MANU/SCOR/00608/2015

INTHESUPREMECOURTOFINDIA

Writ PetitionsCriminal Nos. 13/2015

Date of Order: 09.02.2015

Appellants: **Dayanidhi Maran**
Vs.
Respondent:**CentralBureauOfInvestigationRepByItsDirector,NewDelhi**

Hon'ble Judges/Coram:
Hon'ble Mr. Justice V. Gopala Gowda Hon'ble Mrs. Justice R. Banumathi

Counsels:
ForAppellant/Petitioner/Plaintiff:,Mr.C.AryamaSundaram,Sr.WP(Crl)13/15Mr. AmarenderSharan,Sr.Mr.K.V.Jagdishvaran,Ms.G.Indira,Mr.SumeshD.,Ms. Vatsala,,WP(Crl)14/15Mr.L.NageshwarRao,Sr.Mr.ShekharNaphade,Sr.Mr. AnirbanBhattacharya,Mr.AbhisekhE.Kisku,Mr.GauharMirza,Ms.SukritiMago,Mr. AbhayKumar,

ForRespondents/Defendant:Mr.K.K.Venugopal,Sr.C.B.I.Ms.PinkyAnand,A.S.G., Mr.AnandGrover,Sr.Mr.GopalSankaranarayanan,Ms.SoniaMathur,Mr.Rohit Bhat,

ORDER

2 On6.02.2015,afterwedictatedtheorder,onthesubmissionmadebyMs.Pinky Anand,learnedAdditionalSolicitorGeneral,intheafternoonsessionbeforethis Courtroseforthe day,forthereasonsrecordedinourorder,thedictatedorderon 6.02.2015inthesepetitionswasrecalled.AfterwedictatedtheOrderon6.2.2015, thesematterswererelistedforhearingtodayaspertheroster.WehaveheardMs. PinkyAnand,learnedAdditionalSolicitorGeneral,Mr.K.K.Venugopal,learnedsenior counsel,fortheC.B.I.andMr.AnandGrover,learnedseniorcounsel,fortheSpecial JudgeCourt.Wehaveheardfurthersubmissionsoflearnedseniorcounselappearing forthepetitioners.LearnedseniorcounselfortheC.B.I.invitedourattentiontothe orderwhichwehavedictatedon6.02.2015notingthesubmissionmadeonbehalfof learnedseniorcounselinboththewritpetitionswouldgiveanimpressionthatthey mayapproachtheHighCourt,thoughthisCourthasnotexpresslygivenlibertyto them to approach the High Court. In that event, that would be contrary to the judgmentsofthisCourtinCentreforPublicInterestLitigation&Ors.vs.U.O.I.&Ors.,(2012)3SCC117para30,CentreforPublicInterestLitigation&Ors.vs.U.O.I. &Ors.,(2011)1SCC560,CentreforPublicInterestLitigation&Ors.vs.U.O.I.and Ors.,2013(8)SCC18para8andShahidBalwavs.U.O.I.&Ors.,2014(2)SCC687 para13toshowthatthisCourthasinexplicittermshasstatedinrelationtothe2G Scamcases,otherthanthisCourt,nootherHighCourtorCourtshavejurisdictionto examinethematter.Thesaidsubmissionisstronglyrebuttedbylearnedsenior counsel, Mr. C.A. Sundaram, Mr. Shekhar Naphade and Mr. L. NageshwarRao appearingforthepetitioners.Mr.C.A.3Sundaram,learnedseniorcounsel,madea submissionwhichisreiteratedbyotherlearnedseniorcounselthatthematterswhich arebeingfiledbeforethisCourtinthesepetitionsarenot2GScamcases,therefore, theSpecialJudgedesignatedtotrythe2GScamcasesexclusivelyhasnojurisdiction inrelationtothechargesheetsfiledinthesecasesbeforehimandinrespectof

chargesagainstthepetitionersand,therefore,relianceplacedonthejudgmentsof thisCourtbylearnedseniorcounselonbehalfoftherespondenthavenorelevanceto thefactsofthepresentcases.Learnedseniorcounselforthepetitionersfurther contended placing strong reliance upon Section 482 of the Codeof Criminal Procedurethattherightavailabletothepetitionerscannotbetakenaway.Itwas submittedthatwhentheyhavetakenpleaintheseproceedingsthattheSpecial Judgehasnojurisdiction,thealternativeremedyavailableforthem,itwascontended that,evenassumingthatthesubmissionmadeonbehalfoftheC.B.I.andU.O.I.with respecttotheaforesaidcasesuponwhichtheyhaveplacedstrongrelianceare correct,thenthisCourtistheappropriateforumtoexaminethepetitionunderArticle 32oftheConstitutionofIndiaandtherefore,requestedthisCourttoexamineasto whethertheircaseswouldfallunder2GScamcases.Wehaveheardlearnedsenior counselappearingonbehalfoftheparties.Werestoretheorderwhichwehave dictatedinthefirstinstanceon6.02.2015withafurtherclarificationthatonlythe submissionofthelearnedseniorcounselonbehalfofthepartiesarenotedinour dictatedorderwhichisrestoredtoday.Further,wemakeitveryclearthatinviewof thedecisionsreferredtosupraonwhichrelianceisplacedbyMr.K.K.4Venugopal, learnedseniorcounsel,wehavenotgivenanylibertytothepetitionerstoapproach theHighCourtoranyotherCourtexcepttheSpecialJudge,atthefirstinstance,to raisethejurisdictionalissue.Withtheaforesaidclarification,werestoreourdictated orderdated6.02.2015inthesewritpetitions.Thewritpetitionsaredisposedof accordingly. (S. K.RAKHEJA)

MANU/SCOR/06627/2015

IN THE SUPREME COURT OF INDIA

Petitions for Special Leave to Appeal Crl. Nos. 6582-6583/2015

Date of Order: 12.08.2015

Appellants: **Dayanidhi Maran**
Vs.
Respondent: **The State By Deputy Superintendent Of Police Cbi**

Hon'ble Judges/Coram:
Hon'bleMr.JusticeT.S.ThakurHon'bleMr.JusticeV.GopalaGowdaHon'bleMrs. Justice R.Banumathi

Counsels:
For Appellant/Petitioner/Plaintiff: , Mr. ShyamDivan, S r . Mr. H.S.Chandiok, Mr. AnirbanBhattacharya,Mr.GauharMirza,Mr.AbishekE.Kisker,Mr.SumeshDhawan, MS.Vatsala,Mr.VenkitaSubramoniamT.R.,

For Respondents/Defendant: Mr. Mukul Rohtaggi, AG, Mr. Tushar Mehta, ASG, Mr. P.K.Dey, Mr. Abhinav Mukherjee, MS. Ranjana Narayan,

ORDER

Digitally signed by Shashi Sareen Date: 2015.08.12 10:23:49 IST Reason: Issue notice.

Mr. B.V.Balram Das, Adv. accepts notice on behalf of the respondent-CBI. 2 Objectionstobefiledwithintwoweeks.Rejoinder,ifany,befiledwithinoneweek thereafter.

Poston14.09.2015.Operationoftheimpugnedordershallremainstayed,pending furtherordersfromthisCourt.(ShashiSareen)(VeenaKhera)AR-cum-PS

MANU/RH/1368/2015

IN THE HIGH COURT OF RAJASTHAN (JAIPUR BENCH)

D.B.CivilWritPetitionNos.7296,6419and7329/2014,D.B.CivilSpecialAppeal (Writ)No.1411/2014andD.B.CivilContemptPetitionNo.1482/2014

Decided On: 11.08.2015

Appellants:**DeshRajKhareraandOrs.**
Vs.
Respondent: **Union of India and Ors.**

Hon'ble Judges/Coram:
Sunil Ambwani, C.J. and Ajit Singh, J.

Counsels:
ForAppellant/Petitioner/Plaintiff: Rajesh Yadav, Prateek Kasliwaland PushkarTaimni

For Respondents/Defendant: N.M. Lodha, Advocate General, Vishal Sharma, SheetanshuSharma,R.D.Rastogi,Addl.SolicitorGeneral,SandeepPathak,Ashish Tiwari,SnehaSingh,R.N.Mathur,ShovitJhajaria,PrateekMathur,PrashantKumar Sharma,AnirbanBhattacharya,AngadMirdha,VirendraLodhaandJaiLodha

ORDER

Sunil Ambwani, C.J.

D.B. Civil Writ Petition No.7296/2014

1. Wehaveheardlearnedcounselappearingforthepartiesandallthestakeholders includingtheCentralGovernment,NHAI,StateofRajasthan,IDBI,leadBankerand theMembersoftheConsortiumBanks.

2. Bythiswritpetition,thepetitionerhasprayedforthefollowingreliefs:--

"(i)toissueanappropriatewritofmandamus,orderordirectioninthe natureofmandamustodirectRespondentNo.1&2totakeimmediateaction toterminateandsuspendtheconcessiongrantedtoRespondentNo.5;

(ii) to issue an appropriate writ, order or direction in the nature of mandamustorestraintheRespondentNo.5fromcollectingtolltax;

(iii) topassanyotherwrit,orderordirectioninthenatureofmandamusto cancel/reviewthecurrenttolltaxratesunderthepretextofrealizationof theircapitalinvestedintheprojectandfurthertorestrainRespondentNo.1 &2tolevyorcollectanyuserfee(tolltax)tillfinalcompletionofsixlaning of theProject;

(iv) topassanyotherwrit,orderordirectioninthenatureofmandamusto appointanyCourtCommissionertodetermineastowhetheranytolltaxis imposableupontheusersofthestretchofProjectquaRoadtax&othercessetc.

(v) This Hon'ble Court may be pleased topass any other writ, order or

directionasmaybedeemedfitandproperinthefactsandcircumstancesof thecaseinfavourofthepetitioner.

(vi) awardcoststothepetitionerfromthecontestingrespondents."

3 .ThewritpetitionwasentertainedbylearnedSingleJudge.On1stSeptember, 2014,learnedSingleJudgepassedthefollowingorder:--

"Heard.Despiteearlierdirectionsofthiscourt,therespondent-National HighwaysAuthorityofIndia(NHAI)couldnotsatisfyastowhyactionhas notbeentakenstrictlyasperthetermsoftheagreementbetweentheparties forsubstitutionagreement.Thecopyofsubstitutionagreementhasbeen presentedbeforethecourt.Thereferenceofpara3.3and3.4hasbeen given.Theaforesaidparasprovideastohowsubstitutionwouldoccurand theprocessofsubstitution.Thoseparasarequotedhereunderforready reference-

"3.3 Substitution upon occurrence of Concessionaire Default

Upon occurrence of a Concessionaire Default, the Authority shallbyanoticeinformtheLenders'Representativeofitsintention toissueaTerminationNoticeandgrant15(fifteen)daystimetothe Lenders' Representative to make a representation, stating the intentiontosubstitutetheConcessionairebyaNominatedCompany.

In the event that the Lenders' Representative makes a representationtotheAuthoritywithintheperiodof15(fifteen)days specifiedinClause3.3.1,statingthatitintendstosubstitutethe Concessionaire by a Nominated Company, the Lenders' Representative shall be entitled to undertake and completethe substitution of the Concessionaire by a Nominated Companyin accordancewiththeprovisionsofthisAgreementwithinaperiodof

180 (one hundred and eighty) days from the date of such representation,andtheAuthorityshalleitherwithholdTermination or undertake Suspension for the aforesaid period of 180 (one hundredandeighty)days;providedthatuponwrittenrequestfrom the Lenders' Representative and the Concessionaire, the Authority shallextendtheaforesaidperiodof180(onehundredandeighty) daysbyaperiodnotexceeding90(ninety)days.

Procedure forsubstitution

TheAuthorityandtheConcessionaireherebyagreethatonor after the date of Notice of Financial Default or the date of representationtotheAuthorityunderClause3.3.2,asthecasemay be,theLenders'Representativemay,withoutprejudicetoanyofthe otherrightsorremediesoftheSeniorLenders,invite,negotiateand procureoffers,eitherbyprivatenegotiationsorpublicauctionor tenders for the take over and transfer of the Project Highway includingtheConcessiontotheNominatedCompanyuponsuch NominatedCompany'sassumptionoftheliabilitiesandobligationsof theConcessionairetowardstheAuthorityundertheConcession AgreementandtowardstheSeniorLendersundertheFinancing Agreements.

Tobeeligibleforsubstitutioninplaceoftheconcessionaire, theNominatedCompanyshallberequiredtofulfiltheeligibility criteriathatwerelaiddownbytheAuthorityforshort-listingthe biddersforawardoftheConcession;providedthattheLenders' RepresentativemayrepresenttotheAuthoritythatalloranyofsuch criteria may be waived in the interest of the Project, and ifthe Authority determines that such waiver shall not have any material adverse effect on the Project, it may waive all or any of such eligibilitycriteria.

Upon selection of a Nominated Company, the Lenders' RepresentativeshallrequesttheAuthorityto:

(a) accedetotransfertotheNominatedCompanytheright to construct, operate and maintain the Project Highway in accordance with the provisions of the Concession Agreement;

(b) endorseandtransfertheConcessiontotheNominated Company,onthesametermsandconditions,fortheresidual Concession Period;and

(c) enter into a Substitution Agreement with the Lenders' Representative and the Nominated Company on the same termsasarecontainedinthisAgreement.

IftheAuthorityhasanyobjectiontothetransferofConcession in favourof the Nominated Company in accordance with this Agreement,itshallwithin7(seven)daysfromthedateofproposal madebytheLenders'Representative,giveareasonedorderafter hearingtheLenders'Representative.Ifnosuchobjectionisraisedby theAuthority,theNominatedCompanyshallbedeemedtohavebeen accepted. The Authority thereupon shall transfer and endorse the Concession within 7 (seven) days of its acceptance/deemed acceptanceoftheNominatedCompany;providedthatintheeventof such objection by the Authority, the Lenders' Representative may proposeanotherNominatedCompanywhereupontheprocedureset forthinthisClause3.4shallbefollowedforsubstitutionofsuch NominatedCompanyinplaceoftheConcessionaire."

Itisadmittedthatonaccountofconcessionaire'sdefault,anoticetoinform aboutintentiontoissueaterminationnoticewasgivenwith15days'timeto makearepresentationbythelenders'representativestatingtheintentionto substituteconcessionairebyanominatedcompanyinitsplace.Para3.3, quoted above, refers to undertake and complete substitution of the nominatedcompanywithinaperiodof180days.

Itisadmittedbythepartiesthataforesaidperiodhasalreadyexpiredinthe monthofAugust,2014.Asperpara3.4,theprocedureofsubstitutionhas beengiven.Itisnotclarifiedastowhyprocessofsubstitutionhasnotbeen adheredto.Theeventsbroughtbeforethecourtshownon-adherenceofthe agreement.

Thiscourt,whilepassingpreviousorder,madeitclearthatifthecourtwould

notbesatisfiedwiththeactionoftherespondentsandthewayeventshave takenplace,thematterwouldbereferredtotheCBIforinvestigation.The orderaforesaidwaspassedtomakeawareaboutitbecauseaprayertothis effectdoesnotexistinthewritpetitionbutitmakesprayerforanyother appropriaterelief.

Thiscourtgrantedtimetoclarifycertainissueswhichwereveryspecificand foradherenceoftheagreementinthepresentscenarioandforcollectionof toll,however,itseemsthatevenafterpassingoftheorder,theNHAIhas failedtotakeupthematterproperlyandtheIDBIisbentupontoflouttterms oftheagreement.Thebankisnotpartytothelitigation,however,ifthe matter is referred for investigation by the CBI, it would be against all concerned.

Atthisstage,petitionerssubmitthatNHAIhastakenadecisiontoincrease thetolldespitenon-completionoftheworkandbadconditionoftheroad.

Mr. Subhash Janu, Project Director, NHAI submits that the terms of agreement provides yearly increase of toll. It islooking to arrangement to maintainfour-lanewhileundertakingtheworkofwideningandconversionto six-laneroad.

Thepetitionerssubmitthatevenfour-laneroadhasnotbeenmaintainedas perthetermsoftheagreement,towhich,Mr.ShashankShekhar,Directorof therespondentNo.5-PinkcityExpressLtd.hasmadecontest.Theyhaveeven showntheirwillingnesstofileanadditionalaffidavitthatfour-laneroadhas beenmaintained.

Mr.SubhashJanu,ProjectDirector,NHAIhasalsoacceptedthatincreaseof thetollisontheconditiontomaintainfour-laneroadandsincetheincrease oftollisprovidedundertheagreement,ithasbeenmadewithoutexception.

Thiscourtaskedastowhetherincreaseintollisprovidedevenifthere remainsdefaultonthepartofthecontractortocarryoutandcompletethe workspeciallywhenanoticeforterminationhasbeengiventothecontractor bytheNHAI,thattoo,inthemonthofFebruary,2014andtheincreaseoftoll wassubjecttomaintenanceoffour-laneroad.

Inviewofabove,respondentNo.5-PinkcityExpresswayLtd.soasthe NationalHighwaysAuthorityofIndiamayfileadditionalaffidavit/stothe effect that four-lane road has been maintained as per the terms of the agreement.Theadditionalaffidavitmaybefiledwithinsevendays.Ifthe NHAIfeelthatfour-laneroadhasnotbeenmaintainedasperthetermsofthe agreement,theymaynotfileadditionalaffidavitasdirectedabove.Inthat case,presumptionwouldbethatfour-laneroadhasnotbeenmaintainedas pertermsoftheagreement,but,tillthenextdateandfactscomesregarding maintenanceoffour-laneroadaspertermsoftheagreement,NHAIwillnot effect increase oftoll.

List these cases on 10.9.2014. All the parties are given liberty to file necessarydocumentstobringotherfactsonrecordsothatonthenextdate, mattermaybeheardanddecidedfinally."

4 . On18.9.2014,learnedSingleJudgewasinformedthatthewritpetitionbearing

No.6419/2014hasbeentreatedtobeapublicinterestlitigation,andaccordingly, thematterswereplacedbeforetheDivisionBench.TheRegistrywasdirectedtolistthe matters before the Division Bench and that is how the matters came up for consideration beforeus.

5 On12.3.2015,afterhearingthepartiesandexaminingtheConcessionAgreement betweentheNHAIandtheConcessionaireforaperiodof912daysbeginningfrom 3.2.2009, which expired on 1.10.2011 and supplementary agreement dated 20.12.2013,whichextendedtheperiodupto15.10.2014,thisCourtfoundthatthe constructionhasbeenhinderedbyseveralobstaclesmainlyattributabletotheNHAI, theStateofRajasthanandtheGovernmentofHaryana.TheNHAIproposedtoextend theperiodofconstructionupto31.6.2015withoutenteringintoorextendingthe periodofcontract.ANotificationwasissuedbytheMinistryofShipping,Road, Transport&Highway,GovernmentofIndiaon23.3.2009undersection8Aofthe NationalHighwaysActreadwithRule3oftheNationalHighways(CollectionofFees by any person for the use of Section of National Highways/Permanent Bridge/Temporary Bridge on National Highway) Rules, 1997, authorizing the collectionoftollsonsixlanes,whichhavenotbeenconstructed,northefourexisting laneswerebeingmaintained,causingpublicconcernandoutcry.

6 . In the special circumstances, the Court prima facie found that after the extended period of construction in the agreement has come to an end, the authorityundersection8AoftheNHAActforcollectionoftollscommensurate withtheconcessionagreement,hascometoanend.

7. ThesixlaningofGurgaon-Kotputli-JaipurSectionofNationalHighwayNo.8from 42.70kmto273.00kmintheStateofHaryanaandRajasthanundertheNHDPPhase-VtobeexecutedasBOT(Toll)onDBFOpatternwasnotprogressingaccordingtothe schedule, on which the Minister for Surface Transport had, as reported in his statement,expressedhisinabilitytodomuchinthematterandhadassuredtolook forsolution.

8.Intheaforesaidcircumstancesandconsideringthattheperiodof construction, despitesupplementaryagreementhadcometoanendandthatthetollswerebeing collectedregularlyasuserfee,weproceededfurtherinthispublicinterestlitigation toprovideinitiativeforremovingthehindrances,whichappearedatthattimetobe the main obstacle in the completion of the main Project and requested all the stakeholders,namely,theCentralGovernment,NHAI,Bankers,Concessionaireand theStateGovernmenttosatisfytheCourtwhethertheworkisinprogressandthe sameshallbecompletedintheschedule time.

9. On22.4.2015,wefoundthatameetingwasconvenedon19.3.2015andthenext meeting,whichwastobeheldon9.4.2015,wasadjournedfor15.4.2015.The minutes of the meeting dated 15.4.2015 were not produced before the Court. The matter was thus adjourned directing the Concessionaire to explain the non-compliancesoftheresolutionNos.1and12relatingtoinfusionofequityandnon-paymentofrealizedtollsandtheworkofmaintenanceoffourlaneathisriskand cost,forwhichassurancesweregiveninthemeeting.TheAdvocateGeneralwas requestedtoinformtheCourtwhether37hindrancesinthechartgivenbytheState Governmenthavebeentakencareof.TheSDM,KotputliandtheSDM,Behrorwere directedtolookintothematterandiftheydonottakeanyactioninthematter,they may bereplaced.

10. On29.4.2015,thereportoftheIndependentEngineerregardingtheprogressof theworkwasfiled.Afterinspectingthesite,hesubmittedthereportalongwith photographs and emphasized on the removal of the hindrances. The report ofthe Independent Engineer demonstrated that out of 57 structures, 47 structures have beenopenedfortraffic;oneROB;and17structureshavebeende-linkedtobetaken upasandwhenthelandismadeavailable,butthesixlaninghastobecompletedin thefirstinstance.Onmaintenance,theIndependentEngineerreportedthatthe Concessionairehadnotcarriedoutitsobligationsofmaintenanceoffourlanes,in accordancewiththeConcessionAgreement.Weissuedfurtherdirectionswithregard toremovalofhindrancesNo.23,26,33and36.

11. We were alsoinformedthatin five cases,referencesfor enhancement of compensationinlandacquisitionproceedingsarependingandthus,possessioncould notbetaken.Thereferenceshavenothingtodoafterthelandisacquired,whichhas becomefinalandcompensationisdeterminedanddepositedorpaid.Whileissuing directionsthattheworksatfiveplacesshouldnotbehelduponaccountofpendency of references, after taking possession and demolition of constructions, directions wereissuedthatthehindranceNo.36-ShivTempletoberelocated;hindranceNo. 33-Ghasipura School, for which draft of Rs. 90 lacs prepared by the NHAI for relocationwastobehandedovertotheStateGovernment.OnhindranceNo.23,it waspointedoutbytheNHAIthatthehousesandshopsontheserviceroadand utilityatBoochahedaunderthechargeofADM,Kotputli,forwhichthelandwas acquired and the award amount has already been deposited and thus, possession couldbetaken.WealsoissueddirectiononhindranceNo.26,whichisaBaba BalnathSamadhiandwhichwassaidtobeareligiousstructure.Atthisstage, learnedAdvocateGeneralstatedthatthereisaBavdi(stepwell)causinghindrance. WedidnotfindanymentionofBavdiinthereportpreparedbytheSDMandtheADM and observed that since the land has been acquired for a project of National importance,theworkshouldnotbestoppedforSamadhiorBavdiandtherewasno reasonforconstructionofROBtocrossovertheSamadhiasitwasnotcontemplated.

12. On15.4.2015,anothermeetingwasheldunderthedirectionsofthisCourt,in which further progress was reported and attention of the Concessionaire was attractedtothemaintenanceandsafetyoftheroad.

13. InpursuanceoftheorderspassedbythisCourt,anadditionalaffidavitwasfiled byShriN.N.Giri,projectDirector,ProjectImplementationUnit,JaipurNational HighwaysAuthorityofIndiaannexingtheminutesofthemeetingheldon7.5.2015, inwhichonceagainfocuswasontheutilityshifting,hindrancesclearanceand hindrancesinHaryanaaswellastheconstructionoftollplazas.Thequestionof fundingwasdiscussedforthefirsttimeandinwhichthelendersinformedthatthey wouldsubmitthestatementsoffundingandEscrowaccountby11.5.2015.Onthe de-linkedstructures,theConcessionairewasremindedinthemeetingtosubmitthe programmefortakingupthede-linkedstructure,wheremostofthehindrancesare cleared or getting cleared shortly. The issue of pending payments due to ConcessionairetowardsutilityshiftingandCOSetc.wasdeliberatedinthemeeting andtheConcessionairewasadvisedtofurnishcertainmissingdata/clarifications.

14. Thedirectionswerefollowedbyhearingon10.7.2015aftertheCourtre-opened andinwhichwenoticedthatarequestwasmadebyNHAItotheIDBIforreleasing its revenue share of Rs. 114.58 crores. The Concessionaire had requested for defermentoftherevenueshareofNHAI,asaccordingtohim,hewasinvestingabout Rs.15croresperweek.Wenoticedthatonthelastdate,therewasabout114crores

intheEscrowaccountmaintainedbyIDBIandthatwhenthematterwastakenupon 10.7.2015,itwasfoundthatintheEscrowaccount,therewasonly13.61crores.The ConcessionairehadrequestedtheIDBIvideletterdated16thJune,2015tostart disbursingthepaymentsfromEscrowaccountattheearliest,andhadalsoaddressed alettertoNHAIrequestingittoconsiderthedefermentofitsrevenueshareandhad agreedforrepaymentofthatamountalongwithinterestcommencingfromNovember, 2015tobecompletelyrepaidbyMarch,2016.Ontheseinterveningevents,we observed in our order asfollows:--

> "WearesurprisedtonotethecontentsoftheletteroftheNationalHighways AuthorityofIndiasingedbyShriB.N.Sahay,GeneralManager(Raj.)by which,theNHAIhasagreedinpursuanceofthediscussionduringreview meetingheldon18.6.2015fordefermentofitsrevenueshareofRs.114.58 crores(uptoMay2015)toberepaidinfivemonthlyinstalmentsstartingfrom November,2015withapplicableinterestasperCA.TheNHAIalsorequested the IDBI Bank Limited by the same letter dated 18.6.2015 to movean applicationtotheHighCourtofRajasthanandhavetheordersoftheCourt dated 19.5.2015modified.
>
> We may observe that the period of agreement between NHAI and Concessionairehascometoanendin October,2014andthatinthelarger publicinterestforcompletionoftheroad,theCourthadintervenedinthe writpetition,whichwasfiledbythepetitionertostopthecollectionoftolls, tobringtogetherallstakeholdersandtofindoutwhethertheroad,whichis ofextremepublicimportance,canbecompleted.Thestakeholdershad agreedinthejointmeetingstoallowtheconcessiontocompletetheproject forwhichtheCourthasfixedtheperiodending30.6.2015.
>
> TheConcessionaireiscollectingapproximately1.5to2croresbywayoftolls everyday,whichisbeingdepositedinEscrowaccountofIDBI.Onenquiries madefromlearnedcounselappearingfortheIDBI,NHAIandConcessionaire, theywerenotabletoexplainastowhyandwheretheamountofRs.100 croresapproximatelyhadbeendisbursed,whichwassoughttobeandhas beenallowedtoberepaidinfivemonthlyinstalmentsfromNovember,2015. Learned counsel for the Concessionaire states that it has not received amount.LearnedcounselforNHAIstatesthathedoesnotknowwhether NHAIhasagreedtopaytheamounttotheConcessionaire,andinanycase NHAIhasnotreceivedtheamountandhasagreedtodeferthepaymentinsix instalments beginning from Nov.2015.
>
> Inthecircumstances,allthestakeholdersarerequiredtoexplaintothecourt astohowtheamountofRs.100croresapproximatelyoftheshareofNHAI wasallowedtobedisbursedandtowhomtheamounthasbeenpaid.
>
> TheConcessionaireisclaimingabout100croresforchangeofthescopeof thework,whichhasnotbeenacceptedbyNHAI.It,howeveragreesthatthe amounthasnotbeenpaidtoitsofar.
>
> WearealsoinformedthatthePetition(s)forSpecialLeavetoAppeal(C)No. 16461-16462/2015StateofRajasthanandanr.v.DeshRajKhareraandors. againsttheorderdated19.5.2015,wasallowedtobewithdrawnwithliberty toapproachtheHighCourtforreview/clarificationoftheimpugnedorder.
>
> The State of Rajasthan has not filed any application for review/clarification

so far, although the SLP was withdrawn on 5.6.2015, with the said liberty."

15. Thepartiesfiledtheiraffidavits,withwhichwewerenotsatisfiedanddirectedto againconveneameetingtofindoutthewhereaboutsof114.58crores,whichwas quantifiedbythem,towhichtheNHAIcategoricallystatedthatithadnoacknowledge norithadgivenanyconsenttotheIDBItoreleasetheamountfromtheEscrow account.On6.8.2015,theminutesofthemeetingheldon5thAugust,2015,in pursuancetoourorderdated4.8.2015,werefiled.Theminutesofthemeetingare quoted asfollows:--

"Minutes of Meeting

Sub:SixlaningofGurgaon-Kotputli-JaipursectionofNH-8fromkm42.200 tokm273.000intheStateofHaryana/Rajasthan.

In pursuance to directions of the Hon'ble High Court of Rajasthan on 04.08.2015, a review meeting was held with the representatives of Concessionaire, Lenders, IE, RO and PD of above project in NHAI on 05.08.2015underchairmanshipofMember(Fin)atNHAIHQ,NewDelhito reviewthestatusofwork,balanceworkandmeansoffinancetocomplete theproject.

List of participants is attached at Annexure-I.

1 .ROJaipur/FDinformationthestatusofbalanceworkvis-Ã-visscope ofworkaspersupplementaryagreementasunder:--

S.No.	Particulars	Scope of work	Completed upto 19.03.2015	Balance as on 19.03.2015	Completed between 19.03.2015 and 31.07.2015	Balance as on date
1	6 laning	225.2 km	205.4	19.8	8.0 km	11.8 km
2	Structures	57 Nos.	46	11	4	7

2 . It was apprised that out of balance 20 km of six laning, 8 km was completeduptoJuly2015andforremaining12kmandbalance7structures, thelikelydateofcompletionisasunder:--

Particulars	Balance	Likely date of completion	Remarks
6 laning	11.8 km	0.8 km by 31.08.2015	Work in progress
		4.00 km by 30.09.2015 (structure approaches)	To be completed alongwith structures.
		3.00 km affected by Hindrances (likely to be completed by 31.12.2015)	Hindrances removal and utility shifting at Paota, Shahpura & Manesar is in progress.
		3.00 km by 31.03.2016 (structure approaches)	The hindrances have been removed and land has been made available in the month of June 2015.
		1.0 km by 30.06.2016 (structure approaches)	Flyover in Shahpura town. The work shall be taken up after shifting of utility (Electrical & Water pipe line).
Structures like flyover/VUP	7 Nos.	3 Nos.by 30.09.2015 (4 km)	Work in progress.
		3 Nos. by 31.03.2016 (3 km)	The hindrances have been removed and land has been made available in the month of June 2015
		1 No. by 30.06.2016 (1 km)	Flyover in Shahpura town. The work shall be taken up after shifting of utility (Electrical & Water pipe line).

3 . AsconfirmedbytheIndependentEngineerandtheConcessionaire,the requirementoffundsforcompletionofthesebalanceworks,workouttobe approx. Rs. 276cr.

4. AfterdiscussionwiththeIE,Concessionaireandtherepresentativeofthe lendersthemeansoffinanceforbalanceworkisannexedatAnnex.-II.Entire amountwillbemadeavailablebetween Aug.2015toMar.2016.

5. . The Concessionaire and the representative of the lenders were requestedtoprovideunequivocalundertakingfortheircontributiontowards equityanddebtrespectivelywhichmayhavetobeplacedbeforetheHon'ble HighCourt.

6. . Withregardtobalanceworksuchas17delinkedstructures(wherein 6-laneatgradehasbeencompleted),balanceserviceroadof94kmlength andothermiscellaneousitemslikeentryexitrams,buslaybyesandtruckslay byes etc. the tentative cost comes out to an additional Rs. 513 cr. Theconcessionairewasaskedaboutthesourceoffinanceforthesebalance work for entire completion of the project. In this regard, the concessionaireandthelendersinformedthataproposalforadditional financefortheprojectisunderconsiderationanditshallbefinalizedby 30.09.15.

7.Member(F)whileexpressingconcernedoncontinuousdelayinproject completion,hasinformedthatincasetheConcessionairedonotadhereto thecompletionscheduledasprovidednPara-2,NHAIshallbeconstrainedto initiatenecessaryactionaspertheprovisionsoftheConcessionAgreement includinginvokingclause17.10(OverridingpoweroftheAuthority)and Article37(Termination)oftheConcessionAgreement.Thismayalsobe

informed to the Hon'ble High Court accordingly.

8.TheConcessionairewasdirectedtoimmediatelytakeupmaintenanceof the entire projecthighway.

The meeting needed with a vote of thanks to the chair."

16. Onthesamedayi.e.on6.8.2015,afterhearinglearnedcounselfortheparities, weframedthefollowingtwoquestionstobeconsideredbyus:--

"(1)WhethertheNHAIhasanyrighttocontinuetocollectthetollsandthe ratesonwhichthetolliscollectedasuserfeevideNotificationdated23rd March,2009issuedundersection11oftheNationalHighwaysAuthorityof theIndiaAct,1988,authorizingthecollectionoftollsundersection8Aofthe NationalHighwaysAct,1956readwithRule3oftheRulesof1997;and whethertheRulesof2008,whichcameintoforceon5thDecember,2008 willbeapplicableforcollectionoftolls,whichprovidesthatnotollscanbe collectedduringthedelayinconstructionperiodstipulatedintheagreement.

(2)Whetherthefinancialarrangementprojectedinthereviewmeetingheld on5.8.2015andinwhichtheConcessionaireandtherepresentativesofthe lenders agreed to provide unequivocal undertaking for their contribution towardsequityanddebtrespectivelybeforetheHon'bleHighCourt,aswell astheproposalforadditionalfinance,issatisfactory,whilemeetingthelegal requirementsforcollectionoftollsundertheNationalHighwaysAct,1988."

17. Uponhearinglearnedcounselappearingfortheparities,wefindthatthe NationalHighwaysFee(DeterminationofRatesandCollection)Rules,2008(for short, "the Rules of 2008") are not applicable to the Concession Agreement, inasmuchas,Rule1(3)oftheRulesof2008publishedintheOfficialGazetteofIndia dated5thDecember,2008clearlyprovidesthattheRulesof2008shallnotapplyto theagreementsandcontractsexecutedandbidsinvitedpriortothepublicationof theseRules.Inthepresentcase,thebidswereinvitedandConcessionAgreement wasexecutedpriorto5thDecember,2008.Inviewoftheexclusionofagreements andcontrastsexecutedandthebidsinvitedpriortothepublicationoftheRules,the proviso to sub-rule (9) of Rule-3 of the Rules of 2008 is not applicable, which providesthatnouserfeeshallbeleviedforthedelayedperiodbetweenthedateof completionaspertheagreemententeredintowiththeConcessionaireandthedateof actualcompletionoftheproject.UndertheoldRulesof1997,therewasnosuch restrictionthattheuserfeecannotbelevied,duringtheextendedperiodorforthe periodofdelaybetweenthedateofcompletionaspertheagreemententeredinto withtheConcessionaireandthedateofactualcompletionoftheproject.

18. LearnedcounselappearingfortheNHAI,ConcessionaireandtheIDBIhavemade detailedsubmissionstotheeffectthatthecompletionoftheProject,asallegedby thepetitioners,isnotthedatefixedforcompletionperiodbytheNHAI;itdepends uponvariousfactorsasthecompletionhastobedoneinvariousphases,forwhich Schedule-Goftheoriginalagreementisrelevant.

19. Wearenotrequiredto adjudicatethematterso astofindoutthedateof construction,inasmuchas,inourview,sincetheRulesof2008arenotapplicable, theprovisotosub-rule(9)ofRule3isnotattracted.Theperiodofconcessionis upto2021andthus,thequestionwhethertheperiodofconstructionhascometoan end,isamatterwhichistoberesolvedbetweentheNHAI,theBankersaswellasthe

Concessionaire, in accordance with the Concession Agreement and the Supplementary Agreementbywhichthedateofcompletionofconstructionswasextendedwith disclaimingbyboththeparties toanyclaimonthataccount.

20. Onthequestionastowhethertheconcessionairewillbeableto meetthe financialobligationsasperthe minutesofthelastmeetingheldon5thAugust,2015, in which it was clearly provided in para 5 that the Concessionaire and the representativeofthelenderswererequestedtoprovideunequivocalundertakingfor theircontributiontowardsequityanddebtrespectively,whichmaybeplacedbefore theHighCourt,anaffidavitofShriShashankShekherhasbeenfiled,withwhichhe hasannexedanundertakingonastamppaperofRs.100/-providingonlyforthe infusionofequityin8instalmentsfromAugust,2015toMarch,2016(wrongly mentionedasMarch,2015).Theundertakinggivenby ShriShashankShekher, DirectoroftheP inkcityExpresswayPrivateLimited,doesnotsatisfytotheCourtat all,inasmuchas,itdoesnottakecareofRs.114.58crores,whichwasreleasedby theIDBItotheConcessionaire,withouttheconsentoftheNHAI.Anundertakingby the Authorized Signatory/Director, without any Board resolution and bankers certificateorbankguaranteeismeaningless.Wealsofindthatwhiletheh Courtwas monitoringthematterwithregardtotheremovalofhindrancesforcompletionof work,aspecificdirectionwasgivenintheorderdated19.5.2015regardingthe EscrowaccountthatIDBIreleasedRs.114croreswithouttakingconsentoftheNHAI or informing theCourt.

21. TheConcessionaireaswellastheIDBIhavenotsatisfactorilyexplained thefinancialarrangementoftheprojectanddisbursementofthefundsfromthe Escrowaccount.LearnedcounselfortheIDBIstatesthattheamounthasbeen releasedbytheIDBIasdebttocompletetheprojectandtheConcessionairehas tobringinbalanceequity.TheConcessionairehadagreedtoprovideequityofRs. 631crores.Ithastostillbringinandprovideequityof Rs.67.51crores.TheBank hadreleasedthedebtofRs.109crorestotheConcessionaire,forwhichtheconsent of NHAI was notnecessary.

22. Paragraphs 3, 4 and 5 of the minutes of the meeting dated 5.8.2015 clearly stipulates that as confirmed by the Independent Engineer and the Concessionaire, the requirement of funds for completion of the balance work was workedouttobeapprox.Rs.276crores.TheamountofRs.276croreswasto beprovided inthemannerthattheConcessionairewasrequiredtoinfuseequityof Rs.67.51croresandtheremainingamountwastobereleasedbytheBankersas debt.

23. Lookingtotheperformance,theassurancesgivenandthedelayincompleting theproject,evenaftermostofthehindrances havebeenremoved,wearenot satisfiedthattheConcessionairewillbeabletocompletetheconstructionofsix laningofroad,whilemaintainingtheexistingfourlaningwithinthespecifiedtime. TheBankersareinterestedintheportionoftheirinterestonlending,whichtheyhave investedbydebt,ratherthancompletionoftheproject.Itisadmittedbythemthatin casetheprovisionalcertificateisnotfurnishedbytheConcessionaire,tobeprovided byNHAI,onthesatisfactionrecordedbytheIndependentEngineerby1stOctober, 2015,thelendinghastobestoppedandinthatevent,theentireprojectmaybe jeopardized.

24. We took up the monitoring of the Project in larger public interest and passedseveralordersforremovinghindrancesinthecompletionofProject,and intheinterestoftheBankersinprotectingtheirinvestmentofpublicmoneyinthe Project.

Ourinterventionhasbeenmisusedbytheconcessionaireinfailingtorecordprogress tocompletetheProjectwithinthestipulatedperiod.Itisadmittedtoalltheparties thatextendedperiodofconstructionhascometoanend.Itwaswiththehopethat the Concessionaire will complete the work that the period was extended by supplementary agreement upto 15.10.2014. Now, the extended period as well as furtherextensionsbeyondtheperiodinSupplementaryAgreementhasalsocometo anend.TheConcessionairehoweverhasoneorotherexcusefornotcompletingthe project.

25. Weentirelyagreewiththesubmissionsmadeonbehalfoftherespondentsthat wehadtravelledbeyondthescopeoftheprayersmadeinthewritpetitionsandthat havingdecidedthattheRulesof2008arenotapplicableandtheperiodofconcession isstillupto2021,weshouldhaverefrainedfromissuinganyfurtherdirectioninthe matter.Ourconcerninpublicinteresthashoweverbeenusedbytheconcessionaire togainundueadvantagebothingettingunauthorizedextensionoftheperiodof construction,andinwithdrawingmorethanRs.100crores,withouttheknowledge andconsentofNHAI,andtakingtheCourtintoconfidence.

26. Wemayobserveherethatfromthebeginning,wedidnotintendtoeither interferewiththetermsandconditionsoftheConcessionAgreementortointerpret thedatesofperiodofcompletionofthework.Ourendeavourwastoseethatthe roadiscompletedandforthatpurpose,orderswerepassedtoremovehindrances. Wehoweverfindthateachofthepartiesistryingtoprotectitsowninterestandis notinterestedintheultimateobjectofcompletionoftheconstructionofroad.Itis apparentfromtheproceedingsofthejointmeetingandthedocumentsfiledbeforeus thattheofficersoftheNHAIhaveextendedtheperiodofpaymentofamount,which hasbeenclandestinelytakenawaybytheConcessionairefromtheEscrowaccount upto31stMarch,2016.Weareunabletoappreciateastohowthe Concessionaire waspermittedbyNHAItopaytheamountininstalments,whenitwasnotentitledto withdrawtheamountfromtheEscrowaccount,unlesstherewasconnivancebetween thethreestakeholders,namely,theConcessionaire,NHAIandIDBIBank.

27. . Wemayalsoobserveherethatinoneofthehearings,theProjectDirector ofNHAI,Rajasthanhadonourqueriesstatedin theCourtthattheConcessionaireis notinapositionormaynotbeabletocompletetheworkofconstructionoftheroad andonthatstatement,wehaddirectedholdingofthemeetingtoconsiderwhether theConcessionaireshallbeallowedtocompletetheworkofconstructionoftheroad ortheagreementbeterminated.Inthemeeting,theDirector(Finance),NHAI, withoutconsideringtheopinionoftheProjectDirector,gaveafreshleaseoflife totheConcessionairebyprovidingthathemaydeposittheamountofRs.276 croresincludingtheequityanddebtby31stMarch,2016ininstalments.

28. Intheaforesaidcircumstances,whennoneofthestakeholdersiscooperatingand isonlyparticipatingtoservetheirowninterest,wedonotproposetomonitorthe matteranyfurtherforcompletingtheconstructionsandclosetheproceedingswith directionstotheCentralGovernmenttoconsiderastowhethertheConcessionaire shallbeallowedtocontinuetocompletetheworkofconstructionoftheroad,on makinganindependentassessmentofthematter,keepinginviewtheworkcarried outbytheConcessionaireandtheamountswithdrawnbyitwithouttheapprovalof theNHAI.TheCentralGovernmentmay,afterobtainingthereportoftheIndependent Engineerandconsideringthefinancialarrangementsbetweentheparties,referthe mattertotheCBIforinvestigation.Itmayalsopassnecessaryorderswithregardto issuance of Provisional Completion Certificate by NHAI,and the termination of the

agreementaswellastocontinuetocollectthetolls.TheCentralGovernmentmay takeapositivedecisioninthematterwithinsixweeks,aftertakingintoconsideration theissueraisedbeforetheCourt,theobservationsmadeandconcernsexpressedby theCourt.

29. Thewritpetitionisdisposedofwiththeaforesaiddirections.

D.B. Civil Special Appeal (Writ) No.1411/2014

D.B. Civil Contempt Petition No. 1482/2014

D.B.Civil WritPetitionNo.6419/2014

D.B.Civil WritPetitionNo.7329/2014

30. .Theseconnectedmattersarealsodisposedofintermsoftheorderpassedin D.B. Civil Writ Petition No.7296/2014,

31. Acopyofthisorderbeplacedinalltheconnectedcases.

MANU/DE/3717/2011

Equivalent Citation: 182(2011)DLT548, 2011(187)EC R261(Delhi), 2011[24]S.T.R.129(Del.), (2011)45VST413(Delhi)

IN THE HIGH COURT OF DELHI

WP(C)Nos.3398,3746,3750,3782,3783,3809,3837,3838,3856,3867,3868, 3869,3881,3886,3936,4010,4025,4026,4028,4050,4054,4079,4081,4086, 4087,4091,4092,4098,4115,4132,4139,4144,4214,4216,4319,4367,4440, 4503,4538,4539,4549,4616,4650,4757,4787,4792,4907,4929,4952,5067, 5074,5123,5127,5137,5138,5145,5159,5160,5221,5222,5223,5224,5226, 5227,5241,5246,5263,5267,5286,5291,5338,5342,5346,5353,5472,5545, 5548,5639,5652,5679,5747,5751,5844,5856,5896,5960,5965,5970,5972, 6004,6021,6025,6030,6047,6084,6174,6189,6296,6320,6345,6376,6377, 6392,6401,6449,6490,6535,6551,6553,6604,6605,6659,6666,6668,6669, 6673,6741,6750,6785,6842,6861,6869,6882,6883,7032,7075,7106,7237, 7307,7308,7328,7356,7369,7393,7394,7454,7605,7710,7747,7772,7775, 7896,7916,7917,7930,7954,7986,7988,8005,8069,8087,8088,8099,8124, 8288,8316,8317,8320,8323,8379,8380,8386,8387,8388,8389,8390,8391, 8392,8447,8488,8588,8674of2010,15,202,242,476,498,866,965,968, 1121,1128,1220,1488,1585,1640,1783,1787,1996,2015,2341,2573,2582, 2613, 2651, 2652 2654, 3008, 3019, 3058 and 3373 of 2011

Decided On: 23.09.2011

Appellants: **Home Solutions Retails (India) Ltd.**
Vs.
Respondent: **Union of India (UOI) and Ors.**

Hon'ble Judges/Coram:
Dipak Misra, C.J., A.K. Sikri and Sanjiv Khanna, JJ.

Counsels:
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Applicant Ambiance Mall in CWP No. 3750/2010

ForRespondents/Defendant:A.S.Chandhiok,ASG,BhagatSingh,H.C.Bhatia,Sonia Sharma,GurpreetS.Parwanda,SumitBatra,JatanSingh,RuchirMishra,S.P.Kansal, VikrantSharma,RavinderAgarwal,AnjanaGosain,SachinDatta,B.V.Niren,Advs.for RespondentUnionofIndia,MukeshAnand,Adv.forDepartmentofServiceTaxand CentralBoardofExciseandCustomsinCWPNos.3398/2010,3746,3750,3782, 3783,3809,3837,3838,3856,3867,3868,3869,3881,3886,3936,4010,4025, 4026,4028,4050,4054,4079,4081,4086,4087,4091,40,92,4098,4115,4132, 4139, 4144, 4214, 4216, 4319, 4367, 4440, 4503, 4538, 4539, 4549, 4616, 4650, 4757, 4787, 4792, 4907, 4929, 4952, 5067, 5074, 5123, 5127, 5137, 5138, 5145, 5159, 5160, 5221, 5222, 5223, 5226, 5227, 5246, 5267, 5291, 5639, 5652, 5679, 5751, 6750, 6785, 6842, 6869, 6882, 7369, 7393, 7454, 7747, 7916, 7917, 7954, 8087, 8088, 8099, 8316, 8317, 8320, 8323, 8379, 8380, 8386, 8387, 8388, 8389, 8390,8391,8392,8447,8488,8588,8674of2010and CWPNos.965,968,1121, 1128,1220,1585,2613,2651,2652and2654of2011,SatishKumar,Adv.for DepartmentofRevenue,MinistryofFinance,CentralBoardofExciseandCustoms, DG,ServiceTaxinCWPNos.5224,5241,5338,5342,5346,5353,5545,5546, 5747, 5844, 5856, 5896, 5960, 5965, 5970, 5972, 6004, 6021, 6025, 6030, 6047, 6084, 6174, 6189, 6296, 6320, 6345, 6376, 6377, 6392, 6401, 6449, 6490, 6535, 6551, 6553, 6605, 6659, 6666, 6668, 6669, 6741, 6861, 6883, 7032, 7075, 7106, 7237, 7307, 7308, 7328, 7356, 7394, 7605, 7710, 7747, 7772, 7775, 7896, 7916, 7986, 8005, 8069, 8087, 8088, 8099, 8124, 8288, 8488, of 2010, 242, 498, 866, 1783,1787,1996,of2011,AtulNanda,Sr.Adv.,RuchirMishra,AnujAggarwal, GauravKhanna,Advs.forUOIinCWPNos.4754/2010,5145/2010,6376/2010, 6401/2010,6449/2010,7237/2010,7916/2010,7930/2010and7986/2010,Amish Tandon, Adv. for Respondent No. 36 to 38 in CWP No. 5896/2010,AmrreetaSwaarup,Adv.forRespondentNos.27to29inCWPNo.15/2011,A nusuyaSalwan, Adv.forRespondentNo.4inCWP No. 6296/2010,Shobit Chandra, Adv. for RespondentNo.8inCWPNo.3782/2010,AnilGrover,RakeshKumarGargAdvs.for RespondentsinCWPNo.15/2011,NeerajChaudhary,CGSCforUOIinCWPNos. 4952,5267,6666,6668,6669,6673,6882of2010andCWPNo.1220,2573and 2582 of 2011, Sunil Kumar, Rajiv Ranjan Mishra, Advs. for UOI in CWP No. 3837/2010,SumeshDhawan,VatsalaKak,Advs.forRespondentNos.4to6inCWP No.6741/2010andforRespondentNo.7inCWPNo.3837/2010,PoojaSingh,Adv. forRespondentNo.8inCWPNos.3809/2010and3837/2010andforRespondentNo. 6inCWPNos.4503/2010and5751/2010,MalabikaSarkar,SusmitaLal,G.K.Sarkar, Advs.forRespondentNo.8inCWPNo.6861/2010,KapilKher,Adv.forRespondent No.5inCWPNo.4081/2010,forRespondentNos.48and49inCWPNo.4025/2010 and for Respondent Nos. 17 and 18 in CWP No. 15/2011,Neha Mittal, Adv. for RespondentNo.4inCWPNo.6396/2010,SahilMongia,Adv.forRespondentNos.20, 21 and 22 in CWP No. 7394/2010, NirbhaySharma,Anjum Javed, Adv. for RespondentNo.4inCWPNos.6861/2010and6883/2010,BhanitaPatowary,Adv.for RespondentNo.7inCWP6376/2010,RajanBhanti,Adv.forRespondentNo.5in CWPNo.6376/2010,VaibhavArora,AjayMonga,AteevMathur,SumitBansal,Adv. forRespondentNo.5inCWPNo.4929/2010andforRespondentNos.6to8inCWP No.4010/2010,SatyenSethi,A.T.Panda,Advs.forRespondentNo.3inCWPNo. 4092/2010,PriyankaKathuria,SangeetaChandra,Advs.forRespondentDDAinCWP No. 4132/2010, Sangeeta Sharma, Adv. for Respondent No. 8 in CWP4050/2010, ArchanaGaur,Adv.forMCDinCWPNo.4132/2010,RajivNanda,Addl.Standing Counsel,RachnaSaxena,Adv.forRespondentNo.4inCWPNos.5291/2010and 5965/2010,BindraRana, MeenuSharma,Advs.forRespondentNo.21inCWPNo. 6376/2010, Neil Hildreth, SparshBhargava, Rony O. John, Shashi Mathews,Shruti

Sabharwal,Advs.forRespondentNo.39inCWPNo.3838/2010,forRespondentsNo. 6 and 7 in CWP No. 7106/2010, for Respondent No. 49 in CWP No. 4091, for RespondentNo.51inCWPNo.6376/2010,RajatAneja,Adv.forRespondentNos.7 to11inCWPNo.4092/2010,RakeshChitkara,SurenderGupta,Advs.forRespondent in CWP Nos. 5679/10, 5844/10, 5856/10, 5960/10, 6666/10, 6668/10, 6669/10, 8087/10and8124of2010,ArunK.SharmaAdv.forRespondentNo.4inCWPNo. 7605/2010,ArunVohra,Adv.forRespondentNo.4and6inCWPNo.8380/2010, K.K.Khurana,AnshulArora,A.K.Mehta,Adv.forRespondentNo.54inCWPNo. 5127/2010, PraveenaGautam, Adv. for Respondent No. 5 in CWP No.6376/2010, VikramSaini,Adv.forRespondentNo.4inCWPNo.6296/2010,S.P.Kaushal,Vikrant Sharma,Adv.forRespondentNos.14to18inCWPNo.4792/2010,B.B.Gupta,Adv. forRespondentinCWPNos.4319,5067,5241,5970,5972/2010,AakanshaMunjhal, Adv.forRespondent-JSLinCWPNo.4050/2010,MaheshB.Chhibber,Adv.for RespondentNos.12to16inCWPNo.4139/2010,MehjaveenA.Marak,Adv.for RespondentNo.5inCWPNo.4539/2010,VaneetGarg,Adv.forRespondentNos.51 to 57 in CWP No. 5896/2010 and for Respondent Nos. 9 and 10 in CWP No. 7394/2010,KartikBhatnagar,Sarthak,Advs.forRespondentinCWPNo.5159/2010, AkashdeepKakkar,Adv.forRespondentinCWPNo.15/2011,DigvijayRai,Adv.for AAIinCWPNos.4538,5074and7106of2010,VinodMehta,Adv.forRespondent Nos.21,22,23,42and43inCWPNo.15/2011,DivyaJain,AtulGrover,Adv.for RespondentNos.8and9inCWPNo.5346/2010,KapilArora,Manjula,Advs.for Respondent No. 13 in CWP No. 7394/2010,Anshul Arora, A.K. Mehta, Adv. for RespondentNo.54inCWPNo.4050/2010,NavneetKumar,DeepakChawla,Adv.for JandKBank,AnilKher,Sr.Adv.,S.S.Pandit,Adv.forRespondentNo.17and18in CWPNo.7393/2011forRespondentNo.5inCWPNo.4081/2010andforRespondent Nos.48and49inCWPNo.4025/2011,MaheshB.ChhiberAdv.forRespondentNo. 12to16inCWPNo.4139/2010,AmreetaSwarup,Adv.forRespondentsNo.27to29 inCWPNo.15/2011,HarshRaghuvanshi,ArvindNayar,Adv.forRespondentNo.7in CWP No. 3837/2010,RahulRaj Verma, Adv. for Respondent No. 54 in WPC 4050/2010,ShobhitChandra,Adv.forRespondentNo.8inWP(C)No.3782/2010 andAnuragChawla,Adv.inCWPNo.15/2011

JUDGMENT

Dipak Misra, C.J.

1.InthisbatchofwritpetitionspreferredunderArticle226oftheConstitutionof India,theconstitutionalvalidityofSection65(105)(zzzz)oftheFinanceAct,1995 (forshort'the1995Act')andSection66asamendedbytheFinanceAct,2010(for brevity'the2010Act')iscalledinquestion.Thematterswereinitiallyplacedbeforea DivisionBenchwhereinthelearnedCounselforthepartiesraisedmanyasubmission andregardbeinghadtothenatureofthecases,thewithconnectedmattersPage13 of100DivisionBenchthoughtitappropriatethatthecontroversyshouldbedwelled uponbyalargerBench.Thereafter,themattershavebeenplacedbeforeus.

2. Forthesakeofclarityandconvenience,weshalladverttothefactsadumbratedin W.P.(C)No.3398/2010anddealwiththecontentionscanvassedbythelearned Counselforthepartiesinallthewritpetitionsastheissueiscommontoall.The Petitioner, a registered company under the Companies Act, 1956, has taken commercialproperty/shopsonrentforcarryingonitsretailbusiness.Ittakes immovablepropertybywayofleaseorlicenceandoncetheleasedeedorthedeed oflicenceisenteredwiththeowner,thereisnocontinuousflowoftransaction betweenthem.Thetenantisentitledtousethepremisesforafixedtenureunderthe

agreement and the transaction with the owner isa onetime transaction. The transactionsareprincipaltoprincipalandthereisnovalueadditionbyprovidingthe premisesonlease/licencebytheowneroftheproperty.ThePetitioner,aspleaded,is asubstantialcontributorto thesustainedgrowthanddevelopmentofthenational economyandhascontributedhugeamountstotherevenuebypaymentoftaxes, chargesandcessunderdiverseheadsandthepremisesoccupiedbyitestablishing commercial establishments like shops are meant for diverse situations and, accordingly,arrangementshavebeenmade.Theconsiderationpaidbythe Petitioner underthe leasedeedoragreementoflicenceispurelyaconsiderationforacquiring theoccasionalandpossessoryrightsofthesepremisesandutilizingthesame.The premisesthathavebeentakenbythePetitionerhavebeenreferredtointhepetition anditisurgedthatinthecaseoftheagreementsthathavebeenenteredwiththe respectiveowners,theliabilityrestswiththeownerstopaytheservicetaxbutthe ownersinsistuponthePetitionertomakepaymentoftheservicetax.Itiscontended thatanartificialliabilityhasbeencreatedonthetenantsbytheFinanceAct,1994 which introduced the service tax. Reference has been made to Sub-Section 90(a) whichwasinsertedinSection65oftheFinanceAct,1994bytheFinanceAct,2007 totaxany"serviceprovidedtoanypersonbyanyotherpersoninrelationtorenting of immovable property for use in the course or furtherance of business or commerce".Therentingofimmovablepropertyhasbeendefinedtoincluderenting, letting,leasing,licensingandothersimilararrangementsofimmovablepropertyfor useinthecourseoffurtheranceofbusinessorcommerceincludinguseasfactory, building,warehouse,exhibitionhalls,multipleusebuilding,etc.Thesaidprovision cameintoforcewitheffectfrom1.6.2007.Itisurgedthatcontrarytotheexpress words of the provisions of the Act, the first Respondent, placing anerroneous interpretationonSection65(105)(zzzz)asitstoodin2007,issuedanotificationNo. 24/2007dated22.5.2007.Afterthenotificationwasissued,acirculardated4.1.2008 wasissuedbytheMinistryofFinanceoftheUnionofIndia.Theconstitutional validityofthenotificationandthecircularwasquestionedbeforethisCourtinthe caseofHomeSolutionRetailIndiaLtd.v.UnionofIndia158(2009)DLT722(DB).

3. InthecaseofHomeSolutionRetailIndiaLtd.(supra),itwascontendedthatthe notificationandcircularhadcomeintoexistencebyabsolutefallaciousinterpretation placedonSection65(105)(zzzz)andSection65(90)(a)inasmuchasanattempthas beenmadetolevyservicetaxonrentingofimmovablepropertyasopposedtothe levyofservicetaxontheserviceprovided"inrelationtorentingofimmovable property".TheDivisionBenchadvertedtothelanguageemployedinthenotification dated22.5.2007andthecirculardated4.1.2008andafterreferringtothedecisions in T.N. Kalyana Mandapam Association v.Union of India and Ors. MANU/SC/0354/2004:(2004)5SCC632,AllIndiaFederationof TaxPractitioners andOrs.v.UnionofIndiaMANU/SC/3283/2007:(2007)7SCC527,DoypackSystem sPrivateLimitedv.UnionofIndia(1998)2SCC299,BSNLv.UnionofIndia MANU/SC/1091/2006:(2006)3SCC1,CommissionerofIncome-Tax,Bangalorev. B.C. Srinivasa Shetty MANU/SC/0285/1981 : (1981) 2 SCC 460, Lucknow DevelopmentAuthorityv.M.K.GuptaMANU/SC/0178/1994:(1994)1SCC243,NS Nayak and Sons v. State of Goa MANU/SC/0398/2003 : (2003) 6 SCC 56 and interpreting the terms "in relation thereto", distinguished the decision renderedin T.N.KalyanaMandapamAssociation(supra)holdingthattheutilizationofpremises asamandapbyitselfwouldconstituteserviceashasbeenheldbytheApexCourt butthesameisdifferentfromthekindofactivitythatiscontemplatedunderSection 65(105)(zzzz).TheDivisionBenchthereafterproceededtostateasfollows:

> 33. .Thenextdecisionwhichrequiresconsiderationisthedecisionofthe

Supreme Court in the case of All India Federation of Tax Practitioners (supra).Wehavealreadyquotedparagraph8ofthesaiddecisionwhereinit hasbeenobservedthatservicetaxisavalueaddedtaxandthatjustas excisedutyisataxonvalueadditionongoods,servicestaxisonvalue additionbyrenditionofservices.Adistinctionhasalsobeensoughttobe madebetweenpropertybasedservicesandperformancebasedservices.The propertybasedservicescoverserviceproviders,suchasarchitects,interior designers, real estate agents, construction services, mandap keepers, etc. Whereastheperformancebasedservicesarethoseprovidedbypersons,such as stock-brokers, practisingchartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc.TheSupremeCourtalsonotedthatservicetaxisataxonserviceandnot on the serviceprovider.

34. From the above discussion, it is apparent that service tax is a value added tax. It is a tax on value addition provided by a service provider.Itisobviousthatitmusthaveconnectionwithaserviceand,there mustbesomevalueadditionbythatservice.Ifthereisnovalueaddition, thenthereisnoservice.Withthisinmind,itwouldbeinstructivetoanalysethe provisions of Section 65(105)(zzzz). It has reference to a service provided or to be provided to any person, by any other person in relation to "renting of immovable property for use in the course or furtherance of business or commerce". The wordings of the provision are sostructuredastoentail-aserviceprovidedortobeprovidedto'A'by'B' inrelationto'C'.Here,'A'istherecipientoftheservice,'B'istheservice providerand'C'isthesubjectmatter.AspointedoutabovebyMrGanesh, theexpression'inrelationto'maybeofwidestamplitude,butithasbeen used in the said Act as per its context. Sometimes, 'in relation to' wouldincludethesubjectmatterfollowingitandonotheroccasionsit wouldnot.Asinthecaseoftheserviceofdrycleaning,theexpression'in relation to dry cleaning' also has reference to the very service of dry cleaning.Ontheotherhand,theservicereferredtoinSection65(105)(v), whichreferstoaserviceprovidedbyarealestateagent'inrelationto realestate',doesnot,obviously,includethesubjectmatterasaservice. This is so because real estate by itself cannot by any stretch of imaginationberegardedasaservice.Goingbacktothestructuredsentence, i.e.-serviceprovidedortobeprovidedto'A'by'B'inrelationto'C',itis obvious that 'C' can either be a service (such as dry cleaning, hair dressing,etc.)ornotaservicebyitself,suchasrealestate.Theexpression "inrelationto"would,therefore,havedifferentmeaningsdependingon whether 'C' is a service or is not a service. If 'C' is a service, then the expression'inrelationto'meanstheservice'C'aswellasanyotherservice having connection with the service 'C'. Where 'C' is not a service, the expression'inrelationto'wouldhavereferenceonlytosomeservicewhich hasaconnectionwith'C'.But,thiswouldnotimplythat'C'itselfisaservice.

35. Fromthisanalysis,itisclearthatwehavetounderstandastowhether renting of immovable property for use in the course or furtherance of businessorcommercebyitselfisaservice.Thereisnodisputethatany service connected with the renting of such immovable property would fall withintheambitofSection65(105)(zzzz)andwouldbeexigibletoservice tax.Thequestioniswhetherrentingofsuchimmovablepropertybyitself constitutesaserviceand,thereby,ataxableservice.Wehavealreadyseen that service tax is a value added tax. It is a tax on the valueaddition

providedbysomeserviceprovider.Insofarasrentingofimmovableproperty foruseinthecourseorfurtheranceofbusinessorcommerceisconcerned, weareunabletodiscernanyvalueaddition.Consequently,therentingofim movablepropertyforuseinthecourseorfurtheranceofbusinessofcommerc ebyitselfdoesnotentailanyvalueadditionand,therefore,cannotberegardedas aservice.ofcourse,ifthereissomeotherservice,suchasair conditioningserviceprovidedalongwiththerentingofimmovableproperty, thenitwouldfallwithinSection65(105)(zzzz).

36. Inviewoftheforegoingdiscussion,weholdthatSection65(105)(zzzz) doesnotintermsentailthattherentingoutofimmovablepropertyforusein thecourseorfurtheranceofbusinessofcommercewouldbyitselfconstitute ataxableserviceandbeexigibletoservicetaxunderthesaidAct.The obviousconsequenceofthisfindingisthattheinterpretationplacedbythe impugnednotificationandcircularonthesaidprovisionisnotcorrect. Consequently,thesameareultraviresthesaidActandtotheextentthat theyauthorizethelevyofservicetaxonrentingofimmovablepropertyper se, they are setaside.

37. Beforepartingwiththisbatchofcases,wewouldliketoobservethatwe havenotexaminedthealternativepleatakenbythePetitionerswithregardto thelegislativecompetenceoftheParliamentinthecontextofEntry49ofList IIoftheConstitutionofIndia.Suchanexaminationhasbecomeunnecessary becauseoftheviewwehavetakenonthemainpleatakenbythePetitioners as indicateabove.

[Emphasis added]

4. Fromtheaforesaiddecision,itisquitevidentthattheDivisionBenchhasheldthat Section65(105)(zzzz)couldnothavebroughtinitsambitandsweeptherentingout ofimmovablepropertyforuseinthecourseoffurtheranceofbusinessorcommerce toconstituteataxableserviceandtherebyexigibletoservicetaxand,accordingly, thenotificationandcircularweredeclaredultravires.

5. . Afterthesaiddecisionwasrendered,Section65(90)(a)andSections65and 66 were amended. For the purpose of better appreciation, the provision that existedpriortotheFinanceAct,2010andpostamendmentbytheFinanceAct, 2010 are produced below ina tabular form:

PRIOR TO FINANCE ACT, 2010	POST AMENDMENT BY FINANCE ACT, 2010
Section65(90a)"rentingof immovable property" includes renting, letting, leasing, licensingorothersimilar arrangements ofimmovable propertyforuseinthecourse or furtherance of business or commerce but does not include" (i) renting of immovable propertybyareligiousbody ortoareligiousbody;or	Section 65(90a) "renting of immovable property" includes renting, letting, leasing, licensingorothersimilar arrangements ofimmovable propertyforuseinthecourse or furtherance of business or commerce but does not include" (i) renting of immovable propertybyareligiousbody ortoareligiousbody;or

(ii) renting of immovable propertytoaneducational b o d y , imparting skillor knowledge or lessons onany subjectorfiled,otherthana commercialtrainingor coachingcentre;	(ii) renting of immovable propertytoaneducational b o d y , imparting skillor knowledge or lessons on any subjectorfiled,otherthana commercialtrainingor coachingcentre;
Explanation No. 1:- For the purposesofthisclause,"for use in the course or furtherance of business or commerce"includesuseof immovable property as factories, office buildings, warehouses, theaters, exhibitionhallsandmultiple-usebuildings;	Explanation No. 1:- For the purposesofthisclause,"for use in the course or furtherance of business or commerce"includesuseof immovable property as factories, office buildings, w a r e houses, theaters, exhibition halls and multiple-usebuildings;
Explanation No. 2:- For the removal of doubts, it is herebydeclaredthatforthe purposes of this clause "renting of immovable property"includesallowingor permittingtheuseofspacein a n immovable property, irrespectiveof the transfer of possession or control ofthe saidimmovableproperty;	Explanation No. 2:- For the removal of doubts, it is herebydeclaredthatforthe purposes of this clause "renting of immovable property"includesallowingor permittingtheuseofspacein a n immovable property, irrespectiveof the transfer of possession or control ofthe saidimmovableproperty;
Section 66-Charge of Service Tax-	Section 66-Charge of Service Tax-
There shall be levied a tax (hereinafterreferredtoasthe service tax) at the rate of twelvepercentofthevalueof taxableservicesreferredtoin sub clauses '.(zzzz)'. of Clause (105) of Section 65 and collected in suchmanner asmaybeprescribed.	There shall be levied a tax (hereinafterreferredtoasthe service tax) at the rate of twelvepercentofthevalueof taxableservicesreferredtoin sub clauses '.(zzzz)'. of Clause (105) of Section 65 andcollected in such manner asmaybeprescribed.
Section 65(105) "taxable service" means any service providedortobeprovided"	"Section 66(105) "taxable service" means any service providedortobeprovided"
'(zzzz)toanyperson,byany other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.	'(zzzz)toanyperson,byany other person, by renting of immovable property or any otherserviceinrelationto such renting, for use in the course of or furtherance of business orcommerce.
Explanation 1. " For the	

purposes of this sub-clause, "immovableproperty" includes- (i) building and part of a building,andtheland appurtenantthereto; (ii) landincidentaltotheuse ofsuchbuildingorpartofa building; (iii) the common orshared areasandfacilitiesrelating thereto;and (iv) in case of a building located in a complex or an industrialestate,butdoesnot include- All common areas and facilitiesrelatingthereto, withinsuchcomplexorestate, butdoesnotinclude- (a) vacantlandsolelyunder for agriculture, aquaculture, farming,forestry,animal husbandry,miningpurposes; (b) vacant land whether or nothavingfacilitiesclearly incidentaltotheuseofsuch vacantland; (c) landusedforeducational, sports, circus, entertainment andparkingpurposes;and (d) building used solelyfor residential purposes and buildingsusedforthe purposes of accommodation, including hotels,hotels, boarding houses, holiday accommodation, tents, campingfacilities. Explanation 2 " For the purposes of this sub-clause, animmovablepropertypartly for use in the course or furtherance of businessor	Explanation 1. " For the purposes of this sub-clause, "immovableproperty" includes- (i) building and part of a building,andtheland appurtenantthereto; (ii) landincidentaltotheuse ofsuchbuildingorpartofa building; (iii) the common orshared areasandfacilitiesrelating thereto;and (iv) in case of a building located in a complex or an industrial estate, allcommon areas and facilitiesrelating thereto, within suchcomplex orestate, (v) Vacant land, given on l e a s e or license for construction of building or temporarystructureatalater stage to be used for furtherance of business or commerce; But does not include - (a) vacantlandsolelyusedfor agriculture, aquaculture, farming,forestry,animal husbandry,miningpurposes; (b) vacant land, whetheror nothavingfacilitiesclearly incidentaltotheuseofsuch vacantland; (c) landusedforeducational, sports, circus, entertainment andparkingpurposes;and (d) building used solelyfor residential purposes and buildingsusedforthe purposes of accommodation, including hotels, hostels, boarding houses,holiday

commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;	accommodation, tents, campingfacilities. Explanation 2 " For the purposes of this sub-clause, animmovablepropertypartly for use in the course or furtherance of businessor commerce and partly for residential or any other purposeshallbedeemedto be immovable property for use in the course or furtherance of business or commerce;

Be it noted, the amendments have been brought with retrospective effect.

6. . Challenging the validity of the amendments, Mr. Harish N. Salve, learned seniorcounsel,hassubmittedthattheParliamenthasnoauthoritytoenactthe impugned legislation as renting of immovable property is a tax on lands and buildingswhichsquarelycomeswithinEntry49ofListIIoftheSeventhScheduleof theConstitutionofIndia.Thelearnedseniorcounselfurthersubmittedthattheuseof theword'taxes'inEntry49connotesamultitudeoftaxesimposableonlandwhen therentingofanimmovablepropertywouldsquarelyfallwithinEntry49ofList II. Relying on the decision in State of West Bengal v. Kesoram Industries Ltd. (2004)10SCC20,itissubmittedthatreadingEntry49ofListIIinawidemanner,it wouldincludealltypesoftaxesimposedorimposableonlandsandbuildingsandthe samewouldfallwithintheexclusiveauthorityoftheStateLegislatureandinno mannerwouldcomewithintheresiduaryEntry97ofListIbyvirtueofwhichthe Parliamentcanlegislate.Hehaspropoundedthattheservicetaximposedbythe Parliamentonrentingofimmovablepropertytakesintoaccounttheuseoftheland orbuilding,hence,itisataxwhichtheStateLegislaturesalonecouldconceivably imposeunderEntry49ofListII.Inordertobuttresstheaforesaidsubmission, reliancehasbeenplacedonthedecisioninAjoyKumarMukherjeev.LocalBoardof BarpetaMANU/SC/0266/1965:AIR1965SC1561whereinataxhadbeenimposed under Section 62 of the Assam Local Self Government Act, 1953 and while upholding the validity of the tax, the Apex Court noted that the tax was, in substance,ataxonthelandbutthechargeonlyaroseonthelandwhichwasused foramarket.Expandingtheaforesaidstreamoflogic,thelearnedseniorcounsel submitted that the act of renting of an immovable property by one person to anotherfor"commercialuse"wouldcomewithintheexclusivejurisdictionofthe StateLegislature.

7.Pyramidingtheaboveassertions,thelearnedseniorcounselcontendedthatthe impugnedtaxhasdirectnexuswiththeimmovablepropertyandisnothingbutatax onlandandbuildings,themeasurebeingtherentpayablebythetenanttothe landlordforrentingoftheimmovableproperty.Thereisnodifferencebetweenthe transactionofrentingofimmovablepropertyandthepropertyitselfand,therefore, theprovisionisacolourablepieceoflegislation.

8. Thesecondplankofthelearnedseniorcounsel'ssubmissionsemphasisesonthe relevanceoftheconceptof"AspectTheory"totheIndianConstitutionalscheme.Itis urgedbyhimthatthe"aspectdoctrine"isnotapplicabletotheIndianConstitutional

schemeasthereexisttwoseparateLists.Asaclarification,itisproponedthatthe "Aspect Theory" enunciated in Federation of Hotel Restaurant Association of India (supra)limitsitselfonlytosuchaspectswhichcouldbedirectlycoveredbyaspecific entryinthetwoLists.ItisurgedbyhimthatifEntry97istakenrecoursetodespite thespecificEntryofListII,itwouldcreateconflictandrenderthespecificEntryof ListIIsubservienttotheresiduaryEntryofListIwhichisnotpermissibleunderthe Constitutionalscheme.PressingintoservicethedecisioninGodfreyPhillipsIndiaLtd. v.StateofU.P.MANU/SC/0051/2005:(2005)2SCC515,hefurthersubmittedthat intheIndiancontext,ifanaspectiscoveredbyanEntryinListI,thenitcannotbe saidthatanotheraspectcannotbetaxedunderanEntrywithinListII.Thesame logic,however,doesnotextendtoasituationwherethecontestorcavilisbetween theresiduaryEntrywithinListIandaspecificEntrywithinListII.

9. . Mr.Salvehasfurtherarguedthatinthelightofthejudgmentrenderedin HomeSolutions(supra),rentingbythelandlordforcommercialpurposestothe tenant,perse,couldnotbeconstruedasrenderingofservice.Theconceptof "serviceseeker"and"serviceprovider"asenunciatedintheFinanceAct1994is wholly absent in the impugned legislation. He further submitted that the Respondent'sjustificationoftheimpostonthegroundthatthepowertotaxrests withtheParliament, employingdeemingfictiontodescribethetaxasaservicetax withintheresiduarypowerofttheParliament,istotallycontrarytotheconstitution benchjudgmentoftheApexCourtinGodfrey Phillips India Ltd. (supra)wherein it hasbeenauthoritativelypronouncedthattheParliamentcannotemployadeeming fictiontobringinanincidentoftaxorataxableeventwithinitsfold.Highlighting thesaidproponement,itisurgedthatmerelydescribingthetaxtobea"service tax"wouldnotalterthenatureofthetaxforbeingataxonlandandbuildingand, therefore, the Parliament does not have the legislative competence to introduce a deemingfictiontotaxrentingofimmovablepropertyand,therefore,theimpugned provisiondeservestobedeclaredultravires.

10. Dr.Singhvi,learnedseniorcounselappearinginsomeofthewritpetitions,has submittedattheforethatthereisnoserviceinvolvedinthelettingofimmovable propertyandconsequently,itisnotopentotheParliamenttoimposeservicetaxon theassumptionthatthetaxableserviceisinvolvedinlettingofimmovableproperty. Itissubmittedbyhimthatitiswellsettledinlawthattheegislatureinenactinga lawisentitledtoenactorprescribeadeemingfictionbuttheexerciseofthesaid powercomeswithalimitationthatbydeemingafiction,thelegislaturecannot transgressuponaconstitutionalrestrictionorthefieldoflegislationthatisreserved ordemarcatedforanotherlegislature.Alternatively,itisurgedthatanylegalfiction, embeddedintheprovisionsoflawenactedbytheLegislature,doesnotconferany legislative competence upon it which it does not otherwise possess under the Constitutionandthetaxontheuseoflandandbuildingforaparticularpurpose being squarely covered under Entry 49 of List II cannot be covered underthe conceptionof'deemed'.Edificingthesaidpropositionfurther,hesubmittedthat lettingofimmovablepropertyforcommercialpurposealsoconstitutesaparticular useofthepropertyand,therefore,thetaxonsuchlettingissquarelycoveredunder Entry49ofListII.Inthisregard,reliancehasbeenplacedonthedecisionofthe SupremeCourtinKesoramIndustriesLimited(supra).

11. Dr.Singhvi,drawinganalogyfromtheinternationallyfollowedprinciples,further submitted that even internationally, leasing/letting of immovable property is exemptedfromvalueaddedtaxationsinceithasbeenconstruedthatthesamedoes notprovideanyvalueadditionandsincetheGovernmentofIndiahassoughttorely upontheinternationallyacceptedvalueaddedtaxregime,itneedstofollowthesame

fully and exempt leasing/letting of immovable property from the domain of value addedtax.Inthisregard,hehasplacedrelianceonthedecisionoftheHouseof LordsinCommissionersofCustomandExcisev.SinclairCollisLimited(2001)UKHL 30 (7th June,2001).

12. Thelearnedseniorcounselhasfurtherdrawninspirationfromtheobservations oftheEuropeanUnionCourtinBelgiumv.TemcoEuropeSA[CaseC-284/03of 18.11.2004] wherein it has been held that if the leasing/letting of immovable propertyisapassivetransaction,thenitwouldbeexempted.

13. Mr.S.Ganesh,learnedseniorcounsel,analysingtheanatomyoftheprovisions underSection65,submittedthatamongthetaxableservices,thetaxableservicein Sub-clause(zzzz),towhichtheconstitutionalchallengeintheseproceedingsrelates, wasinitiallyinsertedbytheFinanceActof2007witheffectfrom1stJune2007and thetaxableservicewasdefinedtomean"anyserviceprovidedortobeprovidedto anyperson,byanyotherpersoninrelationtorentingofimmovablepropertyforuse inthecourseorfurtheranceofbusinessorcommerce"and,hence,intheabsenceof servicecomponent,servicetaxcannotbeimposed.Emphasishasbeenlaidonthe expression"rentingofimmovableproperty"asdefinedinClause(90)(a)ofSection 65 of theAct.

14. . It is his submission that letting of immovable property is merely a property transaction and does not involve remotely any value addition whatsoeverwhichresultsfromtherenderingoftheserviceandtherefore,theservice tax is not leviable. He has heavily relied on the decision rendered in All India FederationofTaxPractitioners(supra)whereintheApexCourthasnotedthata servicetaxisataxonvalueadditionmadebyrenderingofservices.

15. . Thelearnedseniorcounselfurthersubmittedthattheimpugnedlevyoftax is nothing but a tax on the letting of immovable property and the same is squarelycoveredbyEntry49ofListIIandconsequently,theParliamenthasno legislativecompetencetolevythesaidtaxunderresiduaryEntry97ofListIof theSeventhSchedule.Theservicetaximposedbytheparliamentonrentingof immovableproperty,itisurged,takesaccountoftheuserofthelandorbuildingand hence,itisataxwhichtheStateLegislaturesalonecanimposeunderEntry49of ListII.Thelearnedseniorcounselhascommendedustothedecisionsin D.G.GoseCo.(Ag entsPvt.Ltd.)v.StateofKeralaMANU/SC/0330/1980:(1980)2SCC410 andGoodrickeGroupLtd.v.StateofWestBengalMANU/SC/0964/1995:(1995) Supp.1SCC707tohighlightthatEntry49ofListIIhasbeenendowedwithwide range of coverage andinterpretation.

16. Itisfurthercanvassedbythelearnedseniorcounselthatundertheconstitutional scheme,asingletransactionortaxableeventcannotbetaxedbyboththeParliament and the State Legislature. It is argued by him that there exists a meticulous separationofallthetaxingpowersoftheParliamentascomparedtothetaxing powersoftheStateinordertoavoidanykindofoverlappingwhatsoeverbetweenthe two.Itisproponedthatithasbeenheldbytheapexcourtthattheverysame transaction cannot be subjected to tax by both the Parliament and the State Legislature.

17. Questioningthelevyofservicetaxonrentingofimmovablepropertywith retrospective effect from 1st June 2007, he submitted that there can be no retrospectiveauthorizationofpenalactiontobetakenagainstAssesseesincluding,in

particular, the imposition of penalties or penal interest and prosecution, and that suchretrospectiveimpositionofpenalactionwouldbeunconstitutionalinthelightof thedecisioninStarIndiaPvt.Ltdv.CCEMANU/SC/2545/2005:(2005)7SCC203.

18. Mr.S.K.Bagaria,learnedseniorcounsel,relyingonAllIndiaFederationofTax Practitioners(supra)andAssociationofLeasingandFinancialServiceCompaniesv. UnionofIndiaandOrs.MANU/SC/0909/2010:(2011)2SCC352,delineatedatthe outsettheessentialfeaturesofservicetaxtomeanthatitisleviableonlyonservices provided by the service provider to its customer and it is fundamentally and inseparablyconnectedwiththevalueaddition.Thelearnedseniorcounselhasfurther submittedthatrentingofimmovablepropertyforuseinthecourseorfurtheranceof businessorcommercebyitselfdoesnotentailanyvalueadditionand,therefore, cannot be regarded as aservice.

19. Thelearnedseniorcounselhasplacedreliance onHansrajandSonsv.Stateof JammuandKashmirMANU/SC/0589/2002:(2002)6SCC227,Member-Secretary, AndhraPradeshStateBoardforPreventionandControlofWaterPollutionv.Andhra PradeshRayonsLtd.MANU/SC/0279/1988:(1989)1SCC44,SaraswatiSugarMill v.HaryanaStateBoardMANU/SC/0052/1992:(1992)1SCC418andCommissioner ofGiftTax,Madrasv.N.S.GettyChettiarMANU/SC/0249/1971:(1971)2SCC741 toreinforcehissubmissionthatthedefinitionof'taxableservice'isamatterwhich relatestochargeabilityandthechargingprovisionshavetobestrictlyconstrued.

20. ItisurgedbyMr.Bagariathattheconstitutionalconceptsrelatingtoservicetax as laid down by the Apex Court cannot be whittled or nullified by a statutory amendment.Elaboratingfurther,itisputforththatatransactionrelatingtomere rentingofimmovablepropertycouldneverbetermedasrenderingofanyservice givingrisetoavalueadditionastheelementsofserviceaswellasvalueadditionare completelyabsent.

21. . The learned senior counsel, placing reliance on PuranSingh Sahniv. SundariBhagwandasKripalaniMANU/SC/0541/1991:(1991)2SCC180,has submittedthatinSection65(90a),theexpression'rentingofimmovableproperty'hasbee n defined to include renting, letting, leasing, licensing or other similar arrangementsofimmovablepropertyandalltheseactivitiesofimmovableproperty are recognized in law as transfer of right in land/buildings by the lessor tothe lesseeandthetransactionisrecognizedasatransferofpropertyfromthelessorto the lessee under Section 105 of the Transfer of Property Act, 1882 and the instrumenteffectuatingsuchatransferdefinedasconveyanceisliabletostampduty undertheprovisionsoftheIndianStampAct,1899.Thelearnedseniorcounselhas placedreliance onAjoyKumarMukherjee(supra)GoodrickeGroupLtd.(supra) and International Tourist Corporation v. State of Haryana MANU/SC/0331/1980 : (1981)2SCC318andsubmittedthatanytaxleviedonsuchtransaction,inpith andsubstance,isnothingelsebutataxonland/buildingunderEntry49ofListII of the Seventh Schedule of the Constitution as such a transaction involves transfer of right to enjoy such property and has direct nexus with the land/buildinginquestion.Therefore,theParliament,bymerelygivingitalabelof service, cannot subject it to service tax as such an exercise is nothing but a colourableexercise ofpower.

2 2 . Mr. A.S. Chandhiok, learned Additional Solicitor General, countering the aforesaidsubmissions,hascontendedthatbyvirtueoftheamendmentincorporated bytheFinanceAct,2010,thelevyisontheveryactivityofrenting,leasing,letting, licensingoftheimmovablepropertyorpermittingtheimmovablepropertythrough

anyarrangementwhatsoevertobeusedinthecourseorfurtheranceofbusinessor commerceandforthesaidpurpose,transferofright,titleandinterestistotally irrelevant.Itishisfurthersubmissionthattheactivitywhichissoughttobetaxed underSection65(105)(zzzz)isallowing/permittingtheusageofimmovableproperty inthecourseandfurtheranceofbusinesswhichisneithercoveredundertheTransfer ofPropertyActnorundertheIndianEasementsActandbynomeansisataxonland andbuildingtocomewithintheambitandsweepofEntry49ofListIIoftheSeventh Schedule of the Constitution. Combating the submission as regards the legislative competenceoftheParliament,thelearnedAdditionSolicitorGeneralhassubmitted thatinordertotakeaidofEntry49ofListII,certainconditionsprecedentaretobe satisfiedsuchasthetaxoughttobeadirecttaxonlandandbuilding,andtheland orbuildingistobetaxedasunitsoftaxationasithasnoconcernwithownership, divisionofinterestoroccupation.Thatapart,submitsMr.Chandhiok,itdoesnot coverindirecttaxonlandandbuildingandasanaturalcorollary,ouststaxon incomefromlandorbuildingfromitspurview.Itiscanvassedbyhimthatthetaxin thepresentcaseisanindirecttaxandtheimpostisontheactivityandnotonrenting orleasing.Itiscanvassedbyhimthatthesubjectoftaxortheeventoftaxationis differentfromthemeasureoflevyandthemodeofassessmentandthelattercannot betakenintoconsiderationfordeterminingthenatureandcharacteroftax.

23. Mr.ChandhiokhasurgedthatKesoram'scase(supra)couldnotberelieduponto justifytheimpugnedlevyunderEntry49ofListIIinasmuchasthelevythereinwasa directtaxonlandandthemeasureofthesaiddirecttaxonlandwasclassifiedonthe basisofdifferentusersoflandatdifferentrates.Itissubmittedbyhimthattheissue tobedealtwiththereinwaswhetherthetaxwasonlandfallingunderListIIoron theCoalMinesorTeaEstatewhichisasubjectmatterofListI.Thecourtinterpreted thesaidprovisionsandconcludedthatthetaxunderthesaidprovisionswould remaintaxonlandirrespectiveofusetowhichitisputbecauseclassificationofland indifferentidentifiablegroupswasonlyforthepurposeoftaxation.Distinguishing the decision in AjoyKumar (supra), the learned Additional Solicitor General submittedthatinthesaidcase,thelevywasdirectlyonlanditselfbutwastobe measured/recoveredwhenitwasbeingusedasmarketandtheApexCourthad concludedthatthetaxwasonlandbutthechargearoseonlywhenthelandwasused foramarket,whereasinthepresentcase,thelevyisnotonlandbutontheactivity ofrenting,leasing,letting,licensing,allowingandpermittingtheusageofimmovable propertyinthecourseorfurtheranceofbusinessorcommerce.

24. . ThelearnedAdditionalSolicitorGeneralcontendedthatataxonlandisto bemeasuredwithreferencetoitsincomeandnothingelseandinthecaseofDG FoseandCompany(Agents)Pvt.Ltd.(supra),taxwasleviedirectlyonbuildingand wasmeasuredonthebasisofannualvaluewhichwaschallengedonthegroundthat theStateLegislaturehadnocompetencebecauseonlytheUnionhadthepowerto levytaxonannualcapitalvaluewhichwasrejectedbythecourtbyreiteratingthelaw thatthelegislaturewasfreetotakeadecisionastothemeasureoftaxbutthe sameisnotthesituationinthecaseathand.ThelearnedASG,derivingstrength from the decisions in Tamil Nadu Kalyana Mandapam Assn. (supra); All India FederationofTaxPractitionersandOrs.(supra)andAssociationofLeasingand FinancialServiceCompanies(supra),alsosubmittedthatlevyofservicetaxunder Article248(2) readwithEntry97ofListIispermissible.

25. Onthenatureofservicetax,thelearnedASGsubmittedthatbesidesthefactthat serviceisinherentunderSection65(90a)andSection65(105)(zzzz),thereisvalue additionandthewholeactivityhasaninseparablenexuswithcommercialactivity.

EmphasizingontheconceptofValueAddedTax(VAT),itissubmittedbyhimthat VATwasbasedontheadditionalservicesandtherelatedVATliabilityoftheservice providercanbecalculatedbydeductinginputtaxcreditfromthetaxcollectedonthe servicesmakingitamultipointtaxonvalueadditionwhichiscollectedatdifferent stagesofprovidingserviceswithprovisionforsetoffforthetaxpaidattheprevious stage/taxoninputs.Inthisregard,thelearnedASGhasreferredtothestatutory provisionsoftheCentralExciseAct,1944,theFinanceAct,1994andtheCENVAT CreditRules,2004,Dr.RajaJ.ChelliahCommittee'sreportontaxreformsaswellas thedecisioninAllIndiaFederationofTaxPractitionersandOrs.(supra)whereinthe SupremeCourthasdescribedservicetaxasVAT.

2 6. Thelearned ASG, justifying the retrospective operation of the impugned provisions,inhisfinallap,submittedthatonlytheretrospectiveoperationofSection 65(105)(zzzz) had been challenged and that too as an alternative relief. It is submittedthatbyvirtueofSection76(a)(6)(h)oftheFinanceAct,2010,Section 65(105)(zzzz) had been amended to clarify the intent of the legislature w.e.f. 11.5.2007andfurtherSection77oftheFinanceAct,2010validatedallactions. ReferringtothefirstHomeSolutionscase(supra),thelearnedASGsubmittedthat thecourt,inthesaidcase,hadnotquashedorinvalidatedthesubstantiveprovisions of law which still remains intact. Further, relying on the decisions in Empire IndustriesLimitedandOrs.v.UnionofIndiaandOrs.MANU/SC/0186/1985:(1985) 3SCC314,PyareLalSharmav.ManagingDirectorandOrs.MANU/SC/0675/1988 (1989)3SCC488andA.ManjulaBhashiniandOrs.v.TheManagingDirector,A.P. Women's Cooperative Finance Corporation Ltd. and Anr. MANU/SC/1128/2009 : (2009)8SCC431,itissubmittedthatthelegislaturehasthepowertoamendthelaw with retrospectiveeffect.

27. PressingintoservicethedecisioninShivDuttRaiFatehChandandOrs.v.Union ofIndiaandAnr.MANU/SC/0315/1983:(1983)3SCC529whereintheSupreme Courthadupheldthelevyofpenaltyintheyear1996witheffectfrom1957,the learnedASGsubmittedthatpenaltycanalsobeleviedretrospectively.

28. Inresponsetotheaforesaidsubmission,thePetitionersintheirrejoinder,citing the decision in Governor-General in Council v.Province of Madras MANU/PR/0006/1945:AIR1945PC98whichwasfollowedbytheSupremeCourtin R.R. Engineering Company v. Zilla Parishad MANU/SC/0328/1980 : (1980) 3 SCC 330,havesubmittedthatthenamegiventoataxisimmaterialandhasnoimpactor bearingontheissueofitsconstitutionalvalidity.Itisalsosubmittedthatthemere factthatSection65(105)(zzzz)oftheFinanceActregardedthelettingofimmovable propertyforcommercialpurposeasaserviceandproceededtolevyservicetaxon thesamedoesnotleadtotheconclusionthatthesaidtaxwasinrealityandin substanceaservicetax.Theissueofconstitutionalvalidityofatax/levydependson itsessentialnatureandnotmerelyitsnomenclature.

29. . It is further reiterated that it is a settled legal position that the legal fiction contained in the provisions of law enacted by the Legislature does not conferanylegislativecompetenceupontheLegislature.Inthiscontext,thedecisions inStateofMadrasv.GannonDunkerley&CompanyLtd.MANU/SC/0152/1958: (1959) SCR 379, Bhopal Sugar Industries v. Sales Tax Officer MANU/SC/0349/1962 : (1964)1SCR 481, Twentieth Century Finance Company Ltd. v. State of Maharashtra MANU/SC/0412/2000:(2000)6SCC12;AllIndiaFederationofTaxPractitioner's case (supra) Tamil Nadu KalyanmandapamAssociation (supra) and Association of LeasingandFinancialServiceCompanies(supra)havebeenpressedintoservice.

30. . ToappreciatethecontentionsraisedattheBar,first,weshalladverttothe schematicconceptpertainingtothe"fieldsoflegislation".InRajaJagannathBaksh Singhv.StateofUttarPradeshandAnr.MANU/SC/0184/1962:AIR1962SC1563, whiledealingwithArticles245and246,ithasbeenheldthatitisanelementary cardinalruleofinterpretationthatthewordsusedintheConstitutionwhichconfer legislativepowermustreceivethemostliberalconstructionandiftheyarewordsof wideamplitude,theymustbeinterpretedsoastogiveeffecttothatamplitude.It wouldbeoutofplacetoputanarroworrestrictedconstructiononwordsofwide amplitudeintheConstitution.Ageneralwordusedinanentrymustbeconstruedto extendtoallancillaryorsubsidiarymatterswhichcanfairlyandreasonablybeheld to be included init.

3 1 . In Union of India and Ors. v. Shah GoverdhanL. KabraTeachers College MANU/SC/0882/2002:AIR2002SC3675,ithasbeenlaiddownthatthepowerto legislateisengraftedunderArticle246oftheConstitutionandthevariousentriesin thethreelistsoftheSeventhSchedulearethe"fieldsoflegislation".Thedifferent entriesbeinglegislativeheadsareallofenablingcharacterandaredesignedto defineanddelimittherespectiveareasoflegislativecompetenceoftheUnionandthe StateLegislature.Theyneitherimposeanyrestrictionsonthelegislativepowersnor prescribeanydutyfortheexerciseoflegislativepowerinanyparticularmanner.It hasbeenacardinalprincipleofconstructionthatthelanguageoftheentriesshould begiventhewidestscopebywhichtheirmeaningisfairlycapableofandwhile interpretinganentryofanyList,itwouldnotbereasonabletoimportanylimitation therein.Theruleofwidestconstruction,however,wouldnotenablethelegislatureto makealawrelatingtoamatterwhichhasnorationalconnectionwiththesubject matterofanentry.TheirLordshipshavefurtheropinedthatitisawell-settled principlethattheentriesinthedifferentlistsshouldbereadtogetherwithoutgiving anarrowmeaningtoanyofthem.ThepoweroftheParliamentaswellastheState legislatureisexpressedinpreciseanddefiniteterMs.Whileanentryistobegivenits widestmeaning,itcannotbesointerpretedastooverrideanotherentryormake anotherentrymeaninglessandincaseofanapparentconflictbetweendifferent entries,itisthedutyoftheCourttoreconcilethem.Whenitappearstothecourt thatthereisapparentoverlappingbetweenthetwoentries,thedoctrineof"pithand substance"hastobeappliedtofindoutthetruenatureofalegislationandtheentry withinwhichitwouldfall.Incaseofconflictbetweentheentriesin ListIandListII, thesamehastobedecidedbyapplicationoftheprincipleof"pithandsubstance". Thedoctrineof"pithandsubstance"meansthatifanenactmentsubstantiallyfalls withinthepowersexpresslyconferredbytheConstitutionupontheLegislaturewhich enactedit,itcannotbeheldtobeinvalidmerelybecauseitincidentallyencroaches onmattersassignedtoanotherlegislature.Whenalawisimpugnedasbeingultra-viresofthelegislativecompetence,whatisrequiredtobeascertainedisthetrue characteroftheLegislation.If,onsuchanexamination,itisfoundthattheLegislation isinsubstanceoneonamatterassignedtotheLegislature,thenitmustbeheldtobe validinitsentiretyeventhoughitmightincidentallytrenchonmatterswhichare beyonditscompetence.Inordertoexaminethetruecharacteroftheenactment,the entireAct,itsobjectandscopeandeffectisrequiredtobegoneinto.Thequestionof invasionintotheterritoryofanotherLegislationistobedeterminednotbydegreebut bysubstance.

32. InDharamDuttaandOrs.v.UnionofIndiaandOrs.MANU/SC/0970/2003:AIR 2004SC1295,ithasbeenheldthus:

> 72. The various entries in the three Lists of the Seventh Schedule are

legislativeheadsdefiningthefieldsoflegislationandshouldbeliberallyand widelyinterpreted.Notonlythemainmatterbutalsoanyincidentaland ancillarymattersareavailabletobeincludedwithinthefieldoftheentry. Thesettledrulesofinterpretationgoverningtheentriesdonotcountenance anynarrowandpedanticinterpretation.Thejudicialopinionisforgivinga largeandliberalinterpretationtothescopeoftheentries.Sufficeittoquote fromtheopinionofthejudicialCommitteeofthePrivyCouncilinBritishCoal Corporationv.TheKingMANU/PR/0099/1935:AIR1935PC158,162-that ininterpretingaconstituentororganicstatuteindeedthatconstructionwhich ismostbeneficialtothewidestpossibleamplitudeofitspowersmustbe adopted. The Federal Court in the United Provinces v. Atiqa Begum MANU/FE/0003/1940:AIR1941FC16,25observedthatnoneoftheitems inthelistsistobereadinanarroworrestrictedsenseandallancillaryor subsidiarymattersreferabletothewordsusedintheentryandwhichcan fairlyandreasonablybesaidtobecomprehendedthereinaretobereadin theentry.Thisapproachhasbeencountenancedinseveraldecisionsofthis Court.

(To wit, see Navinchandra Mafatlal v. CIT Bombay City MANU/SC/0070/1954:(1955)1SCR829:AIR1955SC58atp.61;SriRam RamNarainMedhiv.StateofBombayMANU/SC/0132/1958:1959Supp(1) SCR 989 : AIR 1959 SC 459

3 3. In State of Andhra Pradesh v. K. Purushotham Reddy and Ors. MANU/SC/0215/2003:AIR2003SC1956,ithasbeenheldthattheconflictinthe legislativecompetenceoftheParliamentandtheStateLegislatureshavingregardto Article246oftheConstitutionofIndiamustbeviewedinthelightofthesettled positionoflawwhich,innouncertainterms,laysdownthateachEntryhastobe interpretedinabroadmanner.BoththeParliamentarylegislationasalsotheState legislationmustbeconsideredinsuchamannerastoupholdbothofthemandonly inacasewhereitisfoundthatbothcannotco-exist,theStateActmaybedeclared ultravires.ClauseIofArticle246oftheConstitutionofIndiadoesnotprovidefor thecompetenceoftheParliamentortheStateLegislaturesasisordinarilyunderstood butmerelyprovidesfortherespectivelegislativefields.Furthermore,theCourts shouldproceedtoconstrueastatutewithaviewtoupholditsconstitutionality.

34. InWelfareAssociation,A.R.P.,MaharashtraandAnr.v.RanjitP.GohilandOrs. MANU/SC/0129/2003 : (2003) 9 SCC 358, while dealing with the concept of colourablelegislation,ithasbeenheldthatthesaiddoctrinefundamentallydealtwith thequestionofcompetencyofaparticularlegislaturetoenactaparticularlaw.Ifthe legislatureiscompetenttopassaparticularlaw,themotiveswhichimpelledittoact arereallyirrelevant.Ontheotherhand,ifthelegislaturelackscompetency,the questionofmotivesdoesnotariseatall.Whetherastatuteisconstitutionalornotis thusalwaysaquestionofpower(videCooley'sConstitutionalLimitations,Vol.1, p.379).Thecrucialquestiontobeaskediswhethertherehasbeenatransgressionof legislativeauthorityasconferredbytheConstitutionwhichisthesourceofallpowers asalsotheseparationofpowers.Alegislativetransgressionmaybepatent,manifest ordirect,ormayalsobedisguised,covertandindirect.Itistothislatterclassof casesthattheexpression"colourablelegislation"hasbeenappliedincertainjudicial pronouncements. The expression means that although apparently a legislature, in passingastatute,purportstoactwithinthelimitsofitspowers,yetinsubstanceand inreality,ittransgressesthosepowers,thetransgressionbeingveiledbywhat appears,onaproperexamination,tobeamerepretenceordisguise.Thediscerning testistofindoutthesubstanceoftheActandnotmerelytheformoroutward appearance. If the subject-matter in substance is something which is beyondthe

legislative power, the form in which the law is clothed would not save it from condemnation.Theconstitutionalprohibitionscannotbeallowedtobeviolatedby employingindirectmethods.Totestthetruenatureandcharacterofthechallenged legislation,theinvestigationbythecourtshouldbedirectedtowardsexamining(i) the effect of the legislation, and (ii) its object, purpose or design. In the said decision,ithasbeenopinedthatwhileinterpretingandconstruing,aneffortoughtto bemadetomaketheentrieseffectiveinsteadofrenderingthemotiose.Itistheduty ofthecourttoexaminethepithandsubstanceoftheActtofindoutwhetherthe mattersubstantiallyfallsunderaparticularentryinalistornot.

3 5 . In HarakchandRatanchandBanthia and Ors. v. Union of India and Ors. MANU/SC/0038/1969 : AIR 1970 SC 1453 it has been held as follows:

> **6.**...TheentriesinthethreeListsareonlylegislativeheadsorfieldsof legislation;theydemarcatetheareaoverwhichtheappropriatelegislatures canoperate.Itiswellestablishedthatthewidestamplitudeshouldbegiven tothelanguageoftheentries.Butsomeoftheentriesinthedifferentlistsor inthesamelistmayoverlapormayappeartobeindirectconflictwitheach other.ItisthenthedutyofthisCourttoreconciletheentriesandbring aboutaharmoniousconstruction.IninreTheCentralProvincesandBerar SalesofMotorSpiritandLubricantsTaxationAct,1938,MANU/FE/0001/1938 : 1939 FCR 18 : AIR 1939 FC 1, Sir Maurice Gwyer proceeded to state:
>
> > OnlyintheIndianConstitutionActcantheparticularproblemarise whichisnowunderconsideration;andanendeavourmustbemade tosolveit,astheJudicialCommitteehavesaidbyhavingrecourseto thecontextandschemeoftheAct,andareconciliationattempted betweentwoapparentlyconflictingjurisdictionsbyreadingthetwo entries together and by interpreting, and, where necessary, modifying,thelanguageoftheonebythatoftheother.Ifindeed suchareconciliationshouldproveimpossible,then,andonlythen, willthenonobstanteclauseoperateandthefederalpowerprevail; fortheclauseoughttoberegardedasalastresource,awitnessto theimperfectionsofhumanexpressionandthefallibilityoflegal draftsmanship.
>
> After so stating, their Lordships further proceeded to state as follows:
>
> > 7....Itiswell settledthattheentriesinthethreelistsareonly legislativeheadsorfieldsoflegislationandtheydemarcatethearea overwhichtheappropriatelegislaturecanoperate.Thelegislative entriesmustbegivenalargeandliberalinterpretation,thereason being that the allocation of subjects to the listis not by way of scientificorlogicaldefinitionbutisamereenumerationofbroadand comprehensivecategories....

36. Wehavereferredtotheaforesaiddecisionsonlytounderstandthepurpose behindthevariousentriesrelatingtolegislationbytheParliamentaswellasthe StateLegislature,thefieldoflegislation,thedoctrineof"pithandsubstance", adoptionofanon-pedanticapproach,interpretationonawiderspectrum,thetrue characteroftheenactmentbypavingthepathofrealsubstance,andthedemarcation ofthe areasoflegislation,incidentalandancillaryencroachment,designofthe statute and substantialentrenchment.

37. . Presently,weshallproceedtorefertocertainauthoritieswhichpertainto theimpositionoftaxonlandasitisimperativetoscanandunderstandwhatis exactlymeantby"taxesonlandsandbuildings"Entry49ofListIIreadsasfollows:

> **49.** Taxes on lands andbuildings.
>
> Ifthereforeataxisdirectlyimposedon"buildings",itwillbearadirect relationtothebuildingsownedbytheAssessee.Itmaybethatthebuilding ownedbyanAssesseemaybeacomponentofhistotalassets,butatax underEntry86willnotbearanydirectordefinablerelationtohisbuilding.A taxon"buildings"isthereforeadirecttaxontheAssessee'sbuildingsas such,andisnotapersonaltaxwithoutreferencetoanyparticularproperty.

38. . InAjoyKumarMukherjee(supra),theConstitutionBench,placingreliance onRallaRamv.ProvinceofEastPunjabMANU/FE/0011/1948:AIR1949FC81, opined asfollows:

> Itiswell-settledthattheentriesinthethreelegislativelistshavetobe interpretedintheirwidestamplitudeand,therefore,ifataxcanreasonably beheldtobeataxonlanditwillcomewithinentry49.Furtheritisequally well-settledthattaxonlandmaybebasedontheannualvalueoftheland andwouldstillbeataxonlandandwouldnotbebeyondthecompetenceof theStatelegislatureonthegroundthatitisataxonincome.[seeRallaRam v.provinceofEastPunjabMANU/FE/0011/1948:1948FCR207:AIR1949 FC81.Itfollows,therefore,thattheusetowhichthelandisputcanbe takenintoaccountinimposingataxonitwithinthemeaningofentry49of ListII,fortheannualvalueoflandwhichcancertainlybetakenintoaccount inimposingataxforthepurposeofthisentrywouldnecessarilydepend upontheusetowhichthelandisput.

39. In Sudhir Chandra Nawn v. Wealth-tax Officer, Calcutta and Ors. MANU/SC/0032/1968:AIR1969SC59,itwasheldthatthepowertolevytaxon landsandbuildingsunderEntry49ofListIIdidnottrenchuponapowerconferred ontheParliamentbyEntry88ofListIand,therefore,theenactmentoftheWealth TaxActbytheParliamentwasnotultravires.Inthesaidcase,ithasbeenopinedas follows:

> ...ButthelegislativeauthorityofParliamentisnotdeterminedbyvisualizing the possibility of exceptional cases of taxes under two different heads operatingsimilarlyontaxpayers.Againentry49ListIIoftheSeventh Schedulecontemplatesthelevyoftaxonlandsandbuildingsorbothas units.Itisnormallynotconcernedwiththedivisionofinterestorownership intheunitsoflandsorbuildingswhicharebroughttotax.Taxonlandsand buildingsisdirectlyimposedonlandsandbuildings,andbearsadefinite relationtoit.Taxonthecapitalvalueofassetsbearsnodefinablerelationto landsandbuildingswhichmayformacomponentofthetotalassetsofthe Assessee.Bylegislationinexerciseofpowerunderentry86ListItaxis contemplatedtobeleviedonthevalueoftheassets.Forthepurposeof levying tax under entry 49 List II the State Legislature may adopt for determiningtheincidenceoftaxtheannualorthecapitalvalueofthelands andbuildings.Buttheadoptionoftheannualorcapitalvalueoflandsand buildingsfordeterminingtaxliabilitywillnot,inourjudgment,makethe fieldsoflegislationunderthetwoentriesoverlapping.

40. InTheAssistantCommissionerofUrbanLand TaxandOrs.v.TheBuckingham andCarnaticCompanyLtd.,Etc.MANU/SC/0068/1969:1969(2)SCC55,the challengewastotheMadrasUrbanLandTaxAct,1966.Acontentionwasraisedthat theimpugnedActfellinScheduleVII,ListI,Entry86astheimpugnedActwas,both informandsubstance,taxationofcapitaland,hence,beyondthecompetenceofthe StateLegislature.Inthatcontext,theirLordshipsopinedthatthelegislativeentries mustbegivenalargeandliberalinterpretation,thereasonbeingthattheallocation ofthesubjectstothelistisnotbywayofscientificorlogicaldefinitionbutbywayof ameresixplexenumeratioofbroadcategoriesand,therefore,thereisnoconflict betweenEntry86ofListIandEntry49ofListIIasthebasictaxationunderthetwo entriesisquitedistinct.TheirLordshipsproceededtostatethatinEntry86ofListI, thebasisoftaxationisthecapitalvalueoftheassetanditisnotataxdirectlyonthe capitalvalueoftheassetsofindividualsandcompaniesonthevaluationdataand, therefore,thetaxisnotimposedonthecomponentsoftheassetsoftheAssessee. TheirLordshipsfurtherstatedthatthetaxunderEntry86proceedsontheprincipleof aggregationandisimposedonthetotalityofthevalueofalltheassets.Afterso stating,theirLordshipsproceededtostateasfollows:

> **...**It is imposed on the total assets which the Assesseeowns and in determiningthenetwealthnotonlytheencumbrancesspecificallycharged againstanyitemofasset,butthegeneralliabilityoftheAssesseetopayhis debtsandtodischargehislawfulobligationshavetobetakenintoaccount. Incertainexceptionalcases,whereapersonowesnodebtsandisunderno enforceableobligationtodischargeanyliabilityoutofhisassetsitmaybe possible to break up the tax which is leviable on the total assets into componentsandattributeacomponenttolandsandbuildingsownedbyan Assessee.Insuchacase,thecomponentoutofthetotaltaxattributableto landsandbuildingsmayinthematterofcomputationbearsimilaritytoatax onlandsandbuildingsleviedonthecapitalorannualvalueunderEntry49, List II. But in a normal case a tax on capital value of assets bears nodefinable relation to lands and buildings which may or may not form acomponent of the total assets of the Assessee. But Entry 49 of List II, contemplatesalevyoftaxonlandsandbuildingsorbothasunits.Itisnotconc ernedwiththedivisionofinterestorownershipintheunitsoflandsorbuilding swhicharebroughttotax.Taxonlandsandbuildings,isdirectlyimposedonlan dsandbuildingsandbearsadefiniterelationtoit.Taxonthecapitalvalueofasset sbearsnodefinablerelationtolandsandbuildingswhich may form a component of the total assets of the Assessee.By legislationinexerciseofpowerunderEntry86,ListItaxiscontemplatedto beleviedonthevalueoftheassets.Forthepurposeoflevyingtaxunder Entry 49, List II the State Legislature may adopt for determining the incidenceoftaxtheannualorthecapitalvalueofthelandsandbuildings. Buttheadoptionoftheannualorcapitalvalueoflandsandbuildingsfor determiningtaxliabilitywillnotmakethefieldsoflegislationunderthetwo entriesoverlapping.Thetwotaxesareentirelydifferentintheirbasicconcept and fall on differentsubject-matters.
>
> [Emphasis added]

41. InTheSecondGiftTaxOfficer,Mangalorev.D.H.HazarethMANU/SC/0309/1970 :AIR1970SC999,theApexCourt,whiledealingwiththeimpostortaxongiftsof landsandbuildings,referredtoArticle248which("impositionof"or"impostof") containsdeclarationoftheresiduarypowersoftheLegislature.TheirLordships

observedthattheParliamenthasexclusivepowertomakeanylawinrespectofany matternotenumeratedintheConcurrentListorStateListandthesameincludesthe powerofmakinganylawimposingataxnotmentionedineitherofthoselistsandto avoidanykindofdoubt,Entry97hasbeenincludedintheUnionList.Afterso stating,theirLordshipsproceededtolaydownasfollows:

> 5.Itwill,therefore,beseenthatthesovereigntyofParliamentandthe Legislaturesisasovereigntyofenumeratedentries,butwithintheambitof anentry,theexerciseofpowerisasplenaryasanylegislaturecanpossess, subject, of course, to the limitations arising from the Fundamental Rights. Theentriesthemselvesdonotfollowanylogicalclassificationordichotomy. AswassaidinStateofRajasthanv.S.ChawlaMANU/SC/0141/1958:(1959) Supp1SCR904:AIR1959SC544theentriesinthelistsmustberegarded asenumeratiosimplexofbroadcategories.Sincetheyarelikelytooverlap occasionally,itisusualtoexaminethepithandsubstanceoflegislationwith aviewtodeterminingtowhichentrytheycanbesubstantiallyrelated,a slight connection with another entry in another list notwithstanding. Therefore,tofindoutwhetherapieceoflegislationfallswithinanyentry,its truenatureandcharactermustbeinrespecttothatparticularentry.The entriesmustofcoursereceivealargeandliberalinterpretationbecausethe fewwordsoftheentryareintendedtoconfervastandplenarypowers.If, however,noentryinanyofthethreelistscoversit,thenitmustberegarded as a matter not enumerated in any of the three lists. Then it belongs exclusivelyto ParliamentunderEntry97oftheUnionListasatopicof legislation.

Eventually,inthesaidcase,itwasheldthatgifttaxisnotataxonlandandbuilding assuchwhichisataxrestinguponegeneralownershipoflandsandbuildingsbutisa levyuponaparticularactwhichistransmissionoftitlebygift.Thetwoarenotthe samethingandtheincidenceoftaxisnotthesame.TheApexCourtruledthatsince Entry49oftheStateListcontemplatesataxdirectlyleviedbyreasonofgeneral ownership of lands and buildings, it cannot include gift tax as levied by the Parliamentand,therebeingnootherentrywhichcoversagifttax,theresiduary powerofthe Parliamentcouldbeexercisedtoenactthelaw.

42. InD.G.BoseandCompany(Agents)Pvt.Ltd.(supra),theconstitutionalvalidity oftheKeralaBuildingTaxAct,1975waschallengedbeforetheHighCourtofKerala whichupheldthevalidityoftheAct.Theprincipalcontentionthatwascanvassed beforetheApexCourtwasthatthesubjectmatteroftheActbeingataxonbuilding isataxonthecapitalvalueoftheassetofanindividualoracompanyandfalls withinthescopeofEntry86ofListIoftheSeventhScheduleoftheConstitutionand not under Entry 49 of List II and, therefore, it travels beyond the legislative competenceoftheStateLegislature.TheirLordshipsreferredtotheconceptoftaxas definedunderClause(28)ofArticle366oftheConstitutionofIndia,advertedto Entry86andthereafter,whiledealingwithEntry49,proceededtostateasfollows:

> **8.** Ontheotherhand,Entry49ofListIIisasfollows:
>
> > **49.** Taxes on lands andbuildings.
> >
> > Ifthereforeataxisdirectlyimposedon"buildings",itwillbeara directrelationtothebuildingsownedbytheAssessee.Itmaybe thatthebuildingownedbyanAssesseemaybeacomponentofhis

totalassets,butataxunderEntry86willnotbearanydirector definablerelationtohisbuilding.Ataxon"buildings"isthereforea directtaxontheAssessee'sbuildingsassuch,andisnotapersonal taxwithoutreferencetoanyparticularproperty.

9. Ithastobeappreciatedthatinalmostallcases,ataxhastwoelements whichhavebeenpreciselystatedbySeervaiinhis"ConstitutionalLawof India",secondedition,Volume2,asfollows,aspage1258:

> Another principle for reconciling apparently conflicting taxentries followsfromthefactthatataxhastwoelements:theperson,thing oractivityonwhichthetaxisimposed,andtheamountofthetax. Theamountmaybemeasuredinmanyways;butdecidedcases establishacleardistinctionbetweenthesubject-matterofataxand thestandardbywhichtheamountoftaxismeasured.Thesetwo elementsaredescribedasthesubjectofataxandthemeasureofa tax.

Itmaywellbethatone'sbuildingmayimperceptiblybethesubject-matterof tax,saythewealthtax,asacomponentofhisassets,underEntry86(ListI); anditmayalsobesubjectedtotax,sayadirecttaxunderEntry46(sic49) (ListII),butasthetwotaxesareseparateanddistinctimposts,theycannot besaidtooverlapeachother,andwouldbewithinthecompetenceofthe legislaturesconcerned.

Aftersostating,theirLordshipsreferredtothedecisionsinSudhirChandraNawn (supra)andBuckinghamandCarnaucCompany

Ltd.(supra)andeventuallyheldthattheStateLegislaturewascompetenttotaxthe buildingunderEntry49ofListII.

43. InUnionofIndiav.HarbhajanSinghDhillonMANU/SC/0062/1971:AIR1972 SC1061,whiledealingwiththerequisitesofataxunderEntry49ofListII,their Lordships have ruledthus:

> **65.** Therequisitesofataxunderentry49,ListIImaybesummarisedthus:
>
> (1) Itmustbeataxonunits,thatislandsandbuildingsseparately asunits.
>
> (2) Thetaxcannotbeataxontotality,i.e.itisnotacompositetax onthevalueofalllandsandbuildings.
>
> (3) Thetaxisnotconcernedwiththedivisionofinterestinthe buildingorland.Inotherwords,itisnotconcernedwhetherone personownsoroccupiesitortwoormorepersonsownoroccupyit.
>
> **66.** Inshort,thetaxunderentry49ListIIisnotapersonaltaxbutataxon property.

4 4. InKesoramIndustriesLtd.andOrs.,(supra),theConstitutionBench,after dwellinguponthepprincipleofinterpretationrelatingtoArticles246,265andthe SeventhScheduleoftheConstitutionandtheschemeandnatureofthepowerto legislate,permajority,opinedthatifanypowertotaxisclearlymentionedinListII, thesamewouldnotbeavailabletobeexercisedbytheParliamentbasedonthe

presumptionofresiduarypower.Inthesaidcase,whiledealingwiththeconceptof landintermsofEntry49,ListII,ithasbeenstatedthatithaswideconnotationand thelandremainslandthoughitmaybesubjecttodifferentuses.Thenatureofuseof thelandwouldnotenableapieceoflandtobetakenoutofthemeaningofland itself.Ithasbeenruledthereinthattobeataxonland,thelevymusthavesome directanddefiniterelationshipwiththelandandsolongasthetaxisataxonland bybearingsuchrelationshipwiththeland,itisopentothelegislature,forthe purposeoflevyingtax,toadoptanyoneofthewellknownmodesofdeterminingthe valueofthelandsuchasannualorcapitalvalueofthelandoritsproductivity.Ithas beenfurtherheldthatthemethodologyadopted,havinganindirectrelationshipwith the land, would not alter the nature of the tax as being one on the land. The ConstitutionBenchhasalsolaidemphasisontheaspectthattheprimaryobjectand theessentialpurposeofthelegislationmustbedistinguishedfromitsultimateor incidentalresultsorconsequencesfordeterminingthecharacterofthelevy.Alevy essentiallyinthenatureofataxandwithinthepoweroftheStateLegislaturecannot beannulledasunconstitutionalmerelybecauseitmayhaveaneffectonthepriceof the commodity. A State legislation which makes provisions for levying acess, whetherbywayoftaxtoaugmenttherevenueresourcesoftheStateorbywayof feetorenderservicesasquidproquobutwithoutanyintentionofregulatingand controllingthesubjectofthelevy,cannotbesaidtohaveencroacheduponthefield ofRegulationandcontrolbelongingtotheCentralGovernmentbyreasonofthe incidenceofthelevybeingpermissibletobepassedontothebuyerorconsumerand therebyaffectingthepriceofthecommodityorgoods.Beitnoted,inthesaidcase, theirLordshipsweredealingwithacasewherebyaDivisionBenchofCalcuttaHigh Courthadstruckdowncertainleviesbywayofcessoncoalasunconstitutionalfor wantoflegislativecompetenceoftheStatelegislature.

4 5 . In Lt. Col. Sawai Bhawani Singh and Ors. v. State of Rajasthan and Ors. MANU/SC/1103/1996:(1996)3SCC105,whiledealingwithwealthtaxunderEntry 49ofListII,theirLordshipsheldthatinpithandsubstance,itwasataxon propertyandnotapersonaltax.AsperEntry49ofListII,theStateLegislatureis competent to impose tax either on lands or on buildings or on both. A land or buildingorbothofapersonmaybesubjectedtodirecttaxbytheStateLegislature underEntry49ofListIIandmayalsobethesubject-matterofdirecttaxasa componentofhistotalassets,likewealthtaxbytheUnionLegislatureasmentioned inEntry86ofListI.Thesetwotaxesareseparateanddistinctinnatureanditcannot besaidthatthereisanyoverlappingorthattheStateLegislatureisnotcompetentto levysuchtaxonlandsandbuildingsmerelyonthegroundthattheyhavebeen subjectedtoanothertaxasacomponentofthetotalassetsofthepersonconcerned.

46. Fromtheaforesaidenunciationoflawinvariousauthorities,thefollowing principles can be culledout:

(a) UnderEntry49ofListII,theStateLegislatureiscompetenttoimposetax eitheronlandsorbuildingsoronboth.Itisbasicallyataxonproperty.

(b) Entry49ofListIIoftheSeventhSchedulecontemplateslevyoftaxon landsandbuildingsorbothasunits.

(c) Thelevyoftaxonlandsandbuildingsisnotconcernedwiththedivision ofinterestorownershipintheunitsoflandsorbuildingswhicharebrought totax.Taxonlandsandbuildingsisdirectlyimposedonlandsandbuildings andbearsadefiniterelationtoit.

(d) Thetaxonlandandbuildingisafundamentaltaxrestinguponthe general ownership of the lands and buildings but would not include a particularactlikeatransmissionoftitlebygift.

(e) ThereisadistinctionbetweenadirecttaxontheAssessee'sbuildingas such and a personaltax.

(f) Thereisadistinctionbetweentheelementsoftax,namely,theperson, thingoractivityonwhichthetaxisimposedandtheamountoftax.

(g) Ataxmayimperceptiblybethesubject-matteroftaxlikewealthtaxand maybesubjectedtotaxasadirecttaxunderEntry49ofListII.

(h) To be a tax on land, the levy must have some direct and definite relationshipwiththelandandaslongasthetaxisataxonlandbybearing suchrelationshipwiththeland,itisopentotheStatelegislature,forthe purpose of levying tax, to adopt any one of the well known modes of determiningthevalueofthelandsuchasannualorcapitalvalueoftheland oritsproductivity.Themethodologyadopted,havinganindirectrelationship withtheland,wouldnotalterthenatureofthetaxasbeingoneonland.

(i) Whiledealingwiththetaxonthesubject,thingoractivity,theprimary objectandtheessentialpurposeofthelegislationmustbedistinguished fromitsultimateorincidentalresultsorconsequencesfordeterminingthe character of thelevy.

(j) Ifataxisimposedonanytransactioninthemarketbypersonswhocome thereforbusiness,itisnotimposedonlandbutonthebusinessinvolved therein.

(k) Ataxleviedonactivityorservicerenderedhavingnexuswithlandor buildingwouldnotcomewithinthecompartmentoftaxonlandandbuilding.

Beitnoted,wehaveculledouttheaforesaidprinciplesforthesakeofclarity andconvenience.

47. ThelearnedseniorcounselappearingforthePetitionerswouldcontendthatthe levyofservicetaxonrentingorleasingofimmovablepropertyorhavingsimilar arrangementofimmovablepropertyforuseinthecourseoffurtheranceofbusiness orcommerceisfundamentallyataxonthelandwhichcomessquarelywithinthe legislativecompetenceoftheStateLegislature.Ashasbeennotedhereinbefore,it hasbeenvehementlyurgedthatbyintroducingthedoctrineof"pithandsubstance" or"aspectdoctrine",itcannotbebroughtunderEntry97ofListIundertheresiduary powerofthe Parliament.Thatapart,ithasbeenhighlightedthatthereisnoservice renderedwhenthepremisesareletoutanditisadirecttaxonlandand,therefore,it is a colourablepiece of legislation by the Parliament and there is a direct entrenchment.EmphasishasbeenlaidonthefirstHomeSolutionscase(supra)to bolster the submission that in the absence of any value addition, which isthe essential and fundamental component of service tax, the levy is unconstitutional. Regard being had to the aforesaid facets,we think it seemly to advert to the principlesthathavebeenlaiddownbytheApexCourtpertainingtoservicetaxin variousdecisions.

4 8 . In T.N. Kalyana Mandapam Association (supra), the assail was tothe

constitutionalvalidityofSections66,67(o)oftheFinanceAct,1994andRule2(1)(d)(ix)oftheServiceTaxRules,1994andotherprovisionsrelatingtoKalyanaMandapamsandMandapkeepers.Sub-Sections65(8),(19)and(20)oftheFinance Act,1994defined'caterer','mandap'and'mandapkeepers'.Section65(41)(p) defines'taxableservice'tomeananyserviceprovidedtoaclientbyamandapkeeper inrelationtotheuseofamandapinanymannerincludingthefacilitiesprovidedto theclientinrelationtosuchuseandalsotheservices,ifany,renderedasacaterer. ThechallengetotheconstitutionalvalidityberetheHighCourthadmetwith failure.BeforetheApexCourt,itwastheprincipalcontentionthattheservicetaxon themandapkeepersisacolourablelegislationandunconstitutionalasthesaidtaxis notonservicesbutis,inpithandsubstance,onlya"taxongoods"and/orlandand theprovisionsarenotwithinthelegislativecompetenceoftheUnionofIndiabut withinthecompetenceoftheStateLegislature.TheirLordshipsposedsixquestions, oneofwhichbeingrelevantisreproducedhereinbelow:

> WastheHighCourtcorrectinnotconstruingthespecificentriesinListIIviz. Entries18,49and54bygivingthewidestamplitude,particularlywhenthe Unionwasseekingtojustifythelevyundertheresiduary Entry97inListIof theSeventhScheduleoftheConstitution?

Answeringthesaidquestion,theirLordshipsopinedthatservicetaxisimposedby theParliamentpursuanttotheresiduarypowerunderEntry97ofListIreadwith Article246oftheConstitution.Thereafter,theirLordshipsproceededtostateas follows:

> **46.**Itiswellsettledthatthemeasureoftaxationcannotaffectthenatureof taxationand,therefore,thefactthatservicetaxisleviedasapercentageof the gross charges for catering cannot alter or affect the legislative competenceofParliamentinthematter.
>
> xxx xxxxxx
>
> **5 1 .**Taxable services, therefore, could include the mere providing of premisesonatemporarybasisfororganisinganyofficial,socialorbusiness functions,butwouldalsoincludeotherfacilitiessuppliedinrelationthereto. Nodistinctionfromrestaurants,hotels,etc.whichprovidelimitedaccessto property for specificpurpose.
>
> xxx xxxxxx
>
> **53.** Itisalsoemphasizedthatataxcannotbestruckdownonthegroundof lackoflegislativecompetencebyenquiringwhetherthedefinitionaccords withwhatthelayman'sviewofserviceis.Itiswellsettledthatinmattersof taxationlaws,thecourtpermitsgreaterlatitudetopickandchooseobjects andratesfortaxationandhasawidediscretionwithregardthereto.Wemay inthiscontextrefertothedecisionof MafatlalIndustriesLtd.v.Unionof India(SCCpara343,atpp.740-41):
>
> > Inthematteroftaxationlaws,thecourtpermitsagreatlatitudeto thediscretionofthelegislature.TheStateisallowedtopickand choose districts, objects, persons, methods and even rates for taxation,ifitdoessoreasonably.Thecourtsviewthelawsrelating toeconomicactivitieswithgreaterlatitudethanothermatters.

54. Therefore,alevyofservicetaxonaparticularkindofservicecouldnot be struck down on the ground that it does not conform to a common understandingoftheword"service"solongasitdoesnottransgressany specificrestrictioncontainedintheConstitution.

55. Infact,makingavailableapremisesforaperiodofafewhoursforthe specificpurposeofbeingutilizedasamandapwhetherwithorwithoutother serviceswoulditselfbeaserviceandcannotbeclassifiedasanyotherkind oflegalconcept.Itdoesnotcertainlyinvolvetransferofmovableproperty nordoesitinvolvetransferofmovablepropertyofanykindknowntolaw eitherundertheTransferofPropertyActorotherwiseandcanonlybe classified as aservice.

49. InGujaratAmbujaCementLtd.v.UnionofIndiaMANU/SC/0225/2005:AIR 2005 SC 3020, the challenge was to the legislative competence of the Parliamenttoimposeservicetaxoncarriageofgoodsbytransportoperators.Itwas urgedthatthemattercameexclusivelyunder Entry 56 of List II of the Seventh Schedulewhichpertainsto"taxesongoodsandpassengerscoveredbyroador inlandwaterways".TheirLordshipsnotedthatservicetaxisdistinctfromatax onthesaleorhirepurchaseofgoodsandfromataxonland.Whiledealingwith thespecificissue,theApexCourthasstatedthus:

32. ItisclearthereforethatSection66readwithSection65(41)(j)and(ma) Chapterv. oftheFinanceAct,1994donotseektolevytaxongoodsor passengers.Thesubjectmatteroftaxunderthoseprovisionsofthe Finance Act,1994isnotgoodsandpassengers,buttheserviceoftransportation itself.Itisalevydistinctfromthelevyenvisagedunder Entry 56.Itmaybe thatboththeleviesaretobemeasuredonthesamebasis,butthatdoesnot makethelevythesame.AswasheldinFederationofHotelandRestaurant AssociationofIndiaetc.v.UnionofIndiaandOrs.MANU/SC/0180/1989:(1989) 3 SCC634:

> ...subjectswhichinoneaspectandforonepurposefallwithinthe power of a particular legislature may in another aspect andfor anotherpurposefallwithinanotherlegislativepower....Indeed,the law'withrespectto'asubjectmightincidentally'affect'another subjectinsomeway,butthatisnotthesamethingasthelawbeing on the latter subject. There might be overlapping; but the overlappingmustbeinlaw.Thesametransactionmayinvolvetwo ormoretaxableeventsinitsdifferentaspects.Butthefactthatthere isanoverlappingdoesnotdetractfromthedistinctivenessofthe aspects."(pg.652-653).

33. SinceserviceTaxisnotalevyonpassengersandgoodsbutontheevent of service in connection with the carriage of goods, it is not therefore possible to hold that the Act in pith and substance is within theStates exclusivepowerunder Entry 56 of List II. WhattheActostensiblyseeksto taxiswhatit,insubstance,taxes.Inthecircumstances,theActcouldnotbe termed to be a colourablepiece of legislation. It is not the case of the PetitionersthattheActisreferabletoanyotherentryapartfrom Entry 56 of List II. Thereforethenegationofthe Petitioners submissionperforceleadsto theconclusionthattheActfallswithintheresiduarypowerofParliament under Entry 97 of List I.

50. InAllIndiaFederationofTaxPractitioners(supra),aDivisionBenchdecisionof theBombayHighCourtupholdingthelegislativecompetenceoftheParliamentto levyservicetaxvidetheFinanceAct,1994andtheFinance(No.2)Act,1998was assailedbeforetheApexCourt.Theissuethatarosepertainedtothecompetenceof theParliamenttolevyservicetaxonpractisingCharteredAccountantsandArchitects havingregardtoEntry60,ListIIoftheSeventhScheduletotheConstitutionand Article276oftheConstitution.TheirLordshipsreferredtothereasonsforimposition ofservicetax,theschemeoftheFinanceAct,1994andtheFinanceAct,1998,the relevantprovisionsoftheConstitutionofIndiaanddealtwiththemeaningofservice tax.Whiledealingwiththeconceptandmeaningofservicetax,theirLordships opinedthattheconceptofservicetaxisaneconomicconcept.Thereafter,theApex Courtproceededtostatethatasaneconomicconcept,thereisnodistinctionbetween theconsumptionofgoodsandconsumptionofserviceasbothsatisfyhumanneeds. Itisthiseconomicconceptbasedonthelegalprincipleofequivalencewhichnow stands incorporated in the Constitution vide the Constitution (Eighty-eighth Amendment)Act,2003.Further,itisimportanttonotethat"servicetax"isavalue addedtaxwhich,inturn,isageneraltaxwhichappliestoallcommercialactivities involving production of goods and provision of service. Moreover, VAT is a consumptiontaxasitisbornebytheclient,thatis,thepersonwhoenjoysthe benefitoravailstheservice.Thereafter,theirLordshipsreferredtothedecisionin MotiLaminates(P)Ltd.v.CCEMANU/SC/0658/1995:(1995)3SCC23andopined thus:

> **24.** TheimportanceoftheabovejudgmentofthisCourtistwofold.Firstly, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the serviceproviderforconsideration,whichcorrespondinglystandsconsumed bytheservicereceiver.Itisthisprincipleofequivalencewhichisin-built intotheconceptofservicetax,whichhasreceivedlegalsupportintheform of the Finance Act, 1994. To give an illustration, an Event Manager (professional) undertakes an activity, namely, of organizing shows. He belongstotheprofessionofEventManagement.Aslongasheisinthe businessorcallingorprofessionofanEventManager,heisliabletopaythe taxonprofession,callingortradeunderEntry60ofListII.However,thattax underEntry60ofListIIwillnotcoverhisactivityoforganizingshowsfor consideration which provide entertainment to the connoisseurs. For each showheplansandcreateseventsbasedonhisskill,experienceandtraining. Ineachshowheundertakesanactivitywhichiscommercialandwhichhe placesbeforehisaudienceforitsconsumption.Thetaxonserviceislevied foreachshow.Thissituationisverysimilartoasituationwheregoodsare manufacturedorproducedwiththeintentionofbeingclearedforhome consumptionundertheCentralExciseAct,1944.Thisishowtheprincipleof equivalenceequatesconsumptionofgoodswithconsumptionofservicesas bothsatisfythehumanneeds.Inthecaseofinternetserviceprovider, service tax is leviable for online information and database providedby websites. But no service tax is leviable on e-commerce as there is no databaseaccess.
>
> **25.** Onthebasisoftheabovediscussion,itisclearthatservicetaxisVAT whichinturnisbothageneraltaxaswellasdestinationbasedconsumption taxleviableonservicesprovidedwithinthecountry.

Aftersostating,theirLordshipsproceededtoadverttothemeaningofthewords "taxesonprofessions"andheldasfollows:

34. Asstatedabove,Entry60,ListIIreferstotaxesonprofessions,etc.Itis thetaxontheindividualperson/firmorcompany.Itisthetaxonthestatus. Acharteredaccountantoracostaccountantobtainsalicenceoraprivilege fromthecompetentbodytopractice.Onthatprivilegeassuchthe Stateis competenttolevyataxunderEntry60.However,asstatedabove,Entry60 isnotageneralentry.Itcannotbereadtoincludeeveryactivityundertaken by a chartered accountant/cost accountant/architect for consideration. Service tax is a tax on each activity undertaken by a chartered accountant/costaccountantoranarchitect.Thecostaccountant/chartered accountant/architectchargeshisclientforadviceorforauditingofaccounts. Similarly,acostaccountantchargeshisclientforadviceaswellasdoingthe work of costing. For each transaction or contract, the chartered accountant/costaccountantrendersprofessionbasedservices.Theactivity undertakenbythecharteredaccountantorthecostaccountantoranarchitect hastwoaspects.Fromthepointofviewofthecharteredaccountant/cost accountantitisanactivityundertakenbyhimbasedonhisperformanceand skill.Butfromthepointofviewofhisclient,thecharteredaccountant/cost accountantishisserviceprovider.Itisataxon"services".Theactivity undertakenbythecharteredaccountantorcostaccountantissimilarto saleableormarketablecommoditiesproducedbytheAssesseeandclearedby theAssesseeforhomeconsumptionundertheCentralExciseAct.

35. Foreachcontract,taxisleviedundertheFinanceActs,1994and1998. TaxcannotbeleviedunderthatActwithoutservicebeingprovidedwhereasa professionaltaxunderEntry60isataxonhisstatus.Itisthetaxonthe status of a cost accountant or a chartered accountant. As long as a person/firmremainsintheprofession,he/ithastopayprofessionaltax.That taxhasnothingtodowiththecommercialactivitieswhichheundertakesfor hisclient.Evenifthecharteredaccountanthasnoworkthroughoutthe accountingyear,stillhehastopayprofessionaltax.Hehastopaythetaxtill heremainsintheprofession.Thisistheambitandscopeof Entry60,ListII whichisataxingentry.Therefore,Entry60contemplatestaxonprofessions, assuch.Entry60,ListIIrefersto"taxonemployments".

xxx xxxxxx

39. Itwasfurtherobservedthatalawyerhastopaytaxtotakeoutalicence irrespectiveofwhetherheactuallypracticesornot.Thattaxisataxforthe privilege of having the right to exercise the profession if and when the person taking out the licence chooses to do so. It was held that the impugnedtaxonentertainmentleviedbytheCantonmentBoardwasataxon theactofentertainmentresultinginashowand,therefore,theimpugnedlaw imposingtaxonentertainmentfellunderEntry50oftheProvincialListin ScheduleVIItotheGOIAct,1935andnotunderEntry46(similartoEntry 60ofListII).Therefore,itwasheldthatBombayLegislaturehadpowerto enactthelawimposingtaxonentertainmentwhichhadnothingtodowith thelawimposingtaxontheprivilegeofcarryingonanyprofession,tradeor callingunderEntry46(similartoEntry60ofListIIinthepresentcase). Therefore,thisCourthasclarifiedthedichotomybetweentaxonprivilegeof carryingonanytradeorcallingononehandandthetaxontheactivity

whichanentertainerundertakesoneachoccasion.Thetaxonprivilegeto practicetheprofession,therefore,fallsunderEntry60,ListII.Itisquite differentfromtaxonservices.Keepinginmindtheaforestateddichotomy,it isclearthattaxonservicedoesnotfallunderEntry60,ListII.Therefore, Parliamenthasabsolutejurisdictionandlegislativecompetencetoenactthe lawimposingtaxonservicesunderEntry97,ListIoftheSeventhSchedule to theConstitution.

Eventually,ithasbeenheldinthesaidcasethatthetaxonservicesdonotfallunder Entry60,ListIIandtheservicewouldfallunderEntry92-C/97ofListI.Beitnoted, ithasbeenheldthereinthatservicetaxisavalueaddedtaxandthevalueadditionis onaccountofactivitieslikeplanning,consultation,advising,etc.Itisanactivity whichprovidesvalueadditionasinthecaseofmanufactureofgoodswhichattracts exciseduty.TheirLordships,inthesaidcase,opinedthatthetaxfallsontheactivity whichisthesubjectmatterofservicetax,iftheword"service"istobesubstitutedin theplaceofgoodsbyapplyingtheprincipleofequivalence.

51. InAssociationofLeasingandFinancialServiceCompanies(supra),whiledealing withthevalidityofSections65(12)and65(105)(zm)oftheFinanceAct,1994as amendedwhichpertaintothelevyofservicetaxonleasingandhire-purchase,the ApexCourt,afterreferringtothedecisionsinD.H.Hazareth(supra),UjagarPrints (II)v.UnionofIndiaMANU/SC/0675/1988:(1989)3SCC488,InternationalTourist Corporation(supra)andGoodrickeGroupLtd.(supra),hasheldthus:

> 59.Applyingtheabovedecisionstothepresentcase,onexaminationofthe impugnedlegislationinitsentirety,weareoftheviewthattheimpugned levyrelatestooriswithrespecttotheparticulartopicof"bankingandother financialservices"whichincludeswithinitoneoftheseveralenumerated servicesviz.financialleasingservices.Theseincludelong-termfinancingby banksandotherfinancialinstitutions(includingNBFCs).Theseareservices rendered to their customers which comes within themeaning of the expression"taxableservices"asdefinedinSection65(105)(zm).Thetaxable eventundertheimpugnedlawistherenditionofservice.Theimpugnedtax isnotonmaterialorsale.Itisonactivity/servicerenderedbytheservice providertoitscustomer.Equipmentleasing/hire-purchasefinancearelong-termfinancingactivitiesundertakenastheirbusinessbyNBFCs.Asfarasthe taxablevalueincaseoffinancialleasingincludingequipmentleasingand hirepurchaseisconcerned,theamountreceivedasprincipalisnotthe considerationforservicesrendered.Suchamountiscreditedtothecapital accountofthelessor/hire-purchaseserviceprovider.Itistheinterest/finance chargewhichistreatedasincomeorrevenueandwhichiscreditedtothe revenue account. Such interest or finance charges together with the lease management fee/processing fee/documentation charges are treated as considerationsfortheservicesrenderedandaccordinglytheyconstitutethe valueoftaxableservicesonwhichservicetaxismadepayable.

52. From the aforesaidpronouncements inthe field,the following principles regardingservicetaxcanbefruitfullyculledout:

> (i) Themeasureoftaxationdoesnotaffectthenatureoftaxationand, therefore,themannerofquantificationofthelevyofservicetaxhasno bearingonthefactumoflegislativecompetence.

(ii) Taxableservicescanincludeprovidingofpremisesonatemporarybasis fororganizinganyofficial,socialorbusinessfunctionbutalsootherfacilities supplied in relationthereto.

(iii) Levyofservicetaxonaparticularkindofservicecannotbestruckdown onthegroundthatitdoesnotconformtoacommonunderstandingofthe word 'service' as long as it does not transgress any specificrestriction embodied in theConstitution.

(iv) Servicetaxisalevyontheeventofservice.

(v) Theconceptofservicetaxisaneconomicconcept.

(vi) 'Consumptionofservice'asincaseof'consumptionofgoods'satisfies humanneeds.

(vii) Service tax is a value added tax which, in turn, is a general tax applicabletoallcommercialactivitiesinvolvingprovisionofservice.

(viii) Value added tax is a general tax as well as destination based consumptiontaxleviableonservicesprovidedwithinthecountry.

(ix) Theprincipleofequivalenceisin-builtintotheconceptofservicetax.

(x) Theactivityundertakeninatransactioncanhavetwocomponents, namely,activityundertakenbyapersonpertainingtohisperformanceand skilland,secondlythepersonwhoavailsthebenefitofthesaidperformance andskill.Inthesaidcontext,thetwoconcepts,namely,activityandthe serviceproviderandservicerecipientgainsignificance.

53. Havingenumeratedtheprinciplesrelatingtothefieldsoflegislation,the situationsandcircumstanceswhenalevyontaxonlandcomesunderEntry49ofList IIandwhatinconceptualessentialitycoversthefacetofservicetax,itispresently seemly to dwell upon the three major submissions which have been astutely canvassedindifferentwaysbythelearnedCounselattheBar.Whatiscontendedby themisthatrentingandleasingisbasicallyassociatedwiththelandandputtingany kindofunnecessaryimpactonthesamewouldnotmakeitataxonanyactivityto bringitwiththepurviewofEntry97ofListIoftheConstitution.Itisurgedthatitis thedutyofthecourttobroadlyinterprettheentriesofthefieldandefforthastobe madetoseethattheParliament,pursuanttotheresiduarypowersvestedinit,does nottrenchuponthepowersoftheStateLegislatureespeciallyinthecaseofataxable eventpertainingtotheobjectwhichiscoveredwithinEntry49ofListII.Inessence, theproponementisthatintothefieldofStatelegislationunderListII,afreeentryof Entry97ofListIshouldnotbeallowed.Thatapart,itissubmittedthattheconcept ofservicetaxhasbeenevolvedbythecourtsoflawbyattachingvalueadditiontoit andintheabsenceofanyvalueadditioninrenting,leasingandlicensingorany aspect in that regard,if the same brought under the netof service tax, a constitutionalamendmentisrequiredanditisnotpermissibletobringitinby statutoryamendmentashasbeendonebytheFinanceAct,2010.Theseminal submissionisthatthereisnovalueadditionand,therefore,theservicetaxisnot imposable. Per-contra, the learned Additional Solicitor General would submit that oncealevyoftaxdoesnotfallunderListIIorListIII,itwouldfallinListI,regard beinghadtotheamplitudeoftheresiduarypowerthathasbeenprovidedinthe ConstitutionunderEntry97ofListIoftheSeventhScheduleoftheConstitution.In

this regard, we may note with profit certain authorities in the field.

54. InInternationalTouristCorporation(supra), it hasbeenheldthat before exclusivelegislativecompetencecanbeclaimedbytheParliamentbyresorttothe residuarypower,thelegislativeincompetenceoftheStatelegislaturemustbeclearly established.Entry97itselfisspecificinthatamattercanbebroughtunderthatEntry onlyifitisnotenumeratedinListIIorListIIIandinthecaseofataxifitisnot mentionedineitherofthoseLists.InaFederalConstitutionlikeours,wherethereis adivisionoflegislativesubjectsbuttheresiduarypowerisvestedintheParliament, suchresiduarypowercannotbesoexpansivelyinterpretedastowhittledownthe poweroftheStateLegislature.Thatmightaffectandjeopardizetheveryfederal principle.ThefederalnatureoftheConstitutiondemandsthataninterpretationwhich wouldallowtheexerciseoflegislativepowerbytheParliamentpursuanttothe residuarypowersvestedinittotrenchupontheStatelegislationandwhichwould therebydestroyorbelittlestateautonomymustberejected.Inthesaidcase,ithas beenfurtheropinedthatwherethecompetingentriesareanentryinListIIandEntry 97 of List I, the entry in the State List must be given a broad and plentiful interpretation.

55. InHarbhajanSinghDhillon(supra),ithasbeenheldthus:

> 59.ItwasalsosaidthatifthiswastheintentionoftheConstitutionmakers theyneednothaveformulatedListIatall.Thisisthepointwhichwastaken bySardarHukamSinghandOrs.inthedebatesreferredtoaboveandwas answeredbyDr.Ambedkar.Butapartfromwhathasbeenstatedby Dr. Ambedkarinhisspeechextractedabovethereissomemeritsandlegaleffect inhavingincludedspecificitemsinListIforwhentherearethreelistsitis easiertoconstrueListIIinthelightofListsIandII.Iftherehadbeenno ListI,manyitemsinListIIwouldperhapshavebeengivenmuchwider interpretationthancanbegivenunderthepresentscheme.Bethatasitmay, wehavethethreelistsandaresiduarypowerandthereforeitseemstous thatinthiscontext;ifaCentralActischallenged,asbeingbeyondthe legislativecompetenceofParliament,itisenoughifitisalawwithrespectto mattersortaxesenumeratedinListII.Ifitisnot,nofurtherquestionarises.

56. InStateofKarnatakav.UnionofIndiaandAnr.MANU/SC/0144/1977:AIR1978 SC68,ithasbeenheldthus:

> 96.ItwillbeseenthatthetestadoptedinDhillon'scase(supra)wasthatifa subjectdoesnotfallwithinaspecificallydemarcatedfieldfoundinListIIor List III it would fall in List I apparently because the amplitude of the residuaryfieldindicatedbyEntry97,ListI.Legislativeentriesonlydenote fieldsofoperationoflegislativepowerwhichisactuallyconferredbyoneof thearticlesoftheConstitution.ItwaspointedoutthatArticle248ofthe Constitution conferring legislative power is "framed in the widest possible terMs."ThevalidityoftheWealthTaxActwasupheldinthatcase.The argumentthatawiderangegiventoEntry97ofListI,readwithArticle248 oftheConstitutionwoulddestroythefederalstructure"ofourRepublicwas rejectedthere.Onanapplicationofsimilartesthere,thepowersgiventothe CentralGovernmentbySection3oftheAct,nowbeforeus,couldnotbe held to be invalid on the ground that federal structure of the State is jeopardizedbytheviewweareadoptinginconformitywiththeprevious decisions of thisCourt.

5 7 . In M/s. Sat Pal and Company etc., v. Lt. Governor of Delhi and Ors. MANU/SC/0579/1979:AIR1979SC1550,whiledealingwiththechallengeto legislativecompetence,ithasbeenheldthus:

> Wheneverlegislativecompetenceisinquestionattemptoftheourtsisto findoutwhetherthelegislationsquarelyfallsinoneortheotherentry.Ifa particularlegislationiscoveredbyanyspecificentrywellandwouldbe:isit beyondthelegislativecompetenceofParliament?Inundertakingthisexerciseitisqu iteoftenknownthatalegislationmaybecoveredbymorethanone entrybecauseananalysishasshownthattheentriesareoverlapping.Ifthe legislationmayfallinoneentrypartlyandpartofitmaybecoveredbythe residuaryentry,thelegislationwouldnonethelessbeimmunefromtheattack onthegroundoflegislativecompetence.

Aftersostating,theirLordshipsproceededtostatethatwiththeadvancementof society,expandinghorizonsofscientificandtechnicalknowledge,probeintothe mysteryofcreation,itisimpossibletoconceivethateveryimaginableheadof legislationwithinhumancomprehensionandwithintheforeseeablefuturecouldhave beenwithinthecontemplationofthefoundingfathersandwas,therefore,specifically enumeratedinoneortheotherofthethreeLists,meaningtherebythatthethree ListswereexhaustiveofGovernmentalactionandactivity.Elaboratingfurther,their LordshipsstatedthatthedemandsofthewelfareState,hopesandaspirationsand expectationsinadevelopingsocietyandthecomplexworldsituationwithinter-dependenceandhostilityamongstnationsmaynecessitatelegislationonsomesuch topicswhichmaybeinconceivableevenforvisionariesand,hence,couldnothave been within the contemplation of the founding fathers. Complex modern governmentaladministrationinafederalsetupprovidingdistributionoflegislative powerscoupledwiththepowerofjudicialreviewmayraisesuchsituationsthata subjectoflegislationmaynotsquarelyfallinanyspecificentryinListsIorIII.Upon properappraisaloftheaforesaid,theirLordshipsfinallyopinedthatitmaynotbe coveredbyanyentryinListII,thoughapparentlyoronasuperficialviewitmaybe coveredbyanentryinListII.Insuchasituation,theParliamentwouldhavethe powertolegislateonthesubjectinexerciseoftheresiduarypowerunderEntry97, ListIanditwouldnotbepropertoundulycircumscribe,corrodeorwhittledownthis powerbysayingthatthesubjectoflegislationwaspresenttothemindoftheframers oftheConstitutionbecauseapparentlyitfallsinoneoftheentriesinListIIand therebydenypowertolegislateunderEntry97.

58. In Godfrey Phillips India Ltd. (supra), it has been held thus-

> **46.**Therefore,taxingentriesmustbeconstruedwithclarityandprecisionso astomaintainsuchexclusivity,andaconstructionofataxationentrywhich mayleadtooverlappingmustbeeschewed.Ifthetaxingpoweriswithina particularlegislativefielditwouldfollowthatotherfieldsinthelegislative listsmustbeconstruedtoexcludethisfieldsothatthereisnopossibilityof legislativetrespass.

Further, withrespecttotheexclusivelegislativepowersoftheParliamentandthe States, their Lordshipshave held thus:

> 49.UnderthethreelistsoftheSeventhScheduletotheIndianConstitutiona taxationentryinalegislativelistmaybewithrespecttoanobjectoran eventormaybewithrespecttoboth.Article246makesitclearthatthe

exclusivepowersconferredontheParliamentortheStatestolegislateona particularmatterincludesthepowertolegislatewithrespecttothatmatter. Hence, where the entry describes an object of tax, all taxable events pertainingtotheobjectarewithinthatfieldoflegislationunlesstheeventis specificallyprovidedforelsewhereunderadifferentlegislativehead.Where thereisthepossibilityoflegislativeoverlap,courtshaveresolvedtheissue accordingtosettledprinciplesofconstructionofentriesinthelegislative lists.

5 9. In Federation of Hotel and Restaurant v. Union of India and Ors. MANU/SC/0180/1989:AIR1990SC1637,ithasbeenheldthatthequestionof legislativepracticeastowhataparticularlegislativeentrycouldbeheldtoembrace isinappositewhiledealingwithataxwhichissuigenerisornon-descriptimposedin exerciseoftheresiduarypowerssolongassuchtaxisnotspecificallyenumeratedin Lists II andIII.

60. Asthetabularchartthatwehavereproducedwouldclearlyshow,Section65is theprovisionwhichdealswiththechargingofservicetax.Section66(105)defines taxableservicetomeananyserviceprovidedortobeprovidedtoanyperson,byany otherpersonbyrentingimmovablepropertyoranyotherserviceinrelationtosuch rentingforuseinthecourseoforfurtheranceofbusinessorcommerce.Section 65(90a)hasbeenamendedin2010tomeanrentingofimmovablepropertywhich includes renting, letting, leasing, licensing or other similar arrangements of immovablepropertyforuseinthecourseorfurtheranceofbusinessorcommercebut doesnotincludecertainaspects.ExplanationNo.1tothesaidprovisionprovides that"foruseinthecourseorfurtheranceofbusinessorcommerce"includestheuse ofimmovablepropertyasfactories,officebuildings,warehouses,theatres,exhibition hallsandmultiple-usebuildings.Explanation2furtherdeclaresthatforthepurposes of this said clause, renting of immovable property would include allowing or permittingtheuseofspaceinanimmovableproperty,irrespectiveofthetransferof possessionorcontrolofthesaidimmovableproperty.Theearlierprovisionhad introducedthedefinitionofrentingofimmovablepropertyincludingrenting,letting, leasing,licensingorothersimilararrangementsinthecourseorfurtheranceof business orcommerce.

61. . In the first Home Solution case, the Division Bench had posed the questionwhethertherentingofimmovablepropertyforuseinthecourseofor furtheranceofbusinessorcommercebyitselfisservice.TheBenchreferredto Section65(105)(zzzz)asitstoodthenandopinedthatitwasunabletodiscern anyvalueadditionand,hence,therentingofimmovablepropertyforuseinthe courseorfurtheranceofbusinessorcommercebyitselfdoesnotentailanyvalue additionand,therefore,cannotberegardedasservice.Becauseofthesaidview,the circular was quashed. Be it noted, in the said decision, the Bench has not appositelyadvertedtoSection65(90a)whichclearlypostulatedthatrentingof immovablepropertyincludesrenting,letting,leasing,licensingorothersimilar arrangements for use in the course or furtherance of business or commerce barringcertainexceptions.InSection66(105)(zzzz),thetaxableservicewas definedtomeananyserviceprovidedtoanypersonbyanyotherpersonrelating totherentingofimmovablepropertyforuseinthecourseoforfurtheranceof business or commerce. The Parliament, by amendment, has differently positioned thewords"inrelationto".Asweperceive,theDivisionBenchhaslaiddownthat themererentingofimmovablepropertyforuseinthecourseoforfurtheranceof businessorcommercebyitselfcouldnotentailanyvalueaddition.Ifthedefinition in Section 65(90a) is taken into consideration, there isa

deemingconceptwithregardtoserviceandthetaxableserviceisbasedorfounded onrentingofimmovableproperty.Thelearnedseniorcounselforthe Petitioner wouldcontendthattheParliamentcannot,bydeemingfiction,createataxliabilityto bring it within the purview of Entry 97 of List I as that would be an indirect entrenchmentonEntry49ofListII.Per-contra,Mr.Chandhiok,relyingonthe decisioninTamilNaduKalyanaMandapamAssn.(supra),submitsthattheconceptof service,asisunderstoodbyalayman,isnotapplicabletotheconceptoftaxing statuteundertheconstitutionalframework.Hewouldfurthercontendthatoncethis Courtholdsthatthelevydoesnotpertaintoataxonlandorbuildingbutanactivity likerenting,leasing,licensingorothersimilararrangementsofimmovableproperty foruseinthecourseorfurtheranceofbusinessorcommerce,itwouldcomewithin theresiduarypoweroftheParliamentandthesameshouldputthecontroversyto rest.

62. Aspresentlyadvised,weshalldwellupontheconceptofvalueaddition.Thehub ofthematteriswhenapremiseisletoutforuse,shouldapersonwhorentsan immovablepropertyorrendersanyotherserviceinrelationtosuchlettingforusein thecourseorfurtheranceofbusinessorcommercebeliabletoservicetax.

6 3 . The Division Bench in the first Home Solution case (supra), as we have reproducedhereinbefore,hasopinedthatrentingofimmovablepropertyforusein thecourseorfurtheranceofbusinessorcommercebyitselfwouldnotconstitute serviceasthereisnovalueaddition.Inthedictionaryclausein Section65(90A), whiledefiningrentingofimmovableproperty,ithasbeenstatedthatitincludes renting,letting,leasing,licencingorothersimilararrangementsforimmovable propertyforuseinthecourseorfurtheranceofbusinessorcommerce.Onaperusal ofthedecisioninthefirstHomeSolutioncase(supra),itisdiscerniblethatthe DivisionBenchhasnotappositelyadvertedtothesame.Thecontentionthatdespite theamendmentwhenthevalueadditionasaconceptisnotattractedtorenting, letting,leasingandlicencingevenforcommercialpurpose,theingredientsofservice taxarenotsatisfiedisnotwellfounded.Inthiscontext,itistobeappreciatedthat the concept of service, as is understood in common parlance or common understanding,wouldnotbeafactortoholdaprovisionasunconstitutional.We neednotadverttowhethertheParliamenthas,byusingofthedefinition,createda fiction.Thetermswhicharesignificantarerenting,letting,leasingandlicencingfor useinthecourseorfurtheranceofbusinessorcommerce.Thelegislaturehasnot merelysaidrentingofimmovableproperty.Ithasusedtheterminologyrentingof propertyoranyserviceinrelationtosuchrentingandthattoointhecourseor furtherance of business or commerce, the last part being important. While understandingtheconceptofservicetax,itistobekeptinmindthatitisbotha generaltaxaswellasadestinationbasedconsumptiontaxleviedonservices. Sometimesservicescanbe"propertybasedservices"and"performancebased services".Thearchitects,interiordesignersandrealestateagentswouldcomeinthe categoryofperformanceserviceproviders.

64. Itiscontendedthatwhenapropertyisleasedorrented,theelementofserviceis absolutely absent. In this context, the concept of rent has to be appositely understood.Arentisbasicallyarewardpaidfortheuseoftheland.Thetenantor theoccupantpaysthesametousethepremises.Intheeconomicconcept,rentcan be categorized into two heads, namely, contract rent and economic rent. Contract rentfundamentallyreferstothetotalamountofmoneypaidforuseofthelandand economicrentisapartofthetotalpaymentwhichismadefortheuseoflandandit isestimatedonmanyaground.Theeconomicrentcanbecontractrentminus

interestonthecapitalinvested.Togiveanexample,atenantpaysRs.20,000/-per yearascontractrentbuttheinterestoncapitalinvestedisRs.3,000/-peryear.Thus, theremainingamount,thatis,Rs.17,000/-(Rs.20,000.00-Rs.3,000.00)ispaidfor the use of theland.

65. Theconceptofeconomicrentcanalsorepresentanamountwhichafactorcan earninitsnextbestalternativeuse.Togiveanexample,apieceoflandyieldsina particularuseRs.5,000inayear.Ifitistransferredtoitsnextbestuse,itcanearna betterincome.AtonepointoftimetheTheoryofRentwaspropagatedbyDavid Ricardo.AccordingtotheRicardiantheory,renthasdifferentialsurplusandthesame arises due to certain facets relating to fertility, productivity, extensive cultivation, quality,etc.Ricardofundamentallyconsideredrentasasurplusaccruingtosuperior landoverinferiorlandcalled"marginalland".Italsodependeduponshiftingof population.Beitnoted,therentvariesdependinguponadvantages.Togivean example,twodecadesback,amarketisestablishedinzone'A',thereafter,arailway stationstartsinanotherzonecalled'B'.Thecostofaparticularitemonbeing transported from zone 'A' to outside the city will cost more than the articles transportedfromzone'B'.Comparedtozones'A'and'B',iftherearеotherzones whicharefartherawaylikezones'C'and'D',theywillbelessadvantageous.Thus, thelandsorbuildingslocatedinzones'A'and'B'wouldbemoreadvantageous.The value difference comes into play because of transport charges. The surplus arises becauseofthelocationandavailabilityoffacilities.Appreciatedinthiscontext, economicrentisasurpluswhicharisesonaccountofnaturaldifferentialadvantages andcanbetreatedas'service'.Thatapart,scarcityofpremises,thepressureof demandandtheincreaseofpopulationarealsocontributoryfactors.Consequently, anylandorbuildingsituatedinaparticularplacedoespossesscertaininherent qualitieswhichdistinguishesitfromlandorbuildingatotherplaces.Thefactors whichreallyweigharelocation,accessibility,goodwill,constructionqualityandother advantages.Alandorbuildinginoneareamayfetchmorerentthaninanotherarea. Whenaparticularbuildingisrentedorleasedorgivenunderarrangementfor commercialorbusinesspurposes,manyfactorsaretakenintoconsideration.Every buildingorpremisescannotbeutilizedforcommercialorbusinesspurposes.Whena particularbuildingorpremiseshasthe"effectpotentiality"tobeletoutonrentfor thesaidpurpose,anelementofserviceisinvolvedintheimmovablepropertyand thattantamountstovalueadditionwhichwouldcomewithinthecomponentof servicetax.Tofurtherclarify,anelementofservicearisesbecauseapersonwho intendstoavailthepropertyonrentwishestouseitforaspecificpurpose.Thevalue ofthebuildinggetsaccentuatedbecauseofscarcityoflandorbuilding,goodwill, accessibilityandsimilarancillaryadvantageswhichconstitutevalueaddition.

66. Themoderneconomictheoryofrentalsohasanexuswithdemandandsupply. Inthisanalysis,rentalishikedbecausesupplyoflandisscarceinrelationtoits demand.Thiseconomicconceptiscalled"scarcitytheoryofrent".Thisincludesthe facetofcompetitionandquality.Accordingtothemoderntheory,rentisnotpeculiar tolandalonebutarisesinthecaseofmanyafactorwhichearnoverandabovethe transferearnings.Thereisadistinctionbetween"actualearnings"and"transfer earnings".Accordingtothemodernanalysisofrent,itisnotpeculiartolandalone andtheconceptoftransferearningismoreattractedtowardsthebuildingdepending uponitsuse.Asaneconomicconcept,ithasbeendevelopedthatrentquabuilding orpremises or, forthatmatter,landhasanexus,aninseparableone,withthe potentialityofitsuseinacompetitivemarket.Theeconomicgrowthhasaneffecton rent.Inthisregard,moderneconomistshaveevolvedcertainmethods,namely, technicalprogressinmethodsofproduction,developmentinmeansoftransportation

andpopulationgrowth.Wehavereferredtotheseconceptsonlytohighlightthatthe legislaturehasnotimposedtaxonmerelettingbutassociateditwithbusinessor commercialuse.Thus,itcomeswithintheconceptofactivityandthevalueaddition isinherent.Itisworthnotingthatthelanguageemployedinthedictionaryclause andthechargingsection,thatis,"commercialuseforbusinesspurposes"havetheir ownsignificance.InBlack'slawdictionary,"commercial"hasbeendefinedas"relates toorisconnectedwithtradeandtrafficorcommerceingeneral;isoccupiedwith businessandcommerce".InR.M.InvestmentandTradingCompanyPvt.Ltd.v. BoeingCompanyandAnrMANU/SC/0246/1994:(1994)4SCC541,whiledealing with the expression "commercial" it has been opined that the expression "commercial" should be construed broadly having regard to the manifold activities whichareintegralpartofinternationaltradetoday.

67. . InStroud'sjudicialdictionary(5Edition),theterm'commercial'isdefined astraffic,tradeormerchandizeinbuyingandsellingofgoods.

68. Whenpremisesistakenforcommercialpurpose,itisbasicallytosubservethe causeoffacilitatingcommerce,businessandpromotingthesame.Therefore,there canbenotraceofdoubtthatanelementofvalueadditionisinvolvedandoncethere isavalueaddition,thereisanelementofservice.

69. Inviewofouraforesaidanalysis,wearedisposedtothinkthattheimpositionof servicetaxunderSection65(105)(zzzz)readwithSection66isnotataxonlandand buildingwhichisunderEntry49ofListII.Whatisbeingtaxedisanactivity,andthe activity denotes the letting or leasing with a purpose, and the purpose is fundamentallyforcommercialorbusinesspurposeanditsfurtherance.Theconcept hastobereadinconjunction.Aswehaveexplainedthatservicetaxisassociated withvalueadditionasevolvedbythejudgmentsoftheApexCourt,thesubmission thatthebaseofthesaiddecisionscannotbetakenawaybyastatutoryamendment neednotbeadvertedto.Oncethereisavalueadditionandtheelementofserviceis involved,inconceptualessentiality,servicetaxgetsattractedandtheimpostgetsout ofthepurviewofEntry49ofListIIoftheSeventhScheduleoftheConstitutionand fallsundertheresiduaryentry,thatis,Entry97ofListI.

70. Inviewofourconclusion,thedecisioninthefirstHomeSolutioncasedoesnot laydownthelawcorrectlyinasmuchasinthesaiddecision,ithasbeencategorically laiddownthatevenifabuilding/landisletoutforcommercialorbusinesspurposes, thereisnovalueaddition.Beingofthisview,weoverrulethesaiddecision.

71. . Thenextlimbofattackiswithregardtotheretrospectiveapplicabilityof theprovision.ThelearnedCounselforthePetitionershavesubmittedthatthetaxand thepenaltycouldnothavebeenimposedwithretrospectiveeffect.Itisworthnoting that the Parliament, keeping in view the first Home Solution case, substituted Sub-clause(zzzz)inthepresentincarnationandgaveretrospectiveeffecttocurethe deficiency. It is well settled in law that it is open to the legislature to pass a legislationretrospectivelyandremovethebaseonwhichajudgmentisdelivered.The said view has been stated in Bakhtawar Trust andOrs. v. M.D. Narayan andOrs.MANU/SC/0390/2003:(2003)5SCC298.Inthesaidcase,inparagraphs 20and26,ithasbeenheldthus:

> **20.**InVijayMills Company Ltd. and Ors. v. State of Gujarat and Ors. MANU/SC/0239/1994 : (1993) 1 SCC 345, itwas held-
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> 18. From the above, it is clear that there are different modes of

validatingtheprovisionsoftheActretrospectively,dependingupon theintentionofthelegislatureinthatbehalf.WheretheLegislature intendsthattheprovisionsoftheActthemselvesshouldbedeemed tohavebeeninexistencefromaparticulardateinthepastandthus to validate the actions taken in the past as if the provisions concerned were in existence from the earlier date, the Legislature makes the said intention clear by the specific language of the validatingAct.Itisopenforthelegislaturetochangetheverybasis oftheprovisionsretrospectivelyandtovalidatetheactionsonthe changedbasis.Thisisexactlywhathasbeendoneinthepresent caseasisapparentfromtheprovisionsofClauses(3)and(5)ofthe Amending Ordinance corresponding to Sections 2 and 4 of the AmendingAct2of1981.Wehavealreadyreferredtotheeffectof Sections 2 and 4 of the amending Act. The effect of the two provisions,therefore,isnotonlytovalidatewithretrospectiveeffect therulesalreadymadebutalsotoamendtheprovisionsofSection 214itselftoreadasifthepowertomakeruleswithretrospective effectwerealwaysavailableunderSection214sincethesaidsection stoodamendedtogivesuchpowerfromthetimetheretroactive rulesweremade.Thelegislaturehadthustakencaretoamendthe provisionsoftheActitselfbothtogivetheGovernmentthepowerto maketherulesretrospectivelyaswellastovalidatetheruleswhich were alreadymade.

X XX X

26. Wherealegislaturevalidatesanexecutiveactionrepugnanttothe statutory provisions declared by a court of law, what the legislatureis requiredtodoisfirsttoremovetheverybasisofinvalidityandthenvalidate theexecutiveaction.Inordertovalidateanexecutiveactionoranyprovision ofastatute,itisnotsufficientforthelegislaturetodeclarethatajudicial pronouncement given by a court of law would not be binding, as the legislaturedoesnotpossessthatpower.Adecisionofacourtoflawhasa bindingeffectunlesstheverybasisuponwhichitisgivenissoalteredthat thesaiddecisionwouldnothavebeengiveninthechangedcircumstances.

72. InStateofHimachalPradeshv.NarainSinghMANU/SC/1129/2009:(2009)13 SCC165,ithasbeenheldthatitwouldbepermissibleforthelegislaturetoremovea defectinearlierlegislationandthedefectcanberemovedbothretrospectivelyand prospectivelybylegislativeactionandthepreviousactionscanbevalidated.

73 . On the question of penalty due to non-payment of tax, it is open to the governmenttoexaminewhetheranywaiverorexemptioncanbegranted.Itmaybe notedthattheappealagainstHomeSolutions-IispendingbeforetheSupremeCourt buttheoperationofthesaidjudgmenthasnotbeenstayed.

74. Quiteapartfromtheabove,aswehaveoverruledthefirstHomeSolutioncase, wearedisposedtothinkthattheprovisionswouldoperatefrom2007andthe amendmentbroughtbytheParliamentisbywayofexabundanticautela.

75. Inviewoftheaforesaidanalysis,weproceedtoenumerateourconclusionsin seriatim asfollows:

(a) The provisions,namely, Section 65(105)(zzzz) and Section 66 of the

FinanceAct,1994andasamendedbytheFinanceAct,2010,areintravires the Constitution ofIndia.

(b) ThedecisionrenderedinthefirstHomeSolutioncasedoesnotlaydown the correct law as we have held that there is value addition when the premisesisletoutforuseinthecourseofor

furtherance of business or commerce and it is, accordingly overruled.

(c) The challenge to the amendment giving it retrospective effect is unsustainable and, accordingly, the same stands repelled and the retrospectiveamendmentisdeclaredasconstitutionallyvalid.

76. Consequently, the writ petitions, being sans substratum, stand dismissed without any order as tocosts.

MANU/DE/4598/2016

IN THE HIGH COURT OF DELHI

O.M.P.(I) (COMM.) NO. 71/2016 O.M.P.(I) (COMM.) NO. 72/2016

Decided On: 14.03.2016

Appellants: **Kal Airways Private Limited and Ors.**
Vs.
Respondent: **Spicejet Limited and Ors.**

Hon'ble Judges/Coram:
Manmohan Singh, J.

Counsels:
For Appellant/Petitioner/Plaintiff: Rajiv Nayar, Sr. Adv. with AnirbanBhattacharya, GauharMirza,Abhishek,AdityaVikram,Advs.,KapilSibal,Sr.Adv.,AbhishekManu Singhvi,Sr.Adv.withAnirbanBhattacharya,GauharMirza,Abhishek,AdityaVikram, Advs.

ForRespondents/Defendant:ParasKuhad,Sr.Adv.withAtulSharma,MilankaChaudhury, SatakshiSood, K.R.Sariprabhu, Vishnu Sharma, J.Chaturvedi, Swati Vijayvergiya, Advs.forR1. Sandeep Sethi,Sr.Adv.withAtulSharma,Milanka Chaudhury,SatakshiSood,Advs.forR2.

JUDGMENT

1. The abovementioned two petitions have been filed under Section 9 of the ArbitrationandConciliationAct,1996,seekingvariousinterimreliefs,inter-alia,for restrainingtherespondentsNo.1&2fromallotting/transferring/issuing/alienating and/or creating any third partyinterest and/or encumbrance on any shares ofthe Company.

2.Whenthesepetitionswerelistedon11thMarch,2016,Mr.KapilSibal,learned Seniorcounselappearingonbehalfofthepetitionerin O.M.P.(I)(COMM.)No. 72/2016hadinformedtheCourtthatthepetitionerMr.KalanithiMaranhasissuedthe 'GeneralLienLetter'dated24thFebruary,2015totheChiefManager,CityUnionBank Limited,MandaveliBranch,Chennai-600028,requestinghimtotakedeliveryofthe depositofRs.100croresdulydischargedinfavourofthesaidBankandholdthe sameassecurityforthecreditfacilitiessanctioneduptoanoverallllimitofRs.100 crores.Thesubmissionsofthepetitionerarecontrovertedbythelearned Senior counselappearingonbehalfoftherespondents.

3 . Various other issues were discussed by both the parties. Learned Senior counsel appearing on behalf of the respondents had also relied upon various parasofthereplydated9thOctober,2015tothenotice.Aftersmallsubmissions, boththepartiesagreedthattheresolutionwouldbepassedbytheBoardofthe respondentNo.1-Company,authorizinganAgenttoappearandrepresentthe CompanybeforetheBombayStockExchange(BSE)/SecuritiesandExchangeBoard ofIndia(SEBI)inthematterofissuanceofwarrantsandplacethesamebeforethe BSE to consider the application dated 18th September, 2014. Thereafter, the matterwasadjournedfortodayforthepurposesofdraftingtheresolutiontobe passedbytheBoardaswellasauthorizationtoappearandrepresenttherespondent No. 1- Company in thematter

of issuance of warrants.

4 . It is pertinent to mention here that on 24th August, 2014, the Board Resolutionwaspassedfortheissuanceof(i)81,680,629and(ii)107,410,749 Warrants. On 18th September, 2014, 'in-principle' application for issuance of warrantswasmadebyrespondentNo.1-SpicejettoBSE.On24thSeptember,2014, the general meeting was held and thereafter, on 29th January, 2015, Share Purchase Agreement was executed between the parties. The entire shareholding ofthepetitionerswastransferredtoMr.AjaySingh,respondentNo.2herein.The BSEthereafteron27thMarch,2015sentalettertorespondentNo.1-Company seekingundertakingfrombanksforthepledgedshares.On10thJuly,2015,theBSE alsosentanotherlettertorespondentNo.1-Companyclosingthe'in-principle' applicationdated18thSeptember,2014,asthesaidCompanydidnotprovide clarification.ItisamatteroffactthatrespondentNo.1sentaletterdated5th August, 2015 to BSE stating that entire shareholding has been transferred, therefore,clarification/undertakingwasnotrequired.RespondentNo.1thereafteron 7thJanuary,2016maderepresentationtotheSEBIforapprovalonthe'in-principle' application.

5 . LearnedcounselforrespondentNo.1hasinformedtheCourtthattheaspect ofclosingoftheapplicationdated18thSeptember,2014isnowpendingbeforeSEBI.

6.Learnedcounselforthepetitionerssubmitsthatasfarasthecomplianceof depositofthesumofRs.100croresisconcerned,thesamewasdepositedintime andaletterwasalsoissuedtotheChiefManager,CityUnionBankLimited,MandaveliBran ch,Chennai.Hesaysthataftertheapplicationisclosed,thesameshouldbe reconsideredbytheBSE,astherespondentsareagreeabletosubmitthefresh resolutionbytheBoardbeforetheBSEalongwiththeauthorizationlettersothatin the application, appropriate order be passed and thereafter, the respondents may issue the warrants asagreed.

7. Certainsuggestionsaregivenwithoutprejudice.Thesamearereadasunder:-

a)IntermsofClause6.3.2oftheSPA,Rs.100crorestobereleasedtotheCompany forthwith.b)TheBoardoftheCompanyshallpassaresolutionjointlyauthorizingthe representativeofKALAirways/Mr.KalanithiMaranandtheCompanytorepresentand pursuetheapplicationseekingapprovalfortheissueofwarrantswiththeBSE/SEBI. c)ThereaftertheCompanyshallpassaboardresolutionforissuingtheCRPSshares intermsoftheprovisionsoftheSPA.d)Onreceiptofapprovalof BSE/SEBI,the warrantsaretobeissuedonthesametermsasapprovedintheGeneralMeeting dated24thSeptember,2014.e)Since,theCompanyhaspaidthestatutorydues statedinSchedule1oftheSPAtotheextentoftheprincipleamount,asrequired undertheamendedScheduleHoftheSPAandasthepenalactionhasnotbeen launchedduetoanybreach/defaultofthetermsoftheSPAthusthereisnobreachof theundertakinggivenundertheSPA.Asthepenalactionhasbeenlaunchedespite paymentofthestatutoryduesstatedinSchedule1,andhasinfactbeeninitiated priortotheSPA,thematterisinthedomainofadisputeandwouldhavetobe adjudicated in an appropriateproceedings.

8. Inviewoftheentiregamutofthematter,Iamoftheviewthatatpresent,thereis noimpedimentiftheBSEmayconsidertheapplicationdated18thSeptember,2014 inthelightofchangeofcircumstances,becauseofthereasonthatearlierthe respondent No. 1-Company did not provide clarification and now, since the clarificationisavailablecoupledwiththesubsequentevents,theapplicationdated

18thSeptember,2014canbeconsideredbytheBSEandthesaidsubsequentevents can also be informed to SEBI who is dealing with the representation madeby respondent No. 1 forapproval.

9.Accordingly,asagreed,thepartieswillfilethefreshresolutionalongwiththe letterofauthoritiesbeforetheBSEwithinthreedaysfromtoday.Incaseofany furtherqueriesoranyclarificationrequiredbytheBSE,thepartiesarereadyto cooperatewitheachother.Inviewofthesame,theBSEwilldecidetheapplication withintwoweeksfromthedateofsubmittingtherequisitepapers.Assoonasifthe orders are passed 'in-principle' application dated 18th September, 2014, consequentlytherewouldbenoimpedimentonthepartoftherespondentstoissue the warrants without anydelay.

10. List these petitions on 7th April, 2016 for further directions.

MANU/SCOR/01062/2016

IN THE SUPREME COURT OF INDIA

ITEMNO.1COURT NO.1SECTIONPILWITEMNO.1COURT NO.1SECTIONPILW385-386, 387, 388, 389 & 390, 391-392, 393, 394 IN I.A.NO.365 IN

Date of Order: 21.01.2016

Appellants:**M.C.Mehta**
Vs.
Respondent: **Union Of India &Ors.**

Hon'ble Judges/Coram:
The Chief Justice Mr. Justice R. Banumathi

Counsels:
ForAppellant/Petitioner/Plaintiff:,,Mr.HarishSalve,Sr.(A.C),Mr.AparajitaSingh (A.C),Mr.A.D.N.Rao(A.C.),,Mr.SidharthaChoudhary(A.C.),,Petitioner-in-person, ,Ms.PoojaDhar,,Ms.ArtiSingh,,Dr.J.N.Dubey,Sr.,(ApplicantinMr.Anurag Dubey,,,,,I.A.No.71,72Mr.MeeneshDubey,,/2015)Mr.RajshPandey,,Mr. S.R.Setia,,Mr.PranavRishi,,(ApplicantinMr.SudhirNaagar,,383-384/2016)Ms. AsthaSharma,,(ApplicantinMr.SaurabhRath,,I.A.No.387)Mr.S.S.Shroff,, (Applicant in Mr. Sameer Jain, , I.A.No.391-392) Mr. Harsh Vardhan, , Mr. R. Majumder,,Mr.VijaySondhi,,Mr.AnirbanBhattacharya,,Ms.CauveriBirbal,,Mr. FaisalSherwani,,Mr.HarshadPathak,,Mr.AranyakPathak,,Ms.SujeetaSrivastava, ,(ApplicantinMr.K.T.S.Tulsi,Sr.,IANo.395-396)Mr.RakeshK.Sharma,,Ms. SangitaChauhan,,Mr.GopalSubramanium,Sr.,(Forapplicant)Mr.AnandPathak,, Mr.AmitMishra,,Mr.Mr.NikhilNayyar,,Mr.AkshatHansaria,,Mr.Mr.Dhananjay Baijal,,Mr.N.SaiVinod,,Ms.HimaLawrence,

ORDER

Pursuanttoourorderdated05.01.2016,anaffidavithasbeenfiledbyMr.SibashKabiraj,DeputyInspectorGeneral,NationalHighways,Haryanastatingthatthedirectionsregardingdiversionoftrafficfrom NH-1andNH-8havebeenimplemented. Theaffidavitalsoindicatesthediversionfiguresin Panipat.Theaffidavitfurtherstatesthatinsofarasdiversionoftrafficfrom NH-2andNH-10isconcerned,apreliminarymeetinghastakenplaceon09.01.2016inwhichsomedecisionshavebeentakenwhichshallbefinalizedbythenextmeetingscheduledtobeheldon23.01.2016.

ItissubmittedthatthedirectionissuedbythisCourtfordiversionoftrafficfrom NH-2andNH-10shallbefaithfullycompliedwithpursuanttothedeliberationsheldinthemeetingdated09.01.2015andthatscheduledtobeheldon23.01.2016.TheDeputyInspectorGeneral(Traffic&Highways)shallaccordinglyfileanotheraffidavitindicatingthestepstakeninobedienceto6thedirectionsofthisCourt.

Mr.GauravBhatia,learnedcounselfortheStateofU.P.,praysfortimeandisgrantedtwoweekstimetofileanaffidavitindicatingthestepstakenbytheauthoritiesforcomplyingwithourdirectionsdated05.01.2016regardingdiversionoftrafficon NH-58and NH-57 away fromDelhi.

Mr.RanjitKumar,learnedSolicitorGeneralmayinthemeantimetakeinstructions

fromtheNationalHighwaysAuthorityofIndia(forshort,Å"theNHAIÂ)ascertain directionsissuedbyusorthosethatwemayissueinfuturewoulddemandthe presenceofthesaidauthoritybeforeus.

ByourorderdatedO5.01.2016wehadrequestedtheSolicitorGeneralofIndiatofile aStatusReportasregardsthefeasibilityofprovidingaleakage-freerecoveryoftoll system like Radio Frequency Identification Device (RFID)or any other system supportedbymoderntechnology.Mr.RanjitKumarseekssomemoretimetodothe needful.Heispermittedtodosobythenextdateofhearing.

Mr.RanjitKumarfurthersubmitsthatthedirectionregardingsettingupof104CNG stations in the 10 districts of National Capital Region by 31.03.2016 is being compliedwithandtheauthoritiesshallsoonreportfurtherprogressinthematterto EnvironmentPollutionControlAuthority(EPCA).

Asregardsourdirectionregardingaugmentingofthebusfleet7intheNCTofDelhi, Mr.RanjitKumarpointsoutthatatpresenttherearearound6,000busesbeingplied bytheDelhiTransportCorporation.Hesubmitsthatoutofthe7parcelofland allotted to the Government three have already been handed over to the Transport DepartmentbytheNCTofDelhiwhiletheGovernmenthasyettorespondastoits requirementquathe4thsite.Threemoresitesmentionedinthelistareaccordingto Mr.RanjitKumarinvolvedinlitigation.Hefurtherpointsoutthataccordingtohis instructionssomeofthebusparkingareasremainunutilized.

HesubmitsthathewillbeabletomakegoodthatsubmissionbeforeEPCAgivenan opportunitytodoso.WerequestEPCAtoexaminethematterandalsotomakeits recommendationsregardingprovidingofanyfurtherspaceforparkingofbuses.

WehaddirectedMr.RanjitKumartotakeinstructionsfromDMRCastoitsplanfor augmentingMetroRailsectorbyincreasingthefrequencyoftrains.Mr.RanjitKumar submitsthatinsofarasincreasingthefrequencyoftrainsisconcerned,DMRCfinds itdifficulttodosoasanyreductionintheintervalsbetweentrainswilldemandheavy capitalinvestmentwhichDMRCcannotmakeatpresent.He,however,submitsthat DMRCiscommittedtocommissioningthenewlinesusingnewcoachesbetween December,2016toDecember,2017whichwouldseeatleast486morecoachesin operation.HesubmitsthattheDMRCisaugmentingitsrollingstockby420additional coachestobeintroducedinaphasedmannerbytheendofDecember,2017andas andwhenthecoachesaredeliveredtoDMRCthesamewillbeimmediatelypressed intoservice.Heundertakestoplacetherelevantfactsandfigures8beforeEPCAinits nextmeetinginwhicheventEPCAisrequestedtoverifythetrueposition and if necessarymakerecommendationstothisCourtforappropriatedirection,ifany.

AsregardstheadvancementofBharat-VIfuel,Mr.RanjitKumar,oninstructions, submitsthatconversionhasalreadybeenpre-ponedfrom2023toApril,2020and thataccordingtohisinstructionsitisnotpossibleforCorporationtoadvancethe saiddeadlineanyfurther.He,however,agreestotakeupthematterwithEPCAwhich shall examine and make recommendations as to the feasibility of further advancement, ifany.

Mr.RanjitKumarseekssometimetotakeinstructionsaboutthepossiblephasingout of old diesel vehicles in use with the Government and other autonomous and statutorybodiesunderitscontrol.Hemaydotheneedfulwithinthreeweeks.

Mr.HarishN.Salve,learnedamicuscuriaeshallinthemeantimefilehisobjectionsto

I.A.No.393of2011filedbyUnionofIndiaseekingexemptionfromthedirectionof thisCourtdated16.12.2015insofarasvehiclesrequiredforusebythespecial protection group areconcerned.

Mr. Rahul Mehra, learned counsel for the State of NCT of Delhi submits on instructionsthattheGovernmentofDelhihasalreadytakenadecisionthatolddiesel vehiclesbeingusedbytheDelhiGovernmentanditsestablishmentsshallbephased out. That submission isrecorded.

Byourorderdated16.12.2015,wehaddirectedtheState9Governmentconcerned totakestepstoenforcetheCPCBRulesandRegulationsagainstthoseengagedin construction activity causing environmental pollution to prevent rise of such pollution.

Mr.Salvesubmitsthatinviewoftheabovedirection DPCChasissuedcertainnotices totheprojectsfoundviolatingthepollutionnormsbutnofurtherdetailsaboutthose notices have been indicated. Learned Counsel for the State of Haryana states that actionhasbeentakenagainstthepollutingconstructionsitesandbuilderengagedin thatactivity.LearnedcounselfortheNCTofDelhiandStateofHaryanaaretherefore permitted to file requisite data regarding steps taken against the polluting constructionsitestotheEPCAwhichmayhavethesameverifiedandrecommend appropriateactionwhereveritiscalledfor.

Wemakeitclearthatsincethequestionwhetheranypollutingconstructionsiteshas gone scot free on account of any indifference or apathy on the part of the enforcementagencywillrequirespotchecksofverification.EPCAshallbefreeto makesurprisechecks whereverconsideredappropriateandsubmitareportastothe natureoftheactivityandthefailureofenforcementagencyintakingactionagainst such violations. EPCA may also consider making use of credible volunteers/ organizationsforundertakingsuchsurprisechecksonconstructionsites.

Wehadbyourorderdated16.12.2015directedtheGovernmentofNCTofDelhito takeimmediatestepsforroadrepairworkandalsomakepavementswhereverthe samearemissing.Stepsforprocurementofrequisitevacuumcleaningvehicleson Delhiroad10werealsodirected.LearnedcounselfortheNCTofDelhisubmitsthat giventwoweekstimehewillplacetheprogressmakeonthedirectionbeforethe EPCAwhichwilllookintothesameandsubmitareporttothisCourt.

LearnedcounselfortheNCTofDelhisubmitsthatalthoughsomevacuumcleaning workisbeingdoneduringthedaytimebutinstructionswillhavetobeissuedtothe concernedNDMCDepartmentforsuchworkbeingcarriedoutinDelhiatnighttime also.AsregardswasteburningalsowedirectDPCC,GovernmentofNCTofDelhi, StateofHaryana,StateofU.P.toreporttheactiontakenbythemincompliancewith thedirectionissuedbythisCourttotheEPCAwhichshallmakeuseofitsvolunteers andverifycomplianceandfailure,ifany,onthepartoftheenforcementagenciesin doing theneedful.

Mr.HarishSalvesubmitsthatnotonlyhadtheGovernmentofDelhirequestedfor closureofBadarpurThermalPowerStationbutevenEPCAreportwhichhasbeenfiled beforethisCourtrecommendsitsclosure.HesubmitsthattheGovernmentofIndia couldbeaskedtorespondtothedemandforclosureoftheThermalPowerStationat Badarpur and the NTPC could also be notified to make its submissions onthat subject. Mr.RanjitKumar, learned Solicitor General has agreed to take instructions fromtheGovernmentofIndiaonthesubjectincludinginstructionsfromtheNational

ThermalPowerCorporationthroughitsManagingDirectorandtoshowcausewhythe ThermalPowerStationatBadarpurshouldnotbeshutdownordirectedtomakeuse ofalternativeorlesspollutingfuel11insteadofcoal.Noticeshallinadditionto ManagingDirector,NTPCreturnablewithinthreeweeks.

IAsNo.395and396of2016Mr.K.T.S.Tulsi,learnedseniorcounselhasdrawnour attentiontoI.As.No.395and396of2016inwhichtheapplicanthasprayedfor clarificationoforderdated26.11.2014passedbytheNationalGreenTribunalfor holding a vintage car rally.Mr.

TulsisubmitsthatalthoughtheapplicationforclarificationoftheTribunal™sorder shouldhavebeenmadebeforetheTribunalitselfyetitmaydeclinetopassany orderskeepinginviewthefactthatthepresentproceedingsarependingbeforethis Court.

We,however,permittheapplicanttoapproachtheTribunalwithanapplicationfor clarification/exemptionfortheproposedvintagecarrallyasaone-timeevent.The pendencyoftheseproceedings,wemakeitclearshallnotpreventtheTribunalfrom passingappropriateordersonanysuchapplication.Liston18thFebruary,2016. (Ashok RajSingh)

(Saroj Saini)

MANU/SC/0093/2010

EquivalentCitation:AIR2010SC963,2010(2)AWC1091(SC),JT2010(2)SC28,2010(2)SCALE211,(2010)13SCC3244,(2010)13SCC361

IN THE SUPREME COURT OF INDIA

TransferPetition(C)Nos.435-442and444of2008,SuoMotuContemptPetition(C) No.326of2009inTransferPetition(C)Nos.438and440of2008andSpecialLeave Petition(C)No.9489of2008

Decided On: 09.02.2010

Appellants:**StateofU.P.andOrs.**
Vs.
Respondent: **Gomti Nagar Jan Kalyan Maha Samiti and Ors.**

Hon'ble Judges/Coram:
H.S. Bedi and A.K. Patnaik, JJ.

Counsels:
ForAppearingParties:GopalSubramanium,SG(A.C)(NP),HarishSalve,R.N.Trivedi, SatishChandraMishra,AbhishekManuSinghvi,RajeevDhawanandSidharthLuthra, Sr.Advs.,R.S.SuriandJyotindraMishra,Adv.Genl.,ShailKumarDwivedi,AAG, MeenakshiGrover,DevendraUpadhyay,VandanaMishra,KapilMishra,ManojKumar Dwivedi, Ashutosh Mishra, KamlendraMishra, GunnamVenkateswaraRao, Amit Bhandari, Gaurav Mehrotra, Nadeem Murtaza, Gaurav Dhingra, M.C. Dhingra,C.D. Singh,AdityaSingh,SunnyChoudhary,SanjeevPanigraphi,ShashankParihar,Gagan Gupta, AnilendraPandey, Priya Kashyap, Gaurav Bhatia, ShamikNarain, Abhishek Chaudhary,PrashantBhushan,RekhaPandey,S.A.Syed,ShivPrakashPandey,Vijay K. Sondhi,AnirbanBhattacharya,WasimBeg,SubramoniumPrasad,NavinChawla,B. SunitaRao,PraveenAgarwal,SamirAliKhanandVivekGupta,Advs.forBhatiaand Co.(N.P.

Case Category:
ORDINARY CIVIL MATTER - T.P. UNDER ARTICLE 139A(1) OF THE CONSTITUTION INDIA

ORDER

1. SpecialLeavePetition(C)No.9489of2008hasbeenfiledbytheStateofU.P. againsttheinterlocutoryorderdated04.04.2008passedbytheDivisionBenchofthe AllahabadHighCourt,LucknowBench,Lucknow,inWritPetitionNo.3576(M/B)of 2006directingtheStateGovernmenttomaintainstatusquoandnottoraiseany constructionatanyplacewhichhadbeennotifiedbythenoticesfiledalongwiththe affidavit dated 21.02.2008 of Shri Shankar Agarwal, the then Secretary, Housing, GovernmentofU.P..On21.04.2008,thisCourtwhileissuingnoticeintheSLPalso directedstayoftheimpugnedinterlocutoryorderdated04.04.2008passedbythe DivisionBenchoftheAllahabadHighCourt,LucknowBench,Lucknow,andfurther proceedingsbeforetheHighCourtinWritPetitionNo3576(M/B)of2006.

2. TransferPetitionsNos.435-442and444of2008havebeenfiledbytheStateof U.P.fortransferringtothisCourtWritPetitionsNos.3576(M/B)of2006,3695(M/B) of2006,1368(M/B)of2008,8430(M/B)of2007,7357(M/B)of2007,9343(M/B) of2007,8782(M/B)of2007,2841(M/B)of2008,and3236(M/B)of2006pending

beforetheAllahabadHighCourt,LucknowBench,Lucknow,on*interalia*theground thatthequestionoflawraisedinthewritpetitionswasthesameastheoneraisedin S.L.P. (C) 9489 of 2008.

3. . On 08.09.2009, this Court passed orders in I.A. Nos. 65- 66 of 2009 in T.P.(C)Nos.438&440of2008recordingtheundertakingonbehalfoftheStateof U.P. that no further construction over the properties, which are subject-matter of the writ petitions pending before the Allahabad High Court, Lucknow Bench, Lucknow,wouldbemade.Pursuanttoreportsinthenewspapersthatsomework continuedontheproperties,thisCourtpassedordersinI.A.Nos.65-66of2009in T.P.(C) Nos. 438& 440 of 2008 directing that all activities of all manner and kinds, whether construction,repairormaintenance,shallstopforthwithatalltheconstructionsites coveredbythepreviousorderofthisCourtandalltheconstructionsitesshallbe vacatedoftheentireworkforce,exceptingthewatchandwardstaffwithinsixhours.

4. On06.10.2009,thisCourtfurtherpassedordersinI.A.Nos.65-66of2009inT.P. (C)Nos.438&440of2008initiatingthecontemptproceedingsagainsttheChief Secretary,StateofU.P.,anddirectingnoticetohimtoshow-causewhyheshould notbeproceededagainstandpunishedfordeliberateandconsciousviolationofthe undertakinggiventothisCourton08.09.2009andoftherestraintorderpassedby thisCourton11.09.2009and accordingly*suomotu*ContemptPetition(C)No.326of 2009hasbeenregistered.On06.10.2009,thisCourtalsopassedordersmakingthe interimorderspassedon11.09.2009inI.A.Nos.65-66of2009inT.P.(C)No.438&440 of 2008absolute.

5. WehaveheardMr.HarishN.SalveandMr.R.N.Trivedi,learnedCounselforthe petitionersandDr.AbhishekManuSinghvi,learnedCounselfortherespondents.

6 . We are not inclined either to interfere with the interlocutory order dated 04.04.2008passedbytheDivisionBenchoftheAllahabadHighCourt,Lucknow Bench,Lucknow,inWritPetitionNo.3576(M/B)of2006ortodirecttransferofthe writpetitionspendingintheAllahabadHighCourt,LucknowBench,tothisCourt. We,however,requesttheChiefJustice,AllahabadHighCourt,tonominateassoonas possibleanappropriateBenchtohearWritPetitionNo.3576(M/B)of2006along withalltheWritPetitionswhichweresoughttobetransferredtothisCourtbythe TransferPetitions(C)Nos.435-442and444of2008andwerequesttheBenchofthe AllahabadHighCourtsonominatedtohearanddisposeofallthesematterswithina periodoffourmonthsfromthedateofconstitutionoftheBench.

7. . We had called upon the Chief Secretary, Government of U.P., to file an affidavitindicatingthecleaning,maintenanceandrepairworkwhichneedtobe done during the pendency of the writ petitions before the High Court and an affidavithasbeenfiledbyShriV.K.Sharma,ActingChiefSecretary,Governmentof U.P.,alongwiththelistofworksthatneedtobedoneinthedifferentprojectsites. WehaveperusedthelistannexedtotheaffidavitoftheActingChiefSecretary, GovernmentofU.P.,butwearenotinclinedtopermittheStateGovernmentofU.P. tocarryoutalltheitemsofworkmentionedinthelistannexedasAnnexure-I. Instead,wedirectthatuntilthewritpetitionsaredisposedof bytheBenchof theAllahabadHighCourttobenominatedbytheChiefJustice,theinterimorderswhic hwerepassedbythisCourton11.09.2009inI.A.Nos.65-66of2009in T.P.(C) Nos. 438 & 440 of 2008and whichweremadeabsoluteon06.10.2009willcontinuetobeinforce.Duringthe pendency of the Writ Petitions in the High Court, the State Government may, however, carry out the following works at the different project sites listed in

Annexure-I to the Affidavit of the Acting Chief Secretary, Government of U.P.:

KANSHIRAM SMARAK STHAL, JAIL ROAD, LUCKNOW

Entrance Plaza

Stonewasteislyingatsomeplacesontheoutersideofthebuilding;needto beremoved.

Parking Place

Brokenstoneheapsarelyingatsomeplaces;needtoberemoved.

SiteDevelopment

There are some temporary construction and labourhutment whichare required to be removed.

Thesaplingsofthetreesandgrasshavedriedupatsomeplaces.New Saplingsandgrassarerequiredtobeplanted.

Theleakagesinthewatersupplylinearevisibleatsomeplaces;needtobe rectifiedimmediately.

The unutilized construction materials are required to be removed.

RAMABAI AMBEDKAR MAIDAN (RALLY GROUND)

Theunutilizedbuildingmaterialandscaffoldingsfromtheareabehindstand to beremoved.

DR. BHIMRAO AMBEDKAR STHAL

Thereareleakagesinthewatersupplylineatsomeplaceswhichneedtobe pluggedimmediately.

Somesaplingsplantedinthecampushavedriedupandhencearerequired to bereplaced.

Therearesometemporaryconstructionsandlabourhutmentswhichare required to beremoved.

The unutilized construction materials are required to be removed.

8 . In*suomotu*ContemptPetition(C)No.326of2009,wehaveperusedthe replyfiledbytheChiefSecretary,StateofU.P.,tothe*suomotu*noticeofcontempt andwefindthattherehasbeennoconstructionofanykindafter11.09.2009.We, therefore,dischargethe*suomotu*noticeofcontemptissuedtotheChiefSecretary, Government ofU.P.

9. Withthisorder,theSpecialLeavePetition,theTransferPetitionsandtheContempt Petitionstanddisposedof.Theinterimorderdated21.04.008passedbythisCourtin SpecialLeavePetition(C)No.9489of2008isvacated.Nocosts.Weclarifythatthis orderwillnotaffecttheproceedingsinanyotherSpecialLeavePetitionorCivil Appeals pending in thisCourt.

MANU/UP/0508/2020

INTHEHIGHCOURTOFALLAHABAD

Arbitration Application No. 68 of 2019

Decided On:19.02.2020

Appellants: **Vedanta Equipment Pvt. Ltd.**
Vs.
Respondent: **Sany Heavy Industries India Pvt. Ltd.**

Hon'ble Judges/Coram:
Jaspreet Singh, J.

Counsels:
For Appellant/Petitioner/Plaintiff: SudhanshuChauhan

For Respondents/Defendant: Anirban Bhattacharya and Romit Seth

ORDER

Jaspreet Singh, J.

1. HeardSriSudhanshuChauhan,learnedcounselforthepetitionerandSriAnirban BhattacharyaalongwithSriRomitSeth,learnedcounselfortherespondents.

2. TheinstantpetitionhasbeenpreferredunderSection11(6)oftheArbitrationand ConciliationAct,1996withtheavermentsthatthepetitionerisadealerappointedby therespondentsforsaleofgoodsandwithhishardworkthepetitionercreateda marketfortherespondentswithintheterritorycomprisingofvariousdistrictsas enumerated in Annexure No. A-1 appended with the dealership agreement dated 01.10.2015.Ithasbeensubmittedthatafterthepetitionerhadfullyestablishedthe businessoftherespondentsinvariousdistrictsintheStateofUttarPradeshwhich fell within the territory allotted to the petitioner, however, suddenly the petitioner receivedane-mailon18.10.2016bymeansofwhichallthebusinessbetweenthe petitioner and respondents wasterminated.

3. Inviewoftheaforesaidterminationnoticedisputeseruptedbetweenthepetitioner andtherespondents.Thepetitionerbymeansoftheletterdated27.09.2018invoked thearbitrationclause.Itisfurtherstatedthattherespondentsappointedone Sri SamirShahasthesolearbitratorwhowasbasedoutofAhmedabad.

4. . The said arbitrator had fixed the date for preliminary hearing at Pune. However, since the claimant received the notice of preliminary hearing on 22.11.2018 just 5 days prior to the date so fixed by the arbitrator hence the petitioner requested that he could not attend the arbitral hearing at such a shortnoticeandrequestedthearbitratortofixsomeotherdate,consequentlythe next date fixed was24.12.2018.

5.On24.12.2018whilethepetitionerparticipatedinthehearing,thepreliminary modalitiesregardingtheproceduretobefollowedwasdiscussedandthereafterthe nextdatefixedwas27.02.2019.Thetimeandvenueforthenextdatewastobe communicatedlater.

6.Bethatasitmay,thepetitionerappearedbeforetheArbitratoron27.02.2019and

raisedanobjectionregardingtherightofappointmentaswellasthatsincetheplace ofarbitrationintermsoftheagreementwasfixedatPune,thus,theArbitratorshould notbefromoutsidePuneandfurtherthatthecostoftravelandotherexpensesofthe soleArbitratoroughtnottobepaidbytheclaimant.Thematterwasheardbythe Arbitratorandthematterwasfixedforpassingorderontheobjectionssoraised. LaterwhilethematterwaspendingbeforetheArbitrator,thepetitionermadean applicationbeforetheArbitratorseekingtheterminationoftheproceedingsonthe groundthattheArbitratorsoappointedwasagainstthespiritofSection12(5)ofthe ArbitrationandConciliationAct,1996asdulyamendedbytheActNo.3of2016.

7.Intheaforesaidbackdrop,thesoleArbitratorSriSamirShahbymeansofthe orderdated25.09.2019terminatedtheproceedingsintermsoftheSection25(a)of theActof1996.Thereafterthepetitionerpreferredtheinstantpetitionseeking appointmentofanindependentArbitratortoadjudicatethedisputesarisenbetween thepartiesintermsoftheagreementdated01.10.2015.

8. Thelearnedcounselfortherespondentshasfiledhisobjectionsandhasraiseda preliminaryobjectionregardingthemaintainabilityofthepetitionbeforethisCourt.It hasbeensubmittedbythelearnedcounselfortherespondentsthatClause12.3of thecontractwhichprovidesforthearbitrationclearlyindicatesthattheplaceof arbitrationshallbeatPuneandfurtherthatintermsofClause13.4thedisputes arisingoutoforanywayconnectedwiththeaforesaidagreementshallbesubjectto theCourtshavingterritorialjurisdiction,thus,ithasbeensubmittedthatona conjointreadingoftheaforesaidtwoclauses,thejurisdictionwouldexclusivelylieat PuneandforthatmatteritisonlytheHighCourtexercisingterritorialjurisdiction overPunewouldbetheappropriatecourtwhereapetitionunderSection11ofthe Act of 1996 wouldlie.

9. IthasfurtherbeensubmittedthatinlightofthedecisionoftheApexCourtinthe caseofBGSSGSSomaVs.N.H.P.C.reportedinMANU/SC/1715/2019.Ithasbee clarifiedbytheApexCourtthattheseatofarbitrationwouldbetheplaceconferring jurisdictionontheCourtsrelatingtothearbitraldisputesandsinceinlightofthe agreementexecutedbetweenthepartieswhereintheplaceofarbitrationhasbeen fixedandagreedtobeAtPuneandthusthepetitionwouldnotliebeforetheCourtat Lucknow.

10. Though,thelearnedcounselfortherespondentshasraisedcertainotherissues relatingtoandpertainingtothemeritsofthecontroversy,however,thesamehasnot beendealtwithbythisCourtsincetheCourthasconfineditselfonlyonthequestion regarding the territorial jurisdiction, in case if it is to be found that thisCourt possessestheterritorialjurisdictiontoentertainthepetitiononlythentheother objections would beconsidered.

11. ItisinthisbackdropthattheCourthasconsideredtherivalsubmissionsandhas alsoperusedthematerialavailableonrecord.

12. Attheveryoutset,itmaybenotedthattheagreementdated01.10.2015,acopy ofwhichhasbeenannexedasAnnexureNo.1isnotdisputedbetweentheparties. Thesaidcontractofdealershipasevidentfromthecontractitselfwasmadeon 01.10.2015atPune.Clause12whichrelatestoapplicationoflawandarbitrationand moreparticularlyClause12.3containsthearbitrationclausewhichprovidesforthe placeofarbitrationtobeatPuneandforreadyreference,thesameisre-produced hereinafter:-

12.3 Alldisputesarisingoutoftheexecutionorinrelationtothis Agreement shallbesettledamicablythroughfriendlynegotiationbetweentheparties.If asettlementcannotbereached,anydispute,controversyorclaimarisingout oforinrelationtothisAgreement,includingthevalidity,invalidity,breach orterminatingthereof,shallbereferredforarbitration,tosolearbitrator appointedbytheManagingDirector/CEOofSanyHeavyIndustryIndiaPvt. Ltd.

Place of Arbitration shall be at Pune & language of arbitration proceedings shall beEnglish.

13. . Similarly, Clause 13.4 provides that all disputes arising out of or in anywayconnectedwiththeseshallbesubjecttojurisdictionoftheCourts,having territorialjurisdiction.

14. Thelearnedcounselforthepetitionerrelyinguponthe aforesaidclausessubmits thattheagreementclearlyenvisagestheterritoryoverwhichtheaforesaidagreement istooperate.SriChauhanhasdrawntheattentionoftheCourttoAnnexureA-1 whichexplainsthegeographicalareaandterritoryoverwhichthedealershipofthe petitionerwastooperate.Ithasfurtherbeensubmittedthatsincetheagreementwas tooperateovertheaforesaiddistrictsasmentionedinAnnexureA-1,thus,itwould bethecourtsatLucknowwhichwouldpossessterritorialjurisdictiontoentertainthe petitionsunderSection11oftheArbitrationandConciliationAct.

15. . Thelearnedcounselforthepetitionerhasfurthersubmittedthattheplace ofarbitrationwhichhasbeenmentionedtobeatPuneintermsofClause12.3isnot anexclusionaryclauseratheritonlyprovidesforthevenueofarbitrationandit couldnotbeconstruedtobeseatofarbitration.Ithasfurtherbeensubmittedthat since the petitioner has its office at Lucknow, accordingly, it is the courts at Lucknowwhoarecompetenttoentertainthepetitionandexercisejurisdictionover allarbitraldisputesarisingbetweentheparties.

16. Percontra,thelearnedcounselfortherespondentshasdrawntheattentionof theCourttotheminutesofthemeetingdated27.02.2019recordedbytheerstwhile appointedArbitratorwhereinthesubmissionsoftheclaimant/thepetitionerherein wasrecordedtotheeffectthatthesolearbitratorcouldnotbefromoutsidePuneand thatthepetitionerwasnotwillingtopaythecostoftravelandexpensesofthesole arbitrator.Ithasfurtherbeensubmittedthatthepetitionerbyvirtueofsubmittingto thejurisdictionoftheerstwhileArbitratorandbeforehimhadraisedanobjectionthat theArbitratorshouldnotbefromoutsideofPuneindicatesthatthepetitionerhad understoodandsubmittedthattheseatofArbitrationandconsequentlythecourts exercisingjurisdictionoverthearbitrationmatterwasatPune.

17. Ithasfurtherbeensubmittedbythelearnedcounselfortherespondentsthatthis aspectofthematterregardingthevenueofarbitrationandtheseatofthearbitration hasbeendealtwithbytheApexCourtinthecaseofBGS(supra)andassuchithas beenheldthatwherethepartieshaveexpresslyprovidedforspecificvenuefor arbitralproceedings,ineffectitisreallytheseatofthearbitrationandassuchthere beingnocontraryindicationthattheplacesomentionedintheagreementwas merelyavenuewithoutitbeingtheseatofarbitralproceedings,hence,inthepresent case,thepartieshadclearlyagreeduponttobetheseatofarbitralproceedingshence inlightoftheaforesaiddictumoftheApexCourt,thecourtsatLucknowwouldbe denudedofterritorialjurisdictiontoentertainthematter.

18. Inordertoappreciatetherivalsubmissions,itwillbenecessarytorefertothe

decisionoftheApexCourtinthecaseofBGS(Supra).Fromtheperusalofthe aforesaiddecision,itindicatesthatthecontroversybeforetheApexCourtwasin respectofthemaintainabilityofthepetitionsunderSection37oftheArbitrationand ConciliationAct,1996giventhearbitrationclauseintheaforesaidcase.Thequestion posedbytheApexCourtwaswhethertheseatofarbitralproceedingsisNewDelhior Faridabad.Consideringthefactsoftheaforesaidcasewheretheprojectsitewas locatedinSuvansharidistrictintheStateofAssamandArunachalPradesh,whilethe arbitration clause provided that the arbitral proceedings shall be held at New Delhi/Faridabad. A threememberArbitral Tribunal was constituted as per the arbitrationclausewhichmadeitsawardatNewDelhi.ApetitionunderSection34of theArbitrationandConciliationAct,1996seekingtosetasidetheawardwasfiled beforetheDistrict&SessionsJudgeatFaridabad,Haryana,whereinanobjectionwas raisedregardingtheterritorialjurisdictionthatsincethearbitrationproceedingswere heldatNewDelhi,thus,theseatofarbitrationwasatNewDelhi,consequently,all petitions arising outof thesaid disputes were maintainable only before the competentcourtatNewDelhi.TheCourtsatGurugramwhowereseizedwiththe matterallowedtheapplicationandreturnedthepetitionstobefiledbeforethe competentcourtatNewDelhiandthisorderregardingthereturnofthepetitionsto befiledatNewDelhiwasassailedbeforethePunjabandHaryanaHighCourtat Chandigarh.TheHighCourtallowedtheappealonthepremisethatNewDelhiwas merelytheconvenientvenueforthearbitralproceedingsanditwasnottheseatof arbitration,consequently,theCourtsatFaridabadwouldhavethejurisdictiononthe basisofcauseofactionhavingarisenpartinFaridabad.

19. . It is in the aforesaid backdrop that the matter was taken up before the ApexCourtandtheSupremeCourtafterconsideringvariousprovisionsofthe ArbitrationandConciliationActaswellastheCommercialCourtActandalsothe schemeofthearbitrationandconciliationActaswellasthereportsoftheLaw Commissionoftheyear2014examinedthecontroversyingreatdetailandafter consideringtheentireconspectuousofcases,laiddownthetestfordeterminationof theseat.Whiledoingso,theApexCourthadtakennoteoftheearlierdecisions includingtheEnglishLawonthesubjectandfinallygaveitsconclusioninparagraph 85andthereafterinparas100and101whicharereproducedhereinafter:-

> **85.**Onaconspectusoftheaforesaidjudgments,itmaybeconcludedthat whenever thereisthedesignationofaplaceofarbitrationinanarbitration clauseasbeingthe"venue"ofthearbitrationproceedings,theexpression "arbitrationproceedings"wouldmakeitclearthatthe"venue"isreallythe "seat"ofthearbitralproceedings,astheaforesaidexpressiondoesnot includejustoneormoreindividualorparticularhearing,butthearbitration proceedingsasawhole,includingthemakingofanawardatthatplace.This languagehastobecontrastedwithlanguagesuchas"tribunalsaretomeet orhavewitnesses,expertsortheparties"whereonlyhearingsaretotake placeinthe"venue",whichmayleadtotheconclusion,otherthingsbeing equal,thatthevenuesostatedisnotthe"seat"ofarbitralproceedings,but only a convenient place of meeting. Further, the fact that the arbitral proceedings"shallbeheld"ataparticularvenuewouldalsoindicatethatthe parties intended to anchor arbitral proceedings to a particular place, signifyingthereby,thatthatplaceistheseatofthearbitralproceedings. This,coupledwiththerebeingnoothersignificantcontraryindiciathatthe stated venue is merely a "venue" and not the "seat" of the arbitral proceedings,wouldthenconclusivelyshowthatsuchaclausedesignatesa "seat" of the arbitral proceedings. In an International context, ifa

supranationalbodyofrulesistogoverntheArbitration,thiswouldfurtherbe anindiciathat"thevenue",sostated,wouldbetheseatofthearbitral proceedings.InanationalcontextthiswouldbereplacedbytheArbitration Act,1996asapplyingtothe"statedvenue",whichthenbecomesthe"seat" for the purposes ofarbitration.

100. GiventhefactthatiftherewereadisputebetweenNHPCLtd.anda foreign contractor, clause 67.3(vi) would have to be read as a clause designatingthe"seat"ofarbitration,thesamemustfollowevenwhensub-clause(vi)istobereadwithsub-clause(i)ofClause67.3,wherethedispute betweenNHPCLtd.wouldbewithanIndianContractor.Thearbitration clauseinthepresentcasestatesthat"ArbitrationProceedingsshallbeheldat NewDelhi/Faridabad,India...",therebysignifyingthatallthehearings, includingthemakingoftheaward,aretotakeplaceatoneofthestated places.Negativelyspeaking,theclausedoesnotstatethatthevenueisso thatsome,orall,ofthehearingstakeplaceatthevenue;neitherdoesituse languagesuchas"theTribunalmaymeet",or"mayhearwitnesses,experts orparties".Theexpression"shallbeheld"alsoindicatesthattheso-called "venue"isreallythe"seat"ofthearbitralproceedings.Thedisputeistobe settledinaccordancewiththeArbitrationAct,1996which,therefore,applies anationalbodyofrulestothearbitrationthatistobeheldeitheratNew DelhiorFaridabad,giventhefactthatthepresentarbitrationwouldbe Indian and not international. It is clear, therefore, that even in such a scenario, New Delhi/Faridabad, India has been designated as the"seat" of the arbitrationproceedings.

101. However, the fact that in all the three appeals before us the proceedingswerefinallyheldatNewDelhi,andtheawardsweresignedin NewDelhi,andnotatFaridabad,wouldleadtotheconclusionthatboth partieshavechosenNewDelhiasthe"seat"ofarbitrationunderSection20 (1) oftheArbitrationAct,1996.Thisbeingthecase,bothpartieshave, therefore,chosenthattheCourtsatNewDelhialonewouldhaveexclusive jurisdictionoverthearbitralproceedings.Therefore,thefactthatapartof thecauseofactionmayhavearisenatFaridabadwouldnotberelevantonce the "seat" has been chosen, which would then amount to an exclusive jurisdictionclausesofarasCourtsofthe"seat"areconcerned.

20. InlightoftheaforesaidprincipleswhichhavebeenlaiddownbytheApexCourt, thisCourtisoftheconsideredopinionthatthepartiesbytheirownagreementand consenthadagreedPunetobetheplaceofarbitration.FromtheperusalofClause 13.4 concerning jurisdiction which does not specifically identify or conferany contraryintentionregardingvestingofjurisdictioninCourtsataparticularplace.The irresistibleconclusionthatcanbedrawnisthatthepartiesagreedthatPunewasnot onlytheplaceforconvenientvenueforarbitralproceedingsbutineffectitwouldbe theseatofarbitration.Moreover,thepetitioneronhisown,hadalsounderstoodthe agreementinthesamecontextaswhilehehadparticipatedbeforetheerstwhile Arbitrator,hehadnotraisedanydisputeregardingPunenotbeingtheseatof Arbitration.Though,laterhehadassailedtheappointmentoftheArbitratorinterms ofSection12(5)oftheActof1996butneverthelessthereisnodisputethatthe petitioner agreed to participate atPune.

21. FortheaforesaidreasonsaswellastheprincipleslaiddownbytheApexCourtin thecaseofBGS(Supra)thisCourtfindsthattheinstantpetitionisnotmaintainable

atLucknowandconsequently,thepetitionisdismissed,however,thepetitionerwill beatlibertytoapproachtheappropriateCourthavingjurisdictionforraisinghis grievances.ItismadeclearthatthisCourthasonlydismissedthepetitiononthe groundofwantofterritorialjurisdictionandnootherpleaofeitherpartyhasbeen examined.

22. Withtheaforesaid,thepetitionisdismissed,however,thereshallbenoorderas tocosts.

MANU/OR/0236/2020

Equivalent Citation: 2020(II)OLR898

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBP No. 56 of 2018

Decided On: 01.10.2020

Appellants:**S.J.BizSolutionPvt.Ltd.**
Vs.
Respondent: **Sany Heavy Industry India Pvt. Ltd.**

Hon'ble Judges/Coram:
Mohammad Rafiq, C.J.

Counsels:
For Appellant/Petitioner/Plaintiff: Avijit Pal

For Respondents/Defendant: A. Bhattacharya and BaibaswataPanigrahi

JUDGMENT

Mohammad Rafiq, C.J.

1 . Petitioner-M/s. SJ Biz Solutions Pvt. Ltd. has filed this application under Section11(6)oftheArbitrationandConciliationAct,1996(forshort,"Act,1996") seeking appointment of an independent arbitrator to arbitrate the disputes between the petitioner and the oppositeparty.

2 Thecaseofthepetitionerassetupinthepresentapplicationisthattheopposite party-M/s. Sany Heavy Industry India Pvt. Ltd. is the manufacturer of heavy constructionequipments.Thepetitionerapproachedtheoppositepartyfordealership intheStateofOdisha.Accordingly,adealershipagreementwasenteredintobetween thepartiesinJanuary,2014,initiallyforaperiodofoneyearanditwasfurther renewedintheyear2014,2015and2016,eachtimeforaperiodofoneyear.Lastly, thecontractwasextendedon01.01.2017foraperiodofoneyeartill31.12.2017. Pursuanttotheagreement,thepetitionersubmittedBankGuaranteeforasumofRs. 25,00,000/-(RupeesTwenty-fiveLakh)drawnintheBankofBarodainfavourofthe oppositeparty.Evenasthedealershipagreementwassubsisting,theoppositeparty without any rhyme or reason, and without any notice to that effect, illegally terminatedtheagreementon04.09.2017,muchpriortoexpiryoftheperiod.The opposite party did not even pay the legitimate dues of the petitioner. The representativesofthepetitionermettheoppositepartytodiscussthependingissues. The minutes of meeting held on 28.12.2017 were drawn up for full and final settlementofduesforresolutionofalltheissues.Theminutesweresignedbythe representativesofboththeparties.Theissuesinrespectofthespareparts,FOC (Free of Cost Accessories), claims regarding reimbursement, machine delivery on account of M/s. Ganesh Paltasingh and release of SY 2010 and SY 220 were discussed and finalized. The opposite party agreed to pay an amount of Rs. 33,49,926/-tothepetitionerinrespectoftheclaimsofFOC.Thebalanceclaimof Rs.4,44,879/-wassubjecttofurtherreconciliation.Theoppositepartyhoweverdid notmakeanypaymenttillMarch,2018intermsoftheabovesaidsettlement.The petitioneron24.03.2018requestedtheoppositepartyforreleaseofthesaidamount

ashehadtosettlethestatutoryduesoftheGovernmentpriorto31.03.2018.The opposite party vide its e-mail dated 30.03.2018 informed the petitioner about the amount receivable from him and requested the petitioner to get NOC fromall customersinrespectofFOCamount.

3 . Asthematterstoodthus,thepetitionerreceivedaletterdated05.04.2018 fromBankofBaroda,BarbilBranch,whereinitwasintimatedtothepetitionerthat theyhavereceivedanoticedated29.03.2018fromtheoppositepartyinvoking Bank guarantee in order to make payment of Rs. 25,00,000/-. In these circumstances,thepetitionerfiledanapplicationunderSection9oftheAct,1996 beforethelearnedDistrictJudge,KhurdaatBhubaneswarvideARBPNo.25of 2018.ThelearnedDistrictJudgebyhisorderdated09.04.2018issuedanoticeto theoppositeparty,directingittomaintainstatusquoasonthedateinrespectof encashmentofthebankguarantee.However,despitesuchdirectionofthelearned DistrictJudge,theBankguaranteewasencashedandthemoneyremittedtothe oppositeparty.Thepetitionerthereforebyletterdated16.04.2018submittedits claimto theoppositeparty,whobyitse-maildated04.05.2018,acknowledgedthe receiptoftheclaimofthepetitionerdated16.04.2018on03.05.2018,butrefuted alltheclaimsofthepetitioner.Disputeshavingthusarisenbetweentheparties,the petitionerbyitsletterdated23.07.2018invokedthearbitrationClause15.3ofthe DealershipAgreementdated17.01.2017andrequestedtheoppositepartytoappoint a sole Arbitrator. The said letter was received by the opposite party on 01.08.2018.Sincetheoppositepartyfailedtoappointthearbitratorwithinaperiod of30days,thepetitionerwasconstrainedtofilethispetitionunderSection11(6)of the Act,1996.

4 Mr.AvijitPal,learnedcounselforthepetitionersubmittedthatevenifthe parties inclause15oftheDealershipAgreement(Annexure-1)agreedthattheplaceof arbitrationshallbeat'Pune',thejurisdictionofthisCourttoentertainthepresent applicationfiledunderSection11(6)oftheAct,1996isnotexcludedascauseof action,wholly,oratleastinpart,hasarisenintheterritoryoftheStateofOrissa.It iscontendedthatinviewofSection20(1)oftheAct,1996thepartiesarefreeto chosetheplaceofarbitration.Theword'place'inSection20hasbeenusedinthe senseoftheword'Venue'.Evenifthepartiesinthepresentcaseinclause15.3ofthe DealershipAgreement,agreeduponthepleaceofarbitrationat'Pune',theword'place' usedthereinonlydenotesthevenueofarbitrationproceedings,whichcantakeplace anywhere.Thisbecomesfurtherclearfromclause16(13.4)oftheagreementwhich providesthat"alldisputesarisingoutoforinanywayconnectedwiththesepresents shallbesubjecttothejurisdictionoftheCourts,havingterritorialjurisdiction." Clause17oftheagreementalsoclarifiesthispositionbyindicatingthegeographical areasofterritory,wouldbetheentiredistrictsofOdisha.Itissubmittedthatinview ofthedefinitionoftheCourtgiveninSection2(1)(e)oftheAct,1996,theCourtsat Bhubaneswarwouldhavethejurisdictiontoentertainthepetitionunder Section9of theAct,1996andforthesamereason,thisCourtwouldalsohavetheterritorial jurisdiction,especiallyinviewofSection11(11)oftheAct,1996whichprovidesthat whereterequesthasbeenmadetomorethanoneHighCourt,theHighCourtwhere requesthasbeenmadefirstinpointoftime,whichinthiscaseisOrissaHighCourt, wouldbecompetenttodecidetheapplication.Learnedcounselforthepetitionerin supportofhisargumentsrelieduponthedecisionoftheSupremeCourtinthecase ofMayavatiTradingPrivateLimitedvs.PradyuatDebBurman,MANU/SC/1232/2019:(2 019) 8 SCC714.

5.Mr. A.Bhattacharya,learnedcounselfortheoppositepartyhasarguedthat Section20oftheAct,1996hasgivenfreedomtothepartiestodecidetheplaceof

arbitration.Ifthepartiesintheagreementhavechosenaparticularplaceastheplace ofarbitration,onlytheHighCourthavingterritorialjurisdictionoverthatplacewould be competent to entertain and decide the application under section 11 for appointmentofarbitrator.Itisdeniedthattheoppositepartyhasillegallyinvoked theBankguaranteeandthattheoppositepartyhasforfeitedtherighttoappointthe Arbitrator.Infact,theoppositepartyhasalreadyappointedHon'bleJustice(Retd.) Mr.S.R.Sathe,BombayHighCourt,residingatPune,asthesolearbitrator.The presentapplicationoughttobethereforedismissedasinfructuous.Asregardsthe BankGuarantee,itissubmittedthatnoticeonthepetitionfiledbythepetitioner underSection9oftheAct,1996wasissuedbythelearnedDistrictJudge,Khurdaon 09.04.2018totheoppositeparty.Butinthemeantime,theoppositepartyhad alreadyinvokedthebankguaranteeon29.03.2018byencashingtheamounteven before receiving such notice. Therefore, the petition under Section 9 was also renderedinfructuous.

6.Learnedcounselsubmittedthatthiscontroversyhasbeensetatrestbyacatenaof decisionsoftheSupremeCourt.Learnedcounselhasinsupportofhisargument reliedonjudgmentoftheSupremeCourtinIndusMobileDistributionPvt.Ltd.vs. DatawindInnovationsPrivateLtd.&Ors.,MANU/SC/0456/2017:(2017)7SCC678 andBGSSGSSomaJVvs.NHPCLimited,MANU/SC/1715/2019:(2020)4SCC23 ItisarguedthattheSupremeCourtinIndusMobileDistributionPvt.Ltd.,suprahas reiteratedthesamelaw,asinBharatAluminiumCompany(BALCO)vs.Kaiser AluminiumTechnicalServicesInc.,MANU/SC/0722/2012:(2012)9SCC552,asto theautonomygiventothepartiestochoosetheplaceofarbitrationunderSection20 oftheAct1996.Theseandothercitedandrelevantjudgmentsshallbediscussedat the appropriate placehereinafter.

7.Ihavegivenmythoughtfulconsiderationtorivalsubmissionsandperusedthe material onrecord.

8. Inordertoappreciatetherivalsubmissions,itisdeemedappropriatetoreproduce clause15.3ofthedealershipagreement,whichreadsasfollows:

> "Alldisputesarisingoutoftheexecutionorinrelationtothisagreement shallbesettledamicablythroughfriendlynegotiationbetweentheparties.If asettlementcannotbereached,anydispute,controversyorclaimarisingout oforinrelationtothisAgreement,includingthevalidity,invalidity,breach orterminationthereof,shallbereferredforarbitration,tosolearbitrator appointedbytheManagingDirector/CEOofSanyHeavyIndustryIndiaPvt. Ltd.PlaceofarbitrationshallbeatPune&languageofarbitratorproceeding shall beEnglish."

9. . TheParliamenthasinitslegislativewisdomgiventhefreedomtotheparties tochoosetheplaceofarbitration,whichisevidentfromSection20oftheAct, 1996.TheConstitution Benchof the SupremeCourtin Bharat AluminiumCompany (BALCO), supra, examined the matter with regard to "subjectmatterofarbitration"vis-a-vis"subjectmatterofsuit"inthecontextofthe definition of the Court as given under Section 2(1)(e) of the Act, 1996. The Constitution Bench in that judgment while dealing with the concept of 'autonomy' given to the parties as to selection of the place of arbitration, also extensively examinedSection20oftheAct,1996.Relevantdiscussioninpara96to98ofthe report is reproducedhereunder:

> "96. Section 2(1) (e) of Arbitration Act, 1996 read as under:

"2. Definitions (1) In this Part, unless the context otherwise requires -

(a) - (d) xxxxxx

(e)"Court"incaseofanarbitrationotherthaninternational commercial arbitration, the principal Civil Court oforiginal jurisdiction in a district, and includes the High Court in exerciseofitsordinaryoriginalciviljurisdiction,having jurisdiction to decide the questions forming thesubject matterofthearbitrationifthesamehadbeenthesubject matterofasuit,butdoesnotincludeanycivilcourtofa gradeinferiortosuchprincipalCivilCourt,oranyCourtof SmallCauses."

Weareoftheopinion,theterm"subject-matterofthearbitration" cannotbeconfusedwith"subject-matterofthesuit".Theterm "subject-matter"inSection2((1)(e)isconfinedtoPartI.Ithasa referenceandconnectionwiththeprocessofdisputeresolution.Its purposeistoidentifythecourtshavingsupervisorycontroloverthe arbitrationproceedings.Hence,itreferstoacourtwhichwould essentiallybeacourtoftheseatofthearbitrationprocess.Inour opinion, the provision in Section 2(1)(e) has to be construed keepinginviewtheprovisionsinSection20whichgiverecognition topartyautonomy.Acceptingthenarrowconstructionasprojected bythelearnedcounselfortheappellantswould,infact,render Section20nugatory.Inourview,thelegislaturehasintentionally givenjurisdictiontotwocourts,i.e.thecourtwhichwouldhave jurisdictionwherethecauseofactionislocatedandthecourtswhere thearbitrationtakesplace.Thiswasnecessaryasonmanyoccasions theagreementmayprovideforaseatofarbitrationataplacewhich wouldbeneutraltoboththeparties.Therefore,thecourtswherethe arbitrationtakesplacewouldberequiredtoexercisesupervisory controloverthearbitralprocess.Forexample,ifthearbitrationis heldinDelhi,whereneitherofthepartiesarefromDelhi,(Delhi havingbeenchosenasaneutralplaceasbetweenapartyfrom MumbaiandtheotherfromKolkata)andthetribunalsittinginDelhi passesaninterimorderunderSection17oftheArbitrationAct, 1996,theappealagainstsuchaninterimorderunderSection37 mustlietothecourtsofDelhibeingthecourtshavingsupervisory jurisdiction over the arbitration proceedings and the tribunal.This wouldbeirrespectiveofthefactthattheobligationstobeperformed underthecontractweretobeperformedeitheratMumbaiorat Kolkata, and only arbitration is to take place in Delhi. In such circumstances,boththecourtswouldhavejurisdictioni.e.thecourt withinwhosejurisdictionthesubject-matterofthesuitissituated andthecourtswithinthejurisdictionofwhichthedisputeresolution i.e. arbitration is located.

97. ThedefinitionofSection2(1)(e)includes"subject-matterofthe arbitration" to give jurisdiction to the courts where the arbitration takesplace,whichotherwisewouldnotexist.Ontheotherhand, Section47whichisinPartIIoftheArbitrationAct,1996dealing

withenforcementofcertainforeignawardshasdefinedtheterm "court"asacourthavingjurisdictionoverthesubject-matterofthe award.Thishasaclearreferencetoacourtwithinwhosejurisdiction theasset/personislocated,againstwhich/whomtheenforcementof theinternationalarbitralawardissought.Theprovisionscontained inSection2(1)(e)beingpurelyjurisdictionalinnaturecanhaveno relevancetothequestionwhetherPartIappliestoarbitrationswhich take place outsideIndia.

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

"20.Placeofarbitration-(1)Thepartiesarefreetoagreeonthe place ofarbitration.

(2) Failinganyagreementreferredtoinsub-section(1),theplaceof arbitrationshallbedeterminedbytheArbitralTribunalhavingregard tothecircumstancesofthecase,includingtheconvenienceofthe parties.

(3) Notwithstandingsub-section(1)orsub-section(2),theArbitral Tribunal may, unless otherwise agreed by the parties, meet atany placeitconsidersappropriateforconsultationamongitsmembers, forhearingwitnesses,expertsortheparties,orforinspectionof documents,goodsorotherproperty."

AplainreadingofSection20leavesnoroomfordoubtthatwheretheplace ofarbitrationisinIndia,thepartiesarefreetoagreetoany"place"or"seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, Section 20(2) authorizes the tribunal to determinethe place/seatofsucharbitration.Section20(3)enablesthetribunaltomeetat anyplaceforconductinghearingsataplaceofconvenienceinmatterssuch as consultations among its members for hearing witnesses, experts or the parties.

10. . An identical issue came up before the Supreme Court in the case of Swastik Gases Private Limited vs. Indian Oil Corporation Limited, MANU/SC/0654/2013(2013)9SCC32.Inthatcase,therespondent-IndianOilCorporation Limited appointed M/s. Swastik Gases (P) Ltd. as their consignmentagentat Jaipur,Rajasthan.Therelevantclauseintheagreement betweenthepartiesprovidedthattheagreementshallbesubjecttothejurisdiction oftheCourtsatKolkata.SwastikGases(P)Ltd.invokedclause18ofthearbitration clause and filed application under Section 11(6) of the Act, 1996 before the RajasthanHighCourtforappointmentofarbitrator.Therespondent-IndianOil CorporationraisedthepleaoflackofterritorialjurisdictionofRajasthanHighCourt contendingthattheagreementhasbeenmadesubjecttojurisdictionoftheCourts atKolkata.Thedesignatedjudgeheldthattheapplicationunder Section11(6)oftheAct, 1996.TheorderoftheHighCourtwaschallengedbeforetheSupremeCourton the ground that the words like "alone", "only", "exclusive" or "exclusive jurisdiction", have not been used in the agreement. Therefore, even the RajasthanHighCourtwouldhaveterritorialjurisdiction.Repellingtheargument,the SupremeCourtheldthatuseofsuchwordsinasmuchasnon-useofsuchwords doesnotmakeanymaterialdifferenceastotheintentionofthepartiesinhavingin clause 18 of the agreement that the courts at Kolkata shall havethe

jurisdiction.Relevantdiscussioninparas-31and32ofthereportisworthquoting:-

> "31.Intheinstantcase,theappellantdoesnotdisputethatpartofcauseof actionhasariseninKolkata.Whatappellantsaysisthatpartofcauseof actionhasalsoariseninJaipurand,therefore,ChiefJusticeoftheRajasthan HighCourtorthedesignateJudgehasjurisdictiontoconsidertheapplication madebytheappellantfortheappointmentofanarbitratorunderSection11. HavingregardtoSection11(12)(b)andSection2(e)ofthe1996Actread withSection20(c)oftheCode,thereremainsnodoubtthattheChiefJustice orthedesignateJudgeoftheRajasthanHighCourthasjurisdictioninthe matter. The question is, whether parties by virtue of clause 18 of the agreementhaveagreedtoexcludethejurisdictionofthecourtsatJaipuror, in other words, whether in view of clause 18 of the agreement, the jurisdictionofChiefJusticeoftheRajasthanHighCourthasbeenexcluded?
>
> **32.**Foranswertotheabovequestion,wehavetoseetheeffectofthe jurisdictionclauseintheagreementwhichprovidesthattheagreementshall besubjecttojurisdictionofthecourtsatKolkata.Itisafactthatwhilst providingforjurisdictionclauseintheagreementthewordslike'alone', 'only','exclusive'or'exclusivejurisdiction'havenotbeenusedbutthis,in ourview,isnotdecisiveanddoesnotmakeanymaterialdifference.The intentionoftheparties-byhavingclause18intheagreement-isclearand unambiguousthatthecourtsatKolkatashallhavejurisdictionwhichmeans thatthecourtsatKolkataaloneshallhavejurisdiction.Itissobecausefor constructionofjurisdictionclause,likeclause18intheagreement,the maximexpressiouniusestexclusioalteriuscomesintoplayasthereis nothingtoindicatetothecontrary.Thislegalmaximmeansthatexpression ofoneistheexclusionofanother.Bymakingaprovisionthattheagreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedlyexcludedthejurisdictionofothercourts.Wherethecontract specifiesthejurisdictionofthecourtsataparticularplaceandsuchcourts havejurisdictiontodealwiththematter,wethinkthataninferencemaybe drawnthatpartiesintendedtoexcludeallothercourts.Aclauselikethisis not hit by Section 23 of the Contract Act at all. Such clause is neither forbiddenbylawnoritisagainstthepublicpolicy.ItdoesnotoffendSection 28oftheContractActinanymanner."

11. . The Supreme Court in Indus Mobile Distribution Private Limited, supra whilerevisitingtheConstitutionBenchdecisionrenderedinBharatAluminiumComp any, supra, considered the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) w.e.f. 23.10.2015. The Supreme Court while analyzing the definitionofthe'Court'underSection2(1)(e)andSection20oftheAct,1996 categoricallyheldthatthemomentttheseatisdesignated,itisakintoanexclusive jurisdictionclause.Inthatcase,theseatofarbitrationwasMumbai.Therelevant clauseoftheagreementmadeitclearthatthejurisdictionexclusivelyvests in theMumbaicourts.TheSupremeCourtheldthatundertheLawofArbitration, unlikethecodeofCivilProcedure,whichappliestosuitsfiledincourts,areference to"seat"isaconceptbywhichaneutralvenuecanbechosenbythepartiestoan arbitration clause. The observations of the Supreme Court in para-19 of the judgmentinthecaseofIndusMobileDistributionPrivateLimited,supraarequoted hereunder:-

> "19.Aconspectusofalltheaforesaidprovisionsshowsthatthemomentthe seatisdesignated,itisakintoanexclusivejurisdictionclause.Onthefacts

ofthepresentcase,itisclearthattheseatofarbitrationisMumbaiand Clause19furthermakesitclearthatjurisdictionexclusivelyvestsinthe Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedurewhichappliestosuitsfiledincourts,areferenceto"seat"isa concept by which a neutral venue can be chosen by the parties to an arbitrationclause.Theneutralvenuemaynotintheclassicalsensehave jurisdiction--thatis,nopartofthecauseofactionmayhavearisenatthe neutralvenueandneitherwouldanyoftheprovisionsofSections16to21of CPCbeattracted.Inarbitrationlawhowever,ashasbeenheldabove,the moment"seat"isdetermined,thefactthattheseatisatMumbaiwouldvest Mumbaicourtswithexclusivejurisdictionforpurposesofregulatingarbitral proceedingsarisingoutoftheagreementbetweentheparties."

12. . The Supreme Court in M/s. EMKAY Global Financial Services Ltd. vs. GirdhaSondhi,MANU/SC/0875/2018:(2018)9SCC49,examinedthecorrectness ofthejudgmentofDelhiHighCourtchallengedbeforeit.Thecasewasthatan awardwasrenderedbetweenthepartiesinanarbitrationproceedingwhichwas heldatDelhi,whereasthepartieshadagreedintheagreementthattheexclusive jurisdictionoftheCourtswouldbeontheCourtsatMumbai.Therespondentfiled apetitionunderSection34oftheAct,1996beforetheAdditionalDistrictJudge, who referring to the exclusive jurisdiction clause contained in the agreement, held thattheCourtatDelhiwouldhavenojurisdictiontoproceedfurtherinthematter and, therefore, rejected the Section 34 application. The Delhi High Court reversed the order of the learned Additional District Judge. Challenge was made to the judgmentoftheDelhiHighCourtbeforetheSupremeCourt.TheSupremeCourt set aside the judgment of the Delhi High Court and restored the order of the AdditionalDistrictJudge.ExaminingtheeffectofanexclusivejurisdictionclauseandalsoconsideringthelawlaiddowninIndusMobileDistributionPvt.Ltd.(supra), theSupremeCourt inM/s.EMKAYGlobalFinancialServicesLtd.Supra,inparas-8 and9ofthereportheldasunder:-

"8.Theeffectofanexclusivejurisdictionclausewasdealtwithbythis Court inseveraljudgments,themostrecentofwhichisthejudgmentcontainedin IndusMobileDistributionPvt.Ltd.(supra).Inthiscase,thearbitrationwas tobeconductedatMumbaiandwassubjecttotheexclusivejurisdictionof courtsofMumbaionly.Afterreferringtothedefinitionof"Court"contained inSection2(1)(e)oftheAct,andSection20and31(4)oftheAct,thisCourt referred to the judgment of five learned Judges in BALCO vs. Kaiser AluminumTechnicalServicesInc.inwhich,theconceptofjuridicalseat whichhasbeenevolvedbythecourtsinEngland,hasnowtakenrootinour jurisdiction.

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9.Followingthisjudgment,itisclearthatoncecourtsinMumbaihave exclusivejurisdictionthankstotheagreementdated03July2008,readwith theNationalStockExchangebye-laws,itisclearthatitistheMumbaicourts andtheMumbaicourtsalone,beforewhichSection34applicationcanbe filed.Thearbitrationthatwasconductedat Delhiwasonlyataconvenient venueearmarkedbytheNationalStockExchange,whichisevidentona readyofBye-law4(a)(iv)readwithsub-clause(xiv)containedinChapterXI. "

13. . The Supreme Court in a recently delivered decision in Brahmani River Pellets Limited vs. KamachiIndustries Ltd., MANU/SC/0968/2019 : (2020) 5 SCC462consideredwhethertheMadrasHighCourtcouldexercisejurisdiction under Section 11(6) of the Act, 1996 to appoint the sole arbitrator at the instance of the respondent, despite the fact that the agreement contains the clausethatvenueofarbitrationshall be Bhubaneswar. The appellant challenged the said order by questioning the jurisdiction of the Madras High Court on the groundthatsincethepartieshadagreedthattheseatofarbitrationshallbeat Bhubaneswar,onlytheOrissaHighCourthasexclusivejurisdictiontoappointthe arbitrator.TherespondentarguedbeforetheSupremeCourtthatsincethecauseof action arose at both the places, i.e., Bhubaneswar and Chennai, both Madras High Court as well as Orissa High Court will have supervisory jurisdiction. It was argued that in domestic arbitration, unless the parties tie themselves to an exclusivejurisdictionofthecourtintheagreement,merementionofvenueasa placeofarbitrationwillnotconferexclusivejurisdictionuponthatcourt.Itwas also submitted that mere expression "venue of arbitration shall be Bhubaneswar" willnotconferexclusivejurisdictionupontheOrissaHighCourt,particularlyin view of the definition of the 'Court' as stipulated in Section 2(1)(e) of the Act, 1996,whichconferspoweronthePrincipalCivilCourtoforiginaljurisdictionina district and includes the High Court in exercise of its original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration,ifthesamehadbeenthesubjectmatterofasuit.TheSupremeCourt relying the Constitution Bench decision of Bharat AluminiumCompany i.e. Balco, suprarepelledtheargumentinparas-16and17ofthereportinBrahmaniRiver PelletsLimited,suprawhileobservingthus:-

> "16.Wherethecontractspecifiesthejurisdictionofthecourtataparticular place,onlysuchcourtwillhavethejurisdictiontodealwiththematterand partiesintendedtoexcludeallothercourts.Inthepresentcase,theparties have agreed that the "venue" of arbitration shall be at Bhubaneswar. ConsideringtheagreementofthepartieshavingBhubaneswarasthevenue ofarbitration,theintentionofthepartiesistoexcludeallothercourts.As held in Swastik, non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.
>
> **17.**Whenthepartieshaveagreedtohavethe"venue"ofarbitrationat Bhubaneswar,theMadrasHighCourterredinassumingthejurisdictionunder Section 11(6) of the Act. Since only Orissa High Court will have the jurisdictiontoentertainthepetitionfiledunderSection11(6)oftheAct,the impugnedorderisliabletobesetaside."

14. TheSupremeCourtinBGSSGSSOMAJVsupra,relieduponbylearnedcounseforthe oppositeparty,wasexaminingSections20and2(1)(e)oftheAct,1996,in thecontextofclause67.3(vii)oftheagreementexecutedbetweenthepartiesinthat case which provided that "Arbitration proceedings shall be held at New Delhi/Faridabad,India".FollowingratiooftheConstitutionBenchdecisioninBALCO supra,itwasheldthattestfordeterminationofjuridicalseat,whereverthereisan expressdesignationofa"venue",andnodesignationofanyalternativeplaceasthe "seat",theseatofarbitration,wherealternativevenuesforconductofproceedings arementionedinarbitrationagreement,shallbedeterminedonthebasisofvenue chosen for conducting arbitration proceedings, to the exclusion of all other courts, eventhecourtswherepartofthecauseofactionmayhavearisen.Theissueinvolved inthatcasewasthusslightlydifferentthantheonewhichisbeingexaminedinthe

presentmatter. Nonetheless,thelawregardingthelegislativerecognitiongivento partyautonomyastothechoiceoftheseatofarbitrationhasbeenreiterated.

15. . PriortoSection11(6A),theSupremeCourtinseveraljudgments,leading onebeing SBP& Co. vs. Patel Engineering Ltd. & another, reported inMANU/SC/1787/2005:(2005)8SCC618,hadenunciated thelawthatatthestageofconsiderationofSection11(6)application,theChief Justiceorhisdesignateneednotmerelyconfinetheexaminationoftheexistenceof anarbitrationclausebutcouldalso go into certain preliminary questions such as stale claim, accord, andsatisfactionhavingbeenreachedetc.But this position underwent a significant change after insertion of Sub-Section (6A) in Section 11 by Amending Act of 2015 w.e.f. 23.10.2015. It was this provision which the Supreme Court interpreted in DuroFelguera, S.A. vs. Gangavaram Port Limited,MANU/SC/1352/2017:(2017)9SCC729andheldthatallthattheCourt atthestageofSection11needtoseeiswhetheranarbitrationagreementexists, nothing more, nothing less. It was held that legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator. The Supreme Court in MayavatiTrading Private Limited, supra relied by learned counsel for the petitioner also similarly held that after insertion of Sub-Section(6A)inSection11oftheAct,1996,byAmendmentAct,2015w.e.f. 23.10.2015, the Supreme Court or, as the case may be, the High Court, while consideringanyapplicationundersub-section(4)orsub-section(5)orsub-section (6),shall,notwithstandinganyjudgment,decreeororderofanycourt,confineto the examination of the existence of an arbitration agreement. Therefore, the argument of the learned counsel for the petitioner that while considering the petitionu/s.11(6)oftheAct,thisCourtoughttoonlyexaminetheexistenceofthe arbitrationagreementandshouldleaveallotherquestions,includingthequestionof territorialjurisdiction,openforconsiderationbythearbitratorinthescopeofsection 16oftheAct,1996,cannotbecountenanced.TheSupremeCourtinMayavatiTrading PrivateLimited,supramerelyheldthat"existence"of"arbitration"agreementas referredtoinsubsection(6A)ofSection11insertedby2015amendmentw.e.f. 23.10.2015hascorrectlybeeninterpretedinearlierjudgmentinDuroFelguera,S.A. supra.ThesubsequentjudgmentinUnitedIndiaInsuranceCo.Ltd.Vs.AntiqueArt Exports(P)Ltd.,MANU/SC/0465/2019:(2019)5SCC362washeldtohavenotlaid downthecorrectlawandwastherefore,overruled.Thedecisioninthecaseof MayavatiTradingPrivateLimited,suprathereforedoesnotinanymannerhelpthe petitionerasitdoesnotdealwiththequestionofterritorialjurisdictionoftheHigh Court.

16. Inviewoftheabovediscussion,itmustbeheldthatthisCourtdoesnothavethe territorialjurisdictiontoentertainthepresentpetitionfiledunderSection11(6)ofthe Act,1996,whichisaccordinglydismissedasnotmaintainable.

17. Withtheaboveobservations,theARBPstandsdismissed.

18. As Lock-downperiodiscontinuingforCOVID-19,learnedcounselforthe petitionermayutilizethesoftcopyofthisjudgmentavailableintheHighCourt's official website or print out thereof at par with certified copies in the manner prescribed,videCourt'sNoticeNo.4587dated25.03.2020.

MANU/DE/2799/2015

Equivalent Citation: [2015]129C LA328(Delhi), [2015]132SC L510(Delhi)

IN THE HIGH COURT OF DELHI

Crl.M.Cs. 5224, 5225, 5226 and 5391/2014

Decided On: 17.09.2015

Appellants:**KaviAroraandOrs.**
Vs.
Respondent: **The Registrar of Companies and Ors.**

Hon'ble Judges/Coram:
Manmohan Singh, J.

Counsels:
For Appellant/Petitioner/Plaintiff:AnirbanBhattacharya,GauharMirza andSukritiMago,Advs.

JUDGMENT

Manmohan Singh, J.

1.TheabovementionedpetitionsunderSection482Cr.P.C.bythepetitioners, namely,KaviArora(ManagingDirector),PunitArora(CompanySecretary),Atul Gupta(Ex-WholeTimeDirector),AnilSaxena(Director)andJatinderSinghGrewal (Ex-WholeTimeDirector)havebeenfiledforquashingofthecomplaintbearingcase No.222/3/2014titled"RegistrarofCompanies.vs.Mr.KaviAroraandors."pending intheCourtofAdditionalChiefMetropolitanMagistrate,TisHazariCourt,Delhiand the proceedings emanatingtherefrom.

2. Ascommonlegalissuesareinvolvedthus,thesamearebeingdecidedtogetherby a singleorder.

3. Thepetitionersarehavingtheirrespectivepositionasabovesaidin theCompany namedReligareFinvestLimited(hereinafterreferredtoasthe'Company').The Companybeinganonbankingfinancialcompanyfocusingonfinancingsmalland medium enterprise (SME). It provides SME mortgage loans, SME working capital loans,andretailcapitalmarketsfinancing.Thecompanyisasubsidiaryof ReligareEnterprisesLimited.

4.Thebriefrelevantfactsofthecasearethaton1stJune,2010thestatutory auditorsPriceWaterhouse(PWC)issueditsAuditedreportofthebalancesheetofthe Company,therelatedProfitandLossAccountandCashFlowStatementason31st March,2010.

On30thMay,2011PWCissuedauditors'reportofthebalancesheetoftheCompany, relatedProfitandLossAccountandCashFlowStatementason31stMarch,2011.On 22ndMay,2012,PWCissuedauditors'reportofthebalancesheetoftheCompany, relatedProfitandLossAccountandCashFlowStatementason31stMarch,2012. TherespondentNo.2byitsletterdated16thJanuary,2013directedtheinspectionof thebooksofaccountandotherrecordsoftheCompanyunderSection209Aofthe CompaniesAct,1956(hereinafterreferredtoasthe'Act').Theinspectionofthe

booksofaccountsoftheCompanywascarriedoutbyAssistantDirector(Inspection) inApril,2013forthefinancialyears2009-10,2010-11and2011-12.Uponthesaid investigation,violationsofSection211(3A),(3B)and(3C)oftheActreadwith Accounting Standards-16 (AS-16) and Accounting Standards-26 (AS-26) were observed to have been allegedly committed by the petitioners Company. The respondentNo.1byitsletterdated22ndMay,2013soughtcommentsfromthe Companyontheobservationsoftheinspectingofficer.Byitsdetailedreplydated 18thJune,2013thecompanyrepliedandclarifiedastowhynoviolationasalleged couldbesaidtohavebeenmadeout.InspectionReportunderSection209-Aofthe ActwassubmittedbytheDirector(InspectionandInvestigation)totherespondent No. 1 on 24th June,2013.

5. TherespondentNo.2RegionalDirectorissueddirectionon2ndJune,2014tothe respondentNo.1tolaunchprosecutionagainsttheCompany.On17thJune,2014, therespondentNo.1issuedashowcausenoticeunderSection211(3A)oftheAct, repeatingthesamesetoffactsandallegingviolationofSection211(3A),211(3B) and211(3C)oftheActreadwithAS-16andAS-26.TheCompanyfiledareplytothe saidshowcausenoticeon5thAugust,2014.On21stAugust,2014,anothershow causenoticeunderSection211(3A)oftheAct,repeatingthesamesetoffactsand allegingviolationofSection211(3A),211(3B)and211(3C)oftheActreadwithAS-16andAS-26wasissuedbytherespondentNo.1.TheCompanyfiledareplytothe saidshowcausenoticeon1stSeptember,2014.

6. Thesaidshowcausenoticesraisedtwomainallegations:

a. Non-disclosureofcapitalizationofborrowingcostsinthebalancesheets fortheyear31stMarch,2010,31stMarch,2011,31stMarch,2012stating thattherewasaviolationofSections211(3A),211(3B),and211(3C)ofthe Actreadwithclause23(b)ofAS-16("BorrowingCosts"),

b. Non-disclosureofcapitalizationofcomputersoftwareandnon-disclosure ofcertainclassesofintangibleassets,whichallegationistwo-fold:-(i)non-disclosureofdetailsofcapitalizationofcomputersoftwareintheCompany's booksofaccountsfortheyear31stMarch,2010,31stMarch,2011,31st March,2012;and-(ii)non-disclosureofeachclassofintangibleassets, distinguishingbetweeninternallygeneratedintangibleassetsandother intangibleassets.

7. Withoutgrantinganyhearingoranyfurtherdiscussions,thecomplaintwasfiled. In the complaint, the clarification/plea raised by the company was not specifically averredexceptthecopyofthereplywasfiledasannexed.Inthecomplaintitwas statedthatthepetitionershadfailedtocomplywiththestatutoryrequirementsof Sections211(3A),(3B)and(3C)oftheActreadwithAS-16andAS-26andhence liable for prosecution under Section 211(7) of the Act. It is the case of the respondents,theMinistryofCorporateAffairs,respondentNo.2videletterdated 16thJanuary,2013directedthattheInspectionofthebooksofaccountandother recordsofthecompanyunderSection209AoftheActbeconducted.Theinspection ofthebooksofaccountsofthesaidcompanywascarriedoutbyAssistantDirector (Inspection)inApril,2013.TheInspectingOfficersubmittedtheInspectionreporton 24thJune,2013toRegionalDirectorandthesamewasforwardedbyRegional DirectortotheMinistryofCorporateAffairsonthesamedateasrequiredunder Section209(6)oftheAct.Thereafter,onthebasisofdirectionsreceivedfromthe Ministry/RegionalDirector,thepresentcomplainti.e.,CCNo.222/3/2014wasfiled

bytheofficeofrespondentNo.1onthebasisoftheinspectionreportsaswellas allegationsmadeintheshowcausenotice.

8. Itisalsoobservedthatthefinancialstatementsshouldalsodisclosethefollowing foreachclassofintangibleassets,distinguishingbetweeninternallygenerated intangibleassetsandotherintangibleassets:-

a. Theusefullivesortheamortizationratesused;

b. The amortization methodsused;

c. Thegrosscarryingamountandtheaccumulatedamortization

d. Areconciliationofthecarryingamountatthebeginningandendofthe periodshowing:-

i. Additions,indicatingseparatelythosefrominternaldevelopment and throughamalgamation;

ii. Retirements anddisposals;

iii. Impairmentlossesrecognizedinthestatementofprofitandloss during the period (ifany);

iv. Impairment losses reversed in the statement of profit and loss during the period (ifany);

v. Amortizationrecognizedduringtheperiod;and

vi. Otherchangesinthecarryingamountduringtheperiod.

9. Thereplygivenonbehalfofthecompanyon1stSeptember,2014arereproduced hereinbelow:-

"September 01, 2014

Mr. P.L. Malik
Dy. Registrar of Companies
OfficeoftheRegistrarofCompanies
NCT of Delhi and Haryana
Ministry of Corporate Affairs
4thFloor,IFCITower,NehruPlace
NewDelhi-110019

Ref:ShowCauseNoticesdated 21.08.2014,receivedon26.08.2014,bearing the followingnumbers:

1. 1480/ROC/209A/2013/6311issuedtoMr.AtulGupta;

2. 1480/ROC/209A/2013/6312issuedtoMr.JatinderSinghGrewal;

3. 1480/ROC/209A/2013/6313issuedtoMr.PunitArora;

Sub:ReplybyReligareFinvestLimitedforwithdrawalandcancellationof the aforementioned Show CauseNotice.

Dear Sir,

WithreferencetotheabovementionedShowCauseNotices(the"SCNs"), andonbehalfofthepersonsmentionedintheseSCNs,ReligareFinvest Limited("RFL"or"Company")respectfullysubmitsasunder:

At the outset, we wish to state and submit for your kind considerationthatthecontentsofthesamearewhollymisconceived, incorrectandaredenied,thereasonsforwhicharesoughttobe elucidatedhereunder:

Thisreplyisinthreeparts;PartAdealswiththebackground inlightofwhichthereplyisbeingfiled;PartBdealswith theissuesraisedintheseShowCauseNoticesandother responsesthereto;PartCdealswithoursubmissionsand preliminaryobjections.TheresponsesinPartBaresubject tothesubmissionsmadeinPartC.

A. Background

1. ThebooksofaccountsandrecordsoftheCompanywere inspected under Section 209A of the Companies Act, 1956("Act") by an officer of the Office of the Regional Director(NR),MinistryofCorporateAffairs("Inspecting Officer").TheInspectingOfficerobservedthattheCompany has violated certain requirements of Sections 211(3A), 211(3B)and211(3C)readwithAS-16andAS-26issuedby theInstituteofCharteredAccountantsofIndia(ICAI)forthe FinancialYears2009-10,2010-11and2011-12;

2. . TheCompanyhadfurnishedadetailedresponsevide itsletterdatedJune18,2013refutingtheallegedviolation of the provisions of Sections 211(3A), 211(3B) and 211(3C)readwithAS-16andAS-26issuedbytheICAI.In addition, in itsresponseto theSCN datedJune 19, 2014,thecompanyhadagainprovideditsexplanationin relationtotheseprovisions.Thesameisreiteratedbelow in response to the presentSCNs.

B. Show Cause Notice Issues and Company'sResponse

Issue No.1

"ItisobservedfromSchedule-S(PointNo.2(p)oftheNotes toaccountsattachedwithBalanceSheetfortheyearended 31/03/2010, 31/03/2011 and 31/03/2012 the details regardingtheamountofborrowingcostscapitalizedduring periodasperrequirementsofclause23(b)readwithAS-16 issuedbyICAI.HencethereisviolationofSection211(3A), 211(3B)and211(3C)oftheActreadwithAS-16issuedby theICAI."

Company's Submission:

1.Religare Finvest Limited is a Non-Banking Financial Company (NBFC) registered with Reserve Bank of Indiato carryouttheactivitiesrelatedtoprovidingfinancetomainly smallandmediumenterprise(SME).Thediversifiedsuiteof lendingsolutionsincludesSMEMortgageLoansandSME WorkingCapitalLoans.ReligareFinvestLimitedalsorunsa retailcapitalmarketsfinancingbusinesswhichincludesLoan against Marketable Securities. For this, the Company borrowsmoneyfromvarioussourcesforonwardlendingto itscustomers.Theinterestonmoneysoborrowedhasbeen recognizedastherevenueexpenditureandnotcapitalizedin the financial statements. Since, no interest on borrowings hasbeencapitalized;thereisnodisclosureintheNotesto theAccounts.

2. AsdefinedintheAccountingStandard(AS)16:

"A qualifying asset is an asset that necessarily takes a substantialperiodoftimetogetreadyforitsintendeduseor sale."

3. Para5ofAS16-providesexamplesofqualifyingassets which include manufacturing plants, power generation facilities,inventoriesthatrequireasubstantialperiodoftime to bring them to a saleable condition, and investment properties. Other investments, and those inventories that are routinely manufactured or otherwise produced in large quantitiesonarepetitivebasisoverashortperiodoftime, arenotqualifyingassets.Thismeansthatassetsthatare readyfortheirintendeduseorsalewhenacquiredalsoare not qualifyingassets.

4. Para6ofAS16furtherstatesthat-BorrowingCostsstthat are directly attributable to the acquisition, construction or productionofaqualifyingassetshouldbecapitalizedaspart ofthecostofthatasset.Theamountofborrowingcosts eligible for capitalization should be determined in accordance with this Statement. Other borrowing costs shouldberecognizedasanexpenseintheperiodinwhich they areincurred.

5 . Para 7 of AS 16 states that - Borrowing costs are capitalizedaspartofthecostofaqualifyingassetwhenitis probablethattheywillresultinfutureeconomicbenefitsto theenterpriseandthecostscanbemeasuredreliably.Other borrowingcostsarerecognizedasanexpenseintheperiod in which they areincurred.

6 . Para 23 of AS 16 states that the financial statements shoulddisclose:

(a) theaccountingpolicyadoptedforborrowingcosts;and

(b) theamountofborrowingcostscapitalizedduringthe

period.

7 . Accordingly, the Company has made the following disclosuresinScheduleS[Point2(o)]NotestotheFinancial Statements:

"SIGNIFICANT ACCOUNTING POLICIES

Borrowing Cost

Ancillarycostsincurredforarrangementofborrowingssuch asupfrontfees/brokeragesareamortizedoverthetenureof theborrowingasperthetermsofsanction/agreement."

8. Facts applied to ReligareFinvest Limited (RFL):

InRFL,themoneywhichisborrowed(eitherbywayofbank loans, debentures, commercial paper etc.) is immediately deployedinassets(LoansandAdvances)andthereforethere is no delay in generation of return from these assets (interest income on loan). Loan therefore does not fall within the definition of qualifying assets based on submissionmadeinpoints2,3,4,5and6above.

Thecompanyhasnotborrowedanyfundforacquisition, constructionorproductionofanunderlyingcapitalasset (QualifyingAssets).Itisfurthersubmittedthattherewasno capital asset under development which is funded from borrowings.

BasedupontheSubmissionsmadeunderPoints1to8above and we believe that the borrowing cost incurred by the companyisnotrequiredtobecapitalizedsincethereisno qualifyingasset.Kindlynotethatintheeventweoptforthe capitalizationofborrowingcosts,theprofitfortherelevant currentyearwouldbeoverstatedanditwouldbeagainstthe principleofprudence.Hence,thereisnocontraventionof Section211(3A)oftheActreadwithAS16.Wehavealso beengiventounderstandthattheprocessfollowedatRFLis similar to all other participants in NBFC and banking industry.Inthisconnection,wewouldliketomeetyouso that we are able to personally explain our position and understandyourperspectiveonthisissue.

Issue No. 2

(i) As per Accounting Standard (AS)-26, the financial statementsshoulddisclosethecostofasoftwarepurchased forinternalusecomprisingitspurchaseprice,includingany import, duties and other taxes (other than those subsequentlyrecoverablebytheenterprisefromthetaxing authorities)andanydirectlyattributableexpenditureon makingthesoftwarereadyforitsuse,Tradediscountsand rebatesshouldbedeductedinarrivingatthecost.However,

thecompanyhasfailedtodisclosedetailsofcapitalizedin its books of account during the period 31/03/2010, 31/03/2011 and31/03/2012.

(ii) Furtheritisalsoobservedthatthefinancialstatements should also disclose the following for each class of intangible assets, distinguishing between internally generatedintangibleassetsandotherintangibleassets:

a) theusefullivesortheamortizationratesused;

b) the amortization methodsused;

c) the gross carrying amount and the accumulated amortization

d) areconciliationofthecarryingamountatthebeginning andendoftheperiodshowing:

i) Additions, indicating separately these from internal developmentandthroughamalgamation;

ii) Retirements anddisposals;

iii) Impairmentlossesrecognizedinthestatementofprofit andlossduringtheperiod(ifany);

iv) Impairmentlossesreversedinthestatementofprofitand lossduringtheperiod(ifany)';

v) Amortizationrecognizedduringtheperiod;

vi) Otherchangesinthecarryingamountduringtheperiod.

ItisobservedfromtheBalanceSheetasat31/03/2010, 31/03/2011 and 31/03/2012 that the company has not disclosed the above classes of intangible assets, distinguishing between internally generated intangible assets and other intangible assets. Hence, there is violation of section211(3A),(3B)and(3C)oftheActreadwithAS-26 issued byICAI.

Company's Submission

We would like to draw your kind attention towards the followingprovisionswithrespecttothequeryraisedinpoint (i):

3 . AsperScheduleVI,undereachheadoffixedassets the original cost, the additions and deductions thereto therefrom during the year, and the total depreciation writtenofforprovideduptotheendoftheyearis/aretobe stated.

4 Asrequiredinpoint(i)above,thedetailsofcapitalization ofintangibleassetsisnotrequiredtobedisclosedinthe

financial statements. An enterprise has to arrive at capitalization cost of intangible assets by following the treatmentgivenisAS-26.TheCompanymaintainsthatthe recordofcapitalizationsaspertheaccountingstandardand Auditors have verified the same during the audit of respective financial years on materiality basis. AS-26 disclosurerequirementdoesnotaskforfulldisclosureof capitalization and to disclose only the gross carrying amount.

Furthermore,wewouldliketodrawyourkindattention towardsthefollowingdisclosuresinScheduleSnotestothe Financial Statements with respect to theissue/observation raised in point(ii):

"SIGNIFICANT ACCOUNTING POLICIES"

Depreciation

DepreciationisprovidedonStraightLineMethod,Pro-Rata totheperiodofuse,attheratesspecifiedinScheduleXIVto theActortheratesbasedonusefullivesoftheassetsas estimated by the management, whichever are higher. The annuldepreciationratesareasunder:

Asset Description	Depreciation Rate (%)
Data Processing Machines	16.21%
Office Equipment	Between 10% to 20%
Furniture and Fixtures	6.33%
Vehicles	9.50%
Buildings	1.63%
Intangible Assets-Software	16.21%

ItissubmittedthattheonlyintangibleassetoftheCompany iscomputersoftwareandthesamehasbeenseparately disclosed in the Fixed Assets schedule attached to the BalanceSheetdisclosingthefactinaccordancewiththePara 90 of theAS-26.

Further, as required by Para 90 of AS-26, the Schedule contains the following details:--Gross block as at the beginning and at the end of the year

- Additions,deletionsandadjustmentsduringtheyear

- Depreciation for theyear

- Accumulated depreciation as at the beginning and atthe end of theyear

- Netblockasatthebeginningandattheendoftheyear

It is further submitted that the Company does not have any

self/internally generated intangibleassets.

Inviewoftheabove,theCompanyhasnotviolatedthe provisionofSection211(3A)oftheActreadwithAccounting Standard26asissuedbytheICAI.

WehavealsobeengiventounderstandthattheprocessfollowedatRFLissimilartoallotherparticipantsinNBFC andBankingIndustry.Inthisconnection,wewouldliketo meet you so that we are able to personally explain our positionandunderstandyourperspectiveonthisissue.

C. Our HumbleSubmissions:

1. FromthereplyfiledbytheCompanyasaboveitisclear that the Company has complied with the provisions of Sections211(3A),211(3B)and211(3C)oftheActreadwith AS-26 issued by theICAI;

2.TheFinancialStatementsoftheCompanyfortheyears 2009-10, 2010-11 and 2011-12 have been audited by the StatutoryAuditors,PriceWaterhouse,whichisareputable firmofauditors,andhavebeenauditedinaccordancewith the applicable provisions of the Act and the Accounting Standards, guidance and clarifications issued by the ICAI. TheAuditors'ReportsforthefinancialyearsendingonMarch 31, 2010, March 31, 2011 and March 31, 2012 (the "Auditors'Reports")whichclearlymentionthefollowing:

- Firstly,theauditconductedbytheauditorsprovidesa reasonablebasisoftheiropinion.Paragraph2inthereports states asfollows:

"Weconductedourauditinaccordancewiththeauditing standards generally accepted in India. Thosestandards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining,onatestbasis,evidencesupportingtheamounts anddisclosuresinthefinancialstatements.Anauditalso includes assessing the accounting principles used and significant estimates made by management, as well as evaluatingtheoverallfinancialstatementpresentation.We believethatourauditprovidesareasonablebasisforour opinion."

- Secondly,thatintheauditors'opinion,theBalanceSheet, ProfitandLossAccountandCashFlowStatementdealtwith bythisreportcomplywiththeaccountingstandardsreferred toinsub-section(3C)ofSection211oftheAct.(paragraph 4(d) in the Auditors'Reports).

3. AsfarastheShowCauseNoticeisconcerned,wewishto make the followingsubmissions:-

i. NocopyoftheInspectionReporthasbeenattachedtothe showcausenotice.Insuchacase,wewishtoreserveour righttofileanadditionalresponseoncethecompletereport isreceived.

ii. The notices have been issued to all directors of the company,whichoughtnottohavebeendoneinlightofthe expressprovisionofSection211(7)oftheCompaniesAct which prescribes such persons as referred to inSection 209(6) and under Section 209(6), such persons are following,namely:-

- wherethecompanyhasamanagingdirectorormanager, such managing director or manager and all officersand otheremployeesofthecompany,and

- wherethecompanyhasneitheramanagingdirectornor manager,everydirectorofthecompany.

iii. NospecificfactshavebeenmentionedintheShowCause Notice asto-

(a) WhathasbeenfoundinviolationsunderSection211of the Companies Actand,

(b) WhatoughttohavebeenstatedintheBalanceSheetand FinancialStatementinrelationtoAccountingStandardsAS- 16 andAS-26.

iv. The notice under reply is vague and based on mere conjecturesandsurmises.Thereisnothingonrecordto showwhatwasitthatthecompanyhadtodowithregardto everyparticulartransactionandthatitfailedtodoso.There isacompleteomissionoftheparticularsofwhichwouldbe inanyallegedviolationoftheCompaniesAct,1956andhow thatviolationhadanynexuswiththespecificprovision.

v. The show cause notice reflects utter lack of any applicationofmindinverifyinganyparticularactofbreach bytheCompany.Meremechanicalissuanceofashowcause noticewhichisbasedonavagueInspectionReportisclearly an unlawful exercise of jurisdiction and violative of the principles of naturaljustice.

Inlightofthesecircumstances,andintheabsenceofsuch details,itissubmittedthatthenoticeisvagueandhence, must berecalled.

4. . Further,itissubmittedthatthedirectorsandofficers ofthecompanyhaveactedhonestlyandreasonably,and ought to be fairly excused since any breach under the provisions of Section 211 was not willful or deliberate. Thereisnothingonrecordtoevenvaguelysuggestany willfulnessintheallegedactions/omissionsonthepartof the companyand/or

its directions.

5. InourreplydatedAugust,5,2014totheSCNdatedJune 19,2014,wehadinformedyouthatwewereintheproceeds of obtaining an independent opinion on the accounting treatmentandrelevantdisclosureunderconsideration.We havenowobtainedtheexternalindependentopinionwhich isannexedtothisreplyasAnnexureA.Thesameisnow beingsubmittedforyourkindconsideration.

6. . TheCompanyrequestsyoutoreconsidertheabove andkindlywithdrawandnottoinitiateanyproceedings undertheShowCauseNoticeissuedagainsttheCompany and its officers/directors namedtherein.

7. TheCompanymaybegivenanopportunityforameeting topresentitscaseinpersonsothatthemattercouldbe explainedindetail,andfurtherclarificationandinformation maybeprovided.Thisrequestwaspreviouslymadeinour letter seeking personal hearing dated 13th August, 2014. Thisrequestismosthumblyreiterated.Thisletterhasbeen annexed for your kindperusal.

Wesincerelyhopethattheaboveexplanationsareconsideredfavourably.We shallbepleasedtoprovideanyfurtherinformationorclarificationasmaybe required in thisregard.

Weexpresslyreserveourrighttochallengetheauthorityandthemannerof issuing the show cause notice and this reply must not be deemed or construedinanymannertobeawaiverofthatright.

Yours sincerely,
For ReligareFinvest Limited

Sd/-
Punit Arora
Company Secretary
Membership No.A18880

Address:D3,P3B,DistrictCentre
Saket, NewDelhi-110017

Encls.:AnnexureAasabove.

Copyto:

i) TheRegionalDirectorOffice(NR),MinistryofCorporateAffairs-Noida (UP)

ii) TheSecretary,MinistryofCorporateAffairs,NewDelhi."

10. ItisobservedfromtheBalanceSheetason31stMarch,2010,31stMarch,2011, 31stMarch,2012thatthecompanyhasnotdisclosedtheaboveclassesofintangible assets,distinguishingbetweeninternallygeneratedintangibleassetsandother intangibleassets.HencethereisviolationofSection211(3A),(3B)and(3C)ofthe

Act read with AS- 26 issued by ICAI.

11. ThesaidcomplaintwasfiledbytherespondentNo.1,RegistrarofCompanies (NCTofDelhi&Haryana)on18thSeptember,2014underSection211(7)oftheAct forallegedcontraventionofSections211(3A),(3B)and(3C)oftheAct,readwith AS-16andAS-26againstthepetitionersandotherpersonsincludingtheDirectors andotheremployeesoftheCompany.

InthesaidcomplainttheACMMtookcognizanceoftheallegedoffenceunderSection 211(7) of the Act and issued summons against the petitioners and others by summoningorderdated18thSeptember,2014,returnableon11thNovember,2014.

12. Thesummoningorderdated18thSeptember,2014hasbeenreproducedhereas under:-

> "18.09.2014
>
> Fresh complaint filed. It be checked and registered.
>
> Present: Complainant Rajneesh Kumar Singh with Company prosecutor.
>
> Presentcomplainthasbeenfiledbythecomplainant,apublicservantin dischargeofhisofficialduties.Therefore,pre-summoningevidenceofthe complainantisdispensedwithu/s200ofCr.P.C.
>
> Heard.
>
> Itissubmittedthatcomplaintiswithinlimitationastheoffencealleged againsttheaccusediscontinuinginnature.
>
> Ihaveperusedthecomplaintalongwithdocumentsattached withthesame.
>
> Perusal of complaint, prima facie discloses commission of offence u/s 211(3A),(3B)and(3C)r/wAS-16andAS-26oftheCompaniesAct,1956. Issuesummonstoalltheaccusedonstepstobetakenbythecomplainant.
>
> Complainanthasprayedforgrantofexemptionofhispersonalappearance statingthatbeingpublicservanthewillremainbusyindischarginghis officialduties.Inviewofthefactsstated,complainantisexemptedthrough Ms.KusumYadav,companyprosecutorwhoisappearinginthecourtand lookingafterthecaseofthecomplainant,tillfurtherorder.
>
> Issue summons to all accused returnable for 11.11.2014.
>
> (D.K. Sharma)ACMM(Spl.Acts)/ CENTRAL DELHI/ 18.09.2014"

13. Inthesummoningorderdated18thSeptember,2014itwasobservedthatthe offencesunderSection211(3A),(3B)and(3C)oftheActreadwithAS-16andAs-26 arecontinuinginnatureandthusthecognizanceofthesamecouldnotbetaken withoutreferencetoSection473Cr.P.C.

14. Vakalatnamawasfiled on behalfofthepetitionersandan application for exemptionfrompersonalappearancewasalsomovedon11thNovember,2014,

whichapplicationwasdismissedbytheACMMbyorderdated11thNovember,2014.TheACMMbythesaidorderalsoissuedbailablewarrantsagainstthepetitioners,but theissuanceofthesamestandsdeferredtillthenextdateofhearingi.e.20th November,2014.Inthemeanwhile,thepresentpetitionshavebeenfiledwhereinthe interimorderwaspassedon22ndJanuary,2015.

15. TheallegationsagainstthepetitionersareforallegedcontraventionofSections 211(3A),(3B)and(3C)oftheActinrespectoftheBalanceSheetsoftheCompany, fortheyearsended31stMarch,2010,31stMarch,2011,31stMarch,2012inthe complaintisthatthesaidBalanceSheetsdidnotcomplywithAS-16andAS-26as framedbytheInstituteofCharteredAccountants.

16. TheoffenceunderSection211(7)oftheActispunishablewithimprisonmentfor atermwhichmayextendtosixmonthsorwithfinewhichmayextendtoRs.10,000 orwithbothandassuch,underSection468(2)(b)Cr.P.C.,theperiodoflimitationis oneyear.

17. Thefirstsubmissionofthelearnedcounselfortherespondentsisthatthepower underSection482Cr.P.C.shouldnotbeusedtoquashaproceedingwheredisputed questionsoffactareinvolvedsincedisputedquestionsoffactcanonlybedecided duringtrial.Learnedcounselhasreferredthefollowingdecisions:-

a. InthecaseofManjitJajuv.RegistrarofCompanies2010(159)CompCas 112 this Court held asunder:-

> "5.Withdueregardtothe,SingleJudge,underSection482,the Courtcannotenterintoaninquiryandcannotdecidedthedisputed questionsoffacts.Disputedquestionsoffactcanonlybedecided duringtrial.ThepowerunderSection482Cr.P.C.istobeexercised verysparinglyandonlywherethetrialcourthasactedingross illegality.Wherethetrialcourthadnotevengoneintotheissueof limitationandthefactsareyettobeproved,thisCourtcannotgo intotheissueoflimitation,sincelimitationisamixedquestionof lawandfacts,andquashthecomplaint."

b. InthecaseofAjayJainv.RegistrarofCompaniesMANU/DE/2450/2010:2010(119)DRJ545thisCourtheldasunder:-

> "5.....Whetherthedirectorshadresignedornotwhichisaquestion offactwhichcannotbegoneintobythisCourtandonlythetrial court,duringtrialcandecidewhetherthedirectorshadresignedor theycontinuedtobethedirectors.Ifindnoforceinthispetition. Thesameisherebydismissedwithnoorderstocosts."

c. In the case of Iridium India Telecom Ltd. Vs. Motorola Inc., MANU/SC/0928/2010:(2011)1SCC74,theSupremeCourtheldasunder:-

> "76.Asnoticedearlier,boththeappellantsandtherespondentshave muchtosayinsupportoftheirrespectiveviewpoints.Whichofthe viewsisultimatelytobeaccepted,couldonlybedecidedwhenthe partieshavehadtheopportunitiestoplacetheentirematerials beforetheCourt.ThisCourthasrepeatedlyheldthatthepowerof quashproceedingsattheinitialstagehastobeexercisedsparingly withcircumspectionsandintherarestofrarecases.Thepoweristo

beexercisedexdebitojustitiae.Suchpowercanbeexercisedwhere acriminalproceedingismanifestlyattendedwithmalafidesandhave beeninstitutedmaliciouslywithulteriormotive.Thisinherentpower oughtnotbeexercisedtostiflealegitimateprosecution.

78. Inouropinion,theHighCourtclearlyexceededitsjurisdictionin quashing the criminal proceeding in the peculiar facts and circumstances of this case. The high court noticed that while exercisingjurisdictionsunderSection482Cr.P.C."thecomplaintin itsentiretywillhavetobeexaminedonthebasisoftheallegations madetherein.ButtheHighCourthasnoauthorityorjurisdictionto gointothematterorexamineitscorrectness.Theallegationsinthe complaintwillhavetobeacceptedinthefaceofitandthetruthor falsitycannotbeenteredintobytheCourtatthisstage."Havingsaid so,theHighCourtproceededtodoexactlytheopposite."

18. Itisstatedbythelearnedcounselfortherespondentsthatinthecomplaintfiled bytherespondentNo.1,thenoticeunderSection251Cr.P.C.hasnotyetbeen framed.Therefore,thepetitionershaveanalternateandefficaciousremedyavailable tothemtourgethepleastakenhereinbeforetrialcourtatthetimeofframingof noticeunderSection251Cr.P.C.Thereforeatthisstage,thepetitionsareliabletobe dismissed as the petitioners have failed to take all reasonable steps to secure compliancebytheCompanyasrespectsanyaccountslaidbeforeit,ingeneral meetingwiththeprovisionsoftheSectionastothematterstobestatedinthe accountsbythepersonconcernedisundoubtedlyanoffencepunishableunder Section211(7)oftheActanditispunishablewithimprisonmentforatermwhich mayextendtosixmonthsorwithfineorwithboth.Acomplaintinrespectofsuchan offencehastobefiledwithinoneyearasperSection468(2)(b)oftheCr.P.C.

19. . It is true and it has been rightly held by the Supreme Court in Iridium India Telecom (supra) which merely lays down the general and well settled principlethatthecomplainthastobeexaminedinitsentirety,onthebasisof allegationsmadethereinandthetruthorfalsityoftheallegationsinthecomplaint cannotbeenteredatthestageofSection482Cr.P.C.Inthepresentcase,aspointed outinthewrittensubmissionsfiledbythepetitionerson19thAugust,2015,thatin thecomplaintthereisnotevenabareallegationthatCompanyhadcapitalized interestonborrowing,aspartofthecostofitsassets,orthattheCompanyhad self-createdsoftwares,overandabovethepurchasedsoftwares.Intheabsenceof thebareallegations,evenifthecomplaintisreadasawholeanditscontentsare assumedtobetrue,notenableallegationofcommissionofoffencecanbesaidto have been made out against the Company or the petitioners. In the said circumstances,IridiumIndiaTelecom(supra)alsohasnoapplicationinthepresent case.

20. . Thequashingofacomplaintispermissiblewheretheallegationsmadein the complaint, even if they are taken at their face value and accepted in their entiretydonotprimafacieconstituteanyoffenceormakeoutacaseagainstthe accused.Thequashingofacomplaintispermissibleifthereisanexpresslegal bar engrafted in any of the provisions of the Cr.P.C. to the institution and continuance of theproceedings.

Scope of Interference

21. ThescopeofSection482Cr.P.C.hasbeendiscussedinvariouscasesincluding

thecaseofStateofBiharv.MuradAliKhan,reportedinMANU/SC/0470/1988:AIR 1989SC1wheretheSupremeCourtheldasunder:-

> "ItistritejurisdictionunderSection482Cr.P.C.whichsavestheinherent poweroftheHighcourt,tomakesuchordersasmaybenecessarytoprevent abuseoftheprocessofanyCourtorotherwisetosecuretheendsofjustice, hastobeexercisedsparinglyandwithcircumspection.Inexercisingthat jurisdictiontheHighCourtwouldnotembarkuponanenquirywhetherthe allegationsinthecomplaintarelikelytobeestablishedbyevidenceornot. ThatisthefunctionofthetrialMagistratewhentheevidencecomesbefore him.Thoughitisneitherpossiblenoradvisabletolaydownanyinflexible rulestoregulatethatjurisdiction,onething,however,appearsclearanditis thatwhentheHighCourtiscalledupontoexercisethisjurisdictiontoquash aproceedingatthestageoftheMagistratetakingcognizanceofanoffence theHighCourtisguidedbytheallegations,whetherthoseallegations,set outinthecomplaintorthecharge-sheet,donotinlawconstituteorspellout any offence and that resort to criminal proceedings would, in the circumstances,amounttoanabuseoftheprocessoftheCourtornot."

22. InthecaseofZanduPharmaceuticalWorksLtd.&Ors.v.Mohd.SharafulHaque &Anr.,reportedinMANU/SC/0932/2004:(2005)1SCC122,theSupremeCourt heldthattheremaynotbeanystraightjacketformulaforexercisingpowerunder Section482Cr.P.C.butthesamehastobeexercisedsparinglyandinrarestofrare cases.SimilarviewwastakenbytheSupremeCourtinthecaseofPopularMuthiahv. StaterepresentedbyInspectorofPolice,reportedinMANU/SC/8399/2006:(2006)7 SCC296.

23. Thus,itistobeexaminedastowhetheronthefaceofthecomplaintanyoffence ismadeoutorthecomplaintfiledbytherespondentsistimebarredornot,ifthe answerisyes,thentheCourtisempoweredtointerferewith,otherwiseno.

24. . Normally, while exercising the discretion, the High Court should not interfere,unlessitisfoundfromtheimpugnedorderpassedbythetrialCourt thatitisaperverseorderand againstthelawthentheCourtisempowered to quashthesummoningorderasperlawlaiddownbytheSupremeCourtandHigh Courts from time totime.

The Supreme Court in State of Karnataka v. L. Muniswamy and Others MANU/SC/0143/1977 : AIR 1977 SC 1489, observed as under:-

> "Inthe,exerciseofthiswholesomepower,theHighCourtisentitledto quashaproceedingifitcomestotheconclusionthatallowingtheproceeding tocontinuewouldbeanabuseoftheprocessoftheCourtorthattheendsof justicerequirethattheproceedingoughttobequashed.Thesavingofthe HighCourt'sinherentpowers,bothincivilandcriminalmatters,isdesigned toachieveasalutarypublicpurposewhichisthatacourtproceedingought nottobepermittedtodegenerateintoweaponofharassmentorpersecution. Inacriminalcase,theveiledobjectbehindalameprosecution,thevery natureofthematerialonwhichthestructureoftheprosecutionrestsandthe likewouldjustifytheHighCourtinquashingtheproceedingintheinterestof justice.Theendsofjusticearehigherthanthe,endsofmerelawthough justicehasgottobeadministeredaccordingtolawsmadebythelegislature. The compelling necessity for making these observations is that withouta

properrealizationoftheobjectandpurposeoftheprovisionwhichseeksto savetheinherentpowersoftheHighCourttodojusticebetweentheState anditssubjects,itwouldbeimpossibletoappreciatethewidthandcontours of that salientjurisdiction."

25. InthecaseofStateofHaryanav.BhajanLal,MANU/SC/0115/1992:1992(2) Supp(1)SCC335whereinitwasheldthat:-

"102. In the backdrop.....

"(1) where the allegations made in the FirstInformation Report or the Complaint,eveniftheyaretakenattheirfacevalueandacceptedintheir entiretydonotprimafacieconstituteanyoffenceormakeoutacaseagainst theaccused."

(2) ...

(3) ...

(4) ...

(5) ...

(6).Wherethereisanexpresslegalbarengraftedinanyoftheprovisionsof the Code or the concerned Act (under which a criminal proceeding is instituted)totheinstitutionandcontinuanceoftheproceedingsand/or where there is a specific provision in the Code or the concerned Act, providingefficaciousredressforthegrievanceoftheaggrievedparty."

26. LearnedSeniorcounselhasarguedthatthepetitionerinthepresentcaseisnot disputinganyfact.Inthepresentcasethecomplainttakenonitsfacevalueand assumingeveryallegationthereintobetrue,isnotonlybarredbylimitationbutalso nooffenceismadeoutinthecomplaintagainstthepetitionersandthereforesince therearenodisputedquestionsoffactinvolvedinthepresentcase,theaforesaid decisionofManjitJaju(supra)hasnoapplicationinthepresentcase.

27. Hismainargumentisthattheissuesraisedbythepetitionersdonotgiveriseto anydisputedfacts,eitherwithrespecttolimitationorinrespectofwhetherany breach of any Accounting Standards could possibly be alleged to have been committedbyCompany.Consequently,thesaidjudgmentiswhollyirrelevantand inapplicableinthepresentcase.Similarly,thejudgmentofthisCourtinAjayJain (supra)laysdownthatdisputedquestionsoffactcannotbedecidedbythisCourt. Forthereasonsalreadyexplained,thisjudgmentisalsoirrelevantinthepresent case.

28. Thereisareasonbehindthesaidlogicaboutthescopeofinterferenceof summoningorderwhileexercisingthepowervestedwiththeHighCourtunder Section482Cr.P.C.,asitissettledlawthatsummoningofanaccusedinacriminal casesisaseriousmatter.Criminallawcannotbesetintomotionasamatterof course.Itisnotthatthecomplainanthastobringonlytwowitnessestosupporthis allegationsinthecomplainttohavethecriminallawsetintomotion.Theorderofthe Magistratesummoningtheaccusedmustreflectthathehasappliedhismindtothe factsofthecaseandthelawapplicablethereto.Hehastoexaminethenatureof allegationsmadeinthecomplaintandtheevidencebothoral anddocumentaryin

supportthereofandwouldthatbesufficientforthecomplainanttosucceedin bringingchargehometotheaccused.ItisnotthattheMagistrateisasilentspectator atthetimeofrecordingofpreliminaryevidencebeforesummoningoftheaccused. TheMagistratehastocarefullyscrutinisetheevidencebroughtonrecordandmay evenhimselfputquestionstothecomplainantandhiswitnessestoelicitanswersto findoutthetruthfulnessoftheallegationsorotherwiseandthenexamineifany offenceisprimafaciecommittedbyalloranyoftheaccused.Relianceisplacedon Pepsi Food Ltd. and Another v.Special Judicial Magistrate and Others, MANU/SC/1090/1998:(1998)5SupremeCourtCases749.

29. TheAS-16requiresthatwhereacompanyhastakenaloanforacquiringanasset andhascapitalizedtheinterestontheloaninthecostoftheasset,thentheamount ofsuchinterestmustbeshownseparatelyinthebooksofaccounts.Inthepresent case,theCompanynevertookanyloantoacquireanyassetandtherefore,never capitalizedanyinterest.Therefore,thereisnorequirementfortheCompanyto comply withAS-16.

TheAS-26requiresthatwhereacompanyownspurchasedsoftwareaswellasself-createdsoftware,suchself-createdsoftwaremustbeshownseparately.Inthe presentcase,theCompanyhadnoself-createdsoftwareand,therefore,noquestion arisesofshowingthesameseparatelyorofcomplyingwithAS-26atall.

30 . It is submitted by the learned Senior counsel appearing on behalf ofthe petitioners that no interest was capitalized during the relevant period under consideration,therefore,theveryquestionofdisclosureofthesamedoesnotarisein thefirstplace.Theinterestonmoneyborrowedhasbeenrecognizedasrevenue expenditure.The"borrowingcostsarecapitalizedaspartofthecostofaqualifying asset",butsinceinthepresentcasetherewasnoqualifyingassetthatexistedinthe balancesheetswithinthetermsofAS-16,hencethequestionofcapitalizingthe borrowingcostsdidnotarise.Itisalsosubmittedthattheentireamountofinterest incurredhasbeenallowedasrevenueexpenditurebytheincometaxauthorities.

Regardingtheallegationofnon-disclosureofcertainclassesofintangibleassets,the onlyclassofintangibleassetthattheCompanyhadwas'computersoftware'andthe samehasbeenseparatelydisclosedintheFixedAssetsschedulealongwiththe depreciation/amortizationrateandalsothedepreciationmethodusedasapartofthe notestoaccounts;attachedtotheBalanceSheetdisclosingthefactinaccordance withthePara90oftheAS-26.TheCompanydoesnothaveanyself/internally generated intangibleassets.

Theparticularsprovidedinrelationtothesoftwarearesameasthatoftheother companieswhichusecomputersoftwareasintangibleassetsprovideintheirbalance sheets.Thereisnothingextraordinaryabouttheir Company'sapproachinthisregard. Therefore,therespondentshaveactedinadiscriminatorymanneragainstthe petitioners.

31. Inpara8ofthecomplaintitismentionedthattheshowcausenoticesdated17th June,2014and21stAugust,2014wereissuedbytherespondentNo.1tothe Company.Thecomplaintdoesnotdisclosethefateofsuchshowcausenotices.The Companyrespondedtotheshowcausenotices.Itisalsorelevanttomentionthatthe Companyvideitsletterdated13thAugust,2014andanotherletterdated16th September,2014explainedindetailastohowandwhynooffenceismadeoutatall and also requested the respondent No. 1 to grant an opportunity forpersonal

hearing,butthesamelettershaveneitherbeendealtwithnordisclosedbythe respondentNo.1inthesaidcomplaint.Thepersonalhearing,ifhadbeengrantedto theCompany,wouldhaveprovidedanopportunitytoexplaintheperceptional differenceandwouldnothavenecessitatedfilingoftheinstantcomplaint.The Company was however, not grantedany opportunity of hearing and the complaint wasfiledon18thSeptember,2014longafteritslimitationperiodexpired.Italso bearsnotingthatsuchshowcausenoticeswereissuedon17thJune,2014and21st August,2014i.e.afteradministrativeinstructionsweregrantedforfilingcomplaints on2ndJune,2014.ThemannerinwhichtherespondentNo.1hasconducteditselfis arbitrary and unreasonable. Admittedly, the complaint is based on the inspection reportwhichwasindisputablyfiledon24thJune,2013andthesamebeingthedate ofknowledgeoftheoffence,thelimitationperiodforfilingofthecomplaintexpired on23rdJune,2014.Thecomplainthavingbeenfiledon18thSeptember,2014is clearly time-barred, therefore, the consequent summoning and the proceedings commencedtherebyareliabletobequashed.

32. InreplytotheletterInspectingOfficerdated22ndMay,2013the Companyinitsreplydated18thJune,2013haspointedoutthatithadnocapitalized interestonloansnoranyself-createdsoftwareandtherefore,thesaidAS-16andAS-26hadnoapplicationatall.ItwasnotedintheInspectionReportbutnotdealtwith orcommenteduponatall.InthecommentsoftheInspectionOfficer,itwouldrepeat thatthereplyoftheCompanywasconsideredtobesatisfactory,hencenoactionwas proposedtobetakenforthesaidallegedviolation.

33. Thelearnedcounselforthepetitionersinthematterssubmitsthatthecomplaint doesnotcontainanyallegationwhatsoever,eitherthatthepetitionershadcapitalized interestinthecostofitsassetsorthatthepetitionershadanyself-createdsoftware. Intheabsenceofthesespecificallegations,thecomplaintdoesnotmakeoutany caseatallagainstthepetitionersofthesaidBalanceSheetsbeinginviolationofthe AS-16andAS-26.Eventheplearaisedbythecompanyhasnotbeenspecially referredinthecomplaintsothatthetrialcourtwhileissuingthesummonorders oughttohaveexaminedthedefenceofthepetitioners.Merely,thesamewasfiledas annexures.Theimpugnedorderdoesnotrevealordiscussesthesaidaspect.

34. Theobjectionsarealsoraisedonbehalfofthepetitionersthatinthesummoning orderdated18thSeptember,2014theACMMtookcognizanceoftheoffencesupona bareperusalofdocumentsfiledbytherespondentNo.1whicharenotadmissiblein evidence. The documentsatAnnexure-I, Annexure-II and Annexure-III to the complaintarenotthedocumentswhichcouldhavebeentakencognizanceof,since the same are not admissible in evidence (even for conducting pre summoning evidence)underSection610(3)oftheActand/orSection399(3)oftheAct,2013, sincethesaiddocumentshavenotbeencertifiedbytheRegistraroranyoneso empowered under theAct.

35. Theotherissueraisedbythepetitionersisthatthecomplaintisbarredby limitation.UnderSection469(1)(b)readwithSection468Cr.P.C.,thecomplainthad tobefiledwithinoneyearofthedateonwhichtheoffencecametotheknowledgeof thecomplainant,theRegistrarofCompanies.Para3ofthecomplaintexpressly mentionsthatthecomplaintisbasedontheinspectionreportoftheAssistant Director(Inspection).

36. TheInspectionReportwasadmittedlyreceivedbytheRegistrarofCompanieson 24thJune,2013.Thus,theRegistrarofCompaniesbecameawareofthealleged

offenceon24thJune,2013andthecomplaintifanyoughttohavebeenfiledonor before 23rd June,2014.

37. Thecomplaintwasfiledon18thSeptember,2014.Itisonthefaceofitbarred bylimitation.Thefollowingdecisionsarereferredbythelearned Seniorcounselfor thepetitioners:

a. Nalco&orsv.RegistrarofCompanies,MANU/OR/0181/2003:96(2003) CLT592ithasbeenheldasunder:-

> "14....theknowledgeoftheRegistrarofCompaniescanbeattributed asonthedatewhentheinspectingOfficeroninspectionfoundthe anomalies and the Regional Director asked the Company to clarify theanomaly...."

b. R.Aghoramurthy,RegistrarofCompanies,Bombayv.M/s.BombayDyeing &Mfg.Co.Ltd.andOthers.CriminalAppealNo.585of1990JT1991(5)SC 432ithasbeenheldinpara10that"dateofknowledgeshouldbetakenfrom thedateofreceiptofthereport".

c. WebcityInfosysLtd.v.RegistrarofCompanies(DelhiandHaryana), MANU/DE/8660/2007:2007(98)DRJ710ithasbeenheldasunder:-

> "15.Beforeconcluding,asubmissionmadewhenjudgmentwas being dictated may be noted. The submission was by learned Counsel for the respondent. It was urged that limitationwould commencewitheffectfromthedateRegionalDirectoraccorded permissionforfilingofthecomplaint.
>
> "16.Iamafraid,thesubmissionisbasedonacompleteignoranceof law.Limitationhastocommencewhenactionableknowledgeis gainedbythecompetentauthority.Intheinstantcase,itmaybe notedthattheinspectionswerecompletedandreportswereavailable withtheRegionalDirector,NorthernRegion,Kanpurbytheendof December2000."

38. InthesummoningorderoftheMagistratewhoacceptedtheavermentsmadein thecomplaintthatthe"complaintiswithinlimitationastheoffenceallegedagainst theaccusediscontinuinginnature".Thus,evenaccordingtothecomplainantandthe Magistrate, the complaint would be time-barred if it is found that it is not a "continuingoffence".Mr.Ganesh,Seniorcounselarguedthatthefindingofthetrial courtinthesummoningorderisnotsustainableinviewofwell-settledlaw.No reasonsareassignedbythetrialcourt.Onceonthefaceofthecomplaint,itistime barred,thesummoningorderswouldnothavebeenpassed.Thetrialcourtby ignoringthelawhaspassedtheimpugnedorder.

39. ItisarguedonbehalfoftherespondentNo.1thatasperSection209A(6)ofthe Act,thereportoftheinspectorhastobemandatorilysenttotheCentralGovt.The CentralGovernmentmayacceptthereportoftheInspectorandorderthatthe prosecutionbefiledagainstthe"officerinDefault"ormayrejectthefindingsofthe Inspectionreport.Thus,itisonlywhentheCentralGovt.passesanorderoraccords itspermissiontofileprosecution,theperiodoflimitationwouldstart.Moreover,the defaultcontinuedwithoutbeingrectifiedi.e.theoffencewasacontinuingoneand notbarredbylimitation.Pertainingtolimitationincontinuingoffences,learned

counsel appearing on behalf of the respondents have referred the following decisions:-

ii) InUdaiShankarAwasthivs.StateofU.P.&Anr.MANU/SC/0018/2013:(2013)2SCC435ithasbeenheldasunder:-

> "10. Section 472 Cr.P.C. provides that in case of a continuing offence,afreshperiodoflimitationbeginstorunateverymoment of the time period during which the offence continues. The expression,'continuingoffence'hasnotbeendefinedintheCr.P.C. becauseitisoneofthoseexpressionswhichdoesnothaveafixed connotation,andtherefore,theformulaofuniversalapplication cannotbeformulatedinthisrespect."

iii) InBalakrishnaSavalramPujariWaghmare&Ors.VShreeDnyaneshwar MaharajSansthan&Ors.,MANU/SC/0174/1959:AIR1959SC798,this Court dealt with the aforementioned issue, and observed that a continuing offenceisanactwhichcreatesacontinuingsourceofinjury,andrendersthe doeroftheactresponsibleandliableforthecontinuationofthesaidinjury. In case a wrongful act causes an injurywhich is complete, there is no continuingwrongeventhoughthedamageresultingfromthesaidactmay continue.Ifthewrongfulactisofsuchacharacterthattheinjurycausedby itself continues, then the said act constitutes a continuing wrong. The distinctionbetweenthetwowrongsthereforedepends,upontheeffectofthe injury.Inthesaidcase,thecourtdealtwithacaseofawrongfulactof forcibleouster,andheldthattheresultinginjurycaused,wascompleteatthe dateoftheousteritselfandthereforetherewasnoscopefortheapplication ofSection23oftheLimitationActinrelationtothesaidcase.

iv) InGokakPatelVolkartLtd.v.DundayyaGurushiddaiahHiremath&Ors., MANU/SC/0535/1991:(1991)2SCC141,thisCourtdealtwiththeissueand held asunder:

> "AccordingtotheBlacks'LawDictionary,FifthEdition,'Continuing' means'enduring;notterminatedbyasingleactorfact;subsisting foradefiniteperiodorintendedtocoverorapplytosuccessive similarobligationsoroccurrences.'Continuingoffencemeans'type ofcrimewhichiscommittedoveraspanoftime.'Astoperiodof statute of limitation in a continuing offence, the last act of the offencecontrolsforcommencementoftheperiod.'Acontinuing offence,suchthatonlythelastactthereofwithintheperiodofthe statute of limitations need be alleged in the indictment or information,isonewhichmayconsistofseparateactsoracourseof conductbutwhicharisesfromthatsinglenessofthought,purposeor action which may be deemed a single impulse.' So also a 'ContinuousCrime'means"oneconsistingofacontinuousseriesof acts, which endures after the period of consummation, as, the offenceofcarryingconcealedweapons.Inthecaseofinstantaneous crimes, the statute of limitation begins to run with the consummation,whileinthecaseofcontinuouscrimesitonlybegins withthecessationofthecriminalconductoract."

Whiledeciding thecaseinGokak Patel Volkart Ltd. (supra), this Courtplaced

relianceuponitsearlierjudgmentinStateofBiharv.DeokaranNenshi&Anr., MANU/SC/0469/1972:AIR1973SC908,whereinthecourtwhile dealingwiththecaseofcontinuanceofanoffencehasheldasunder:

> "Acontinuingoffenceisonewhichissusceptibleofcontinuanceand isdistinguishablefromtheonewhichiscommittedonceandforall. Itisoneofthoseoffenceswhicharisesoutofafailuretoobeyor complywitharuleoritsrequirementandwhichinvolvesapenalty, theliabilityforwhichcontinuesuntiltheruleoritsrequirementis obeyedorcompliedwith.Oneveryoccasionthatsuchdisobedience or non-compliance occurs and recurs, there is the offence committed.Thedistinctionbetweenthetwokindsofoffencesis betweenanactoromissionwhichconstitutesanoffenceonceand for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues.Inthecaseofacontinuingoffence,thereisthusthe ingredientofcontinuanceoftheoffencewhichisabsentinthecase of an offence which takes place when an act or omission is committedonceandforall."ReliancebealsoplacedonBhagirath Kanoria&Ors.v.StateofM.P.,MANU/SC/0338/1984:AIR1984SC 1688; and Amrit Lal Chum v. Devoprasad Dutta Roy, MANU/SC/0587/1988:AIR1988SC733.

v) InM/s.RaymondLimited&Anr.,v.MadhyaPradeshElectricityBoard&Ors., MANU/SC/0702/2000:AIR2001SC238,thisCourtheldthatitcannot legitimatelybecontendedthattheword"continuously"hasonedefinite meaningonlytoconveyuninterruptednessintimesequenceoressenceand ontheotherhandtheverywordwouldalsomean'recurringatrepeated intervalssoastobeofrepeatedoccurrence'.Thatapart,usedasanadjective itdrawscolourfromthecontexttoo.

vi) InSankarDastidarv.Smt.BanjulaDastidar&Anr.,MANU/SC/8738/2006 :AIR2007SC514,thisCourtobservedasunder:"Asuitfordamages,inour opinion,standsonadifferentfootingvis-a-visacontinuouswronginrespect ofenjoymentofone'srightinaproperty.Whenarightofwayisclaimed whetherpublicorprivateoveracertainlandoverwhichthetort-teaser;has norightofpossession,thebreacheswouldbecontinuingone.Itis,however, indisputablethatunlessthewrongisacontinuingone,periodoflimitation doesnotstoprunning.Oncetheperiodbeginstorun,itdoesnotstopexcept wheretheprovisionsofSection22oftheLimitationActwouldapply."The Courtfurtherheldthat:"Articles68,69and91oftheLimitationActgovern suitsinrespectofmovableproperty.Forspecificmovablepropertylostor acquiredbytheft,ordishonestmisappropriationorconversion;knowledgeas regardspossessionofthepartyshallbethestartingpointoflimitationin termsofArticle68.Foranyotherspecificmovableproperty,thetimefrom whichtheperiodbeginstorunwouldbewhenthepropertyiswrongfully taken,intermsofArticle69.Article91providesforaperiodoflimitation,in respect of a suit for compensation for wrongfully taking or injuring or wrongfullydetaininganyotherspecificmovableproperty.Thetimefrom whichtheperiodbeginstorunwouldbewhenthepropertyiswrongfully takenorinjuredorwhenthedetainer'spossessionbecomesunlawful."

40. Byreferringthesecases,learnedcounselfortherespondentssubmitsthatinthe

caseofacontinuingoffence,theingredientsoftheoffencecontinue,i.e.endureeven aftertheperiodofconsummation,whereasinaninstantaneousoffence,theoffence takesplaceonceandforalli.e.whenthesameactuallytakesplace.

41. Hisfurthercontentionisthatthetrialcourtprimafacierealreadygaveitsopinion thattheoffencewasacontinuingoneand,therefore,thebaroflimitationwasnot attracted.

42. Theissueastowhatwouldbethestartingpointofthelimitationinthecases filedbytheRegistrarofCompanies,theHighCourtofKarnatakainthematterof RegistrarofCompanies,Karnatakav.FairgrowthAgenciesLimitedCrl.Rev.P.Nos. 710and711to715/2000decidedon12thApril,2006whilerelyingonthejudgment ofStateofRajasthanv.SanjayKumar,MANU/SC/0335/1998:1998(5)SCC82has held asunder:

> "InacaseregisteredontheComplaintlodgedbytheRegistrarofCompanies inrespectofanoffenceagainsttheCompaniesAct,onehastoconsiderthe dateonwhichsuchoffencecametohisknowledge.Inonecase,itmaybe thattheRegistrarmayhavecometoknowabouttheoffenceonthedate whentheInspectingOfficerdetectsthecontraventionoftheAct.Inanother casehemaynotbeawareofOffenceuntilareportismadebytheInspecting Officertohim.Determinationofthisdateofknowledgeoftheregistrar dependsonfactsofeachcase.Incaseswheretheinspectionofbooksof AccountsandotherBooksoftheCompanyisdoneunderClause(ii)ofthe Section209-A(1)oftheCompaniesAct,areportoftheInspectionwillhave tobemadetotheCentralGovernmentundersub-section(6)ofSection209- AoftheCompaniesActandtheRegistrarofCompaniesmaycometoknow aboutthecommissionofsuchoffenceagainsttheCompaniesActonlywhen hereceivesacommunicationfromtheconcernedofficeroftheDeportmentof Company Affairs. In such cases, the date on which he receives a communicationfromtheConcernedOfficerofDepartmentoftheCompany Affairs.Insuchcases,thedateonwhichhereceivescommunicationinthis regardwillhavetobetakenasthestartingpointforlimitationundersection 469(1)(b)oftheCodeofCriminalProcedure."

43. . The next explanation given by the respondents on the issue of delay in the Counter-affidavit is that the Registrar of Companies received instructions onasubsequentdatefromtheMinistryofCompanyAffairstofilethecomplaint.

44. Reliancehasbeenplacedonthefollowingjudgmentswhereinithasbeenheldby thisCourttobeirrelevantandimmaterial:-

a. WebcityInfosysLtd.VsRegistrarofCcompanies(DelhiandHaryana) (supra);

> **15.**Beforeconcluding,asubmissionmadewhenjudgmentwas being dictated may be noted. The submission was by learned Counsel for the respondent. It was urged that limitationwould commencewitheffectfromthedateRegionalDirectoraccorded permissionforfilingofthecomplaint.
>
> "16.Iamafraid,thesubmissionisbasedonacompleteignoranceof law.Limitationhastocommencewhenactionableknowledgeis gainedbythecompetentauthority.Intheinstantcase,itmaybe

notedthattheinspectionswerecompletedandreportswereavailable withtheRegionalDirector,NorthernRegion,Kanpurbytheendof December2000"

b. N. Kumar Vs. M.O. Roy, Assistant Director, Serious Fraud Investigation Office, Ministry of Company Affairs, Government of India MANU/TN/1368/2007:2007(3)CTC650"49.Thereisnoprovisionunder theActcontemplatingpriorsanctionforprosecutionofthecompaniesunder Section207oftheActandassuchthecomplainantcannottakeshelterunder theguiseofobtainingsanctionforthepurposeofcomputingtheperiodof limitation...."

45. . Thus,thetimeperiodtakenbytheRegionalDirectortotakethedecision to direct the Registrar of Companies to launch prosecution cannot be excluded for thepurposeofcomputingtheperiodoflimitationasboththeRegionalDirector,i.e.theCen tralGovernmentaswellastheRegistrarofCompanieswascompetentto launchprosecutiononcetheyhadknowledgeofthecommissionoftheoffencesas on24thJune,2013,i.e.whentheinspectionreportswerefiledwitheitherofthem. Since for the offences under Section 211(7), 211(3A), (3B) and (3C) of the Act,noconsent/sanctionforprosecutionfromtheCentralGovernmentisrequired. Section470(3)Cr.P.C.cannotberelieduponbytherespondents.

46. TherelevantpartofSection469(1)Cr.P.C.relatingtothecommencementofthe period of limitation is asfollows:

"Commencementoftheperiodoflimitation.--(1)Theperiodoflimitation,in relation to an offender, shallcommence,--

(a) onthedateoftheoffence;or

(b) wherethecommissionoftheoffencewasnotknowntothe personaggrievedbytheoffenceortoanypoliceofficer,thefirstday onwhichsuchoffencecomestotheknowledgeofsuchpersonorto anypoliceofficer,whicheverisearlier:or

(c) whereitisnotknownbywhomtheoffencewascommitted,the firstdayonwhichtheidentityoftheoffenderisknowntotheperson aggrievedbytheoffenceortothepoliceofficermakinginvestigation intotheoffence,whicheverisearlier."

47. Admittedly,Section211oftheActispunishablewithsixmonthsimprisonment andfine.UnderSection468Cr.P.C.-noCourtshalltakecognizanceofanoffence punishablewithimprisonmentforatermnotexceedingoneyearfromthedateof offenceorthedateofknowledgeoftheoffence.Admittedly,theInspectorsubmitted hisinspectionreporton24thJune,2013andthesaidcomplaintwasonlyfiledon 18thSeptember,2014,aftertheexpiryofayearfromthedateofknowledgeofthe offenceasprovidedunderSection468(2)(b)Cr.P.C.

48 . It is not mentioned in Section 211(7) of the Act rendering the offence a continuingoneandtheoffenceiscompletewiththefailuretotakeallreasonable stepstosecurecompliancesrespectsanyaccountlaidbeforethecompanyandsuch anoffenceiscommittedonceandforallasandwhenonecommitsthedefaultand theSectiondoesnotlaydownthatthepersonconcernedwouldbeguiltyofan offenceifhecontinuestocarryonwithoutcomplianceorthattheoffencecontinues

untiltherequirementiscompliedwith.TheoffenceunderSection211(7)oftheActis notinthenatureofacontinuingoffencesincetheingredientofcontinuanceofthe offenceisabsentunlikeinSections113,162and168oftheAct.

49. Under Section 621of the Act, both the RegionalDirector,i.e. the Central Government as well as the Registrar of Companies are competent to file the complaint:

> a. N. Kumar Vs. M.O. Roy, Assistant Director, Serious Fraud Investigation Office,MinistryofCompanyAffairs,GovernmentofIndia(supra)"49.There isnoprovisionundertheActcontemplatingpriorsanctionforprosecutionof thecompaniesunderSection207oftheActandassuchthecomplainant cannottakeshelterunderthe guiseofobtainingsanctionforthepurposeof computing the period oflimitation...."

50 . For the computation of the period of limitation the respondents have placed reliance on Registrar of Companies, Karnataka v. M/s. Fairgrowth Agencies Limited,(supra).Thesaidcasecanbedistinguishedfromthepresentcaseasinthe present case, both the Central Government as well as the Registrar of Companieshadknowledgeoftheoffenceon24thJune,2013whentheDirector (InspectionandInvestigation)submitteditsreport.AsperSection621oftheAct, cognizanceofanyoffence,againsttheCompanycanbetakenonthecomplaint in writing of the Registrar, or of a shareholder of the company, or of a person authorized by the Central Government in that behalf, both the Central GovernmentaswellastheRegistrarofCompanieswerecompetenttoprosecute theCompanyascontemplatedunderSection621(1)oftheAct,butinsteadthey slept over it and the complaint was filed by the Respondents only on 18th September,2014whichwasbeyondtheprescribedperiodoflimitation.

InresponsetothesamethepetitionershaveplacedrelianceonWebcityInfosysLtd. Vs.RegistrarofCompanies(DelhiandHaryana)(supra)whereinithasbeenheldby theCourtthat"Limitationhastocommencewhenactionableknowledgeisgainedby thecompetentauthority".TheCompetentAuthorityinthepresentcaseincludesthe ROCandadmittedlyactionableknowledgewasgainedbytheROCon24thJune,2013 whentheDirector(Inspection&Investigation)submitteditsreporttoboththeRegionalDirector(CentralGovernment)aswellastheROC.

51. RespondentshavealsoplacedrelianceonUdaiShankarAwasthi.(supra)wherein the Supreme Court heldthat:-

> "29.....thelawontheissuecanbesummarisedtotheeffectthat,inthe caseofacontinuingoffence,theingredientsoftheoffencecontinue,i.e., endureevenaftertheperiodofconsummation,whereasinaninstantaneous offence,theoffencetakesplaceonceandforalli.e.whenthesameactually takesplace.Insuchcases,thereisnocontinuingoffence,eventhoughthe damageresultingfromtheinjurymayitselfcontinue....."

InUdaiShankarAwasthi(supra)Thisjudgmentmerelylaysdownthegeneral principleswithregardtocontinuingoffenceincontrastwithacompletedoffence.The saidjudgmentmerelyreiteratesthegeneralprinciples laiddowninjudgmentofState ofBiharvs.DeokaranNenshi,(supra)whichinfactisbeingrelieduponbythe petitioners.

Thereareanumberofjudgmentswhicharereferredtoandrelied inUdaiShankar

Awasthi(supra).However,allthesejudgmentsmerelyreiteratethegeneralprinciples relatingtocontinuingoffenceascontrastedwithcompletedoffence.However,none ofthesejudgmentsrefertoordealwithoffenceunderSection211ofActinrespect ofaBalanceSheetfiledbyacompany.

5 2. InRegistrarofCompanies,Karnatakav.M/s.FairgrowthAgenciesLimited, (supra)thesaidjudgmentdoesnotdealatallwiththeissueofcontinuingoffence versuscompletedoffence.Onthecontrary,thisjudgmentproceedsonthefooting thatanoffencerelatingtotheaccountsofacompanyisacompletedoffenceandnot continuing,undertheAct.Theonlyissueconsideredinthisjudgmentiswithregard toastartingpointoflimitation.Thisjudgmentonlylaysdownthatlimitationstarts fromthedatetheRegistrarcomestoknowoftheoffence.Butthedateofknowledge maydependoneachcase.Thisjudgmentstates"Inonecase,itmaybethatthe Registrarmayhavecometoknowabouttheoffenceonthedatewhentheinspecting OfficerdetectsthecontraventionoftheAct.Inanothercasehemaynotbeawareof Offenceuntilareportismadebytheinspectingofficertohim".Inthepresentcase there can be no doubt whatsoever that he Registrar of Companies, who isthe Complainantcametoknowoftheoffenceon24thJune,2013,whentheinspection reportwassubmittedtohimhasbeenfiledasAnnexureP-1readwithAnnexureP-9.

53. Thepetitionerdoesnotdisputetheaforesaidposition.Thesaidjudgmentrelies onStateofBiharvs.DeokaranNenshi,(supra)whichhasbeenquotedinparagraph No.26"Acontinuingoffenceisonewhichissusceptibleofcontinuanceandis distinguishablefromtheonewhichiscommittedonceandforall.Itisoneofthose offenceswhicharisesoutofafailuretoobeyorcomplywitharuleoritsrequirement andwhichinvolvesapenalty,theliabilityforwhichcontinuesuntiltheruleorits requirementisobeyedorcompliedwith.Oneveryoccasionthatsuchdisobedienceor non-compliance,occursandrecurs,thereistheoffencecommitted.Thedistinction betweenthetwokindsofoffencesisbetweenanactoromissionwhichconstitutesan offenceonceandforallandanactoromissionwhichcontinuesandtherefore constitutesafreshoffenceeverytimeoroccasiononwhichitcontinues.Inthecase ofacontinuingoffence,thereisthustheingredientofcontinuanceoftheoffence whichisabsentinthecaseofanoffencewhichtakesplacewhenanactoromission iscommittedonceandforall."DeokaranNenshi(supra)hasalsobeenfollowedin C.K. Ranganathan (supra) on which the petitioners place reliance.

54. Thesaidpleaofthepetitionersiscorrectinlawasanoffenceunder Section211 isnotacontinuingoffenceandiscompletethemomenttheBalanceSheetinquestion isissuedbytheCompanyunlikeoffencesunderSection113,162and168ofthe CompaniesAct,1956whicharecontinuinginnature.RelianceisplacedonC.K. Ranganathanv.RegistrarofCompanies-MANU/TN/0912/2001:2003(4)SCL500 (Mad) wherein itwas held as under-

> "13.SincetheoffenceunderSection211(7)oftheActisnotacontinuing one,thelearnedMagistrateoughtnottohavetakencognisanceofthe offenceinthepresentcaseaftertheexpiryoftheperiodoflimitationinview ofthebarunderSection468oftheCr.P.C.andtheproceedingsareliableto bequashed."

55. Asperthecomplaint,theRegionalDirectorbyhisletterdated2ndJune,2014 directedtherespondentNo.1tolodgeprosecution.However,despiteissuanceofthe said instruction, two show-cause notices dated 17th June, 2014 and 21st August, 2014wereissuedbytherespondentNo.1totheCompanyanditsvariousofficers.

Thesaidshow-causenoticesweredulyrepliedtoviderepliesdated5thAugust,2014 and1stSeptember,2014respectively.TheCompanyalsowrotealetterdated13th August,2014.Thereferenceofrepliesaswellastheletterdated1stSeptember, 2014doesnotevenfindamentioninthecomplaint.Theexplanationonlygivenby thecounselfortherespondentsisthatadmittedlycomplaintdonotmentionabout therepliesgivenbythepetitioners.However,thesameareannexedwithcomplaint.

5 6 . The offences in the present case are not continuing in nature, limitation commencedasperSection469(1)(b)Cr.P.C.whenactionableknowledgewasgained bythecompetentauthorityi.e.whentheRegistrarofCompanieshadknowledgeof thecommissionoftheallegedoffences,i.e.24thJune,2013whentheRegistrarof CompaniesreceivedthereportoftheInspectorandranouton23rdJune,2014and thus the complaint, which was admittedly filed on 18th September, 2014 was hopelesslybarredbylimitation.ThereisnoprovisionundertheActwherebyany consent/sanctionoftheCentralGovernmentisrequiredforprosecutionofthe offencesunderSection211(7),211(3A),(3B)and(3C)oftheAct.Thereforethe complainantcannottakeshelterofSection470(3)Cr.P.C.forexclusionofsuchtime takenbytheCentralGovernmenttogiveinstructionstotheRegistrarofCompanies.

57. Thecomplaintisbasedontheinspectionreportoftheofficer.Consequently,in thepresentcasethereisnoissueoffactatallwithregardtothedateofknowledge ofoffencetotheRegistrarofCompanies.Thecomplaintis,therefore,timebarred.

58. Theimpugnedsummoningordersandotherproceedingsemanatingfromthesaid ordersagainstthepetitionersareaccordinglyquashed.

59. Nocosts.