

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 23.01.2009

+ STA 12/2008

COMMISSIONER OF SALES TAX

... Appellant

- versus -

M/S BEHL CONSTRUCTION

... Respondent

AND

+ STA 13/2008

COMMISSIONER OF SALES TAX

... Appellant

- versus -

M/S ARAVALI ALUMINIUM PVT LTD

... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Parag P. Tripathi, ASG with Ms Avnish Ahlawat

For the Respondent : Mr Surendra Kumar with Mr A. K. Babbar and
Mr Rajesh Mahna

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. In these appeals under section 81 of the Delhi Value Added Tax Act, 2004 (hereinafter referred to as “the said Act”) the following substantial questions of law arise for our consideration:-

1. Where on the expiry of time specified in section 74(7) of the Delhi Value Added Tax Act, 2004 the Commissioner has not exercised either of the options set out in section 74(7)(a) or 74(7)(b), whether the objection pending before the commissioner shall be deemed to be allowed?
2. Whether the Tribunal was correct in law in providing a mandatory period of eight months, within which the Commissioner has to dispose of the objection pending before him under section 74(7) of DVAT Act, particularly, when no such stipulation is provided by the statute?

2. In STA 12/2008 (Behl Construction), the Appellate Tribunal, Value Added Tax (hereinafter referred to as ‘the Tribunal’), by virtue of its decision dated 24.04.2008 in Appeal No. 402/ATVAT/06-07, though it decided against the dealer/assessee on facts, *inter alia* held on law that: (a) the provisions of section 74(7) of the said Act are directory and not mandatory; (b) if no notice of 15 days is given as provided under sub-section (8) of section 74, the objection cannot be kept pending indefinitely by the objection hearing authority; (c) The legislative intent is abundantly clear from a harmonious reading of sub-sections (7), (8) & (9) of section 74 of the said Act that the objection

must be decided within a maximum period of eight months. The revenue is aggrieved by these conclusions of law.

3. In STA 13/2008 (Aravali Aluminium), the Tribunal, by virtue of its order dated 22.05.2008, followed its order dated 24.04.2008 in the case of *Behl Construction* and reiterated that if the objections are not decided within a period of 8 months, even if the notice of 15 days has not been given by the objector to the objection hearing authority, the objections would be deemed to have been allowed, as in such a situation, the objections cannot be kept pending for an indefinite period and must be decided within a reasonable time. The Tribunal observed that in the case of *Behl Construction* it had determined the reasonable period to be eight (8) months. In *Aravali Aluminium*, since the objections were decided after a period of more than nine (9) months, the Tribunal held that the objections were deemed to have been allowed. The revenue is aggrieved by this.

4. Some facts may be necessary. In *Behl Construction*, the dealer/assessee, being aggrieved by an order of penalty passed by the Value Added Tax Officer (VATO), filed its objections to the same under section 74 of the said Act on 21.09.2005. The Joint Commissioner issued a notice dated 19.12.2005 extending the time to

consider the objections by a period of two (2) months. The objections were ultimately rejected by the Joint Commissioner by his order dated 20.03.2006. Being aggrieved, the dealer/assessee filed an appeal before the Tribunal and contended that the order passed by the Joint Commissioner was beyond time and the objections ought to be deemed to have been allowed. It was argued on behalf of the dealer/assessee that the period of limitation for considering objections was three (3) months in the first instance and, after the two month extension under the first proviso to section 74(7), even the period of five months had expired before the order dated 20.03.2006 was passed. It is pertinent to note that though the dealer/assessee could have issued a notice under section 74(8) requiring the Joint Commissioner to decide upon the objections, it did not do so. The Tribunal, as mentioned above, rejected the pleas of the dealer/assessee but, did so by holding that the objections under section 74 could be disposed of within eight (8) months and, irrespective of whether the dealer/assessee gave or did not give a notice as contemplated under section 74(8) of the said Act, if the order disposing the objections was not passed within these eight (8) months, it would be deemed that the objections were allowed/accepted. This finding on a question of law has caused the revenue to file the appeal in *Behl Construction*, though on facts, the Tribunal held that since the objections were disposed of within eight months, the order dated 20.03.2006 was not hit by the time bar.

5. At this juncture, we may also set down the facts in *Aravali Aluminium*. Here, the objections under section 74 of the said Act were filed on 19.01.2003 and the Joint Commissioner passed the order rejecting them on 31.10.2007. Since the time gap between the two dates was more than eight (8) months, the Tribunal held that the objections were deemed to have been allowed. Consequently, the order of the Joint Commissioner passed on 31.10.2007 was held to be beyond time.

6. The relevant provisions of Section 74 of the said Act read as under:

“74 Objections

- (1) Any person who is dis-satisfied with
 - (a) an assessment made under this Act (including an assessment under section 33 of this Act); or
 - (b) any other order or decision made under this Act;
- may make an objection against such assessment, or order or decision, as the case may be, to the Commissioner;

XXXX XXXX XXXX XXXX

XXXX

(7) Within three months after the receipt of the objection, the Commissioner shall either

(a) accept the objection in whole or in part and take appropriate action to give effect to the acceptance (including the remission of any penalty assessed either in whole or in part); or

(b) refuse the objection or the remainder of the objection, as the case may be;

and in either case, serve on the person objecting, a notice in writing of the decision and the reasons for it, including a statement of the evidence on which it is based:

PROVIDED that where the Commissioner within three months of the making of the objection notifies the person in writing, he may continue to consider the objection for a further period of two months:

PROVIDED FURTHER that the person may, in writing, request the Commissioner to delay considering the objection for a period of up to three months for the proper preparation of its position, in which case the period of the adjournment shall not be counted towards the period by which the Commissioner shall reach his decision.

(8) Where the Commissioner has not notified the person of his decision within the time specified under sub-section (7) of this section, the person may serve a written notice requiring him to make a decision within fifteen days.

(9) If the decision has not been made by the end of the period of fifteen days after being given the notice referred to in sub-section (8) of this section, then, at the end of that period, the Commissioner shall be deemed to have allowed the objection.

(10) Where on the date of commencement of this Act a dispute under the Delhi Sales Tax Act, 1975 (43 of 1975) has been pending before a sales tax authority referred to in section 9 of the Delhi Sales Tax Act, 1975 (43 of 1975), the dispute shall be disposed of

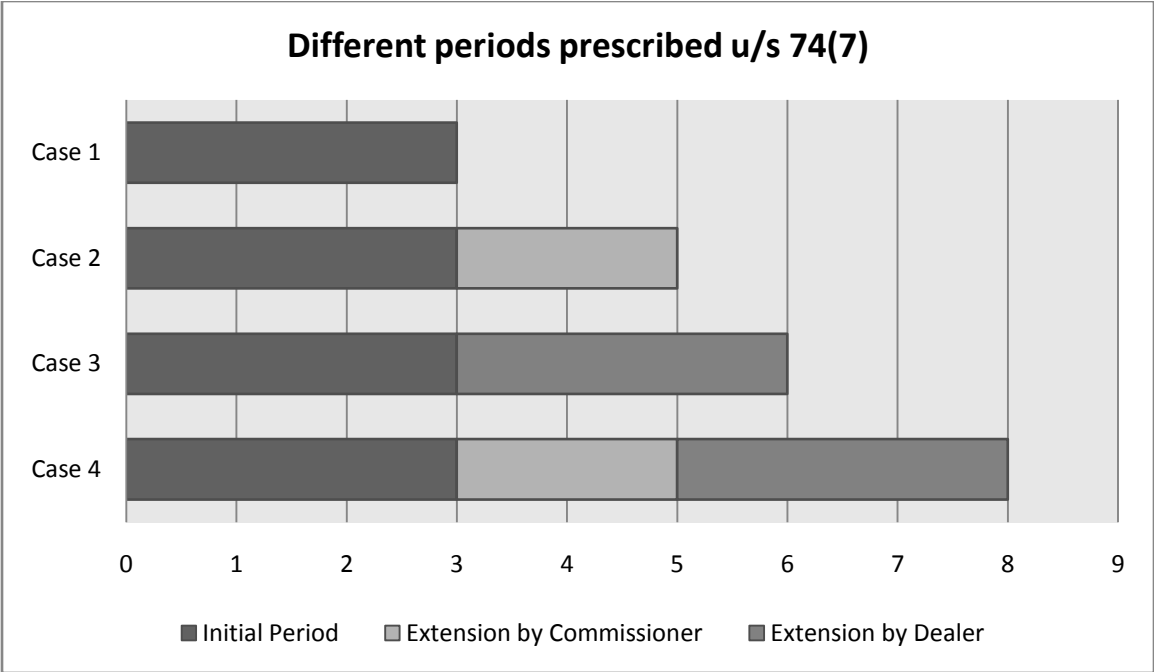
within a period of five years from the date of the commencement of this Act.

(11) Where the dispute referred to in sub-section (10) of this section has not been decided within the time required, the dispute shall be deemed to have been resolved in favour of the dealer.”

Clearly, sub-section (7) requires the Commissioner to either (a) accept the objection in whole or in part and take appropriate action to give effect to the acceptance (including the remission of any penalty assessed either in whole or in part) or (b) refuse the objection or the remainder of the objection, as the case may be, within three months after the receipt of the objection. And, in either case, the Commissioner shall serve on the person objecting, a notice in writing of the decision and the reasons for it, including a statement of the evidence on which it is based. Sub-section (7) contains two provisos. Under the first proviso the Commissioner has been empowered to continue to consider the objection for a further period of two months beyond the three month period prescribed in the main part of sub-section (7). However, such an extension would be operative only if the Commissioner sends a written notice to the objector, within three months of the making of the objection, of his intention to extend the period of his consideration by a further period of two months. The second proviso deals with extension of time at the instance of the objector who can request the Commissioner, in writing, to delay

considering the objection for a period of up to three months to enable the objector to prepare its case properly. Though this period of three months operates as an extension of time, technically speaking it is an adjournment and is not be counted towards the period by which the Commissioner is to reach his decision.

7. There are four possible cases under section 74(7): Case 1: Where neither the commissioner nor the objector seek an extension of time. The applicable period for deciding the objections would be three (3) months from the receipt of the objections; Case 2: Where the Commissioner alone seeks an extension invoking the first proviso. The period would get extended to five (5) months from the receipt of objections; Case 3: Where the objector alone seeks time under the second proviso. The period of consideration could get extended by a maximum of three months or, in other words, upto six months from the receipt of objections; Case 4: Where both the Commissioner and the objector seek more time under the first and second provisos, respectively. Here, the period could get extended to eight (8) months (3 + 2 + 3) from the receipt of the objections. These four cases are depicted in the chart below:



Whether the applicable period is three months or five months or six months or eight months, the commissioner is required to either accept or reject the objections within that time. But what happens if the commissioner does not dispose of the objections during the applicable period? Does it mean that the objections are deemed to be allowed or accepted with the mere passage of the applicable period? We are of the view that such a deeming fiction is not discernible from a plain reading of the provisions of section 74(7) of the said Act. This is explained below.

8. In sub-sections (8) and (9) of section 74, the legislature has provided for the situation where the commissioner does not dispose of the objections during the applicable period. This, in itself, is indicative

of the fact that the legislature was mindful of such a situation and that the mere passage of the applicable period without the commissioner disposing the objections one way or the other did not mean that the objections could be deemed to have been accepted or allowed. For this to happen, something more is required and that is exactly what is stipulated in sub-sections (8) and (9). In sub-section (8) it is provided that where the Commissioner has not notified the objector of his decision within the time specified under sub-section (7) (ie., the applicable period), the objector may serve a written notice requiring him to make a decision within fifteen days. And, by virtue of sub-section (9), if the decision is not made by the end of the period of fifteen days after being given the notice referred to in sub-section (8), then, at the end of that period, the Commissioner shall be deemed to have allowed the objection. So, the deeming fiction of sub-section (9) gets triggered only if a notice as stipulated in sub-section (8) is given and the period of fifteen days specified therein expires without any decision from the commissioner. Not otherwise. This is the clear legislative intendment which we can gather upon a plain reading of the provisions of sub-sections (7), (8) and (9) of section 74 of the said Act.

9. Mr Parag Tripathi, the learned Additional Solicitor General of India, appearing for the appellant/revenue submitted that sub-sections

(7), (8) and (9) of section 74 of the said Act must be read together and not disjunctively. He submitted that the legal fiction created by the deeming provision in sub-section (9) can only be raised if the conditions precedent for its application are satisfied. He contended that the condition precedent for the applicability of the deeming fiction under sub-section (9) is provided in sub-section (8). A notice calling upon the Commissioner to decide within fifteen days is a must. If no such notice is issued by the objector, then the deeming provision of sub-section (9) does not get activated. He placed reliance on **Dilip N. Shroff v. CIT: (2007) 6 SCC 329**, wherein the Supreme Court observed [at page 354]:

“Legal fiction, however, as is well known must be given its full effect when the conditions precedent therefor are satisfied and not otherwise. (*Ashok Leyland Ltd. v. State of T.N.: (2004) 3 SCC 1*)”

Mr Tripathi referred to the decision of the Supreme Court in the case of ***Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver: (1996) 6 SCC 185***, wherein it was held as under [at pages 195-196]:

“Rule of construction of provisions creating legal fictions is well settled. In interpreting a provision creating a legal fiction the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the

language of the section by which it is created. It cannot also be extended by importing another fiction. In this connection we may profitably refer to two decisions of this Court. In the case of *CIT v. Shakuntala*:(AIR 1966 SC 719) a three-Judge Bench of this Court speaking through S.K. Das, J., made the following pertinent observation in paragraph 8 of the Report:

“The question here is one of interpretation only and that interpretation must be based on the terms of the section. The fiction enacted by the legislature must be restricted by the plain terms of the statute.”

In another case reported in the same volume at page 870, namely, *CIT v. Moon Mills Ltd.*(AIR 1966 SC 870) another three-Judge Bench of this Court speaking through Subba Rao, J., observed in paragraph 8 of the Report in connection with the provision creating such legal fictions as under:

“The fiction is an indivisible one. It cannot be enlarged by importing another fiction....”

It was also contended by Mr Tripathi that the provisions of section 74(7) of the said Act were directory and not mandatory. This was so, because there were no consequences of failure provided for in the said sub-section. He relied upon *State of Jharkhand v. Ambay Cements*: (2005) 1 SCC 368. The Supreme Court held that [at page 378]:

“Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a

particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed.”

Reliance was also placed on the constitution bench decision in **Bhikraj**

Jaipuria v. Union of India: (1962) 2 SCR 880, wherein the supreme

court observed as under [at pages 902-903]:

“Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity: if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good. As observed in *Maxwell on Interpretation of Statutes*, 10th Edn., p. 376:

“It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the

real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded.”

Lord Campbell in *Liverpool Borough Bank v. Turner*

[(1861) 30 LJ Ch 379] observed:

“No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.”

10. While we may, at this juncture itself, indicate that we agree with Mr Tripathi’s submissions, it would be necessary to deal with the arguments advanced on behalf of the respondents. The learned counsel for the respondents in both the appeals contended that the provisions of section 74(7) of the said Act were mandatory as it used the word “shall”. In their assertion that section 74(7) was a mandatory provision, the learned counsel for the respondents relied upon **Dalchand v. Municipal Corpn.: (1984) 2 SCC 486**. The Supreme Court held as under [at page 486-487]:

“There are no ready tests or invariable formulae to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most

important. The weighing of the consequence of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provision is necessary to invalidate the act complained of. It is well to remember that quite often many rules, though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit. The negligence of those to whom public duties are entrusted cannot by statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object of the statute. It is as well to realise that every prescription of a period within which an act must be done, is not the prescription of a period of limitation with painful consequences if the act is not done within that period.”

[underlining added]

As the last sentence, which has been underlined by us in the extract above, would show, the said decision is not one which favours the stand taken by the respondents. Quite to the contrary, it makes it clear that every stipulation of a period during which an act must be done does not by itself translate to a stipulation of limitation, the non-compliance with which would lead to any penal consequences. In fact, the provisions of section 74(7) merely contain a prescription of a period or periods relative to different circumstances during which the

Commissioner ought to decide the objections. They do not contain any stipulation by way of consequences for non-compliance. Thus, although section 74(7) uses the word “shall” which is usually found in mandatory provisions, the absence of a stipulated consequence for non-compliance reveals the true nature of the provision, that is, it is directory.

11. On behalf of the respondents, reliance was also placed on a division bench decision of the High Court of Andhra Pradesh in the case of *Santosh Wines v Asst Commercial Tax Officer, Khairatabad Circle, Hyderabad : 99 STC 160*. That decision, also, would be of no help to the respondents. The deeming fiction for the grant of a registration certificate was specifically engrafted in the provisions itself. Rule 28 of the A.P. General Sales Tax Rules, 1957 dealt with the question of registration. Clause (a) of sub-rule (10) of rule 28 provided that if the registering authority is satisfied that all the requirements have been complied with he shall register and issue the certificate within 30 days of receipt of the application. Clause (b) of sub-rule (10) stipulates that the registering authority shall give the applicant a notice of further enquiry or a notice to show cause against rejection of the application within a period of 30 days from the date of receipt of the application for registration, if for any reason the certificate of registration could not be

issued within the period of 30 days. Clause (c) of sub-rule (10) specifically provides that if the registering authority fails to comply with clause (a) and clause (b), that is, he neither issues the certificate within 30 days nor issues the notice or show cause notice (as the case may be) within the period of 30 days, then, the application shall be deemed to have been duly registered. It is obvious that the deeming fiction is specifically provided for as a consequence of default. There is no such specific consequence under section 74(7) of the said Act. In fact, the deeming provision of section 74(9) of the said Act is triggered only if the condition of notice stipulated in section 74(8) is satisfied. It is clear that the decision in *Santosh Wines (supra)* turns on its own facts and is of no assistance to the respondents.

12. The learned counsel for the respondents also contended that the requirement of passing an order either accepting or rejecting the objections cannot be left open-ended in the sense that the Commissioner may pass an order after several months or even years. It is for this reason, according to them, that the Tribunal sought to fix a reasonable time period of eight (8) months within which the order ought to be passed. They submitted that the Tribunal's view in this regard does not call for any interference. They also supported the conclusion of the Tribunal that in case the order is not passed within

eight (8) months of the receipt of objections, irrespective of whether the notice under section 74(8) of the said Act is issued by the objector or not, the objections be deemed to have been accepted.

13. There is a fallacy in the argument that there is no time limit for passing an order either accepting or rejecting the objections. As we have noted earlier in this judgment, there are specific time limits prescribed in respect of four different eventualities. The first being the period of three (3) months from the date of receipt of objections. Thus, where neither the commissioner extends time for considering the objections nor the objector seeks further time, the time limit is only three (3) months. The Tribunal has gone wrong in fixing the time limit at a purported “reasonable” period of eight (8) months. Where the time limit of three (3) months is applicable, the objector could, immediately on the passing away of that period, issue a notice under section 74(8) of the said Act requiring the commissioner to pass the order within 15 days. If an order is not passed within 15 days then the objector, by virtue of the fiction created in section 74(9) of the said Act, would be within his rights to deem that his objections have been accepted. However, if an order is passed within 15 days, the order shall determine as to whether the objections have been accepted or rejected. Similar situations prevail when the applicable periods are five (5) months

(where the commissioner alone extends time) or six (6) months (where the objector alone seeks time) or eight (8) months (where both the commissioner and the objector seek extension of time). So, there is a specific time limit prescribed in each of the four possible situations. Moreover, it is also specifically provided that if the applicable time limit expires and no order is passed by the the commissioner then the objector may issue a notice calling upon the commissioner to pass the order within 15 days. It is only if such notice is issued and if no order is passed within the stipulated period of 15 days that the objector's objections would be deemed to have been accepted. Not otherwise.

14. The time limits of three (3) months, five (5) months, six (6) months or eight (8) months are merely directory. However, if such time limit expires and the notice under section 74(8) of the said Act is issued then the period of 15 days would be mandatory. The consequence of not passing an order is clearly spelt out and that is that the objections would be deemed to have been accepted. It is apparent that the scheme is not left open-ended as submitted by the learned counsel for the respondents and wrongly assumed by the Tribunal. If it is contended that it is left at the whim and fancy of the commissioner to pass an order when he likes, the answer is, what prevents the objector from issuing a notice under section 74(8) of the said Act and thereby

fixing a terminal date for passing the order? If the contention is that why should the objector issue such a notice as by virtue of section 35(2) of the said Act he enjoys a virtual stay during the pendency of his objections, the answer is that such an objector would have to choose between the protection of section 35(2) and invoking the deeming provisions of section 74(9). He cannot 'eat his cake and have it too', as it were. He cannot let the applicable time limit (and more) slip by, all this while enjoying the virtual stay, and also say, at the end of it, without issuing the peremptory 15 day notice under section 75(8) of the said Act, that his objections are deemed to have been accepted. Accepting the contentions of the respondents and the conclusions of the Tribunal would amount to re-writing the provisions which are clear and unequivocal. When the meaning of a statutory provision is clear and without doubt, it does not call for any exercise of interpretation. Nor can we introduce a meaning which the legislature did not intend.

15. For all these reasons we hold that an objection pending before the commissioner cannot be deemed to have been accepted simply because of the fact that the time specified in section 74(7) of the Delhi Value Added Tax Act, 2004 has expired and the Commissioner has not exercised either of the options set out in section 74(7)(a) or 74(7)(b). The deeming provision of section 74(9) of the said Act would only get

triggered if the conditions precedent provided under section 74(8) of the said Act are satisfied. We also hold that the Tribunal erred in law in fixing a mandatory period of eight months, within which the Commissioner has to dispose of the objection pending before him under section 74(7) of said Act, particularly, when no such stipulation is provided by the statute. Consequently, both the questions of law are decided in favour of the revenue/appellant and against the respondents. While this will not alter the outcome in *Behl Construction*, as indicated above, it sets right the position in law which the Tribunal had erroneously taken and which was being followed in other cases before the Tribunal.

The appeals are allowed and the impugned orders are set aside to the extent indicated above. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

January 23, 2009
SR