

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.12.2020

CORAM

THE HON'BLE Mr. JUSTICE M.SUNDAR

O.P.No.249 of 2014

- 1.The Union of India,
represented by the General Manager,
Southern Railway,
Southern Railway Headquarters Office,
Park Town, Chennai-600 003.
- 2.The Chief Engineer (Gauge Conversion),
Southern Railway, Works Construction Branch,
Egmore, Chennai-600 008. .. Petitioners

Vs.

- 1.M/s.V.Manikkam Engineers (Pvt.) Ltd.,
No.364, Pillaiyar Koil Street,
Panneer Nagar,
Mogappair (West),
Chennai-600 037.
- 2.Hon'ble Mr.Justice T.V.Ramakrishnan,
(Sole Arbitrator)
Anugraham, Panchalam,
Ernakulam.
(Respondent No.2 stands deleted
in and by this order) .. Respondents

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 05.05.2011 made in relation to disputes arising out of agreement dated 30.03.1999 bearing No.134/CN/99 insofar as the award under claims 3 to 7 and the counter claims 2 and 3 are concerned and thus render justice.

For Petitioners : Mr.P.T.Ramkumar

For Respondents : Mr.V.Ayyadurai, Senior Counsel
for Mr.A.Durai Eswar for R-1

ORDER

Captioned 'Original Petition' (hereinafter '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 brevity, convenience and clarity. Captioned OP has been filed assailing an 'award dated 05.05.2011' ('impugned award' for the sake of brevity and convenience) made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole arbitrator, who is a former Hon'ble Judge of the Kerala High Court. To be noted, this court is informed without any dispute or

disagreement that this Former Hon'ble Judge of Kerala High Court was appointed as sole arbitrator and AT was constituted in and by an order dated 26.10.2006 made in section 11 (A and C Act) proceedings being A.R.No.1 of 2005 on the file of High Court of Kerala.

2 Captioned OP has been presented in this Court on 26.08.2011. Therefore, applying the *Hindustan Construction Company* principle being dicta laid down by Hon'ble Supreme Court in **Hindustan Construction Company Limited Vs. Union of India** reported in **2019 SCC OnLine SC 1520** and *Ssangyong* principle being dicta 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 pre 23.10.2015 regime of the A and C Act. In other words, captioned OP will be governed by A and C Act as it stood prior to amendment by Act 3 of 2016 which kicked in with retrospective effect on and from 23.10.2015.

3 In the captioned OP, there are two petitioners and the two

petitioners shall be collectively referred to as 'Southern Railway' for the sake of convenience and clarity. The contractor qua Southern Railway with whom arbitrable disputes arose culminating in impugned award is respondent No.1. Respondent No.1 company shall, from hereon, be referred to as 'Contractor' for the sake of convenience and clarity.

4 The sole arbitrator who is a former Hon'ble Judge of the Kerala High Court, who constituted the AT, has been arrayed as second respondent in captioned OP. Considering the nature of the matter, ideally it is not necessary to array the Hon'ble Judge as second respondent. Therefore, drawing inspiration from *Vinay Heavy Equipments case law* i.e., **Zonal General Manager, Ircon International Limited Vs. Vinay Heavy Equipments** reported in **(2015) 13 SCC 680** and following the procedure adopted by Hon'ble Supreme Court in *Vinay Heavy Equipments* case (to be noted, deletion procedure in *Vinay Heavy Equipments* case is reported in **2007 SCC OnLine SC 4**), this Court deletes the second respondent Former Hon'ble Judge of Kerala High Court from the array of parties in captioned OP. Therefore, the contractor now becomes the lone respondent in captioned OP.

5 In the web hearing on a video conferencing platform, i.e., virtual hearing today, Mr.P.T.Ramkumar, learned Standing Counsel for Southern Railway and Mr.V.Ayyadurai, learned Senior counsel instructed / assisted by counsel on record Mr.A.Durai Eswar were before me.

6 A very interesting point regarding jurisdiction has been raised in the instant matter. This is captured in earlier proceedings made by me in some of the earlier listings and relevant listings in which proceedings in this regard were made are listings on 06.07.2020, 27.07.2020, 05.08.2020 and 14.10.2020. Proceedings made in these listings read as follows:

'Proceedings dated 06.07.2020:

Ms.Shankar Devi, learned counsel representing Mr.P.T.Ramkumar, learned Standing Counsel for Railways on behalf of petitioners and Mr.Ayyadurai, learned senior counsel instructed by Mr.A.Durai Eswar, counsel on record for contesting first respondent are before me in this web-hearing on a video-conferencing platform.

2.Learned senior counsel submits that there is a preliminary objection, which turns on Section 42 of 'The Arbitration and Conciliation Act, 1996' (Act 26 of 1996). Learned senior counsel placing reliance on a recent judgment

of Hon'ble Supreme Court in **BGS SGS SOMA JV Vs.NHPC Ltd.**, reported in (2020) 3 MLJ 336(SC) submits that in instant case seat of arbitration was Kerala (Ernakulam) and therefore an application under Section 34 of A and C Act cannot be entertained by this Court.

3.Learned counsel for petitioners submits that there is some personal difficulty due to lockdown and seeks time to get ready for the hearing.

At request of learned counsel for petitioners, list this matter under the same caption on 27.07.2020.

Proceedings dated 27.07.2020:

Ms.Shankar Devi, learned counsel representing Mr.P.T.Ramkumar, learned Standing Counsel for Railways on behalf of petitioners and Mr.V.Ayyadurai, learned Senior Advocate, instructed by Mr.A.Durai Eswar, counsel on record for contesting first respondent, are before me in this web-hearing on a video-conferencing platform.

2. Adverting to the earlier proceedings dated 06.07.2020, learned senior counsel submits that execution petition has already been launched vide E.P.No.181 of 2012 in District Court, Kozhikode. It was also pointed out that impugned award is dated 05.05.2011, instant OP has been presented in this Court on 26.08.2011, delay in re-presentation was condoned on 23.07.2012, after which 24 days delay in filing was condoned on 26.03.2014 without notice to respondent, this was carried in appeal by way of an intra-court

appeal in O.S.A.No.214 of 2014 and the same came to be disposed on 09.10.2014 giving certain directions. It was submitted that copy of the order of Hon'ble Division Bench will be e-mail filed before next listing.

3. To be noted, learned senior counsel for contesting respondent is ready. However, on behalf of Standing Counsel for Railways an adjournment is sought, but it is agreed that the main OP can be taken up for final disposal in the next listing.

At request made on behalf of Standing Counsel for Railways, list this matter under the same caption on 05.08.2020.

Proceedings dated 05.08.2020:

Mr.P.T.Ramkumar, learned Standing Counsel for Railways on behalf of petitioners and Mr.V.Ayyadurai, learned senior counsel instructed by Mr.A.Durai Eswar, counsel on record for contesting first respondent, are before me in this web-hearing on a video-conferencing platform.

2.Read this in conjunction with and in continuation of earlier proceedings dated 27.07.2020.

3.Order dated 09.10.2014 made in O.S.A.No.214 of 2014 by a Hon'ble Division Bench of this Court has since been e-mail filed (paragraph 2 of previous proceedings). Today, learned Standing Counsel for Railways seeks a short accommodation.

List under the same caption on 19.08.2020.

Proceedings dated 14.10.2020:

Mr.P.T.Ramkumar, learned Standing Counsel for Railways on behalf of petitioner and Mr.A.Durai Eswar, counsel on record for contesting first respondent are before me in this web-hearing on a video-conferencing platform.

2.Read this in conjunction with and in continuation of earlier proceedings, more particularly proceedings dated 06.07.2020. Paragraph 2 of 06.07.2020 proceedings is of relevance and the same reads as follows:

'2.Learned senior counsel submits that there is a preliminary objection, which turns on Section 42 of 'The Arbitration and Conciliation Act, 1996' (Act 26 of 1996). Learned senior counsel placing reliance on a recent judgment of Hon'ble Supreme Court in **BGS SGS SOMA JV Vs.NHPC Ltd.**, reported in **(2020) 3 MLJ 336(SC)** submits that in instant case seat of arbitration was Kerala (Ernakulam) and therefore an application under Section 34 of A and C Act cannot be entertained by this Court.'

3.Today, when the matter was taken up, it came to light that arbitration agreement between the parties being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 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 brevity, is in the form of two clauses in what this Court is informed is 'General Conditions of Contract'

(' GCC'). This Court is further informed that relevant clauses qua arbitration agreement are clauses 63 and 64. Learned Standing Counsel for Southern Railway undertakes to produce these clauses, namely clauses 63 and 64 by next listing as territorial jurisdiction issue is being raised as a preliminary issue. Learned Standing Counsel for Railways undertakes to do physical filing of the aforesaid clauses after sharing copies with the other side.

List on 09.11.2020.'

7 Aforesaid proceedings set the stage for the interesting legal tussle between the parties on territorial jurisdiction or in other words jurisdiction of this court.

8 Therefore, with the consent of learned counsel on both sides, this court took the approach of deciding the jurisdiction issue first. In other words, testing the captioned OP on merits would arise (if at all and if that be so), if this court finds that it has jurisdiction to entertain the captioned OP.

9 Owing to aforementioned trajectory in the hearing, this court embarked upon the exercise of hearing learned Standing counsel for Southern Railway and learned Senior counsel for contractor on territorial jurisdiction.

10 Submissions on jurisdiction made by learned Standing counsel for Southern Railway can be given as a summation and the same is as follows:

(a) As captioned OP is governed by pre 23.10.2015 regime of A and C Act, *Associated Contractors principle* being dicta laid down by Hon'ble Supreme Court in **State of West Bengal and others Vs. Associated Contractors** reported in (2015) 1 SCC 32 is applicable to case on hand and therefore, the order made by Hon'ble Kerala High Court in section 11 proceedings does not attract section 42 of A and C Act;

(b) Arbitration agreement between the parties is in the form of clause in General Conditions of Contract (GCC) being Clauses 63 and 64 captioned 'SETTLEMENT OF DISPUTES – INDIAN RAILWAY ARBITRATION RULES' and these two clauses in GCC as applicable to captioned OP do not spell out i.e., specify the place of arbitration;

(c) The contract between the parties of which GCC becomes an integral part was signed at Chennai. The office of Southern Railway concerned is situate in Chennai. Therefore, cause of action has arisen in Chennai and the captioned OP can be entertained by this Court.

(d) There was a delay in filing the captioned OP. The delay was condoned vide order dated 26.3.2014 made in A.No.5352 of 2012. This was carried in an appeal by way of a intra court appeal being O.S.A.No.214 of 2014 which came to be disposed of by a Hon'ble Division Bench of this Court on 09.10.2014 which granted liberty to the parties to mention the captioned OP before learned Single Judge.

11 In response to the above submissions on jurisdiction, Mr.V.Ayyadurai, learned Senior counsel made submissions, summation of which is as follows:

(a) The parties have chosen to have the entire arbitral proceedings conducted at Ernakulam, Kerala and therefore, applying the *BGS SGS Soma* principle being ratio laid down by Hon'ble Supreme Court in **BGS SGS Soma JV Vs. NHPC Ltd.** reported in **(2020) 3 MLJ 336 (SC)**, this Court does not have territorial jurisdiction.

(b) The order made by Hon'ble Division Bench of this Court in an intra court appeal arose out of delay condonation application, it does not deal with the jurisdiction issue and the same cannot be used to confer jurisdiction on this Court.

12 As a rejoinder to the reply submission, learned Standing counsel for Southern Railway submitted that *BGS SGS Soma* principle laid down by Hon'ble Supreme Court cannot be given retrospective effect as the same was not available when an order came to be passed by Hon'ble Division Bench.

13 This Court now proceeds to consider the rival submissions and test the territorial jurisdiction issue. With regard to the submission

made by learned Standing counsel for Southern Railway posited on *Associated Contractors* principle, there is no difficulty in accepting the submission that *Associated Contractors* principle is applicable to this case and therefore, Section 42 of A and C Act is not attracted merely because Section 11 application was filed in Kerala High Court. There is no difficulty as far as this submission of learned Standing counsel for Southern Railway is concerned, but the difficulty arises in another form for Southern Railway. That difficulty is post order dated 26.10.2006 made by Hon'ble Kerala High Court, the parties participated in arbitral proceedings in Ernakulam. The entire arbitral proceedings were held in Ernakulam and the impugned award came to be made in Ernakulam by Hon'ble AT. Therefore, the parties have consciously chosen Ernakulam, Kerala as the place for arbitration where the entire arbitral proceedings were held and impugned award ultimately came to be made. There is absolutely no disputation or disagreement about this factual position and therefore, the matter does not turn on Section 42 of A and C Act, but it turns on choice of place of arbitration (seat/venue) made by parties obviously by exercise of party autonomy which is the bedrock of A and C Act philosophy. This means that *Associated Contractors* principle

does not help Southern Railway in the instant case.

14 This takes us to the arbitration agreement between the parties which is in the form of clauses 63 and 64 of GCC. There is no dispute that place of arbitration has not been spelt out in the arbitration agreement between the parties, but the parties have chosen Ernakulam (Kerala) as the place (venue/seat). Both the parties accepted the order made by Hon'ble Kerala High Court under section 11. This court is making it clear that it is not taking the view that the captioned OP also should be filed in Kerala High Court in the light of section 42 of the A and C Act owing to Section 11 having been filed in Kerala. The point is parties have consciously chosen Ernakulam (Kerala) as the place (venue/seat) for the arbitration and therefore that i.e., Kerala becomes the exclusive territorial jurisdiction qua case on hand if *BGS SGS Soma* principle in which the principle laid down by Hon'ble Supreme Court (in **Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited** Case reported in (2017) 7 SCC 678 (rendered on 19.04.2017) was reiterated) is applied. Owing to this exclusive jurisdiction concept laid down by Hon'ble Supreme Court turning on

place of arbitration (venue/seat), it becomes clear that exclusive territorial jurisdiction in the instant case is with Courts in Kerala.

15 There are some other case laws which are of relevance and they are **Enercon (India) Limited Vs. Enercon GmbH** reported in **(2014) 5 SCC 1** (rendered on 14.02.2014), **Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited** reported in **(2017) 7 SCC 678** (rendered on 19.04.2017), **Union of India Vs. Hardy Exploration and Production (India) Inc.** reported in **(2019) 13 SCC 472** (rendered on 25.09.2018), **Brahmani River Pellets Limited Vs. Kamachi Industries Limited** reported in **(2020) 5 SCC 462** (rendered on 25.07.2019). Very recently (as recent as 26.11.2020), Hon'ble Supreme Court in **Noy Vallesina Engineering SPA, (Now Known as Noy Ambiente S.P.A.) Vs. Jindal Drugs Limited and others** reported in **2020 SCC OnLine SC 957**, while testing the correctness of a challenge to a foreign award under section 34 and while deciding on that, referred to BALCO case and in paragraphs 24 and 25 had held (after extracting relevant parts of BALCO) that substantive challenge to an award was correctly adjudicated by the Malaysian court as in that case, the seat of arbitration was Kuala Lumpur. To be noted

BALCO citation is **(2012) 9 SCC 552**. It may not be necessary to dilate further on this aspect of the matter. It will suffice to say that the principle is substantive challenge to an award should be adjudicated by a Court where the seat of arbitration is situate. Hon'ble Supreme Court has also *inter-alia* clarified in the aforementioned case laws that the venue would become seat when no seat has been mentioned with specificity.

16 With regard to the argument that cause of action having arisen within the jurisdiction of this court and therefore, substantive challenge to the impugned award is being laid in this court, the same has to be rejected as paragraphs 97 and 99 of **BGS SGS Soma** case is a neat answer to this argument and paragraphs 97 and 99 read as follows:

'97. Coming to the impugned judgment in the present appeals, it is clear that the reasoning followed stems from the subject-matter test that flows from the definition of 'court' in Section 2(1)(e)(i) of the Act. According to the impugned judgment, since the agreement was executed at Faridabad, part of the cause of action would arise at Faridabad, clothing Faridabad courts with jurisdiction for the purposes of filing a Section 34 petition. The second part of the reasoning is that Faridabad is the place where the request for reference to arbitration was received, as a result of which part of the cause of action arose in Faridabad, which ousts the jurisdiction of Courts of New

Delhi, in which no part of the cause of action arose.

99. Given the fact that if there were a dispute between NHPC Ltd. and a foreign contractor, Clause 67.3(vi) would have to be read as a clause designating the “seat” of arbitration, the same must follow even when sub-clause (vi) is to be read with sub-clause (i) of Clause 67.3, where the dispute between NHPC Ltd. would be with an Indian Contractor. The arbitration clause in the present case states that “*Arbitration proceedings shall be held at New Delhi/Faridabad, India...*”, thereby signifying that all the hearings, including the making of the award, are to take place at one of the stated places. Negatively speaking, the clause does not state that the venue is so that some, or all, of the hearings take place at the venue; neither does it use language such as “the Tribunal may meet”, or “may hear witnesses, experts or parties”. The expression “shall be held” also indicates that the so-called “venue” is really the “seat” of the arbitral proceedings. The dispute is to be settled in accordance with the Arbitration Act, 1996 which, therefore, applies a national body of rules to the arbitration that is to be held either at New Delhi or Faridabad, given the fact that the present arbitration would be Indian and not international. It is clear, therefore, that even in such a scenario, New Delhi/Faridabad, India has been designated as the “seat” of the arbitration proceedings.'

17 In **BGS SGS Soma** case law, parties had the option of

holding the arbitration proceedings either in New Delhi or in Faridabad and the parties chose New Delhi. The contention that part of cause of action arose within Faridabad Court for the purpose of section 34 petition was negated. In the other aforementioned case laws, more particularly **Indus Mobile** supra, the scope of sections 16 to 21 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) and non applicability of the same for determination of jurisdiction of supervisory court has been clearly laid down. In other words, jurisdiction of supervisory court i.e., the court in which substantive challenge to arbitral award should be laid should be decided on the basis of A and C Act and not on the basis of CPC principle. The A and C Act does not use the term 'seat' or 'venue', but uses the expression 'Place of arbitration'. This court is conscious of the fact that venue / seat principle has been elucidatively and instructively laid down by Hon'ble Supreme Court in aforementioned case laws. The sequiter is, the submission that cause of action arose within Chennai and therefore substantive challenge to arbitral award in the captioned OP can be filed in this Court does not find favour with this Court. This court unhesitatingly holds that this argument cannot be countenanced.

18 This takes us to the last argument predicated on order dated 09.10.2014 made in intra-court appeal i.e., the aforementioned O.S.A. Hon'ble Division Bench has not expressed any view on jurisdiction. Hon'ble Division Bench has only granted liberty to parties to mention the captioned matter before learned Single Judge and therefore, the submission that before the learned Single Judge, all questions including jurisdiction can be raised is acceptable. Hon'ble Supreme Court in Lion Engineering case being **Lion Engineering Consultants Vs. State of Madhya Pradesh** reported in (2018) 16 SCC 758 held that preliminary issue of this kind can be raised for the first time even in a Section 34 petition, even if the same has not been raised before the AT. Therefore, when the matter is taken up by a section 34 Court, the field is wide open to test territorial jurisdiction aspect and obviously that has to be tested in accordance with the law laid down nay law declared by Hon'ble Supreme Court in this regard.

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19 Further, as rightly pointed out by learned Senior counsel, Hon'ble Supreme Court in paragraph 19 of *BGS SGS Soma* case has held as follows:

'19. The reasoning in this judgment in commends itself to us, as a distinction is made between judgments which either set aside, or refuse to set aside, an arbitral award after the court applies its mind to Section 34 of the Arbitration Act, 1996, as against preliminary orders of condonation of delay, which do not in any way impact the arbitral award that has been assailed.'

20 The above fortifies the submission of learned senior counsel that the intra-court appeal does not come in the way of this court testing territorial jurisdiction in case on hand. This Court respectfully follows the principal laid down in *BGS SGS Soma* case law in this regard also. In other words, following the dicta of Hon'ble Supreme Court, in the light of no directive or pronouncement regarding jurisdiction in the intra court appeal order, this Court respectfully follows the dicta laid down by Hon'ble Supreme Court as a matter of judicial discipline.

21 With regard to rejoinder submission made by learned Standing counsel for Southern Railway that *BGS SGS Soma* principle (seat/venue determining exclusive territorial jurisdiction) laid down by Hon'ble Supreme Court cannot be given retrospective effect, this court

finds that the principle that venue has to be read as seat and that this would decide the court with supervisory jurisdiction qua arbitral award, was available even prior to the matter being argued before Hon'ble Division Bench on 09.10.2014 as *Enercon* case law supra was rendered by Hon'ble Supreme Court on 14.02.2014. To be noted this point is dealt with and decided only to make this order complete and comprehensive as this point becomes otiose in the light of paragraph 17 of BGS SGS Soma case law.

22 In the light of the narrative thus far, captioned OP is rejected on the ground that this court does not have jurisdiction to entertain the impugned award made in arbitral proceedings held in Ernakulam (Kerala State) by the AT constituted by a former Hon'ble Judge of Kerala High Court (Sole Arbitrator). Though obvious, it is made clear that this court has not expressed any opinion or view on the merits of the matter in this order. There shall be no order as to costs.

23 Post dictation of this order in open Court, learned Standing counsel for Railways requested that Registry may please be directed to return the original impugned award to Standing counsel for Railways.

This request is acceded to. Registry is directed to return the original impugned award under due acknowledgement to counsel for petitioners i.e., Standing counsel for Southern Railways.

01.12.2020

Speaking order

Index : Yes

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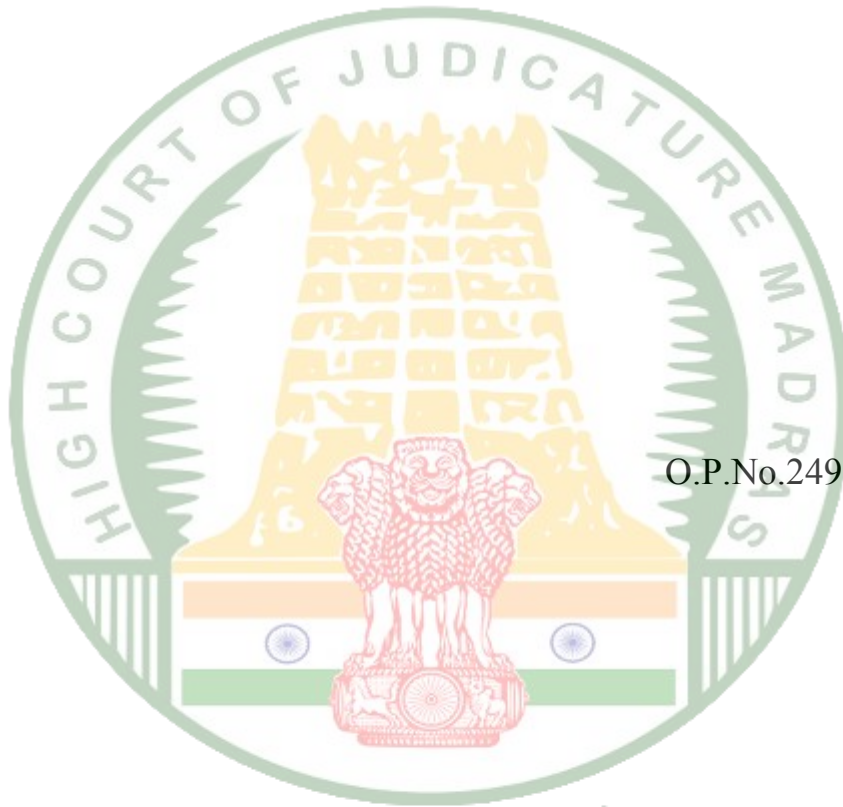


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