

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.12.2020

CORAM

THE HONOURABLE MR.JUSTICE R. SURESH KUMAR

W.P. Nos. 24455 of 2019 & 34413 of 2018 and
W.M.P. Nos. 24193 and 24194 of 2019 and
W.M.P. Nos. 39987 and 39988 of 2018

W.P. No. 24455 of 2019

The Senior Regional Manager,
Tamil Nadu Civil Supplies Corporation,
Chennai North Region,
No.9, Conron Smith Road,
Gopalapuram,
Chennai - 600 086. Petitioner

-vs-

1. The Additional Commissioner of Labour,
Chennai, 6th Floor, Teynampet,
Chennai.
(Appellate Authority as under the
Payment of the Gratuity Act, 1972)
2. The Assistant Commissioner of Labour - I,
Chennai - 6.
(Controlling Authority as under the Payment
of the Gratuity Act, 1972)
3. Thiru R. Selvaraj ... Respondents

W.P. No. 34413 of 2018

The Senior Regional Manager,
Tamil Nadu Civil Supplies Corporation,
Nagapattinam Region. Petitioner

-vs-

1. The Joint Commissioner of Labour,
Trichy.
(Appellate Authority as under the
Payment of the Gratuity Act, 1972)
2. The Assistant Commissioner of Labour,
Trichy.
(Controlling Authority as under the Payment
of the Gratuity Act, 1972)

3. Mr. A. Rajarathinam

... Respondents

PRAYER in W.P. No. 24455 of 2019: Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorari to call for the records of the order of passed by the second respondent, the Assistant Commissioner of Labour - I, Chennai - 6, the Controlling Authority as under the payment of the Gratuity Act, 1972 in P.G. No. 13 of 2014 dated 29.07.2015 and consequential order of the first respondent, the Additional Commissioner of Labour, Chennai, the Appellate Authority as under the Payment of the Gratuity Act, 1972 in P.G.A. No. 44 of 2015 dated 07.03.2018 and to quash the said orders.

PRAYER in W.P. No. 34413 of 2018: Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorari to call for the records of the order of passed by the second respondent, the Assistant Commissioner of Labour, Trichy, the Controlling Authority as under the payment of the Gratuity Act, 1972 in P.G. No. 10 of 2016 dated 23.11.2016 and consequential order of the first respondent, the Joint Commissioner of Labour, Trichy, the Appellate Authority as under the Payment of the Gratuity Act, 1972 in P.G.A. No. 42 of 2017 dated 15.03.2018 and to quash the said orders.

For W.P. No. 24455 of 2019

For Petitioner : Mr. P. Paramasiva Doss

For Respondents : Ms. R.J. Radhika
Government Advocate for R1 & R2
Mr. V. Ajay Khose
Amicus Curiae

For W.P. No. 34413 of 2018

For Petitioner : Mr. P. Paramasiva Doss

For Respondents : Ms. R.J. Radhika
Government Advocate for R1 & R2
Mr. V. Ajay Khose
Amicus Curiae

C O M M O N O R D E R

The issue raised in both the Writ Petitions is one and the same and in both the Writ Petitions, the writ petitioner /

employer is The Tamil Nadu Civil Supplies Corporation. Therefore, with the consent of the learned counsel appearing for both sides, both the Writ Petitions were heard together and are disposed of by this common order.

2. The following facts are required to be noticed for the purpose of disposal of W.P. No. 24455 of 2019:

(i) That the Third respondent namely one Selvaraj (hereinafter to be referred to as 'employee') was appointed as a Watchman at the petitioner corporation, by order of appointment of the petitioner corporation dated 11.10.1980. According to the petitioner corporation, though the employee was appointed in the year 1980, it was only a temporary seasonal employment, as the petitioner corporation mainly concentrate in procuring the agricultural produces, therefore, the job is only seasonal in nature. Therefore, once the job is over at the season of the year, the service of those employees including the present employee i.e., the third respondent also would be dispensed with and accordingly, upto the year 1993, the employee was working only as a seasonal employee and not as a full time employee. However, only from 03.12.1993, the third respondent / employee has become permanent and regular employee of the petitioner corporation as a Packer and accordingly, he was working till his superannuation on 31.10.2013 and hence, he retired from service on that day.

(ii) In this context, it is the further case of the petitioner corporation that, on retirement, the third respondent since claimed the gratuity, the same was calculated for the entire service period, where the employee was permanently working with the petitioner corporation i.e., from 1993 to 2013 for 20 years and accordingly, a sum of Rs. 2,06,296/- was paid. However, the third respondent / employee claimed a sum of Rs.3,30,260/- as a total gratuity payable to him by calculating his entire service of 33 years, right from the date of appointment i.e., 11.10.1980 till the superannuation i.e., 31.10.2013.

(iii) In this context, in view of the different calculation of gratuity, where, according to the third respondent / employee, a sum of Rs.1,23,964/- has to be paid by the petitioner as the remaining amount of gratuity, by calculating the entire service of 33 years, the employee had approached the Controlling Authority under the Payment of Gratuity Act, where the Gratuity Petition in P.G. No. 13 of 2014 was heard and decided by the Controlling Authority, by order dated 29.07.2015, where, having accepted the case of the employee by rejecting the case, put forth by the petitioner corporation, allowed the said gratuity case and directed the petitioner corporation to pay a sum of Rs.1,23,964/- with 10% interest to the employee within thirty days period.

(iv) Aggrieved over the said order passed by the Gratuity Authority, an appeal under the said Act was filed by the petitioner corporation in P.G.A. No. 44 of 2015, where also, the Appellate Authority having accepted the case of the employee, rejected the appeal filed by the petitioner corporation, by its order dated 07.03.2018. Challenging the said order passed by the Appellate Authority dated 07.03.2018, confirming the order passed by the Original Authority under the Act dated 29.07.2015, this Writ Petition was filed by the petitioner corporation.

3. The short facts pertaining to W.P. No. 34413 of 2018 is that, in this case also the facts are almost similar, where the third respondent / employee was appointed by the petitioner corporation on 04.01.1984 and after 29 years of service, he superannuated and retired from service on 28.02.2013. Therefore, for the whole period, the employee sought for the gratuity amount, however, the petitioner corporation since paid only a sum of Rs. 68,372/- instead of total gratuity amount of Rs. 2,37,610/-, the Controlling Original Authority under the Act, by order dated 23.11.2016 in P.G. No. 10 of 2016, directed the petitioner corporation to pay the remaining gratuity amount of Rs. 1,69,238/-.

4. Here also, felt aggrieved over the order passed by the Original Authority under the Act, the petitioner corporation preferred an appeal in P.G.A. No. 42 of 2017, which was also decided in favour of the employee, by order dated 02.01.2018, thereby the Appellate Authority directed the petitioner to pay the said amount of Rs. 1,69,238/-, being the remaining gratuity amount with 10% interest within the time frame. As against the said order passed by the Appellate Authority under the Act, this Writ Petition has been filed by the petitioner corporation.

5. That is how, both the Writ Petitions were filed by the petitioner corporation, assailing the orders passed by the Original Authority as well as the Appellate Authority under the Payment of Gratuity Act, 1972.

6. Mr. P. Paramasiva Doss, learned counsel appearing for the petitioner in both the cases would contend that, though order of appointment was given for these employees in the year 1980 and 1984 respectively, they have not been engaged as full time employee by the petitioner corporation and since the petitioner corporation, being the seasonal employer mainly concentrating with procuring the agricultural produces only during the season, the whole service for several years of these employees were seasonal in nature. Therefore, such kind of employees for the period under seasonal employment, would not be entitle to get gratuity within the meaning of the provisions of the Gratuity Act, where the learned counsel appearing for the petitioner would rely upon Section 2(e) of

the Payment of the Gratuity Act, 1972, (in short 'The Act') which reads thus:

"2(e) "Employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment, to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity."

7. The learned counsel would also submit that, only after several years, these employees had been made permanent or become regular employees and only from the date, when they become regular employees, these employees services were taken into account by opening the service record and only from that date till the date of superannuation, their service was calculated for the purpose of paying the gratuity, and the gratuity amount was accordingly calculated and paid. Therefore, the learned counsel would contend that, the excess amount, as has been directed by both the authorities under the Gratuity Act, through the impugned orders, taking the period of seasonal employment of these employees also, may not be justified, in view of the provisions available under the Act. Therefore, the said orders passed by the Original Authority as well as the Appellate Authority which are impugned in these Writ Petitions, are necessarily to be interfered with and set aside, he contended.

8. Mr. V. Ajay Khose, learned Amicus Curiae, who was appointed by this Court since no one was appearing on behalf of the employees, would content that, the issue as to whether, the petitioner corporation is a seasonal employer and the employees, who had been engaged by them, are the seasonal employees and the employment is the seasonal employment, came up for consideration before this Court in W.P. No. 4371 of 1998, where, by order dated 30.07.2008, a learned Judge of this Court has taken the view that, by taking into account the explanation given in the provisions of the Gratuity Act with regard to the seasonal employment, it cannot be said that the Tamil Nadu Civil Supplies Corporation is a seasonal employer, therefore, the employment cannot also be considered as the seasonal employment.

9. As against the said order passed by the learned Judge of this Court in W.P. No. 4371 of 1998, Intra Court Appeal was filed in W.A. No. 1282 of 2008, where, a Division Bench of this Court decided the issue on 19.07.2010, confirming the order passed by the Writ Court.

10. Stopping for a moment, the learned counsel appearing for the petitioner corporation, in these two cases, has very much relied upon this judgment and would contend that, though it was held in those decisions that, the employment of the employees of the Tamil Nadu Civil Supplies Corporation are not seasonal employment or they are not seasonal Employees, subsequently there has been a settlement under Section 12(3) of the Industrial Disputes Act, whereby, the employees seems to have agreed to take the service benefits, only from the date of the regular employment and therefore, what services rendered by them, by way of seasonal employment prior to the regular employment, cannot be taken into account for the purpose of service benefits like the Payment of Gratuity and therefore, those decisions cannot be made applicable to the present set of employees in these two cases now under consideration and therefore, the learned counsel appearing for the petitioner corporation would contend that, the principle laid down in those cases referred to above, as quoted by the learned Amicus Curiae, may not be applicable in the present cases.

11. However, Mr. V. Ajay Khose, learned Amicus Curiae would further contend that, the said issue as to whether, the 12(3) settlement reached between the Tamil Nadu Civil Supplies Corporation and the employees Association would prevail over the statutory provisions of the Payment of Gratuity Act, has also been considered by another two Division Benches of this Court, i.e., in a batch of Writ Appeals in W.A (MD) Nos. 353 to 357 of 2014 dated 12.03.2018 and in another batch of Writ Appeals in W.A (MD) Nos. 773 to 776 of 2018 dated 05.06.2018.

12. Relying upon these two Division Bench Judgments, the learned Amicus Curiae submitted that, the issue as to whether the terms under 12(3) settlement under the Industrial Disputes Act, would prevail upon the statutory provisions of the Gratuity Act has been considered and answered by the Division Bench of this Court stating that, whatever be the terms under 12(3) settlement that would not stand in the way of the statutory provisions under the Gratuity Act, where it has been specifically explained under Section 2(e) that, what is the seasonal employment and who is the seasonal employer. Therefore, the view taken by the learned Single Judge in W.P. No. 4371 of 1998 as has been confirmed by the Division Bench in W.A. No. 1282 of 2008 dated 19.07.2010, having been accepted and affirmed or relied by subsequent Division Bench, that has been referred to in the order dated 12.03.2018 and 05.06.2018, therefore, the learned Amicus Curiae submitted that, the issue as to whether, the Tamil Nadu Civil Supplies Corporation is a seasonal employer or not, has already been concluded by more than one judgment and therefore that issue is no more res integra. The learned Amicus Curiae would further contend that, in view of the settled legal position

with regard to the plea raised by the petitioner, the plea now raised by these employees to get the full gratuity amount for the entire service period from the date of the appointment till the date of superannuation, has to be accordingly calculated or computed and therefore, whatever be the remaining amount payable by the petitioner corporation to these employees for the period claimed to have been the seasonal employment from the point of view of the petitioner corporation, shall also be calculated and be paid to the employees. This has been rightly done by both the Original Authority as well as the Appellate Authority under the Gratuity Act, through the impugned orders, therefore, both the orders are sustainable, he contended.

13. I have considered the rival submissions made by the learned counsel appearing for the petitioner as well as the learned Amicus Curiae.

14. As rightly pointed out by the learned Amicus Curiae, the issue as to whether, the Tamil Nadu Civil Supplies Corporation is a seasonal employer or not and the employees are seasonal employees or not and the employment would be the seasonal employment or not, has already been concluded in more than one judgment as quoted above.

15. In order to appreciate the said contentions, the relevant portion of the order of a Division Bench of this Court in W.A(MD) Nos. 353 to 357 of 2014 dated 12.03.2018, can be usefully referred to, where the Division Bench of this Court has passed the following order:

"2. These writ appeals are directed against the common order dated 30.09.2013, made in W.P (MD) Nos. 16007 to 16011 of 2013. The said writ petitions were filed challenging the orders passed by the Payment of Gratuity Authority, computing the gratuity payable to the workmen.

3. The legal issue involved in these writ petitions is squarely covered by the decision of this Court in W.P. No. 4371 of 1998, dated 30.07.2008, which was confirmed by the Hon'ble Division Bench in W.A. No. 1282 of 2008, dated 19.07.2010. The operative portion of the order, dated 30.07.2008, passed in W.P. No. 4371 of 1998, reads as follows:

"15. But in the present case, all the workers covered by the impugned order were all Assistant Quality Inspectors, Watchmen, Packer, Helper, Bill Clerk, etc. The procurement, storage and distribution are all on going process and if they are really seasonal, there is no question of the workmen being covered by the settlement or the Award as referred to by the Management. On the contrary, in the present case, even as per the admission of the learned

counsel for the Management, who has given a tabular statement showing that the number of the workmen taken against the regular vacancy was 70.

16. Further, in the letter dated 02.04.1991 sent by the Chairman cum Managing Director of the petitioner Management to the Joint Commissioner of Labour over which a reference was made in the impugned order. The Managing Director had written in page 3 as follows:-

"Regarding payment of retaining allowance to the D.P.C. staff, this cannot be compared to the seasonal industries like sugar industry. This is not a seasonal industry and the Government have not declared it so. We need not retain them when there is no procurement and as such no retaining allowance need be paid."

Even as per the provisions of Permanent Status Act, if the petitioner wants, they can move the Government to declare the DPC as seasonal and they have not done so.

17. The argument that the settlement and the Award is binding cannot be accepted because of the non-obstante clause found in Section 3(1) of the I.D. Act. Originally, it did not cover a Settlement or an Award. Therefore, if there was any settlement or Award between the employer and the workmen, then the provisions of Tamil Nadu Act 46 of 1981 will have no application. This was noticed by a Division Bench of this Court in its judgment in Metal Powder Co. Ltd., Thirumangalam and another v. The State of Tamil Nadu and another [1985 (2) L.L.J. 376] and after referring to the similar provisions in other Labour enactments in paragraph 27, it was observed as follows:-

Para 27: ".... We are bound to take notice of the legislative practice that where the intention of the legislature is that a law is to have effect notwithstanding any award, agreement or contract of service, such an intention is expressed in clear and unambiguous words. Consequently, in the absence of reference to an award, an agreement or a contract of service in S.3(1) and restricting the operation of the non-obstante clause in S.3(1) only to "anything contained in any law for the time being in force", we must accept the contention of the learned counsel for the petitioner that S.3 will not supersede a settlement between the

employer and the employees in so far as the subject matter of the settlement is conferment of permanent status to the workmen...."

Taking note of the above judgment, the State Legislature amended Section 3(1) of the Tamil Nadu Act 46 of 1981 and the words 'settlement' and 'Award' have been included in the Explanation to Section 3(1) of the Act.

18. In fact, when the amended provisions were challenged before the Supreme Court, the Act was held to be intravires of the Constitution by the Supreme Court in State of Tamil Nadu and others v. Nellai Cotton Mills Ltd. and others [1990 (2) SCC 518]. Therefore, the objections based on the Award and settlement by the learned counsel for the Management must necessarily fail.

19. Thereafter, Mr. Ajay Khose, learned counsel appearing for the workmen brought to the notice of this Court a judgment of this Court in Tamil Nadu Civil Supplies Corporation Modern Rice Mill Engineering Section employees Union v. The Tamil Nadu Civil Supplies Corporation, rep. by its Managing Director [1998 Writ L.R. 514] relating to the very same Corporation. In that case, the petitioner Corporation gave a circular regularizing the casual workers working in the Modern Rice Mill and gave their own date of regularization. P.D. Dinakaran, J., in paragraphs 11 and 15 of the said judgment, held as follows:-

Para 11: "Section 3(1), being a non-obstante provision, it prevails over any law for the time being in force which includes any service rules, Government Orders or government instructions. Therefore, want of sanctioned posts as required under General service rules cannot take away the rights conferred under Section 3(1) of the Act. Similarly, Government Orders which require that the appointments should be made only through Employment Exchange also cannot be a ground to refuse the right provided under section 3(1) of the to the petitioners if they comply the requirements prescribed under Section 3(1). Therefore, it is not open for the respondent to take shelter under any other law in force much less any Government Orders, Government Instructions to deny the benefits conferred under Section 3(1) of the Act, to the petitioners, if they satisfy the conditions prescribed therein, irrespective of the availability of sanctioned posts or Sponsorship from Employment Exchange."

Para 15: "Therefore, the respondents are directed to modify the proceedings dated 24.02.1989 to confer the permanent status to individual workmen from the day on which they satisfy the condition namely completing the continuous service for period of 480 days in a period of 24 Calendar months in the respondent establishment. The respondent shall pass appropriate orders as directed above within 6 weeks from the date of receipt of a copy of this order."

20. In the light of the above, the contentions raised by the petitioner Management will have to be necessarily rejected. In fact, the petitioner Management themselves have regularized the workmen on a posterior date. In the light of the above judgments of this Court and the Supreme Court, such action cannot be countenanced by this Court. The impugned order of the first respondent will have to be necessarily upheld. Accordingly, the writ petition will stand dismissed. However, there will be no order as to costs."

4. In the light of the above, the issue is squarely covered by the above referred decisions and therefore, the writ appeals fail and accordingly, the same are dismissed, confirming the common order, dated 30.09.2013, made in W.P(MD)Nos.16007 to 16011 of 2013. No costs. Consequently, connected Miscellaneous Petitions are dismissed."

16. Similarly, in another Division Bench order dated 05.06.2018, made in W.A (MD) Nos. 773 to 776 of 2018, the Division Bench has passed the following order:

"4. The relevant portion of the judgment passed by the Division Bench of this Court reads as follows:

"3. The legal issue involved in these writ petitions is squarely covered by the decision of this Court in W.P. No. 4371 of 1998, dated 30.07.2008, which was confirmed by the Hon'ble Division Bench in W.A. No. 1282 of 2008, dated 19.07.2010. The operative portion of the order, dated 30.07.2008, passed in W.P. No. 4371 of 1998, reads as follows:

"15.

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4. In the light of the above, the issue is squarely covered by the above referred decisions and therefore, the writ appeals fail and

accordingly, the same are dismissed, confirming the common order, dated 30.09.2013, made in W.P (MD) Nos.16007 to 16011 of 2013. No costs. Consequently, connected Miscellaneous Petitions are dismissed."

5. The learned Counsel appearing for the respondents also submitted that in view of the judgment of the Division of this Court, the writ appeals are liable to be dismissed.

6. Since the learned Counsel appearing on either side have not disputed that the issue involved in the present writ appeals are covered by the decision of the Division Bench of this Court made in W.A. (MD) Nos. 353 to 357 of 2014, following the said judgment, the writ appeals are liable to be dismissed. In the light of the above issue is squarely covered by the decision made in W.P. No. 4371 of 1998, dated 30.07.2008, which was confirmed by the Division Bench of this Court in W.A. No. 1282 of 2008, dated 19.07.2010, the Writ Appeals are dismissed. No costs. Consequently, the connected Civil Miscellaneous Petitions are also dismissed."

17. In view of these two Division Bench judgments as well as the earlier Division Bench judgment in W.A. No. 1282 of 2008 dated 19.07.2010, the issue is no more res integra, insofar as the claim of the petitioner corporation that, it is a seasonal employer and the employees are the seasonal employees, till they become permanent or regular employees.

18. Therefore, the plea raised by the two employees have been answered in favour of the employees by both the Original Authority as well as the Appellate Authority, under the Act, through the impugned order, which, in the considered opinion of this Court, have to be sustained.

19. Once the main issue has been found and decided in favour of the employees, then it shall be the only conclusion, where, if the petitioner corporation has decided to give gratuity to these employees that shall be calculated from the date of their original appointment and whatever service rendered by them, from the date of appointment that shall be computed and the Tamil Nadu Civil Supplies Corporation should have calculated and paid the gratuity to these employees.

20. Moreover, it is not in dispute that, these employees had been appointed by appointment order dated 11.10.1980 and 04.01.1984 respectively. It is also not in dispute that, these employees retired from service only on superannuation on 31.10.2013 and 28.02.2013.

21. In between, they had been in continuous service and there is no whisper, whatsoever to show on behalf of the petitioner corporation that, they have been disengaged or

dismissed from service or terminated and rejoined service after some time. There is no proof to show the periodical breaking of service of these employees to establish the fact that, the employers are only the seasonal employees up to particular period.

22. These aspects based on the evidence adduced by the employees have been considered in proper perspective, both by the Original Authority as well as the Appellate Authority in the impugned orders. Therefore, based on these factors, the total service rendered by the employees can only be accepted as 33 years of service and 29 years of service respectively. Thereafter for the full period of service, both are entitled to get gratuity.

23. Since the petitioner corporation has calculated the part of the gratuity amount and the remaining amount has not been calculated and paid, it has been rightly calculated and directed to be paid within a time frame, as per the orders passed by both authorities under the Act through the impugned orders. Therefore, the said orders are fully justifiable and do not require any interference from this Court. If the amount of remaining gratuity, as directed by the authority under the orders, have been deposited before the authorities concerned, both the employees are at liberty to withdraw the same by filing a formal petition before the concerned authority. Once such plea comes, they shall be permitted to withdraw the amount immediately.

24. In the result, both the Writ Petitions are failed and are liable to be dismissed, accordingly dismissed and there shall be no order as to costs. Consequently, connected Miscellaneous Petitions also closed. The assistance rendered by Mr.V.Ajay Khose, learned Amicus Curiae is deserved to be appreciated.

सत्यमेव जयते

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vji

To

1. The Additional Commissioner of Labour,
Chennai, 6th Floor, Teynampet,
Chennai.

2. The Assistant Commissioner of Labour - I,
Chennai - 6.

3. The Joint Commissioner of Labour,
Trichy.

4. The Assistant Commissioner of Labour,
Trichy.

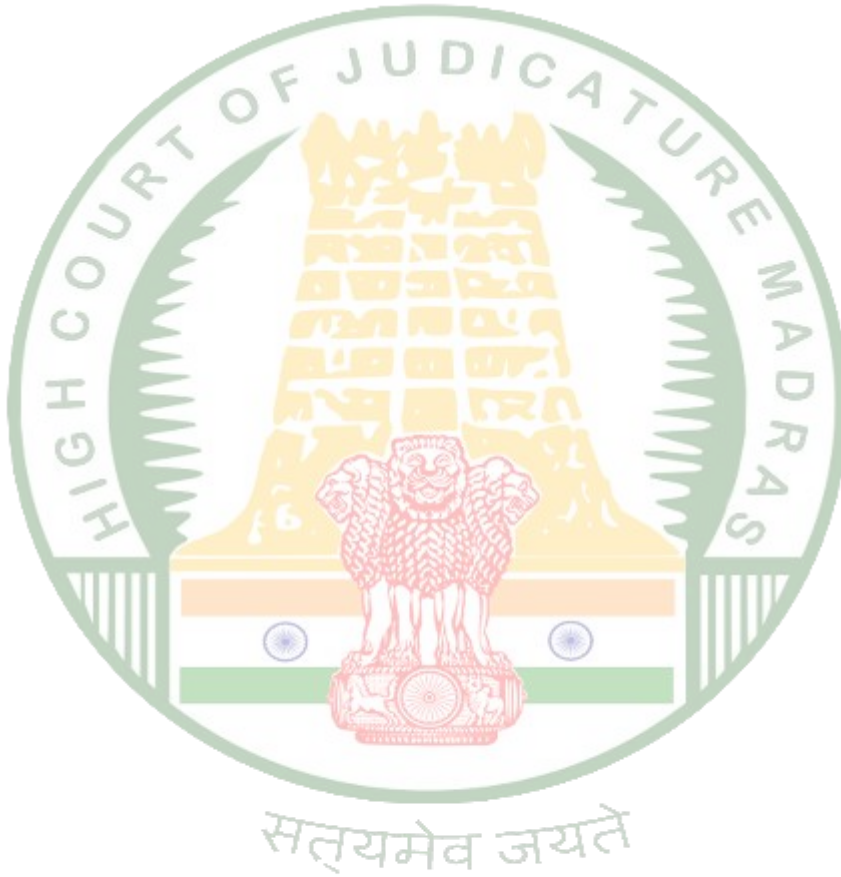
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W.P. Nos. 24455 of 2019 & 34413 of 2018 and

W.M.P. Nos. 24193 and 24194 of 2019 and

W.M.P. Nos. 39987 and 39988 of 2018

A.SK(15.03.2021)



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