

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.01.2021

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.549 of 2014

1. Sivasakthi.R
2.Ravindran.C

.. Petitioners

vs.

1.TATA Motors Limited

A company incorporated under the provisions of the companies Act, 1956 having its Registered office at 3rd floor, Nanavati Mahalaya, 18, Homi Mody Street, Fort, Mumbai-400001 and interalia Corporate office at 1st Floor, Cybertech House, Plot No.B-63/65, Road No.21/34, J.B, Sawant Marg, Wagle Estate, Thane west – 400 604

2. Nitin Chavan

Chartered Accountant

No.69/11, 4th Floor, Jivatesh Niwas

Tarun Bharat Society, Chakala

Anderi East, Mumbai – 400 099

... Respondents

Petition filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the arbitration award dated 7/03/2011 in the proceedings of Arbitration Case Lot 123/R 23503 of 2010 passed by the second respondent against the petitioners and thus render justice.

For Petitioners : Mr.S.Saravanan

For Respondents : Mr.Anand Johnson
for Mr.S.Namasivayam for R1
No appearance for R2

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity assailing an 'arbitral award dated 07.03.2011 bearing reference Arbitration Case No.123/R 23503/2010' ('impugned award' for the sake of brevity).

2.Proceedings made in earlier listings on 22.12.2020 and 07.01.2021 are relevant and the same read as follows:

' Proceedings dated 22.12.2020

Mr.S.Saravanan, learned counsel on record for two petitioners and Mr.Anand Johnson learned counsel representing the counsel on record for contesting first respondent are before me in this web hearing on a video conferencing platform.

2. Read this in conjunction with and in continuation of earlier proceedings dated 23.09.2020.

3. Today, learned counsel for contesting first respondent requests for further time.

4. Learned counsel for petitioners, draws the attention of this Court to paragraph No.2 of the impugned award, points out that according to impugned award first notice sent by 'Arbitral Tribunal' ['AT' for the sake of convenience and clarity] is dated 06.04.2010 fixing 11.05.2010 as the first sitting of AT. Learned

counsel for petitioners drew the attention of this Court to a communication dated 19.05.2010 (post 06.04.2010) sent by first respondent to first petitioner wherein first respondent has mentioned that they would be initiating arbitration proceedings. Pointing this out, learned counsel for petitioners submits that sole arbitrator who constituted AT obviously could not have been appointed on 06.04.2010 and there was no prior notice of appointment of arbitrator to petitioners.

5. Be that as it may, another aspect of the matter is that the impugned award has been made by a sole arbitrator by conducting arbitration proceedings in Mumbai. To be noted, sole arbitrator is a Chartered Accountant. The impugned award refers to an 'agreement dated 10.09.2008 bearing Agreement/Account No.108859' [hereinafter 'said agreement' for the sake of convenience and clarity] which is between two petitioners and contesting first respondent.

6. It is now become necessary to look at the arbitration clause in the said agreement which serves as an arbitration agreement between parties within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

7. Unfortunately, both sides have not placed said agreement before this Court. It has become necessary to look at the said agreement to ascertain seat/venue as arbitration has been conducted in Mumbai. To be noted, this is relevant for territorial jurisdiction qua captioned OP. Learned counsel for contesting first respondent submits that said agreement has been filed as part of execution proceedings i.e., E.P.No.229 of 2012 which have been lodged in Chennai on the basis of impugned award. 8. This Court is

informed that execution petition i.e., E.P.No.229 of 2012 is on the file of IX Assistant Judge, City Civil Court, Chennai. Therefore, Registry is directed to call for records of said E.P.No.229 of 2012 on the file of IX Assistant Judge, City Civil Court, Chennai and place the same along with case file in the next listing. Notwithstanding this position, learned counsel for first respondent shall also produce a photocopy of said agreement in the next listing after sharing an advance copy with learned counsel for petitioners.

9. List on 07.01.2021.'

'Proceedings dated 07.01.2021

Read this in conjunction with and in continuation of earlier proceedings made in previous listing on 22.12.2020.

2.Today, Mr.S.Saravanan, learned counsel on record for two petitioners and Mr. Anand Johnson, learned counsel representing the counsel on record for contesting first respondent are before me in this web-hearing on a video-conferencing platform i.e., virtual hearing.

3. In and by earlier proceedings, this Court had directed the Registry to call for records i.e., the entire case file of E.P.No.229 of 2012 on the file of IX Assistant Judge, City Civil Court, Chennai. To be noted, this is to ascertain jurisdiction as it was submitted that agreement (containing arbitration clause) has been filed along with the Execution petition. Registry has today put up a note saying notice has been served, but records are awaited. IX Assistant Judge, City Civil Court, Chennai is within this Court campus and the proximity is such that a loud shout from here can be heard there. Therefore, it is surprising that the case file sought for on 22.12.2020 by this Court is still awaited.

4. Registry to send a Special Messenger forthwith who will amble across to the IX Assistant Judge's Court and collect the case file. Registry to place the aforementioned Execution Court file before me on Monday (11.01.2021) positively (after following SOP in this regard). To be noted, SOP denotes Standard Operating Procedure.

5. Be that as it may, both sides submit that they are unable to produce a copy of the said agreement which contains the arbitration clause.

List on Monday i.e., 11.01.2021.'

3. Pursuant to earlier proceedings made in previous listing on 07.01.2021, Registry has put up the entire records/case file qua E.P.No.229 of 2012 on the file of the IX Assistant Judge's Court, City Civil Court, Chennai. From the aforementioned proceedings, more particularly paragraph 5 of proceedings dated 22.12.2020, it becomes clear that territorial jurisdiction issue arises in this matter. Therefore, it is necessary that this territorial jurisdiction issue is to be tested first (without going into the merits of the matter) as it goes to the root of the captioned OP.

4. This Court now embarks upon the exercise of examining the territorial jurisdiction of this Court qua captioned OP.

5. On a careful perusal of the records of the case file in the aforementioned execution petition, it comes to light that the agreement between the parties, more particularly the agreement which contains the clause which serves as an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act has not been filed in the Execution Court.

6. Today, Mr.S.Saravanan, learned counsel on record for two petitioners and Mr.Anand Johnson, learned counsel representing the counsel on record for contesting first respondent are before me in this web-hearing on a videoconferencing platform. Today also both the learned counsel reiterate that they are unable to produce a copy of the contract / agreement containing the clause, which serves as arbitration agreement between the parties. Therefore, the question as to whether seat/venue, one of the two or both has/have been specified in the arbitration agreement is a question which remains unanswered. This takes us to the venue where arbitral proceedings were held and impugned award was made.

7. A perusal of the impugned award makes it clear that arbitral proceedings have been held entirely and impugned award has been made in Mumbai. In this regard, it is to be noted that impugned award has

been executed in non-judicial stamp paper issued in the State of Maharashtra and a scanned reproduction of the same is as follows:



8. To be noted, the above also gives the address of the sole arbitrator who constituted the AT and this is also in Mumbai. This is of relevance as paragraph 2 of impugned award says that the sole arbitrator directed the parties to appear before him at his office on 11.05.2010. Therefore, going by the impugned award it is clear that the arbitral proceedings have been held in the office of the sole Arbitrator in Mumbai and the impugned award has been made in Mumbai, State of Maharashtra.

9. This takes us to **BGS SGS Soma** principle being principle laid down by Hon'ble Supreme Court in **BGS SGS Soma JV vs. NHPC Ltd.** reported in (2020) 4 SCC 234. In this case, paragraph 33 of **BGS SGS Soma** assumes significance and for the purpose of putting this matter in perspective, paragraph 33 of **BGS SGS Soma** case law can be profitably reproduced and the same reads as follows:

'33. Some of the early decisions of this Court did not properly distinguish between "seat" and "venue" of an arbitral proceeding. The five-Judge Bench in BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] dealt with this problem as follows : (SCC pp. 597-99, 605-607, paras 75-76, 95-96, 98-99)

"75. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act, 1996 does not

make seat of the arbitration as the centre of gravity of the arbitration. On the contrary, it is accepted by most of the experts that in most of the national laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern in Para 3.54 concludes that 'the seat of the arbitration is thus intended to be its centre of gravity.' [Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009)] This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the Court of Appeal in England in Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru [Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru, (1988) 1 Lloyd's Rep 116 (CA)] wherein at p. 121 it is observed as follows:

'The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances,

it is by no means unusual for an Arbitral Tribunal to hold meetings —or even hearings —in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country — for instance, for the purpose of taking evidence.... In such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties.'

These observations were subsequently followed in Union of India v. McDonnell Douglas Corpn. [Union of India v. McDonnell Douglas Corpn., (1993) 2 Lloyd's Rep 48]

76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms “seat” and “place” are often used interchangeably. In Redfern and Hunter on International Arbitration [Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009)] (Para 3.51), the seat theory is defined thus: ‘The concept that an arbitration is governed by the law of the place in which it is held, which is the “seat” (or “forum” or locus arbitri) of the arbitration,

is well established in both the theory and practice of international arbitration. In fact, the Geneva Protocol, 1923 states:

‘2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.’

The New York Convention maintains the reference to ‘the law of the country where the arbitration took place’ [Article V(1)(d)] and, synonymously to ‘the law of the country where the award is made’ [Articles V(1)(a) and (e)]. The aforesaid observations clearly show that the New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration. The author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that:

‘1. (2) the provision of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of the State.’

Just as the Arbitration Act, 1996 maintains the territorial link between the place of arbitration and its law of arbitration, the law in Switzerland and England also maintain a clear link between the seat of arbitration and the lex arbitri. The Swiss Law states:

‘176(I). (1) The provision of this chapter shall apply to any arbitration if the seat of the Arbitral Tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.’ [See the Swiss Private International Law Act, 1987, Ch. 12, Article 176 (I)(1).]

95. *The learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. These provisions indicate that the Arbitration Act, 1996 is subject-matter centric and not exclusively seat-centric. Therefore, “seat” is not the “centre of gravity” so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim expressum facit cessare tacitum, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression “this Part shall apply where the place of arbitration is in India” necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the learned counsel for the appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn.*

96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

‘2. Definitions.—(1) *In this Part, unless the context otherwise requires.—*

(e) **“Court”** means the Principal civil court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same

had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal civil court, or any Court of Small Causes.'

We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the

courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.

98. We now come to Section 20, which is as under:

‘20. Place of arbitration.—(1) *The parties are free to agree on the place of arbitration.*

(2) *Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.*

(3) *Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property.’*

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any “place” or “seat” within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting

hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

99. The fixation of the most convenient “venue” is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned.”

(emphasis in original and supplied)

10. Paragraph 45 of **BGS SGS Soma** can also be profitably reproduced and the same reads as follows:

'45. It was not until this Court's judgment in Indus Mobile Distribution (P) Ltd. [Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of India titled, “Amendments to the Arbitration and Conciliation Act, 1996” (August, 2014) (hereinafter referred to as “the Law Commission Report, 2014”), under which Sections 20(1) and (2) would refer to the “seat” of the arbitration, and Section 20(3) would refer only to the “venue” of the arbitration. Given the fact that when parties, either by agreement or, in default of there being an agreement, where the Arbitral Tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties

having chosen the seat, or the Arbitral Tribunal having determined the seat, have also chosen the courts at the seat for the purpose of interim orders and challenges to the award. '

11. Suffice to say that a combined reading of **Indus Mobile** case [**Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and others** reported in (2017) 7 SCC 678], referred to supra in Paragraph 45 of **BGS SGS Soma** and **Brahmani River Pellets** case [**Brahmani River Pellets Limited Vs. Kamachi Industries Limited** reported in (2020) 5 SCC 462] and **BGS SGS Soma** principles are on the same lines and this Court refrains itself from burdening this order with extracts from all those case laws. Suffice to say that these case laws and *ratio decidendi* thereat make it clear that in the case on hand, contextually speaking venue becomes the seat and that determines exclusive jurisdiction (inter-alia) for captioned OP and that exclusive jurisdiction is Mumbai, State of Maharashtra.

12. Faced with the above situation, learned counsel for petitioner submitted that it is his specific case that the entire arbitral proceedings are sham, according to him no proceedings were held and learned counsel drew my attention to second part of Ground (F) and Ground (H) in captioned OP, which read as follows:

'F.....In this present case no claim statement, document, exhibit and other informations based on which the arbitral tribunal made the award, are not communicated to the petitioners. Even in the award it is not mentioned that based on which documents the award is passed. No exhibits were mentioned in the award. Mere reading the award will show that it was passed with the collusion of the respondents and not in accordance with law. It is clear case of fraud committed by the respondents.

'H. The first respondent mere participated in a fake proceedings conducted by the second respondent, who is loyal to them, which is illegal. On this sole ground the arbitration award is liable to be set aside. Even the copy of the fake award was not delivered to the petitioners. Section 31(5) of the arbitration and conciliation act 1996 states as follows:

“After the arbitral award is made, a signed copy shall be delivered to each party.”

Hence the act mandates the sole arbitrator/Arbitration tribunal to deliver the award to each party concerned. In this present case no such award was delivered to the petitioners.'

13. This Court is clear that on a demurrer even if the submission of learned counsel is accepted, the impugned award has been made in Mumbai and the impugned award says that the arbitral proceedings were held in the office of the sole Arbitrator in Mumbai. This is in the light of the exclusive jurisdiction principle, this question of whether arbitral proceedings were actually held or whether there was a fraud as alleged

should also be decided only by the jurisdictional Court and not by this Court. This again is in the light of exclusive jurisdiction principle i.e., **BGS SGS Soma** principle.

14. The sequitur of the narrative, discussion and dispositive reasoning thus far is, captioned OP deserves to be rejected for lack of jurisdiction. Though obvious, it is made clear that this Court examined and set out only the bare minimum aspects of the matter necessary for examining jurisdiction and has not expressed any opinion on the merits of the matter. To state with specificity, this Court makes it clear that it has not examined any point on merits and expressed any view on the same (except territorial jurisdiction point) as this Court is coming to the conclusion that it lacks jurisdiction in the light of **BGS SGS Soma** principle. Therefore, if the petitioner who is the protagonist of captioned OP chooses to approach the jurisdictional Court, it is made clear that this order will not come in the way and all questions including questions raised in the captioned OP are left open.

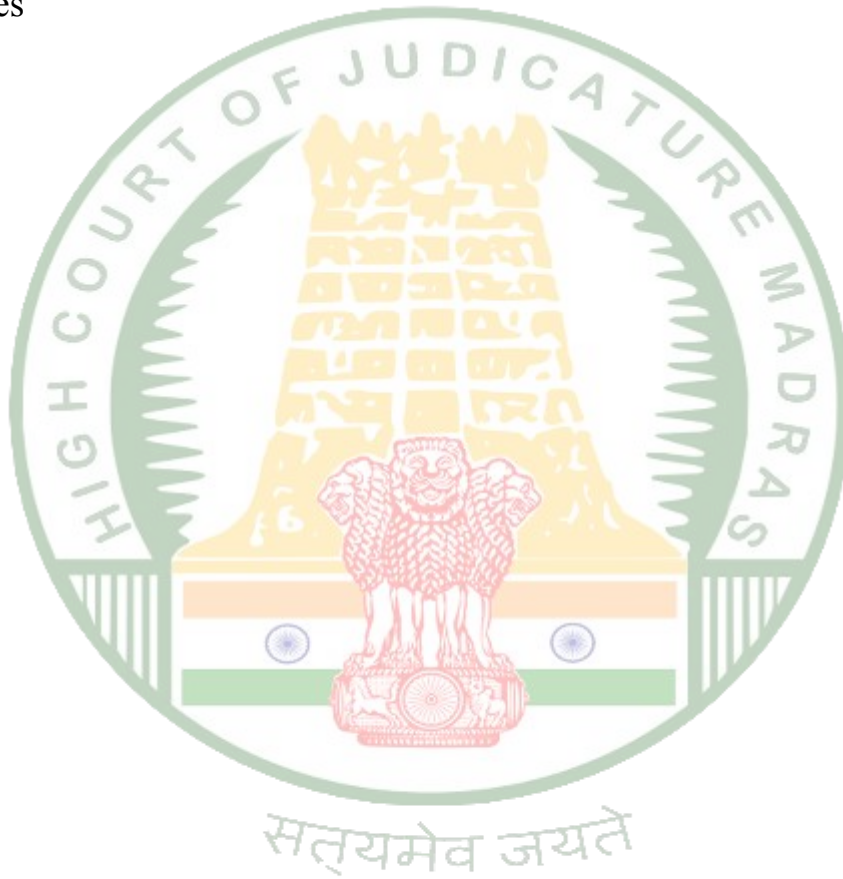
Captioned OP is rejected on the ground of lack of jurisdiction for this Court. There shall be no order as to costs.

11.01.2021

Speaking order: Yes

Index: Yes

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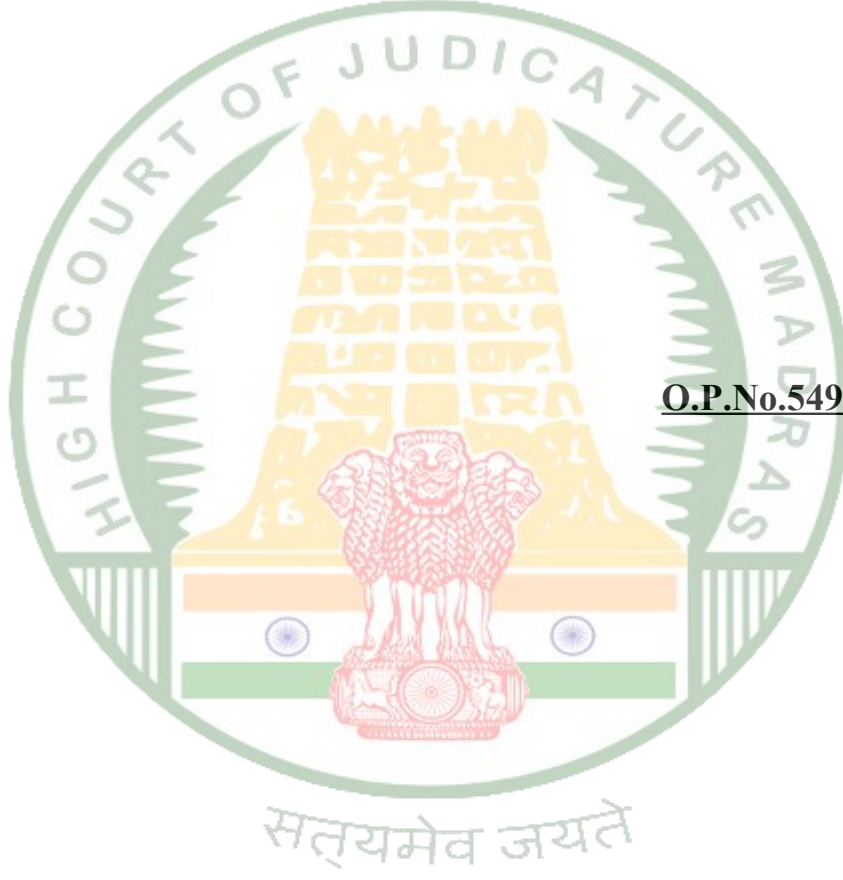


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