

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.02.2020

Delivered on : 08.05.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.Nos.955 of 2019 and 15 of 2020

O.P.No.955 of 2019:

M/s.Suryadev Alloys and Power Pvt. Ltd.,
Rep. by its Authorised Signatory,
Mr. Govind Gagoria,
Having registered office at
No.497, Poonamallee High Road,
Arumbakkam, Chennai - 600 106.

... Petitioner

Vs.

M/s. Shri Govindaraja Textiles Pvt. Ltd.
Rep. by its Director,
Having registered office at
No.258, Tiruchuli Road,
Aruppukottai,
Virudhunagar District - 626 101.

... respondent

O.P.No.15 of 2020:

M/s. Shri Govindaraja Textiles Pvt. Ltd.
Rep. by its Director,
Having registered office at
No.258, Tiruchuli Road,
Aruppukottai,
Virudhunagar District - 626 101.

... Petitioner

Vs.

M/s.Suryadev Alloys and Power Pvt. Ltd.,
Rep. by its Authorised Signatory,
Mr. Govind Gagoria,
Having registered office at
No.497, Poonamallee High Road,
Arumbakkam, Chennai - 600 106.

.... respondent

Prayer in O.P. No.955 of 2019: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 13.09.2019 in so far as Non-Award of interest for the period from 17.06.2016 to 13.09.2019 made in A.F.No.73 of 2017 on the file of the Hon'ble Sole Arbitrator Mr. Justice R.S. Ramanathan and consequently direct the respondent to pay the interest at the rate of 18% per annum to the award amount of Rs.1,49,95,039/- from 17.06.2016 till the date of award.

Prayer in O.P. No.15 of 2020: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated

13.09.2019 made in A.F.No.73 of 2017 on the file of the Hon'ble Sole Arbitrator Mr. Justice R.S. Ramanathan and consequently direct the respondent to pay a sum of Rs.13,80,864/- to the petitioner herein together with interest at the rate of 18% per annum from the date of counter claim to the award amount of Rs.1,49,95,039/- from 17.06.2016 till the date of award.

For Petitioner : Mr.Sharath Chander
(For Mr.P. Krishnan)
For Respondent : Mr.P.Rajagopal

(In O.P. No.955 of 2019)

For Petitioner : Mr.P.Rajagopal
For Respondent : Mr.Sharath Chander
For Mr.P. Krishnan

(In O.P. No.15 of 2020)

COMMON ORDER

The question that arises for consideration in this petition is the validity of the Award passed a year, after the period fixed by Court had lapsed. O.P. No.955 of 2019 has been filed by the claimant challenging the award in as much as the Arbitrator had failed to award pendente lite interest

and O.P. No.15 of 2020 is filed by the respondent challenging the same award primarily on the ground that the award had been passed after the mandate of the Learned Arbitrator had terminated.

2. Since the issue involved is purely a legal issue, the facts giving rise to the instant petitions are reproduced in brief herein below and parties are referred to in the same ranking as before the Arbitral Tribunal.

3. The Claimant would contend that they had entered into a Power purchase agreement with the respondent and that the respondent had failed to clear the invoices. As on 27.04.2016 a sum of Rs.3,91,78,799/- was due from the respondent. The claimant had invoked the Bank Guarantee and received a sum of Rs.2,41,43,760/- leaving a balance of Rs.1,49,95,039/- as on 16.06.2016. Despite the legal notices dated 21.06.2016 and 01.08.2016, the respondent did not come forward to clear its dues but on the contrary, claimed production cost of Rs.2,16,86,400/-. Therefore, they had invoked the Arbitral Clause in the Power purchase agreement and appointed one

Dr.C. Ravichandran, Advocate as their Arbitrator. The Respondent had not given their consent constraining to the petitioner to move this Court by filing an petition in O.P. No.807 of 2016 under Section 11 of the Arbitration and Conciliation Act, 1996, (hereinafter called as "the 1996 Act"). This Court by order dated 17.03.2017 was pleased to appoint a Sole Arbitrator, who by his notice dated 20.03.2017 had entered reference.

4. Per contra, the respondent would contend that after April, 2015, the Claimant had not allotted Power as per the contracted demand of energy and by 30.09.2015 had completely stopped the Power supply. However, the Claimant had raised a Debit Note for Rs.1,62,82,600/- on 30.09.2015. The respondent sent a reply dated 07.10.2015 highlighting the fact that on account of the non-supply, the respondent had to purchase power from TANGEDCO for which they had to pay an excess sum of Rs.13,80,864/-. The claimant thereafter, withdrew the Debit Note but did not come forward to pay the sum of Rs.13,80,864/-. Apart from this sum, the respondent had suffered a loss of Rs.2,16,86,400/- on account of the failure to supply

power. The respondent therefore, raised a counter claim for Rs.2,30,67,264/-.

5. The Learned Arbitrator by his Award dated 13.09.2019 had allowed the claim filed by the claimant but had granted interest only from the date of the Award. The Counter claim filed by the respondent was rejected. Challenging this Award, the claimant and the respondent are before this Court.

6. The Counsel for the petitioner in O.P. No.15 of 2020 who is the respondent in O.P. No.955 of 2019, contended that the Award is not a valid award as the mandate of the Learned Arbitrator had terminated long before the award was passed. He would contend that earlier, since the time for concluding the Arbitration proceedings was to come to an end, an application was filed by the claimant before this Court on 26.06.2018 in A.No.5195 of 2015. This Court by order dated 04.09.2018 was pleased to extend the time by a period 6 months from the date of receipt of the order

copy. The Counsel would contend that thereafter, arguments were concluded on 09.02.2019 and the claim was reserved for Judgment. A year and half later, the award was passed by the Learned Arbitrator which was much beyond the time granted by this Court. He would rely on the following Judgments in support of his contention that the award passed after the mandate of the Arbitrator had lapsed is invalid.

(a). **2010 (2) SCC page 385** - in the case of **"NBCC Ltd. Vs.J.G. Engineering Private Ltd."**.

The issue involved in this case was the failure on the part of the arbitrator to publish the award within the period extended by consent of both the Parties. i.e. on or before 30.09.2005. The learned Judge observed as follows at Para 22 which is herein below extracted.

"22. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time under the Act unlike Section 28 of the 1940 Act which had such a provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an award. It is true that apparently

there is no provision under the Act for the Court to fix a time-limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in exercise of its inherent power on the application of either party. Where however the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them."

(b). ***O.P. No.592 of 2018*** in the case of "***M/s.Satyam Caterers Pvt. Ltd. Vs. The Assistant Commercial Manager (PS and CATG) and others."***

In this Judgment of this Court, the Learned Judge had held an award passed after the expiry of the extended period as patently illegal and had observed at paras 12 & 13 as under:

"12. So it is evidently clear as seen from Section 29A(1)(2) and (4) of the Act, the Arbitration proceedings

will have to be completed within one year from the date of commencement of the arbitration with a grace period of six months thereafter that too, with the consent of the parties to dispute. In all, the maximum time, the arbitral tribunal can take for completion of the arbitral proceedings in only 18 months. If extension is required beyond the period of 18 months, the parties will have to approach this Court for extension. In the case on hand, the arbitral proceedings commenced on 16.05.2016 and one year period expired on 01.07.2017 and by consent, the period was also extended up to 31.12.2017. But the arbitral award was passed on 16.05.2018 beyond the period stipulated under Section 29(A) of the Arbitration and Conciliation Act without the permission of Court.

13. Therefore, it is very clear that the Award passed by the Arbitrator on 16.05.2018 is patently illegal as it violates the provisions of section 29A of the Arbitration and Conciliation Act. In the result, the Award dated 16.05.2018 passed against the petitioner by the second respondent is set aside and the petition is allowed. No costs. Consequently, connected A.No.5080 of 2018 is closed."

(c). **2012 SCC Online Bom 669** in the case of **"M/s. Bharat Oman Refineries Ltd. Vs. M/s. Mantech Consultants"**.

A Division Bench of the Bombay High Court was considering the order of the Single Judge setting aside the Award on the ground that it was not made within the stipulated time. After considering the various Judgments and the provisions of the 1996 Act, the learned Judges had held as follows:

"21. In view of the agreed clause itself, after lapse of agreed time, the Arbitrator loses his jurisdiction as per the mandate of Sections 14 and 15 of the Act. Such defect is incurable. The implied consent cannot confer jurisdiction once the agreed period is lapsed. There is no provision to raise objection to the constitution of the Arbitral Tribunal except Section 14 and 15 of Act. But, once the Arbitration is closed for award, that stage also goes and the parties have no choice but to wait for the award. There was no reason and/or occasion for the respondent to raise any such objection before the Arbitrator under Section 16 of the Act and/or even before the Court under Section 14 of the Act. Once the matter is closed for judgment/order, a call for stamp-paper is nothing, but a ministerial procedure. It cannot

be stated to be judicial proceedings to be attended by all the parties. Even otherwise, how party can presume that the arbitrator would not follow the mandate of the arbitration agreement, once the agreed period is over. The arbitrator could have and/or might have, after expiry of two years, and as extendable by consent one year more, refused to pass Award or terminated the arbitration proceedings suo motu. Any judgment and/or order cannot be presumed or assumed by the parties after closing of the matter unless actual order is passed and/or circulated to the parties.

7. Per contra, Mr. Sharath Chander the learned counsel appearing on behalf of the Claimant would contend that it is well open to this Court to exercise the jurisdiction vested upon the Court under the newly inserted Section 29A(4) of the 1996 Act and extend the time till the date of the passing of the Award. He would rely on the Judgment of a Learned Single Judge of the Delhi High Court reported in **2018 SCC Online Del 11000** in the case of "**M/s.Chandok Machineries Vs. S.N. Sunderson & Co.** in support of the above argument. The Learned Judge in this case had

proceeded to extend the time after the Award was pronounced beyond the extended time by exercising powers under Section 29A(4) of the 1996 Act.

8. The learned counsel would argue that under Section 28 of the Arbitration Act, 1940, (hereinafter referred to as "the 1940 Act",) the Court was given wide power to enlarge the time for making the award. Since this was giving rise to huge delays and there was greater judicial interference, the Law Commission in its 76th report has recommended a time frame being introduced as a Proviso to Section 28 for the making of an Award. The 1996 Act did not provide a time frame for the making of the Award which resulted in Arbitrator / Parties taking a long time to conclude the Arbitral proceedings. In these circumstances, the Law Commission was called upon to review the 1996 Act and by reason of the 176th report of the Law Commission, the 1996 Act was amended by Act 3 of 2016 in and by which Section 29A came to be introduced. The learned counsel would therefore, contend that Section 29A traces its origin to Section 28 of the 1940 Act. He would rely on the following the Judgments arising out of the 1940 Act.

(a). ***AIR 1962 SC 78 - "Hari Shanker Lal Vs. Shambhu Nath and Others."***

It was a case where the Constitution Bench of the Hon'ble Supreme Court was asked to decide a question regarding the construction of Rule 3 of the 1st Schedule to the 1940 Act. The learned counsel would rely on the observation of the Bench at Para 16 of the above judgment that so long as the power vested in them to decide the dispute between the parties is not withdrawn, they continue to be competent to act on the reference in anticipation that the period for making the award would be extended by the Court.

(b). ***1985 (2) SCC 629 - "State of Punjab Vs. Hardyal"***

He would draw the attention of this Court to para 10 of the Judgment in support of his argument that the Court alone has the power to extend the time under Section 28 of the 194 Act.

(c). ***1987 (4) SCC 93 - "Hindustan Steel Works Construction Ltd. Vs. C. Rajasekhar Rao".***

This was a case where the Hon'ble Supreme Court had held that the Court

has the power to extend the time even after the expiry of the period prescribed for the Award.

(d). ***AIR 1990 SC 2273 -"Nagar Palika Vs. Mirzapur Electric Supply Co. Ltd."***.

This was a case where time was extended after the Award was passed beyond the prescribed period.

(e). ***2007(11) SCC 453 -"Jatinder Nath Vs. Chopra Land Developers (P) Ltd. and another."***.

This Judgment was cited in support of his argument that failure of the Arbitrator to make the award within the stipulated period will not involve the consequence of the award being set aside.

(f). ***2010(6) MLJ 124 -"Tamil Nadu Water Supply and Drainage Board Vs. N. Abdul Kareem and others"***.

A Division Bench of this Court relying on the Judgment of the State of Punjab Vs. Hardyal, had held that the time can be extended even after the award was passed.

9.He would rely on a Judgment of the Kerala High Court in ***OP(ICA).No.5 of 2018*** in the case of ***"Union of India Vs. Advanced Ploymer Technolgy and others"***. In this case, the Learned Judge despite holding that the orders had been passed after the Arbitrator had become functus officio proceeded to enlarge the time for making the award.

10.Heard the learned counsels at length and perused the Judgment and records.

11.The submission of the Claimant would proceed on the footing that Section 28(1) of the 1940, Act. has been replicated with minor changes as Section 29A in the 1996 Act by virtue of Act 3 of 2016. Therefore it is necessary to extract the two provisions in order to morefully appreciate the issue on hand.

1940 Act:- ***" Section 28. Power to Court only to enlarge time for making award.***

(1). The Court may, if it thinks fit, whether the time for making the award has expired or not and

whether the award has been made or not enlarge from time to time the time for making the award."

1996 Act:- Section 29A. Time-limit for arbitral award.-

(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.--For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment."

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings

have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

The provision of Section 28(1) dealing with the enlargement of time can be broken down into the following:-

It is only the Court that can grant the extension and the extension can be granted in the following circumstances:-

- (a) The time for making the award has expired; or
- (b) The time for making the award has not expired; or
- (c) The award has been made; or
- (d) The award is yet to be made.

In such contingencies, the Court can enlarge the time from time to time.

There was no cap on the number of times an extension could be sought for.

12. Let us now juxtapose this position with the provisions contained in Section 29A which deals with the time limit for making an award. For the above purpose, the provisions of Section 29A(1), (3), (4) and (5) may be analysed and the following propositions arise:

(a) That mandatorily an award has to be made within a period of 12 months from the date on which the Arbitral Tribunal enters upon the reference.

(b) If the Arbitral Tribunal does not make the award within the above stated period of One year, there are two remedies available to the parties:-

(i) The parties to the proceedings can by consent extend the period by a further Six months and such discretion should be exercised before the period of One year specified in Section 29A(1) comes to an end. The fact that the consent has to be given by the parties before the period specified in Section 29A(1) comes to an end is evident from a reading of Section 29A(4) which lays down that at the end of the period of One year, the mandate of the Arbitrator comes to an end.

(ii) If the parties are unable to reach a consensus/agreement on the extension, then before or

after the expiry of the period of One year, any one of the party can move the Court for extension of the period and in such circumstances, the Court can extend the period even beyond the Six months as the cap on extension for a period of Six months is prescribed only when the parties by consent extend the period for making the award as specified in Section 29A(3).

(c) If the Arbitral Tribunal is unable to make the award after the period of One year specified in Section 29A(1) and the parties have not arrived at any agreement for extending the period or where the parties have entered into an agreement as provided in Section 29A(3) and still the Arbitral Tribunal is unable to make an award, the parties may either before or after the period specified in Section 29A(1) or the extended period specified in Section 29A(3) move the Court for an extension.

(d) The above extension would be granted by the Court:

- (i) On an application by any of the parties,
- (ii) On sufficient cause being shown; and
- (iii) On such terms and conditions as the Court may impose.

13. It is therefore, clear that unlike the provision of Section 28(1) of the 1940, Act which gave wide powers to the Court to enlarge the time for making an award even after the expiry of the time for making the award or even after the award has been made, the 1996 Act has curtailed these powers and restricted the extension only within the provisions of Section 29A(3) and 29A(4) which has been elaborated in para 12 supra. A reading of which clearly implies that it is only the Court that can extend the period for making of the award after the expiry of the One year period under Section 29A(1) or the extended period under Section 29A(3). However, even the Court cannot ratify an award ex post facto by extending the period in a petition filed under Section 34 by an aggrieved party.

14. In the Judgment of the Constitution Bench in "***Hari Shanker Lal Vs. Shambhu Nath and Others***" referred in Para No.8 supra, the learned Judges considering the object of the Rule 3 of the First Schedule to the 1940 Act, which provided that the Arbitrator shall make their award within a period of 4 months from their entering reference or from the date on which

they have been called upon to so Act in writing from a party to the agreement or within such extended time as the Court may allow, held as follows:

"6.The object of the rule is to prescribe a time limit in the interest of expeditious disposal of arbitration proceedings. If under the second alternative notice to act can be given at any time, it would enable one of the parties to enlarge the period of time prescribed indefinitely: not only the time limit prescribed would become meaningless but one of the parties could also, without the consent of the other, resuscitate a dead or stale reference. This could not have been the intention of the Legislature and, therefore, a reasonable construction should be placed upon the provision. Such a limitation on the right of a party to reopen an abandoned reference is implicit in the words "to act". A party can ask the arbitrator to act if he is legally bound to act under the reference. If after the expiry of four months from the date of entering on the reference an arbitrator can no longer act, a notice given thereafter cannot ask him to act. Realizing this difficulty, learned counsel for the respondents suggests that an

arbitrator can act even after four months, though the award cannot be filed without getting an extension of time from the court. But the relevant provisions do not support this contention.

7.The third alternative in Rule 3 shows that an award can be made within the extended time allowed by the Court. Section 28 of the Act enables the court to extend the time for the making of the award; extension of time may be given even after the award has been factually made. So till the time is extended an award cannot be made, though, when extended, the award factually made may be treated as an award made within the time so extended. To put it differently, if time was not extended by court, the document described as an award would be treated as non est. In this view, the second alternative in Rule 3 can be invoked only in a case where a notice to act has been given to the arbitrators either before the arbitrators entered on the reference or after they have entered on the reference but before the period of four months from that date has run out."

15. Since the provisions of Section 28(1) of the 1940 Act gives express power to the Court to enlarge the time even after the making of the Award, the Award passed after the extended period can be validated. However, a similar provision is not available in Section 29A of the 1996 Act. The language of Section 29A(4) clearly stipulates that if the award is not made within the stipulated period or the extended period then the mandate of the Arbitrator stands terminated unless extended by Court.

16. The Judgment of the Hon'ble Supreme Court in "**NBCC Ltd. Vs. J.G. Engineering Private Ltd.**" is a case wherein the Arbitrator had failed to make the award even after time was extended till 30.09.2005 by consent of both parties. Thereafter, one of the parties had moved the Court to terminate the mandate of the Arbitrator and the High Court of Calcutta had terminated the mandate. The order was upheld by the Hon'ble Supreme Court and the Bench had observed as follows:

"27. With reference to the contention made by the appellant that the arbitrator having concluded the proceedings could not be said to have failed to act so as

to attract the provisions of Section 14 of the Act, which will call for termination of the arbitration proceeding. It is pertinent to mention here that the arbitrator had not concluded the proceedings as had been agreed to by the parties within the time fixed for doing so. The mandate of the arbitrator was terminated only because of the fact that the arbitrator having failed to conclude his proceedings within the time did not warrant to be continued as a arbitrator in the absence of the consent of both the parties. It is clear from a bare reading of sub-section (1)(a) of Section 14 of the Act, the mandate of an arbitrator shall terminate if he fails to act without undue delay.

28. In the present case, it is clear that the arbitrator had extended the time provided to it without any concrete reasons whatsoever and thus his mandate was liable to be terminated. Sub-section(1)(b) further states that the mandate of an arbitrator shall also stand to be terminated if he withdraws from his office or the parties agree to the termination of his mandate. From a perusal of the records and the submissions of the parties, we observe that the mandate of the arbitrator

was extended beyond 30.09.2005. Thus it can be construed that the parties had not agreed to the extension of the mandate of the arbitrator failing which, the mandate was automatically terminated."

17. The following dates and events are to be taken note of in the instant case.

17.03.2017 : Order in O.P. No.807 of 2016 appearing the Learned Arbitrator.

20.03.2017 : Learned Arbitrator enters reference.

19.03.2018 : One year period for making the award lapses.

20.06.2018 : Application filed seeking extension of time for making the award filed before this Court in A.No.5195 of 2015.

04.09.2018 : Time extended for a period of Six months from the date of receipt of the order.

09.02.2019 : Arguments concluded and matter reserved for the Award.

13.09.2019 : Award made by the Arbitrator.

18. In the instant case, this Court by order dated 04.09.2018 had extended the time for concluding the proceedings by Six months from the date of receipt of the order. After receiving the order, the Learned

Arbitrator held sittings and had reserved the matter for orders on 09.02.2019. The award was made after a period of Seven months therefrom. The Learned Arbitrator has proceeded to make the award when he had become functus officio since his mandate had terminated on the expiry of the Six month period from the date of receipt of the order of this Court extending time. Admittedly after receipt of the order copy, sittings had been held and the matter reserved for orders on 09.02.2019 which presupposes that the order of this Court had been received much before 09.02.2019.

19. The Judgment of the Learned Single Judge of the Delhi High Court in "***M/s.Chandok Machineries Vs. S.N. Sunderson & Co.***" as stated supra was a case where the majority of the Arbitrators had signed the award well within the time extended for making of the award and it was only one of the Three who had signed it thereafter. However, I beg to disagree with the observation of the Learned Judge that the provisions of Section 29A(4) of the 1996, Act empowers the Court to extend the time even after the

making the award. Unlike, the language of Section 28(1) of the 1940 Act which expressly empowers the Court to extend the time even after the award has been made, a similar power has not been incorporated in Section 29A of the 1996 Act.

20. On a conspectus of the above discussion, it is clear that the award has been made after the termination of the mandate of the Learned Arbitrator. Consequently, O.P.No.15 of 2020 is allowed and O.P.No.955 of 2019 is dismissed. The award dated 13.09.2019 passed by the Sole Arbitrator is set aside. There shall be no order as to costs.

08.05.2020

Lbm

Index : Yes/No

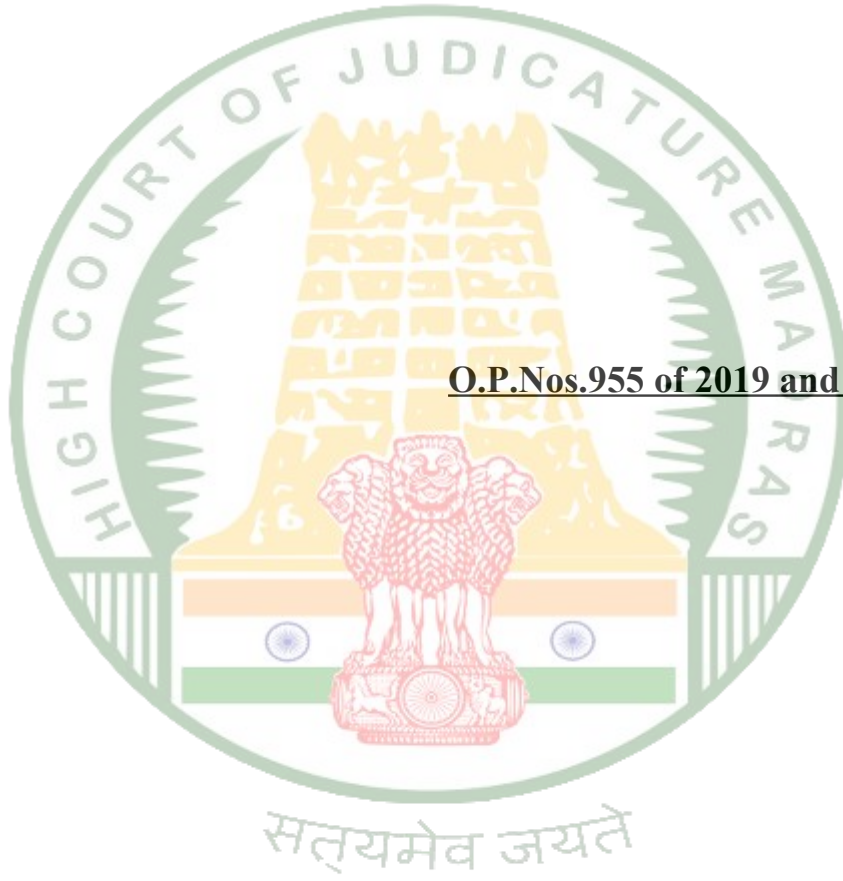
Speaking order/non-speaking order

27/28

O.P.Nos.955 of 2019 & 15 of 2020

P.T.ASHA, J.,

Lbm



O.P.Nos.955 of 2019 and 15 of 2020

WEB COPY **08.05.2020**