

IN THE HIGH COURT OF JUDICATURE AT MADRAS**Reserved on : 11.04.2018****Delivered on: 04.06.2018****CORAM****THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM****AND****THE HONOURABLE MR.JUSTICE N.SESHASAYEE****T.C. (Appeal).Nos.186 and 187 of 2005 &****TC.M.P.Nos.164 & 165 of 2005****&****W.P.Nos.43110 & 43111 of 2006****T.C.A.Nos.186 & 187 of 2005**

M/s.Khandelwal Steel & Tube Traders
No.81, Armenian Street,
Chennai – 600 001.

...Appellant
in both the appeals

The Income Tax Officer,
Ward IX (3),
No.121, Nungambakkam High Road,
Chennai – 600 034.

...Respondent
in both the appeals

Appeals filed under Section 260A of the Income Tax Act against the order of the Income Tax Appellate Tribunal Chennai Bench 'A' dated 06.04.2005 made in ITA No.3167/MDS/2004 and ITA No.3168/MDS/2004.

W.P.Nos.43110 & 43111 of 2006

M/s.Khandelwal Steel & Tube Traders
No.81, Armenian Street,
Chennai – 600 001.

...Petitioner
in both W.Ps.

VS

1.The Income Tax Officer,
Ward IX (3),
4th Floor Kannammai Building,
611, Anna Salai,
Chennai – 600 006.

2.The Commissioner of Income Tax,
Chennai-VIII,
7th Floor, New Block,
121, Nungambakkam High Road,
Chennai – 600 034.

...Respondent
in both W.Ps.,

COMMON PRAYER: Petitions have been filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, to call for the records in P.A.No.AAAFK 2820Q, dated 24.03.2006, relating to Assessment Year 2001-02 & 2002-03 on the file of the second respondent and quash the same.

For Appellant / : Mr.G.Baskar
Petitioner

For Respondents : Mr.J.Narayanaswamy in
W.P.Nos.43110 & 43111/2006

Mr.M.Swaminathan in
T.C.Nos.186 & 187 of 2005

COMMON JUDGMENT**T.S.SIVAGNANAM.J.,**

These Tax Case (Appeals) have been filed by the Assessee questioning the order passed by the Income Tax Appellant Tribunal, Bench 'A', Chennai in I.T.A.Nos.3167 & 3168/MDS/2004, for the assessments 2001-02 & 2002-03.

2. W.P.Nos.43110 & 43111 of 2006, have been filed by the assessee, challenging the order passed by the Commissioner of Income Tax, Chennai-VIII, Chennai, dated 24.03.2006, rejecting the petitions filed by the assessee under Section 264 of the Income Tax Act, 1961, (hereinafter referred to as "Act") for the assessment years 2001-02 & 2002-03.

3. Tax Case (Appeals) have been admitted on 28.04.2005, on the following substantial questions of law:-

1. Whether the Income Tax Appellate Tribunal is right in law in not cancelling the levy of penalty?

2. Whether the Income Tax Appellate Tribunal is right in law in not considering the

specific grounds raised by the appellant herein on the leviability of penalty?

3. Whether the Income Tax Appellate Tribunal was right in confirming the levy of penalty where the alleged income admittedly is spread over a period of several years?

4. Whether the Income Tax Appellate Tribunal is right in law in holding that reality would be imposed notwithstanding that the assessee had agreed to the additions on the specific understanding that penalty would not be impact?

5. Whether the Income Tax Appellate Tribunal was right in disposing the appeal and confirming the levy of penalty in the light of its observation that the validity of the assessment proceedings could not be challenged in the penalty proceedings, when a specific contention had been raised regarding the pendency of the revision petition before the Commissioner?

4. In the Tax Case (Appeals), the assessee challenges the levy of penalty for the aforesaid two assessment years and in the Writ Petitions, the assessee questions the order passed by the

Commissioner of Income Tax, refusing to delete the additions made or in the alternative, the opening balance difference be set off and the closing stock adjusted for the difference and the income recomputed or in the alternative to set aside the order of assessment and recompute the correct income.

5. Mr.G.Baskar, learned counsel appearing for the assessee submitted that a survey was conducted in the premises of the assessee under Section 133A of the Act, which ultimately lead to the passing of the assessment order, dated 17.04.2003, wherein the differences in the balances of four major suppliers of the assessee, were worked out. The assessee explained that reconciliation of the closing balance have not been effected and arose on account of the running balance maintained by the assessee in respect of the transactions with four suppliers as well as non-examination and the credit notes were not considered. It is further submitted that since the assessee wanted to purchase peace with the department, additional income totalling Rs.168,45,190/- was offered vide two revised returns of income. While so, the assessee received a notice initiating proceedings for levy of penalty under Section 271(1)(c) of the Act. This ultimately lead to an order imposing penalty on the assessee, which was questioned by the assessee by filing appeal. The assessee

also filed petition under Section 264 of the Act for revision of the assessment order by contending that the Assessing Authority had not granted any opportunity to the assessee to reconcile the closing balance and had arbitrarily foisted allegations of irregularities and deficiencies in the assessee's account that were factually and legally untenable and incorrect. Further major suppliers of the assessee are public limited companies and it is inconceivable that a company of stature of M/s.Tata Iron and Steel Co., would be involved in suppression of materials supplied to the assessee, as alleged by the respondents. It is further submitted that the Commissioner of Income Tax proceeded on the basis that it is only on account of the penalty proceedings, the revision applications were filed and the main contention raised by the petitioner that additional income offered, did not represent the reconciled correct figures, after taking into account the credit note and the running notes in respect of four major suppliers were not considered. Therefore, It is submitted that the order passed by the Commissioner rejecting the petition under Section 263 of the Act is erroneous.

6. With regard to the levy of penalty, it is submitted that the Tribunal ought to have considered as to whether the levy of penalty

was justified, when the assessee had agreed to certain additions on the specific contention that the penalty would not be levied by the department. The Tribunal failed to take into consideration that when the correctness of the penalty proceedings were considered by the Tribunal, the revision petition before the Commissioner to revise the assessment proceedings were pending and the Tribunal was not right in observing that the validity of the assessment proceedings could not be challenged in a penalty proceedings. The learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Distributors (Baroda) P., Ltd., vs. Union of India & Ors., [(1985) 155 ITR 0120]*** and submitted that the revision petition ought to have been considered by the Commissioner in a proper prospective and the correctness of the assessment proceedings cannot be tested based upon the reasons in the penalty proceedings thereby, non-suiting the petitioner before the both forums. Thus, it is submitted that to rectify is compulsion of judicial conscience. Reliance was placed on the decision of the Division Bench in the case of ***Sri Selvamuthukumar vs. Commissioner of Income Tax, Chennai-VI [2017] 79 Taxmann.com 113 (Madras)***, to explain the power of the Commissioner under Section 264 of the Act.

7. Mr.J.Narayanaswamy, learned Senior Standing counsel

appearing for the Revenue in the Writ Petitions and Mr.M.Swaminathan, learned Senior Standing counsel appearing for the Revenue in the Tax Case (Appeals), submitted that the Commissioner after taking into consideration the factual aspects, has given reasons for rejecting the revision petition and the plea raised by the assessee is unacceptable and reading of the order passed by the Commissioner as well as the Tribunal would clearly establish the conduct of the assessee and there is no error in the order. Further, it is submitted that the levy of penalty under Section 271(1)(c) of the Act, is proper and valid and mere voluntarily offering additional income after the survey proceedings will not exonerate the assessee from penalty proceedings. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Mak Data (P) Ltd., vs. Commissioner of Income Tax-II [(2013) 38 Taxmann.com 448 (SC)]**.

8. Heard the learned counsels appearing for the parties and perused the materials placed on record.

9. Firstly, we take up the Tax Case (Appeals) for consideration. As mentioned above, the appeals have been filed challenging the order passed by the ITAT, rejecting the assessee's appeal and confirming the order passed by the Commissioner of Income Tax (Appeals)-IX, dated

05.11.2004. The assessment for the year 2001-02, was completed on 17.04.2003, and in the course of assessment proceedings, penalty notice under Section 274 read with Section 271(1)(c), was issued to the assessee. The assessment for the year 2002-03 was completed on 17.04.2003, and in the course of assessment proceedings, penalty notice dated 14.05.2003, was issued to the assessee. The assessee submitted separate replies to the notices.

10. For the assessment year 2001-02, the assessee stated the addition made by the Assessing Officer of Rs.3,19,021/-, represented amount due to two trade creditors, who were reported to have closed their business and their whereabouts were not known. According to the assessee, it cannot be safely concluded that the credit balances have become time barred or not recoverable by the concerned party. Further it was contended that in view of their voluntarily offering substantial amount for the assessment year 2002-03, in the wake of survey, the assessee has chosen to accept the department's proposal to make additions for the assessment year 2001-02, to avoid prolonged litigation and purchase peace. It was further submitted that the issue is an arguable matter and merely because, the assessee had agreed for addition, the act of concealment cannot be presumed. For

the penalty notice for the assessment year 2002-03, the assessee stated that the assessment was completed on 17.04.2003, on the basis of the revised return filed by them on 12.03.2003 after including the additional income of Rs.1,68,45,194/-, and this amount has been offered voluntarily in the course of survey operations. Further, it was stated that the assessee in their letter dated 10.03.2003, that they are offering the differences in the 4 sundry creditors cases, as they could not reconcile the same and this was to avoid protracted litigation and purchase peace. Further, they have stated that there is no concealment either by suppressing any income or by deliberately furnishing the inaccurate particulars warranting levy of penalty. The Assessing Officer among other things held the assessee did not prove the credit balance in the account of the two concerns and only as a result of this, the assessee offered Rs.3,19,021/- as income and but for the survey conducted by the Department, assessee might not have agreed to the addition hence, it cannot be said the addition was made voluntarily.

11. So far as the assessment year 2002-03, the Assessing Officer pointed out that whenever defects were noticed by the Department and put across to the assessee, they came forward and offered additional income and the additional income was brought to tax

only due to survey operation under Section 133A and on facts, it cannot be said the assessee voluntarily offered income. Further, it was observed that no assessee will offer Rs.1.40 crores, unless he is sure that the department has material to make addition to that extent. Thus, taking into facts and circumstances of the case levied minimum penalty of Rs.1,25,056/- for the assessment year 2001-02 and Rs.60,13,733/- for the assessment year 2002-03.

12. The Commissioner of Income Tax (Appeals) while testing the correctness of this order, held that the assessee cannot contend that revised returns filed, were not valid and they having filed the same voluntary. It was further pointed out that the assessee on the one hand contend that what was found and deducted, can be explained and the other hand states it has accepted the discrepancies in order to buy peace with the department and avoid prolonged litigation. Therefore, the CIT (Appeals) held both the arguments cannot go together. After taking note of certain decisions, the CIT (Appeals) observed that the quality of evidences deducted positively justify levy of penalty under Section 271(1)(c), as *mens rea* has been fully established with deduction of evidence against the assessee and the assessee having accepted the same by filing revised returns. Similar reasons were

assigned by the CIT (Appeals) in the appeal against the penalty order for the assessment year 2002-03.

13. On appeal to the Tribunal, it was pointed out that the assessee raised three contentions, namely, (i) return was filed voluntarily, therefore penal action was not attracted; (ii) the revised return was filed only after an assurance given by the department that no penalty proceedings will be initiated; (iii) Revenue has not proved that income was really concealed.

14. On the first question, the Tribunal took note of the findings during the survey proceedings and that the actual purchase was inflated and the inflation of purchase was admitted to the tune of Rs.90,63,508/-, credit balances had been inflated by the assessee and disclosure of the concealed income after the department has seized material, cannot be voluntary disclosure, because, it was made under the constraints of exposure of adverse action by the Department.

15. On the second issue, the Tribunal held that there was no material to show that there was any assurance on the part of the revenue, that no penalty will be imposed if the assessee agrees to offer additional income. Accordingly, the same was rejected.

16. On the third issue, the assessee contended that the credit

balances stood inflated on account of accumulation of various years and it cannot be said that income belonged to a particular year, much less the income was concealed. The Tribunal observed that the assessee cannot challenge the assessment proceeding in a penalty proceeding and agreed with the stand taken by the department that incriminating material was found during survey, assessee offered to declare income in particular years, probably with a view to save interest under Section 234B and at that same time, the assessee shut further enquiry to be made by the department. Further, it was pointed out that once the assessee offered additional income, it was a clear admission of concealed income and therefore, the Revenue was required to do nothing further. Further, the filing of revised return not being on account of any inadvertent mistake or omission, the imposition of penalty would be justified. Further, the assessee did not bring any material to show that there was inadvertent omission or mistake in the original return. With the said reasoning and after referring to the decision of the Hon'ble Supreme Court in the case of ***K.P.Madhusudhanan vs. CIT [251-ITR-99(SC)]***, dismissed the appeals.

17. The learned counsel appearing for the assessee contended

that the CIT (Appeals) as well as the Tribunal non-suited the assessee, while contesting the penalty proceedings based on the findings in the assessment proceedings, which was pending in appeals/revision at the relevant time. It is further submitted that penalty proceedings is independent of the assessment proceedings and mere fact that the assessee did not contest the assessment proceedings, will not be a bar for the assessee to contest the penalty proceedings.

18. The facts of the case has been set out in a fairly elaborate manner to show the conduct of the assessee in the proceedings. It is an admitted fact that after the survey operations, the assessee filed revised returns. The revised returns is deemed to be a voluntary action of the assessee, as there is nothing on record to show that for certain other reasons, the assessee had filed revised returns. Therefore, the Tribunal was justified in rejecting the case of the assessee stating that because the Revenue assured that the penalty proceedings will not be initiated, if addition is admitted, therefore, revised return were filed. In these Appeals, we are required to examine as to whether the requirements under Section 271(1)(c) have been satisfied.

19. The Hon'ble Supreme Court in **Mak Data (P) Ltd.**, (supra),

pointed out that the Assessing Officer shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement" etc., to explain away its conduct. It was further pointed out that the question is whether the assessee has offered any explanation for concealment of particular income of furnishing inaccurate particulars of income. It was pointed out that explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer between the reported and assessed income. That burden is then on the assessee to show, otherwise, by cogent and reliable evidence, when the initial onus placed by the explanation, has been discharged by the assessee, the ownership's is on the revenue to show that the amount in question constituted the income and not otherwise.

20. In Mak Data, on facts, it was found that the surrender of income was after deduction was made by the Assessing Officer in the search conducted in the sister concern of the assessee. Applying the decision in the case of **Mak Data (P) Ltd.**, (supra), to the facts and circumstances of the case, irresistible conclusion to be arrived, is that the revised returns filed by the assessee, cannot be termed to be voluntary, as it was done by the assessee after the revenue deducted

non-disclosure inflation of purchases and concealment of income during the search proceedings.

21. Mr.G.Baskar, learned counsel counsel for the assessee strenuously contended that the Tribunal failed to consider as to whether the Department could levy penalty where the additions pertained to accumulated differences in the closing balances with reference to the four suppliers and this issue has not been specifically answered by the Appellate Authority or by the Tribunal. Further, it is submitted that various other grounds were raised as well as including the one that there was a specific undertaking given by the Department that no penalty could be levied and therefore, the assessee agreed to offer income for assessment.

22. The Tribunal while approving the view taken by the CIT (A), held that there was specific evidence in respect of inflation of stock, inflation of purchase, inflation of sundry creditors, etc, which constitute valid evidence for holding that the assessee has concealed its income. Further, it was pointed out that the assessee WHEN confronted with these materials, had accepted the inflation and offered income for taxation and the assessee had no suitable explanation against the

evidences found during survey.

23. To examine the correctness of the argument of the learned counsel for the assessee, we perused the order passed by the CIT (A) and the findings recorded on facts, as the assessee would persistently state that the closing balances with reference to four suppliers were not considered. On a perusal of the order passed by the CIT (A), it is seen that during the course of survey, incriminating evidences regarding the purchase were found and the statement of the assessee was recorded. The stock statement showed a negative figure of Rs.13,71,146/- and there was a difference in closing balances in case of four sundry creditors and the total difference worked out to Rs.1,68,45,192/ and the assessee accordingly filed revised return admitting additional income. Thus, during the search, there was specific evidence on account of stock, on account of purchases, sundry creditors and closing balances of the stock. The assessee was given an opportunity to explain and no where rebutted the evidences, which were recovered during the course of survey. Thus, in the absence of any explanation, the assessee has come forward by filing revised return. Thus, we are unable to agree with the stand taken by the learned counsel for the assessee that the contentions advanced by the

assessee were not considered by the CIT (A) or for that matter the Tribunal.

24. It was argued that merely by filing a revised return and offering additional income will not by itself be a ground to levy penalty. This is a broad legal principle, but has to be applied by taking note of the facts of each case. The assessee has to satisfy the test that he has a satisfactory explanation regarding such income offered in the revised return. The explanation as to why there was an omission or wrong statement in the original return must be due to bona fide inadvertence or bona fide mistake on the part of the assessee. Even if the assessee agreed to the addition with a condition that penalty could not be imposed, the Department is not precluded from initiating penalty proceedings. In the instant case on facts, it was found that there was no such assurance.

25. Reading of the order passed by the CIT (A) as confirmed by the Tribunal would clearly show that the materials, which were recovered during the search proceedings reveal concealment of income and the assessee agreed for the additions and it would be too late for the assessee to now state that the authorities are not justified in levy

penalty, especially when the assessee had no satisfactory explanation as to why he had offered income in the revised return.

26. It is a settled legal position that the burden is on the assessee to prove non-concealment against additional income disclosure in the revised return. In the instant case, no explanation was offered for not having disclosed income earlier. Thus, for the above reasons, we find that the order passed by the Tribunal was perfectly correct and the questions of law framed for consideration, are to be answered against the assessee and in favour of the Revenue.

27. The challenge in the Writ Petitions is to the order passed by the CIT, rejecting the petition filed under Section 264 of the Act. For the assessment year 2001-02, the stand taken by the petitioner was that the addition made in respect of credit balances appearing in the names of two parties, was not proper in as much as the said balances are correct, though the parties are not traceable. The assessee further stated that the difference in closing balance was added as 'income' without proper investigation or verification of the correctness of the figures. It was further submitted that the difference was treated as purchase inflation and therefore, closing stock should have been

correspondingly adjusted, which was not done. Further, the amount of Rs.3,19,021/- was offered to tax to purchase peace with the Department and on assurance that they would be no liability, interest and penalty.

28. Commissioner of Income Tax considered the said factual submission and rejected the same as being erroneous, by taking note of the record of proceedings that addition was made after the same was offered for taxation by the assessee. Further, the Commissioner has noted that as per the assessee's own version, the trade creditors were not traceable. That apart, the Commissioner took note of the order passed by the ITAT confirming the order of penalty. The submission of the learned counsel for the assessee is that the revision petition was rejected by the Commissioner solely for the reason that penalty proceedings were confirmed by the Tribunal and none of the aspects, which have been pointed out by the petitioner in the revision petition have been dealt with. We are unable to persuade ourselves to accept the said contention for the reason that the Commissioner has taken note of the conduct of the assessee and has come to the conclusion that the addition was made after the assessee offered the same for taxation and the assessee also admitted that the said trade

creditors are not traceable. After rendering such a finding, the Commissioner has referred to the order passed by the ITAT confirming the penalty proceedings. Therefore, the revision petition for the assessment year 2001-02, was not rejected, solely for the reason that the ITAT had confirmed the penalty proceedings. Thus, we find that there are no extraneous circumstances warranting interference on the factual findings recorded by the Commissioner affirming the findings recorded by the Assessing Officer for the year 2001-02.

29. With regard to the assessment year 2002-03, the sum and substance of the contention of the assessee is that the disclosure of additional income of Rs.1,68,45,194/- does not represent the correct figure, since final reconciliation was not done. After taking note of the contentions raised by the petitioner/assessee, the Commissioner took note of the declaration given by the senior partner of the petitioner/assessee firm at the time of survey, which was based upon the documents discovered during the course of survey and the Commissioner rejected the contention of the assessee that the declaration of additional income was made in a hurry without proper appreciation of account. It was pointed out that the additional income of Rs.1.40 crores, was declared during the course of survey which was

further enhanced to Rs.1.68 crores and these figures have been shown in two revised returns filed by the assessee. In this regard, the letter given by the senior partner of the assessee firm, dated 10.03.2003, was taken note of. Thus, factually the Commissioner concluded that the contention of the assessee that additional income was offered without application of mind was rejected. In the said order also, the Commissioner has noted that the order imposing penalty, has been confirmed by the Tribunal.

30. Be it noted that the assessee had filed two revised returns. In the first revised return, the assessee offered additional income of Rs.1.40 crores. At that point of time, the assessee did not take a stand that there was insufficient time or the same does not represent correct figures etc. Assuming, it was so, then the assessee had other remedies upon filing a revised return accepting additional income of Rs.1.40crores. The assessee did not avail any such remedy, but on the contrary filed a second revised return admitting additional income of Rs.1.68 crores.

31. Thus, the Commissioner on facts rightly held that the contention of the assessee that additional income was offered without due application of mind is to be rejected and the offer made by the

assessee was a conscious one.

32. As observed earlier, though there is an observation regarding the order passed by the ITAT confirming the penalty proceedings in the Section 264 order, we find that is not the reason for rejecting the revision petition, but on facts, the Commissioner has recorded findings and confirmed the order passed by the Assessing Officer.

33. Thus, we find there are no good grounds made out by the assessee to dislodge the factual findings recorded by the Commissioner in the impugned order under Section 264 of the Act. Therefore, the Writ Petitions have to necessarily fail.

34. In the result:-

(i) Thus, for the above reasons, we find that the order passed by the Tribunal was perfectly correct and the substantial questions of law framed for consideration, are answered against the assessee and in favour of the Revenue. Accordingly, Tax Case Appeals are dismissed.

(ii) we find there are no good grounds made out by the petitioner to dislodge the factual findings recorded by the Commissioner in the impugned order under Section 264 of the Act. Therefore, the Writ Petitions fail and they are dismissed.

(iii) Consequently, connected Miscellaneous Petitions are closed.

No costs.

[T.S.S.J.,] [N.S.S.,J]

04.06.2018

Index: Yes/No
Internet: Yes
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To

1.The Income Tax Officer,
Ward IX (3),
No.121, Nungambakkam High Road,
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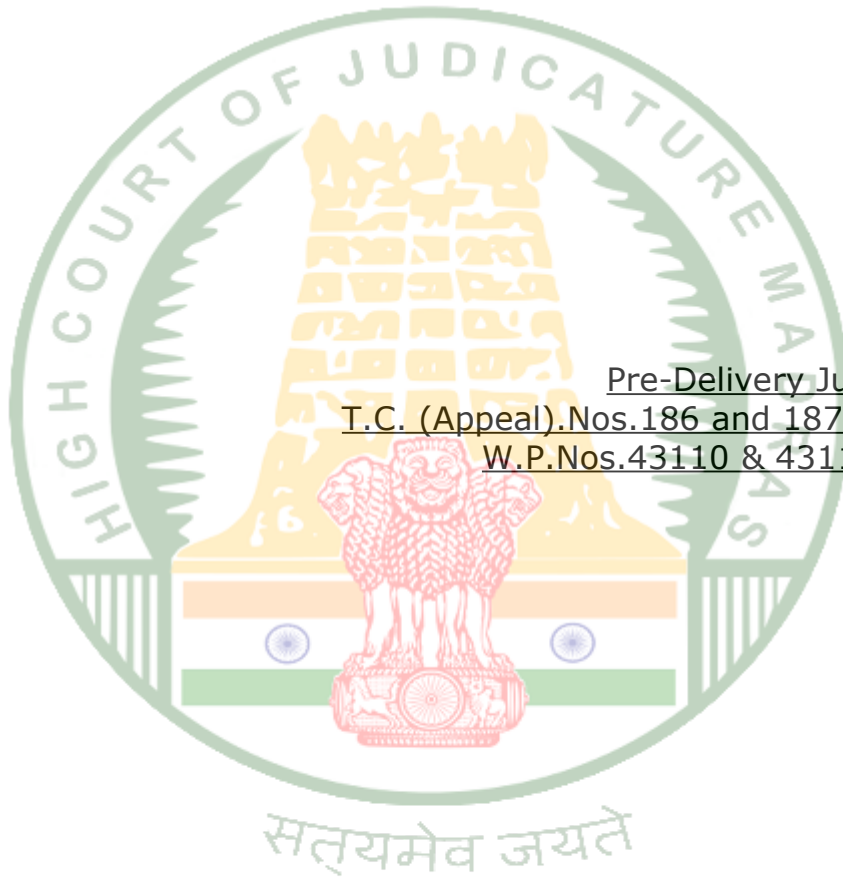
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T.S.SIVAGNANAM.J.,
&
N.SESHASAYEE.J.,

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Pre-Delivery Judgment in
T.C. (Appeal).Nos.186 and 187 of 2005 &
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