas other than the Madras Metropolitan areas, the following concessional tariffs shall be charged for the first three years from the date the consumer is given service connection under high tension tariff I:

For the first year .. 60 per cent of the High Tension rates
For the second year .. 70 per cent of the High Tension rates
For the third year .. 80 per cent of the High Tension rates
for the fourth year Full Tariff.

The above concession shall apply to both unit rates and maximum demand charges. This concession shall not however be applicable to an industry set up before the 3rd May 1989. The concession shall not also be applicable to a consumer who utilizes power from his own generating units or makes other arrangements for production purposes and utilizes the power supplied by the Board for auxiliary purposes only:

Provided that the High Tension Industries set up in any area (including industrially under developed area, notified as such by the Government) before the 3rd May 1989 which are availing tariff concessions or reduction under High Tension Tariff I as on the 2nd May 1989, shall continue to avail the said tariff concession or reduction until the

expiry of the period of five years from the date the consumer is given service connection under High Tension Tariff I.

Explanation:-- For the purpose of electricity tariff concessions for new industries the term 'new industries' shall mean a new investment by any entrepreneur including by an existing industry in any area other than the Madras Metropolitan areas, provided the assets other than cash, of the existing industry, are not transferred and shown as assets of the new industry."[emphasis added]

3. Pursuant to the application dated 18.01.1997, the TNEB agreed to offer the tariff concession to S.S. Minerals from 28.10.1996 for a period of three years reckoned from the date of high tension supply. This was communicated to S.S.Minerals on 11.02.1998. A further communication, in this regard, was also sent to the Superintending Engineer, Kanchipuram Electricity Board Distribution Circle stating that the tariff concession would apply from 28.10.1996 for a period of three years in the following manner. The liability of S.S. Minerals shall be: 60% of the high tension tariff from 08.10.1996 to 07.10.1997 (first year); 70% of the high tension tariff from 08.10.1997 to 07.10.1998(second year); and 80% of the high tension tariff from 08.10.1998 to 07.10.1999(third year). From the fourth year onwards, the full tariff shall be paid. Towards the end of the concessional tariff period, by a communication dated 17.07.1999, S.S. Minerals was called upon to produce photocopies of bills relating to the purchase of machineries erected in the industry. In response, by communication dated 01.09.1999, S.S. Minerals informed the TNEB that it would furnish a copy of the lease deed executed with W.S.Industries (India) Limited (W.S. Industries) on the same date. Although there is no documentary evidence regarding the handing over of the lease deed on 01.09.1999, S.S. Minerals has stated in paragraph 9 of the affidavit in support of the writ petition that it was handed over on 01.09.1999 and this averment is not denied in the counter of TNEB. Instead, TNEB states that the lease of machineries was not disclosed by S.S. Minerals until details were requested for by TNEB.

4. The next material development was that TNEB, by communication dated 20.06.2002, called upon S.S. Minerals to explain as to why machineries were taken on lease from W.S. Industries instead of purchasing new machineries. In addition, S.S. Minerals was called upon to explain as to why the lease deed was executed on 17.09.1997 with retrospective effect from 17.10.1996. By reply dated 01.7.2002, S.S.Minerals stated that it is a small scale industry in a backward area. It invested about Rs.29.50 lakh in purchasing several items of plant and

machinery. Moreover, a large sum of money was also invested for the construction of the building. Upon making such investment, S.S. Minerals had limited funds for procuring other plant and machinery.

Therefore,
for manufacturing of Quartz and Feldspar powder, it was decided to take such machinery on lease from W.S. Industries. By the said communication, S.S. Minerals also informed the TNEB that the value of the said machinery in the books of W.S. Industries was only Rs.2.16 lakhs.

5. As regards the execution of the lease deed on 17.09.1997 with retrospective effect from 17.10.1996, S.S. Minerals explained that the machinery was taken on lease in two installments: the first installment in 1996 and the second installment in 1997. Therefore, a composite agreement was executed on 17.09.1997 with retrospective effect from 17.10.1996. In response, by communication dated 27.07.2002, the TNEB informed S.S. Minerals that it had not made any investment in the main machineries involved in the manufacturing activity and instead took machineries on lease from W.S. Industries. Consequently, S.S. Minerals was informed that there is no justification to allow tariff concession as per G.O.Ms.No.29. On that basis, S.S. Minerals was called upon to pay a sum of Rs.21,18,702/-, which is the difference between the full tariff and the concessional tariff over the period extending from October 1996 to October 1999. In addition, S.S. Minerals was called upon to pay interest at 1.5% per month which amounted to a sum of Rs.14,19,449/-. In the aggregate, S.S. Minerals was called upon to pay a sum of Rs.35,38,151/- to the TNEB. The said communication dated 27.07.2002 was challenged in W.P. No.34001 of 2002. As stated earlier, the said writ petition was allowed by order dated 07.06.2013 on the ground that S.S. Minerals is a new industry as per G.O.Ms.No.29 and that there is no prohibition in the said Government Order as regards taking machineries on lease. The present appeal was filed in the above facts and circumstances.

6. We heard Mr.P.Gunaraj, the learned counsel for the TNEB; Mr.R.Murari, the learned senior counsel, assisted by M/s.Aditi Ashok for S.S. Minerals; and Mr. Satish Parasaran, the learned senior counsel, assisted by Ms. Preeti Mohan for L&T.

7. Mr.Gunaraj submitted that the tariff concession is intended to provide an incentive to new industries which are established in non-metropolitan areas. The object and purpose of the concession is to reduce the expenditure of such new industries during the first three years of operation because they would be incurring heavy expenditure towards establishing

the new industry by purchasing land, putting up construction and purchasing and installing plant and machinery. This concession is not intended for existing industries or for industries that take over the assets of an existing industry without investing in the purchase of such assets.

8. In order to buttress the above contention, the learned counsel invited the attention of the Court to G.O.Ms.No.29, and, in particular, the explanation to clause (a) thereof. He also relied upon the judgment in State of Gujarat and Others v. Saurashtra Cement & Chemical Industries Ltd., (2003) 2 SCC 394. In the said judgment, the Court was concerned with an exemption under Section 3(2)(vii)(b) of the Bombay Electricity Duty Act, 1958 (the Bombay Electricity Duty Act). The learned counsel pointed out that the exemption provision in the said Act applied to new industrial undertakings and a new industrial undertaking was defined in such a manner as to exclude industrial undertakings formed by the splitting up or reconstruction of a business or undertaking already in existence in the State or by transfer to a new business or undertaking of a building, machinery or plant previously used in the State for any industrial purpose. The said exemption provision was interpreted by the Hon'ble Supreme Court and the Court concluded that the new unit could not function without the assets of the existing unit and was, consequently, not totally independent of the existing unit. Accordingly, the Hon'ble Supreme Court concluded that the new unit is an expansion of an existing undertaking and, therefore, it is not entitled to exemption as per Section 3 (2)(vii)(b) of the Bombay Electricity Duty Act. According to the learned counsel for the TNEB, the said judgment of the Hon'ble Supreme Court is squarely applicable to the present dispute inasmuch as G.O.Ms.No.29 is substantially similar to the exemption provision in the Bombay Electricity Duty Act. Therefore, he submits that the impugned order of the Writ Court is liable to be set aside.

9. On the contrary, Mr. Murari submitted that G.O.Ms.No.29 is applicable to new industries. It is not in dispute that S.S. Minerals was set up as a new industry. He contended that the explanation to clause (a) is attracted only if the assets, other than cash of the existing industry, are transferred and shown as assets of the new industry. In the present case, he submitted that S.S. Minerals invested the substantial sum of about Rs.1.13 crore towards construction of the building and in purchasing, machinery, furniture and office equipments in a non-metropolitan area. Therefore, it cannot be said that S.S. Minerals is not a new industry or that it did not invest a substantial sum of money to establish an industry in a non-metropolitan area. In support of this contention, the learned senior counsel referred to the balance sheet of S.S. Minerals

for the financial years ended on 31.03.1997 and 31.03.1998. He also submitted that proof of procurement of machinery and equipments was available in the form of invoices which have been included in the typed set of papers. As regards the judgment of the Hon'ble Supreme Court in State of Gujarat v. Saurashtra Cement & Chemical Industries Ltd., he submitted that the exemption provision in the Bombay Electricity Duty Act is different from G.O.Ms.No.29 inasmuch as it expressly excludes industries formed by transfer of building, machinery or plant previously used in the State for industrial purposes.

10. By contrast, he contended that G.O.Ms.No.29 does not contain any such exclusion. He also pointed out that the assets that were taken on lease from W.S.Industries have a book value of only about Rs.2.16 lakhs as per the balance sheet of W.S. Industries whereas S.S. Minerals had made an aggregate investment of about Rs.1.13 crore in establishing the new industry. Therefore, he submitted that S.S. Minerals was entitled to the tariff concession and that the order of the learned single Judge is liable to be affirmed.

11. With regard to W.P. No.2624 of 2020, Mr. Satish Parasaran submitted that L&T acquired the land of S.S. Minerals under a Sale Deed dated 26.02.2015, and applied for a high tension connection, whereas the TNEB refused to provide such connection unless the dues of S.S. Minerals is paid by L&T. In response, Mr. Gunaraj submitted that the Tamil Nadu Electricity Supply Code empowers the TNEB to claim the dues of the previous occupant from the new occupant of the premises as a condition for the grant of a new connection or for re-connection.

12. We considered the submissions of the learned counsel/senior counsel for the respective parties and examined the materials available on record.

13. The principal question that arises for consideration is whether S.S. Minerals was entitled to tariff concession as per G.O.Ms.No.29. In order to answer this question, the said Government Order should be subjected to close scrutiny. We find that it is stipulated therein that the concession is not applicable to an industry set up before 03.05.1989. S.S. Minerals was admittedly set up after 03.05.1989. It is also stated therein that the concession shall not be applicable to a consumer which utilizes power from its own generating units or makes other arrangements for production purposes and utilizes the power supplied by the TNEB for auxiliary purposes only. It is not the case of the TNEB that S.S. Minerals is not entitled to tariff concession on these grounds. Instead, in effect, the

contention of TNEB is that S.S. Minerals does not qualify as a new industry and is, therefore, not entitled to tariff concession per G.O. Ms.29.

14. In order to test this contention, the explanation to clause (a) of G.O. Ms.29, which deals with the term 'new industries', should be examined. In the said explanation, for the purpose of electricity tariff concessions, the term 'new industries' is defined as "a new investment by any entrepreneur including by an existing industry in any area other than the Madras Metropolitan areas, provided the assets other than cash, of the existing industry, are not transferred and shown as assets of the new industry."

15. From the above explanation, it is clear that the incentive is intended to encourage and promote new investments by an entrepreneur, including an existing industry, in a non-metropolitan area. Therefore, the principal criterion for availing the concession is the making of a new investment in a non-metropolitan area. In light of the above object and purpose, the transfer of assets by an existing industry/entity to a new industry/entity, which shows these old assets as its assets, is not reckoned as a new investment. In fact, we find that clause (aa) of G.O. Ms.29 makes it clear that the tariff concession was also applicable to the expansion of an industry outside the Madras Metropolitan area in which the main industry is functioning, provided the assets of the existing/main industry, other than cash, are not transferred and shown as the assets of the expanded industry. Therefore, in our view, the sine qua non for availing tariff concession under G.O.Ms.No.29 is the making of a new investment outside the Madras Metropolitan area. As regards existing industries, the entitlement to be treated as a new industry and claim the concessional tariff would hinge on establishing that such existing industries did not transfer the assets to a new industry and claim the tariff concession on the strength of such old assets, which are now shown as the assets of the new industry.

16. Consequently, the entitlement of S.S. Minerals to the benefit of tariff concession would turn on whether it made new investments or merely transferred the existing assets from an existing entity and showed such assets as its assets. For this purpose, it is necessary to examine the financial statements of S.S. Minerals. The balance sheet of S.S. Minerals for the financial year ended on 31.03.1997 shows that the company had fixed assets of the aggregate value of Rs.97,08,367/- [after depreciation]. This consisted of building, machinery, furniture and office equipments. It is stated that this does not include the leased assets of W.S. Industries, which continue to be reflected on the books of W.S. Industries. The schedule of Fixed

Assets of S.S. Minerals for the financial year ended on 31.03.1997 is set out below:

Schedule - 4

Fixed Assets

Sl No	Description of Assets	GROSS BLOCK		As at 31.3.97 Rs.	DEPN. For the year Rs.	NET BLOCK As on 31.3.97 Rs.
		As at Addition/ exp 1.4.96 capitalised Rs. Rs.	Pre-op Deletion Rs.			
1.	Land	56,000		56,000		56,000
2.	Building 3.34%	3,486,790 1,102,422	1,811,659	6,400,871	89,079	6,311,792
3.	Machinery 5.28%	2,072,130 569,565	665,310	3,307,005	72,341	3,234,664
4.	Furniture 6.33%	17,735	79,876	97,611	2,575	95,036
5.	Office Equipments 4.75%	11,095		11,095	220	10,875
	Total	5,633,005 1,671,987	2,567,590	9,872,582	164,215	9,708,367

Similarly, the balance sheet for the financial year ended on 31.03.1998 is on record and the schedule of Fixed Assets shows that the aggregate value of the fixed assets after depreciation is a sum of Rs.1,07,52,343/-. The said schedule of fixed assets is extracted hereunder:

Schedule - 4

Fixed Assets

Sl No	Description of Assets	GROSS BLOCK As at Addition/ at 1.4.97 Deletion 31.3.98 Rs. Rs. Rs.	As As As at Addition at 1.4.97 for the 31.3.98 y ear	Depreciation Reserve As at Addition at 1.4.97 for the 31.3.98 y ear	NET BLOCK As on As on 31.03.98 31.03.97
1.	Land	56,000	56,000	-	56,000
2.	Building 3.34%	6,400,871 27,245 6,428,116	89,079 214,699 303,778	6,124,338 6,311.792	
3.	Machinery 5.28%	3,307,005 1,476,954 4,783,969	72,341 252,593 324,934	4,459,025 3,234,664	
4.	Furniture 6.33%	97,611 13,525 111,136	2,575 7,035 9,610	101,526 95,036	
5.	Office Equipments 4.75%	11,096 1,160 12,256	220 582 802	11,454 10,875	
	Total	9,872,683 1,518,884 11,391,467	164,215 474,909 639,124	10,752,343 9,708,367	

17. We also find that the invoices related to the purchase of equipments and materials for the establishment and operation of the industry at Neervalur Village have been produced in the typed set of papers at pages 82 to 162.

18. Upon perusal of the aforesaid documents, there is little doubt that S.S. Minerals had invested a substantial amount of money in excess of Rs.1 crore towards establishing an industry in Neervalur Village, Kanchipuram Taluk. Significantly, the claim for concessional tariff was not made on the basis of the value of the existing assets of W.S. Industries, which were taken on lease by S.S.Minerals. The TNEB took a decision to demand payment of the difference between the concessional tariff and the full tariff along with interest thereon mainly on the ground that S.S. Minerals had taken critical machinery on lease from W.S.Industries. In addition, it is stated that S.S. Minerals did not disclose the fact that the machinery was taken on lease until the relevant particulars were called for by TNEB

towards the end of 2009. Upon perusal of G.O.Ms.No.29, we find that an existing industry that transfers its assets and claims tariff concession by showing the old assets as the assets of the new industry is not entitled to claim the concession but there is no prohibition against taking of assets on lease by a new industry, which makes the claim for tariff concession on the basis of new investments in the new industry. While we are conscious that a concession order should be subjected to strict scrutiny, as per applicable principles, a careful scrutiny of the text of G.O.Ms.No.29, and the spirit of such text as can be discerned therefrom, indicates clearly that the incentive is intended to encourage and promote new investments outside the Madras Metropolitan area. The documents on record, including, in particular, the balance sheet of S.S. Minerals for the financial years ended on 31.03.1997 and 31.03.1998 disclose that substantial investment has been made. This is corroborated by the invoices which also disclose that materials have been supplied to S.S. Minerals in a non-metropolitan area.

19. As regards the judgment of the Hon'ble Supreme Court in Saurashtra Cement & Chemical Industries Limited, we find that the said judgment turned on the language of Section 3(2)(vii)(b) of the Bombay Electricity Duty Act, which defined an industrial undertaking as follows:

Explanation. - For the purpose of clause (vii)--

(i) an industrial undertaking 'means an industrial undertaking which manufactures or produces for sale or use in the manufacture or production of other goods but does not include an undertaking which manufactures or produces any kind of food and drinks, meant ordinarily for consumption on the premises of the undertaking; and

(ii) "a new industrial undertaking" means any such industrial undertaking which-

(a) is not formed by the splitting up or the reconstruction of a business or undertaking already in existence in the State; or

(b) is not formed by transfer to a new business or undertaking of a building, machinery or plant previously used in the State for any industrial purpose, of such value in relation to total investments, as the State Government may, by notification in the Official Gazette, specify (emphasis added); or

(c) is not an expansion of the existing business or undertaking in the State."

By contrast, G.O.Ms. No.29 does not exclude from the definition of a new industry an industry that uses machinery that had been previously used in the State, provided new investments are made and it is not merely old wine in a new bottle. Indeed, G.O.Ms.No.29, in contrast to the Bombay Electricity Duty Act, permits investment by an existing industry, including by way of expansion. Therefore, it is sufficient for the purpose of G.O.Ms.No.29 if there is proof that new investments have been made in an area outside the Madras Metropolitan area. In the present case, we find that there is sufficient evidence that such investment was made. Accordingly, we see no reason to interfere with the impugned order of the learned single Judge. Hence, the order of the learned single Judge is affirmed and the writ appeal is dismissed.

20. As stated earlier, W.P. No.2684 of 2020 is filed by L&T to grant a high tension power connection without insisting on the payment by L&T of sums allegedly due from S & S Minerals. In view of the conclusion arrived at in W.A.No.934 of 2016, the TNEB is not justified in demanding such amounts from L&T. Accordingly, as a consequence of the conclusion in the writ appeal, the TNEB is directed to dispose of the application of L&T for a high tension power connection on merit and without reference to the claims against S.S. Minerals within a period of one month from the date of receipt of a copy of this judgment. Nonetheless, we make it clear that we have not examined or decided the question related to the entitlement of TNEB to make such claim against the subsequent owner/occupant of the premises under the Tamil Nadu Electricity Supply Code as such determination is unnecessary in the facts and circumstances.

21. Accordingly, W.A. No.934 of 2016 is dismissed and W.P. No.2684 of 2020 is disposed of on the above terms. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

सत्यमेव जयते
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1.The Superintending Engineer,
Tamilnadu Generation and Distribution Corporation,
Kanchi, Electricity Distribution Circle,
Kanchipuram - 631 502

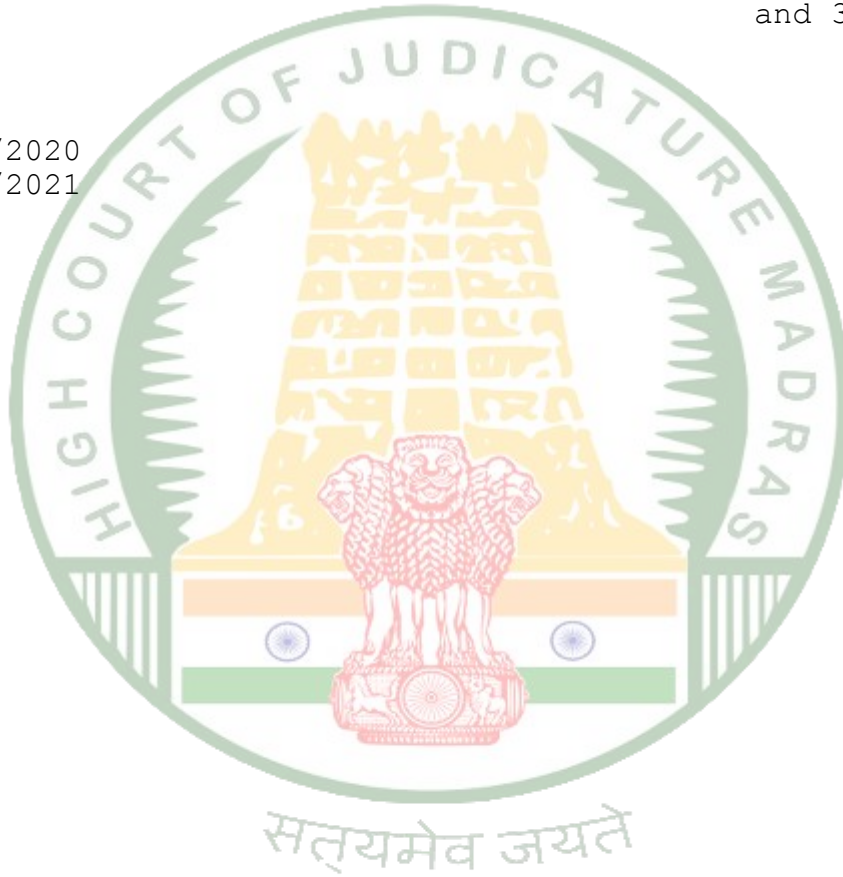
2.The Superintending Engineer,
Kancheepuram Electricity Distribution Circle,
Tamilnadu Electricity Board,
Annamaligai, Vellore Road,
Olimohampet, Kanchipuram.

+1cc to Mr.P.Gunaraj, Advocate, S.R.No.38459

+2ccs to M/s.Preeti Mohan, Advocate, SR.NO.38847

W.A.No.934 of 2016 &
W.P. No.2684 of 2020 & W.M.P.No.3114 &
and 3115 of 2020

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