

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.1057 of 2019

and

A.No.9740 of 2019

M/s. Hyundai Motor India Ltd.,
Represented by its Managing Director,
having its Registered Office at
H-1, SIPCOT Industrial Park,
Irungattukottai, Sriperumbudur Taluk,
Kancheepuram District,
Tamil Nadu.

Vs.

...Petitioner

M/s. St. Antony's Cars Pvt. Ltd.,
Represented by its Managing Director,
Mr. Haimer Reynolds,
having its Registered Office at
XII/268, Mundakkal,
S.N. College Junction
Kollam -691 001 Kerala

PRAYER: Petition is filed under Section 34 (2) (b) (ii) of the Arbitration and Conciliation Act, 1996 praying to

- i) Set aside the Arbitral Award dated 15.03.2019 passed by the learned Arbitrator to the extent it has awarded against the petitioner in issues 1,2,4,5,6,8,9,11,12,13 and 14.
- ii) Set aside the Arbitral Award dated 15.03.2019 passed by the learned Arbitrator allowing an amount of Rs.2,30,000/- to the respondent towards the cost of the Arbitration.
- iii) Pass such further or other orders remitting the case back to the Learned Arbitrator to consider all the facts, pleadings and documents before ti to pass a new Award
- iv) Award costs to the petitioner.

For Petitioner : Ms. Vandana for
M/s. Surana and Surana

For Respondent : Mr. Ajit Joy

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ORDER

This Section 34 Petition is filed by the unsuccessful respondent before the Arbitral Tribunal.

2. The facts in brief which has culminated in the filing of the above Petition are as follows:

The respondent herein who is the claimant before the Arbitral Tribunal has filed the claim seeking the following reliefs:

a) Declare that the termination notice dated 02.08.2013 is null, void and bad in law

b) Directing the respondent to pay the claimant a sum of Rs.4,72,025.12/- together with interest at the rate of 18 % from 26.05.2009 till date of claim and future interest on account of warranty claims.

c) Directing the respondent to pay a sum of Rs.75,00,000/- on account of business transactions between the claimant and respondent. The respondent is liable to produce account for the same and pay sum of

Rs.75,00,000/- together with interest at 18 % with effect from 03.04.2013 till date of claim and future interest.

d) Directing the respondent to pay as Training Expense of Rs.5,74,065.00/- together with interest @ 18 % p.a. with effect from 26.05.2009 till date of claim and future interest.

e) Directing the respondent to compensate the claimant for loss of the date of claim till date and with future interest.

f) Direct the respondent to compensate for declaring the claimant's dealership as an NPA under SARFAESI Act, due to the act of terminating the dealership by the respondent and cancellation of booking of cars amounting till the date of the award and future interest.

g) Directing the respondent liable to compensate the claimant for the expenses incurred towards creation of respondent's Goodwill of Rs.2,09,97,068.00/-

h) Directing the respondent in compensating the loss of profit in future is at the present estimate at Rs.5,00,00,000.00/- and the respondent is liable to the claimant for the said sum from date of claim.

3. Case of the respondent/claimant

3.1. It is the case of the respondent that the petitioner herein was on a look out for prospective dealers to open their dealership for Kollam District. The respondent had requested the petitioner to award the dealership to them. On 09.08.2007, the petitioner had issued a letter of intent offering the dealership to the respondent herein. Pursuant to the letter of intent, the claimant had also deposited a sum of Rs.2,50,000/- towards sincerity deposit. Thereafter a dealership agreement was entered into on 24.08.2009 between the petitioner and the respondent. Prior to the agreement the dealership was offered and the inauguration was held on 26.05.2009 and the operation had also commenced. The agreement between the petitioner and the respondent had clearly stipulated that the respondent was being given a non-exclusive right to buy the Hyundai products.

3.2. The respondent would further submit that the terms of the sales was being changed unilaterally by the petitioner from time to time. Further the pricing, volume, etc. was on the sole discretion of the petitioner.

Despite such heavy odds, the respondent herein had increased the sales in Kollam District and that apart on account of the assurance of long standing relationship having been offered by the then Vice President, Sales and Marketing, the respondent herein had terminated the Tata Service Centre that was being run by them. The respondent had further leased a larger tract of land and constructed a showroom for the business. When the plan for the building was initially submitted by the respondent herein, the petitioner had rejected the same and had directed the respondent to construct the showroom as per their specifications and the second plan was approved by the petitioner herein.

3.3. The respondent would submit that they had spent considerable time and money in setting up the showroom and they had to put in considerable effort to get the necessary approval from the authorities. In all, the respondent had spent over a sum of Rs.2,40,00,000/- to set up the showroom which was located in a prime locality of the NH bye pass of Kollam. The claimant had borrowed money to put up this construction. All

of this was done on the assurance of a long standing relationship with the respondent.

3.4. The respondent would further submit that in view of the tireless and outstanding work put in by them, the petitioner herein had permitted the claimant to open two Rural Sales Outlet (RSO) at Anchal and Ochira at Kollam on 06.12.2010. Thereafter on 16.10.2011, the petitioner had granted the dealership to the respondent for running a dealership at Attingal, Trivandrum.

3.5. The claimant would submit that a sum of over Rs. 13 crores was invested by them which included the initial sums for ensuring the requisite number of vehicles maintenance and up keeping expenditure and payment of the salary to the employees who were over 130 in number. The respondent would further submit that they had to keep giving training to their employees with regard to the various models of cars that was being manufactured by the petitioner herein. The respondent would further

submit that they had been given encomiums by the petitioner in view of the outstanding work that was being done by them.

3.6. Although the term of the dealership was originally three years the petitioner herein kept the business relationship on with the respondent and therefore by implication the agreement stood extended. Although the overall growth of the petitioner had dipped in the year 2012 compared to the year 2011, the respondent's business had increased by 21 per cent. The respondent herein had no problem till such time the earlier Vice President Sales and Marketing was in-charge. After the entry of the new Vice President Sales and Marketing, the respondent started facing a lot of problems. The incumbent had started adopting methods to ensure that the respondent did not have a conducive atmosphere for running his business.

3.7. On 28.11.2012, the petitioner had served a show cause notice on the respondent asking them as to why the agreement could not be terminated as the targets were not being achieved. The respondent had given a suitable

reply to the said show cause notice vide their letter dated 11.12.2012. Thereafter the petitioner herein started fixing unachievable targets. That apart, the petitioner ensured that the fast moving cars were not allotted to the claimant. They had also not provided a GDMS code and the connectivity was not activated between the main showroom and other units, which was also causing great deal of hardship to the respondent.

3.8. While so, on 05.04.2013, the petitioner had inserted an advertisement in the Malayalam Manorama Daily calling for dealership for Kollam. This advertisement was once again issued on 08.05.2013 following this, the petitioner ensured that supply of cars was delayed to the respondent showroom, though the respondent was very prompt in payments. On 18.04.2013, yet an another show cause notice was issued and the respondent was threatened with termination. This constrained the petitioner to invoke Section 9 of the Arbitration and Conciliation Act, 1996 by filing OP. No.118 of 2013 on the file of the District Court, Kollam as the Agreement between the petitioner and the respondent contemplated

resolution of the disputes between them by Arbitration.

3.9. The respondent on entering appearance did not counter the application on merits but had taken out an application in I.A.No.808 of 2013 questioning the jurisdiction of the court at Kerala. Accepting the arguments of the petitioner herein, the learned District Judge, Kollam was pleased to dismiss the OP. The said order was taken up on challenge to the High Court of Kerala in Arbitration Appeal No.53 of 2013. On 03.09.2013, the respondent was advised to withdraw the appeal and consequently the Arbitral Appeal No.53 of 2013 was dismissed as withdrawn.

3.10. Meanwhile, by notice dated 02.08.2013 the petitioner had terminated the dealership of the respondent, though the notice dated 02.08.2013 was received by the respondent only on 07.05.2013. The said orders were sought to be stayed by the respondent by invoking Section 9 of the Act by filing OA.Nos.665 and 666 of 2013 before this Court. Thereafter the respondent had invoked the Arbitration clause and filed the claim

petition for the reliefs stated herein above:

4. Case of the Petitioner/respondent

4.1. The petitioner herein had countered the claim by contending that the allotment in favour of the respondent was only for a period of 3 years and that the same had neither been renewed thereafter nor was a fresh agreement entered into. They would contend that the respondent right from the inception of the agreement had not adhered to the terms and conditions of the dealership agreement. They would submit that the respondent had failed to maintain the monetary fund as required by them which was a sum of Rs. 450 lakhs in order to ensure that the petitioner is continuously maintaining an inventory of 100 numbers of vehicles at their sales point. The said contract was challenged only after waiting for a considerable time. That apart, the petitioner would contend that the respondent was not achieving the sales as required and their performance was not up to the mark. In fact when the auto mobile industry in Kollam showed growth of

5.43 per cent during from January 2012 to July 2012, the market share of the respondent had dropped. This was on account of the fact that funds were not being properly invested into the business by the respondent. That apart, the petitioner would contend that the customer service rendered by the respondent was not at all satisfactory.

4.2. They would further contend that when reviewing the work done for the period January-September 2012, it was found that there was no improvement and subsequently a warning notice dated 27.10.2012 was issued by the respondent. By their reply dated 11.12.2012, the respondent had contended that the poor sales was only on account of the poaching by other dealers.

4.3. The petitioner had further accused the respondent of opening unauthorised sales units which had to be subsequently regularised by the petitioner. These units were opened at Karugnapalli, kavangat, Anchal and Ochira. The petitioner would further submit that the respondent had

violated the terms of clause 4.10 of the dealership agreement by not servicing the loans borrowed by them properly as a result of which banks had initiated SARFAESI/DRT proceedings against the respondent and Tata capital had initiated arbitration proceedings. The petitioner would contend that on account of the unethical business practices and the poor sales done by the respondent, they were constrained to terminate the dealership.

4.4. The learned Arbitrator after perusing the pleadings and the documents submitted by both parties had framed the following issues:

- 1. Whether the termination notice dated 02.08.2013 is null, void and bad in law?*
- 2. Was there any delay in supplying of vehicles to the claimant by the respondent company?*
- 3. Whether the respondent is liable to pay the claimant a sum of Rs.4,72,025.12/- together with interest at the rate of 18% from 26.05.2009 till the date of the claim and future interest on account of warranty claims?*

4. Whether the respondent is liable to pay a sum of Rs.75,00,000/- on account of the business transactions between the claimant and the respondent together with interest at 18 % p.a. with effect from 03.04.2013 till the date of claim and future interest.

5. Whether the respondent is liable to pay Rs.5,74,065/- towards training expenses together with interest @ 18% p.a. with effect from 26.05.2009 due to the termination notice issued by the respondents?

6. Whether the respondent is liable to compensate the loss of investment of Rs.5,05,50,544/- made by the claimant at the behest of the respondent?

7. Whether the respondent is liable to compensate the loss caused to the claimant due to the act of terminating the dealership by the respondent and cancellation of booking of cars amounting to Rs.8,76,62173/- together with interest @ 18 p.a. from 02.07.2013 till the date of the award and future interest?

8. Whether the respondent is liable to compensate the claimant for the expenses incurred towards creation of respondent's Goodwill to the

extent of Rs.2.09,97,068/- ?

9. Whether the claimant is entitled to the relief for loss of profit in future to the extent of Rs.5,00,00,000/-?

10. Whether the relationship between claimant and respondent is on a Principal to Principal basis and whether the claimant bound by the terms of the agreement dated 24.08.2009?

11. Has the claimant failed to open the outlet at Ochira, workshop at Anchai and service branch in Attigal in spite of extension of time provided by the respondent?

12. Whether the sales outlet maintained by the claimant at Tiruvalla and Pathanamthitta were authorized by the respondent company?

13. Whether the claimant fulfilled the commitments made in the meeting held on 16.07.2012 and 23.01.2013?

14. To what other reliefs the claimant is entitled to?

4.5. Ultimately the Arbitrator had allowed the claim and held that the petitioner herein was liable to pay a sum of Rs.1,64,58,776/- to the

claimants together with interest at the rate of 12 per cent per annum from the date of the filing of the claim petition; that is, 29.04.2014 till the date of Award and thereafter at 9 per cent till date all the realisation. The following amounts were awarded:

1. Rs.35,96,271/- on account of the business transactions to claimant and respondent.
2. Rs. 3,82,710/- towards part of training expenses.
3. Rs. 75,30,235/- towards loss of investment.
4. Rs.31,49,560/- towards expenses for creating the goodwill for the petitioner through the respondents marketing and promotion.
5. Rs.18,00,000/- towards future profits.

challenging the said Award the petitioner has moved to this Court.

5. Mr. P.R. Vandana, learned counsel appearing on behalf of M/s. Surana and Surana, counsel for the petitioner would contend that the Award passed is patently illegal as the Arbitrator has adopted the Emden's formula for a sales transaction. She would submit that this formula is used in

construction contract and therefore submits the very basis of the Award being erroneous the entire Award deserves to be set aside.

6. She further argued that the Arbitrator has failed to appreciate that the respondent herein had also made profits and consequently mulcting the petitioner above with the liability is total contrary to the terms of the agreement entered into between the petitioner and the respondent herein. The parties had entered into a dealership agreement only for a period of three years. Therefore, she would contend, that the respondent was very much aware of the fact that the business between them and the petitioner was only for a period of three years and therefore the allegations that huge investments had been made on the belief that the relationship would be long standing is to say the least absurd. The Arbitrator had clearly gone beyond the terms of the agreement while passing the impugned order.

She would rely upon the following Supreme Court judgments:

a) Bharat Coking Coal Ltd. Vs. L.K. Ahuja reported in (2004) 5

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This judgment has been cited in support of her contention that the adoption of the Emden's formula for arriving at loss of profit was erroneous. The Hon'ble Supreme Court has in the said judgment found fault with the order of the Patna High Court in arriving at a loss of profit by adding 15 per cent to the total profit under this head.

b Draupadi Devi Vs. Union of India [reported in (2004) 11 SCC 425] . This judgment was cited to buttress her argument that in order to claim damages the burden to establish loss is on the person claiming the damages.

c) Oil and Natural Gas Corporation Ltd. Vs. Western Geco international Ltd. [reported in (2014) 9 SCC 263]

The learned counsel for the petitioner relied upon this judgment to contend that the case on hand does not come within the grounds of challenge set out in Section 34 (2) and of the Arbitration and Conciliation Act. She would further argue that the Award suffers from perversity and the ultimate calculation is totally irrational and it is contrary to the agreed terms of the contract.

d) "Kanchan Udyog Limited Vs. United Spirits Limited [reported in (2017) 8 SCC 237]"

This judgment was cited in support of her argument that in order to claim loss of anticipated profits on account of the termination the actual loss had to be proved by the person claiming the damages.

7. The judgment of the Delhi High Court "[reported in 1997IAD(Delhi) 190] in the case of *Classic Motors Ltd. Vs. Maruti Udyog Ltd*" has been relied upon in support of her arguments that the contract between the petitioner and the respondent being purely a commercial transaction. The allegations of loss of business, loss of profits, etc. cannot be sustained when the contract contains a clause granting authority to one party to terminate the contract. The said termination cannot be called in question and the therefore holding the elimination to be illegal was erroneous.

8. The Judgment of the Bombay High Court "[report in 2012(3)]

BomCR546] in the case of Shah Jagshi Jethabhai Vs. J.N. Construction"

has been relied upon to support her arguments that the Arbitrator being a creature of agreement is bound by the terms of the contract.

9. The judgment of the Bombay High Court ***"[reported in 2013 SCC Online Bom 5] in the case of Edifice Developers and Project Engineers Ltd Vs. M/s. Essar Projects (India) Ltd."*** has been cited in support of her contentions that the adoption of the emden's formula was not a scientifically proven formula for calculating the loss and that the damages should be only on actual loss.

10. Per Contra, Mr. Ajay Joy, learned counsel appearing on behalf of the respondent would contend that the Arbitrator has passed a well considered and well reasoned award. He would submit that the allegation that the Arbitrator has passed an Award contrary to the terms of the agreement is totally erroneous. He would further contend that the Arbitrator had not adopted the Emden's formula as a whole to arrive at the loss but has

only adopted the percentage to calculate the loss.

11. The learned counsel would submit that the order passed is well reasoned one is evident from the fact that the Arbitrator has not awarded the entire sum claimed under the head of business transactions. The Arbitrator has arrived at a sum of Rs.35,96,271/-. After perusing the accounts that have been produced by the respondent which shows an outstanding of Rs.22,55,026 levied by the petitioner even after the termination of the dealership that apart the amount of Rs.13,64,507/- which included the security deposit had to be paid to the respondent and on adding the two arrived at a total sum of Rs.35,96,271/- With regard to the claim under the head of training expense, the Arbitrator had taken into account the fact that the petitioner had also benefited from such training and had made profits and therefore apportioned the said amount and held that the respondent claimant was entitled to a sum of Rs.3,82,710/-. The respondent had under the head of loss of investment claimed a sum of Rs.5,05,50,544/-. The Arbitrator has taken into account the balance sheet A1 to A9 which has

been produced by the respondent to show the turn over and this document has not been refuted by the petitioner.

12. The Arbitrator has opined that the respondent had enjoyed the fruits of the dealership for about three and half years. He has calculated the loss of investment by calculating 15 per cent to the investment of Rs.5,02,01,569/- to arrive at the loss of investment. Even the petitioner would admit that the respondent had invested considerably in the dealership agreement. The Arbitrator has awarded a sum of Rs.75,30,235/- under this head.

13. The Arbitrator had rejected the claim of Rs.2,09,97,068/- under the head of creating the Respondent's Good will.

14. The learned counsel for the respondent would contend that the claimant had incurred an expenditure of Rs.2,09,97,068/- evinced by Ex.A50A to A50E, which are ledger accounts of capital expenditure which

has been incurred by increasing the sale. Once again the Arbitrator has taken into account the entire expenditure and adopted 15 per cent and arrived at a compensation of Rs.31,49,560/-. The Arbitrator has also awarded a sum of Rs.18,00,000/- towards future loss of profit.

15. The learned counsel for the respondent would rely upon the following Judgments:

1. In the case of ***"E. Venkatakrishna Vs. Indian Oil Corporation [reported in 2000 KHC 1386]"*** where the Arbitrator comes to the conclusion that the termination of distributorship is unlawful then it was well within his right to Award compensation.

2. ***"A.T. Brij Paul Singh Vs. State of Gujarat [reported in AIR 1984 SC 1703]"*** This Judgement has been relied upon to highlight the fact that where there is a breach of contract then the parties suffering the breach are entitled to be compensated with damages. It would suffice if the person seeking damages for breach of the contract prove that the termination had caused a loss to him. The only thing is to be considered that the

compensation that is justifiable.

3. He had relied on the judgment in the case of “***State of Kerala Vs. Bhaskaran reported in [1984 KHC 380]***” wherein the methodology adopted by the Division Bench to arrive at the value of the balance of work contract was the subject matter of challenge before the Hon'ble Supreme Court. Ultimately, the Hon'ble Supreme Court held that 15 per cent was a reasonable measure of damages for loss of profit. He would therefore argue that the Award cannot be interfered with reference to the loss of profit.

4. He would also rely on the judgement in “ ***McDermott International Inc Vs. Burn Standard Co [reported in 2006 KHC 1293]***” and would draw the attention of this Court to the observation of the Hon'ble Supreme Court that Section 55 and 73 of the Contract Act does not provide for a mode and manner in computing of damages or compensation and therefore the formula adopted by other countries was held to be not prohibited in law or found inconsistent with the Indian law. The Bench had

further accepted the adoption of the formula for working the loss of profit.

He would submit that the respondent had submitted proof to show the turnover that the respondent was achieving prior to its termination and it is not a case of absence of proof. The Arbitrator has calculation of loss on the adopted the percentage basis.

16. Discussion:

This Court is called upon to consider the Award insofar as it relates to paragraph 18 (iii) to 18.(vii) of the Award.

Paragraph 18 (vii) relates to compensation granted under the head of loss of future profits. Admittedly the contract was only for a period of 3 years and had been continued without an extension or renewal. Therefore it is very clear that the respondent had entered into the agreement knowingly fully well that the entire contract was only for a period of three years. The contract continued for an extended period of 6 months and the respondent would have also made profits. Therefore granting compensation under this head is totally contrary to the terms of the agreement and has to be set aside.

With reference to the claims under the other heads, the learned Arbitrator has considered in detail the evidence that has been let in and has analysed the contract between the respondent and the petitioner to arrive at the award. The only major ground of challenge is the Award under the head of loss of investment which has been arrived at by adopting Emden's formula. It is an admitted fact that the respondent had invested huge sums for setting up and maintaining the showroom and other outlets. The showroom was also constructed as per the plan approved by the petitioner and therefore the showroom can be used only as a Car Showroom and if the same has to be put to some other use the respondent will have to incur expenditure. No doubt the same can be put to use by the respondent for earning profits. However a promise that was held out was that the business relationship would be for a considerable period which was observed in the breach. Admittedly the respondent had borrowed money to put up the showroom and the outlets and this sudden termination has resulted in their facing difficulties in servicing the loans and therefore they are entitled to compensation under this head. The respondent has shown proof of the

investment and the Arbitrator in the absence of a standard formula has adopted the percentage basis for calculating the loss. He has not adopted the entire Emden formula. The Hon'ble Supreme Court in the judgment “**McDermott International Inc Vs. Burn Standard Co [reported in 2006 KHC 1293]**” has observed that where a person complains of a breach he is entitled for the compensation upon his producing documentary evidence to show the expenses incurred by them and the loss that they are likely to suffer on account of the termination of the contract. The Arbitrator has taken this figure and has held that the 15 per cent of the said amount would constitute the amount that was due by them to the respondent.

In the Judgment of the Delhi High Court which has been pressed into service by the learned counsel for the petitioner namely “**The Braithwaite Burn and Jessop Construction Company Limited reported In MANU/DE/1306/2019**” it has been held that in the absence of independent evidence to show that the petitioner has suffered a loss the adoption of Emden's formula was erroneous. However the learned Judge has observed

that whether the Emden's formula was erroneous. However the learned Judge has observed that whether the Emden's formula or any other formula can be applied is purely in the domain of the Arbitration. In the present case, the Arbitrator has considered the documents filed by the petitioner and damages have been calculated after considering the same. Therefore facts of that case would not comply to the fact of the present case.

Under these circumstances this Court does not wish to interfere with the Arbitral Award in so far as it relates to paragraph 18 (i) to (vi) of the Arbitral Award. The award is set aside in so far as it relates to the Award under Paragraph 18 (vii).

In the result, the OP is partly allowed the Award is set aside in so far as it relates to paragraph (vii) and in all other respects the award is confirmed. At the end of the arguments, the learned counsel for the respondent submitted that despite their requesting the applicants to take back spares and other accessories, the same has not been taken by the

respondent. It is well open to the petitioner to take back the products from the respondent. On a request in this regard being made by the petitioner, the respondent shall handover the items without any demur. No costs. Consequently connected Miscellaneous Petition is closed.

26.02.2020

mrn

Index : Yes/No
Speaking order/non-speaking order

To,
1. M/s. Hyundai Motor India Ltd.,
Represented by its Managing Director,
having its Registered Office at
H-1, SIPCOT Industrial Park,
Irungattukottai, Sriperumbudur Taluk,
Kancheepuram District,
Tamil Nadu.

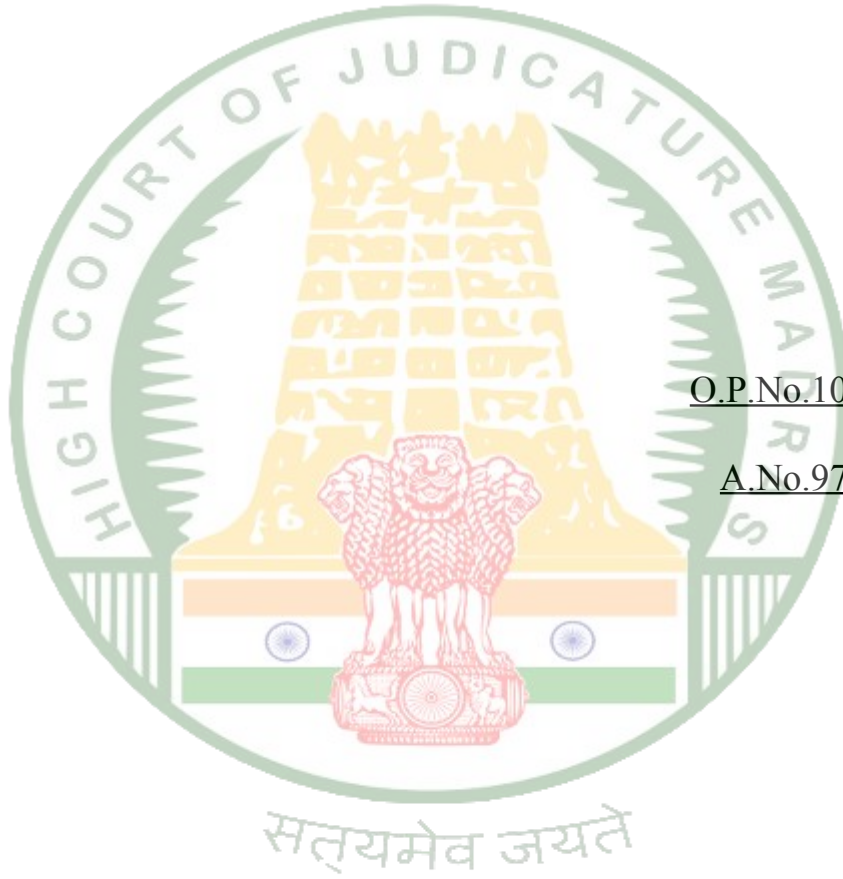
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