

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.03.2020

DATE OF DECISION : 19.03.2020

CORAM

THE HON'BLE Mr. JUSTICE M.SUNDAR

O.P.No.538 of 2019

and

A.No.4836 of 2019

- 1.The Tamil Nadu Text Book and Educational Services Corporation,
EVK Sampath Maaligai,
68, College Road,
Chennai-600 006.
 - 2.The Managing Director,
The Tamil Nadu Text Book and Educational Services Corporation,
EVK Sampath Maaligai,
68, College Road,
Chennai-600 006.
- .. Petitioners

Vs.

M/s.Kores (India) Ltd.,
having its registered office at No.301/302,
Ashford Chambers, Lady Jamshedji Road,
Mahim (West), Mumbai-400 016
and Branch offices inter alia, at
191, Anna Salai, 3rd Floor,
'Hamid Building', Chennai-600 006
rep by its authorised signatory,
Mr.K.S.Vijaykumar

.. Respondent

This original petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking (a) to set aside the impugned award dated 14.03.2019 passed by Hon'ble Tribunal in the arbitration between petitioners and the respondent / claimant, (b) direct the respondent / claimant to bear the costs of the proceedings and (c) pass such further or other reliefs as this Court may deem fit in the light of facts and circumstances of the present case.

For Petitioners : Mr.S.T.S.Murthi,
Additional Advocate General
for / assisted by
Mr.C.Munusamy
Ms.S.Varsha

For Respondent : Mr.Bijesh Thomas

ORDER

Mr.S.T.S.Murthi, learned Additional Advocate General assisted by Mr.C.Munusamy and Ms.S.Varsha, learned counsel on record for petitioners and Mr.Bijesh Thomas, learned counsel for respondent are before this Court.

2 Prefatory note :

(a) Instant 'Original Petition' ('O.P' for the sake of brevity) has been filed under section 34 of 'The Arbitration and Conciliation Act,

1996' (hereinafter referred to as 'A and C Act' for the sake of brevity), assailing an Arbitral Award dated 14.03.2019 made by an 'Arbitral Tribunal' constituted by a Sole Arbitrator qua an agreement dated 21.07.2015.

(b) Challenge to an arbitral award under section 34 of A and C Act, going by the language in which section 34 of A and C Act is couched, is by way of an 'application', but this court is giving the nomenclature 'Original Petition' for such applications under section 34 of A and C Act. Therefore, this Court will continue to refer to instant matter as 'O.P'. A O.P under section 34 of A and C Act is neither an appeal nor a revision. It is not even a fullfledged judicial review, but it is a limited judicial review within the contours and confines of section 34 of A and C Act. By 'contours and confines of section 34 of A and C Act', this Court refers to the eight slots adumbrated in section 34 of A and C Act. To be noted, five slots are adumbrated under section 34(2)(a), two slots are adumbrated under section 34(2)(b) and sub section (2A) of section 34 is one slot. This court chooses to deploy the term 'slots' in preference to 'grounds' as instant O.P is neither an appeal nor a revision and it is not

even a fullfledged judicial review as mentioned earlier. To put it differently, it is a mere 'challenge to an award'. When it comes to challenge to an award, the principle is, if a petitioner / applicant is able to fit his case into any one or more of the eight slots neatly and snugly, the award will be dislodged or in other words, set aside. If that not be so, the award will not be interfered with. This is owing to 'minimum judicial interference' in 'Alternate Dispute Resolution' ('ADR') mechanism which is an important sublime philosophy and salutary principle qua scheme of A and C Act. In this context, this Court chooses to describe the eight slots adumbrated in section 34 as eight pigeon holes. To be noted, some of these pigeon holes are even in the nature of keyholes and pinholes, as some of these slots have been circumscribed by limitations not entailing review on merits of the dispute qua conflict with public policy of India slot vide Explanation 2 to Section 34(2)(b)(ii), besides making reappreciation of evidence impermissible and eliminating even erroneous application of law vide proviso to section 34(2A) from patent illegality slot.

- (c) Having set out the scope and ambit of instant O.P under

Section 34 of A and C Act and having noticed that minimum judicial interference is one of the important pillars of ADR mechanism, expeditious disposal of O.Ps under Section 34 is also a very important facet of the matter. This facet of the matter finds statutory expression in sub-section (6) of Section 34 of A and C Act, which mandates that such O.Ps shall be disposed of expeditiously and in any event within a period of one year from the date on which notice under sub-section (5) is served on the party concerned. This sub-section (6) and importance of disposing of O.Ps of instant nature as expeditiously as possible and within the one year time line was emphasised by Hon'ble Supreme Court in ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in (2018) 9 SCC 472. To be noted, though ***Bhumi Vikas*** case law is an authority for the broad proposition that sub-section (5) of Section 34 is only directory and not mandatory, there is a categoric observation in the ***Bhumi Vikas*** case law that every endeavour should be made by courts dealing with Section 34 O.Ps to adhere to one year time line in sub-section (6) of Section 34. This observation is articulated in paragraph 26 of ***Bhumi Vikas*** case law which 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.

(Underlining and double underlining made by this Court to supply emphasis and highlight)

(d) Broad summation of this prefatory note is:

- i) Contours/confines of Section 34 O.P are limited;
- ii) The adumbration under Section 34 are in the nature of pigeon holes (some being keyholes and pinholes) and not grounds;
- iii) A O.P under Section 34 is neither an appeal nor a

revision. It is not even a full-fledged judicial review, but a limited judicial review within the contours and confines of 8 pigeon holes adumbrated in section 34;

iv) Minimum judicial interference which is one of the pillars of ADR mechanism is the sublime philosophy and salutary principle underlying the scheme of A and C Act;

and

v) Expeditious disposal of O.Ps of this nature is imperative for ADR mechanism to be successful.

3 Facts :

(a) Owing to the aforementioned Prefatory note, it is not necessary to delve into the facts in great detail. Suffice to say that petitioners before this court placed an order for supply of Geometry boxes with the sole respondent, details of which are captured in a letter dated 19.05.2016, a scanned copy of which is as follows :

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TAMILNADU TEXTBOOK AND EDUCATIONAL SERVICES CORPORATION

T.V.R. SAMPATH 3F
NUSSE COLLEGE ROAD
Phone : 044 - 2827 5851 / 2827 6107 / 2827 8244
Fax : 2822 4493

Mythili K. Rajendran, I.A.S.,
Managing Director

R.C.No.17/C1/2015 Date: 19.05.2016

To:
Mrs. Kores (India) Ltd.,
Ashford Chambers, 3rd Floor,
Lady Jamshedji Road, Mahim,
Mumbai - 400 016

Sr,

Sub: Tamilnadu Textbook and Educational Services Corporation -
Payment towards supply of Geometry Box - regarding

Ref: 1. Purchase Order No.17/C1/2015 dated 16.07.2015
2. ECS No.229/IOB dated 17.05.2016

This is to inform you that, in the purchase order cited, the purchase order has been issued to your firm for the supply of Geometry Box for the year 2015-2016. In this regard the details of payment released under the tender No.17/C1/2015 is furnished below.

Details of Payment ECS No.229/IOB dated 17.05.2016

Supplier Name	Quantity x Rate Rs.31.60	Value Rs. (A+B+C) (A)	90% Value Rs. (A)	Delay Penalty Rs. (B)	Net Amount paid Rs. (A-B)
M/s. Kores (India) Ltd.,	Qty 14,49,376	4,58,00,345	4,12,20,310	1,38,39,535	2,73,80,775
	Value Rs.				

The Penalty is calculated as per the tender special terms and condition Clause (11).
The receipt of the payment may kindly be acknowledged at once.

For Managing Director

सत्यमेव जयते

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(b) This was preceded by an agreement dated 21.07.2015 for the aforesaid supply (hereinafter 'said agreement' for brevity). Clause 24 of said agreement captioned 'Conciliation & Arbitration' is an arbitration

clause. In other words, clause 24 of said agreement serves as arbitration agreement between petitioners and respondent being 'arbitration agreement' within the meaning of section 2(1)(b) read with section 7 of A and C Act.

(c) Supplies were made and differences erupted with regard to quantum of payment. Suffice to say that petitioners levied penalty inter-alia by relying on clause 20 of said agreement captioned 'Liquidated Damages and Penalty'. This was disputed by respondent and respondent raised an arbitrable dispute. To be noted, aforementioned arbitration agreement between parties is multi tiered. This Court is informed that first tier of conciliation failed and therefore, arbitration clause was invoked. Vide proceedings made in O.P.No.92 of 2018 in exercise of power under Section 11 of A and C Act, this court appointed a sole Arbitrator. To be noted, a Former Judge of this Court was appointed as Sole Arbitrator. Sole respondent in instant O.P was claimant before the Arbitral Tribunal and the prayer paragraph in the claim statement as can be culled out from the case file placed before this Court reads as follows:

'(a)Direct the 1st Respondent to pay to the Claimant a sum of Rs.1,07,52,568/- [Rupees One Crore Seven Lakhs Fifty Two Thousand Five Hundred & Sixty Eight only, i.e.,

Rs.75,19,415/- as the principal, along with interest thereon Rs.32,33,117/-) at 18% p.a., and further interest @ 18% p.a on principal sum of Rs.75,19,451/- [Rupees One Crore Seven Lakhs Fifty Two Thousand five Hundred & Sixty Eight only] to be paid from the date of the Claim till actual realization;

(b) grant the costs of these proceedings to the Claimant; and

(c) pass such other or further orders as may be deemed fit in the interests of justice.'

(d) Petitioners responded by saying that delivery period is 75 days, this was not adhered to and therefore, penalty was levied. Respondent in instant O.P submitted that the question of delivery period will arise only when petitioners discharge their part of obligations and petitioners not having done the same cannot now levy penalty.

(e) Arbitral Tribunal entered upon reference and passed an Award dated 14.03.2019. Suffice to say that issues as framed by Arbitral Tribunal read as follows :

- i) As per the agreement dated 21.7.2015 whether or not the materials are to be supplied on or before 7.10.2015?
- ii) Whether or not the commencement of supply period of 75 days will be effective from the date of acceptance of same i.e. on 5.8.2015?
- iii) Whether or not the 1st respondent has received the

products without any demur?

iv)Whether or not the claimant is delayed in supply of materials?

v)Whether or not the claimant supplied the defective materials?

vi)Whether or not deduction of Rs.75,19,451/- as penalty on 4.8.2016 after payment of Rs.63,20,084/- from 1,38,39,535/- is justified?

vii)Whether or not the respondent imposed penalty as per the terms and conditions of the agreement dated 21.7.2015 is justified?

viii)Whether or not the claimant is entitled to a sum of Rs.75,19,431/- as principal as on 19.5.2016?

ix)Whether or not the claimant is entitled to interest at the rate of 18% per annum from 16.05.2016 till 04.09.2016?

x)Whether the parties are entitled to costs?"

(f) The conclusion of Arbitral Tribunal captioned 'Arbitral

Resultant Findings and Award' reads as follows :

'(1)Security deposit of Rs.22,90,036/- pending with the corporation / respondent has to be settled between the parties as the claim is only for Rs.75,19,451/- with effect from 19.05.2016 after deduction of Rs.16,08,809/- towards pre and post inspection and testing charges.

(2)There was no monetary loss sustained by the corporation. There was no evidence let in on the side of the Corporation /

respondent to show that they had sustained loss of reputation or caused financial burden to the parents.

(3) Since there was no kind of objections raised by the Corporation / respondent in the manner of supply of materials at any point of time, the question of delay or much less willful delay in supply of materials by the contractor / claimant arise at all in this case as the period of time limit of 75 days for supply of materials according to the conditions of the agreement has no relevancy and more so the delay caused by the Corporation / respondent while performing their part of contract has been waived by themselves in this regard.

(4) Counsel for the claimant relied on the provisions of the Arbitration Act coupled with the provisions of other act and contended that the claimant is also entitled to interest at the rate of 18% p.a. on the amount due against the corporation as the case on hand is one of commercial transaction. However, the counsel for the Corporation / respondent contended that the contractor is not entitled for any kind of interest on the alleged amount due as there is no condition provided under the agreement in this regard. The submissions of both sides were considered in detail. The present case is one of commercial transaction. From 19.5.2016 onwards the Corporation / respondent has retained a huge sum of Rs.75,19,451/- on the ground of penalty which is not bonafide and that they have enriched themselves in this regard. Hence, fixing the rate of interest at

9% p.a. on the amount due against the Corporation / respondent would meet the ends of justice. Since the Corporation / respondent retained a huge sum of Rs.75,19,451/- from 19.05.2016 which is not bonafide, imposing cost of the proceedings against them would also meet the ends of justice.

(5)The Contractor / claimant has incurred arbitral expenses in the following manner upto 14.03.2019:

<u>Summary</u>	<u>Rs.</u>
1)Arbitration Fees ...	5,00,000/-
2)Arbitration hall charges ...	36,000/-
3)Secretarial expenses ...	75,000/-
4)Initial reading charges ...	1,00,000/-
Total	7,11,000/-

ARBITRAL AWARD :

In the result claim petition is allowed. The Corporation / respondent is liable to pay to the claimant / contractor

- 1) Rs.75,19,425/- towards principal
- 2) Interest at the rate of 9% p.a. on the principal amount of Rs.75,19,425/- from 19.05.2016 till the date of realization.
- and
- 3)Rs.7,11,000/- towards cost of Arbitral proceedings.'

4 Submissions and Dispositive Reasoning :

(a) Having set out the factual matrix, it is to be noticed that the case file placed before this court reveals that caption to instant O.P says that it has been filed under section 34 of A and C Act (without mentioning subsection thereunder with specificity). Learned Additional Advocate General submitted that instant O.P is predicated on Section 34(2)(a)(iv) and 34(2)(b)(ii) read with Clauses (ii) and (iii) of Explanation 1 thereto. In other words, it is the petitioners' case that impugned award contains decisions on matters beyond the scope of the submission to arbitration and that it is in conflict with public policy of India.

(b) With regard to the first ground, the submission made by learned Additional Advocate General is to the effect that the Arbitral Tribunal fell in error in holding that fixation of 75 days is inappropriate and according to him, this tantamounts to wandering beyond said agreement. A careful perusal of said agreement and more particularly, clauses 1, 14 and 20 of said agreement leaves this court with the considered view that the Arbitral Tribunal has not wandered beyond said agreement as clauses 1, 14 and 20 of said agreement read as follows :

'1.The supplier should manufacture the Geometry Box, in

conformity with the specifications given in the tender schedule, and complete the supply to the Government and Government aided Schools, at the designated locations as per the requirement and time schedule, of the Corporation/ Purchaser as detailed below.

Ordered quantity	:	14,49,390 No. of boxes
Rate per Geometry Box (inclusive of Cost of Delivery at Designated locations and other incidental charges)	:	Rs.31.60/-
Delivery Period	:	75 days

14. Delivery of the Goods and performance of service shall be made by the Supplier in accordance with the time schedule specified by the Corporation / Purchaser in his schedule of requirement or Purchase Order.

a) The willful delay by the Supplier in the performance of his delivery obligation shall render the Supplier liable to any or all the following sanctions 1) imposition of liquidated damages, 2) forfeiture of Security deposit, 3) termination of the contract for default and cancellation of future and pending purchase orders, and 4) ban on future participation of tenders invited by the Purchaser.

b) If the Purchaser has incurred, sustained or put to any loss by reasons of this contract having been so put an end to or on account of the failure or negligence or deficiency or defaults of the SUPPLIER, for reasons of exemption other than those contained in tender document, the Corporation / Purchaser shall be entitled to recover such compensation,

loss, cost, damage, expenses or monetary differences or difference in price as may be determined by the Managing Director. The SUPPLIER undertakes to compensate the same to the PURCHASER (Corporation) in full.

(c) In case, if any of the materials delivered by the Supplier is rejected by the Corporation / Purchaser under any of the provisions and replacement sought for by the Corporation / Purchaser from Supplier, the latter shall effect replacement within such reasonable time as the Corporation / Purchaser may in his discretion allow for the purpose.

d) In the event of the Supplier's failure to supply the specified quantity within the stipulated time, i.e., as per Tender conditions and Purchase Order, the Purchaser shall be entitled at his discretion to reject the Geometry Box and to repudiate the contract and proportionately deduct from the Security Deposit the price paid and the damages and also to recover the sum paid if in excess and this shall be without prejudice to any other remedy open to the Purchaser under these provisions or under law.

20. Liquidated Damages and Penalty:

a) If the Contractor fails to deliver the Geometry Boxes (Mathematical Drawing Instruments) as per the Purchase Order and the Delivery Schedule specified by the Corporation, the Corporation shall have the right to impose **penalty of 1%** of the value of the order for every week of delay or part thereof after the due date of delivery for a period of **two weeks** and thereafter at the rate of 5% of the value of

the delayed supply for each Week of delay or part for another **Two weeks** of delay. The Corporation shall have the right to make purchase from outside at higher rates if the delay continues even after the expiry of the aforesaid period of four weeks for which penalty is imposed on the Contractor and the loss sustained by the Corporation to this effect shall be deducted from the bill of the Contractor and / or from the Security Deposit of the Contractor.

b)The Corporation shall have the right to place the Purchase Order with the other eligible Tenderer(s) if the supply is delayed beyond four weeks after the due date and it shall be at the cost and consequences of the Contractor who is in default. The Corporation also reserves the right to take any other action against the Contractor in default for the loss and the consequential loss sustained by the Corporation.'

(c) A perusal of aforesaid undisputed covenants reveals that 75 days delivery period has been prescribed and penalty can be imposed only when there is wilful delay and there are mutual obligations in this regard. Therefore, there is no difficulty in coming to the conclusion that section 34(2)(a)(iv) is not attracted.

(d) This takes us to the next limb of attack, namely hit by the vice of impugned award being conflict with the public policy of India. It was argued that Arbitral Tribunal has proceeded on the basis that

liquidated damages have been imposed, whereas what has been imposed is only penalty. According to learned Additional Advocate General, this is a clear case of conflict with the public policy of India.

(e) In response to aforementioned submission, learned counsel for respondent pressed into service a judgment of Hon'ble Supreme Court in *MMTC Limited Vs. Vedanta Limited* reported in (2019) 4 SCC 163 and drew attention of this court to paragraphs 11 and 12 which read as follows :

'11.As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the

principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses v. Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders v. DDA* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see *ONGC Ltd. v. Saw Pipes Ltd.* [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] ; *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* [*Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445] ; and *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181])'

(f) Adverting to aforesaid paragraphs, it was submitted that the

submission of petitioners would tantamount to review on merits which is impermissible. It was pointed out that paragraph 12 of **MMTC Ltd.** case makes it clear that interference under section 34(2)(b)(ii) of A and C Act, i.e., plea of an award being in conflict with the public policy of India can be gone into and an award can be interfered with on this ground only when it does not entail a review on merits of the dispute.

(g) In terms of dispositive reasoning, arriving at a conclusion about whether the impugned award is in conflict with public policy of India can be done by taking recourse to principles laid down in this regard by Hon'ble Supreme Court in **ONGC Ltd. Vs. Western Geco International Ltd.** reported in (2014) 9 SCC 263, **Associate Builders Vs. Delhi Development Authority** reported in (2015) 3 SCC 49 and **Centrotrade Minerals and Metal Inc. Vs. Hindustan Copper Ltd.** reported in (2017) 2 SCC 228. To be noted, *Western Geco* and *Associate Builders* cases were rendered by Hon'ble Supreme Court prior to 23.10.2015, i.e., prior to the expression 'public policy' being statutorily explained in A and C Act. However, *Centrotrade* case which was rendered post 23.10.2015 has reiterated the principles laid down in

Western Geco and Associate Builders.

(h) Hon'ble Supreme Court, in *Western Geco* case followed by *Associate Builders* case had culled out three distinct juristic principles qua public policy. Hon'ble Supreme Court had not only culled out three distinct juristic principles, but has also laid down litmus tests for each of the three distinct juristic principles. The three juristic principles are (a) judicial approach, (b) Natural Justice Principal ('NJP' for brevity) and (c) irrationality / perversity. With regard to tests, Hon'ble Supreme Court went on to hold that (a) judicial approach should be tested by examining whether there is fidelity of judicial approach, (b) NJP should be tested on the age old *audi alteram partem* philosophy and (c) irrationality / perversity should be tested on the time honoured *Wednesbury* principle of reasonableness.

(i) A plain reading of the grounds raised in instant O.P makes it clear that instant O.P does not fit into any of the slots. The grounds raised are more in the nature of a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) in the light of the fact

that it requires review on merits of the matter which is clearly impermissible under section 34 of A and C Act while testing conflict with public policy of India slot.

(j) The plea that, what was imposed is not liquidated damages, but penalty does not carry the petitioners very far and it does not fit into any one of the aforementioned juristic principles. As rightly pointed out by learned counsel for respondent, there are reciprocal obligations on the part of respondent and the 75 days delivery period will start operating only when such obligations are honoured. The Arbitral Tribunal has given a factual finding that petitioners have not discharged their obligations. Such factual finding cannot be interfered with by treating instant O.P as a regular first appeal under section 96 of CPC.

(k) Therefore, the plea of impugned award being in conflict with public policy of India also fails.

5 Conclusion :

As both the grounds on which instant O.P is predicated are negatived, challenge to impugned award cannot but fail.

6 Decision :

Instant O.P is dismissed. Considering the nature of submissions made and considering the nature of the matter, parties are left to bear their respective costs. Consequently, connected application is closed.

19.03.2020

Speaking order

Index : Yes

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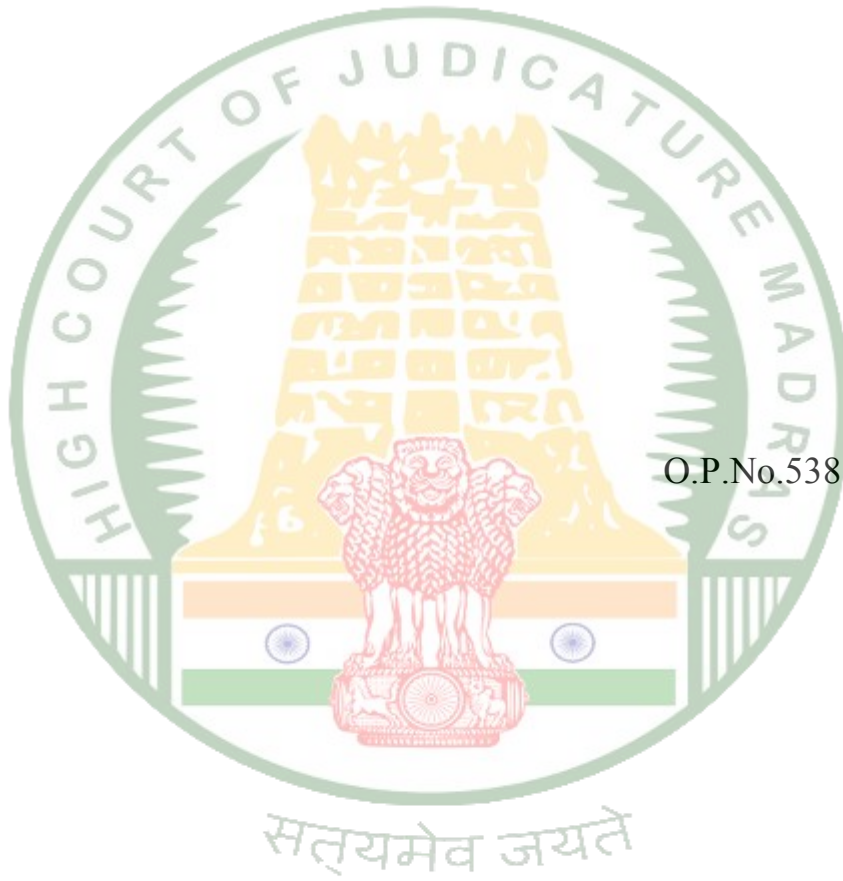


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