Sita Ram & Ors vs State Of U.P on 24 January, 1979

Equivalent citations: 1979 AIR 745, 1979 SCR (2)1085, AIR 1979 SUPREME COURT 745, (1979) 2 SCC 656, 1979 CRILR(SC MAH GUJ) 190, (1979) 2 SCR 1085 (SC), (1979) 2 SCR 1085, 1979 SCC(CRI) 576, 1975 2 SCC 656

Author: V.R. Krishnaiyer

Bench: V.R. Krishnaiyer, P.N. Shingal, P.S. Kailasam, D.A. Desai, A.D. Koshal

PETITIONER:
SITA RAM & ORS.

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT24/01/1979

BENCH:
KRISHNAIYER, V.R.
BENCH:
KRISHNAIYER, V.R.
SHINGAL, P.N.
KAILASAM, P.S.
DESAI, D.A.
KOSHAL, A.D.

CITATION:
1979 AIR 745 1979 SCR (2)1085
1979 SCC (3) 656
CITATOR INFO :
R 1980 SC 470 (10)
RF 1980 SC1707 (4)
R 1981 SC1218 (1)
R 1986 SC 180 (39)
RF 1992 SC 891 (23)

ACT:
Supreme Court Rules, 1966, Order XXI, Rule 15(1)(c), Constitutional India, 1950. Articles 134, 136, 145, Criminal Procedure Code, 1898, s. 384 and Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, J, 2(a)-Procedure of the Supreme Court hearing appeals in criminal matters at the admission stage ex-parte-Whether ultra vires.
Words & Phrases-'Appeal' and procedure-Meaning of.

HEADNOTE:

Rule 15(1)(c) of Order XXI of the Supreme Court Rules, 1966 envisages that the petition of appeal under sub-clause (a) or sub-clause (b) of clause (1) of Art. 134 of the Constitution or under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 or under s. 379 of the Code of Criminal Procedure 1973, on being Registered shall be put up for hearing ex-parte before the court which may either dismiss it summarily or direct issue of notice to all necessary parties or make such orders, as the circumstances of the case may require.

The appellants in the appeal who were acquitted by the Sessions Court had been convicted and sentenced by the High Court and awarded life imprisonment under s. 302 read with s. 149 IPC.

When their appeal under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 was listed for preliminary hearing under Rule 15(1)(c) of Order XXI of the Supreme Court Rules, 1966 it was contended (1) that the said provision empowering the court to dismiss the appeal summarily was ultra vires the Enlargement Act, 1970, (2) the power of the Supreme Court to frame rules under Art. 145 of the Constitution can not be extended to annul the rights conferred under an Act of Parliament and (3) that an appeal under the Enlargement Act, 1970 cannot be dismissed summarily without calling for the records, ordering notice to the State and without giving reasons.

^

HELD:

(Per Krishna Iyer, Shinghal & Desai, JJ.)

1. Article 134(1)(c) spells a measure of seriousness because the High Court which has heard the case certifies that it involves questions of such moment that the Supreme Court itself must resolve them. To dispose of such a matter by a preliminary healing is to cast a reflection on the High Court's capacity to understand the seriousness of a certification. [1095 D-E]

2. Article 136 vests a plenary discretion in the Supreme Court to deign or decline to grant leave to appeal against any conviction or sentence. Before deciding to grant or reject such Leave the court accords an oral hearing after 1086
perusing all the papers produced. Once leave is granted, the appeal is heard, after notice to the state, in full panoply. After leave, the appeal is born. Then it ripens into fullness and is disposed of when both sides are present. No appeal after leave, is dismissed summarily or ex-parte. If Art. 136 gives a discretionary power to grant leave to appeal or to dismiss in limine, after an ex-parte hearing (or after issue of notice if the court so chooses), Art. 134 which gives a constitutional right to appeal as it were,

must stand on a higher footing lest the Constitution makers be held to have essayed in supererogation. [1095G-1096A]

3. There is much more 'hearing' content in an absolute appellate right than in a precarious 'special leave' motion. Jurisprudentially, a right is large than a permission. Art 134 puts the momentous class of cases covered by it beyond the discretionary compass of Art. 136 and within the compulsory area of full hearing such as would follow upon leave being granted under Art. 136(1). A full hearing may not obligate dragging the opposite side to court involving expense and delay. Fullness of hearing of the proponent is not incompatible with non-hearing of the opponent when after appreciating all that could be urged in support of the cause there is no need felt to call upon the other side, as where the proposition is groundless, frivolous or not prima facie statable. [1096B-D]

4. Article 134(2) empowers Parliament to expand the jurisdiction of the Supreme Court to entertain criminal appeals. In exercise of this power, Parliament enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 in its grave concern for long incarceration being subject to great scrutiny at the highest level if first inflicted, by the High Court. A right of appeal to the Supreme Court was granted when the High Court has, for the first time sentenced an accused to life imprisonment or to a term of or above ten years of rigorous imprisonment and equated it with that granted under Art. 134(1)(a) and (b). [1097G-1098D]

5. The nature of the appeal process cannot be cast in a rigid mould as it varies with jurisdiction and systems of jurisprudence. Whatever the protean forms the appellate process may take, the goal is justice so that a disgruntled litigant cannot convert his right of appeal into breaking down the court system by sufferance of interminable submission after several tribunals have screened his case and found it fruitless. The signification of the right of appeal under Art. 134 is a part of the procedure established by law for the protection of life and personal liberty. Nothing which will render this right illusory or its fortune chancy can square with the mandate of Art. 21. [1100H-1101A, 1102F, 1103D, 1104H-1105A]

6. When the High Court trying a case sentences a man to death a higher court must examine the merits to satisfy that human life shall not be haltered without an appellate review. A single right of appeal is more or less a universal requirement of the guarantee of life and liberty rooted in the conception that men are fallible, that Judges are men and that making assurance doubly sure before irrevocable deprivation of life or liberty comes to pass, full-scale re-examination of the facts and the law is made an integral part of fundamental! fairness or procedure. [1105C, E]

7. The life of the law is not perfection of theory but realisation of justice in the concrete situation of a given

system. It is common knowledge that
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a jail appeal or an appeal filed through an advocate does not contain an exhaustive accompaniment of all the evidentiary material or record of proceedings laying bare legal errors in the judicial steps. It is not unusual that a fatal flaw has been discovered by the appellate judges leading to a total acquittal. Such a high jurisdiction as is vested by Art. 134 calls for an active examination by the judges and such a process will be an ineffectual essay in the absence of the whole record. A preliminary hearing is hardly of any use bearing in mind that what is being dealt with is an affirmation of death sentence for the first time. Section 366 of the Code requires the Court of Session which passes a sentence of death to submit the proceedings to the High Court and rulings insist on an independent appellate consideration of the matter and an examination of all relevant material evidence. The Supreme Court's position is analogous, and independent examination of materials is impossible without the entire records being available. So it is reasonable that before hearing the appeal under Rule 15(1) (c) of Order XXI, ordinarily the records are sent for and are available. Counsel's assistance apart, the court it self must apply its mind, the stakes being grave enough. [1105F-1106B]

8. The recording of reasons is usually regarded as a necessary requirement of fair decision. The obligation to give reasons for decision when consequence of wrong Judgment is forfeiture of life or personal liberty for long periods needs no emphasis, especially when it is a first appeal following upon a heavy sentence imposed for the first time. The constraint to record reasons secures in black and white what the Judge has in mind and gives satisfaction to him who is condemned that what he has had to say has not only been 'heard' but considered and recorded. Art. 21 is a binding mandate against blind justice. In the narrow categories of cases covered by Art. 134(1)(a) and (b) and s. 2(a) of the Enlargement Act, the subject matter is of sufficient gravity as to justify the recording of reasons in the ultimate order. [1160F-G, 1106H-1107A]

9. Protection at the third deck by calling for the records or launching on long ratiocination is a waste of judicial time. Our Rules of Criminal Procedure provide for dismissal at the third level without assigning written reasons, not because there are no reasons, but because the tardy need to document them hampers the hearing of the many cases in the queue that press upon the time of the court at that level. [1107F]

10. Order XXI, Rule 15(1)(c) of the Rules in an enabling provision not a compulsive one. Harmonious construction of Art. 134 and Art. 145 'leads to the conclusion that the contemplated rules are mere machinery provisions. The sequence is simple. The formalities for

entertaining certain types of appeal ale covered by Art. 145(1)(d) the manner of hearing and disposal is governed by Art. 145(1)(b) and the substantive sweep of the appeal as a method of redressal is found in Art. 134. [1107G-H, 1108D, 1109A].

11. It is daily experience to see judges on the high bench differ, and a fortiori so in the field of sentence, This reality is projected in the context of full freedom for the first appellate decider of facts to reach his own finding on offence and sentence, only to highlight how momentous it is-for the appellant to have his case considered by the highest court when the Constitution and Parliament have conferred a full right of appeal Summary dismissal, save in glaring cases, may spell grave jeopardy to life-giving justice

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That is why Order XXI Rule 15(1)(c) while it survives to weed out worthless appeals, shall remain sheathed in extra-ordinary cases where facts on guilt or the wider range of considerations on sentence are involved. [1109G-1110B]

12. Rule 15(1)(c) of Order XXI is general and covers all conceivable cases under Art. 134(1). It operates in certain situations, not in every appeal. It merely removes an apprehended disability of the court in summarily dismissing a glaring case where its compulsive continuance, dragging the opposite party, calling up prolix records and expanding on the reasons for the decision, will stall the work of the court (which is an institutional injury to social justice) with no gain to anyone, including the appellant to keep whom in agonising suspense for long is itself an injustice. [1111C-D]

13. If every appeal under Art. 134(1) (a) and (b) or s. 2(a) of the enlargement Act, where questions of law or fact are raised, is set down for preliminary hearing and summary disposal, the meaningful difference between Art. 134 and Art. 136 may be judicially eroded and Parliament stultified. The minimum processual price of deprivation of precious life or prolonged loss of liberty is a single comprehensive appeal. To be peevel by this need is to offend against the fair play of the constitution. [1111H-1112B]

14. Upholding the vires of Order XXI Rule 15(1)(c) of the Supreme Court Rules and also s. 384 of the Criminal Procedure Code the majority however held that in their application both the provisions shall be restricted by the criteria set out hereunder ns a permissible exercise in constitutionalisation of the provisions. [1112H]

15. Order XXI Rules 15(1)(c) in action does not mean that all appeals falling within its fold shall be routinely disposed of. Such a course obliterates the difference between Articles 134 and 136, between right and leave. The rule in cases of appeals under Art. 134(1)(a) and (b) and s. 2(a) is notice, records and reasons, but the exception is preliminary hearing on all such materials as may be placed

by the appellant and brief grounds for dismissal. This exceptional category is where, in all conscience, there is no point at all. In cases of real doubt the benefit of doubt goes to the appellant and notice goes to the adversary even if the chances of allowance of the appeal be not bright. [113A-C]

[With a view to invest clarity and avoid ambiguity, Order XXI Rule 15(1)(c) may be suitably modified.]

Maneka Gandhi v. Union of India, [1978] 1 SCC 248; Presidential Ref. No. 1 of 1978 [1979] 2 SCR 476; Wiseman v. Barneman, [1971] AC 297; Russel v. Duke of Norfolk, 11949] 1 All. ER 109, Ponnamma v. Arumogam, [1905] AC at p. 390; Colonial Sugar Refining Co. v. Irving, [1905] AC 369; Newman v. Klausner, [1922] 1 KB 228; referred to.

Black's Law Dictionary 4th Edn. p. 1368, Stroud's Judicial Dictionary, 3rd Edn. Vol. 1, pp. 160-161; Current Legal Problems 1958 Vol. 11 p. 194, Law Quarterly Review Vol. 71, 1955 p. 410-11. The Judicial Process by Henry J. Abraham, 1962 pp. 159-160; referred to.

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Per Kailasam & Koshal, JJ. (dissenting)

1. Article 145 of the Constitution empowers the Supreme Court subject to the provisions of any law made by Parliament with the approval of the President to make rules from time to time for regulating generally the practice and procedure of the court. [1116B]

2. Article 134 confers appellate jurisdiction on the Supreme Court in regard to criminal matters, and while an unrestricted right of appeal is provided to the Supreme Court under clauses (a) and (b) an appeal under such clause (c) is provided only when the case is certified by the High Court as a fit one for appeal. Further, an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Art. 145 and to such conditions as the High Court may establish or require [1116D-1117B]

3. The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) . Act, 1970 has conferred on the Supreme Court further power to entertain and hear appeals than conferred on it under Art. 134(1)(a) and (b) as provided for in Art. 134(2) of the Constitution. [1117C]

4. Article 145(1)(b) enables the Supreme Court to frame rules as to procedure for hearing appeals. Rule 15 of under XXI provides for the procedure for hearing appeals and is valid so far as to the procedure of hearing appeals. [1117D-E, 1118C]

5. While s. 374 confers a right of appeal, s. 375 and s. 376 restrict such a right.Section 384 prescribes the procedure for hearing appeals enabling the court to dismiss certain appeals summarily and to deal with others under s. 385 if they are not summarily dismissed. The right of appeal conferred can be curtailed by procedure as envisaged in s. 384 Cr. P.C. Or Rule 15 order XXI of the Supreme Court

Rules. [1120D]

6. An appeal to the Supreme Court under s. 374 Cr. P.C. is restricted by the provisions of s. 375 and s. 376 and could be dealt with summarily under s. 384 Cr. P.C. An appeal to the Supreme Court is subject to the several provisions of the Cr. P.C. including the provisions relating to summary disposal of the appeals. [1120E-F, G]

7. The powers and the jurisdiction of the appellate court as prescribed by the Criminal Procedure Code and the rule cannot be said to deny a right of hearing to the appellant. The right to be heard in an appeal is regulated be statute. After a full trial the judgment is rendered by a High Judicial Officer such as a Sessions Judge or a High Court Judge. The appellate court has before it the Judgment of the lower court and the petition for appeal. At the preliminary hearing the appellant or his pleader is heard before the court decides to dismiss the appeal summarily. The power to summarily dismiss an appeal is conferred under the Criminal Procedure Code when the court is satisfied that there are no sufficient grounds for interfering with the judgment appealed against. This decision is taken by the appellate court being the Chief Judicial Magistrate, Court of Sessions, the High Court or the Supreme Court. In the case of the Chief Judicial Magistrate and Court of Sessions, reasons should be recorded for summarily dismissal. The High Court and the Supreme Court need not record reasons for summarily dismissing the appeal. It is necessary that the Supreme Court or the High Court should be satisfied that there are not sufficient ground for interfering. The conclusion is arrived at after hear-

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ing the appellant, examining the judgment and the petition for appeal. The appellate court is discharging an onerous duty in dismissing a case summarily. The Code provides for calling for the records before dismissing an appeal. In cases where an appellant is sentenced to death, imprisonment for life or long term of imprisonment, it is the bounden duty of the appellate court to hear the appellant, examine the petition of appeal and copy of the judgment appealed against. If it feels necessary to call for the records of the case, it is duty to call for the records and examine them, before coming to the conclusion that there are not sufficient grounds for interfering. It is the responsibility of the appellate authority to order notice and hear the other side if it is not satisfied that there be no sufficient grounds for interfering. Equally it is the duty of the appellate court to dismiss the appeal summarily if it i.e satisfied that there are no sufficient grounds for interfering is duty is imposed for regulating the work of the courts for otherwise judicial time would be unnecessarily spent. Taking into account the fact that the duty to decide the question where there are no sufficient grounds for interfering is placed on highly placed judicial

officers after affording a due hearing, it cannot be stated that the very right of appeal bas been taken away. [1122E-F, 1122H-1123F]

8. The procedure contemplated in Rules 13, 14 and 15 of the Supreme Court Rules are almost similar to the provisions of the Code of Criminal Procedure relating to appeal. In an appeal sent by the appellant from jail he is entitled to send any written arguments which he may desire to advance in support of his appeal. The Court in proper cases in which it considers it desirable would engage an advocate to present the case of the appellant in jail. The mere fact that the appellant in jail is not being heard in person or through an advocate would not mean that the appeal is not being heard. The court peruses the judgment, petition of appeal and the written arguments, if any, before proceeding to take action under Rule 15. This Court being the highest court is not required to give reasons but is expected to bestow the greatest care in exercising the power of summary dismissal under Rule 15. [1124G-1125A]

P.K. Mittra v. State of West Bengal, [1959] SUPPL. I SCR 63; Shankar Kerba Yadhav v. State of Maharashtra, [1970] 2 SCR 227; Minakshi v. Subramanya, 14 IA 168; Govinda Kadtuji Kadam v. State of Maharashtra, [1970] 1 SCC 469; referred to.

Maneka Gandhi v. Union of India, [1978] 2 SCR 621; distinguished.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 264 of 1978.

Appeal from the Judgment and Order dated 31-3-1978 of the Allahabad High Court in Criminal Appeal No. 597/76.

A.N. Mulla and S.K. Jain for the Appellant.

O.P. Rana for the Respondent.

The Judgment of V.R. Krishna Iyer, P.N. Shinghal and D. A. Desai JJ. was delivered by Krishna Iyer, J.P.S. Kailasam, J. gave a dissenting opinion on behalf of himself and A. D. Koshal, J.

KRISHNA IYER, J.-Exordially speaking, the point for decision is short but its legal import and human portent are deep, sounding in constitutional values and meriting incisive examination. Where the question wears a simple look but its answer strikes at life and liberty we must proceed on the inarticulate major premise of human law as the solemn delivery system of human justice. In formal terms, the problem to be resolved is the vires of Order XXI, Rule 15(1)

(c) of the Supreme Court Rules (the Rules, for short), but in juristic terms it turns on the inflexible stages as against its facultative facets of an appellate hearing when it is a first appear against a death sentence or life imprisonment. More particularly, is an appeal to the Supreme Court falling within the scope of Art. 134(1) or the enlarged jurisdiction permitted by Art. 134(2) liable to shorthand hearing and peril of summary dismissal? Brevi manu, the appellant urges that Art. 134 of the Constitution compels this Court to hear and dispose of criminal appeals of the grave categories covered by it, not exparte as Order XXI Rule 15(1) (c) of the Rules permits but in extenso, and only after notice to the State and with the record of the case before it. Therefore, the Rule is bad.

Any legal issue of profound impact, if regarded by Judges literally and not creatively, may be given short shrift, especially if counsel is more assertive than explorative, produces more heat than light and the text to be interpreted lends itself to one sense on the surface and another in the deeper layers. But when the consequences of the construction can be calamitous and the subject-matter involves the-right to life and long loss of liberty, a final court, like ours, must reflect on the meaning of meanings, the human values which illumine our legal system and the ends of justice the means of law must serve. The heart and the head interact and interpret.

A thumb-nail sketch of the sequence of facts may be necessary to get a hang of the constitutional core of the case. Several persons, including the appellants, were accused of murder and other violent offences but were acquitted by the Sessions Judge. The State carried an appeal to the High Court against the acquittal of all the 18 accused persons. In an elaborate judgment the `High Court found the case of the prosecution proved although it confirmed the acquittal of quite a few. The convicted accused, 12 in number, were awarded life imprisonment under s. 302 read with s. 149, I.P.C. and lesser terms of imprisonment for other offences. Thereupon the convicted appellants preferred an appeal to this Court under s. 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, (for short the Enlargement Act). This appeal was listed for preliminary hearing ex parte under Rule 15(1)(c) of the Rules (as amended in 1978). When the case was opened at the preliminary hearing counsel for the appellants contended that, as an inalienable - incident of a statutory appeal, his clients were entitled to a full fledged hearing after notice to the State and not an abbreviated disposal in the shape of a preliminary hearing, however long that hearing might be. Thereupon, the court passed the following order:

> "The appellants have challenged the constitutional validity of clause (c) of sub-rule (1) of rule 15 of order XXI of the Supreme Court Rules, which enables an appeal of the kind with which we are concerned, to be placed for hearing exparte before the Court for ad mission. In that view of the matter, we think that unless the question of the constitutional validity of the rule is 1 decided, we cannot have a preliminary hearing of this appeal for admission. Let the records, therefore, be placed before the Hon'ble the Chief Justice for giving such directions as he may deem fit and proper."

This Bench has come to be seized of the case in the constitutional setting. Such is the scenario, the last and most crucial stage of ' which is the hearing before this Constitution Bench.

A little elucidation of the legal matrix which has given rise to the contentions may be useful. This Court has jurisdiction over a wide range and long reach of litigation under Art. 136 of the Constitution which includes the power to grant leave to appeal in criminal matters. But this is a discretionary jurisdiction with drastic self imposed limitations rarely realised by the gambling litigant and has hardly any semblance of an absolute right of appeal necessarily fol lowed by a full debate after notice to the adversary. But a segment of criminal cases, standing out as a deadly category is, however, dealt with separately by Art.

134. In a short-hand form, sub-clause (1) clothes an accused person, who has been acquitted by the trial court but sentenced to death at the appellate level, or has been tried by the High Court by withdrawal of the case from any other court subordinate to it and in such trial has been visited with death sentence, or has secured a certificate that his case is of such great moment as to qualify for pronouncement by the Supreme Court, with a right- shall we say, a constitutional right-of appeal to this Court. More over, under clause (2) of this Article, Parliament may make law for conferring a statutory right of appeal on other classes of convicts. A Pursuant to this power Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, whereby persons acquitted by the trial court but awarded imprisonment l`or life, or for ten years and more, enjoy a statutory right of appeal.

The proviso to Article 134(1) enables this Court to make provisions subject to which appeals under sub-clause

(c) of Article 134 shall lie. These provisions are to be made under clause (1) (d) of Article 145 which, in specific terms, deals with rules as to the entertainment of appeals under sub-clause- (c) of clause (1) of Article 134. We are not concerned with these rules which relate to the entertainment of appeals or provisions subject to which the appeal may be instituted and do not trench upon the right of appeal or the manner of hearing. But Article 145(1) (b) enables the Supreme Court to make, rules, inter alia, as to the procedure for hearing appeals. One such rule is Order XXI Rule 15 which warrants preliminary hearing and disposal of all categories of appeals covered by Article 134(2). The fate of the present appeal hung in the balance at such a preliminary hearing and counsel challenged the vires of the rule itself. In its wake has come the present hearing.

This sets the stage for a more comprehensive approach to the constitutional problems arising in the case. We must make i clear that we are not concerned with the merits of the appeal at all but are confined to a consideration of the validity of the impugned rule. If we hold that the said rule is ultra vires and further hold that there shall be a regular, full-dress hearing of the appeal a preliminary hearing will be obviated and notice in the appeal will have to go to the State. It requires to be specifically mentioned, although there is no hint about its advertence at the earlier preliminary hearing that the Criminal Procedure Code, 1973 has a fasciculus of provisions relating to appeals, the manner of their hearing and the procedure for their disposal, which is comprehensive enough to cover the present category embraced by Order XXI Rule 15(l)(c). Therefore, the effect of the Sections in the Code hearing on the issue under discussion may also have to be studied before we finally pronounce on the legality Or a preliminary hearing in a criminal appeal filed in exercise of a constitutional or statutory right.

Our consideration falls into two chapters as it were, the first and more important turning on the constitutional provisions vis-a-vis Order XXI Rule (l)(c) and the second turning on the construction and impact of s. 384, Cr. P.C. Taking up the constitutional aspects first, we may proceed to state, right away, the complex of provisions relevant to the discussion and the perspective in which we must read their message.

Art. 134 of the Constitution confers criminal appellate jurisdiction on this Court:

> 134. Appellate jurisdiction of Supreme Court in regard to criminal matters.-
>
> (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court-
>
> (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
>
> (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death: or
>
> (c) certifies that the case is a fit one for appeal to the Supreme Court:
>
> Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require. (2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law No argument is needed to realise the gravity of the subject cover ed by the first two clauses of the article death sentence for the first time or in reversal of an acquittal. Human life is too dear to be deprived of by a death sentence without so much as a single appeal after its award. Our founding faith in human rights is the only warrant for the entrustment of this appellate jurisdiction on the Supreme Court which is far removed from the trial court and is intercepted by the High Court, an elevated tribunal manned by judges of proven calibre. The symbolic meaning is obvious. Life is no matter for easy despatch even by the judicial process and a serious second look is the minimum that the State owes to the citizen before his gallowed farewell. To truncate the fullness of appellate scrutiny into ex parte disposals despite the deliberate insertion by the framers of the Constitution of an express provision, by a procedural knife, may often frustrate their profound concern. Judicial professionalism, at higher level, is particularly conscientious and careful; but all professionalism suffers, by custom, from scelerosis in practice. And so, n full-scale hearing in a first appeal is the fair insistence of the Constitution when the risk is to

precious life.

> We are aware that the disposal of appeals involving death penalty receives anxious concern and deep reflection on the part of judges. We are conscious that the grave stakes forbid judges from dismissing appeals without satisfying themselves against error. But human limitations, perfunctoriness of counsel, oversight of some material hardly highlighted in the judgment under appeal and the misfortune that ex parte examination dulls attention while debate at the bar sparks mental plugs-these too are realities.
>
> Likewise, Art. 134 (1) (c) spells a measure of seriousness because the High Court which has heard the case certifies solemnly that it involves questions of such moment that the Supreme Court itself must resolve them. To dispose of such a matter by a preliminary hearing is to cast a reflection on the High Court's capacity to understand the seriousness of a certification.
>
> Now it is relevant to read Art. 136(1).
>
> 136. Special leave to appeal by the Supreme Court (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

A plenary discretion vests in the Supreme Court to deign or decline to grant leave to appeal against any conviction or sentence. Before deciding to grant or reject such leave the court accords an oral hearing after perusing all the papers produced. Once leave is granted, is heard, after notice to the State, in full panoply. After leave, the appeal is born. Then it ripens into fullness and is disposed of when both sides are present. No appeal, after leave, is dismissed summarily or ex parte. The relevance (If Art. 136 in an examination of Art. 134 is this. If Art. 136 gives a discretionary power to grant leave to appeal or to dismiss in limine, after an ex parte hearing (or after issue of notice if the court so chooses), Art. 134, which gives a constitutional right to appeal, as it were, must stand on a higher footing lest the Constitution-makers be held to have essayed in supererogation. Surely, there is much more 'hearing' content in an absolute appellate right than in a precarious 'special leave' motion. Jurisprudentially, a right is larger than a permission. What is irresistible is that Art. 134 puts the momentous class of cases covered by it beyond the discretionary compass of Art. 136 and within the compulsory area of full hearing such as would follow upon leave being granted under Art. 136(1). But this is not the end of the journey. For, a full hearing may not obligate dragging the opposite side to court involving expense and delay. Fullness of hearing of the proponent is not incompatible with non- hearing of the opponent where after appreciating all that could be urged in support of the cause there is no need felt to call upon the other side, as where the proposition is groundless, frivolous or not prima facie statable. The ambit of appellate hearing may have to be explored in the constitutional context to which we will advert later.

The next step necessitates setting out, as an integral part of the comprehensive picture, Art. 145:

145. Rules of Court, etc.-

(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including:

(a) .....

(b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to l-e entered;

(c) .....

(cc) .....

(d) rules as to the entertainment of appeals under s clause (c) or clause (l) of article 134;

(e) .....

(i) .....

(g) .....

(h) .....

(i) rules providing for the summary determination of appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

(j) .....

This Court has framed rules under this article. The pertinent rule, which is impugned as ultra vires is Order XXI Rule 15(1) (c) which may usefully be read here:

15. (1). The petition of appeal shall be registered and numbered as soon as it is lodged. Each of the following categories of appeals, on being registered, shall be put up for hearing ex parte before the Court which may either dismiss it summarily or direct issue of notice to all necessary parties or may make such orders, as the circumstances of the case may require, namely:-

(a) .....

(b) .....

(c) an appeal under sub-clause (a) or sub clause

(b) of clause (1) of article 134 of the Constitution, or under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (28 of 1970) or under section 379 of the Code of Criminal Procedure, 1973 (2 of 1974).

Plainly, this rule clothes the court with power to shorten the life of an appeal even under Article 134 by dismissing it ex-parte, summarily. Is this abbreviatory power absonent with the appellate scheme envisaged in Art. 134 and, therefor, excessive or offensive and void ? Or is the rule valid because it does not bear upon the substantive right of appeal but relates to the procedure for hearing and fall squarely within Art. 145(1)(b) ? This is the main crux of the debate.

It would be noticed that Art. 134(2) empowers Parliament to expand the jurisdiction of the Supreme Court to entertain criminal appeals. Parliament, in exercise of this power, enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (for short, the Enlargement Act). The relevant section (sec. 2) states: H

2. Enlarged appellate jurisdiction of Supreme Court in regard to criminal matters.-Without prejudice to the powers conferred on the Supreme Court by clause (1) of Act 134 of the Constitution, an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court-

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than tell years;

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years.

Thus a right to appeal to the Supreme Court is given to convicts whom the High Court has, for the first time sentenced to life imprisonment or to a term of or above ten years of rigorous imprisonment. There is no doubt that Parliament, in its grave concern for long incarceration being subject to great scrutiny at the highest level if first inflicted by the High Court, granted a right of appeal in such cases and equated it with that granted under Art. 134(1)(a) and (b). So what applies to death sentence cases applies to life term cases too and this must be borne in mind in the interpretative process. This emphatic import is clear once we excerpt the relevant part of the Objects and Reasons:

"While sub-clauses (a) and (b) of Art. 134(1) of the Constitution confer upon the accused an absolute right of appeal, clause (c) confers upon the High Court a discretion to grant, a certificate to the accused to appeal in cases not falling under sub-clauses (a) and

> (b). The grant of certificate under Art. 134(1) (c) is not a matter of course. The certificate is granted only where there has been an infringement of the essential principles of justice or there is substantial question of law or principle involved; in short the certificate, would not be granted unless there are exceptional and special circumstances. The Supreme Court has also held that the conditions pre-requisite for the exercise af the discretionary power to grant a certificate under Art. 134 (1) (c) cannot be precisely formulated but it should be exercised sparingly and not to convert the Supreme Court into an ordinary court of criminal appeal.

An accused person has no absolute right of appeal even A in circumstances mentioned in clauses (a) and

(b) of Art. 134(1) if the High Court sentences him to life imprisonment or imprisonment of 10 or more years. In such a case his appeal would be admitted in special and exceptional cir cumstances only either under Art. 134(1) (c) or Art. 136 of the Constitution.

* * * * It is therefore proposed to enlarge the appellate jurisdiction of the Supreme Court empowering it to entertain and hear appeals also in cases mentioned in sub-clauses (a) and (b) of clause (2) of the Bill." What is created is an unconditional right of appeal, nothing less and wider than is enjoyed under Art. 136.

We have stated at the outset that for satisfactory understanding of the problem and its solution, certain provisions of the Criminal Procedure Code which cover the same ground need to be dealt with. We will advert to them briefly here conscious that the crucial issue is constitutional. The Code cannot control or contradict the Constitution as the stream cannot rise higher than the source. The provisions of the Code, invaluable as canalising the exercise of the appellate power, must be informed by and be subservient to the normative import of the Supreme Lex lest they run aground and be wrecked.

Chapter XXIX deals with appeals. Taking cognizance of the Enlargement Act the Code has enacted Sec. 374(1) and Sec. 379 which, perhaps, are redundant save for completeness. These are new provisions not found in the Code of 1898 and may be reproduced:

> 374(1). Any person convicted on a trial held by a High Court in its extra-ordinary original criminal jurisdiction may appeal to the Supreme Court.
>
> 379. Where the High Court has, on appeal, reversed an order of acquittal of an accused person and convicted him and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more. he may appeal to the Supreme Court.

Section 384 is significant because it has a decisive bearing on the State of appeals like the present. This Section is in part a mechanical or meaningful?) reproduction of the corresponding provision(s. 421) in the vintage Code.

A casual persual discloses that s. 384 is an omnibus provision embracing all appeals, big and small, grave and goofy, involving a petty fine or inflicting, for the first time, a hanging sentence. And regardless of the stakes, the appellate court is given the pervasive power to dismiss the appeal summarily, and worse, even without calling for the record of the case and without recording its reasons if the Court is higher than the Court of Session. At first blush, a blanket power to dismiss summarily, ex parte, sans record of the case, sans record of reasons, even where an acquitted accused is sentenced to death for the first time by the High Court, is neither human law nor human justice if our jurisprudence is sensitized by the humanity of the Preamble to the Constitution or responsive to the vibrant commitment to civilized values. Petrified print processed through the legislative mint becomes living law when, and only when, its text is tuned to the humane note of the Constitution. We will dwell on the harmonics of the Constitution first since the fundamental note must emanate from it. I) The question then is whether a statutory right of appeal necessarily spells the full unfoldment of notice to the respondent, sending for the records and record of reasons by a speaking judgment. If the answer is in the affirmative the survival of Order XXI Rule 15(1) (c) is perilous. Reaching the same result by resort to artificial respiration from s. 384 may have to be considered. But anticipating our conclusion to avoid suspense, we sustain both the provisions by reading down their scope, substance and intendment.

The appellants have an undeniable right of appeal; but what are the necessary components of a hearing when such a right is exercised ?

Counsel for the appellant insisted that an absolute right of appeal, as he described it, casts an inflexible obligation on the court to send For the record of the case, to hear both parties, and to make a reasoned judgment. Therefore, to scuttle the appeal by a summary hearing on a preliminary posting, absent record, ex parte and absolved from giving reasons is to be; absolutist-a position absonant with the mandate of the Enlargement Act and, indeed, of the Constitution in Article 134 (1) . Counsel's ipse dixit did not convince us but we have pondered over the issue in depth" being disinclined summarily to dismiss.

At the threshold, we have to delineate the amplitude of an appeal, not in abstract terms but in the concrete context of Article 134 read with Article 145 and order XXI Rule 15 and s. 384 of the Criminal Procedure Code, 1973. The nature of the appeal process cannot be cast in a rigid mould as it varies with jurisdictions and systems of jurisprudence. This point has been brought out sharply in "Final Appeal. "The learned authors ask :

> "But what does 'appeal' really mean : indeed, is it a meaningful term at all in any universal sense ? The word is in fact merely a term of convenient usage, part of a system of linguistic shorthand which accepts the need for a penumbra of uncertainty in order to achieve universal comprehensibility at a very low level of exactitude. Thus, while 'appeal' is a generic term broadly meaningful to all lawyers in describing a feature common to a wide range of legal systems, it would be misleading to impute a precise meaning to the term, or to assume, on the grounds that the word (or its translated equivalent) has international currency, that the concept of an appeal means the same thing in a wide range of systems.

> On any orthodox definition, an appeal includes three basic elements: a decision (usually the judgment of a court or the ruling of an administrative body) from which an appeal is made; a person or persons aggrieved by the decision (who is often, though by no means necessarily party to the original proceedings) and a reviewing body ready and willing to entertain the appeal."

The elasticity of the idea is illumined by yet another passage which bears quotation:

> "'Appeals' can be arranged along a continuum of increasingly formalised procedure, ranging from a concerned man in supplication before his tribal chief to something as jurisprudentially sophisticated as appeal by certiorari to the Supreme Court of the United States. Like Aneurin Bevan's elephant an appeal can only be described when it walks through the court room door..... The nature of a particular appellate process-indeed the character of an entire legal system-depends upon a multiplicity of interrelated though largely imponderable) factors operating within the system. The structure of the courts; the status and rule (both objectively and subjectively perceived) of judges and lawyers, the form of law itself-whether, for example it is derived from a code or from judicial precedent modified by statute; the attitude of the courts to the authority of decided cases; the political and administrative structure of the country concerned-whether for example its internal sovereignty is limited by its allegience to a colonizing power. The list of possible factors is endless, and their weight and function in the social equation defy precise analysis."

In short, we agree in principle with the sum-up of the concept made by the author:

> "Appeal, as we have stressed, covers a multitude of jurisprudential ideas. The layman's expectation of an appeal is very often quite different from that of the lawyer and many an aggrieved plaintiff denied his 'just' remedy by judge or jury has come upon the disturbing reality that in England a finding of fact can seldom, if ever, form the basis of an appeal. Similarly, a Frenchman accustomed to a narrowly legalistic appeal in cessation, subject to subsequent reargument in a court below, would find little familiarity in the ponderous finality of the judgment of the House of Lords. And a seventeenth-century lawyer accustomed to a painstaking search for trivial mistakes in the court record, which formed the basis of the appeal by writ of error, would be bewildered by the great flexibility and increased sophistication of a jurisprudential' argument which characterize a modern appeal."

Whatever the protean forms the appellate process may take, the goal is justice so that a disgruntled litigant cannot convert his right of appeal into a bull in a china shop breaking down the court system by sufferance of interminable submissions after several tribunals have screened his case and found it fruitless.

This throws us back to a definitional evaluation of the precise content of 'appeal' in the specific constitutional perspective and statutory setting. Once we accept the liquidity of the appellate

concept we are logically led into a study of the imperatives of 'appeal' within the meaning of Art. 134. Since the right conferred by the Enlargement Act has its source in Art. 134(2) it is fair to attribute common features to the constitutional and statutory rights of appeal in the criminal specialities covered by Order XXI Rule 15(1) (c). The key question is whether a right of appeal casts an inexorable obligation on the Supreme Court not merely to hear the appellant at a preliminary stage but proceed invariably to issue notice to the opposite side and hear him too. Another bone of contention turns on the compulsion to consider the appeal only after receiving the records in the case from the court below. The core controversy involves a third element, namely, the inevitable necessity to state reasons for the conclusions, as distinguished from the extinguishment of the proceedings with the utmost verbal economy by the use of a single word 'dismissed'. These triune facets cannot be judged in vacuo but informed by the grim realities surrounding the disposal. Human jurisprudence is not a brooding omnipotence in the sky, but a normative science and technology dealing with the work, wealth and happiness of mankind as well as its blood, toils, tears and sweat. The higher the consciousness of the law, especially constitutional law, the deeper the concern for the worth of the human person that our legal culture, since Independence, has manifested; and the gravity of the consequences of the decision in appeal on life itself invests the concept with some essential features.

It is just as well that we remind ourselves of a value- setter here. Life and liberty have been the cynosure of special constitutional attention in Art. 21, the fuller implications whereof have been unrevelled in Maneka Gandhi's case(1). When we read the signification of the right of appeal under Art. 134 we must remember that it is a part of the procedure established by law for the protection of life and personal liberty. Surely, law, in this setting, is a pregnant expression. Bhagwati, J. in Maneka Gandhi (supra) stated the position emphatically and since then this Court has followed that prescription and even developed it in humane directions a striking example of which is the recent judgment in Presidention Reference No. 1 of 1978.(2) "Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements ?" asks Bhagwati, J. in the leading opinion, and answers:

> "Obviously, the procedure cannot be arbitrary, unfair or unreasonable"...."The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Art. 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Art. 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Art. 21 would not be satisfied." Holding that natural justice was part of Indian Constitutional jurisprudence the learned Judge quoted Lord Morris of Borth- y-Gest in Wiseman v. Barneman : (3) ".... that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law."

Bhagwati, J, brought out the essence of the concept of natural justice as part of reasonable procedure when he observed:

> "The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker. L.J., emphasised in Russel v. Duke of Norfolk(1) that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case." What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal."

One of us (Krishna Iyer, J) emphasised the fundamental fairness required by Article 21 in every law that abridges life or liberty:

> "Procedure established by law, with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessiate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head .... An enacted apparition is a constitutional illusion. Processual justice is writ patently on Art. 21."

We have set out the sweep of Article 21 because the rule framed by this Court, namely Order XXI Rule 15(1)(c), cannot transcend this obligation, nor indeed can s. 384 of the Code. On the contrary, as Bhagwati, J. has observed in Maneka Gandhi's case: (supra) "It is a basic constitutional assumption underlying every statutory grant of power that the authority on which the power is conferred should act constitutionally and not in violation of any fundamental rights."

We have made these general remarks to set the interpretative tone when translating the sense of the expression "appeal shall lie to the Supreme Court". Nothing which will render this right illusory or its fortune chancy can square with the mandate of Article

21. What applies to the right of appeal under s. 2(a) of the Enlargement Act must apply to an appeal under Art. 134(1)(a) and (b) and therefore, it is wiser to be assured of what comports with reasonableness and fairplay in cases covered by the latter category.

When an accused is acquitted by the trial court, the initial presumption of innocence in his favour is reinforced by the factum of acquittal. If this reinforced innocence is not only reversed in appeal but the extreme penalty of death is imposed on him by the High Court, it stands to reason that it requires thorough examination by the Supreme Court. A similar reasoning applies to cases falling under Art. 134(1)(b). When the High Court trying a case sentences a man to death a higher court must examine the merits to satisfy that a human life shall not be haltered without an appellate review. The next step is whether 3 hearing that is to be extended or the review that has to be made by the Supreme Court in such circumstances can be narrowed down to a consideration, in a summary fashion, of the necessarily limited record then available before the Court and total dismissal of the appeal if on such a prima facie examination nothing flawsome is brought out by the

appellant to the satisfaction of the Court. A single right of appeal is more or less a universal requirement of the guarantee of life and liberty rooted in the conception that men are fallible, that Judges are men and that making assurance doubly sure, before irrevocable deprivation of life or liberty comes to pass, a full-scale re-examination of the facts and the law is made an integral part of fundamental fairness or procedure.

A logical follow-up takes us to the reasonable insistence on the full record being made available for the activist play of the appellate judicial mind. The life of the law is not perfection of theory but realisation of justice in the concrete situation of a given system. Considered this way, it is common knowledge that a jail appeal or an appeal filed through an advocate does not contain an exhaustive accompaniment of all the evidentiary material or record of proceedings laying bare legal errors in the judicial steps. It is not unusual in the history of this or other countries that a fatal flaw has been discovered by appellate judges leading to a total acquittal, although even counsel might not have suspected any lurking lethal illegality. Such a high jurisdiction as is vested by Article 134 calls for an active examination by the judges and such a process will be an ineffectual essay in the absence of the whole record. We, therefore, think that a preliminary hearing is hardly of any use bearing in mind that what is being dealt with is an affirmation of death sentence for the first time. In this connection, we may notice that s. 366 of the Code requires the Court of Session which passes a sentence of death to submit the proceedings to the High Court and rulings insist on an independent appellate consideration of the matter and an examination of all relevant material evidence. The Supreme Court's position is analogous, and independent examination of the materials is impossible without the entire records being available. So it is reasonable to hold that before hearing the appeal under Rule 15(1)(c) of Order XXI, ordinarily the records are sent for and are available. Counsel's assistance apart, the court itself must apply its mind, the stakes being grave enough.

The next ingredient contended for is the hearing of the opposite party and notice to him in that behalf. That is to say, the appeal shall not be dismissed summarily or after a mere preliminary hearing even with the records on hand but only after notice and debate at the bar. Speaking generally, our adversary system finds fulfilment when both sides present rival points of view, unearth embedded infirmities and activate the proceeding with the sparks emanating from the clash of arms. Such considerations may not loom large but for the fact that it is a first appeal we are dealing with and the risk is to life itself. Therefore, we hold that in the common run of cases the Court must issue notice to the opposite party, namely, the State and afford a hearing in the presence of both and with the records on hand.

The vital aspects of natural justice have been carefully incorporated in our criminal jurisprudence. The recording of reasons is usually regarded as a necessary requirement of fair decision. The obligation to give reasons for decision when consequence of wrong judgment is forfeiture of life or personal liberty for long periods needs no emphasis, especially when it is a first appeal following upon a heavy sentence imposed for the first time. The constraint to record reasons secures in black and white what the Judge has in mind and given satisfaction to him who is condemned that what he had had to say has not only been 'heard' but considered and recorded. Art. 21 is a binding mandate against blind justice.

It is interesting that in Maneka Gandhi's case (supra) which dealt with a matter of much less significance the denial or impounding of a passport affecting freedom of movement was required to be decided after recording of reasons save in exceptional cases. Far more serious and indeed fatal is the outcome of an appeal under Article 134(1)(a) and (b) of the Constitution and the insistence on recording of reasons is a funadmental requisite of fairness. In this view, in the narrow category of cases covered by Article 134(1)(a) and (b) and s.2(a) of the Enlargement Act, the subject-matter is of sufficient gravity as to justify the recording of reasons in the ultimate order. The inscrutable face of the sphinx and the unspeaking rejection by the judge are incompatible with fundamental fairness in the critical circumstances of death sentence and life sentence cases for the first time imposed by the court next below.

It is true that Judges of the Supreme Court act with utmost caution, consideration and consciousness and with full realisation that life and personal liberty cannot be forfeited without at least the trial tribunal and one higher have fully applied their minds. It is unusual for judges at the highest level to be tempted into affirmance of the judgment under appeal merely because, on the surface, there is copious evidence attractive reasoning and absence of injustice. There is often more than meets the eye which is best left unsaid. All in all, the necessity to put down reasons for decisions, in the special situations we are considering, is interlaced with the element of reasonableness emphasised in Maneka Gandhi's case (supra).

We hasten to obviate a misapprehension. Where the subject matter is less momentous, where two courts have already assessed the evidence and given reasoned decisions, pragmatism and humanism legitimate, in appropriate cases, the passing of judgment at the third tier without giving reasons where the conclusion is one of affirmance. Natural justice cannot be fixed on a rigid frame and fundamental fairness is not unresponsive to circumstances. The very fact that the subject matter is not fraught with loss of life or long incarceration and that the appellate or revisionary authority is a high tribunal which has examined the materials are an assurance of competent and conscientious consideration of the facts and the law. Further protection at the third deck by calling for the records or launching on long ratiocination is a waste of judicial time. Our rules of criminal proceedure and those of other countries with mature systems of justice provide for dismissal at the third level without assigning written reasons, not because there are no reasons, but because the tardy need to document them hampers the hearing of the many cases in the queue that press upon the time of the court at that level.

We uphold Order XXI, Rule 15(1) (c) of the Rules because it does not have play in certain situations. It must be noted that that provision does not make it obligatory to dispose of all cases summarily or at a preliminary hearing. It is an enabling provision, not a compulsive one. The question is whether there is any situation where it can apply at all in the context of Art. 134(1) (a) and (b) and s. 2(a) of the Enlargement Act. If there is a room for operation, the provision can be sustained although confined to such limited situations as a rule of prudence ripening into a rule of law.

Before discussing the categories where the rule will apply, let us get out of our way the view that the rule is valid because Art. 145(1) (b) authorises Procedural invasion of substantive rights is impermissible, Art. 145 authorises only rules of procedure and procedure is "....that which regulates

the formal steps in an action or other judicial proceeding; a form, manner, and order of conducting suits or prosecutions..... "

> "This term is commonly opposed to the sum of legal principles constituting the substance of the law, and denotes the body of rules, whether of practice or of pleading, whereby rights are effectuated through the successful application of the proper remedies."(1) To go beyond and cut into the flesh of the right itself is ultra vires Art. 145. Likewise, harmonious construction of Art. 134 and Art. 145 also leads to the conclusion that the contemplated rules are mere machinery provisions, not manacles on the right handcuffing its exercise.
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> Going to the basics, an appeal "is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below.... An appeal, strictly so called, is one "in which the question is, whether the order of the court from which the appeal is brought was right on the materials which that court had before it" (per Lord Davey, Ponnamma v. Arumogam, (1905) A.C. at p.390) .... A right of appeal, where it exists, is a matter of substance, and not of procedure (Colonial Sugar Refining Co. v. Irving, (1905) AC 369; Newman v. Klausner, (1922) 1 K.B. 228."(2)- Thus, the right of appeal is para mount, the procedure for hearing canalises so that extravagant prolixity or abuse of process can be avoided and a fair workability provided. Amputation is not procedure while pruning may be.

Of course, procedure is within the Court's power but where it pares down prejudicially the very right, carving the kernal out, it violates the provision creating the right. Appeal is a remedial right and if the remedy is reduced to a husk by procedural excess, the right became a casualty. That cannot be.

So we cannot out down but may canalise the basic right by invoking Article 145(1)(b).

Harmoniously read, the sequence is simple. The formalities for entertaining certain types of appeal are covered by Art. 145(1) (d), the manner of hearing and disposal is governed by Art. 145 (1) (b) and the substantive sweep of the appeal as a method of redressal is found in Art. 134. Amputation of this anatomy by procedural surgery is doing violence to the constitutional scheme.

An appeal is a re-hearing, and as Viscount Cave laid down, "It was the duty of a court of appeal in an appeal from a judge sitting alone to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly."(1) Prof. A. L. Goodhart, dealing with appeals on questions of fact in the English Law, wrote:

> "....it may be suggested, with all respect, that when the appellate judges are in agreement with the trial judge, they take the view that they are bound by his conclusions of fact, but when they disagree with his conclusions then they do not

hesitate to overrule them....if an appellate court has full liberty to draw its own inferences from the facts proved, then appeals on so-called questions of fact will have a far greater chance of success. The most highly trained judges may differ concerning the evaluation of facts, just as ordinary persons may. It is here that conflict of opinion is most frequently found. What is regarded as reasonable by one man, whether judge or layman, may be regarded as unreasonable by another. If, therefore, an appeal can be taken on the evaluation of facts, then there is always a chance that the appellant may succeed, even though the initial duty of showing that the judge below was in error may fall on him."(2) Ridding ourselves of finer nuances and philosophic speculations and taking a realistic approach to a problem beset with human variables, it is daily experience to see judges on the high bench differ, and a fortiori so, in the field of sentence. We project this reality in the context of full freedom for the first appellate decider of facts to reach his own finding on offence and sentence, only to highlight how momentous it is-to be or not to be-for the appellant to have his case considered by the highest court when the Constitution and Parliament have conferred a full right of appeal. Summary dismissal, save in glaring cases, may spell grave jeopardy to life-giving justice. That is why Order XXI Rule 15(1)(c) while it survives to weed out worthless appeals, shall remain sheathed in extra-ordinary cases where facts on guilt or the wider range of considerations on sentence are involved.

We must clarify that very right of appeal does not carry with it all the length of getting the record, hearing both sides and giving full reasons for decisions. Then the institutions of justice will come to a grinding halt. Those who feel otherwise may read with profit, et al, Order 41, Rule 11, Civil Procedure Code and the practice of so august a tribunal as the Supreme Court of the United States. Henry J. Abraham writes:

"Appeal. In the instance of a writ of appeal, the aggrieved party has an absolute, statutorily granted right to carry a case to the United States Supreme Court, which in theory must review it. However, the High Tribunal retains the very considerable loophole of being empowered to reject such an appeal on the grounds that the federal question, otherwise validly raised, is "substantial". This highly significant discretionary element in the area of the Court's so-called compulsory appellate jurisdiction caused it to dismiss 70 appeals in the 1955-56 term, for example. Of these 40 were rejected "for want of a substantial federal question", the balance on other jurisdictional grounds. In the 59- 60 term, 63 of a total of 113 appeals were dismissed on the insubostalltiality ground ! As a rule, fully 50 to 60 per cent of the writs of appeal are thus dismissed or the judgment below affirmed without printing the record or oral argument .... In effect, the appeel is hence used but sparingly-to date in approximately 9 per cent of all cases or controversies presented to the Court."(1) Nor are we charmed by some counsel sometimes asscrting the importance of Oral Arguments Unlimited forgetting that prolixity is counter-productive and expensive and obstructive of case-flow.(2) We never deny the brightening of obscure points and the cross- pollination of creative views promoted by an active process of oral argument.

The decision we make is confined to the criminal jurisdiction covered by Art. 134 and Art. 145(1)(b) and s. 384 Criminal Procedure Code. The compelling thought which has pressured our judgment in a matter of life and death in a first appeal to a final court is best expressed by Edmund Cahn:

"For what gives justice its special savor of nobility ? Only the divine wrath that arises in us, girds us, and drives us to action whenever an instance of injustice affronts our sight."(1) Having stressed the appellant's right at great length, we still sustain rule 15(1)(c) of Order XXI. This provision is general and covers all conceivable cases under Art. 134(1). It enables, not obligates. It operates in certain situations, not in every appeal. It merely removes an apprehended disability of the court in summarily dismissing a glaring case where its compulsive continuance, dragging the opposite party, calling up prolix records and expanding on the reasons for the decision, will stall the work of the court (which is an institutional injury to social justice) with no gain to anyone, including the appellant to keep whom in agonising suspense for long is itself an injustice.

What are those cases where a preliminary hearing is a worthwhile exercise ? Without being exhaustive, we may instance some. Where the only ground urged is a point of law which has been squarely covered by a ruling of this Court to keep the appeal lingering longer is survival after death. Where the accused has pleaded guilty of murder and the High Court, on the evidence, is satisfied with the pleas and has awarded the lesser penalty a mere appeal ex misericordin is an exercise in futility. Where a minor procedural irregularity, clearly curable under the Code, is all that the appellant has to urge the full panoply of an appellate bearing is an act of supererogation. Where the grounds, taken at their face value, are frivolous, vexatious, malicious wholly dilatory or blatantly mendacious, the prolongation of an appeal is a premium on abuse of the process of court. Maybe, other cases can be conceived of but we merely illustrate the functional relevance of Order XXI Rule 15(1)(c).

Ordinarily, save where nothing is served by fuller hearing notice must go. If every appeal under Art.134(1)(a) and (b) or s.2(a) of the Enlargement Act, where questions of law or fact are raised, is set down for preliminary hearing and summary disposal, the meaningful difference between Art. 134 and Art. 136 may be judicially eroded and Parliament stultified. Maybe, many of the appeals after fuller examination by this Court may fail. But the minimum processual price of deprivation of precious life or prolonged loss of liberty is a single comprehensive appeal. To be peeved by this need is to offend against the fair play of the Constitution. The horizon of human rights jurisprudence after Maneka Gandhi's case (supra) has many hues.

The relevant provision of the Criminal Procedure Code have already been quoted. Counsel for the appellant had obvious difficulty in overcoming the obstacle of s. 384. That section is sweeping. Any appellate court (which includes the Supreme Court under Art. 134) may hear and dispose of an appeal summarily, without the records

and recording no reasons for dismissal if it is the High Court or the Supreme Court. Literally read, it sounds arbitrary, where death sentence, at the first appeal is involved. Article 21, in its expansive incarnation, may fatally knock down any summary power of fatally knocking down an appellant facing death penalty in first appeal by an unspeaking order. But the generality of the provision if read down, may well be valid and rightly so. If the appeal is at the second or third tier, there is no reason to grumble. If the punishment is not of the dreadful species, there can be no constitutional consternation. After all, to have a giant's strength is not wrong 'but it is tyrannous to use it like a giant' and judges do know this judicious caution. So we hold that the restrictions already indicated in applying Order XXI rule 15(1) (c) may legitimately be read into s. 384 of the Code. Words of wide import and expressions of expansionist potential may always be canalised and constitutionalised-a proposition too well established to be propped by precedents.

The common embankments applicable to Order XXI Rule 15(1) (c) and s. 384 of the Code to prevent unconstitutional overflow may now be concretised, not as rigid manacles but as guidelines for safe exercise. We are hopeful that the Supreme Court will, if found necessary, make clarificatory rules in this behalf.

To conclude, we uphold the vires of Order XXI Rule 15(1)(c) of the Supreme Court Rules and also s. 384 of the Criminal Procedure Code but hold that in their application both the provisions shall be restricted by certain criteria as a permissible exercise in constitutionalisation.

Order XXI Rule 15(1)(c) in action does not mean that all appeals falling within its fold shall be routinely disposed of, as far as possible, on a preliminary hearing. Such a course, as earlier mentioned, obliterates the difference between Articles 134 and 136, between right and leave. The rule, in cases of appeals under Art. 134 (1) (a) and (b) and s. 2(a) is notice, records and reasons, but the exception is preliminary hearing on all such materials as may be placed by the appellant and brief grounds for dismissal. This exceptional category is where, in all conscience, there is no point at all. In cases of real doubt the benefit of doubt goes to the appellant and notice goes to the adversary-even if the chances of allowance of the appeal be not bright. We think it proper to suggest that with a view to invest clarity and avoid ambiguity, Order XXI Rule 15(1)(c) may be suitably modified in conformity with this ruling.

Before we part with this case, it is right to register our view that too many appeals and revisions are a bane of the Indian Judicial System, involving as it does sterile expense and delay and fruitless chase of perfection. The Evershed Committee, a quarter of a century ago, expressed dissatisfaction with the system of multiple appeals what with the social cost of litigative prolongation, burden of precedents and heavy outlay-a luxury which a Third World country can illafford. Too many appeals are counter- productive as A.P. Herbert in 'Uncommon Law' has wittily driven home:

"The people may be taught to believe in one court of appeal; but where there are two they cannot be blamed if they believe in neither. When a man keeps two clocks which tell the time differently, his fellows will receive with suspicion his weightiest pronouncements upon the hour of the day, even if one of them happens to be right."

Way back in 1832 it has been pointed out that-

"The only ground upon which a suitor ought to be allowed to bring the judgment of one court for examination before the members of another is the certainty or extreme probability of finding in the latter tribunal more wisdom and learning, more maturity of deliberation, and a greater capacity of sound decisions than existed in the court from which the appeal is to proceed. But as every appeal is of necessity attended with the two great and positive evils of expense and delay, it is the bounden duty of every wise and good government to take all possible care that the court of appellate jurisdiction shall possess those advantages, and that superior capacity for wise and impartial adjudication, upon the presumption of possessing which, the public support and the confidence of individual suitors is given to the institution." (1) What is important is the choice of mature minds for dispensation of justice according to law and not wasteful multiplication of hierarchical tribunals.

KAILASAM, J.-I had the benefit of perusing the judgment prepared by Krishna Iyer J. I regret I am unable to agree with it.

This appeal is preferred by the 12 appellants under section 379 of the Code of Criminal Procedure, 1973 read with section 1 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 against the judgment dated 31st March, 1978 of the High Court of Judicature at Allahabad, at Lucknow Bench in Criminal Appeal No. 597 of 1976.

The appellants were acquitted by the 1st Temporary Sessions Judge, Pratapgarh in Sessions Case No. 16 of 1969 of all the charges and on an appeal preferred by the State, the order of acquittal was set aside by the High Court and the appellants found guilty and convicted under section 302 read with s. 149, I.P.C., and sentenced to life imprisonment.

The appeal was listed for preliminary hearing under Rule 15 (1) (c) of Order XXI of the Supreme Court Rules, 1966. The appellants filed an application for adducing additional grounds in Crl. Misc. Petition No. 1862 of 1978 wherein it was pleaded that the provision under clause (c) of sub-rule (1) of Rule 15 of Order XXI of the Supreme Court Rules empowering the Court to dismiss the appeal summarily is ultra vires being inconsistent with the provisions of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. It was submitted that the power of the Supreme Court to frame rules under Art. 145 of the Constitution canot be extended to annul the rights conferred under an Act of Parliament. It was further pleaded that an

appeal under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, cannot be dismissed summarily without calling for the records ordering notice to the State and without giving reasons. When the Crl. Misc. Petition No. 1862 of 1978 came up before this Court it was ordered:-

"The appellants have challenged the constitutional validity of cl. (c) of sub-rule (1) of rule 15 of O. XXI of the Supreme Court Rules, which enables an appeal of the kind with which we are concerned, to be placed for hearing ex parte before the Court for admission. In that view of the matter, we think that unless the question of the constitutional validity of the rule is decided, we cannot have a preliminary hearing of this appeal for admission. Let the records, therefore, be placed before the Hon'ble the Chief Justice for giving such directions as he may deem fit and proper."

As the constitutional validity of cl. (c) of rule 15(1) of Order XXI of the Supreme Court Rules was challenged, the matter was placed before the Full Bench by the Chief Justice.

Rule 15 of Order XXI of the Supreme Court Rules 1966 runs as follows:-

"15. (1) The petition of appeal shall be registered and numbered as soon as it is lodged. Each of the following categories of appeals, on being registered, shall be put up for hearing ex parte before the Court which may either dismiss it summarily or direct issue of notice to all necessary parties, or may make such orders, as the circumstances of the case may require, namely:-

(a) an appeal from any judgment, final order or sentence in a criminal proceeding of a High Court summarily dismissing the appeal or the matter, as the case may be before it;

(b) an appeal on a certificate granted by the High Court under Article 132 (1) and/or 134(1) (c) of the Constitution, or under any other provision of law if the High Court has not recorded the reasons or the grounds for granting the certificate.

(c) an appeal under sub-clause (a) or sub-clause

(b) of clause (1) of Article 134 of the Constitution, or under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (28 of 1970) or under section 379 of the Code of Criminal Procedure, 1973 (2 of 1974);

(d) an appeal under section 476 B of the Code of Criminal Procedure, 1898 (5 of 1898).

(e) an appeal under clause (b) of sub-section (1) of section 19 of the Contempt of Courts Act, 1971 (70 of 1971)."

We are concerned with sub-rule (c) in rule 15(1). The Supreme Court Rules were framed in exercise of the powers conferred under Art. 145 of the Constitution and all other powers enabling the Supreme Court to make rules. Art. 145 of the Constitution empowers the Supreme Court subject to the provisions of any law made by Parliament with the approval of the President to make rules from time to time for regulating generally the practice and procedure of the Court. Two sub-articles are relevant and they are sub- articles (b) and (d). While sub-article (b) empowers the Supreme Court to make rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered, Sub-article (d) enables the Supreme Court to frame rules as to the entertainment of appeals under sub-clause

(c) of clause (1) of article 134. Article 134 confers appellate jurisdiction on the Supreme Court in regard to criminal matters:-

> "134. (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court-
>
> (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
>
> (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
>
> (c) certifies that the case is a fit one for appeal to the Supreme Court.

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain an hear appeals from any judgment, final order of sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law."

While an unrestricted right of appeal is provided to the Supreme Court under clauses (a) and (b) i.e. where on appeal an order of acquittal is reversed by the High Court and an accused person is sentenced to death or when the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death, an appeal under article 134(1)

(c) is subject to certain restrictions. An appeal under sub- clause (c) is provided only when the case is certified by the High Court as a fit one for appeal to the Supreme Court. Further an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require. The Supreme Court is

empowered to prescribe rules regarding entertainment of appeals under article 134(1) (c) by Art. 145 (1), sub-article (d).

So far as procedure for hearing appeals generally rules can be framed by the Supreme Court under sub-article (b) of article 145(1). The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970 has conferred on the Supreme Court further power to entertain and hear appeals than conferred on it under Art 134(1) (a) and (b) as provided for in Art 134(2) of the Constitution. As Art. 145(1) (b) enables the Supreme Court to frame rules as to procedure for hearing appeals the procedure thus prescribed will apply to appeals under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970. Rule 15 of Order XXI is framed under article 145(1), sub-article (b). The rules can provide for the procedure for hearing appeals.

Mr. Mulla, the learned counsel, submitted that the rule making power of the Supreme Court is confined only to the rules as to entertainment of appeals under sub-clause (c) of clause (1) of article 134 and would not enable the Supreme Court to frame rules regarding appeals under any other provision. The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, confers right of appeal to the Supreme Court from any judgment, final order of sentence in a criminal proceeding of a High Court in the territory of India if the High Court:

> (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years;
>
> (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years.

The result is that in addition to the right of appeal under Article 134 (1) (a) and (b) an appellant under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 has also a right to appeal unrestricted by any of the provisions of Article 134 (1) (c) or the rules framed by the Supreme Court under article 145 (1) (d). The submission of learned counsel fails to take note of Article 145 (1) (b) which empowers the Supreme Court to frame rules as to the procedure for hearing appeals which would include hearing of appeals under article 134 (1) (a) and (b) of the Constitution as well as appeals under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. The rules therefore are properly made under Art. 145 (1) (b) and would be valid so far as to the procedure for hearing appeals.

The submission of the learned counsel is that when a right of appeal is conferred on a person the appeal can only be disposed of by the Supreme Court after full hearing i.e. after calling for the records, issuing notice to the other side and hearing both the parties and giving reasons for its conclusion. It was submitted that a summary dismissal affects the substantive right of appeal and is not confined to procedure and is contrary to the provisions of the law made by Parliament and as such beyond the rule making powers conferred under article 145 (1) (b). As the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, conferred a right of appeal any

provision under the Supreme Court Rules restricting such appeal is submitted to be outside the scope of the rule-making powers of the Supreme Court.

The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 confers a right of appeal but the procedure as to the hearing of appeal is not prescribed under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. Before referring to the provisions of the Supreme Court Rules relating to the procedure as to hearing of appeals it is useful to refer to the provisions of the law made by Parliament regulating the hearing of the appeal by all courts including the Supreme Court. Chapter XXIX of the Code of Criminal Procedure, 1973, Act 2 of 1974, deals with appeals. Section 374 (1) provides that any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court. This section confers a right of appeal against all convictions whatever the sentence may be on a trial held by the High Court in its extraordinary original criminal jurisdiction, and is thus wider than the right of appeal conferred under art. 134(1) (a) and (b) or under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. Section 375 provides that there will be no appeal where an accused person has pleaded guilty and convicted on such plea by the High Court. This section thus excludes the appeal obviously to the Supreme Court against the conviction on a trial held by the High Court in its extraordinary original criminal jurisdiction if the accused has pleaded gulity. Section 376 excludes appeals in petty cases, where the High Court passes only a sentence of imprisonment for a term not exceeding six months or a fine not exceeding one thousand rupees. Thus though section 374 confers a right of appeal on any person convicted on a trial held by the High Court in its extraordinary original criminal jurisdiction to the Supreme Court, this right is restricted under sections 375 and 376 in that a person who pleads guilty and has been convicted on such plea by the High Court is barred from preferring an appeal to the Supreme Court. So also an appeal against a sentence of imprisonment for a term not exceeding six months or of fine not exceeding one thousand rupees or of both is taken away under s. 376. Section 379 confers a right of appeal to the Supreme Court where the High Court has, on appeal, reversed an order of acquittal of an accused person and convicted him and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more. Section 379 gives effect to the provision of Art. 134 (1) (a) and (b) of the Constitution and section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. The result of the passing of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 and section 379 of the Criminal Procedure Code is that they provide an appeal to the Supreme Court in addition to the right of appeal conferred under Article 134 (1) (a) and (b) of the Constitution.

The contention of Mr. Mulla, the learned counsel for the appellant, is that rule 15 (1) (c) of Order XXI not merely relates to the procedure but also deprives the substantive right of appeal conferred on the accused under article 134 (1) (a) and (b) and the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act,1970 and under s. 379 of the Code of Criminal Procedure. By the impugned rule the appeal on being registered is put up for hearing ex parte before the court and the court is empowered either to dismiss it summarily or direct issue of notice to all necessary parties or make such orders as the circumstances may require. Section 384 of the Code of Crl. Procedure 1973 confers a right on the appellate court to dismiss the appeal summarily when it considers that there is no sufficient ground for interfering. The proviso to the section requires that no appeal presented

under section 382 by the appellant or his pleader shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of his case. An appeal from the appellant from jail cannot be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case. Section 384 (2) provides that before dismissing an appeal under this section, the Court may call for the record of the case. Under sub-section (3) where the Appellate Court dismissing an appeal under sec. 384 is a Court of Sessions or of the Chief Judicial Magistrate, it shall record its reasons for doing so. Sec. 385 prescribes the procedure for hearing appeals not dismissed summarily. While sec. 374 confers a right of appeal, sec. 375 and sec. 376 restricts such a right. Section 384 prescribes the procedure for hearing appeals enabling the Court to dismiss certain appeals summarily and to deal with others under sec. 385 if they are not summarily dismissed. The right of appeal conferred can be curtailed by procedure as envisaged in sec. 384 Crl. Procedure Code or rule 15 Order XXI of the Supreme Court Rules.

We are unable to accept the contention that a right of appeal would mean that before an appeal is disposed of the records should be called for, notice ordered to the other side, the other side heard and reasons given for the disposal of the appeal. The provisions of the Criminal Procedure Code which have been referred to show that all appeal to the Supreme Court under section 374 of the Criminal Procedure Code is restricted by the provisions of sec. 375 and sec. 376 and could be dealt with summarily under sec. 384 of the Criminal Procedure Code. Mr. Mulla, the learned counsel submitted that the provisions of the Criminal Procedure Code are not applicable to the Supreme Court. But this plea does not bear scrutiny in view of the specific provisions making the procedure applicable to the Supreme Court. An appeal to the Supreme Court is subject to the several provisions of the Crl. Procedure Code, including the provisions relating to summary disposal of the appeals. The plea of the learned counsel that the provisions of the impugned rule are contrary to any law made by Parliament is not maintainable. The impugned rule 15 (1) (c), Order XXI, more or less incorporates the provisions found in the Crl. Procedure Code. The contention of the learned counsel that the right conferred on him under article 134 (1) (a) and (b) of the Constitution and under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, is curtailed is therefore without substance.

In the result, we find that the contention of the learned counsel, namely that the impugned rule is beyond the rule-making power of the Supreme Court under article 145 of the Constitution cannot be accepted as article 145(1) (b) specifically enables the Supreme Court to frame rules as to the procedure for hearing appeals. The contention, that the Rule is opposed to the provisions of laws made by Parliament and is thus beyond the scope of rule-making powers under article 145 cannot also be upheld for the reasons stated.

Neither in the Memorandum of Grounds nor in his arguments the learned counsel contended that a summary dismissal of an appeal under the provisions of the Crl. Procedure Code would offend the provisions of Article 21 of the Constitution. In the course of arguments it was submitted that if the impugned rule is construed as empowering the Court to dismiss an appeal summarily, it would offend Art. 21 of the Constitution. When the provisions in the Criminal Procedure Code enabling the

Court to dismiss an appeal summarily is not challenged the impugned rule is equally unassailable.

We will now consider whether the impugned rule would in any way offend Article 21 of the Constitution. Article 21 of the Constitution reads as follows:-

> "No person shall be deprived of his right or personal liberty except according to the procedure established by law."

The words 'Procedure established by law' have been construed by various decisions of this Court. In A. K. Gopalan's case (1950 SCR page 88) it has been held by a majority that the word 'law' in Article 21 had been used in the sense of 'State made' law and not in the sense of law embodying the principles of natural justice. Procedure established by law means "a law made by Union Parliament or Legislature or State." According to Patanjali Sastri J, law in Article 21 did not mean jus naturale but means positive or state made law. Procedure established by law, according to the learned Judge, did not however mean any procedure which may be prescribed by a competent legislature, but the ordinary well-established criminal procedure that is, those settled usages and normal modes of procedure sanctioned by the Criminal Procedure Code which are the general law of criminal procedure in our country. If this test is applied, the procedure, that is challeged, being the procedure prescribed under the Criminal Procedure Code cannot be assailed. Later decisions have pointed out that even though the procedure is prescribed by a competent legislature, it may fail to satisfy the requirements of the article if the proce dure prescribed is no procedure at all. We cannot accept the plea that the procedure prescribed by the Criminal Procedure Code is no procedure at all.

The main objection to the invoking of Article 21 for challenging the validity of the impugned rule is that a person convicted of an offence has no right of appeal unless such a right is conferred by the statute. If the statute does not confer a right of appeal the person has no remedy. If P. K. Mittra v. State of West Bengal. (1) this Court held that a right of appeal is a statutory right which has got to be recognised by the Courts, and the right of appeal, where one exists, cannot be denied in exercise of the discretionary power even of the High Court. An appeal is a creature of the statute and the powers and the jurisdiction of the appellate court must be circumscribed by the words of the statute vide Shankar Kerba Yadhav v. State of Maharashtra.(2) A right of appeal must be given by statute or by some authority equivalent to a statute or rules framed under a statute vide Minakshi v. Subramanya.(3) The powers and the jurisdiction of the appellate Court as prescribed by the Criminal Procedure Code and the rule cannot be said to deny a right of hearing to the appellant. The plea that audialteram partem has been violated has also no substance. The right to be heard in an appeal is regulated by statute. In the appeal with which we are concerned, the accused persons had the benefit of a full trial before a Sessions Court at the first instance or before the High Court After a full trial the judgment is rendered by a High Judicial Officer such as a Session Judge or a High Court Judge. The appellate court has before it the judgment of the lower court and the petition for appeal. At the preliminary hearing the appellant or his pleader is heard before the court decides to dismiss the appeal summarily.

The impugned rule prescribes the procedure for hearing of the appeals. The Criminal Procedure Code provides that there shall be no right of appeal in cases where the accused is convicted by the

High Court on a plea of guilty or when the High Court passed a sentence of imprisonment for a term not exceeding six months. The appellate court is empowered to dismiss the appeal summarily when there are no sufficient grounds for interfering. The power to summarily dismiss an appeal is conferred under the Criminal Procedure Code when the court is satisfied that there are no sufficient grounds for interfering with the judgment appealed against. This decision is taken by the appellate court being the Chief Judicial Magistrate, Court of Session, the High Court or the Supreme Court. In the case of the Chief Judicial Magistrate and Court of Session, reasons should be recorded for summary dismissal. The High Court and the Supreme Court need not record reasons for summarily dismissing the appeal. It is necessary that the Supreme Court or the High Court should be satisfied that there are no sufficient grounds for interfering. The conclusion that there are no sufficient grounds for interfering is arrived by the High Court or the Supreme Court after hearing the appellant, examining the judgment and the petition for appeal. There can be no doubt that the appellate court is discharging an onerous duty in dismissing a case summarily. It may be noted that the Code provides for calling for the records before dismissing an appeal. In cases where the appellant is sentenced to death, imprisonment for life or long term of imprisonment, it is the bounden duty of the appellate court to hear the appellant, examine the petition of appeal and copy of the judgment appealed against. If it feels necessary to call for the records of the case, it is its duty to call for the records and examine them, before coming to the conclusion that there are no sufficient grounds for interfering. It is the responsibility of the appellate authority to order notice and hear the other side if it is not satisfied that there are no sufficient grounds for interfering. Equally it is the duty of the appellate court to dismiss the appeal summarily if it satisfied that there are no sufficient grounds for interefering. This duty is imposed for regulating the work of the courts for otherwise judicial time would be unnecessarily spent. Taking into account the fact that the duty to decide the question where there are not sufficient grounds for interfering is placed on highly placed judicial officers after affording a due hearing, it cannot be stated that the very right of appeal has been taken away. It is not possible to accept the contention that the procedure prescribed is not in accordance with the law as the Criminal Procedure Code and the impugned rules are laws properly made. It cannot also be said that the law is violative of the right conferred under Article 21.

The decision of the Supreme Court rendered under sec. 421 of the Crl. Procedure Code of 1898 which is similar to section 384 of the Code of Criminal Procedure of 1973 may be referred to. In Govinda Kadam v. State of Maharashtra(1) the Supreme Court held that the appellate Court has full power under section 421 of the Crl. Procedure Code to dismiss an appeal in limine even without sending for the records if on perusal of the impugned order and the petition of appeal it is satisfied with the correctness of the order appealed against. It may be emphasised that the power of summary dismissal has to be exercised after perusing the petition of appeal and the copy of the order appealed against and after affording the appellant and his pleader a reasonable opportunity of being heard in support of the appeal. The order summarily dismissing an appeal by the, High Court by the word 'rejected' is not violative of any statutory provision. While holding that a summary rejection of the appeal by the High Court is not violative of any statutory provision, this Court pointed out that it is desirable that reasons are recorded by the High Court when prima facie arguable issues have been raised as that would enable the Supreme Court to appreciate the reasons for rejection of the appeal by the High Court. These observations are not applicable to the Supreme Court because the order of this Court is final.

Rule 15 (1) of the Supreme Court Rules enables the Supreme Court after putting up the appeal for hearing ex- parte to dismiss it summarily or direct issue of notice to all necessary parties or may make such orders as the circumstances of the case may require. Rule 13 prescribes that a memorandum of appeal shall be in the form of a petition stating succinctly and briefly as far as possible in chronological order, the principal steps in the proceedings from its commencement till its conclusion in the High Court. Sub-rule 2 of rule 13 prescribes that the petition of appeal shall be accompanied by a certified copy of the judgment or order appealed from, and in the case of an appeal on a certificate also of the certificate granted by the High Court, and of the order granting the said certificate. Rule 14 prescribes that when the appellant is in jail, he may present his petition of appeal and the documents mentioned in rule 13 including any written argument which he may desire to advance to the Officer-in- charge of the jail, who shall forthwith forward the same to the Registrar of this Court. The petition of appeal thus received under rule 13 and 14 is put up for hearing ex-parte before the Court which is empowered either to dismiss it summarily or to direct issue notice to the necessary parties. Thus it is to be seen that the procedure contemplated in rules 13, 14 and 15 is almost similar to the provisions of the Code of Criminal Procedure referred to above. In an appeal sent by the appellant from jail he is entitled to and any written arguments which he may desire to advance in support of his appeal. The Court in proper cases in which it considers it desirable would engage an advocate to present the case of the appellant in jail. The mere fact that the appellant in jail is not being heard in person or through an advocate would not mean that the appeal of the appellant in jail is not being heard. The Court peruses the judgment, petition of appeal and the written arguments, if any, before proceeding to take action under rule 15. This Court being the highest Court is not required to give reasons but is expected to bestow the greatest care in exercising the power of summary dismissal under Rule 15. On a consideration of the provisions of the Criminal Procedure Code and the impugned rules, we are unable to accept any of the contentions raised by the learned counsel.

In passing a reference was made by the learned counsel to the decision of this Court reported in [1978] 2 S.C.R. 621 (Maneka Gandhi v. Union of India) in support of his contention that the rights conferred under article 21 are also available to the appellants before the Supreme Court. We are unable to accept the contention for the case referred to is one wherein an opportunity was not provided to a person before the passport was impounded. It has no application to an appeal as in the present case the appellant is properly heard in a trial and is also heard by the appellate court. We feel that Maneka Gandhi's case has no application to the facts of the present case.

In the result we reject all the contentions put forward by the learned counsel and hold that the impugned Rule is within the rule making power of the Supreme Court and answer the reference accordingly.

ORDER In the light of the majority judgment, we uphold the vires of Order XXI Rule 15(1)(c) of the Supreme Court Rules and also S. 384 of the Criminal Procedure Code but hold that in their application both the provisions shall be governed by the criteria laid down in the majority Judgment.

In the appeal, above mentioned, we direct notice to the respondent.

N.V.K.

COLLECTOR, LAND ACQUISITION, ANANTNAG & ANR. A

v.

MST. KATIJI & ORS.

FEBRUARY 19, 1987

[M.P. THAKKAR AND B.C. RAY, JJ.] B

Indian Limitation Act, 1963; s.5—Condoning delay in filing appeal—Existence of 'sufficient cause'—Determination of—State seeking condonation of delay—To be treated equitably.

An appeal by the State, against a decision enhancing compensation in respect of acquisition of lands for a public purpose, raising important questions as regards principles of valuation, was dismissed by the High Court as time barred, being four days beyond time, by rejecting an application for condonation of dalay. C

The State appealed to this Court by special leave. D

Allowing the appeal,

HLED: 1.1 The expression 'sufficient cause' employed by the legislature in s.5 of the Indian Limitation Act, 1963 is adequately elastic to enable the Courts to do substantial justice to parties by disposing of matters on merits. [388E-F] E

1.2 The State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an equitable manner. The Courts, therefore, have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression 'sufficient cause'. So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits. [390B-C] F G

2. In the instant case, sufficient cause exists for delay in instituting the appeal in the High Court. Delay is, therefore, condoned. The matter is remitted to the High Court for disposal on merits. [390C-D]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 460 of 1987. H

From the Judgment and Order dated 14.4.1986 of the Jammu & and Kashmir High Court in Civil 1st Appeal No. 54 of 1985.

Altaf Anjad, Adv. General and S.K. Bhattacharya for the Appellants.

S.M. Aquil and Shakeel Ahmed for the Respondents.

The Order of the Court was delivered by

THAKKAR, J. To condone, or not to condone, is not the only question. Whether or not to apply the same standard in applying the *"sufficient cause"* test to all the litigants regardless of their personality in the said context is another.

An appeal preferred by the State of Jammu & Kashmir arising out of a decision enhancing compensation in respect of acquisition of lands for a public purpose to the extent of nearly 14 lakhs rupees by making an upward revision of the order of 800% (from Rs.1000 per kanal to Rs.8000 per kanal) which also raised important questions as regards principles of valuation was dismissed as time barred being 4 days beyond time by rejecting an application for condonation of delay. Hence this appeal by special leave.

The legislature has conferred the power to condone delay by enacting Section 5[1] of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on *'merits'*. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice—that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. "Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late. A

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. B

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner. C

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. D

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. E

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. F

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a step-motherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinary (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the in- G H

herited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on mertis in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.

Appeal is allowed accordingly. No costs.

P.S.S. Appeal allowed.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2413/2020
(Arising out of SLP(C) No. 12892/2019)

Assistant Commissioner (CT)
LTU, Kakinada & Ors. **...Appellant(s)**

Versus

M/s. Glaxo Smith Kline Consumer
Health Care Limited **...Respondent(s)**

J U D G M E N T

A.M. Khanwilkar, J.

1. Leave granted.

2. The moot question in this appeal emanating from the judgment and order dated 19.11.2018 in Writ Petition No. 39418/2018 passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh[1] is: whether the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India ought to entertain a challenge to the assessment order on the sole

1 For short, "the High Court"

ground that the statutory remedy of appeal against that order stood foreclosed by the law of limitation?

3. The respondent is a registered dealer on the rolls of Assistant Commissioner of Commercial Taxes, Large Tax Payer Unit at Kakinada Division[2] under the provisions of Andhra Pradesh Value Added Tax Act, 2005[3] and the Central Sales Tax Act, 1956[4] and is engaged in the business of manufacturing and sale of Horlicks, Boost, Biscuits, Ghee, Ayurvedic Medicines etc. The Assistant Commissioner had called upon the respondent to produce books of accounts for the assessment year 2013-14 for finalisation of assessment under the 1956 Act. The authorised representative of the respondent produced declaration in Form "F" in support of its claim that certain transactions are inter-State transfers. The information and declaration furnished by the respondent was duly verified and after giving personal hearing to the respondent, final assessment order came to be passed by the Assistant Commissioner on 21.6.2017, raising demand of Rs.76,73,197/- (Rupees seventy six lakhs seventy three thousand one hundred ninety seven only) against turnover

2 For short, "the Assistant Commissioner"
3 For short, "the 2005 Act"
4 For short, "the 1956 Act"

of Rs.3,44,15,240/- (Rupees three crores forty four lakhs fifteen thousand two hundred forty only) on the finding that the respondent had failed to submit Form "F" to the tune of the turnover reported in the Central Sales Tax (CST) return. This assessment order was duly served on the respondent on 22.6.2017. The respondent did not file appeal against this assessment order within the statutory period. Instead, amount equivalent to 12.5% of the demand was deposited on 12.9.2017. The respondent then filed an application under Rule 60 of the Andhra Pradesh Value Added Tax Rules, 2005[5], highlighting the error made in raising the demand based on incorrect turnover reported by the respondent. This application was filed only on 8.5.2018, which came to be rejected by the Assistant Commissioner vide order dated 11.5.2018. Aggrieved by the decision dated 11.5.2018, the respondent filed an appeal before the Appellate Deputy Commissioner of Commercial Taxes, Vijayawada[6] on 28.5.2018, which came to be rejected on 17.8.2018. It is only thereafter, the respondent-assessee was advised to file appeal before the Appellate Deputy Commissioner

5 For short, "the 2005 Rules"
6 For short, "the Appellate Deputy Commissioner" or "the appellate authority", as the case may be"

on 24.9.2018 against the assessment order dated 21.6.2017. In the meantime, another assessment order came to be passed on 31.3.2018 in relation to the Audit taken up for the tax period from 1.4.2013 to 31.3.2017. We are not concerned with the said order in the present appeal.

4. Reverting to the appeal filed by the respondent against the assessment order dated 21.6.2017, the same was dismissed on 25.10.2018 being barred by limitation and also because no sufficient cause was made out. The respondent was then advised to file writ petition before the High Court being Writ Petition No. 39418/2018, solely for quashing and setting aside of assessment order dated 21.6.2017 for tax period – April, 2013 to March, 2014 (CST) being contrary to law, without jurisdiction and in violation of principles of natural justice to the extent of levy on the Branch Transfer turnovers and to direct the Assistant Commissioner (CT) to re-do the assessment and reckon the correct Branch Transfer turnover and grant exemption on the basis of Form "F". The respondent did not challenge the order passed by the Appellate Deputy Commissioner, rejecting the statutory appeal preferred by the respondent against the assessment order dated 21.6.2017,

for reasons best known to the respondent. The Division Bench of the High Court, on 8.11.2018, noted that the respondent had already paid 12.5% of the disputed tax, for the purpose of filing an appeal. It also noted the stand taken by the respondent that the employee who was in charge of the tax matters of the respondent, had defaulted and was subsequently suspended in contemplation of disciplinary proceedings, as a result of which statutory appeal could not be filed within the prescribed time. The Division Bench of the High Court directed the respondent to pay an additional amount equivalent to 12.5% of the disputed tax within one week and posted the matter for 19.11.2018. This was an *ex-parte* order. The respondent, in terms of the stated order, deposited an additional amount equivalent to 12.5% of the disputed tax amount. The writ petition was then taken up for hearing on 19.11.2018, when after hearing the counsel for the parties, the writ petition came to be allowed and the order passed by the Assistant Commissioner, dated 21.6.2017 has been quashed and set aside and the respondent relegated before the Assistant Commissioner for reconsideration of the matter afresh after giving personal hearing to the respondent to explain the discrepancies. This order has also noted that the respondent had

paid Rs.9,59,190/- (Rupees nine lakhs fifty-nine thousand one hundred ninety only) equivalent to the 12.5% of the taxes in the year 2013-14 (CST) on 13.11.2018.

5. Feeling aggrieved, the appellants have filed the present appeal. It is urged that the respondent having failed to avail of statutory remedy of appeal within the prescribed time and also because the delay in filing appeal had not been satisfactorily explained, the High Court ought not to have entertained the writ petition at the instance of such person and moreso, because the respondent had allowed the order passed by the appellate authority rejecting the appeal on the ground of delay to become final. In substance, the argument is that the High Court exceeded its jurisdiction and committed manifest error in setting aside the assessment order dated 21.6.2017 passed by the Assistant Commissioner.

6. The respondent, on the other hand, would urge that the High Court has had ample power under Article 226 of the Constitution of India to grant relief to the respondent considering the peculiar facts of the present case being an exceptional situation which if not remedied, would result in failure of justice.

7. We have heard Mr. G.N. Reddy, learned counsel for the appellants and Mr. V. Lakshmikumaran, learned counsel for the respondent.

8. From the indisputable facts, it is evident that the assessment order dated 21.6.2017 was challenged by the respondent by way of statutory appeal before the Appellate Deputy Commissioner only on 24.9.2018. Section 31 of the 2005 Act provides for the statutory remedy against an assessment order. The same, as applicable at the relevant time, reads thus: -

> "**31.** (1) Any VAT dealer or TOT dealer or any other dealer objecting to any order passed or proceeding recorded by any authority under the provisions of the Act other than an order passed or proceeding recorded by an Additional Commissioner or Joint Commissioner or Deputy Commissioner, may within thirty days from the date on which the order or proceeding was served on him, appeal to such authority as may be prescribed:
>
> Provided that the appellate authority may within a further period of thirty days admit the appeal preferred after a period of thirty days if he is satisfied that the VAT dealer or TOT dealer or any other dealer had sufficient cause for not preferring the appeal within that period:
>
> Provided further that an appeal so preferred shall not be admitted by the appellate authority concerned unless the dealer produces the proof of payment of tax, penalty, interest or any other amount admitted to be due, or of such instalments as have been granted, and the proof of payment of twelve and half percent of the difference of the tax, penalty, interest or any other amount, assessed by the authority prescribed and the tax, penalty, interest or any other amount admitted by the appellant, for the relevant tax period, in respect of which the appeal is preferred.

(2) The appeal shall be in such form, and verified in such manner, as may be prescribed and shall be accompanied by a fee which shall not be less than Rs.50/- (Rupees fifty only) but shall not exceed Rs.1000/- (Rupees one thousand only) as may be prescribed.

(3) (a) Where an appeal is admitted under sub-section (1), the appellate authority may, on an application filed by the appellant and subject to furnishing of such security or on payment of such part of the disputed tax within such time as may be specified, order stay of collection of balance of the tax under dispute pending disposal of the appeal;

(b) Against an order passed by the appellate authority refusing to order stay under clause (a), the appellant may prefer a revision petition within thirty days from the date of the order of such refusal to the Additional Commissioner or the Joint Commissioner who may subject to such terms and conditions as he may think fit, order stay of collection of balance of the tax under dispute pending disposal of the appeal by the appellate authority;

(c) Notwithstanding anything in clauses (a) or (b), where a VAT dealer or TOT dealer or any other dealer has preferred an appeal to the Appellate Tribunal under Section 33, the stay, if any, ordered under clause (b) shall be operative till the disposal of the appeal by such Tribunal, and, the stay, if any ordered under clause (a) shall be operative till the disposal of the appeal by such Tribunal, only in case where the Additional Commissioner or the Joint Commissioner on an application made to him by the dealer in the prescribed manner, makes specific order to that effect.

(4) The appellate authority may, within a period of two years from the date of admission of such appeal, after giving the appellant an opportunity of being heard and subject to such rules as may be prescribed:

(a) confirm, reduce, enhance or annul the assessment or the penalty, or both; or

(b) set aside the assessment or penalty, or both, and direct the authority prescribed to pass a fresh order after such further enquiry as may be directed; or

(c) pass such other orders as it may think fit.

> (4A) Where any proceeding under this section has been deferred on account of any stay orders granted by the High Court or Supreme Court in any case or by reason of the fact that an appeal or other proceeding is pending before the High Court or the Supreme Court involving a question of law having a direct bearing on the order or proceeding in question, the period during which the stay order is in force or the period during which such appeal or proceeding is pending, shall be excluded, while computing the period of two years specified in sub-section (4) for the purpose of passing appeal order under this section.
>
> (5) Before passing orders under sub-section (4), the appellate authority may make such enquiry as it deems fit or remand the case to any subordinate officer or authority for an inquiry and report on any specified point or points.
>
> (6) Every order passed in appeal under this section shall, subject to the provisions of sections 32, 33, 34 and 35 be final."

Going by the text of this provision, it is evident that the statutory appeal is required to be filed within 30 days from the date on which the order or proceeding was served on the assessee. If the appeal is filed after expiry of prescribed period, the appellate authority is empowered to condone the delay in filing the appeal, only if it is filed within a further period of not exceeding 30 days and sufficient cause for not preferring the appeal within prescribed time is made out. The appellate authority is not empowered to condone delay beyond the aggregate period of 60 days from the date of order or service of proceeding on the assessee, as the case may be. In the present case, admittedly,

the appeal was filed way beyond the total 60 days' period specified in terms of Section 31 of the 2005 Act. In that, the respondent had filed the appeal accompanied by an application for condonation of delay setting out reasons in the following words: -

> "2. It is submitted that the impugned Order-in-Original dated 21.06.2017 was received by the Applicant on 22.06.2017 and the appeal ought to have been filed by the applicant on 21.07.2017 in terms of section 31 of the Andhra Pradesh VAT Act, 2005. Thus, there is delay in filing the appeal. The Applicants further submits that the delay is not due to any negligence on part of the Applicant.
>
> 3. It is submitted that the impugned order was received by Mr. P. Sriram Murthy, but the receipt of this assessment order was not informed to any other person of the company.
>
> 4. Mr. P. Sriram Murthy was authorized to handle day to day affairs of sales tax (VAT), service tax and excise and he was also authorized to sign and submit documents with the tax departments, file periodic tax returns and represent the company before Concerned tax authorities.
>
> 5. However, the company has alleged Mr. P. Sriram Murthy with committing certain irregularities for past more than 12 months and initiated disciplinary proceedings against him. He has been suspended from his official duties with effect from 26th July 2018.
>
> 6. It is only post his suspension that the Applicant came to know about the receipt of impugned order. Also, the Appellant has come to know that Mr. Murthy paid the 12.5% of the demand amount on 12.09.2017 as if it is a regular tax payment. Further, since he did not file the appeal in time, therefore to protect himself from the disciplinary action, he adopted alternate route and filed rectification application under rule 60 which is not permissible under law in case demand has been raised on technical grounds.

> 7. A separate affidavit as to the facts of the case is also attached herewith.
>
> 8. It is stated that in view of the facts and circumstances mentioned above and in the attached affidavit, your honor would appreciate that the delay in filing the appeal is completely unintentional and for the bona fide reasons stated above. The applicant company should not be imposed with tax liabilities due to inaction and malafide intention on one employee. The Applicants further submit that if the delay in filing the above numbered appeal is not condoned, the Applicant would be put to great injustice and irreparable injury. On the other hand, no prejudice would be caused if the delay is condoned.
>
> WHEREFORE, it is prayed that the Ld. Appellate Joint Commissioner (ST) be pleased to allow the application for condonation of delay as prayed for."

As stated in the application for condonation of delay in filing the statutory appeal, the respondent caused to file affidavit of Mr. Sreedhar Routh, son of Late Mr. R. Seetha Rama Swamy, who was working as Site Director in the respondent company. In this affidavit, in support of the application for condonation of delay, it is averred thus: -

> ".....
>
> That Mr. P. Sriram Murthy, Deputy Manager-Finance, was authorized to handle day to day affairs of sales tax (VAT), service tax and excise. He was also authorized to sign and submit documents with the tax departments, file periodic tax returns and represent the company before concerned tax authorities.
>
> that the CST assessment for the period 2013-14 was completed by the Assistant Commissioner (CT) LTU raising demand of Rs.76,73,197/- vide assessment order dated 21.06.2017.

> that the assessment order was received by Mr. P. Sriram Murthy. But, the receipt of this assessment order was not informed to any other person of the company.
>
> that Mr. P. Sriram Murthy filed application under Rule 60 of the Andhra Pradesh Act, 2005 without informing the company about such filing.
>
> that Mr. P. Sriram Murthy also engaged a Chartered Accountant and filed an appeal against rejection of application filed under rule 60. The appointment of Chartered Accountant and filing this appeal was also not informed to the company.
>
> that the company has alleged Mr. P. Sriram Murthy with committing certain irregularities and initiated disciplinary proceedings against him.
>
> that Mr. P. Sriram Murthy has been suspended from his official duties with effect from 26th July 2018. Investigation in this matter is going on.
>
> that it is only post his suspension that we have come to know about the demand of Rs.76,73,197/- lakhs raised vide CST assessment order for the year 2013-2014 and therefore could not respond or take any action in respect of this order/demand.
>
> It is prayed that the Ld. Appellate Joint Commissioner (ST) be pleased to allow the application for condonation of delay as prayed for."

The appellate authority vide order dated 25.10.2018, considered the reasons offered by the respondent for the delay in filing of the appeal and concluded that the same were not substantiated with sufficient cause. On that finding including that the delay beyond the period of 60 days from the date of service of the assessment order on the respondent-assessee cannot be condoned, the appellate authority observed thus: -

"However, to abide the principles of natural justice, the appellant has been issued notices dated 03.10.2018 and 19.10.2018 to appear for admission hearings to be held on 10.10.2018 and 25.10.2018 respectively, in the office of Appellate Deputy Commissioner (CT), Vijayawada for explaining reasons and his contentions in support of the admission of appeal petition. **The A.R. appeared for the admission hearing on 25.10.2018 and prayed for admission of appeal petition, but not submitted any reliable grounds and substantial documentary evidence in support of their submission that they were unaware of the receipt of original assessment order**.

It is further pertinent here to record that after receiving the original assessment order, the appellant-dealer has filed a request letter before the assessing authority for re-assessment under rule 60 of APVAT Rules, 2005. However, the AA has not considered re-assessment request, and issued an endorsement dt.11.05.2018, rejecting the re-assessment request. The appellant also filed an appeal on such endorsement. That appeal petition based on endorsement has also not been admitted in this office and rejected vide ADC's orders no. 3470, dt. 17.08.2018. Therefore, cannot be assumed under any circumstances, and by no stretch of imagination that the appellant-dealer was not aware of the service of original assessment orders. Hence, it is to be affirmed that the causes put-forth for delay condonation are not rational and against the facts of the case. It is also relevant here to state that whatever may be circumstances, the delay beyond 60 days could not be condonable in the hands of the appellate authority, therefore, such request prima-facie is not in tune with the provisions of the Act, hence, liable to be rejected.

From the aforesaid discussion, it is construed that no favourable grounds can be made to admit the appeal, since the appellant have failed to file appeal petition within the prescribed time under APVAT Act, 2005. It is also pertinent here to note that the Department has duly served the original assessment order to the appellant without any procedural lapse, and also the appellant has admitted that the original orders were received on 22.06.2017.

In view of the above, since the appellant failed to prefer an appeal on the original assessment order dated 21.06.2017, which was duly served on the appellant, and

> as such the original assessment order has become final, and the present appeal filed by the appellant on 24.09.2018 with a delay of 1 year 62 days, hence cannot be admitted.
>
> **Further the appellants have not submitted any valid reasons/sufficient cause for not preferring the appeal within the prescribed & condonable time of 30+30=60 days of receipt of the original assessment order. Hence the appeal petition is hereby REJECTED as per the provisions of Section 31 of APVAT Act.**"
>
> (emphasis supplied)

The appellate authority was pleased to reject the explanation that the respondent was not aware of the service of assessment order, as it remained unsubstantiated by the respondent. When the matter travelled to the High Court, the Division Bench, after hearing the respondent, proceeded to pass an *ex-parte* order on 8.11.2018, which reads thus: -

> "ORDER:
>
> It is represented by Mr. S. Dwarakanath, learned counsel for the petitioner that the petitioner has already paid 12.5% of the disputed tax, for the purpose of filing an appeal. But, the employee, who was incharge and who was subsequently, suspended in contemplation of disciplinary proceedings, failed to file the appeal. The contention of the learned counsel for the petitioner is that the issue lies in a narrow campus.
>
> Since the petitioner has already paid 12.5% of the disputed tax, the request of the petitioner for granting one more opportunity would be considered favourably, if the petitioner pays an additional amount equivalent to 12.5% of the disputed tax. The petitioner shall make such payment within a period of one week.
>
> Post on 19.11.2018 for orders."

Be it noted that the respondent was advised to file writ petition merely for setting aside of the assessment order dated 21.6.2017, presumably, in light of the decision of Full bench of the same High Court in ***Electronics Corporation of India Ltd. vs. Union of India & Ors.***[7].

9. We may advert to the assertions made in the writ petition (on the basis of which the High Court was pleased to grant relief to the respondent), to explain the delay in filing of the statutory appeal including the reason why the respondent should be given one opportunity. The same read thus: -

> ".....
>
> 7. From the above, it can be summarized that the total disputed demand has arisen on account of two reasons. Firstly, the 1st Respondent has considered the total branch transfer turnover as per monthly CST returns and ignored the revised turnover as per VAT 200-B. Even though, the such revised stock transfer value was considered by the 1st Respondent while computing the ITC credit as per rule 20 (8) of AP VAT act. Secondly, receipt of excess forms on account of inclusion of value of freebies, free samples etc. by receiving state while issuing the F Forms. The 1st Respondent treated these excess F Forms value as concealment by the petitioner and levied tax even, on this branch transfer value duly covered by F Forms which is [*sic*] grossly against the principle of law.
>
> 8. It is submitted that the order was served on the petitioner on 22.6.2017 against which, the Petitioner could have preferred appeal before the 2nd Respondent within 30 days from the said date. Unfortunately, no steps were taken to file any appeal within the due date for the reason that the day to day affairs of the Sales Tax,

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Service Tax and Excise Law was being handled by one Mr. P. Sri Ram Murthy, who was working as Deputy Manager (Finance) in the Company, who failed to take 'appropriate steps to prefer an appeal within time, by his negligence. Excepting Mr. P. Sri Ram Murthy, there was no other person who was well conversant with the facts and the steps to be taken against the assessment order. The other person Mr. Siddhant Belgaonker, Senior Manager (Finance) who attended the assessment hearing also left the services of the Petitioner on 31.1.2018. Consequently, the assessment order remained uncontested.

9. It is respectfully submitted that apart from this act of negligence, Mr. P. Sri Ram Murthy also committed certain other irregularities over a period of one year, which came to the light of the Management of the Company in the month of July, 2018. Immediately, disciplinary proceedings were initiated against him, by issuing a notice on 26.7.2018 (ex. P-3) and also suspending him from official duties with immediate effect.

10. It is submitted that the Petitioner was not aware of the impugned order since that fact was not brought to the notice by its own employee, due to this negligence.

11. It appears, the said Mr. P. Sri Ram Murthy having realized his negligence, made further mistake, by filing an application under Rule 60 of the APVAT Rules read with Rule 14-A(10) of the CST (AP) Rules on 9.5.2018 (Ex. P-4) contending, inter-alia, that the revised value of stock transfer as per VAT 200-B should have been considered instead of Rs.866,25,15,490/-. In the said representation, it is claimed that it has filed revised returns under the VAT Act, disclosing the correct 'F' form turnover for the purposes of restricting the input tax credit while filing Form 200-B at the end of the year. The ITC credit under VAT was also allowed by the 1st Respondent, considering the stock transfer turnover as Rs.863,33,95,259/-. In the said representation, it was contended that the turnover of Rs.1,85,03,360/-, could not have been levied with the tax since it is admittedly covered by 'F' forms.

12. The representation of the Petitioner under Rule 60 was rejected by the 1st Respondent, by endorsement, dated 11.5.2018 (Ex. P-5) on the ground, that it is not a case for considering it as a mistake rectifiable under Rule 60. It is also submitted that Mr. P. Sri Ram Murthy

appear to have filed an appeal against the endorsement of the 1st Respondent dated 11.5.2018 to 2nd Respondent on 28.5.2018. This was also without knowledge of the petitioner's management.

13. It is submitted that the Petitioner was not aware of these developments till the misdeeds of Mr. P. Sri Ram Murthy were being enquired into. It is submitted that Mr. P. Sri Ram Murthy has in fact, remitted an amount of Rs.9,59,150/- being 12.5% of the disputed tax in the assessment order online, on 12.9.2017 (Ex. P-6). The payment was made as if it is towards miscellaneous tax payment for June, 2014. When the Petitioner was seeking to reconcile as to how this amount was deposited and under what account it came to known it is for the purpose of preferring an appeal against the impugned order. All this verification happened post suspension of Mr. P. Sri Ram Murthy.

14. The Petitioner faced with this unfortunate situation, filed an appeal under Section 31 of the VAT Act on 24.9.2018 on the bona fide belief that there are good grounds for condonation of the delay since the Petitioner cannot suffer for the errors committed by one of its employees.

15. It is submitted that the 2nd Respondent, vide order, dated 25.10.2018 (Ex. P-7), rejected the appeal on the ground that he has no power to condone the delay beyond 30 days. It is also observed in the said order that appeal against the Endorsement was also dismissed by him on 17.8.2018. However, copy of the order is not yet served on the petitioner. The 2nd Respondent observed that the Petitioner cannot dispute the service of assessment order on 22.6.2017 and failure to file the appeal within 60 days would mean that the assessment order has attained finality.

16. The petitioner submits that filing of a further appeal to the APVAT Appellate Tribunal at Visakhapatnam is a futile exercise, since as a creature under the Act, the Tribunal cannot find fault with the 2nd Respondent for not condoning the delay beyond 30 days.

17. The petitioner has lost the appellate remedy by efflux of time. It does not mean that the Petitioner should be left remediless. The petitioner submits that a full Bench of this Hon'ble Court in Electronics Corporation of India Limited (Writ Petition Nos. 9482 and 9485 of 2017,

> dated 13.3.2018, dealing with similar situation, under Central Excise Act, held that even if the appeal time under the Act has expired, it does not prevent the assessee from preferring a Writ Petition under Article 226 of the Constitution."

10. The High Court finally allowed the writ petition vide the impugned judgment and order on the ground that the statutory remedy had become ineffective for the respondent (writ petitioner) due to expiry of 60 days from the date of service of the assessment order. Inasmuch as, the appellate authority had no jurisdiction to condone the delay after expiry of 60 days, despite the reason mentioned by the respondent of an extraordinary situation due to the act of commission and omission of its employee who was in charge of the tax matters, forcing the management to suspend him and initiate disciplinary proceedings against him. Soon after becoming aware about the assessment order, the respondent had filed the appeal, but that was after expiry of 60 days' period. The High Court was also impressed by the contention pressed into service by the respondent that it ought to be given one opportunity to explain to the authority (Assistant Commissioner) about the discrepancies between the value reported in the CST returns and the amount indicated in Form "F" relating to the turnover. The additional

reason as can be discerned from the impugned order is that the respondent had already deposited an additional amount equivalent to 12.5% of the disputed tax amount in terms of the earlier order. We deem it apposite to reproduce the impugned order of the High Court. The same reads thus: -

> ".....
>
> The impugned order of assessment is dated 21.6.2017. As against the said order the petitioner filed an appeal with a delay. Since the delay was beyond the period after which it can be condoned, the same was not entertained. Therefore, the petitioner has come up with the above writ petition.
>
> The reason stated by the petitioner is that one of the employees who was in charge, indulged in malpractices forcing the management to suspend him and initiate disciplinary proceedings. The petitioner claims that they were not aware of these orders. Therefore, the petitioner seeks one opportunity.
>
> The reason why the petitioner seeks one opportunity is that 'F' forms submitted by the petitioner were rejected by the Assessing Officer, on the ground that the value of the goods transferred to branch office have not been disclosed in 'F' forms. But the claim of the petitioner is that the value was wrongly reported in the CST returns and that the amount indicated in the 'F' forms was more than the turnover. Therefore, they seek one opportunity to explain this discrepancy.
>
> In view of the peculiar circumstances, even while granting an opportunity to the petitioner, we wanted to put them on condition. Therefore, on 8.11.2018 we passed an interim order to the following effect,
>
> > "It is represented by Mr. S. Dwarakanath, learned counsel for the petitioner that the petitioner has already paid 12.5% of the disputed tax, for the purpose of filing an appeal. But, the employee, who was incharge and who was subsequently, suspended in contemplation of disciplinary proceedings, failed to file the

> appeal. The contention of the learned counsel for the petitioner is that the issue lies in a narrow campus.
>
> Since the petitioner has already paid 12.5% of the disputed tax, the request of the petitioner for granting one more opportunity would be considered favourably, if the petitioner pays an additional amount equivalent to 12.5% of the disputed tax. The petitioner shall make such payment within a period of one week.
>
> Post on 19.11.2018 for orders."
>
> Pursuant to the aforesaid order, the petitioner made payment of Rs.9,59,190/-, representing 12.5% of the taxes for the year 2013-2014 (CST). The amount was paid on 13.11.2018.
>
> Therefore, the writ petition is ordered, the impugned order is set aside and the matter is remanded back to the 1st respondent. The petitioner shall appear before the 1st respondent on 10.12.2018 and explain the discrepancies. After such personal hearing, the 1st respondent may pass orders afresh.
>
> As a sequel, pending miscellaneous petitions, if any, shall stand closed. No costs."

11. In the backdrop of these facts, the central question is: whether the High Court ought to have entertained the writ petition filed by the respondent? As regards the power of the High Court to issue directions, orders or writs in exercise of its jurisdiction under Article 226 of the Constitution of India, the same is no more *res integra*. Even though the High Court can entertain a writ petition against any order or direction passed/action taken by the State under Article 226 of the Constitution, it ought not to do so as a matter of course when the

aggrieved person could have availed of an effective alternative remedy in the manner prescribed by law (see ***Baburam Prakash Chandra Maheshwari vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar***[8] and also ***Nivedita Sharma vs. Cellular Operators Association of India & Ors.***[9]). In ***Thansingh Nathmal & Ors. vs. Superintendent of Taxes, Dhubri & Ors.***[10], the Constitution Bench of this Court made it amply clear that although the power of the High Court under Article 226 of the Constitution is very wide, the Court must exercise self-imposed restraint and not entertain the writ petition, if an alternative effective remedy is available to the aggrieved person. In paragraph 7, the Court observed thus: -

> "**7.** Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High Court that a question of law arose out of the order. But the procedure provided by the Act to invoke the jurisdiction of the High Court was bypassed, the appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the extraordinary jurisdiction of the High Court under Article 226 and sought to reopen the decision of the Taxing Authorities on question of fact. The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles.

8 AIR 1969 SC 556
9 (2011) 14 SCC 337
10 AIR 1964 SC 1419

> **But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy**. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. **The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up**."
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> (emphasis supplied)

We may usefully refer to the exposition of this Court in ***Titaghur Paper Mills Co. Ltd. & Anr. Vs. State of Orissa & Ors.***[11], wherein it is observed that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of. In paragraph 11, the Court observed thus: -

11 (1983) 2 SCC 433

"**11.** Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. **The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of**. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* [(1859) 6 CBNS 336, 356] in the following passage:

> There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in *Neville* v. *London Express Newspapers Ltd.* (1919 AC 368) and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago* v. *Gordon Grant & Co. Ltd.* (1935 AC 532) and *Secretary of State* v. *Mask & Co.* (AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

(emphasis supplied)

In the subsequent decision in ***Mafatlal Industries Ltd. & Ors. vs. Union of India & Ors.***[12], this Court went on to observe that an Act cannot bar and curtail remedy under Article 226 or 32 of the Constitution. The Court, however, added a word of caution and expounded that the constitutional Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the statute.

12. Indubitably, the powers of the High Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this Court under Article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties. Even while exercising that power, this Court is required to bear in mind the legislative intent and not to

12 (1997) 5 SCC 536

render the statutory provision otiose. In a recent decision of a three-Judge Bench of this Court in ***Oil and Natural Gas Corporation Limited vs. Gujarat Energy Transmission Corporation Limited & Ors.***[13], the statutory appeal filed before this Court was barred by 71 days and the maximum time limit for condoning the delay in terms of Section 125 of the Electricity Act, 2003 was only 60 days. In other words, the appeal was presented beyond the condonable period of 60 days. As a result, this Court could not have condoned the delay of 71 days. Notably, while admitting the appeal, the Court had condoned the delay in filing the appeal. However, at the final hearing of the appeal, an objection regarding appeal being barred by limitation was allowed to be raised being a jurisdictional issue and while dealing with the said objection, the Court referred to the decisions in ***Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur & Ors.***[14], ***Commissioner of Customs and Central Excise vs. Hongo India Private Limited & Anr.***[15], ***Chhattisgarh State Electricity Board vs. Central Electricity***

13 (2017) 5 SCC 42
14 (2008) 3 SCC 70
15 (2009) 5 SCC 791

Regulatory Commission & Ors.[16] and ***Suryachakra Power Corporation Limited vs. Electricity Department represented by its Superintending Engineer, Port Blair & Ors.***[17] and concluded that Section 5 of the Limitation Act, 1963 cannot be invoked by the Court for maintaining an appeal beyond maximum prescribed period in Section 125 of the Electricity Act.

13. The principle underlying the dictum in this decision would apply *proprio vigore* to Section 31 of the 2005 Act including to the powers of the High Court under Article 226 of the Constitution. Notably, in this decision, a submission was canvassed by the assessee that in the peculiar facts of that case (as urged in the present case), the Court may exercise its jurisdiction under Article 142 of the Constitution, so that complete justice can be done. This argument has been considered and plainly rejected in the following words: -

> "**12.** In *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602, while explicating and elaborating the principles under Article 142, Sabyasachi Mukharji, J. (as his Lordship then was) opined thus: (SCC p. 656, para 50)
>
> > "*50.* ... The fact that the rule was discretionary did not alter the position. Though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the

16 (2010) 5 SCC 23
17 (2016) 16 SCC 152

court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question of inconsistency between Article 142(1) and Article 32 arose. Gajendragadkar, J., speaking [*Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996] for the majority of the Judges of this Court said that Article 142(1) did not confer any power on this Court to contravene the provisions of Article 32 of the Constitution. Nor did Article 145 confer power upon this Court to make rules, empowering it to contravene the provisions of the fundamental right. At AIR pp. 1002-03, para 12 : SCR p. 899 of the Report, Gajendragadkar, J., reiterated that the powers of this Court are no doubt very wide and they are intended and "will always be exercised in the interests of justice". But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasised that *an order which this Court could make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws*. The court therefore, held that it was not possible to hold that Article 142(1) conferred upon this Court powers which could contravene the provisions of Article 32."

(emphasis in original)

13. The said decision has been clarified by a Constitution Bench in *Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584, wherein M.N. Venkatachaliah, J. (as his Lordship then was) speaking for the majority, ruled that: (SCC pp. 634-35, para 83)

"*83.* It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit

the powers of the Apex Court under Article 142(1) is unsound and erroneous. In both *Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996, as well as *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602, cases the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers — limited in some appropriate way — is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Shri Sorabjee, learned Attorney General, referring to *Garg case* [*Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996], said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression "prohibition" is read in place of "provision" that would perhaps convey the appropriate idea. But *we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express*

statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not "complete justice" of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."

(emphasis in original)

14. In this regard, another Constitution Bench in *Supreme Court Bar Assn.* v. *Union of India*, (1998) 4 SCC 409] opined: (SCC pp. 437-38, para 56)

"*56.* As a matter of fact, *the observations on which emphasis has been placed by us from the Union Carbide case* [*Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584], *A.R. Antulay case* [*A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602] *and Delhi Judicial Service Assn.* v. *State of Gujarat*, (1991) 4 SCC 406, *go to show that they do not strictly speaking come into any conflict with the observations of the majority made in Prem Chand Garg case* [*Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996]. It is one thing to say that "prohibitions or limitations in a statute" cannot come in the way of exercise of jurisdiction under Article 142 *to do complete justice* between the parties in the pending "cause or matter" arising out of that statute, but quite a different thing to say that while exercising jurisdiction under Article 142, this Court can altogether *ignore* the substantive provisions *of a statute*, dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed

> in another statute. This Court did not say so in *Union Carbide case* [*Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584] either expressly or by implication and on the contrary it has been held that the Apex Court *will take note of the express provisions of any* substantive statutory law and regulate the exercise of its power and discretion accordingly. …"
>
> (emphasis in original)

15. From the aforesaid decisions, it is clear as crystal that the Constitution Bench in *Supreme Court Bar Assn.* v. *Union of India*, (1998) 4 SCC 409, has ruled that there is no conflict of opinion in *Antulay case* [*A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602] or in *Union Carbide Corpn. case* [*Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584] with the principle set down in *Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996. **Be it noted, when there is a statutory command by the legislation as regards limitation and there is the postulate that delay can be condoned for a further period not exceeding sixty days, needless to say, it is based on certain underlined, fundamental, general issues of public policy** as has been held in *Union Carbide Corpn. case* [*Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584]. As the pronouncement in *Chhattisgarh SEB* v. *Central Electricity Regulatory Commission*, (2010) 5 SCC 23, lays down quite clearly that the policy behind the Act emphasising on the constitution of a special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by an order of the adjudicatory officer or by an appropriate Commission. The Act is a special legislation within the meaning of Section 29(2) of the Limitation Act and, therefore, the prescription with regard to the limitation has to be the binding effect and the same has to be followed regard being had to its mandatory nature. **To put it in a different way, the prescription of limitation in a case of present nature, when the statute commands that this Court may condone the further delay not beyond 60 days, it would come within the ambit and sweep of the provisions and policy of legislation. It is equivalent to Section 3 of the Limitation Act. Therefore, it is**

> **uncondonable and it cannot be condoned taking recourse to Article 142 of the Constitution**.
>
> **16.** We had stated earlier that we will be adverting to the passage in *Suryachakra Power Corpn. Ltd.* v. *Electricity Deptt.*, (2016) 16 SCC 152. There, the Court had referred to Section 14 of the Limitation Act. It fundamentally relied on *M.P. Steel Corpn.* v. *CCE*, (2015) 7 SCC 58, wherein the Court after referring to certain authorities, analysed thus: (*M.P. Steel Corpn. Case*), SCC p. 91, para 43)
>
> > "*43.* ... when a certain period is excluded by applying the principles contained in Section 14, there is no delay to be attributed to the appellant and the limitation period provided by the statute concerned continues to be the stated period and not more than the stated period. We conclude, therefore, that the principle of Section 14 which is a principle based on advancing the cause of justice would certainly apply to exclude time taken in prosecuting proceedings which are bona fide and with due diligence pursued, which ultimately end without a decision on the merits of the case.""
>
> (emphasis in italics – in original, and in bold – supplied)

Similarly, in ***State vs. Mushtaq Ahmad & Ors.***[18], this Court opined that where minimum sentence is provided for an offence then no Court can impose lesser punishment on ground of mitigating factors.

14. A priori, we have no hesitation in taking the view that what this Court cannot do in exercise of its plenary powers under Article 142 of the Constitution, it is unfathomable as to how the High Court can take a different approach in the matter in

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18 (2016) 1 SCC 315

reference to Article 226 of the Constitution. The principle underlying the rejection of such argument by this Court would apply on all fours to the exercise of power by the High Court under Article 226 of the Constitution.

15. We may now revert to the Full Bench decision of the Andhra Pradesh High Court in ***Electronics Corporation of India Ltd.*** (supra), which had adopted the view taken by the Full Bench of the Gujarat High Court in ***Panoli Intermediate (India) Pvt. Ltd. vs. Union of India & Ors.***[19] and also of the Karnataka High Court in ***Phoenix Plasts Company vs. Commissioner of Central Excise (Appeal-I), Bangalore***[20]. The logic applied in these decisions proceeds on fallacious premise. For, these decisions are premised on the logic that provision such as Section 31 of the 1995 Act, cannot curtail the jurisdiction of the High Court under Articles 226 and 227 of the Constitution. This approach is faulty. It is not a matter of taking away the jurisdiction of the High Court. In a given case, the assessee may approach the High Court before the statutory period of appeal expires to challenge the assessment order by way of writ petition

19 AIR 2015 Guj 97
20 2013 (298) ELT 481 (Kar.)

on the ground that the same is without jurisdiction or passed in excess of jurisdiction - by overstepping or crossing the limits of jurisdiction including in flagrant disregard of law and rules of procedure or in violation of principles of natural justice, where no procedure is specified. The High Court may accede to such a challenge and can also non-suit the petitioner on the ground that alternative efficacious remedy is available and that be invoked by the writ petitioner. However, if the writ petitioner choses to approach the High Court after expiry of the maximum limitation period of 60 days prescribed under Section 31 of the 2005 Act, the High Court cannot disregard the statutory period for redressal of the grievance and entertain the writ petition of such a party as a matter of course. Doing so would be in the teeth of the principle underlying the dictum of a three-Judge Bench of this Court in ***Oil and Natural Gas Corporation Limited*** (supra). In other words, the fact that the High Court has wide powers, does not mean that it would issue a writ which may be inconsistent with the legislative intent regarding the dispensation explicitly prescribed under Section 31 of the 2005 Act. That would render the legislative scheme and intention behind the stated provision otiose.

16. The respondent had relied on the decision of this Court in ***K.S. Rashid & Son vs. the Income Tax Investigation Commission***[21]. This decision of the Constitution Bench, no doubt, deals with the extent of power of the High Court under Article 226 of the Constitution and the situation when the High Court can refuse to exercise its discretion, such as when alternative efficacious remedy is available to the aggrieved party. In paragraph 4 (last paragraph) of this decision, however, the Court plainly noted that it was not necessary to express any final opinion on the question as to whether Section 8(5) of the Taxation on Income (Investigation Commission) Act, 1947 (Act XXX of 1947) is to be regarded as providing the only remedy available to the aggrieved party and that it excludes altogether the remedy provided for under Article 226 of the Constitution.

17. Reliance was then placed on a three-Judge Bench decision of this Court in ***ITC Ltd. & Anr. Vs. Union of India***[22]. In that case, the High Court had dismissed the writ petition on the ground that the petitioner therein had an adequate alternative remedy by way of an appeal under Section 35 of the Central

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21 AIR 1954 SC 207
22 (1998) 8 SCC 610

Excise Act. Concededly, this Court was pleased to uphold that opinion of the High Court. However, whilst considering the difficulty expressed by the petitioner therein that the statutory remedy of appeal had now become time barred during the pendency of the proceedings before the High Court and before this Court, the Court permitted the petitioner therein to resort to remedy of statutory appeal and directed the appellate authority to decide the appeal on merits. This obviously was done on the basis of concession given by the counsel appearing for the Revenue as noted in paragraph 2(1) of the order, which reads thus: -

> "**2.** The High Court has dismissed the writ petition filed by the petitioner on the ground that there is an adequate alternative remedy by way of an appeal under Section 35 of the Central Excise Act. Learned counsel for the petitioner submits that the petitioner will face certain difficulties in pursuing this remedy:
>
> > (*1*) This remedy may not be any longer available to it because the appeal has to be filed within a period of three months from the date of the assessment order and delay can be condoned only to the extent of three more months by the Collector under Section 35 of the Act. It is pointed out that the petitioner did not file an appeal because the Collector (Appeal) at Madras had taken a view in a similar matter that an appeal was not maintainable. That apart, the petitioner in view of the huge demand involved filed a writ petition and so did not file an appeal. In the circumstances of the case, we are of the opinion that the ends of justice will be met if we permit the petitioner to file a

> belated appeal within one month from today with an application for condonation of delay, whereon the appeal may be entertained. **Learned counsel for the Revenue has stated before us that the Revenue will not object to the entertainment of the appeal on the ground that it is barred by time. In view of this direction and concession, the petitioner will have an effective alternative remedy by way of an appeal**.
>
> (emphasis supplied)

In that case, it appears that the writ petition was filed within statutory period and legal remedy was being pursued in good faith by the assessee (appellant).

18. Suffice it to observe that this decision is on the facts of that case and cannot be cited as a precedent in support of an argument that the High Court is free to entertain the writ petition assailing the assessment order even if filed beyond the statutory period of maximum 60 days in filing appeal. The remedy of appeal is creature of statute. If the appeal is presented by the assessee beyond the extended statutory limitation period of 60 days in terms of Section 31 of the 2005 Act and is, therefore, not entertained, it is incomprehensible as to how it would become a case of violation of fundamental right, much less statutory or legal right as such.

19. *Arguendo*, reverting to the factual matrix of the present case, it is noticed that the respondent had asserted that it was not aware about the passing of assessment order dated 21.6.2017 although it is admitted that the same was served on the authorised representative of the respondent on 22.6.2017. The date on which the respondent became aware about the order is not expressly stated either in the application for condonation of delay filed before the appellate authority, the affidavit filed in support of the said application or for that matter, in the memo of writ petition. On the other hand, it is seen that the amount equivalent to 12.5% of the tax amount came to be deposited on 12.9.2017 for and on behalf of respondent, without filing an appeal and without any demur - after the expiry of statutory period of maximum 60 days, prescribed under Section 31 of the 2005 Act. Not only that, the respondent filed a formal application under Rule 60 of the 2005 Rules on 8.5.2018 and pursued the same in appeal, which was rejected on 17.8.2018. Furthermore, the appeal in question against the assessment order came to be filed only on 24.9.2018 without disclosing the date on which the respondent in fact became aware about the existence of the assessment order dated 21.6.2017. On the other hand, in the affidavit of Mr. Sreedhar Routh, Site Director of the respondent

company (filed in support of the application for condonation of delay before the appellate authority), it is stated that the company became aware about the irregularities committed by its erring official (Mr. P. Sriram Murthy) in the month of July, 2018, which pre-supposes that the respondent must have become aware about the assessment order, at least in July, 2018. In the same affidavit, it is asserted that the respondent company was not aware about the assessment order, as it was not brought to its notice by the employee concerned due to his negligence. The respondent in the writ petition has averred that the appeal was rejected by the appellate authority on the ground that it had no power to condone the delay beyond 30 days, when in fact, the order examines the cause set out by the respondent and concludes that the same was unsubstantiated by the respondent. That finding has not been examined by the High Court in the impugned judgment and order at all, but the High Court was more impressed by the fact that the respondent was in a position to offer some explanation about the discrepancies in respect of the volume of turnover and that the respondent had already deposited 12.5% of the additional amount in terms of the previous order passed by it. That reason can have no bearing on the justification for non-filing of the appeal within the statutory

period. Notably, the respondent had relied on the affidavit of the Site Director and no affidavit of the concerned employee (P. Sriram Murthy, Deputy Manager-Finance) or at least the other employee [Siddhant Belgaonker, Senior Manager (Finance)], who was associated with the erring employee during the relevant period, has been filed in support of the stand taken in the application for condonation of delay. Pertinently, no finding has been recorded by the High Court that it was a case of violation of principles of natural justice or non-compliance of statutory requirements in any manner. Be that as it may, since the statutory period specified for filing of appeal had expired long back in August, 2017 itself and the appeal came to be filed by the respondent only on 24.9.2018, without substantiating the plea about inability to file appeal within the prescribed time, no indulgence could be shown to the respondent at all.

20. Reverting to the contention that the respondent having failed to assail the order passed by the appellate authority, dated 25.10.2018 rejecting the application for condonation of delay, the assessment order passed by the Assistant Commissioner, dated 21.6.2017 stood merged, need not detain us in view of the exposition of this Court in ***Raja Mechanical Company Private***

Limited vs. Commissioner of Central Excise, Delhi-I[23]. It is well settled that rejection of delay application by the appellate forum does not entail in merger of the assessment order with that order.

21. Taking any view of the matter, therefore, the High Court ought not to have entertained the subject writ petition filed by the respondent herein. The same deserved to be rejected at the threshold.

22. Accordingly, we allow this appeal and set aside the impugned judgment and order passed by the High Court and dismiss the writ petition. There shall be no order as to costs. Pending interlocutory applications, if any, shall stand disposed of.

.....J.
(A.M. Khanwilkar)

.....J.
(Dinesh Maheshwari)

New Delhi;
May 6, 2020.

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23 (2012) 12 SCC 613

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 237/MUM/2023
Assessment Year: 2013-14

Shree Swamy Samarth, Prassana Oshiwara (E) Unit 3 CHS Ltd. Oshiwara (E) Unit 3 CHS Ltd., Plot No. 1/41, Deep Tower, New Link Road, Near Millat Nagar, Andheri (West) Mumbai-400053. **PAN No. AACAS 7886 B**	***Vs.***	ITO-25(1)(3), C-10, Room No. 404, 4th floor, Pratyakshakar Bhavan, BKC, Mumbai-400051.
Appellant		**Respondent**

Assessee by	:	Mr. Tarun Ghia
Revenue by	:	Mr. A.N. Bhalekar, CIT-DR
Date of Hearing	:	10/05/2023
Date of pronouncement	:	22/05/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal has been preferred by the assessee against order dated 30.11.2022 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short 'the Ld. CIT(A)'] for assessment year 2013-14, raising following grounds:

1. On facts and in circumstances of the case and in law, Ld. AO erred in reopening assessment us. 147 of the Income Tax Act, 1961.

2. On facts and in circumstances of the case and in law, the assessee was not required to file the return of income.

3. On facts and in circumstances of the case and in law, on receipt of notice under section 148 the assessee did not have correct advice and therefore could not furnish correct information and explanation.

4. On facts and in circumstances of the case and in law, as the impugned investment was by a co operative housing society having invested accumulated surplus generated out of collections of funds from its own members.

5. On facts and in circumstances of the case and in law, Ld. AO should have appreciated that a co operative housing society collecting funds from its own members and spending the same for its

own members is covered by the concept of mutuality and consequent non taxability. Ld. CIT-A has erred in confirming the assessement order with addition.

6. On facts and in circumstances of the case and in law, Ld AO should have appreciated that a co operative housing society administering the maintenance of the society on behalf of its members and collecting uniformly from its members cannot have any unexplained investment.

7. On facts and in circumstances of the case and in law, on receipt of ex parte assessment order under section 144, the assessee did not have correct advice and the reasons for delay were not disclosed correctly and therefore could not file appeal at Ld. CIT-A in time.

8. On facts and in circumstances of the case and in law, Ld. CIT -A having availed the audited financial statements of the assessee should have appreciated the gross injustice happening to the assessee and should have condoned the delay so that the assessment can take place on merits.

2. At the outset, we find that the Ld. CIT(A) has not condoned the delay of 387 days in filing the appeal before him and appeal has been rejected as not admitted. The relevant finding of the Ld. CIT(A) is reproduced as under:

> *"21. In the present case, the appellant has not adduced any reasonable cause which prevented it from filing the appeal within the 30 days' time limit which ended on 26.01.2017 and even thereafter for more than 387 days. Unless and until it is demonstrated that there was sufficient cause that prevented the appellant from exercising its legal remedy of filing appeal within that prescribed period of 30 days, the delay thereafter cannot be condoned without there being compelling grounds as advocated by the Hon'ble Courts.*
>
> *22. From the facts of the case, it is clear that the statutory right to appeal which was vested with the appellant was not exercised within the stipulated time u/s.249(2). Thus, this clearly is a case of laches and is directly the result of deliberate inaction on the part of the appellant.*
>
> *23. This is not a case of change in law which is beneficial to the appellant and hence the delay in seeking such remedy may be condoned in the furtherance of substantial justice.Therefore, there is no denial or destruction of a statutory right in this case, by adhering to the prescribed period of limitation as otherwise it will only lead to protract the matter endlessly and will undoubtedly render the legislative scheme and intention behind the concerned provision otiose as held by the Hon'ble Supreme Court in the case of Assistant Commissioner (CT) LTU, Kakinada &Ors. v. MIs Glaxo Smith Kline Consumer Health Care Limited 2020[36] G.S.T.L. 305.*
>
> *24. For these reasons, the delay of 387 days in filing of appeal in this case is not condoned as no "sufficient cause" has been shown u/s. 249(3) of the Income Tax Act, 1961 for the appellant's failure to file the appeal within the prescribed period of limitation us.249(2) of the Income Tax Act, 1961 r.w.s. 5 of Limitation Act and hence the appeal sought to be instituted belatedly is hereby rejected.*

25. In the result, as delay in filing of appeal is not condoned, the appeal is not admitted and is rejected accordingly."

3. Before us, the Ld. Counsel of the assessee has submitted that delay was not deliberate or malafide. He referred to the submissions made before the Ld. CIT(A) and submitted that assessment order was received by the assessee on 12.01.2017 but due to dispute with one of its members, the assessee society could not reply of the notice. It was also submitted that being diverse views of the members, it took time in bringing everyone along for preferring appeal. Before us, the assessee has also filed an affidavit in support of reasons for the delay in filing the appeal before the Ld. CIT(A). It has been stated by the assessee that relevant assessment order was forwarded to the Chartered Accountant dealing with the matter and the assessee came to know about delay only on receipt of the order of the Ld. CIT(A). The assessee has also filed an affidavit from the relevant Chartered Accountant explaining the reason for the delay. The relevant part of the Explanation of the Chartered Accountant is reproduced as under:

"I Bharat Rughani, chartered accountant, having my address at Premises No. 4, Shilpam CHS Ltd, Chincholi Bunder Road, Malad West, Mumbai 400064 hereby state on solemn affirmation as under:

1. I was the chartered accountant and the authorised representative before Ld. AO and Id. CIT-A of Shree Swamy Shree Swamy Samartha Prassana Oshiwara (E) Unit 3 Co operative Housing Society Limited ("Assessee") earlier to and during the year 2015, 2016 and 2017 when the notices for A Y 2009-10 and A Y 2013-14 and the reassessment

order for A Y 2013-14 were received by the assessee society.

2. I say that the assessee had in its income and expenditure account only the collections from members towards maintenance expenses and payments for the maintenance and interest from co operative bank was not taxable and that there was no taxable income and therefore in my considered view the assessee was not required to file the return of income.

3. I say that a notice dated 20.10.2015 under section 148 was received by the assessee for A. Y. 2009-10. When I read the provisions of section 151 of the income tax Act 1961 for assessment year 2009-10 it transpired that the notice under section 148 could be issued by assessing officer who should not be below the position of joint commissioner of income tax and sanction also has to be of the officer of the level of joint commissioner of income tax and above. Even otherwise as the society had no taxable income therefore I advised not to file the return of income.

4. I say that I am in practice of audit and compliances under the incor tax law. I am not in the practice of appellate proceedings and litigatio When the reassessment order was received by the assessee societyforA Y 2013-14 initially I had taken a view that since the society did not hai taxable income therefore no tax was applicable and that the assessment order was erroneous. I had also filed the financial statements of the assessee society on 30.12.2016 during the course of assessment proceedings and I thought that even though the financial statements were not considered by Ld AO as he had already passed the assessment order, but Id CIT-A will consider the financials and will see that the society had no taxable income. I took some time in digesting the appellate provisions and was not aware of the time limits applicable for filing appeal. I also believed that in a cooperative society the delay would be condoned. For various other reasons in my office, the appeal was delayed. I expected that in case of an assessee being a society the delay would be condoned as there was no taxable income. However, the delay was not condoned and the Ld CIT -A order was passed confirming the assessment order. Thereafter I have willingly left the work

of the assessee society so that it can be handled by someone who can deal with the serious situation. I have executed this affidavit so that because of delay on my part in filing the appeal at Id CIT-A, the assessee societyshould not suffer."

3.1 The Ld. Counsel of the assessee relied on the decision of the Hon'ble Bombay High Court in the case of **Vijay VishinMeghani v. DCIT [2017] 86 taxmann.com 98 (Bombay),** wherein delay of 2984 days has been condoned by Hon'ble Bombay High Court. The relevant finding of the Hon'ble High Court is reproduced as under:

"21. We find from paragraph 13 of the order, but for this relevant factors and tests, everything else has been brought into the adjudication by the Tribunal. The Tribunal though aware of these principles but possibly carried away by the fact that the delay of 2984 days is incapable of condonation. That is not how a matter of this nature should be approached. In the process the Tribunal went about blaming the assessee and the professionals and equally the Department. To our mind, therefore, the Tribunal's order does not meet the requirement set out in law. The Tribunal has completely misdirected itself and has taken into account factors, tests and considerations which have no bearing or nexus with the issue at hand. The Tribunal, therefore, has erred in law and on Facts in refusing to condone the delay. The explanation placed on affidavit was not contested nor we find that from such explanation can we arrive at the conclusion that the assessee was at fault, he intentionally and deliberately delayed the matter and has no bona fide or reasonable explanation for the delay in filing the proceedings. The position is quite otherwise."

3.2 The Ld. Counsel also relied on the decision of the Hon'ble Bombay High Court in the case of **Subhkaran& Sons v. N.A. Kazi, 5th ITO and Others [1985] 152 ITR 231 (Bombay)** wherein the Hon'ble High Court has held that a party should not suffer for no

fault on his part and for a sheer mistake or oversight on the part his legal or tax advisers. The relevant finding of the Hon'ble Bombay High Court is reproduced as under:

> *"6. In these circumstances, the better order, and one more in consonance with justice, should have been to accept the firm's request and condone the delay in filing Form No. 11A. Refusal to do so resulted in technicality triumphing over justice. A party may not suffer for no fault on his part and for a sheer mistake or oversight on the part of his legal or tax advisers. All that was necessary for the firm to do was in fact by it and its partners. That the chartered accountants made a mistake through oversight should not have been considered a fatal circumstance outweighing all the other facts and circumstances in favour of the assessee. Though to be perfect is divine, this mortal world has not as yet come across one so perfect and divine as to make no mistake at all."*

3.3 The Ld. Counsel also relied on the decision of the Hon'ble Karnataka High Court in the case of **Mrs. PremalathaPagaria v. ITO [2021] 130 taxmann.com 403 (Karnataka),** where in delay of 310 days has been condoned. The relevant finding of the Hon'ble Bombay High Court is reproduced as under:

> *"9. In the backdrop of the well settled legal principles, the facts of the case on hand may be examined.*
>
> *10. The reasons assigned by the assessee for the delay in filing the appeal is that the impugned order dated passed by the Commissioner of Income-tax (Appeals) was delivered to the assessee some time in the September 2015 and immediately after receipt of the said order, the assessee had supplied the order passed by the Commissioner of Income-tax (Appeals) to the office of the Auditor so far as to take action for filing of an appeal. It is the case of the assessee that the aforesaid order was not brought to the notice of the Chartered Accountant namely*

RAjendraKaravat by his staff, and the same remained in his office files without any action. The appellant thereupon made an enquiry and learnt about the fact on 7-10-2016 that the appeal has not been filed and the appellant took action to contact another Chartered Accountant and filed the appeal thereon.

11. The appellant in the facts and circumstances of the case should not suffer on account of inadvertence on the part of her Chartered Accountant.

12. Thus, in the facts and circumstances of the case, the assessee has made out sufficient cause to condone the delay of 310 days in filing the appeal before the Tribunal.

13. The aforementioned substantial questions of law framed by this Court is answered in favour of the assessee.

14. In the result, order dated 23-2-2017 passed by the Tribunal is hereby quashed and delay in filing the appeal is condoned."

4. We have heard rival submission of the parties and issue-in-dispute and perused the relevant material on record on the issue of condonation of delay in filing appeal before the Ld. CIT(A). We find that the delay has been caused mainly due to the dispute of the assessee society with one of its members and thereafter in taking decision by the Society involving many members. Thereafter delay has occurred in filing appealdue to mistake on the part of the Chartered Accountant. Relying on the decision cited above, we are of the opinion that there is no malafide or deliberate in action on the part of the assessee in filing the appeal with delay of 387 days before the Ld. CIT(A). Accordingly, we direct the Ld. CIT(A) to condone the delay in filing appeal before him and admit the appeal for adjudication on merit in accordance with law after considering

the submission of the assessee. The grounds of appeal by the assessee are allowed for statistical purposes.

5. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 22/05/2023.

Sd/-	**Sd/-**
(KAVITHA RAJAGOPAL)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 22/05/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai

आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Shri, M. Balaganesh, Accountant Member

ITA No.1907/Kol/2016 Assessment Year :2001-02

ACIT, Cicle-36, Aayakar Bhawan, Poorva, 8th Floor, 110, Shantipally, Kolkata-107	**V/s.**	M/s Soorajmull Nagarmull, 8 B.B.D. Bag (East), Kolkata-700001 [**PAN No.AAAAB 0601 N**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Md. Usman CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Akkal Dudhwewal, FCA
सुनवाई की तारीख/Date of Hearing	26-06-2018
घोषणा की तारीख/Date of Pronouncement	20-07-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This Revenue's appeal for assessment year 2001-02 calls into question correctness of the Commissioner of Income Tax (Appeals)-10, Kolkata's order dated 08.07.2016, passed in case No.142/CIT(A)/10/Cir-36/15-16/Kol, reversing Assessing Officer's action invoking section 41(1) after treating the assessee's liability amount of ₹12,97,47,322/- to be a case of cessation of liability assessment order dated 30.03.2015, involving proceedings u/s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

2. We notice at the outset that CIT(A)'s detailed discussion on the above sole issue of cessation of liability u/s 41(1)(a) of the Act reads as follows:-

> "*06. DECISION:*
> *1. I have carefully considered the action of the Ld.AO in adding an amount of Rs.12,97,47,322/- u/s. 441(1) of the Income Tax Act, 1961, on grounds that there was a cessation of liability on the part of the assessee for the impugned amount, and that therefore it would constitute part of the income of the assessee-firm. It is to be observed that this is the 2nd round of the assessment order for the A.Y 2001-02, and*

in the first round the matter had travelled to the Hon'ble ITAT. Briefly, the facts are that the appellant is a very old partnership firm and has been carrying Sundry Creditors over an extended passage of time.

2. For the subject Assessment Year, 2001-02 the appellant-firm had filed return of income u/s 139(2) on 30th July, 2001, declaring loss of Rs.18,740/-. The appellant-firm thereafter received notice u/s 148 of the Income Tax Act, 1961, dated 21.11.2006 reopening the assessment for AY 2001-02. In response the appellant filed a return of income declaring loss of Rs.83,923/-. Thereafter, the Ld.AO framed the assessment u/s 148 on 31.12.2007, at an income of Rs.13,02,16,901/-. In the aforesaid order the Ld.AO had made addition on account of Section 41(l) amounting to Rs.12,97,47,322/- and disallowed bad debts of Rs.5,63,402/-. Against the said order, the appellant preferred an appeal before the Ld. CIT(A)-XX. Kolkata. In the appellate order passed u/s 250 dated 31.03.2008, the Ld. C!T(A: deleted both the additions made by the AO. Against this appellate order, the Department preferred an appeal before the Hon'ble ITAT, Kolkata. The said appeal was adjudicated by the 'C' Bench of Hon'ble ITAT, Kolkata on 04.03.2014 in ***ITA No. 1326/Kol/2008****. After giving consideration to the arguments put forth by the Revenue as well as the appellant, the Hon'ble ITAT set aside the matter back to the file of the Assessing Officer. I have therefore carefully examined the applicable legal provisions and the judicial decisions available on the subject and relied upon by both, the Ld.AO and the Ld.A.Rs for the appellant-firm. As such it is the second round of litigation and the scope of the present proceedings are restricted to directions contained in the appellate order of the Hon'ble Tribunal. The relevant observations of the Hon'ble ITAT, Kolkata are as under:*

[quote]

"The question arises under Sec. 41(1)(a), on whom the onus lies to prove whether the liability has been remitted or ceased. The AO, in this case, has made inquiry and given opportunity to the Assessee to produce the evidence to prove that the liability still exists but no such confirmation or evidence were produced by the Assessee. In case the onus lies on the revenue, then the' revenue has to prove and bring evidence that the interest payable outstanding in the books got remitted or ceased during the year. In case, the onus lies on the Assessee, then the Assessee has to prove that there is no remission or cessation of the interest payable liability during the impugned assessment year. It is not denied that the liability respecting the interest payable is in existence for over 3 decades and under these facts, the immediate question that will arise in the mind of an ordinary person is how the liability for the interest was not paid for over 30 years, whether the liability could be regarded to remain in existence or not and whether the parties to whom the interest is payable by the Assessee are still surviving or not. In our opinion, all these questions are much more relevant to come to a concrete finding whether it can be said that there is remission or cessation of interest payable liability. We noted that the CIIT (A) has deleted the addition mainly on the basis that the AO has not brought any material or record to show that there had been a remission or cessation of the liability and benefit has been granted to the Assessee by the loan creditor in any modes of remission without deciding the issue first whether the onus lies on the AO to prove the remission or cessation of the liability during the year or the onus lies on the Assessee to prove that the liability is in existence during the year. If the onus lies on the AO, then the AO was duty bound to prove that there is remission or cessation of the liability during the year. In our opinion, whether the liability is in existence or not, the burden of proving is on the Assessee and Assessee has to bring evidence on record which may prove that the liability is in

existence during the assessment year even if it is barred by limitation. It cannot be within the domain of the AO to prove that the liability has ceased or remitted during the year even if the Assessee has not filed any confirmation or evidence to prove the existence of the liability. We, therefore, in the interest of justice and fair play to both the parties, set aside the order of CIT (A) and restore this issue to the file of AO with the direction that the AO shall re-examine this issue afresh and give proper and sufficient opportunity to the Assessee to prove that the interest payable which are more than 3 decades old are still liability in praesenti. The AO is also directed that while deciding the issue afresh, to look into the relevant provisions of the Income Tax Act as well as the relevant case laws on the issue for ascertaining on whom the burden to prove lies u/s 41.(1.)(a). In the result, this ground of appeal is allowed for statistical purposes. "

[unquote]

3. In the impugned order, it is to be seen whether both parties, as required by the Hon'ble Tribunal carried out these directions appropriately and only thereafter the Ld.AO could have sustained the addition u/s 41(1) as made in the original assessment u/s 147/143(3). In the present case the facts on record bring forth that in the assessee's Balance Sheet, it had disclosed outstanding current liabilities of Rs.12,97,47,322/- which were added by the AO u/s 41(1) of the Act on the ground that there was cessation or remission of liability. The addition so made in the original order was deleted by first Appellate Authority on the ground that no material was brought on record by the Ld.AO to demonstrate that the assessee-appellant was actually granted remission of the impugned liabilities. However when the matter travelled before the Hon'ble Tribunal, it issued the directions as have been incorporated in the order, and these were required to be carried out both by the assessee-appellant, as well as the Ld.AO. I find that in the first instance the assessee was directed to demonstrate with evidence that there existed valid liability and these were properly accounted in its books of accounts. From the submissions made by the Ld. A.R before the AO as also in this forum, it is to be observed that the appellant had furnished the complete details of outstanding liabilities as on 31.03.2001 amounting to Rs.12,97,47,322/-. The details furnished inter-alia included the names and complete addresses of the Creditors and the amounts due to each of them. The assessee also furnished copies of the Balance Sheet of the assessee-firm and the detailed list of sundry creditors for the AY.s 2000-01, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13 & 2013-14. With reference to these details, the Ld. A.R of the assessee demonstrated that the liability of Rs.12,97,47,322/- which is the subject matter of dispute in the impugned proceedings was consistently disclosed by the assessee on its liability side and by including the amounts due to the said parties in its financial statements filed with the tax authorities the assessee had acknowledged that the liabilities were subsisting and outstanding. In making the complete declaration in the form of liabilities shown in the Balance Sheet, the assessee was acknowledging that it had obligation to pay these amounts to the Sundry Creditors named in the financial statements and the liabilities had not ceased to exist. From the perusal of the assessment order as also from the details available in record, I find that the assessee had not only furnished the detailed list of sundry creditors outstanding as on 31.03.2001, but the assessee had also filed letters of confirmations issued by the parties wherein they had confirmed the balances shown outstanding as per assessee's books of accounts. I thus find that as per the Balance Sheets of the assessee for the immediate preceding year as also for the relevant assessment year, and for the subsequent years till AY 2013-14, the assessee had declared the details of outstanding liabilities due to sundry creditors. Besides disclosing the liabilities in Annual Financial Statements, the assessee-firm had supported existence of liabilities by producing balance

confirmations of the parties for the year ended 31.03.2001. The Ld. A.R for the assessee was directed to file copies of the assessment orders for the years prior to AY 2000-01 to substantiate that in the earlier years when the liabilities accrued, no adverse inference was drawn by any of the AOs under Section 41(1). In response the Ld. A.R of the assessee produced copies of the assessment orders for AYs 1998-99, 2000-01, 2002-03 and 2003-04. From these assessment orders it is apparent that even though the same set of creditors had appeared in the appellant's books of accounts upto 31.03.2000, the Ld. AO had not disbelieved or doubted the genuineness of the liabiliti.es and accordingly no inference with regard to remission or cessation of liability was drawn. All these years, had been subjected to scrutiny and orders were passed u/s 143(3) of the Income Tax Act. On the other hand, these assessment orders demonstrated that even though the same set of creditors appeared in the assessee's books, the Ld. AO had accepted these liabilities to be genuinely outstanding and due to the Creditors, as listed. Similarly in the subsequent assessments also the AO never disputed nor disbelieved the assessee's transactions with these sundry creditors when the assessee had made payments against outstanding balances due as on 31.03.2001. I also find that even though the same set of sundry creditors were shown outstanding as on 31.03.2004, in the assessment framed u/s 143(3) for AY 2004-05, the Ld.AO had not made any adverse comment about the genuineness of the outstanding liabilities. An assessee in the ordinary course of its dealing with the creditors is expected to maintain the basic records in support of the transactions with the parties. When called upon to substantiate the transaction, the assessee is required to furnish names and addresses and the details of financial transactions conducted. Further the assessee may also support the transactions by producing the party confirmations. Therefore with reference to the set of facts and documentary evidences as discussed, I am inclined to observe and hold that the assessee had discharged its onus of proving that as of 31.03.2001, that the assessee had subsisting liability to pay Rs.12,97,47,322/- to sundry creditors; details whereof were not only furnished before the Ld.AO but the assessee had also furnished confirmations from these creditors. In the light of the aforesaid facts, I therefore hold that the assessee had duly discharged the onus cast upon it of proving the fact that the assessee had subsisting and genuine obligation to pay Rs.12,97,47,322/- to the sundry creditors. The directions contained in the order Hon'ble ITAT, Kolkata which the assessee was required to comply were thus satisfactorily carried out by the assessee and therefore the onus of carrying out the other directions of the Hon'ble ITAT, Kolkata shifted on the Revenue, more specifically the Ld A.O.

4.From perusal of the assessment order, it is observed that the Ld. AO had also carried out enquiries and investigation into the details of creditors as furnished by the appellant. It is noted that the Ld. AO had identified the parties who had large outstanding sums which together accounted for more than 850/0 of the outstanding liability considered as income u/s 41(1) and had issued summons u/s 131 on sample basis to six creditors. From the impugned order it is observed that all the summons were served upon all the six creditors. The summons was also complied with by four creditors. The remaining two creditors did not personally appear but furnished the details as sought by the Ld.AO by way of a letter which was submitted in receipt / by post. The statements which were recorded on oath by the Ld.AO from the four creditors have been extensively reproduced in the assessment order at Pages 17 to 24. After carefully perusing the statements u/s 131 of the Income Tax act, 1961, it is to be noted that that none of the creditors denied the, facts that the debts were due by the appellant. None of the persons admitted or stated that the liabilities due to them had ceased to exist or stood remitted. In the said context, it is to be noted that the Directors of the Creditor Companies who had appeared before the Ld.AO were appointed on the Board of the companies much after F.Y. 2000-01, and therefore

they had expressed their inability to explain the financial transactions of their respective companies conducted a few years back in the F.Y 2000-01. Based on such statements therefore the Ld. AO had inferred that the inability of the Directors of the creditor companies to explain the transactions with the appellant in F.Y. 2000-01 established that the liabilities had ceased to exist in terms of Section 41(1) of the Act. In this factual matrix, it is observed that, firstly, the Ld. AO had attempted to comply with the directions of the ITAT, Kolkata as when the appellant had discharged its onus of establishing that the liabilities of Rs.12,97,47,322/- were genuine and subsisting as on 31.03.2001, the Ld.AO conducted enquiries from such creditors to ascertain whether the liabilities actually existed or not. However on careful perusal of statements u/s 131 and the facts as available on record, I note that the conclusions drawn by the Ld.AO based on the statements recorded u/s 131 was without proper and complete consideration of the circumstances eminent. From the statements u/s 131, it is observed that none of the creditors had denied the fact that the debts were not outstanding nor had they stated that the liabilities due by the appellant had ceased to exist. It is further material to note that the letters of confirmations issued by these parties were filed before the Ld.AO, genuineness of which was never denied or disputed by the Directors when they were examined on oath by the Ld.AO. The Directors who had appeared on behalf of the Creditor Companies had only expressed their inability to explain the transactions which were conducted with the appellant during FY 2000-01 since they were not on the Board of Directors back then and that such old books of accounts were not available with them. Taking into account the fact that these Directors were not the Directors during the relevant previous year and also that more than 15 years had elapsed since then, I find myself in agreement with the contentions of the Ld. A.Rs for the appellant that the inability of the Directors to explain the transactions conducted by their companies with the appellant in F.Y 2000-01 could not be viewed adversely. I also note that even under the Companies Act, 1956; the corporate creditors were required to maintain and preserve the books of accounts and other records of their business transactions for period not exceeding 8 years and therefore in view these legal provisions if the Directors of the creditor companies expressed their inability to produce the books of the relevant year or provide explanations with regard transaction of FY 2000-01 then no adverse view appears to be permissible in law. The mere fact that the persons who had appeared were not aware of the transactions which had occurred more than 15 years back cannot be taken as an admission by them that the liabilities due by the appellant had ceased or they were remitted by the creditors. I therefore, hold that the conclusions drawn by the Ld.AO from the statements u/s 131 was wholly unjustified. On the contrary, I find that the enquiries conducted by the Ld.AO actually advance the case for the appellant-assessee. Admittedly the summons u/s 131 were served upon the creditors and were also complied with. The Directors of the creditor companies had personally appeared and their statements on oath was recorded. None of the creditors had denied the liabilities due by the appellant nor had they admitted that they had granted remission of the amounts due from the appellant either in FY 2000-01 or at any time. These facts therefore go on to point that no inference could have been drawn by the Ld. AO to the effect that the creditors of the appellant which were brought forward from the earlier year had granted any remission or cessation of liability during FY 2000-01, so as to constitute as benefit contemplated in Section 41(1) of the Act. Therefore from the facts as were gathered in the course of assessment proceedings, I find that the material collected by the Ld.AO sufficiently indicate that the impugned liabilities of Rs.12,97,47,322/- as reflected in the Balance Sheet for FY 2000-01 had not ceased to exist. For the reasons set out in the foregoing, and in light of the aforesaid facts as discussed, I hold that although the Ld. AO had enquired into the liabilities as reflected by the appellant as outstanding as on 31.03.2001, but the enquiries did not in any manner suggest or prove that the liabilities had ceases to exist or that the sundry creditors

had granted remission of the liabilities to the appellant during the relevant previous year so as to assess the income under the deeming provisions of Section 41(1) of the Income Tax Act.

5. For the reasons discussed in the foregoing therefore, the second direction of the Hon'ble ITAT, Kolkata to the Ld.AO was not fully complied with as no convincing material or irrefutable evidence was brought on record to prove that the Sundry Creditors had granted remission of the amounts due or otherwise the assessee's liability due to the sundry creditors had ceased by 31.03.2001.

6. Further, it is to be observed that in the appellate order dated 04.03.2014, the Hon'ble ITAT had further directed the Ld.AO to bring on record clinching evidence to show that the liabilities if existed, the same were remitted during the relevant year or there was a cessation of the liability during the FY 2000-01 so as to constitute as appellant's income chargeable for AY 2001-02. In this regard I find that the relevant provision of the Act reads as follows:

> "(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,-
>
> (a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or
>
> (b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (e) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.
>
> Explanation 1. -For the purposes of this sub-section, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" shall include the remission or cessation of any liability by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts. "

A plain reading of Section 41(1) shows that the before the deeming provisions thereof are invoked, it is necessary for the Ld. AO to demonstrate with tangible material and admissible evidence that in reality the creditors had granted remission of the liabilities and such remission was granted during the relevant previous year. Since Section 41(1) is a deeming provision of the Act, in terms of which cessation or remission of a trading liability is deemed to be assessee's income; the onus is on the Revenue to prove that in fact there was a remission or cessation of the liability and secondly such remission or cessation occurred during the relevant previous year consequent to which the income accrued to the assessee. For this reason the

Hon'ble ITAT in its order dated 04.03.2014 had required the Ld. AO to bring on record not only the fact the liability was remitted or there was a cessation of liability, but further the AO was required to bring on record sufficient material to prove that such remission or cessation of the liability was granted or occurred during the FY 2000-01 being the relevant previous year for AY 2001-02. From a careful perusal of the impugned assessment order, however I find that the Ld. AO did not bring on record any evidence or document which proved that the assessee derived the benefit in the form of remission granted by the creditor during FY 2000-01 so as to constitute as income under Section 41(1) of the Act.

*7. The last direction of the Hon'ble ITAT, Kolkata required the Ld. AO to consider the scope of Section 41(1) of the Income Tax Act, 1961 in light of the prevailing judicial views on the subject. It is observed that In the impugned order the Ld.AO referred to a solitary judgment of the Delhi High Court in the case of CIT Vs Chipsoft Technology (P) Ltd (26 taxmann.com 109) for justifying invocation of S. 41(1) of the Act. On analysis of this decision it was noted that in the decided case, unpaid dues of the employees had remained outstanding in assessee's books for more than 7-8 years. It was therefore the Revenue's case that under the Industrial Disputes Act, the workmen's dues had become time-barred and therefore there was a cessation of liability within the meaning of Section 41(1) of the Act. On these facts therefore the Hon'ble High Court held that the unpaid dues of employees, whose recovery had got time barred, legally ceased to be the employer's liability and therefore it was rightly assessed as income by the AO u/s 41(1) of the Act. Applying the decision rendered by the Delhi High Court in the above said factual content the Ld. AO justified the addition of Rs.12,97,47,322/- the outstanding liabilities of the appellant which remained outstanding for several years. The Ld. A.Rs for the appellant, in the submission in appeal, however, in my considered view have correctly aptly pointed out that this decision was distinguishable since the facts involved in appellant's case were different. The Ld.A.Rs submitted that in the case before the Hon'ble Delhi High Court, the outstanding liabilities were workmen dues which had become time-barred under the relevant labour Law. These facts are however not involved in the appellant' case. It was explained that the outstanding liabilities did not involve a single rupee of labour dues. Instead all the liabilities were "**trading liabilities**" It was explained by the Ld. A.Rs that under the Limitation Act, 1903 which governed such liabilities, since the appellant had acknowledged the liabilities in its books of accounts, they had not become time-barred but remained subsisting and outstanding. After perusing the judgment of Hon'ble Delhi High Court and the facts involved therein vis-a-vis the facts of the appellant's case, I therefore find merit in the contentions of the Ld.A.Rs. I find that, in the present case, undeniably the outstanding liabilities are not workmen's dues and therefore not governed by Industrial Dispute Act. I find that unlike the facts involved in the judgment of Hon'ble Delhi High Court, there is no material on record that the liabilities of Rs.12,97,47,322/- had become time-barred or there was a cessation thereof in the relevant year. In the course of appellate hearing, the Ld.A.Rs for the appellant filed copy of a decision of Hon'ble ITAT, Bangalore in the case of Asst. CIT Vs Alvares & Thomas (62 taxman.com 286) wherein this particular aspect was considered by the Hon'ble Tribunal. In the decided case also the liabilities of the assessee had remained outstanding for several years. Before the Hon'ble Tribunal the Revenue relied on the judgment of the Delhi High Court in the case of CIT Vs Chipsoft Technology (P) Ltd (supra) to claim that the liabilities had become time barred and therefore there was a cessation of liability. The Tribunal however distinguished the said judgment as it found that the liabilities involved were not workmen dues but they were trading liabilities and therefore the judgment of Hon'ble Delhi High Court had no application to the facts of the assessee's case. The relevant findings of the ITAT, Bangalore in this regard were as follows:*

"The learned DR placed reliance on a decision of the ITAT Mumbai in the case of ITO v. Shailesh D. Shah [IT Appeal No. 7012 (Mum) of 2010, dated 11-12-2013}. We have perused the said decision and we find that was a case where the liability in question was outstanding labour charges in the case of an Assessee engaged in the business of civil construction. The Tribunal followed the decision of the Hon'ble Delhi High Court in the case of CIT v. Chipsoft Technology (P.) Ltd. [2012J 26 taxmann.com 109/210 Taxman 173 (Delhi) wherein the Hon'ble Delhi High Court on the facts of that case where the outstanding liability was wages of workman, expressed the view that it was illogical that wages of workman would remain unpaid for a long duration of time and therefore held that the liability should be considered as having ceased. The present case is a case of trading liability, which cannot stand on the same footing as due to workman. We are therefore of the view that the decision relied upon by the learned counsel for the Revenue would not be of any assistance to the plea of the Revenue. "

(Emphasis supplied)

8. I further note that this judgment of the ITAT, Bangalore was thereafter upheld by the Karnataka High Court & the relevant decision is reported as CIT Vs Alvares Br. Thomas (239 taxman 456). The relevant findings of High Court were as follows:

"7. As in the above referred order of the Tribunal, the relevant portion of Section 41 is reproduced, we may not reproduce the same. But, the relevant aspect is that, there are two requirements for invoking the provision of Section 41. The Sine qua non is, the remission or cessation of the trading liability and the additional requirement is, some benefit in respect of such trade liability is taken by the Assessee. If the aforesaid conditions are satisfied, then only Section 41(1) could be invoked by the Assessing Officer.

8. Examining of the facts of the present case reveals that, it is not the case of the Department that, any benefit in respect of such trading liability was taken by the assessee but, the Revenue contends that since the burden was not discharged of existence of the liability, it be treated as cessation of the liability and therefore, Section 41(1) could be invoked. Further, stand of the Revenue is that, when in respect of debt in question, confirmation was called for, a letter was produced of the creditor with its address but, when the same was verified, the report was that, party could not be traced and therefore, it was not verifiable.

9. In our view, even if we accept the contention of the Revenue that the party could not be traced and therefore debt could not be verified then also, by no stretch of imagination can it be held that it would satisfy the requirement of cessation of liability. In legal parlance, merely because the creditor could not be traced on the date when the verification was made, same is not a ground to conclude that there was cessation of the liability. Cessation of the liability has to be cessation in law, of the debt to be paid by the assessee to the creditor. The debt is recoverable even if the creditor has expired, by the legal heirs of the deceased creditor. Under the circumstances, in the present case, it can hardly be said that the liability had ceased. If the liability had not ceased or the benefit was not taken by the assessee in respect of such trade liability, in our view, the conditions precedent were not satisfied for invoking Section 41(1) the Act in the instant case.

10. The Tribunal has rightly relied upon the decision of Delhi High Court in case of Shri Vardhman Overseas Ltd. (supra). The discussion of the decision of Delhi High Co was relevant, for consideration of the facts of the case in

order to find out as to under what circumstances it could be said that there is cessation of liability. Further, the decision of Delhi High Court is after considering the view taken by the Apex Court case of CIT v. Sugauli Sugar Works (P.) Ltd. [1999J 236 ITR 518/102 Taxman 713.

9. I further find that the Supreme Court in the case of CIT v. Sugauli Sugar Works. (P.) Ltd. (236 ITR 518) had considered the issue concerning cessation or remission of liability and whether the cessation of liability can occur by reason of operation of the respective law. In the said judgment the Supreme Court referred to the decision of Hon'ble Bombay High Court in J.K. Chemicals Ltd. v. CIT (62 ITR 34), the relevant observations are as under:

"The question to be considered is whether the transfer of these entries brings about a remission or cessation of its liability. The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his liability. Remission has to be granted by the creditor. It is not in dispute, and it indeed cannot be disputed, that it is not a case of remission of liability. Similarly, a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the operation of law, i.e., on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to Honour his liability when payment is demanded by the creditor, or a contract between the parties, or by discharge of the debt the debtor making payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability. We have already held in Kohinoor Mills Co. Ltd. v. CIT (1963) 49 ITR 578 (Bom.) that the mere fact of the expiry of the period of limitation to enforce it, does not by itself constitute cessation of the liability. In the instant case, the liability being one relating to wages, salaries and bonus due by an employer to his employees in an industry, the provisions of the Industrial Disputes Act also are attracted and for the recovery of the dues from the employer, under s. 33C(2) of the Industrial Disputes Act, no bar of limitation comes in the way of the employees. "

From the observations as contained in the judgement of the Supreme Court, I find that it in fact the Court went a step ahead and held that even upon the expiry of the period of limitation prescribed under the Limitation Act, the debt or liability will not stand extinguished but it would only prevent the creditor from enforcing the debt and in that view of the matter the deeming provisions of Section 41(1) could not be invoked on the premise that the liability had become time-barred.

10. I further note that in another decision of the Hon'ble Delhi High Court in the case of CIT Vs Vardhaman Overseas Ltd (343 ITR 408) facts involved were similar to one involved in the appellant's case. Facts involved in this case were; the liabilities in question were trading liabilities and not workmen dues. Before the AO, the assessee was unable to furnish confirmations from the creditors which appeared to be old and the assessee was unable to furnish the complete addresses of all the creditors. The outstanding creditors were therefore assessed as income u/s 68. On appeal the CIT(A) though deleted addition u/s 68 but confirmed the addition by invoking Section 41(1) of the Act. On appeal the ITAT found that in the assessee's books, the amounts payable to the creditors were not written back but shown as outstanding to the parties and therefore Section 41(1) was held inapplicable. On appeal the High Court observed that to invoke Section 41(1) it was necessary to show that the assessee was actually granted remission of trading liabilities for which deduction was earlier allowed. The High Court further held that it was not enough that the assessee

*derived some benefit of trading liability but such benefit should necessarily arise on account of remission of the liability. The Court noted that the assessee had not transferred the outstanding amounts from the creditors' account to its Profit & Loss Account but the amounts were shown as "**liabilities**" in the Balance Sheet and the assessee had acknowledged the debts as due to the creditors. The High Court therefore held that Section 41(1) was not applicable. I find that the facts involved in the decision of Delhi High Court were similar Rather facts involved in assessee's case brings its case on much stronger footing because in this case the assessee not only acknowledged liability in the Balance Sheet but was able to file confirmations from creditors as well. The decision of the Hon'ble Delhi High Court in the case of Vardhaman Overseas Ltd is therefore fully applicable in the present case.*

11. The ratio laid down by the Hon'ble Delhi High Court in the case of CIT Vs Vardhaman Overseas Ltd (supra) was reiterated by coordinate Bench of the same Court in a subsequent decision in the case of CIT Vs Jain Exports (P) Ltd (217 taxman 43) which was rendered after the decision of the same Court in the case of CIT Vs Chipsoft Technology (P) Ltd (supra).

In view of. this factual & legal position and the decisions discussed in the foregoing, I therefore find that the lone decision in the case of CIT Vs Chipsoft Technology (P) Ltd (supra) relied upon by the AO in facts was not applicable to appellant's case. Instead the reliance placed by the Ld. A.Rs on the subsequent decisions of Hon'ble Karnataka High Court in the case of CIT Vs Alvares & Thomas (supra), Hon'ble Delhi High Court in the case of CIT Vs lain Exports (P) Ltd (supra) were more appropriate in the appellant's case.

12.It is to be further observed that the proposition put forth by the Hon'ble Delhi & Karnataka High Courts was also laid down by the Hon'ble Punjab & Haryana High Court in the case of CIT Vs Sita Devi luneja (325 ITR 593) wherein the Hon'ble High Court while allowing the assessee's claim observed as follows:

> "After hearing learned counsel for the appellant and going through the impugned order, we do not find any merit in the instant appeal. It is the conceded position that in the assessee's balance sheet, the aforesaid liabilities have been shown, which are payable to the sundry creditors. Such liabilities, shown in the balance sheet, indicate the acknowledgement of the debts payable by the assessee. Merely because, such liability is outstanding for the last six years, it cannot be presumed that the said liabilities have ceased to exist. It is also conceded position that there is no bilateral act of the assessee and the creditors, which indicates that the said liabilities have ceased to exist. In absence of any bilateral act, the said liabilities could not have been treated to have ceased. In view of these facts, the CIT(A) as well as the ITAT have rightly come to the conclusion that the Assessing Officer has wrongly invoked the Explanation I of section 41(1) of the Act and made the aforesaid addition on the basis of presumption, conjectures and surmises. It has been further found that the Assessing Officer failed to show that in any earlier year, allowance of deduction had been in respect of any trading liability incurred by the assessee. It was also not proved that any benefit was obtained by the assessee concerning such trading liability by way of remission or cessation thereof during the concerned year. Thus, there did not accrue any benefit to the assessee which could be deemed to be the profit or gain of the assessee's business, which would otherwise not be the assessee's income. It has been further found as fact that the assessee had filed the copies of accounts of sundry creditors signed by the concerned creditors. In view of this fact, in our opinion, the ITAT has rightly come to the conclusion that confirmation from the creditors were produced.

5. In view of the above, we do not find any illegality in the impugned order passed by the ITAT and in our opinion, no substantial questions of law, as raised by the revenue in this appeal, arise from the order of the ITAT."

13. This decision of the Punjab & Haryana High Court was followed by another Bench of the same High Court in the subsequent judgment rendered in the case of CIT Vs Speedways Tyre Ltd (364 ITR 401). Moreover, it is to be noted that the Hon'ble Gujarat High Court in the case of CIT Vs Nitin 5 Garg (208 Taxman 16) came to identical conclusions. In the case decided by the Hon'ble Gujarat High Court facts involved were almost similar to facts involved in the appellant's case. While decide the appeal the High Court took note of the fact that the assessee had not written back the outstanding liabilities in its books but continued to disclose the outstanding amounts as liabilities in the balance sheet from year on year. According to the Hon'ble High Court merely because the amounts remained outstanding for many years, it could not be inferred that the liabilities had ceased to exist. Merely because the assessee was allowed the deduction of trading liabilities in the earlier years and the balances were carried forward in the subsequent years, did not prove that the trading liabilities had ceased to exist. This decision was followed by the coordinate Benches of the same High Court while deciding the appeals in the cases of CIT Vs Puridevi M. Chaudhary (41 taxmann.com 329), CIT Vs Bhogilal Ramjibhai Atara (222 Taxman 313) & CIT Vs Matruprasad C Pandey (59 taxmann.com 428).

14.The Ld. A.Rs reliance on the decision of the Hon'ble Madras High Court in the case of CIT vs Tamil Nadu Warehousing Corporation (292 ITR 310) also appears to be relevant since the facts of the assessee's case were similar to the facts of the decided case. The High Court in the decided case found that the assessee had disclosed in its balance sheet the liabilities outstanding to the trade creditors which were old and brought forward from earlier years. The AO assessed the outstanding liabilities u/s 41(1). The Hon'ble High Court upheld the ITAT's order allowing relief on the ground that there was no evidence that there was cessation of liability. The Court found that in fact the assessee had acknowledged the liabilities by disclosing them as payables in the Balance Sheet. Following the foregoing decision of the Madras High Court, the Hon'ble jurisdictional ITAT, Kolkata Benches in the following cases deleted additions made u/s 41(1) in respect of the old & outstanding creditors.

- ITO Vs M.L. Sarkar & Bros (ITA No. 1550/KoI/2010)
- ITO Vs Amusar Services & Suppliers Pvt Ltd (ITA No. 609/KoI/2012)
- ITO Vs Multiwyn Industrial Corporation (ITA No. 2165/KoI/2010)

On close examination of the foregoing Hon'ble ITAT decisions, I find that in all the 3 cases the Assessing Officers had invoked Section 41(1) of the Income Tax act; 1961 in respect of old trade creditors on the ground that either the assessee did not furnish the complete particulars of the creditors brought forward from the earlier years or that the notices issued u/s 133(6) remained un-served or non-complied. The CIT(A) & ITAT however held that so long as the assessee disclosed the amounts outstanding in its Balance Sheet and had acknowledged the liabilities as due, provisions of Section 41(1) had no application and therefore additions were not tenable.

From the legal principles as culled out in the above judgments, the position which emerges is that before the deeming provisions of Section 41(1) are invoked, the burden is cast on the Ld.AO to bring on record some tangible and credible material to prove that the assessee had in fact enjoyed benefit in the form of remission granted by the Creditor(s). Moreover it is also necessary for the Assessing Authority to show that benefit in the form of remission was derived by the assessee during the relevant previous year. It is observed that in the present case the assessee has never denied

its obligation to pay the outstanding amounts to the creditors. The material fact which was apparent from the audited accounts was that the assessee never claimed that it had no legal obligation to pay to the sundry creditors. Applying the ratio laid down in these decisions to the appellant's case, I therefore find that both on facts as well as in law the assessee has proved that no material was available with the Ld.AO which in any manner which established that the creditors had granted remission of liabilities to the assessee during the previous year relevant to A.Y. 2001-02. The Ld. AO did not bring on record any tangible material to prove that the creditors had granted remission of liabilities during the relevant previous year because of which the assessee's liabilities ceased to exist in FY 2000-01. I therefore agree with the submissions of the Ld.A.Rs, and hold that addition of Rs.12,97,47,322/- u/s 41(1) was not sustainable in law. The Ld. AO is accordingly directed to delete the addition made u/s 41(1) of the Act.

These grounds are therefore allowed in favour of the appellant-assessee."

3. We have heard both the parties reiterating their respective stands against and in support of impugned section 41(1) remission / cessation of liability involving the amount of ₹12,97,47,322/-. The instant proceedings appear to be second round of litigation between the parties *qua* the very issue before this tribunal. Earlier co-ordinate bench had remitted the instant issue back to the assessing authorities for afresh adjudication (supra).

4. The Assessing Officer took up consequential proceedings. There is no dispute about the assessee to have been carrying forward the impugned liability in its books for a time span of almost three decades. It is an admitted fact that the department did not raise any issue in all intervening assessment years in question. It emerges that Assessing Officer had issued summons to six directors of the concerned entities on test check basis in the instant second round. Four of the said six entities' directors put in appearance. They expressed their ignorance about any such trading transactions with the assessee in their respective statements. This made the Assessing Officer to issue a show-cause dated 12.03.2015 proposing to treat the above sum as a mere book entry as ceased u/s 41(1) of the Act. The assessee stated reiterated the fact of having claimed the impugned liability in its books almost three decades earlier for the first time followed by similar treatment in the intervening assessment years without any change relevant in facts. Its case was that none of its creditors had ever remitted their respective sums so as to

attract section 41(1) of the Act. It highlighted the fact that above random creditors had supported its case as per their written replies in response to the respective summons. All this failed to convince the Assessing Officer. He noticed that one of the said written replies did not contain even concerned party's signatures. He thereafter narrated the entire backdrop and quoted four of the tested check parties statements to conclude that the impugned liability was not genuine one so as to be taken as subsisting upto impugned assessment year. He took cognizance of the fact the that said four directors had expressed their complete ignorance about any corresponding transactions to have taken place in the past. Relevant intervening period had also not seen any payment from the taxpayer's side for a very long period of time as per the Assessing Officer. He was therefore of the view that neither the creditors in question had taken any steps to recover their respective dues nor the instant taxpayer had discharged even a single penny of the impugned liability. All this formed sufficient reason for him to opine that the assessee had no intention to pay that money in question. He alleged creditors non confirmation as well as lack of their identity in his assessment order based on an assumption that they had either vanished or there was no effort at their behest to claim this liability sum. The Assessing Officer was further of the opinion that hon'ble Delhi high court's decision in *CIT vs. Chipsoft Technology Pvt. Ltd.* on 20.07.2012 in **ITA No. 598/2011** had made it clear that section 41(1) Explanation sufficiently indicated the same to be inclusive provision since the legislature had not used "**means**" clause therein. He therefore made the impugned addition u/s 41(1) on cessation of trading liability of ₹12,97,47,322/- in question.

5. The assessee preferred appeal. The CIT(A) has reversed the Assessing Officer's action in his above extracted detailed discussion. This leaves the Revenue aggrieved.

6. Learned Departmental Representative vehemently argues in the light of Assessing Officer's findings that assessee's impugned liability is not a genuine one first of all as per the four parties's directors' statements. He thereafter submits that it can be safely assumed that the liability in question as ceased u/s. 41(1) of the Act. We do not find merit in either of these two arguments. Case file revealed that the assessee has throughout been claiming the impugned liability for a time span of almost three decades without any such objection from department. Relevant sundry creditors list runs into 96 parties; amount and address-wise, particularly in paper book pages 55 to 56 as on 31.03.2001. The assessee partly paid the sum in case of five of the said parties involving gross amount of ₹21,95,04,000/-. Paper book pages 93 to 95 and 57 to 59 contains the summarized statement of liability in question as to 31.03.2000 and from 01.04.1989 to 31.03.2013 involving the sum of ₹12,87,24,079/-; respectively.

7. Case file further suggests that the impugned liability claim has nowhere been doubted in preceding or succeeding assessment years involving regular assessment at least in assessment years 1998-99, 2000-01, 2003-04 and 2004-05. The CIT(A)'s clinching findings that four directors of corresponding entities have been appointed in financial year 2001-02 only whereas the impugned liability dates back to almost 30 years; have gone unrebutted from the Revenue side. We therefore do not see any merit in Revenue's above twin submissions. Its former plea that the impugned liability is not genuine at this belated stage carries no weight. Hon'ble Karnataka high court's decision in *CIT vs. Alvares & Thomas* (2010) 69 Taxman 257 (Kar) holds that mere none verification of such a liability for or for that any doubt raised thereupon does not attract cessation of liability principle u/s 41(1) of the Act as the same has to be a case of cessation in law only. Hon'ble Gujarat high court's judgment in *CIT vs. Nitin S Garg* (2012) 22 Taxman 59 (Guj) has placed reliance on much a celebrate judgment of hon'ble apex court in *CIT vs. Sugauli Sugar Works (P) Ltd.* (1999) 236 ITR 518 (SC) to hold that the mere fact of a liability having

continued to be shown for very many years would not attract section 41(1) since it is for the Assessing Officer has who has to show that concerned assessee has drawn any benefit by way of cessation or remission thereof. We further make it clear that CIT(A)'s above extracted detailed discussion has examined all the facts as well as the relevant legal position at length which has nowhere been rebutted from the Revenue side. We therefore conclude that the CIT(A) has rightly reversed the assessment findings holding the amount in question of ₹12,97,47,322/- to be a case of cessation of liability u/s 41(1) of the Act.

9. This Revenue's appeal is dismissed.

Order pronounced in the open court 20/07/2018

Sd/- Sd/-

(लेखा सदस्य) (न्यायिक सदस्य)

(M.Balaganesh) (S.S.Godara)

(Accountant Member) (Judicial Member)

Kolkata,

*Dkp, Sr.P.S

दिनांकः- 20/07/2018 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-ACIT,Circle-36, Aayakar Bhawan, Poorva,8th Floor, 10, Shantipally, Kolkata-107
2. प्रत्यर्थी/Respondent-M/s Soorajmull Nagarmull 8 B.B.D Bag(East), Kolkata-001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata (sent through e-mail)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata (sent e-mail)
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य
BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER

आयकर अपील सं./**I.T.A. No. 146/VIZ/2024**
(निर्धारण वर्ष/ **Assessment Year: 2017-18)**

Bejavada Subbayamma D.No. 15-48, Meenanagaram Chagallu Mandal– 534342 West Godavari District Andhra Pradesh **[PAN : CNNPB7575B]**	*v.*	Income Tax Officer – Ward – 2 Income Tax Office Aayakar Bhavan, Sajjapuram Tanuku – 534211 Andhra Pradesh
(अपीलार्थी/ Appellant)		**(प्रत्यर्थी/ Respondent)**

करदाता का प्रतिनिधित्व / Assessee Represented by	:	Smt A. Aruna, AR
राजस्व का प्रतिनिधित्व / Department Represented by	:	Dr. Aparna Villuri, Sr.AR
सुनवाई समाप्त होने की तिथि / Date of Conclusion of Hearing	:	21.08.2024
घोषणा की तारीख/Date of Pronouncement	:	23.08.2024

आदेश /O R D E R

PER SHRI DUVVURU RL REDDY, JUDICIAL MEMBER:

1. This appeal is filed by the assessee against the order of Learned Commissioner of Income Tax (Appeals) [hereinafter in short "Ld. CIT(A)"], National Faceless Appeal Centre (NFAC), Delhi in DIN & Order No. ITBA/NFAC/S/250/2023-24/1052676836(1) dated 09.05.2023 arising out

of order passed Under section 144 of the Income Tax Act, 1961 (in short 'Act') dated 27.12.2019 for the A.Y. 2017-18.

2. Briefly stated facts of the case are that, the husband of the appellant; One B. Surya Rao, was allotted licence for liquor business for the Financial Year 2015-16. He carried his business till his demise and after his demise, the assessee/appellant continued the business with the same license issued to her husband. The Excise Department also permitted to do the same business, therefore they continued to deduct TCS under the PAN of husband of the assessee and also filed the TCS returns in his name only. However, the bank authorities did not allow the appellant to operate the bank account operated by her husband for the liquor business. Thereafter the appellant opened the new account on 28.11.2016 bearing Account No. 041311100001079 in the same branch for the liquor business and the sale proceeds were deposited in the account. The appellant filed the return of income on her husband for the A.Y. 2017-18 on 01.12.2018 dully incorporating the turnover in the said bank account in the returned income.

3. On 19.09.2019, the Assessing Officer issued a letter asking the appellant to submit the details of business and source for the deposits in the format mentioned in the letter. The appellant could not comply with

the show cause notices. However, all the relevant details for the cash deposits were already submitted at the time of filing of the return of income. The Assessing Officer completed the assessment on 27.12.2019 by treating the cash deposits of Rs.12,07,827/- as unexplained cash deposits as the source of such deposits stood unverified since assessee failed to avail the opportunities provided by the Assessing Officer to the assessee.

4. Being aggrieved, the assessee preferred an appeal before the Ld.CIT(A) with a delay of 719 days. After considering the COVID-19 situations, Ld. CIT(A), NFAC, Delhi condoned the delay of 719 days and proceeded to dispose of the case on merits. Ld. CIT(A) issued four (4) notices to the assessee asking her to file a reply. In spite of receipt of the notices, she did not comply with the notices. Due to that Ld. CIT(A) disposed off the appeal based on the material available on record and came to the conclusion that the assessee has failed to explain the source of cash deposits an amount of Rs. 12,07,827/- deposited during the demonetisation period. Therefore, Ld. CIT(A) confirmed the order passed by the Ld. Assessing Officer.

5. Being aggrieved, assessee preferred an appeal before the ITAT with a delay of 275 days and also assessee filed a petition for condonation of

delay of 275 days. In order to substantiate assessee's case, assessee has raised the following grounds: -

> *1. The order of the learned Commissioner of Income Tax (Appeals) is contrary to the facts and also the law applicable to the facts of the case.*
>
> *2. The learned Commissioner of Income Tax (Appeals) ought to have decided the appeal on the basis of merits of the case.*
>
> *3. The learned Commissioner of Income Tax (Appeals) ought to have directed the assessing officer to delete the addition of Rs.12,07,827/- made u/s 69A of the Act towards unexplained cash deposits in bank account.*
>
> *4. Any other grounds may be urged at the time of hearing.*

6. In order to condone the delay, it was the submission of the assessee that her Chartered Accountant's wife was not well and she was admitted in Apollo hospitals, Chennai, for treatment. Due to that counsel for the assessee was unable to file the appeal in time. He further argued that the assessee has filed the discharge summary and medical records of the wife of the Chartered Accountant of the assessee, there is no wilful negligence or latches on the part of the assessee and pleaded to condone the delay of 275 days.

7. On the other hand, Ld. Departmental Representative [hereinafter in short "Ld. DR"] submitted that the assessee has not cooperated during the assessment proceedings as well as the appellate proceedings and also

the assessee filed the appeal before the ITAT with a huge delay of 275 days. Ld. DR further submitted that the assessee has not properly explained the delay and her only contention is Chartered Accountant's wife was not well that itself is not a valid ground to condone the delay of 275 days, hence pleaded to dismiss the appeal as not maintainable.

8. Heard both sides and perused the material available on record. I had gone through the medical records filed by the assessee i.e., prescription copies and two discharge summaries and one final scanning report. According to the discharge summary, Wife of the Chartered Accountant of the assessee, was admitted on 24.07.2022 and after her surgery she was discharged on 01.08.2022. Thereafter they have not filed any evidences showing the further treatment of wife of Chartered Accountant of the assessee. However, they filed one scanning report dated 17.04.2023. **But the Ld. CIT(A) passed the order on 09.05.2023, thus it is clear that after one month of her treatment, the Ld. CIT(A) passed the order, therefore the assessee has to file the appeal on or before 08.07.2023 but has filed this appeal on 08.04.2024**. After considering the facts and circumstances of the case, the contention of the assessee that the delay caused due to ill-health of the wife of the Chartered Accountant is not tenable. Thus,

there is no satisfactory cause to condone the delay of 275 days. Therefore, I am of the view that assessee has miserably failed to explain the sufficient cause for which she was prevented to file the appeal within the time. The reasons mentioned in the condonation petition are totally false. Moreover, the assessee did not prosecute the proceedings before the Assessing Officer as well as Ld. CIT(A) and even after passing the order of the Ld. CIT(A) the assessee did not prefer the appeal within the time. Therefore, I am of the considered view that the delay is only due to negligence act of the assessee. Therefore, the grounds raised by the assessee are dismissed.

9. In the result, appeal filed by the assessee is not maintainable and dismissed in-limine.

Order pronounced in the open court on 23rd August, 2024.

Sd/-
(दुव्वूरु आर.एल रेड्डी)
(DUVVURU RL REDDY)
न्यायिक सदस्य/JUDICIAL MEMBER
Dated :. 23.08.2024
Giridhar, Sr.PS

आदेश की प्रति लिपिअग्रेषित / **Copy of the order forwarded to :-**

1. निर्धारिती / The Assessee : Bejavada Subbayamma
D.No. 15-48, Meenanagaram
Chagallu Mandal– 534342
West Godavari District
Andhra Pradesh

2. राजस्व / The Revenue : Income Tax Officer – Ward – 2
Income Tax Office
Aayakar Bhavan, Sajjapuram
Tanuku – 534211
Andhra Pradesh

3. The Principal Commissioner of Income Tax

4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam

5. The Commissioner of Income Tax

6. गार्ड फ़ाईल / Guard file

//True Copy//

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam