

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2020

PRONOUNCED ON : 20.05.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.252 of 2014

M/s.J.K. Fenner (India) Limited,
Formerly known as Fenner (India) Limited
Having its Corporate Office at
5th Floor, Khivraj Complex-11,
No.480, Anna Salai, Nandanam,
Chennai - 600 035.
represented by Mr.R. Krishnan
Vice President (F & A) .. Petitioner/Claimant

-Vs.-

1.M/s.Neyveli Lignite Corporation,
Neyveli House,
135, Periyar EVK High Road,
Kilpauk,
Chennai - 600 010. 1st respondent/
1st respondent

2.Hon'ble Mr. Justice S. Ranganathan (Retd.,)
Presiding Arbitrator,
Former Judge, Supreme Court of India,
New No.42, Old No.32, Bhaktavatsalam Road,
Mylapore,
Chennai - 600 004.

... 2nd Respondent/
Presiding Arbitrator

3.Hon'ble Mr. Justice B.P.Jeevan Reddy (Retd)
Arbitrator,
Former Judge,
Supreme Court of India,
Plot No.301, Road No.25,
Jubilee Hills, HSG Society,
Opp. to Obul Reddy Public School,
Hyderabad - 500 033.

... 3rd respondent /
Arbitrator

4.Hon'ble Mr. Justice K. Govindarajan (Retd),
Arbitrator,
Former Judge,
Madras High Court,
Malaviya Avenue,
Shastri Nagar,
Chennai - 600 041.

... 4th Respondent/
Arbitrator

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 05.10.2013 as modified on 05.01.2014, insofar as it disallows interest on the amount awarded under Claim I, disallows interest on the amount awarded under Claim II(a), disallows Claim III and Claim V, and awards a sum of Rs.1 crore to the respondent out of the amount encashed and sought for under

Claim VII, and allows Counter Claim II.

For petitioner : Mr. Murari,
Senior Counsel
for M/s. Preeti Mohan

For Respondents : Mr.T.R. Rajagopalan,
Senior Counsel
for Mr.N.Nithianandam
for R1

ORDER

The claimant is the petitioner in the above petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter called the Act, challenging the Award of the Arbitral Tribunal dated 05.10.2013 and the modified Award dated 05.01.2014. For ease of reference the parties are referred to in the same ranking as before the Arbitral Tribunal. Although the claimant had made claims under 10 headings, the Arbitral Tribunal has partially allowed 4 claims and with reference to one claim made under two heads, the Tribunal has allowed the claim only with reference to one head and rejected the claim under the other head. The remaining 5 claims have been rejected in toto. Further the Tribunal has

allowed the Counter claim under all heads barring one.

2. Although the claimant had challenged the Award in respect of all those portions that has been held against them, however, in the course of the Arguments and in the written submissions they have restricted the challenge to the Award only in respect of the following claims:

Claim I : Challenging the non-grant of interest towards the retention monies after allowing the claim for refund of the retention money.

Claim III : Refund of amounts recovered by the respondent towards liquidated damages for alleged delays.

Claim V : related to the encashment of the Bank guarantee to the tune of 5% of the contract value issued for the faithful performance/Compliance of the joint Deed of Undertaking by the Collaborator JH by contending that the collaborator had not involved

themselves in the later stages of the execution of the LHS.

Claim VII : Refund of the contract performance Bank guarantee to the tune of 10% of the contract value encashed by the respondents.

Claim V and VII are covered by a composite Bank guarantee submitted by the claimant in favour of the respondent.

3. In order to morefully appreciate the challenge to the Award made in respect of these claims it is necessary to analyze the pleadings and the Arbitral Award in respect of each of these claims separately.

4. A prelude to the Claimant's case leading to the dispute:

The claimant who is engaged in the business, amongst others, of material handling system involving designs, engineering, manufacturing, supply, erection, testing and commissioning on turn key basis catering to various infrastructure industries like coal, mines, chemical, thermal power projects, Petrochemicals, paper, airport and other sectors for over 5

decades, had participated in the tender floated by the respondent for the design, supply and commissioning of a lignite handling and storage system (referred to for the sake of brevity as LHS). The claimant had submitted their bid for the above work on 11.04.1998. On 31.07.1998/12.08.1998, the respondent had issued the letter of Award accepting the claimants bid. Pursuant to this the claimant and the respondent had entered into two agreements both dated 16.07.1999, one was for the supplies (Contract I) and the other for the construction activities (Contract II). It was agreed that Contract I and Contract II constituted the entire agreement between the parties. They had further agreed to resolve their disputes using the machinery of Arbitration.

5.The total contract price payable by the respondent under both Contract I and Contract II to the claimant was a sum of Rs.39,41,54,400/-. As per the terms of the Contract, the claimant was required to complete the whole works up to and including the successful completion of the trial operation in 30 months from the date of the Letter of Award (31.07.1998) i.e., by 31.01.2001.

6. The LHS is an intermediary system for conveying the lignite received from the respondents feeding conveyors and transporting the same to the boiler bunkers located in the power house building. The claimant's scope of work did not include the feeding conveyors or the boiler bunkers.

7. By their letter dated 01.03.2004, the respondent had provisionally taken over the operation and normal maintenance of the LHS with effect from 01.03.2004. Prior to this take over by the respondent the claimant had operated the system for a period of 14 months i.e., from 01.01.2003 to 29.02.2004 under the instructions of the respondent. The claimant would submit that the following milestones had been acknowledged by the respondent:-

Date of completion of trial operations of the LHS and provisional acceptance by the respondent:

(a) External system

- 11.10.2003

(b)Internal system - 13.12.2003

*Date of provisional take over
of LHS by the respondent
for their own operation and
maintenance* - 01.03.2004

*Date of conducting the
performance guarantee test* - 28.02.2005
to 09.03.2005

8. After the completion of the contract, disputes arose between the claimant and the respondent when the claimant sought payment for the work done under various heads. Meanwhile, the respondent had encashed the Bank guarantee of Rs.591.23 lakhs, this despite the claimant asking the respondent to discharge the bank guarantee as it was no longer necessary to keep it alive in view of the successful completion of the work.

9. However, the respondent did not accept the claims of the claimant. In fact, the bank guarantee had been invoked by the respondent only after the respondent had received the notice dated 13.12.2006 from the claimant calling for the resolution of the disputes through arbitration. Despite sincere efforts being made by the claimant to settle the disputes through

discussion, the respondent did not come forward with any offer to settle. Therefore, the claimant had invoked the Arbitration clause of the contract and by their letter dated 11.01.2007 informed the respondent that they were appointing Justice K. Govindarajan, former Judge of this Court as an Arbitrator and calling upon the respondent to appoint the other arbitrator. By their letter dated 01.03.2007, the respondent had appointed Justice Jeevan Reddy, former Judge of the Supreme Court of India as Arbitrator and together the two learned Arbitrators had appointed Justice K. Venkatasami, former Judge of the Supreme Court as the Presiding Arbitrator. After the death of Justice K.Venkatasami, Justice S.Ranganathan former Judge of the Supreme Court of India was appointed as the Presiding Arbitrator. The Arbitral Tribunal has made the award on 05.10.2013 and modified the same on 05.01.2014. As stated supra, the challenge is only in respect of 4 claims of which Claim V and VII are interlinked. The pleading and the Award under each of these heads is hereinbelow narrated in a nutshell.

10.Claim I: Refund of retention money with interest:

Claimant's case and the respondent's response:

a.This related to the refund of Rs.3,42,89,930/- withheld by the respondent from the payments due to the claimant on the ground that the claimant had failed to complete the performance guarantee test as per the contract. The claimant contended that having taken over the LHS on 01.03.2004, the retention amount became payable on the said date. The respondent had denied this claim contending that the claimant was not ready for the test on the scheduled date and was therefore not entitled to the amount particularly when the payment was linked to the successful performance guarantee test.

FINDING OF TRIBUNAL:

(b)The Arbitral Tribunal held that since the equipment as well as the auxiliaries were functioning satisfactorily from March 2003 onwards there was a successful performance of the test and a compliance of the terms of Clause 6.5.2.1(4) and a mere failure on the part of the respondent to issue a Certificate cannot stand in the way of the respondent refunding the

retention money. The Tribunal therefore directed its refund. However, the Tribunal did not award interest from the date of take over of the LHS by the respondent i.e., from 01.03.2004 till date of payment on the ground that the amount became payable only on the date of award. It is this portion of the Award that is challenged.

11. **Claim III: Refund of amounts deducted as liquidated damages.**

(i) Claimant's case:

(a) The terms of the contract stipulates the time for the completion of works upto and including the successful completion of the trial operations of the LHS as 30 months calculated from the date of letter of Award.

(b) The claimant would submit that by letter dated 03.02.2001, the respondent had extended the time for completion upto 30.06.2001 reserving the right to levy liquidated damages (LD), all other terms and conditions of both the contracts remains unaltered. The claimant's plea for extension without levy of LD was not conceded by the respondent. There

was no response from the respondent to the last letter of the claimant dated 03.05.2002 seeking extension till 30.09.2002 without levy of LD.

(c) The claimant would submit that the trial operation of the LHS was completed and acknowledged by the respondent vide their letter dated 14.10.2003 and 19.02.2004. The systems were also provisionally taken over by the respondent on the said dates. The date of the completion of the trial operation and the provisional take over by the respondent were as follows:

For the external system : 11.10.2003

For the internal system : 13.12.2003

That apart, by their letter dated 01.03.2004, the respondent provisionally took over the entire LHS and started operation and normal maintenance on their own. As a result, the generation of power or revenue to the respondent was not affected even for a day on account of the non-performance of the LHS.

(d) The claimant would further submit that despite the LHS being in position to deliver lignite to the boiler bunks, the respondent for reasons best known to them did not deem it fit to operate the same. In fact by their letters dated 10.02.2003, 14.02.2003, 15.04.2003, 16.04.2003 and 02.05.2003, the claimant had informed the respondent that the LHS was in position. It was only on 05.05.2003 that the respondent had informed that Unit I is scheduled for trial operation from 06.05.2003 to 05.06.2003 and consumption of lignite would be 200 TPH. The claimant would further submit that although the designed capacity was 2000 TPH i.e., 48000 tonnes, per day the respondent was not able to supply the requisite quantity. Unit II thereafter was synchronized on 22.07.2003. By letter dated 23.07.2003, the respondent had thanked the claimant and other contractors for their co-operation and dedicated efforts. In fact from January 2003, the claimant was operating the LHS on the instructions of the respondent upto February 2004.

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(e) The claimant has also given reasons for the delay which apart from other reasons included the delay in issue of an Essentiality Certificate

by the respondent for the import of paddle feeders, delay in release of important work fronts by the respondent, additional time required for civil work, a fire accident on 27.01.2003 causing some damages to the equipment, cash flow crunch as the respondent had deducted amounts towards LD from the invoices etc.

(f) The claimant would also contend that having extended the time for performance of the contract periodically, the respondent cannot levy LD. Further, the LHS was ready when the respondent was ready for commissioning the trial operation. In fact when the claimant was ready with the LHS, the respondent was not ready to receive the lignite as boilers of Units I and II were not ready. LD was leviable only when the scheduled date of successful commissioning of trial operation is not adhered to. That apart LD was leviable only on the non-utilizable portion of the work which implied that the respondent being otherwise ready for receiving the lignite the claimant had not completed their work. Such a situation did not arise in the instant case and it is only the reverse. The claimant had claimed a sum of Rs.3,94,15,440/- to be discharged and the original BG returned to

the claimant. That apart 10% cash amount withheld by the respondent is also to be refunded. The claimant had also claimed interest on the amount withheld @18% per annum and payment of Bank charges for the Bank guarantee from 08.04.2007 till 30.06.2007 @ 5% per annum.

(ii) Defense of the Respondent:

a)The respondent would contend that as per the terms of the contract the respondent was to complete the work within a period of 30 months from the date of the letter of Award and the claimant had to strictly adhere to this. The claimant cannot take umbrage under the fact that the respondent was not ready with their part of the obligation as nowhere in the contract has it been stipulated that the completion of the claimant's work was dependant on the installation of the boilers and feeding conveyors. The respondent would contend that the Main Plant Package Contractor had to wait for the inputs from the claimant in respect of JTI area and Boiler Bunker area to proceed with the work of completing the scope of work under package AOI. When the TPS-I expansion units were

ready for full operation the claimant had not completed their scope of work and all components of both the streams was not fully functional/operational. On account of the claimant's delay the trial operation was delayed by almost 3 years.

(b)The respondent would contend that they had suffered significant loss by way of reduced generation power, interest loss and capital and other losses which are not computable in terms of money.

(c)The respondent would submit that in view of the delay by the claimant the respondent had to face arbitral proceedings instituted by another contractor M/s.Ansaldo who was the Main Plant Package Contractor since the claimant was not ready with the LHS. The respondent therefore sought to have the claim rejected. The respondent claimed the refund of 90% LD i.e., Rs.3,54,73,896/- with interest from 05.05.2004 till payment @ 18% per annum or in the alternative allow the respondent to invoke and encash the LD BG for Rs.3,94,15,440/-. Counter claim No.3 was interlinked with counter claim No.2.

(iii) Finding of the Tribunal:

The Tribunal held that on 31.07.2007, which was a month after the original date of completion, the claimant had only finished 76% of the work and works relating to engineering supplies, erection and civil works were outstanding. On 14.06.2002, Stream A was not ready for handling lignite and even on 08.03.2003 Stream B was not ready for operation. The Tribunal observes that till December 2003 because of the claimant lagging behind in its supplies and services the trial operation could not be conducted. Therefore, till 01.01.2003 the entire works set up by the claimant was non-utilizable and the levy of LD was therefore correct. The Tribunal did not hold that after 01.01.2003, the delay was on account of the respondent. The Tribunal therefore held that the respondent was entitled to recover the entire sum of Rs.3,94,15,440/- towards liquidated damages since 90% of this amount i.e., Rs.3,54,73,896/- had been released upon the claimant furnishing a LDBG for the entire amount of LD claimed. The Tribunal rejected claim III of the claim and permitted the respondent to encash the LDBG and set it off against the Award in favour

of the respondent under Counter claim No.2.

12.Claim No.V and Claim No.VII: Refund of the amounts encashed by the respondent of the composite bank guarantee furnished by the claimant for contract performance guarantee and service of John Holland:

(i)Claimants case

a.The qualifying requirement specified in the corrigendum to the tender by the respondent was that the bidder should have designed either by self or through collaboration at least two lignite coal handling plants having a capacity of a minimum of 1200 TPH comprising crushers, screens, bunker extraction feeders, belt conveyors, shuttle conveyors etc and the plant should have been in successful operation for not less than two years as on the scheduled date of bid opening.

(b)For those of the bidders who could not satisfy the above requirement the qualifying conditions provided that the bidders could produce a collaboration agreement with an Indian/Foreign Collaborator

who fully meets the qualifying requirement. Such of these bidders were required to produce a joint deed of undertaking with the collaborator to guarantee the standards of performance of the system details in the tender specification. They were also required to furnish a performance bank guarantee. Once the bid was accepted the bidder was required to furnish a bank guarantee for 5% of the contract value of the LHS in addition to the contract performance guarantee of 10% specified in the tender. The claimant had bid on the basis of a collaboration agreement with an Australian firm M/s. John Holland Construction and Engineering Pty Limited, hereinafter referred to as JH, who possessed the required qualification.

(c) After the Award of the contract, the claimant had in addition to providing Bank guarantee for 5% of the contract value also provided contract performance guarantee of 10% of the contract value towards obligations of JH. The claimant had submitted a composite Bank guarantee for 15% which was also agreed by the respondent. However, the format of the Bank guarantee was not altered and JH's involvement

was not brought out in the contract performance guarantee.

(d)The claimant would further submit that they had utilized the services of JH in fulfilling the obligations under the Contract. However, after taking over the operation and maintenance of the LHS effective 01.03.2004, the respondent by a letter dated 24.01.2006 alleged that JH did not involve themselves in the later stages of the LHS other than vetting certain drawings during the initial stage. The respondent also contended that out of the contract performance guarantee for 15% value submitted by the claimant, 5% was towards the faithful compliance/performance of the joint deed of undertaking by JH. Since the claimant had failed to involve JH as agreed in the joint deed of undertaking appropriate action will be taken against the claimant. This was suitably replied to by the claimant vide their letter dated 24.01.2006.

(c)The Bank guarantee of 10% of the contract value was provided to ensure the time bound, due and faithful performance of the contract and was valid till the expiry of the warranty period after final take over. The

claimant would submit that despite taking over the LHS and successfully running it the respondent enforced the composite Bank guarantee of 15% on 13.12.2006 and they were finally paid by the bankers on 12.04.2007. This action was totally illegal and unjustified and therefore the claimant is entitled to the refund of the sum of Rs.5,91,23,160/-.

(ii) Respondents defense:

a. The respondents would justify the invocation of the composite guarantee deed by contending that JH and the claimant had not fulfilled the terms of the joint undertaking as the contractual obligation of the two was not restricted to only making the LHS function. JH had undertaken to be involved in every stage of the contract right from the design stage to the commissioning stage but however they were not so involved. Therefore, the contract performance guarantee of 10% has been enforced and no exception can be taken for the same.

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b. The respondent would contend that the claimant had not completed all the obligations under the contract and in particular had

failed to conduct the PG test. Such failure on the part of the claimant constituted a breach of the contract terms and the respondent was justified in invoking and enforcing the CPBG. The correspondence between the claimant and the respondent would clearly demonstrate how the claimant had postponed/delayed conducting the PG Test and without doing so had ventured to contend that the PG Test must be deemed to be completed. The respondent therefore contended that the claim No.V and VII should be rejected in *toto*.

(iii) Arbitral Tribunals findings:

a.The Tribunal after considering the Joint Deed of Undertaking (JDU), Collaboration Agreement (CA) and the various correspondences between the claimant and the respondent held that though the contracts did not elaborate the roles of JH, however, a reading of the JDU and the CA which was also submitted to the respondent shows that a comprehensive participation of JH with the claimant in the execution of the project was agreed upon. Clause 2 of the JDU laid down the extent of JH involvement in the execution of the contract. The Tribunal had also taken note of the

fact that the design and drawings were being submitted for the approval of the respondent without the same being vetted by JH. Further, although both the CA and the JDU required the presence of the technical experts of JH from time to time to oversee the progress of the works, in a contract that spanned over six years the officials of JH had visited the site only twice. The Tribunal also held that when the claimant had been confronted with difficulties in the performance of PGT, the claimant had sought the assistance of MIT and not JH. Therefore, the LHS had been installed by the claimant without availing the full expertise of JH which would definitely have a bearing on the quality of the equipment which is expected to last for more than a couple of decades. Therefore, the claim of the claimant to direct the respondent to withdraw their stand regarding JH was rejected.

b. The Tribunal had rejected the contention of the claimant that the PGT could not be conducted due to reasons attributable to the respondent. However, since the warranty period had come to a close at the end of the 24th or the 30th month and the preliminary test operation completed on

01.03.2004, the Arbitral Tribunal observed that a PGT had been conducted initially. The Tribunal also observed that the test was not held thereafter and the non-completion was not on account of the respondent. The Tribunal assessed the damages to the respondent as a result of the indifferent performance by the Claimant of its obligations under the JDU at Rs.1 crore. The Tribunal further held that the respondent had incurred losses listed as counter claim Nos. 5,6, and 7 as well as the sum of Rs.95,833/- which works out to a sum of Rs.1,25,16,953/-. The Tribunal ultimately held that out of the CPBG, the respondent could retain a sum of Rs.2,25,16,955/- and refund Rs.3,66,06,207/- to the claimant along with interest of Rs.3,40,43, 773/-. The Tribunal rejected the claim towards bank charges.

13. Aggrieved by the Award insofar as it was against them the claimant has filed this petition to set aside the same. Though the grounds of challenge is in respect of the portions of the award which was against the claimant, however at the time of arguments the claimant had restricted the challenge only to the claims detailed supra.

14.Submissions:

(A)Mr.R. Murari, learned Senior Counsel appearing on behalf of the counsel for the claimant had made elaborate submissions which has been reduced into written submissions. As regards Claim I, the learned Senior Counsel would contend that the Tribunal having held that the respondents should refund the retention monies, ought to have granted interest from the date on which the retention amounts became due. The Tribunal's finding that the amounts would be payable only at the time of settlement of all claims through arbitration is fallacious.

(B)As regards Claim III, relating to the levy of liquidated damages for the delay, the following arguments were put forward:

(a)Liquidated damages consists of 2 limbs:

(i)Non-fulfillment of time schedule subject to a ceiling of 10%.

(ii)Non-fulfillment of performance guarantee values -10%.

(b)LD is leviable only when the scheduled date of successful completion of trial operations is not adhered to. Therefore, the trigger for levy of LD is only non adherence to the scheduled date of successful completion of trial operation which envisaged the lignite being loaded into the feeder conveyor taken through the LHS to the boiler.

(c)If the trial operation is delayed beyond the completion time and such delay is not attributed to the claimant, LD will not be levied for the time delay between the completion time and trial operations.

(d)Trial operation as per the terms of the contract means the integrated operation of the plant/system/equipment for a specified period at a specified load for passing a trouble free operation.

(e)Not only was the agreed load of lignite not made available, the boilers into which the lignite had to be fed was also not made ready. Further, the LHS was an intermediary system which cannot be trial operated without the main system i.e., the boiler and the boiler bunker

being made ready and functional.

(f) Between December 2002, (in respect of Contract I) and June, 2003, (in respect of Unit II) the main systems were not ready and the respondent was not in a position to feed lignite for the purpose of carrying out the trial operation of the LHS.

(g) The period for which levy of LD is sought to be justified, trial operations could not have been conducted as the main system could not be utilized. Hence, no part of the LHS can be considered to be non-utilisable.

(h) The respondent themselves were shifting the scheduled date for commissioning of the Units. Even when the trial operation was to be conducted the required load of lignite to be fed was not made available.

(i) The respondent has not suffered any legal injury and the finding of the Arbitral Tribunal in this regard is flawed and an error apparent on the face of the record.

(j)The Tribunal has found legal injury not on account of delay but on account of the LHS being operated without the safeguards that would flow from the completion of the PGT.

(C).Claim No.V and VII:

a.LD can be levied for non performance with reference to the values achieved in a PGT and the respondent cannot appropriate the amounts for alleged non performance or deficient performance.

b. The contract clearly sets out the ceiling on LD at 10% of the Contract price for non fulfillment of performance guarantee values. In the light of a stipulation by way of LD the claimant cannot be held liable for general or unliquidated damages over and above the same.

c. The findings of the Tribunal that the respondent has been deprived of a technically superior system is without any basis and awarding damages on this vague ground is against the terms of the

contract.

d. The Tribunal has erred in awarding damages on a presumption that deficiencies in collaboration may manifest in years to come which once again is not the term of the contract.

e. The respondent having failed to prove loss of any kind cannot claim LD.

The following decisions have been referred to by the respondent in support of the above contentions:-

(i)Section 74 - Law relating to levy of LD:

a.2015 (4) SCC 136 [Kailash Nath v. DDA]

b.AIR 1963 SC 1405 [Fateh Chand v. Balkishan Dass]

c.1969 (2) SCC 554 [Maula Bux v. Union of India]

d.2003 (5) SCC 707 [ONGC v. Saw Pipes]

e.2005 (4) LW 319 - Ennore Port Limited v. Hindustan Constructions Limited.

f.2016(5) M.LJ.229 - Raheja Universal Private Limited v.

B.E.Billimoria & Company Limited

g. 244 (2017 ALT 360 [AlhuwaliaContract (India) Limited v. Union of India.

(ii). Claim V and VII - Award of General Damages under Section 73:

(a) AIR 1962 SC 366 - Murlidhar Chiranjilal v.Harishchandra Dwarkadas and others.

(b)AIR 1985 Ker 49 - [State of Kerala v. K.Bhasraran

(iii)Claim I - Award of Interest :

Manu/WB/0009/2020 - Batlibai Limited v. Union of India.

(iv)Section 34 - Setting aside of an Award.

a.AIR 2015 SC 620 (Associates Builders v. DDA)

b.MANU/TN1379/2016 - SKS Logistics v. ONGC

15.Mr.T.R. Rajagopalan, Senior Counsel appearing on behalf of the

respondent had made his oral submissions and the same has also been submitted in the form of written submissions. The following submissions have been made:-

(a) A preliminary objection regarding the maintainability of the petition has been raised since the claimant has received the amounts paid by the respondent in compliance of the award without demur. The respondent would therefore contend that the petition under Section 34 challenging the Award for selective claims is not maintainable.

(b) The findings, discussion and conclusions of the Arbitral Tribunal does not suffer from any perversity or illegality thereby, giving rise to a ground for challenge under Section 34 of the Act.

(c) The Arbitral Tribunal has given cogent reasons for the decisions arrived at for each and every one of the claim and counter claim.

(d) The Arbitral Tribunal has given adequate reasons for denying the pre-award interest and the respondent relied on the Judgment reported in **2019(2) CTC 577 (SC) - Jaiprakash Associates Limited v. Delhi Hydro Development Corporation India Limited** in support of this argument.

(e)The cause factors on the basis of which the claimant had challenged the levy of LD were independently considered by the Tribunal which held against the claimant. The Tribunal has found all the cause factors to be unfounded and arrived at the conclusion that it was the claimant alone who was responsible for the delay and therefore, the levy of LD was justified.

(f)The claimant had been awarded the Contract as they had a collaboration agreement with JH and they along with JH had executed a JDU with the respondent that JH would be part of the project from the design stage to the commissioning stage. However, JH had not been an active participant in the project. The award of a sum of Rs.1 crore towards damages is therefore justified as it did not constitute the LPBG of 5%.

(g)The levy of LD was only on account of the breaches and delays caused by the claimant which the Tribunal has independently considered on the basis of the material before it.

(h)The respondent was only required to prove breach on the part of the claimant and when proved the respondent was entitled to the LD.

The learned Senior Counsel therefore contended that the Award required no interference.

16.Discussion:

The preliminary objection raised by the respondent regarding maintainability cannot be countenanced as the claimant has only challenged that portion of the Award that is against them. Therefore, the acceptance of the amounts due towards that portion of the Award in their favour will not amount to estoppel.

a) From a reading of the pleadings, written arguments, the documents and the Award the following facts emerge. The claimant was awarded the contract for installing the lignite Handling System which was an intermediary system. The contract was awarded to the claimant as they had satisfied the qualifying requirement i.e., they had entered into an agreement with M/s.John Holland Construction and Engineering Pty Limited, an Australian Company who had the requisite experience of

installing a lignite handling system. The terms of the Agreement had stipulated that the LHS shall be completed, upto and including the successful completion of the trial operation by the claimant, within a period of 30 months from the date of the Letter of Award. The letter of award was issued on 31.07.1998/12.08.1998 and therefore, the time for completion of the installation was by 01.01.2001. The terms of the contract (Schedule IV) further provided the bar chart detailing the various stages of the contract and the time to be taken for each of them. This schedule further provided the levy of LD for the non - fulfillment of the time schedule. The terms of the Contract would stipulate that the LD would be leviable when the scheduled date for the successful completion of the trial operation is not adhered with and the rate of LD provided is 0.5% of the non utilizable portion of the works per week of delay or part thereof subject to a maximum of 10%.

b) Admittedly, the claimant had not adhered to the stipulated date of completion and had sought extensions. Ultimately, it was only on 01.01.2003 that the claimant became ready to undergo the trial operations.

The respondent had therefore claimed liquidated damages. The Tribunal had rejected the claim of the claimant to refund the LD recovered by the respondent on the ground that there was a delay and the cause factors given for the delay were not proved. The Tribunal has extensively dealt with each one of the cause factors put forward by the claimant and rendered its finding. The contention of the claimant that the respondent had not suffered any loss as even when the claimant was ready for the trial operation the respondent was not ready and therefore LD cannot be levied has been rejected by the Tribunal with cogent reasons. The Tribunal has observed that the claimant has pushed back the agreed completion date by three years and it is only on account of their delay that the other delay had occurred and the recovery of LD was justified. The learned Senior Counsel appearing on behalf of the claimant has contended that the respondent had not suffered any loss on account of the delay and therefore, the levy of LD was contrary to provisions of Section 74 of the Contract Act. The above argument has been turned down by the Tribunal after taking into account the fact that the claimant without any reasonable cause has delayed the project by over 3 years. The Tribunal has also taken into

account the fact the every extension starting from the first extension has been granted only subject to the levy of LD by the respondent. Therefore, from 01.01.2001, till the date of the LHS being made ready, the LHS was non utilizable. The parties have agreed to have LD levied at the maximum rate of 10% of the non-utilizable portions. The actual loss in the instant case cannot be proved. Further, the LHS was an important and integral system which had to be set in place to convey lignite to the boiler.

c) In the Judgment of Kailash Nath Associates v. DDA, the Hon'ble Supreme Court had discussed as follows:

"436.The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damages or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss can be awarded."

(d).Admittedly, the claimant has delayed the completion of the works by over three years and therefore, the entire project, which was for

the expansion of the first thermal power station, was delayed. The delay has impliedly resulted in a loss to the respondent which however cannot be quantified. The LD agreed upon is reasonable as the project itself was for public interest. Therefore, the award under Claim III does not require any interference.

(e) As regards the Award under the Claim V and VII once again the Arbitral Tribunal has examined the material available before it thoroughly to come to the conclusion that JH, the collaborator has not involved themselves in the project as undertaken by them under the JDA. Under this head, the Tribunal has only awarded the respondent, a sum of Rs.1 crore. The Tribunal having analysed the facts and documents have held against the claimant and this Court does not find any reason to hold otherwise. Further, it is noteworthy that the contract had been awarded to the claimant only on account of the fact that they had a collaboration agreement with JH who had prior experience in putting up a LHS. This was a qualifying requirement. Neither the JDU nor the CA (Collaboration Agreement) were a mere formality but an intrinsic qualifying requirement as the respondent required the expertise of an expert in installing the LHS.

The Tribunal has extensively dealt with the various correspondence between the respondent and the claimant wherein the respondent has sought the presence of JH but the claimant has not been able to involve JH in the work.

(f).Admittedly, the claimant has not done the PGT for the auxiliaries and there is a categoric finding of the Tribunal that the claimant was not ready to do the PGT for the auxiliaries which is contrary to the terms of the contract. The conduct of the PGT was mandatory both in respect of the main equipment as well as the auxiliaries. Though the PGT with reference to the main equipment had not been conducted in the prescribed manner the Tribunal has found fault with both the claimant as well as the respondent and taking an overall view had directed the respondent to pay a sum of Rs.3,66,06,207/- as liquidated damages together with interest of Rs.3,40,43,773/-. I do not find any reason to interfere with this portion of the Award as well.

(g) Claim I related to the non-payment of the amounts withheld

towards retention of 10% from the invoice amount by the respondent as prescribed in keeping with the payment terms. The payment terms prescribed as follows:

"After successful completion of performance test for equipment and Certification of results by the purchases/Consultant - 10% to be paid."

The case of the claimant is that though the trial operation had been carried out from 01.01.2003 to 01.03.2004 and the respondent had taken over the entire system on 01.03.2004 the balance amount of 10% from the Invoice amount was not released by the respondent. The Arbitral Tribunal having held that the retention monies were repayable to the claimant had committed a patent illegality, in not granting interest atleast from 01.03.2004 when the respondent had taken over the LHS and started operating the same. The Tribunal has denied interest on the ground that the retention amount became refundable only on the date of Award and therefore, the claimant was not entitled to interest till the date of Award. Post award interest has also not been awarded.

(h). The denial of interest post 01.03.2004 to the claimant on the

ground that the retention amount became payable only on account of the award is a patently erroneous observation and contrary to the payment terms stipulated in the contract and elaborated in schedule VI thereto. Clause 6.5.2.1 (d) of the above schedule clearly details that on the successful completion of performance test for equipment is conducted and a certification is issued therewith by the respondent, the balance 10% of the contract price is to be released to the claimant. The clause further provides that in the event of commissioning being delayed beyond six months from the schedule date and the delay is not attributable to the claimant the final tranche of pay shall be released against the production and acceptance of a bank guarantee for an equal amount valid for one year or any revised scheduled date of commissioning whichever is earlier. The validity of the Bank guarantee was to be renewed till the commissioning.

(i) A reading of the above clause clearly indicates that the parties had agreed that the final payment had to be released latest beyond six months from the completion of the performance test. Admittedly, the respondent had taken over the LHS and started operating and maintaining

the same ever since 01.04.2003. The respondent had therefore reaped the benefits therefrom the above date. Not only has the respondent retained 10% of the final dues but has also been utilizing the LHS to its capacity thereby enriching itself. The Arbitral Tribunal has overlooked the terms of clause 6.5.2.1(d) and has erred in not granting interest from 01.04.2003. The respondent has wrongly withheld the amount. No doubt the contract does not provide for interest but the Clause 6.5.2.1 (d) makes it evident that the agreement between the parties was that the amounts would be released on the completion of the performance test and latest within a period of 6 months thereof. The release of the amounts was to be done even if the LHS had not been commissioned for which the agreed terms had provided some safeguards to the respondent. Therefore payment of the amounts for the work completed was the clear terms of the agreement. The respondent having failed to adhere to this stipulation and continuing to retain the money thereto has rendered itself liable to pay interest. It is noteworthy that the agreement between the parties does not expressly prohibit the levy of interest.

17. Let me now examine the judicial pronouncement with regard to the grant of interest denied by the Arbitral Tribunal by the Court before which the petition to set aside the Award is pending:-

The Constitution Bench in the Judgment reported in **AIR 1992 SC 732 [Secretary Irrigation Department, Government of Orissa and others v. G.C. Roy]** was considering the jurisdiction of the Arbitrator to award **pendente lite interest** in the absence of an agreement for the same. The learned Judges extensively considered the various earlier judicial pronouncements of the Hon'ble Supreme Court and ultimately laid down the following principles:

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of [Section 34](#), C.P.C., and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) an arbitrator is an alternative form for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the Court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) *An arbitrator is the creature of an agreement It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.*

(iv) *Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that*

observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena's case almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

...45. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (alongwith the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their

disputes-or refer the dispute as to interest as such-to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

18.A later constitution Bench of the Hon'ble Supreme Court in the judgment *"Executive Engineer, Dhenkanal vs N.C.Budharaj (Dead) reported in AIR 2001 SC 626 = 2001 (3) SCC 721"* was answering a reference made for determining the jurisdiction of the Arbitrator to award interest for the **pre-reference period**. The learned Judges had extensively dealt with the issue drawing their conclusions from the various earlier pronouncements including the judgment of the earlier Constitution Bench in *G.C Roy's case [1992(1) SCC page 508]*. The learned Judges ultimately answered the reference as follows:

" For all the reasons state above, we answer

*the reference by holding that the Arbitrator appointed with or without the intervention of the Court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in **Jenas Case [1988 (1) SCC 418]** taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings."*

19.The above referred judgment has also been quoted with approval in later judgments of the Hon'ble Supreme Court.

a) "Bhagawathi Oxygen Limited vs. Hindustan Copper Limited -[2005 (6) SCC page 462]"

That was a case where the Arbitrator had awarded pre-reference period, *pendente lite* and post award interest at 18% per annum. The Learned Judges relying on the aforesaid constitution Bench judgments held that it was within the power of the Arbitrator to award interest and that apart had upheld the award of interest @18% per annum.

b) "Indian Hume Pipe Co. Limited vs. State of Rajasthan -[2009 (10) SCC page 187]"

This was also a case of the Arbitrator granting interest from the pre-reference period till date of payment. However, the District Judge and the learned Single Judge of the High Court had refused to grant the aforesaid interest. The Hon'ble Supreme Court relying on the Judgments in *G.C. Roy* and *N.C. Buddharaj* set aside the order insofar as it related to interest and restored the award together with interest.

c) Union of India vs Saraswat Trading Agency and others [2009 (16) SCC 504

In this case, the Arbitrator had awarded interest @ 16% for the pre-

reference period and *pendente lite*. For the post award period the Arbitrator had awarded 18% per annum. This was challenged by the Union of India. The learned Judges relied on the Judgment in G.C. Roy's case for *pendente lite* interest, the Judgment in N.C. Budharaj for the pre-reference period and the Judgment of the Hon'ble Supreme Court in ***Hindustan Construction Co. Ltd. vs State Of Jammu And Kashmir [(1992) 4 SCC 217]*** for the post award interest and has proceeded to grant the interest.

20.The underlying principle conferring power on the arbitrator to grant interest for a pre-reference period in cases where there is no prohibition in the arbitration agreement is on account of the fact that the forum of arbitration is created by the consent of parties and is a substitute for a conventional civil court. Therefore by implication the Arbitrator would have the same power to award interest in the same way and same manner as a court.

21.Admittedly in the case on hand the contract is silent about the

grant of interest. The learned Arbitrators have refused to grant interest not only for the pre reference period but also the pendente lite interest as well as the post award interest on the ground that the claimant became entitled to the payment of the retention money only with effect from the date of the award. This finding lacks a legal basis since the amount falls due on the commissioning of the LHS. The respondent admittedly has been commercially utilising the LHS effective latest from 01.03.2004 (the date on which they had taken it over from the claimant). The Tribunal having arrived at the finding that the claimant was entitled to the refund of the retention money ought to have granted interest. The respondent has unjustly enriched itself by retaining the claimant's dues and commercially utilising the LHS from 01.03.2004. It is also surprising that having observed that the claimant is entitled to the amount on and from the date of the award, the learned Arbitrators have failed to grant interest post the award till date of payment. The learned Arbitral Tribunal has failed to consider the provisions of Sec 31 (7) (a) and (b).

22.In the judgment reported in *AIR 2015 SC page 856 - Hyder*

Consulting (UK) Limited Vs. Governor, State of Orissa, the 3 judge bench of the Hon'ble Supreme Court was answering a reference on the correctness of the decision in *State of Haryana and others vs. S.L. Arora and Company* [2010 (3) SCC 690]. The learned Judges observed as follows in paragraph 48 to 50.

48. Therefore, it may be concluded that the term "interest", appears to be distinct from the principal amount on which it is imposed. Furthermore, the imposition of an interest is stated to be for the purpose of providing compensation for withholding the said principal amount or, as in the case of clause (a) of sub-section (7) of Section 31 of the Act, 1996, for withholding the money awarded as per the claim, as determined by the arbitral tribunal, from the date the cause of action arose till the date when such award was made. In other words, interest is imposed to compensate for the denial to one party,

by the other party, of the money which rightfully belongs to the said former party under the relevant agreement governing the arbitration proceedings.

49. Having clarified sub-section (a) of sub-section (7) of section 31 of the Act, 1996, I would now consider clause (b) of the said provision. As noticed above, clause (b) is applicable for the period from the date of award to the date of payment. The applicability of clause (b) has also been qualified by the legislature. The said clause uses the phrase "unless the award otherwise directs", which would mean that in the event the arbitral tribunal, in its award, makes a provision for interest to be imposed in this second stage as envisaged by sub-section (7) of section 31 of the Act, 1996, clause (b) would become inapplicable. By the said award, the arbitral tribunal has the

power to impose an interest for the post-award period which may be higher or lower than the rate as prescribed under clause (b). Even if the award states that no interest shall be imposed in the post-award period, clause (b) cannot be invoked.

50. If the arbitral award is silent on the question of whether there would be any post-award interest, only in that situation could clause (b) be made applicable. In the said situation, it would be mandatory as per law that the award would carry interest at the rate of 18% per annum from the date of the award to the date of payment. The term used in the given clause is "shall", therefore, if applicable, the imposition of interest as per clause (b) would be mandatory."

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23. Ultimately at paragraph 61, one of the members had answered the reference as follows:

"61. In light of the above discussion, the reference is answered in the following terms-

I find no infirmity with the S.L. Arora case (supra), whereby it was held that if the arbitral award is silent about interest from the date of award till the date of payment, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till the date of payment."

However the other two members observed that the *"sum directed to be paid"* included both the principal as well as interest but the learned judges upheld the award of interest.

24.Considering the fact that this Court is exercising jurisdiction under Section 34 of the 1996 Act can the award be modified in the light of the discussions made supra and more particularly in the light of the judgment authored by me in ***Sterlite Technologies Limited vs BSNL [OP Nos.200 of 2011 and 774 of 2012 dated 11.12.2019]***.

25. In the judgment in Sterlite Technologies I had, considered the various judgments pronounced by the Hon'ble Supreme Court regarding the scope of interference under Section 34 of the 1996 Act commencing from the judgment of the Hon'ble Supreme Court reported in **2006 (11) SCC 181, *Mc Dermott International Inc vs. Burn Standard Co, Ltd*** wherein the Hon'ble Supreme Court had struck a note that the 1996 Act cast only a supervisory role where the court was only called upon to test the fairness of the award and was not called upon to correct the errors of the Arbitrator. This judgment had been followed in many of the later judgments. Thereafter I had considered the judgments post the Amendment to the 1996 Act vide Act 3 of 2016 and relying on the judgment of the Hon'ble Supreme Court in ***Ssangyong Engineering vs. National Highways Authority***, I had observed that in view of the language of the judgment in ***Ssangyong Engineering vs National Highways*** the Court exercising jurisdiction under Section 34 of the 1996 Act cannot interfere with the findings of the arbitral award. Further since modifying the award in that

case would amount to re appreciating the evidence as vital evidence has been overlooked by the learned Arbitrator therein, I had only set aside the award on the ground of patent illegality without reversing the same award.

26.A Division Bench of this Court in Judgment reported in **2019 (5) L.W. 409 [ISG Novasoft Technologies Limited v. Gayathri Balusamy]** held as follows:

"A reasonable interpretation to Section 34 would only lead to an irresistible conclusion that the Court can modify or vary the Award of the Arbitrator if it is contrary to the material evidence adduced by the parties."

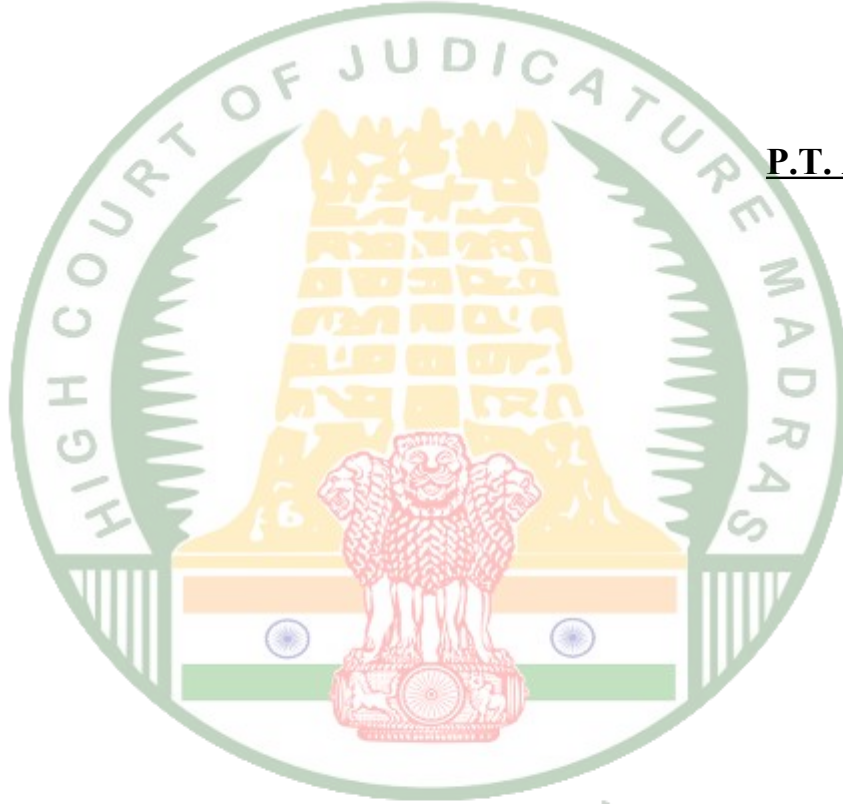
27. In the instant case the learned Arbitrators had after elaborately considering the evidence upheld the right of the claimant to refund of the retention money and the only ground on which the learned Arbitrators have denied interest is on the ground that the amount became payable only by virtue of the award which is per se erroneous. Taking into consideration the judgments of the Hon'ble Supreme Court in **G.C. Roy,**

N.C. Budharaj, Indian Hume Pipe Co. Limited and Hyder Consulting (UK) Limited as also the division bench judgement of this Court in *ISG Nova soft- Technologies Limited* and applying the principles thereon to the case of hand I am of the view that the claimant is entitled to interest @ 9 % p.a from 01.03.2004 (the date on which the respondent had taken over the LHS till the date of award and from the date of award till date of payment at 18 % p.a. as held by the Hon'ble Supreme Court in *Hyder Consulting (UK) Limited* at paragraph 61, particularly in the light of the learned Arbitrators after examining the evidence on record coming to the conclusion that the retention was wrong. Therefore, this Court is not called upon to once again appreciate the evidence.

28.In fine, the Original Petition is partly allowed with regards to Claim I, the Award denying interest is set aside and the respondent is directed to pay interest on the retention money awarded @9% per annum from 01.03.2004 till date of award and thereafter, @18% per annum till date of payment of the retention money. In all other respects, the Award of the Arbitral Tribunal stands confirmed.

20.05.2020

Internet : Yes/No
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Speaking / Non-Speaking
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P.T. ASHA. J.

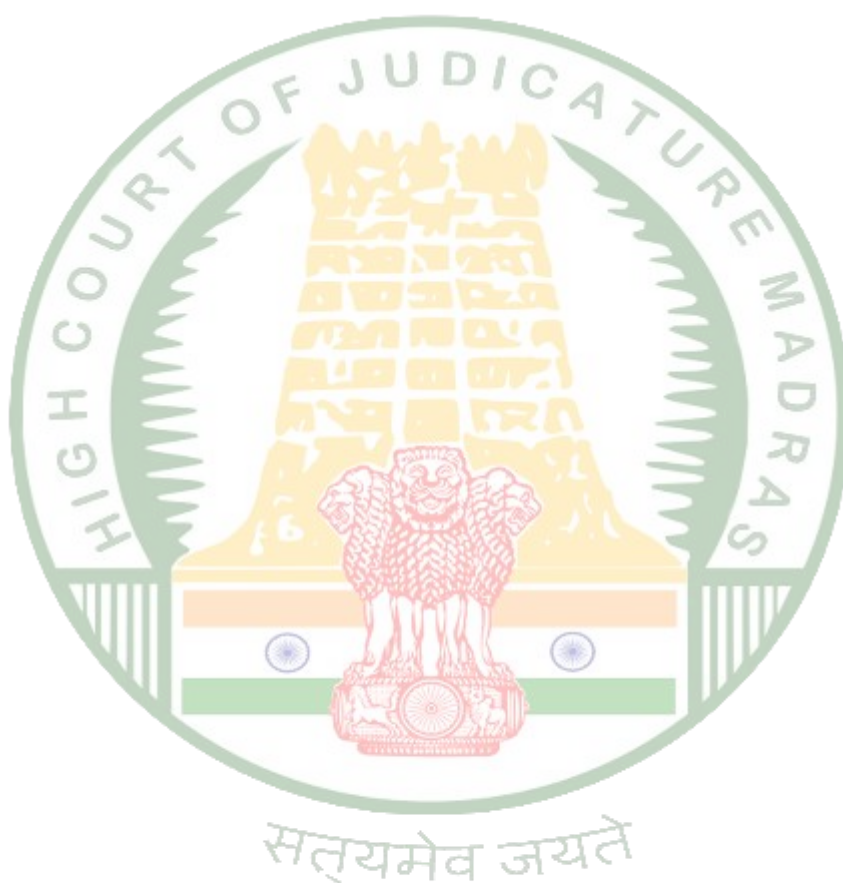
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