Meghalaya Steels Ltd. (M/s.) and Others Vs Commissioner of Income Tax

Court: Gauhati High Court

Date of Decision: April 8, 2013

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 47 Rule 1, Order 47 Rule 1, 100, 114, 151
Constitution of India, 1950 â€" Article 215
Income Tax Act, 1961 â€" Section 256(1), 80IB
Trade and Merchandise Marks Act, 1958 â€" Section 105

Citation: (2013) 4 GLT 254 : (2013) 358 ITR 551

Hon'ble Judges: Iqbal Ahmed Ansari, J; Anima Hazarika, J

Bench: Division Bench

Advocate: A.K. Bhattacharjee, Mr. R.K. Agarwalla, Mr. R. Goenka, Mr. U.K. Borthakur, Mr. A. Goenka and Mr. D.K. Bhattacharjee, for the Appellant; K.P. Pathak, Addl. Solicitor General and Mr. A. Hazarika, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Iqbal Ahmed Ansari, J.
Section 260 of the Income Tax Act, 1960, (in short, the IT Act) provides for appeal to the High Court from the

order passed, in an appeal, by an appellate Tribunal and prescribes the procedure subject to which an appeal can be admitted for hearing. This

apart, Section 260A also prescribes the procedure for disposal of an appeal if the High Court decides to admit the appeal. Whether an appeal,

made u/s 260A of the IT Act, can be heard unless the High Court is satisfied that the appeal has raised substantial question or questions of law? If

the High Court is satisfied that the appeal, made u/s 260A, has given rise to substantial question or questions of law, is it permissible, for the High

Court to hear the appeal without formulating substantial question or questions, which, according to the High Court, the appeal has raised? When

there is no statutory provision, in the IT Act, vesting the High Court with the power to review its decision rendered u/s 260A, is it permissible for

the High Court to review its order by taking resort to its inherent power or in exercise of its plenary jurisdiction, because the High Court is a Court

of record and the Court of record has a duty to keep, for posterity, its record correct, clear and in accordance with law, so far as, at least,

procedural aspect of hearing of appeal, u/s 260A, is concerned? When a review petition is pending in the High Court, which has passed the order

disposing of an appeal u/s 260A, whether it is possible by the other party to file SLP to the Supreme Court and if the special leave is allowed and

regular appeal comes into existence, will pendency of appeal, in the Supreme Court, render the review petition, invariably, incompetent and

infructuous or is there any situation, wherein the High Court can hear the review petition despite the fact that an appeal is pending in the Supreme

Court and if the review petition is allowed by the High Court, will the appeal, pending in the Supreme Court, become legally incompetent and

infructuous? Is there a difference between review of procedure resorted to by a court or tribunal, on the one hand, and a review on merit of an

order if the error of law is apparent on the face of the record, on the other? If so, what is the difference between the two? These are some of the

prominent questions, which have arisen for determination in these review petitions.

2. Considering the fact that all these five review petitions are based on same factual situation, the questions of law involved are same and, on the

request, made by the learned counsel for the parties, all these review petitions have been heard together, we take up all these five review petitions

for disposal by this common order.

3. We have accordingly heard Mr. A.K. Bhattacharjee, learned Senior counsel, for the review petitioner, in Review Petition No. 108/2010, and

Mr. R.K. Agarwalla, learned Senior counsel, for the review petitioners in Review Petition Nos. 116/2010, 117/2010, 119/2010 & 124/2010. We

have also heard Mr. K.P. Pathak, learned Additional Solicitor General of India, appearing on behalf of the opposite party in all the review

petitions.

3a. In their review petitions, the review petitioners have stated the background facts, which have led to the present review petitions.

BACKGROUND FACTS:

4. The chronology of events, as given in the review petitions, supported by affidavit and cause lists, in question, are reproduced below:

6. The aforesaid appeal preferred by the respondent being numbered as ITA 6/2010 was listed for motion on 09.08.2010, before the Division

Bench of this Court constituting of Hon''ble the Chief Justice and Hon''ble Mr. Justice Hrishikesh Roy of this Hon''ble Court as item No. 21 of the

Supplementary Cause List 1 of Part-I of the cause list for the day. The Hon''ble Court after hearing the learned counsel for the respondent passed

an order for issue of notice to be sent by registered A/D post returnable on 09.09.2010.

7. That subsequently on 09.09.2010, the matter was again listed for order before the Division Bench of this Hon''ble Court constituting of Hon''ble

the Chief Justice and Hon''ble Mrs. Justice Anima Hazarika as item No. 8 of the Part-I of the cause list for the day.

8. That this Hon''ble Court on 09.09.2010, heard the counsels of both the sides on the limited issue as to whether the case involved any substantial

questions of law, as set forth in the memorandum of appeal. While the learned counsels for the respondent contended that the substantial questions

of law did arise, the counsels for the review petitioner submitted that such questions did not arise out of the order of the Tribunal. Referring to the

concurrent finding of facts recorded by both the appellate authorities below, the counsels for the review petitioner submitted that there being no

question of perversity in such findings, no substantial question of law, as set form in the memorandum of appeal, arose out of the order of the

Tribunal, as the said authority correctly applied the settled positions of law on the factual matrix of the case.

9. That this Hon''ble Court after hearing the counsels on this limited issue on 09.09.2010, as to whether the case involved any substantial questions

of law, was satisfied that no substantial question of law, which was mentioned as question No. 2 in the memorandum of appeal, arose in respect of

Central Excise refund. However, this Hon''ble Court, on that day, reserved its view regarding question No. 1, as mentioned in the memorandum of

appeal, in respect of transport subsidy and interest subsidy receipts.

10. That on 16.09.2010, instead of listing the matter for order pronouncing formulation of the question framed for admission of the appeal, the

matter was instead listed for judgment before the Division Bench of this Hon''ble Court constituting of Hon''ble the Chief Justice and Hon''ble Mrs.

Justice Anima Hazarika, as item No. 2 of the supplementary cause list-1 of Part-I list for the day.

11. That the Hon''ble Court on 16.092010 was pleased to pronounce judgment/order dated 16.092010 finally disposing of the appeal itself. In

such judgment/order, this Hon''ble Court inter alia held that the substantial questions of law, as set forth in the memorandum of appeal, arose for

consideration out of the order appealed against passed by the Tribunal and answered the aforesaid question No. 1 in the negative, that is to say, in

favour of the respondent and against the review petitioner and answered the aforesaid question No. 2 in the affirmative, that is to say, in favour of

the petitioner and against the respondent. This Hon''ble Court passed the said judgment/order dated 16.092010 under category 10271 (Reference

u/s 256(1) of the Income Tax Act, 1961).

5. The respondents, it may be carefully noted, have not filed any counter affidavit and have not denied, disputed or controverted the chronology of

events, as have been set forth in their review petitions by the review petitioners. This apart, one of us (Hon''ble Mrs. A. Hazarika, J.), who was a

party to the judgment and order, dated 16.09.2010, recollects and recalls that the chronology of events, as have been set forth by the review

petitioners, in the review petitions, are correct.

6. There being, thus, no dispute, on affidavit, as regard the factual aspects leading to the present review petitions, we are, in essence, required to

determine if the judgment and order, dated 16.09.2010, needs to be reviewed.

SUBMISSIONS ON BEHALF OF REVIEW PETITIONERS:

7. Presenting the case on behalf of the review petitioners, Mr. A.K. Bhattacharjee, learned Senior counsel, drawing attention of this Court to

Section 260A, has pointed out that the scheme of disposal of an appeal, as envisaged by Section 260A, clearly shows that an appeal can be

heard, for the purpose of disposal, only after formulating the substantial question or questions of law, which, according to the Court, the appeal

involves. Without adhering to the mandatory procedure, as prescribed by Section 260A, the Court is not empowered, according to Mr.

Bhattacharjee, to decide an appeal.

8. Mr. Bhattacharjee has also submitted that a primary duty is cast by Section 260A on the appellant to mention, in his memorandum of appeal, as

to what substantial question or questions of law the appeal has raised and the High Court has the power to dismiss an appeal if it finds, without

even giving notice to the respondent, that no substantial question of law is involved.

9. The scheme, as embodied in Section 260A, clearly shows, contends Mr. Bhattacharjee, that the Court cannot proceed to hear an appeal on

merit until the time it is "satisfied" that the appeal involves substantial question or questions of law for adjudication; but this satisfaction, submits Mr.

Bhattacharjee, is not sufficient for hearing of the appeal inasmuch as it is a duty cast on the Court to, first, formulate the substantial question or

questions of law involved in a given appeal and, thereafter, to invite the parties to have their say in the matter.

10. As there is no bar, points out Mr. Bhattacharjee, in Section 260A, to the giving of notice to the respondent, in an appeal, before the appeal is

admitted for hearing, a respondent, pursuant to such a notice, shall have the right to satisfy the Court that no substantial question of law is involved

in the appeal and, hence, the appeal may not be admitted; or else, the purpose of giving of notice to the respondent, before the appeal is admitted,

would be meaningless and otiose.

11. Continuing his above trend of arguments, Mr. Bhattacharjee points out that upon receipt of the notice given to a respondent in an appeal,

before the appeal is admitted, the respondent, in order to satisfy the Court, that no substantial question of law is involved, may have to make his

submission on the merit of the appeal; but this submission, on merit, would be, contends Mr. Bhattacharjee, for the limited purpose of showing to

the Court that the substantial question of law, which the memorandum of appeal claims to have arisen, is not legally or factually correct and is,

therefore, untenable in law.

12. In support of his case that a High Court cannot hear an appeal u/s 260A without having formulated the substantial question or questions of law,

which, according to the High Court, the appeal has raised and that this requirement is mandatory in nature and that the High Court must adhere to

the procedure, which Section 260A prescribed, and if this procedure is not adhered to, the final order, passed in appeal, will not be sustainable,

Mr. Bhattacharjee places reliance on M. Janardhana Rao Vs. Joint Commissioner of Income Tax, ,

13. In the present case, points out Mr. Bhattacharjee, learned Senior counsel, the review petitioners, as respondents in the appeal, were given

notice before the appeal came up for admission and when the review petitioners were given the opportunity to have their say in resisting admission

of the appeal, the review petitioners were at liberty to make their submissions, even on merit, with, of course, the limited object of satisfying the

Court as to why or how the appeal can be said to have raised no substantial question of law for determination and this is precisely what was done

in the present case and, hence, in these circumstances, contends Mr. Bhattacharjee, if this Court found that the two substantial questions of law,

which the memorandum of appeal had mentioned, were the ones, which had really arisen for determination, then, it (Court) ought to have admitted

the appeal for hearing on the said two substantial questions of law and it was, thereafter, that the appeal could have been heard not on the basis of

the substantial questions of law, which the appellant had framed, but on the basis of the substantial questions of law, which the High Court would

have formulated.

14. The entire concept and scheme, as envisaged by Section 260A, according to Mr. Bhattacharjee, escaped the attention of this Court and this

Court fell into error in hearing both the parties to the appeal before the appeal was admitted and, then, disposing of the appeal without formulating

any substantial question of law for adjudication. This approach, humbly submits Mr. Bhattacharjee, was completely wrong inasmuch as the same is

wholly contrary to the scheme of hearing of an appeal u/s 260A.

15. It is noteworthy, submits Mr. Bhattacharjee, that at the stage of hearing of the present appeal on the question of its admission, this Court did

not even faintly indicate to the parties concerned that the appeal would be disposed of on the basis of the arguments advanced at the stage of

admission even though the Court had not formulated the substantial question of law, which this Court was required to formulate if this Court was

satisfied to have arisen in the appeal.

16. The error, which has so crept into the procedure of hearing of the appeal, submits Mr. Bhattacharjee, goes to the root of the entire concept of

Section 260A and the procedure laid down therein and this error, being an error involving procedure for disposal of appeal and this error being an

error apparent on the face of the record, needs to be corrected by this Court by recalling its judgment and order, dated 16.09.2010, and, then,

allowing the parties concerned to have their say on the substantial question or questions of law, which this Court may formulate for hearing.

17. In the case at hand, points out Mr. Bhattacharjee, though the questions have been formulated, in the judgment, this formulation of the questions

was subsequent to the hearing of the appeal for admission and this is, contends Mr. Bhattacharjee, wholly incorrect and untenable in law. Support

for this submission, too, is sought to be derived by Mr. Bhattacharjee from the case of M. Janardan Rao (supra).

18. Mr. Bhattacharjee, learned Senior counsel, also submits that though the review petitioners are conscious of the feet that there. is no provision,

in the IT Act, empowering the High Court to review its order, which the High Court may have made on hearing of an appeal u/s 260A, it is trite

that such a power is available to the High Court as a Court of record and, therefore, the High Court can, in a given case, review its order in

exercise of its plenary jurisdiction in order to keep its record correct and clean, for, the Court of record is meant for posterity and the High Court

cannot allow an illegal or incorrect order to remain on record, particularly, when the error is apparent on the face of the record and the error

relates to the procedure adopted by the High Court in hearing of the appeal and thereby causing miscarriage of justice.

19. An error, according to Mr. Bhattacharjee, which arose due to procedural misapprehension by the High Court or if the error is self-evident

error passed contrary to the fundamental judicial principle occasioning failure of justice, the High Court can, in exercise of its inherent power,

review its own order even though the statute may not have specifically conferred, on the High Court, the power of review.

20. In support of his above submissions, Mr. Bhattacharjee has placed reliance on Grindlays Bank Ltd. Vs. Central Government Industrial

Tribunal and Others, , India Carbon Ltd. Vs. Commissioner of Income Tax and Another, , and Commissioner of Income Tax Vs. M/s. Williamson

Tea (Assam) Ltd, (Misc. Case No. 1914 of 2010 in ITA 4 of 2012), too.

21. Otherwise, also, according to Mr. Bhattacharjee, every Court has the power to correct the order, which it has passed op wrong assumptions

or on being misled on facts or in misconception of law contained in that behalf. For this submission, Mr. Bhattacharjee seeks to derive support

from Lily Thomas, Vs. Union of India and Others, .

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

22. Resisting the review petitions, Mr. Pathak, learned Additional Solicitor General, has not disputed the scheme, which Section 260A envisages

for the purpose of hearing of an appeal and disposal thereof. What, however, Mr. Pathak submits is that in the case at hand, notice was given to

the review petitioners as respondents in the appeal and the learned counsel of the review petitioners appeared before this Court and argued the

appeal on merit citing decisions in their favour and that the assessee did not resist the appeal by citing any decisions that the substantial questions of

law, suggested in the memorandum of appeal, had not arisen in the appeal for determination. The review petitioners, according to Mr. Pathak,

argued the matter on merits being aware of the issues involved and the rival case.

23. Referring to the case of Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , Mr. Pathak submits that unless a statute

gives the power to review its order, no Court can review any of its orders in exercise of the Court''s inherent power and, hence, when the IT Act

has not provided the High Court with the power of review of an order made u/s 260, review of the presently impugned judgment and order is not

possible in exercise of the High Court''s inherent power or in exercise of High Court''s plenary jurisdiction. In support of his submissions, the

learned Additional Solicitor General relies upon not only Patel Narshi Thakershi (supra), but also on the decision, in Indian National Congress (I)

Vs. Institute of Social Welfare and Others, .

24. Referring to Lily Thomas (supra),the learned ASG submits that the case of Lily Thomas (supra) is not applicable to the fact situation of the

present case, when the review petitioners had already been heard, before a decision, which may have gone against them, came to be delivered. In

support of his submission that the High Court cannot review, in exercise of its inherent power, its order passed u/s 260A, the learned ASG also

places reliance on Deepak Kumar Garg Vs. Commissioner of Income Tax, , The Commissioner of Income Tax-1 Vs. The West Coast Paper

Mills Ltd., , and Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others, .

25. Mr. Pathak, learned ASG, has submitted that because of the omission, on the part of the High Court, to formulate any substantial question of

law before the appeal was heard, did not cause, and cannot be said to have caused, any prejudice to the review petitioners, when there view

petitioners had been heard at the admission stage. There is no pleading, points out the learned ASG, that any prejudice has been caused to the

review petitioners and, hence, in the absence of any prejudice having been caused to the review petitioners, the non-framing of the substantial

questions of law before the appeal was heard cannot be made a ground for review of the impugned judgment and order. Reliance, in this regard, is

placed by Mr. Pathak on the case of Kannan (dead) by Lrs. and Others Vs. V.S. Pandurangam (dead) by Lrs. and Others, .

26. It is submitted by Mr. Pathak, learned ASG, that the Court has decided the appeal on the substantial questions of law, which were suggested

by the appellants in the memorandum of appeal, and, hence, it cannot be contended by the respondents-review petitioners that they were not given

any opportunity to address the Court on the substantial questions of law, which the Court has, eventually, chosen to answer.

27. The review petitioners, in fact, submits Mr. Pathak, seek, with the help of the present review petitions, fresh adjudication of the issues on merit,

which the Court has answered against the assessees.

28. It is also submitted by Mr. Pathak that the review petitioners could have pointed out, at the time of admission of the appeal, that the substantial

questions of law, as suggested in the memorandum of appeal, had not arisen or the review petitioners could have, at least, requested the Court to,

first, frame the substantial questions of law; but the review petitioners chose to argue the appeal on merits and when the judgment has been

delivered, they cannot seek review of the judgment by contending that the Court did not perform its duty of formulating the substantial questions of

law before hearing of the appeal.

29. Notwithstanding his above argumentative submissions, Mr. Pathak further submits, on the basis of assumptions, thus:

Assuming but not admitting that the Review Petitioners did request the Hon''ble Court for framing the substantial questions of law first but the

Hon''ble Court disposed off the matter on merits, that would only mean that the Hon''ble Court rejected their request and disposed off the Appeal.

In that event, it would mean that the Hon''ble Court applied its judicial mind to such prayer made by the Assessee and still disposed off the Appeal

after hearing the parties on merits. In that situation, review shall not lie.

30. Coupled with the above, it is also the submission of Mr. Pathak, learned ASG, that when in the daily cause list, dated 16.09.2010, it was

notified that the judgment in the appeal would be pronounced, the review petitioners could have raised their objection before actual

pronouncement of the judgment and ask the Court to formulate the substantial questions of law. This, too, however, has not been done by the

review petitioners and, hence, they cannot, according to Mr. Pathak, turn back and challenge the judgment and order passed in the appeal.

31. Mr. Pathak, learned Additional Solicitor General, has pointed out that, in the present case, two issues had arisen for determination by this

Court and one of the issues was decided in favour of the review-petitioners, but the other issue was decided in favour of the Revenue, i.e., the

opposite party herein, and, aggrieved by that part of the impugned judgment and order, dated 16.09.2010, which had gone against the Revenue,

the Revenue applied for special leave to appeal and, by its order, dated 3.10.2012, the Apex Court has condoned the delay in filing the SLP and

granted the leave. Following the leave, so granted, further points out Mr. Pathak, an appeal, bearing Civil Appeal No. 1619/12, has been

registered.

32. According to Mr. Pathak, when the Supreme Court is in seisin of the legality and correctness of the impugned order, dated 16.09.2010, this

Court''s review jurisdiction, as against the impugned judgment and order, dated 16.09.2010, stands ousted due to doctrine or merger as explained

by the Supreme Court, in Kunhayammed and Others Vs. State of Kerala and Another, . Referring to Clause (vii), which appears at paragraph 44,

in Kunhayammed (supra), Mr. Pathak submits that in Clause (vii) of paragraph 44, in Kunhayammed (supra), the Supreme Court has lifted the veil

from the controversy on the question as to whether a review petition shall survive if leave is granted in a SLP arising out of the same subject matter.

REPLY ON BEHALF OF THE REVIEW PETITIONERS:

33. Repelling the submissions, made on behalf of the opposite party, Mr. Bhattacharjee, learned Senior counsel, has submitted that the crux of the

matter is that the learned ASG has not been able to show that the substantial questions of law, which have been decided by this Court, had been

formulated before the appeal was heard on merit nor has the learned ASG been able to show that this Court had made it clear to the parties

concerned that the appeal would be disposed of, on merit, by hearing the appeal at the stage of admission itself. In such a situation, it is clear,

submits Mr. Bhattacharjee, that the procedure, which (in the light of the provisions of Section 260A), is mandatory and must be followed, had not

been, inadvertently, followed by this Court due to its misapprehension of the procedure prescribed by Section 260A and, hence, the decision, in

the appeal, having been rendered without formulating the questions of law, is not sustainable and may, therefore, be reviewed.

34. Appearing on behalf of the review petitioners, in Review Petition Nos. 116/2010, 117/2010, 119/2010 & 124/2010, Mr. R.K. Agarwalla,

learned Senior counsel, while broadly adopting the submissions made by Mr. Bhattacharjee, learned Senior counsel, has referred to the case of

D.N. Singh Vs. Commissioner of Income Tax and Another , which is a judgment of the Full Bench of the Patna High Court and contends that this

decision clearly shows that notwithstanding the fact that there is no statutory provision for review in the IT Act, the High Court is not powerless to

review its own order, made u/s 260A, when an error has been committed by the High Court, particularly, when the error relates to procedure of

hearing of appeal.

35. As regards the case of Kunhayammed and Others Vs. State of Kerala and Another, , Mr. Agarwalla has submitted that if the learned ASG''s

argument that Clause (vii) of para 44 clinches the issue is accepted as correct, then, the law, which has been laid down at para 37, in

Kunhayammed (supra), would be set at naught and carry no meaning at all. Hence, according to Mr. Agarwalla, the only rational reconciliation,

between what para 37 in Kunhayammed (supra) vis-Ã¯Â¿Â½-vis what Clause (vii) of para 44 of Kunhayammed (supra), is that Clause (vii) of para 44

relates to a case, where the appellant, having preferred a special petition to the Supreme Court, particularly, when the leave for appeal has been

granted and regular appeal has come into existence, files an application for review. In such a given situation, Clause (vii) of para 44 makes it clear,

submits Mr. Bhattacharjee, that the person, who has already filed an appeal to the Supreme Court, looses his right to file review. On the other

hand, points out Mr. Agarwalla, para 37 of Kunhayammed (supra) deals with a case, where a person, aggrieved by an order, filed a review

petition and the other party files a SLP in the Supreme Court and leave having been granted, a regular appeal comes into existence. In such a case,

since the review petition was already filed before the SLP was converted into appeal, the High Court does not loose its right to decide the review

petition and this is precisely what, contends Mr. Agarwalla, the observations made in para 37 of Kunhayammed (supra) seek to convey.

DEDUCTIONS AND INFERENCES:

36. In substance, the grievance of the review petitioners, who were respondents in the appeal, is that an order was passed, on 09.08.2010, in the

appeal, by this Court directing issuance of notice to the respondents, (i.e., the review petitioners), making the notice returnable on 09.09.2010. On

the date, so fixed (i.e., on 09.09.2010), the appeal appeared, in the cause list for admission and learned counsel for both the parties to the appeal

appeared.

37. It is contended by the review petitioners that both sides were heard on the limited issue as to whether the appeal involve substantial questions

of law as had been set forth in the memorandum of appeal and while it was contended, on behalf of the review petitioners, that no substantial

question of law had arisen, the learned counsel for the appellants submitted that substantial questions of law, as suggested by the memorandum of

appeal, had, indeed, arisen for determination.

38. It is also the case of the review petitioners that on 09.09.2010, when the appeal came up for admission, the learned counsel for both sides

were heard, as already indicated above, on the limited issue as to whether the appeal involved the substantial questions of law as suggested by the

appellants and, having heard the learned counsel for both the parties on this limited question, the Court reserved its order and, on 16.09.2010,

instead of listing the matter for order informing the parties if the Court had decided to admit the appeal and, if so, then, what were the substantial

questions of law, which had been formulated by the Court for hearing, the appeal was listed for judgment and the judgment was accordingly

pronounced disposing of finally, the appeal denying thereby to the respondents-review petitioners effective opportunity of their having say on the

question as to whether substantial questions of law, which have been, eventually, answered, in the appeal, were sustainable in law or not.

39. We have already pointed out, at para 6 and 7 of this order, that the respondents have not filed any counter and have not denied, disputed or

controverted the chronology of events, as have been set forth in their review petitions by the review petitioners and that there being, on affidavit, no

dispute to the tactual aspects leading to the present review petitions, we are, in essence, required to determine if the judgment and order, dated

16.09.2010, needs to be reviewed.

40. The chronological events, leading to disposal of the appeal, which is supported by cause list and also the review petitioners'' affidavit, show

that the appeal was heard by this Court only once for the purpose of admission and there was no order admitting the appeal; rather, on hearing the

appeal, at the stage of admission, the appeal was, suddenly, listed for judgment and the judgment was pronounced; whereas the order, dated

16.09.2010, which is sought to get reviewed, shows that the appeal was admitted and, then, the appeal was decided on the substantial question of

law, which, according to the Court, had arisen for determination.

41. Clearly, therefore, there was no hearing of the appeal on substantial questions of law, which the High Court formulated for the purpose of

adjudication; whereas the substantial questions of law ought to have been formulated by this Court before the appeal was heard. This position, in

fact, cannot be disputed, because one of us (Hon''ble Anima Hazarika, J.) was a party to the judgment and the procedure followed was that the

appeal was heard, at the admission stage, for the purpose of admission and, then, while delivering the judgment, the appeal was shown to have

been admitted; whereas, as indicated hereinbefore, there was no order admitting the appeal and no order indicating the substantial questions of law

on which the appeal stood admitted and was to be heard.

42. Thus, the procedure, prescribed by Section 260A, was, inadvertently, not adhered to.

43. It is, therefore, imperative to bear in mind that notwithstanding the argumentative submissions made by the learned ASG the tact of the matter

remains that the review petitioners herein had disputed the fact that any substantial question of law was involved in the appeal. In effect, thus, the

review petitioners have clearly averred in the review petitions that the appeal had not been heard, on merit, for the purpose of its final disposal. No

wonder, therefore, that even though Mr. Pathak, learned ASG, has submitted that the assessee did not resist the admission of the appeal, we

cannot but conclude, in the absence of any counter-affidavit to the review petitions, that this submission is either factually not correct or, at least,

not supported by the materials on record.

44. Our impression that the submission made by the respondent, resisting the review petition, is merely argumentative in nature, gets strengthened

from the fact that the respondents have advanced their arguments on the basis of assumptions and not on the basis of uncontroverted or admitted

facts. That their argument is based on assumption is evident from the fact that the clear argument of Mr. Pathak, learned ASG, as already pointed

out above, reads, ""assuming but not admitting that the Review Petitioners did request the Hon''ble Court for framing the substantial questions of law

first but the Hon''ble Court disposed off the matter on merits, that would only mean that the Hon''ble Court rejected their request and disposed off

the Appeal. In that event, it would mean that the Hon''ble Court applied its judicial mind to such prayer made by the Assessee and still disposed off

the Appeal after hearing the parties on merits. In that situation, review shall not lie.

45. We, now, turn to the judgment and order, dated 16.09.2010, which the review petitioners seek review of. For this purpose, it is necessary to

take note of the judgment and order, in question. We may, in this regard, point out that the order, dated 16.09.2010, which is sought to get

reviewed, reads as under:

Admit.

2. The following substantial questions of law arise for consideration out of the order appealed against passed by the Income Tax Appellate

Tribunal (for short, hereinafter called as ""the Tribunal""):--

i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified and correct in law in holding that the

assessee is entitled to a deduction u/s 80IB of the Income Tax Act, 1961, on the transport subsidy and interest subsidy received by it?

ii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified and correct in law in holding that the

assessee is entitled to a deduction u/s 80IB of the Income Tax Act, 1961, on the Central Excise Duty refund received by it?

46. A bare reading of what has been reproduced above shows that the appeal was admitted and it was, then, that the appeal was decided on the

substantial questions of law, which, according to the High Court, had arisen for determination in the appeal. In fact, it is not in dispute before us

that no substantial questions of law was formulated by the High Court before the appeal was heard at the stage of admission and disposed of after

reserving the appeal for order.

FACETS OF Section 260A:

47. As the outcome of these review petitions depend substantially on how Section 260A is interpreted and considering also the feet that while the

review petitioners contend that the provisions, embodied in Section 260A, stand breached and, therefore, the impugned order, in question, needs

to be reviewed and necessary order needs to be passed thereafter, the respondent contends that the order, in question, is not in breach of the

provisions contained in Section 260A, it is appropriate that the provisions, contained in Section 260A, are carefully analysed and the procedure

prescribed therein is noticed and the object of Section 260A is correctly understood. We, therefore, reproduce below Section 260A, which reads

as follows:

260-A. Appeal to High Court.-

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case

involves a substantial question of law.

(2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to

the High Court and such appeal under this sub-section shall be:

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief

Commissioner or Commissioner,

(b) omitted

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that

the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the

appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such

decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which-

(a) has not been determined by the Appellate Tribunal; or..

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court

shall, as far as may be, apply in the case of appeals under this section.

48. A bare reading of Section 260A shows that an appeal shall lie to the High Court from every order passed by an appellate Tribunal provided

that the High Court is satisfied that the case involves a "substantial question of law".

49. Thus, an appeal, u/s 260A, is a qualified appeal and not an absolute and/or unqualified and/or unrestricted appeal. Unless, therefore, an appeal

involves a substantial question of law, no appeal would lie to the High Court from the order passed, in an appeal, by an appellate Tribunal.

50. It follows, therefore, that the satisfaction of the High Court that the appeal involves substantial question of law is sine qua non for the appeal to

be admitted for hearing. This position of law will not remain in doubt, when we proceed to minutely examine the provisions embodied in Section

260A.

51. Sub-section (2) of Section 260A permits the Chief Commissioner or Commissioner as well as an assessee, who may feel aggrieved by the

order passed by an appellate Tribunal, to appeal to the High Court provided that the appeal is filed within one hundred and twenty days from the

date on which the order, appealed against, is received by the assessee or the Chief Commissioner or the Commissioner, as the case may be. This

apart, as indicated above, the appeal has to be in the form of memorandum of appeal precisely stating therein the substantial question or questions

of law involved.

52. Thus, apart from the period of limitation within which an appeal has to be preferred and the form in which the appeal has to be preferred,

Section 260A necessitates that the memorandum of appeal clearly states the substantial question or questions of law, which, according to the

appellant, is, or are, involved in the appeal.

53. Sub-section (3) of Section 260A shows that when an appeal is filed, as prescribed by Sub-section (2), stating the substantial question or

questions of law involved, this would not, automatically, make the appeal admissible in law inasmuch as Sub-sections (1) and (3) of Section 260A

make it clear that if an appeal, preferred u/s 260A, does not state the substantial question or questions of law involved, then, the appeal may not be

admitted by the High Court.

54. Coupled with the above, Sub-section (3) of Section 260A lays down that where the High Court is satisfied that a substantial question of law is

involved in an appeal, it shall formulate that question. Conversely speaking, if the High Court finds, on examination of a memorandum of appeal,

that the appeal does not give rise to a substantial question of law, the High Court is duty bound to dismiss the appeal in limine. If, however, the

High Court takes the view that appeal has given rise to substantial question or questions of law, then, the High Court is under legal obligation to

formulate the substantial question or questions of law, which, according to the High Court, the appeal has raised, and, then, the High Court shall

hear the appeal on the question or questions so formulated.

55. When an appeal is heard, in the light of Sub-section (4) of Section 260A on the substantial question or questions of law, which the Court has

formulated in the appeal, the respondents shall be allowed to argue, at the time of hearing of the appeal, that no such substantial question or

questions of law, as formulated by the High Court, has or have arisen for being answered in the appeal.

56. What further follows from a close reading, as a whole, of Section 260A is that if the High Court decides to give notice to a respondent, in an

appeal, before formulating the substantial question or questions of law, the respondent, in the appeal, shall have the right to satisfy the High Court

that the substantial question or questions of law, as contended by the appellant, is, or are, not really involved; or else, there would be no meaning

and purpose in giving notice to the respondent, in the appeal, before the appeal is admitted by formulating the substantial question or questions of

law on which, in the view of the High Court, the appeal needs to be heard.

57. In other words, if a respondent, in appeal, made u/s 260A, is given notice before admission of the appeal, it necessarily follows that the

respondent has been given an opportunity by the High Court to satisfy the High Court that no substantial question or questions of law, as

contended by the appellant, has or have arisen for determination and it would be thereafter that the High Court would take a decision whether the

appeal has or has not given rise to any substantial question of law and if the High Court finds that the substantial question or questions of law has or

have arisen, it shall admit the appeal by formulating, for hearing, such substantial question or questions of law, which, according to the High Court,

the appeal has given rise to for adjudication and, then, answer the question or questions, so formulated, by according opportunity of hearing to the

parties concerned on the substantial question or questions of law, which the High Court may have formulated.

58. Logically extended, what the above scheme of hearing of the appeal conveys is that if the High Court, without admitting the appeal, chooses to

issue, in a given appeal, notice to the respondent, in the appeal, to have the latter''s say in the matter, the parties to the appeal would have the right

to address the Court. Necessarily, therefore, at the stage of admission, in such a situation, while the appellant can address the Court to show as to

how a substantial question of law or more than one substantial question of law can be said to have arisen, for determination, in the appeal, the

respondent would have equally good right to try to satisfy the Court on merit that the substantial question or questions of law, which the appellant

contends to have arisen, has or have not arisen. If, thereafter, the High Court is satisfied that a substantial question or questions of law is, or are,

indeed, involved, notwithstanding the submissions made to the contrary by the respondent, then, the High Court has to formulate the substantial

question or questions of law on which, according to the High Court, the appeal needs to be heard and it is only on the substantial question or

questions of law, so formulated, that hearing of the appeal would take place and, on this hearing, both the parties to the appeal would have the

right to place their arguments.

59. Obviously, while the appellant would try to show, at the time of hearing of the appeal, on its admission, that the substantial question or

questions of law has or have arisen for determination and needs or need to be decided, the respondent would resist that substantial question of law

(as suggested by the appellant and/or formulated by the High Court), does not really arise. In short, hearing of an appeal, u/s 260A, can, in a given

case, be in two different stages-once, before admission of the appeal, and, once again, after admission of the appeal.

60. We may however, hasten to add that there is no impediment, on the part of the High Court, to admit an appeal without giving notice to the

respondent; but if the High Court decides to give a notice before admitting the appeal and if it decides to hear the respondent on the admission of

the appeal, the High Court cannot straight away allow the appeal on the basis of the substantial question or questions of law, which the appellant

may have formulated inasmuch as Section 260A provides that if the High Court finds that the appeal needs to be heard, the High Court is legally

bound to formulate the substantial question or questions of law, which, according to the High Court, has or have arisen for determination. Put

shortly, an appeal, u/s 260A, can be heard subsequent to the formulation of the substantial question of questions of law, which, according to the

High Court, has or have arisen for determination.

61. We may hastily add that the proviso to Sub-section (4) of Section 260A empowers the High Court to formulate any other substantial question

of law if it is satisfied that the case involves such a question, though the appellant may not have raised such a substantial question of law.

62. Sub-section (5) of Section 260A makes it crystal clear that the appeal can be decided only on the substantial question of law, which has been

formulated by the High Court, and not on the basis of the substantial question or questions of law, which the appellant may have mentioned in the

memorandum of appeal, and the High Court has to deliver the judgment not on the substantial question or questions of law, which an appellant may

have framed, but only on that substantial question of law or those substantial questions of law, which the High Court has already formulated.

63. It clearly follows, therefore, that no appeal can be heard, as already pointed out above, until the time the High Court is satisfied that the appeal

involves a substantial question of law for determination and no appeal can be heard until the time the substantial question of law or questions of

law, as the case may be, has or have been formulated by the High Court for the purpose of hearing of the appeal.

64. Incidentally, one may also point out that the High Court, u/s 260A (6), has the power to determine an issue, which has not been determined by

an appellate Tribunal or has been wrongly determined by the appellate Tribunal.

65. Sub-section (7) makes it further clear that the provisions, relating to second appeal, as embodied in Section 100 CPC, shall, as far as may be,

applied to the appeals u/s 260A.

66. The Supreme Court has pointed out, at para 11, in M. Janardhana Rao Vs. Joint Commissioner of Income Tax, , which Mr. Bhattacharjee,

learned Senior counsel, has relied upon, that u/s Section 260A(c), the appeal, u/s 260A, shall be - (a) in the form of memorandum of appeal, and

(b) the memorandum of appeal must precisely state the substantial question or questions of law involved and Section 260A(3) lays down that when

the High Court is satisfied that a substantial question of law is involved, in a given appeal, it shall formulate that question and the appeal, in terms of

the provisions of Section 260A(4), has to be heard only on the question formulated by the High Court and that in terms of Section 260A(4), the

respondent, in appeal, has to be allowed to argue, at the time of hearing of the appeal, (wherein the substantial question or questions of law stands

or stand already formulated by the High Court), that the appeal does not involve a substantial question or questions of law as has been, or have

been, formulated by the High Court.

67. In M. Janardana Rao (supra), the Supreme Court has also clarified, at para 11, that the proviso to Section 260A(4) lays down that nothing in

Section 260A(4) shall be deemed to take away the power of the High Court to hear, for reasons to be recorded, an appeal on any substantial

question or questions of law not formulated by it provided that the High Court is satisfied that the case involves such a question. In no uncertain

words, the Supreme Court has held, at para 11, in M. Janardana Rao (supra), that the High Court cannot, but decide the substantial question of

law, as formulated by it u/s 260A, and deliver judgment thereon containing the grounds on which its decision is founded. The observations,

appearing at para 11, in M. Janardana Rao (supra), read as under:

11. Various essentials as culled out from the relevant provisions of the Act are as follows:

Under Section 260-A(2)(c) the appeal u/s 260-A shall be (a) in the form of a memorandum of appeal, and (b) precisely stating therein the

substantial question of law involved. u/s 260-A(3) when the High Court is satisfied that a substantial question of law is involved in any case, it shall

formulate that question and u/s 260-A(4) the appeal is to be heard only on the question formulated under the preceding sub-section. It has to be

noted that in terms of Section 260-A(4) the respondent in the appeal is allowed to argue at the time of hearing of the appeal that the case does not

involve a substantial question of law as formulated. However, the proviso to Section 260-A(4) specifically lays down that nothing in Section 260-

A(4) shall be deemed to take away the power of the High Court to hear, for reasons to be recorded, the appeal on any other substantial question

of law not formulated by it, in case it is satisfied that the case involves such question. Section 260-A(5) provides that the High Court is to decide

the question of law as formulated and to deliver the judgment thereon containing grounds on which such decision is founded.

(Emphasis is added)

68. Leaving none in doubt, the Supreme Court, in M. Janardana Rao (supra), has laid down the scope of Section 260A by observing, in clear

terms, that it is essential for the High Court to, first, formulate a substantial question of law and, thereafter, proceed in the matter.

69. In other words, clarifying the scope of Section 260A , the Supreme Court, in M. Janardhana Rao Vs. Joint Commissioner of Income Tax, ,

has pointed out, at para 13, thus:

13. It is important to note that the appeal to the High Court lies only when a substantial question of law is involved. It is essential for the High Court

to first formulate a question of law and thereafter proceed in the matter.

(Emphasis is added)

70. The Supreme Court has pointed out, in M. Janardana Rao (supra), that the conditions, mentioned in Section 260A, must be strictly fulfilled

before an appeal can be maintained u/s 260A meaning thereby that if the appellant is unable to show that a substantial question of law has arisen

for determination, there is no impediment, on the part of the High Court, to dismiss the appeal without even admitting the appeal. Logically

extended, it would mean that if the respondent has been given notice before the High Court decides to admit an appeal, it would remain open to

the respondent to show that no substantial question of law has arisen and in order to show that no substantial question of law has arisen, it would

be, ordinarily, necessary for the respondent to make his submission on merit if the respondent seeks to satisfy the High Court that no substantial

question of law for determination has arisen in the appeal. The relevant observations, appearing in this regard, in M. Janardana Rao (supra), read

as under:

14. Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of

admission, the High Court is not empowered to generally decide the appeal u/s 260-A without adhering to the procedure prescribed u/s 260-A.

Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. In exercise of powers

u/s 260-A, the findings of fact of the Tribunal cannot be disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an

inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time.

The conditions mentioned in Section 260-A must be strictly fulfilled before an appeal can he maintained u/s 260-A. Such appeal cannot be

decided on merely equitable grounds.

(Emphasis is added)

71. A three Judge Bench, in M. Janardana Rao (supra), culled out the test to determine as to what question can be treated as a substantial

question of law. Having referred, in this regard, to the case of Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing

Co., Ltd., ,the Supreme Court has held, at para 15, in M. Janardana Rao (supra), as under:

15. An appeal u/s 260-A can only be in respect of a ""substantial question of law"". The expression ""substantial question of law"" has not been

defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements. In Sir Chunilal V. Mehta &

Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. 1 this Court laid down the following tests to determine whether a substantial question of law is

involved. The tests are: (1) whether directly or indirectly it affects substantial rights of the parties, or (2) the question is of general public

importance, or (3) whether it is an open question in the sense that the issue is not settled by pronouncement of this Court or Privy Council or by the

Federal Court or (4) the issue is not free from difficulty, and (5) it calls for a discussion for alternative view. There is no scope for interference by

the High Court with a finding recorded when such finding could be treated to be a finding of fact.

(Emphasis is added)

72. In M. Janardana Rao (supra), having found that the High Court had not formulated any substantial question of law at the time of admission of

the appeal, but formulated, for the purpose of adjudication of the appeal, the question subsequent to the conclusion of arguments, the Supreme

Court took the view that the procedure, so adopted, is clearly against the scheme of Section 260A.

73. In the face of the facts, as indicated above, the Supreme Court, in M. Janardana Rao (supra), interfered with the order, which had been

passed, in appeal, by the High Court.

74. In the case at hand, too, if this Court finds, in the light of the clearly laid down position of law, in M. Janardana Rao (supra), that this Court

formulated the substantial question or questions of law for adjudication subsequent to the admission of the appeal, as is contended by the

respondent-opposite party, then, such a breach by the High Court would make its judgment and order open to review if the power of review is,

otherwise, found to be available to the High Court in a case of present nature. The relevant observations, appearing at para 16, in M. Janardana

Rao (supra), read as under:

16. On reading of the impugned judgment of the High Court it is clear that no substantial question of law was formulated at the time of admission of

the appeal. Obviously, the High Court has formulated questions subsequently after conclusion of arguments for the purpose of adjudication. That is

clearly against the scheme of Section 260-A. Additionally, grievance that certain points which were urged have not been dealt with by the High

Court appears to be correct.

(Emphasis is added)

75. Relying heavily on the case of Kannan (dead) by Lrs. and Others Vs. V.S. Pandurangam (dead) by Lrs. and Others, , Mr. Pathak, learned

Additional Solicitor General, has submitted that the mere omission to frame substantial question of law before hearing of the appeal cannot be a

reason for interfering with the impugned judgment and order, dated 16.09.2010, unless prejudice is shown to have been caused.

76. In Kanan (Dead) (supra), the Supreme Court has held that when the parties, in appeal, go to appeal knowing fully well the issue, the order,

which is finally passed in the second appeal, cannot be interfered with unless prejudice is shown to have been caused as a result of omission to

frame a substantial question of law.

77. While considering the case of Kanan (supra), it may be noted that, while the decision, in Kanan (supra), has been rendered by a two-Judge

Bench of the Supreme Court, the decision, in M. Janardhana Rao Vs. Joint Commissioner of Income Tax, , has been rendered by a three-Judge

Bench of the Supreme Court. In M. Janardana Rao (supra), the Supreme Court has emphasized, at para 13, that it is essential for the High Court

to, first, formulate a question of law and, thereafter, proceed with the matter and, at para 14, the Supreme Court has held, in M. Janardana Rao

(supra), that the conditions, mentioned in Section 260A, must be strictly fulfilled and that such an appeal cannot be decided merely on equitable

grounds. In fact, in M. Janardana Rao (supra), the Supreme Court interfered with the order, made in the appeal u/s 260A, on the ground that no

substantial question of law had been framed at the time of the admission of the appeal and that the High Court had formulated, for the purpose of

adjudication, the questions subsequent to. the conclusion of the arguments, which procedure is against the scheme, which Section 260A

propounds.

78. In the face of the decision, in M. Janardana Rao (supra), there can be no escape from the conclusion that disposal of an appeal without

formulating the substantial questions of law and without hearing the parties, on such substantial questions of law, is illegal even if the High Court

formulates the question, for the purpose of adjudication, subsequent to the conclusion of the arguments.

79. The question, therefore, of prejudice having been caused or not does not arise. This apart, in the case at hand, it is the grievance of the review

petitioners that as substantial questions of law had not been formulated for the purpose of hearing of the appeal, the review petitioners could not

make their submissions on the merit of the substantial questions of law, which the High Court has, subsequent to the admission hearing, ultimately,

decided inasmuch as one of the issues in the appeal has been decided against the review petitioners without according them an opportunity to have

their say after making it clear to them that the substantial questions of law, which the memorandum of appeal had mentioned, were the substantial

questions of law, which, even according to the High Court, had arisen for determination and these were the questions, which would be finally taken

up for adjudication by the Court

80. Coupled with the above, the decisions, which have been referred to in Kannan (dead) by Lrs. and Others Vs. V.S. Pandurangam (dead) by

Lrs. and Others, , are not on substantial questions of law, but on the question of issues. It is trite that even if an issue was not framed, it would not

disable the Court from refusing to interfere with a decree if the parties were, otherwise, well aware of the issues and if the omission to frame the

issues has not caused any prejudice to either of the parties.

81. In the face of the fact that no substantial question of law was formulated by the High Court before the appeal was heard for the purpose of

disposal and this Court had not made it clear to the parties, in the appeal, that the appeal would be disposed of on hearing the parties concerned at

the admission stage itself it logically follows that the decision, rendered in the appeal, was contrary to, and in violation of, the mandatory

requirements as regards the procedure to be followed in an appeal u/s 260A. Consequently, the impugned judgment and order, dated 16.09.2010,

cannot survive.

IS AN ORDER, MADE u/s 260A, REVIWEABLE?

82. The question, however, is: whether the breach of the provisions of Section 260A, in the manner as we have indicated above, necessitates,

when the error is brought to our notice, interference with the order, dated 16.09.2010, by way of review or, as contended by the respondents-

opposite party, is review of the order, dated 16.092010, barred by law, because of statutory provisions for review having not been provided in

respect of an order passed u/s 260A?

83. Let us, therefore, proceed to decide if this Court has the jurisdiction to review its order passed in an appeal u/s 260A, when there is no

statutory provision conferring the power of review on the High Court and whether the conversion of the SLP into an appeal, because of the leave,

which has been granted to the respondents, the review petitions have become infructuous and, if not, whether the review petitioners have made out

a case for review of the impugned judgment and order.

84. While considering the questions, posed above, it may be noted that in India Carbon Ltd. Vs. Commissioner of Income Tax and Another, , a

Division Bench of this Court, speaking through Ranjan Gogoi, J., (as his Lordship, then, was) pointed out that true it is that the provisions of the IT

Act have not vested, in the High Court, power to review its own order as is conferred by Order 47 of the CPC and though an order, passed u/s

260A, cannot, therefore, be corrected by the High Court even if it discloses an error apparent on the face of the record or when such an order has

been passed in ignorance of relevant facts, which could not be placed before the Court by either of the parties, it is an acknowledged proposition

of law that re-call/correction of such an order can be made by the High Court in exercise of its inherent powers. The observations, so made,

appearing at para 8 of India Carbon Ltd. (supra), read as under:

8. The provisions of the Act have not vested in the High Court any power to review its own orders as conferred by Order 47 of the Code of Civil

Procedure. An order passed u/s 260A of the Act, therefore, cannot be corrected by us even if it discloses an error apparent on the face of the

order itself or if such an order has been passed in ignorance of relevant facts which could not be placed before the Court by either of the parties,

notwithstanding the exercise of due diligence and reasonable care. At the same time it has been acknowledged that recall/correction of such an

earlier order can be made in the exercise of inherent power. The moot question, therefore, will be the dimensions of the said inherent power.

85. From the above observations, it is clear that though the High Court cannot exercise its power of review by virtue of the provisions of Section

114 or Order 47 of the CPC if an order, made u/s 260A, discloses an apparent error on the face of the record or even when the order has been

passed in ignorance of the relevant facts, which could not be placed before the Court by either of the parties, what cannot be denied to the High

Court is its inherent power to re-call/correct such an order. In short, India Carbon Ltd. (supra), thus, recognizes High Court''s power to

recall/correct, in exercise of its inherent powers, its order made u/s 260A.

86. Having posed to itself, as indicated above, the question as to what would be the dimensions of the inherent power, which a High Court can

resort to for recalling or correcting its own order, made u/s 260A, the Court has pointed out, at para 9, that inherent power inheres, in every

Court, by virtue of the fact that the primary duty of the Court is to do justice between the parties in the given facts of a case and that inherent

power has also been understood to be in the nature of a power to do ex debito justitiae. The Court, in India Carbon Ltd. (supra), has, however,

pointed out that a High Court, while exercising its inherent power, naturally, cannot extend the same to cover other areas of corrective jurisdiction,

for example, appeal, revision, review etc., nor can the inherent power, which the High Court or, for that matter, any other Court possesses, be

exercised to correct mere apparent errors as that would amount to exercise of the review jurisdiction. The review of an order, by taking resort to

inherent power is, therefore, according to India Carbon Ltd. (supra), a power more circumscribed than the review power and that an order, in

addition to being apparently erroneous must also be contrary to some fundamental principle of law or jurisprudential value in order to be amenable

to correction in exercise of the inherent power and likewise, an order, passed in inadvertent departure from a core judicial procedure, would also

be amendable to a similar correction and, further, failure of justice cannot be the sole touchtone for its exercise, because every judicial order is

capable of being so perceived by an aggrieved party. Finally, this Court has concluded, in India Carbon Ltd. (supra), that when error is self-

evident in an order passed contrary to a fundamental judicial principle thereby occasioning a failure of justice, an order can, undoubtedly, be

corrected in exercise of the High Court''s inherent power. The relevant observations, appearing, in this regard, at paragraph 9, in India Carbon

Ltd. (supra), read as under:

9. Inherent power inheres in every Court by virtue of the fact that it is the Court whose primary duty is to do justice between the parties in the

given facts of a case. It is an inbuilt reserve power and not a matter of expressed conferment Inherent power has also been understood to be in the

nature of a power to do ex debito justitiae. The Court, while exercising its inherent power, naturally, cannot extend the same to cover other areas

of corrective jurisdiction e.g. appeal, revision, review etc. Inherent power which this Court or for that matter any other Court possesses also

cannot be exercised to correct mere apparent errors as that would amount to exercise of the review jurisdiction. It is, therefore, a power more

circumscribed man the review power. An order, in addition to being apparently erroneous must also be contrary to some fundamental principle of

law or jurisprudential value in order to be amenable to correction in exercise of the inherent power. Likewise, an order passed in inadvertent

departure from a core judicial procedure would also be amendable to a similar correction. Failure of justice cannot be the sole touchtone for its

exercise because every judicial order is capable of being so perceived by an aggrieved party. An exhaustive determination of the situations where

resort to inherent power will be permissible is neither possible nor desirable. In the last resort it is a discretion that must be left to the Court, the

exercise of which has to be guided by proper judicial balance and wisdom. However, if an attempt is required to be made to visualize the ambit of

the said power, the position could be summed up by conceptualizing a self evident erroneous order passed contrary to a fundamental judicial

principle thereby occasioning a failure of justice. Such an order undoubtedly can be corrected in exercise of the inherent power.

87. Before proceeding further, it also needs to be noted that a High Court is a superior Court and, as a superior Court, it is also a Court of record.

As a Court of record, the High Court is duty bound to keep its record correct and in accordance with law. If there is any error in an order of the

High Court, such an order, on well-recognised principles, can be reviewed by invoking the plenary jurisdiction of the High Court to keep its record

correct, clean and free from errors.

88. We are in full agreement with the observations made by the Division Bench, at para 8 and 9, in India Carbon Ltd. (supra). In feet, even in

Misc. Case No. 1914 of 2010, which arose out of ITA 4 of 2012, a Division Bench of this Court, speaking through Amitava Roy, J., (as his

Lordship then was) has, in very clear terms, held that notwithstanding the feet that the statutory power of review, in a given case, may not be

available with the High Court, the High Court would nevertheless have the power to review its own order, should the parameters of such a power

are, otherwise, satisfied.

89. The question, therefore, cannot be, as rightly pointed out at para 8 in India Carbon Ltd. (supra), whether the High Court has the power to

recall and correct its own order by resorting to its plenary jurisdiction or inherent power, where no specific statutory provisions exist; rather, the

question would be whether, in the facts and attending circumstances of a given case, the power of review, which the High Court enjoys as a Court

of record, shall or shall not be exercised.

90. Mr. Bhattacharjee, learned Senior counsel, is also not incorrect, when he refers to, and relies upon, with regard to the above, the decision of

the Patna High Court, in D.N. Singh Vs. Commissioner of Income Tax and Another .

91. In D.N. Singh (supra), the pointed question raised was: whether a High Court can entertain an application for review arising out of its judgment

passed u/s 260A of the IT Act, when statute has not made provisions for review under the IT Act ?

92. While answering the question, posed above, it may be pointed out that, in Bengali Singh (HUF) through Bengali Singh (2010) 325 ITR 350

(Patna), a Division Bench of the Patna High Court had already taken the view that IT Act is a code by itself and in the absence of any provision for

review against an appellate order passed u/s 260A, no power of review can be exercised by the High Court. In Bengali Singh (HUF) (supra), the

Division Bench, at yet another place, observed that once review is not provided by the Income Tax Act, it would not be proper to exercise

jurisdiction of review in the garb of exercise of inherent power, which, normally, is to be exercised only to correct clerical or similar such mistakes

and not entering into the merit of the case.

93. Notwithstanding the above conclusion, which was reached in Bengali Singh (HUF) (supra), what needs to be borne in mind is that the

Supreme Court, in Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another, , has pointed out that the superior Courts stand

on a footing different from other Courts and their powers cannot be curbed or constricted. In this regard, the following passage of Halsbury''s

Laws of England was taken note of:

Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so. while nothing is within the

Jurisdiction of an inferior Court, unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the

particular Court.

If file decision of a superior court on a question of its jurisdiction is erroneous, it can, of course, be corrected by appeal or revision as may be

permissible under the law; but until the adjudication by a superior court on such a point is set aside by adopting the appropriate course, it would

not be open to be corrected by the exercise of the writ jurisdiction of this Court.

(Emphasis supplied)

94. Moreover, in M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama,

Goa, , the Supreme Court has pointed out that the High Courts are superior courts of record, they have original as well as appellate jurisdiction

and they have inherent as well as plenary powers and, therefore, unless expressly or impliedly barred, High Courts have unlimited jurisdiction

including the jurisdiction to determine their own powers subject, of course, to appeal or discretionary jurisdiction. The relevant observations,

appearing at para 66, 67 and 68, read as under:

66. The High Court in India are superior courts of record. They have original and appellate Jurisdiction. They have inherent and plenary powers.

Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High court have unlimited

jurisdiction including the jurisdiction to determine fifty own powers. (See Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and

Another, . As stated in Halsbury''s Laws of England. 4th edition, Vol. 10, para 713: ""Prima facie, no matter is deemed to be beyond the

jurisdiction of a superior court unless it is expressly shown to be so. while nothing is within the jurisdiction of an inferior court unless it is expressly

shown on the face of the proceedings that the particular matter is within the cognizance of the particular court.

67. The observation of this Court in Raja Soap Factory and Others Vs. S.P. Shantharaj and Others, , that section 151 of the CPC did not confer

on the High Court jurisdiction which was not specifically vested was made in the context of section 105 of the Trade and Merchandise Marks Act

(43 of 1958) which conferred a specific jurisdiction in respect of a passing off action. That observation is not relevant to the question regarding the

inherent and plenary jurisdiction of the High Court as a superior court of record. The Andhra Pradesh High Court, as a successor to the Madras

High Court, is vested with all the appellate and original jurisdiction, including admiralty jurisdiction to order the arrest and detention of a ship.

68. In decisions such as Jayaswal Shipping Company Vs. The owners and parties interested in Steamship ""S.S. Leelavati"", ; Kamalakar Mahadev

Bhagat Vs. Scindia Steam Navigation Co. Ltd., ; Rungta Sons Private Ltd. A Anr v. S.S. Edison Mariner'' & Anr., 1961-62 (66) CWN 1083 ;

National Co. Ltd. Vs. Asia Mariner, M.S., The Owners and Parties Interested in, ; Sahida Ismail Vs. Petko R. Salvejkov and Others, and Smt.

Reena Padhi and Others Vs. Owners and parties, interested, in the motor vessel "Jagdhir'' No. 1623 registered at the Bombay Port of Registry,

India and Another, , the High Courts took an unduly restrictive view of the courts'' admiralty jurisdiction by limiting it to what was permitted by the

Admiralty Court Act, 1861 and the Colonial Courts of Admiralty Act, 1890. This was, in our view, an unjustified abdication of jurisdiction and a

self-assumed fetter on competence to render justice.

(Emphasis supplied)

95. In M.M. Thomas Vs. State of Kerala and Another, , the Supreme Court has pointed out that as a Court of record, the High Court, as

envisaged by Article 215 of the Constitution, must have inherent powers to correct the records and that a Court of record envelops all such

powers, whose acts and proceedings are to be enrolled in a perpetual memorial and testimony and that a Court of record is, undoubtedly, a

superior Court, which is itself competent to determine the scope of its jurisdiction.

96. In fact, in M.M. Thomas (supra), the Supreme Court has held that the High Court, as a Court of record, is duty bound to keep auks records

correctly and in accordance with law and, hence, the High Court does not only have the power, but is under a duty to correct any error apparent

in respect of an order passed by it and this is the plenary power of the High Court The relevant observations, appearing at para 14, in this regard,

in M.M. Thomas (supra), read as under

4. The High Court as a Court of Record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A

Court of Record envelops all such powers whose acts and proceedings are to be enrolled in a perpetual, memorial and testimony. A Court of

Record is undoubtedly a superior Court which is itself competent to determine the scope of its jurisdiction. The High Court, as a Court of Record,

has a duty to itself to keen all its records correctly and in accordance with law. Hence, the High Court has not only the power-but a duty to correct

any apparent error in respect of any order passed by it. This is the plenary power of the High Court.

(Emphasis supplied)

97. In fact, the Supreme Court has pointed out, in M.M. Thomas (supra), at para 17, that if the power to correct its own record is denied to the

High Court, even when the High Court notices the apparent error, then, the consequence would be that the status of the High Court, as a superior

Court, will dwindle down and it is, therefore, appropriate that the plenary power of the High Court be treated to include the power of review

relating to errors apparent on the face of the record. In emphatic terms, the Supreme Court has held, in M.M. Thomas (supra), that mere can be

no doubt that the High Court possesses all powers in order to correct the errors apparent on the face of the record. The observations, appearing

at para 17, in M.M. Thomas (supra), read as under:

17. If such power of correcting its own record is denied to the High Court when it notices the apparent errors its consequence is that the superior

status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power

of review relating to errors apparent on the face of record.

There is no doubt that the High Court possesses all powers in order to correct the errors apparent on the face of the record While accepting the

above proposition, in the light of the scheme of the Act, we are of the view that the said decision is also not helpful to the stand taken by the

appellant.

(Emphasis supplied)

98. Having taken note of various decisions, including M. V. Elisabeth (supra) and M.M. Thomas (supra), particularly, paragraph 17 thereof, the

Full Bench of the Patna High Court, in D.N. Singh (supra), speaking through Justice Dipak Misra, C.J. (as his Lordship then was), concluded that

it has no scintilla of doubt that the High Court can entertain an application for review arising out of a judgment passed u/s 260A. The relevant

observations, made by the learned Chief Justice, in D. N. Singh (supra), read:

In view of the aforesaid clear pronouncement of law, we have no scintilla of doubt that the High Court can entertain the application for review

arising out of a judgment passed u/s 260A of the Act.

99. In Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others, , a three Judge Bench of the Supreme Court, at para 13, has

pointed that Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , is an authority for the proposition that the power of

review is not an inherent power and that the power of review must be conferred either specifically or by necessary implication.

100. It is also pointed out, at para 13 in Grindlays Bank Ltd. (supra), that the expression ''review'' is used in two distinct senses, namely (1) a

procedural review, which is either inherent or implied in a court or tribunal to set aside a palpably erroneous order passed under a misapprehension

by it; and (2) a review on merits, when the error, sought to be corrected, is one of law and is apparent on the face of the record.

101. The Supreme Court has further pointed out, in Grindlays Bank Ltd. (supra), that it is in the latter sense that the Court, in Patel Narshi

Thakershi''s case (supra), held that no review lies on merits unless a statute specifically provides for it

102. Obviously, therefore, observes the Supreme Court, when a review is sought due to a procedural defect, the inadvertent error committed by

the court or tribunal must be corrected ex debito justitiae to prevent the abuse of its process and such power inheres in every court or tribunal.

When, however, the review relates to merit of an order on the ground that the order suffers from an error apparent on the face of the record, a

review is not possible, in the light of the decision in Patel Narshi Thakershi (supra), unless there is statutory provision for review. The case, at hand,

is one, wherein the review petitioners are seeking interference, by way of review, with the procedural defect, which the disposal of the appeal,

suffers from and not with the merit of the order passed in the appeal. The relevant observations, appearing at para 13, in Grindlays Bank Ltd.

(supra), read as under

13. We are unable to appreciate the contention that merely because the ex parte award was based on the statement of the manager of the

appellant, the order setting aside the ex parte award, in fact, amounts to review. The decision in Narshi Thakershi v. Pradyumansinghji is

distinguishable. It is an authority for the proposition that the power of review is not an inherent power, it must be conferred either specifically or by

necessary implication. Sub-sections (1) and (3) of s. 11 of the Act themselves make a distinction between procedure and powers of the Tribunal

under the Act. While the procedure is left to be devised by the Tribunal to suit carrying out its functions under the Act, the powers of civil court

conferred upon it are clearly defined. The question whether a party must be heard before it is proceeded against is one of procedure and not of

power in the sense in which the words are used in s. 11. The answer to the question is, therefore, to be found in sub-s.(1) of s. 11 and not in sub-

s.(3) of s. 11. Furthermore, different considerations arise on review. The expression ''review'' is used in two distinct senses, namely (1) a

procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a

misapprehension by it and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It

is in the latter sense that the Court in Narshi Thakershi''s case held that no review lies on merits unless a status specifically provides for it.

Obviously when a review is sought due to a procedural defect the inadvertent error committed by the Tribunal must be corrected ex debito justitiae

to prevent the abuse of its process, and such power inheres in every court or Tribunal.

(Emphasis supplied)

103. When, therefore, an order is passed by a High Court in breach of the procedure, which a statute, such as, Section 260A, has laid down, such

a procedural defect shall remain open to correction by the High Court by taking resort to its plenary power of review or ex debito justitiae to

prevent the abuse of its process.

104. Though the respondents have relied upon the decision, in Lily Thomas, Vs. Union of India and Others, , this Court does not find that the

observations made therein, or the law laid down, in Lily Thomas (supra), will help, in any way, the case of the respondents. In Lily Thomas

(supra), while pointing out that the power of review is a creation of statute and, in the absence of statute, the power of review cannot be exercised

by taking recourse to me inherent power as already held, in Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , and that

the power of review has to be conferred by law either specifically or by necessary implication. The Supreme Court has laid down, in no uncertain

words, in Lily Thomas (supra), that the power of review can be exercised for correction of a mistake, but not to substitute a view.

105. There can, thus, be no doubt, even in the face of the decision, in lily Thomas (supra), that a Court must have magnanimity to acknowledge its

mistake and correct the mistake, ex debito justitiae to prevent the abuse of its process, though review cannot be resorted to for substituting a view.

106. The real theme of the Supreme Court''s decision, in Lily Thomas (supra), is that though the power of review cannot be exercised by a Court

unless the statute confers such a power and that a statutory power of review can be exercised subject to such limitations as the statute may impose,

yet a Court is not powerless, in an appropriate and exceptional case, to rectify its error, because ''an act of court shall prejudice none'' and, hence,

in exceptional cases, a Court can invoke the doctrine of ''actus curiae neminem gravabit'' for correcting an error committed by it

107. In Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , which the learned Additional Solicitor General relied upon,

the Supreme Court has, undoubtedly, held that the power of review is not an inherent power and that it must be conferred by law either specifically

or by necessary implication.

108. Apart from the fact that the decision, in Patel Narshi Thakershi and others (supra), has been explained in many of the Supreme Court

decisions, particularly, in M. M. Thomas (supra), Grinndlays Bank Ltd., etc., it needs to be pointed out that the decision, in Patel Narshi Thakershi

(supra), is not a decision, where the question of the High Court''s power to review its own order was in question. The question, in Patel Narshi

Thakershi (supra), was Government''s power to review its own order and since the statute had not provided for any power of review, the Court

took the view that the power of review cannot be exercised by taking resort to inherent power. The reference, made to the case of Patel Narshi

Thakershi (supra), is, therefore, in the present case, wholly misplaced.

109. Though Mr. Pathak, learned Additional Solicitor General, has also referred to the case of Indian National Congress (I) (supra), it needs to be

noted that this was, again, a case, where the question raised was whether the Election Commission has the power to review its own order. Since

the Election Commission has no power to entertain a complaint and enquire into a complain for registering a particular party for violation of the

Constitutional provisions, the Supreme Court held, in Indian National Congress (I) (supra), that the High Court''s direction, given in Indian National

Congress (I) (supra), would, if allowed to survive, amount to making the Election Commission review its own order, which, in the light of the

Constitutional provisions, is not permissible. The relevant observations, made in this regard, at paragraph 32 of Indian National Congress (I)

(supra), which Mr. Pathak. has relied upon, read as under:

32. This matter may be examined from another angle. If the directions of the High Court for considering the complaint of the respondent that some

of the appellant political parties are not functioning in conformity with the provisions of Section 29-A is to be implemented, the result will be that a

detailed enquiry has to be conducted where evidence may have to be adduced to substantiate or deny the allegations against the parties. Thus, a lis

would arise. Then there would be two contending parties opposed to each other and the Commission has to decide the matter of deregistration of

a political party. In such a situation the proceedings before the Commission would partake the character of quasi-judicial proceeding.

Deregistration of a political party is a serious matter as it involved divesting of the party of the statutory status of a registered political party. We

are. therefore, of the view that unless there is express power of review conferred upon the Election Commission, the Commission has no power to

entertain or enquire into the complaint for deregistering a political party for having violated the constitutional provisions.

110. In The Commissioner of Income Tax-1 Vs. The West Coast Paper Mills Ltd., , relied upon by Mr. Pathak, learned ASG wherein the

Bombay High Court has held that power of substantive review having not been conferred under the IT Act, review is not maintainable. For the

reasons, which we have already assigned above, we are constrained to take a view different from what has been taken in West Coast Papers Ltd

(supra) and hold that a High Court, being a Court of record, cannot, when brought to its notice, allow an order to exist on record, which ex facie

suffers from serious procedural mistake leading to denial of opportunity of effective hearing to a party to the appeal and thereby cause miscarriage

of justice.

WHETHER REVIEW, IN THE PRESENT CASE, STANDS BARRED, BECAUSE OF PENDENCY OF THE APPEAL, PRESENTLY

LYING IN SUPREME COURT, AT THE INSTANCE OF THE RESPONDENTS?

111. In order to correctly appreciate the submission, made by Mr. Pathak, that in the light of the law, laid down, in Kunhayammed (supra), the

review petitions stand barred, we may refer to the relevant observations, made by the Supreme Court, in Kunhayammed (supra). The relevant

observations, appearing at Clause (vii) of paragraph 44, in Kunhayammed (supra), reads as under:

44. To sum up our conclusions are:--

(i) *** *** ***

(ii) *** *** ***

(iii) *** *** ***

(iv) *** *** ***

(v) *** *** ***

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract

the doctrine of merger, the order may be of reversal modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court, the

jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.

(Emphasis added)

112. In Kunhayammed (supra), the Supreme Court has, in no uncertain words, pointed out that where review is filed first and, then, the delay in

preferring the SLP is condoned and the leave is granted, the review jurisdiction of the High Court will not be taken away and High Court will still

remain free to dispose of the review petition Explaining this aspect of law, the Supreme Court, in Kunhayammed (supra), has observed that if the

review of a decree is granted before the disposal of the appeal against the decree, the decree, as appealed against, will cease to exist and the

appeal, in the Supreme Court, would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree

has been granted, because the decree reviewed gets merged into the decree passed in the review and the appeal to the superior Court, preferred

against the earlier decree, becomes infructuous. The relevant observations, appearing, in this regard, at paragraph 37, in Kunhayammed (supra),

read as under:

37. Let us assume that the review is filed first and the delay in the SLP is condoned and the SLP is ultimately granted and the appeal is pending in

this Court. The position men, under Order 47 Rule I CPC is that still the review can be disposed of by the High Court. If there view of a decree is

granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered

incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted. This is because the decree

reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree - the one before

review - becomes infructuous.

113. The case in hand is squarely covered by the illustration, which has been given at paragraph 37 in Kunhayammed (supra). Obviously, a party

to a decree cannot apply for review, if he has already preferred an appeal and if he applies for review, he cannot prefer appeal. Paragraph 37,

therefore, clearly refers to a case, where one party seeks review of a decree and, as against the same decree, a SLP is filed, the delay in making

the SLP is condoned and leave is granted. In such a case, the High Court"s jurisdiction to review the decree is not taken away, because the other

party has, after review petition has already been filed, preferred an appeal against the same decree and, that too, without informing the Supreme

Court. In the case at hand, the Special Leave Petition, which the Revenue has filed, does not, admittedly, make any reference to the leave petition

and, in other words, the Revenue has remained completely silent in the SLP that a review petition, seeking review of the judgment and order, dated

16.09.2010, is pending in this Court. In such circumstances, whether the jurisdiction of this Court to review the judgment and order, dated

16.09.2010, can be treated to have been ousted, because, leave having been granted, a regular appeal is born and pending in the Supreme Court

?

114. Supposing A and B are the two parties to a decree. While A files a review petition seeking review of the decree, B prefers a SLP and special

leave having been granted by the Supreme Court, a regular appeal comes into existence in the Supreme Court In such a case, the jurisdiction of the

High Court to review the decree, at the instance of A, would not become infructuous. Far from this, the High Court can still decide the review

petition and, if the review is allowed, then, the appeal, which was preferred against the original decree, would become incompetent, because there

cannot be an appeal against the original decree, which has already been reviewed, inasmuch as a review decree would subsume the original decree

by application of the doctrine of merger and the original decree would no longer survive. Consequently, the appeal, as indicated hereinbefore,

would become infructuous.

115. In the present case, therefore, this review petition has not become infructuous and the same can still be decided and disposed of by this Court

in accordance with law. This is precisely what has been conveyed by the observations of the Supreme Court, made in paragraph 37 of

Kunhayammed (supra), which we have reproduced above.

116. In the case at hand, merely because the Revenue has, subsequent to the filing of the review petition, gone to the Supreme Court by way of

Special Leave Petition, and that leave having been granted, a regular appeal has come into existence, it would not render me present review

petition filed by the respondents-review petitioners infructuous and incompetent in law; or else, the principle, which has been enunciated by the

Supreme Court in clear terms, at paragraph 37, in Kunhayammed (supra), becomes meaningless and otiose.

DISCUSSION ON MERIT AND RELIEFS, IF ANY:

117. What needs to be borne in mind is that while resisting the substantial questions of law, which an appellant contends to have arisen in an appeal

made u/s 260A, it is open to the respondent to show that such a substantial question of law, which the appellant contends to have arisen, has, in

fact, not arisen and this would obviously take the Court to examine the question on merit, though may not be in such depth as may be required to

be done, when the appeal is admitted on such a substantial question of law and, eventually, heard.

118. Similarly, the feet that in a given case, while resisting admission of an appeal on a substantial question of law, on merit, which the appellant

frames, it cannot be said that the appeal has been heard on merit inasmuch as the appeal can be heard and shall be heard, on merit, only and only

when the Court, on being satisfied that appeal has raised substantial questions of law formulates the substantial question or questions of law for

hearing of the appeal or, in fact, hears the appeal on the substantial question or questions of law, if any, which, according to the High Court,

has/have arisen for being answered in the appeal.

119. In the case at hand, however, this Court has committed a mistake in passing the impugned judgment and order, dated 16.09.2010, and there

shall be no hesitation, on the part of this Court, to acknowledge its mistake as we do and correct the error.

120. While considering the order, dated 16.09.2010, which is under review, it needs to be borne in mind that "to err is human" and the Judges,

being human beings, are not infallible. It is, therefore, not impossible that while interpreting law, a court may err. In such circumstances remaining

stuck to an incorrect view of law in order to maintain consistency is not a virtue. Observed Jackson. J., while giving his dissenting opinion in

Massachusetts Vs. United States, reported in 333 US 611, as under:

I see no reason why should be consciously wrong today because I was unconsciously wrong yesterday. Even Lord Denning expressed similar

views when he observed in OSTIME (INSPECTOR OF TAXES) Vs. AUSTRALIAN MUTUAL PROVIDENT SOCIETY., , the doctrine of

precedent does not compel your lordships to follow the wrong path until you fall over the edge of the cliff.

121. Deriving strength from the above observations made by Jackson J. and Lord Denning, the Constitution Bench, in Distributors (Baroda) Pvt.

Ltd. Vs. Union of India (UOI) and Others, , speaking through P. N. Bhagawati, J., (as his Lordship then was) observed:

.....It is almost as important that the law should be settled permanently as that it should be settled correctly. But there may be circumstances,

where public interest demands that the previous decision be reviewed and reconsidered. The doctrine of stare decisis should not deter the Court

from overruling an earlier decision, if it is satisfied that such decision is manifestly wrong or proceeds upon a mistaken assumption in regard to the

existence or continuance of a statutory provision or is contrary to another decision of the Court.

122. Confronted with a situation, similar in nature as the one that we have at hand, when correctness of an earlier view, expressed by the Court, in

Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and

Another, , was doubted, S. Ranganathan J., who was a part to the decision in Goodyear India Ltd. (supra), observed in his concurrent decision, in

Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., , asunder:

12. I am quite conscious that the conclusion I have expressed here as to the vires of the provision impugned is contrary to the conclusion I reached

in Goodyear on somewhat analogous provisions. I need not, for the purposes of the present cases, express any final conclusion as to whether the

conclusion in Goodyear was rightly reached in the context of the provisions of the statutes there considered or would need a second look and fresh

consideration in the context of what has been said here. But I should not I think, hesitate to accept the point of view now presented to us which

appeals to me as more realistic, appropriate and preferable, particularly when I see that the view one way or the other would affect the validity of a

large number of similar legislations all over India, merely because it may not be consistent with the view I took in Goodyear. Consistency, for the

mere sake of it is no virtue. If precedent is needed to justify my change of mind, I may quote Bhagawati, J. (as he men was) in Distributors

(Baroda) P. Ltd. V. Union of India, ""we have given our most anxious consideration to this question, particularly since one of us, namely P.N.

Bhagawati, J. was a parry to the decision (Cloth Traders Case (Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax , Gujarat-I,

). But having regard to the various considerations to which we shall advert in detail when we examine the arguments advanced on behalf of the

parties, we are compelled to reach the conclusion that Cloth traders case must be regarded as wrongly decided. The view taken in that case in

regard to the construction of Section 80-M must be held to be erroneous and it must be corrected. To perpetuate an error is no heroism. To

rectify it is the compulsion of judicial conscience. In this we derive comfort and strength from the wise and inspiring words of Justice Branson in

Pierce vs. Delameter AMY p. 18 a Judge ought to be wise enough to know that he is fallible and therefore ever ready to learn great and honest

enough to discard all mere pride of opinion and follow truth wherever it may lead and courageous enough to acknowledge his errors.

123. As far as this review petition is concerned, we are not required to decide whether the appeal has been decided by the impugned judgment

and order, dated 16.09.2010, correctly or incorrectly. If this review petition is allowed because of the fact that there was denial of opportunity of

hearing to the review petitioners, the impugned judgment and order would not exist and it would remain open for any of the parties to show as to

what correct answer to the substantial questions of law, which this Court may formulate, shall be.

124. In the present case, since this Court did not formulate the substantial questions of law for adjudication before hearing of the appeal on merit,

there can be no escape from the conclusion that hearing of the appeal prior to its admission has to be treated as a hearing on the admission of the

appeal in order to determine if the substantial questions of law, as contended by the appellants, had or had not arisen and it was only upon having

formulated the questions of law, which, according to the High Court, were the substantial questions of law for adjudication in the appeal that the

appeal could or ought to have been heard.

125. As the omission, on our part, to formulate the substantial questions of law and, then, invite the parties to have their say in the matter amount to

denial of opportunity of effective hearing to the parties concerned, particularly, to the review petitioners, we must have the magnanimity and

courage to acknowledge our mistake, recall the judgment and order, dated 16.09.2010, and, then, decide the appeal, on merit, after having

formulated the substantial questions of law, which this Court may deem necessary for adjudication of the appeal.

126. Because of what have been discussed and pointed out above, these review petitions succeed. The impugned judgment and order stand

accordingly reviewed and recalled.

127. Consequent upon the fact that the Review Petition No. 108/2010 has been allowed today, the Review Petition Nos. 116/2010, 117/2010,

118/2010 & 124/2010, too, which rested on the judgment and order, dated 16.09.2010, are hereby allowed and the orders, passed in ITA No.

22/2010, 21/2010, 23/2010 and 24/2010 respectively, are hereby reviewed and recalled. Let the ITA Nos. 06/2010, 23/2010, 22/2010,

21/2010 and 24/2010, along with the other connected appeals, be listed, for admission, on 10.04.2013.