

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Miscellaneous Appeal No.224 of 2007**

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1. Commissioner of Income Tax, Central, Patna  
2. Asstt. Commissioner of Income Tax, Central Circle-2, Patna  
.....Assessing Officer /Appellants

Versus

Shri Harsh Kochar, Bharat Ice Factory, Karbigahia, Patna  
..... Assessee/Respondent

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**Appearance :**

For the Appellants : Mrs. Archana Sinha, Senior Standing Counsel  
Mr. Alok Kumar, Advocate  
Ms. Shalini Bihari, Advocate

For the Respondent : Mr. Ajay Kumar Rastogi, Advocate  
Mr. Parijat Saurav, Advocate

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**CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA**

**And**

**HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA**

**C.A.V. JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA)**

**Date: 28-04-2016**

The Revenue is in appeal under Section 260A of the Income Tax Act, 1961 (for short, 'the Act') arising out of I.T. (SS) A. No.01/Pat/2006 Block Assessment period 01.04.1997 to 24.04.2003 passed by the Income Tax Appellate Tribunal, Patna Bench, Patna (for short, 'the Tribunal' ).

2. This Court has framed the following substantial questions of law:-

1. *Whether the notebook marked as KPS-5 and the Bank Passbook found as a result of the survey u/s 133A which was carried out in the office premises of Sujata*



*Hotels Pvt. Ltd. of which the Respondent assessee was a Director, on the same day as the search u/s 132 in the residential premises of the Respondent assessee, namely 24.04.2003, could not be taken into consideration by the Assessing Officer while making the computation of the undisclosed income as held by the Tribunal, as the same did not amount to “such other materials or information as are available with the Assessing Officer” within the meaning of Section 158 BB(1) of the Act?*

2. *Whether the reliance placed by the Tribunal on the decision of the Madras High Court rendered in CIT vs. G. K. Senniapan (284 ITR 220) is misconceived being not applicable to the facts of the present case?*
3. *Whether the Tribunal has consequently erred in law in upholding the deletion of the addition of Rs.1,59,40,263/- made by the Assessing Officer on the basis of the notebook and the Bank passbook, and such conclusion is also incorrect in view of the decision of the Delhi High Court rendered in Friends Overseas Pvt. Ltd.'s case (269 ITR 268)?*

3. The brief facts leading to the aforesaid questions is that search and seizure operation under Section 132 of the Act was carried out in the residential premises of the assessee along with his brothers and the other family members on 24<sup>th</sup> of April, 2003. On the same day, there was survey in the premises of Sujata Hotel Pvt. Ltd where the cabin of the assessee in the capacity of the Director of the said Company was located. From that premises, an undisclosed SB

A/C No.9266 and the book KPS-5 were impounded. The aforesaid diary KPS-5 records the transactions in the form of receipts and payments. It contains written pages from 1 to 38 with “Mr. H. K. Account” inscribed on it. It is written in the handwriting of Shri Hardeo Singh.

4. A notice under Section 158BC of the Act was issued to the assessee on 29<sup>th</sup> of August, 2003. The assessee sought photo copies of all the seized documents. The copies of the seized (impounded) documents were supplied to the assessee on various dates between 04.09.2003 to 07.11.2003. The assessee was again asked to file the return vide letter dated 12<sup>th</sup>/13<sup>th</sup> February, 2004 followed by another notice under Section 142(1) of the Act on 04.08.2004. A show cause notice for initiating proceeding under Section 276CCC of the Act was also issued. Ultimately, the assessee filed return on 22<sup>nd</sup> February, 2005 declaring an undisclosed income of Rs.7,02,100/-.

5. A questionnaire along with a notice under Section 142(1) and 143(2) of the Act dated 08.03.2005 was issued. The assessee was asked to explain the basis of undisclosed income of Rs.7,02,100/- for assessment years 2001-02 and 2002-03 shown in the block return. The stand of the assessee as per the order-sheet dated 24.03.2005 was that the income disclosed in the block return relates to the transactions reflected in the SB A/C No.9266 and impounded

document KPS-5. The assessee was further asked to explain the manner in which the total undisclosed income of Rs.7,02,100/- has been shown in the block return for the assessment years 2001-02 and 2002-03. On the basis of undisclosed SB A/C No.9266 and book KPS-5, the reply of the assessee is as under:-

| A. Y.     | Amount (Rs.) |                                                                                                                                                                                |
|-----------|--------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1         | 2            | 3                                                                                                                                                                              |
| 1999-2000 | 190/-        | Due to short disclosure of income from other sources in regular return.                                                                                                        |
| 2000-01   | 230/-        | Due to short disclosure of income from other sources in regular return.                                                                                                        |
| 2001-02   | 2,00,470/-   | Deposit in Bank of India A/c No.9266 and peak credit in Harsh Kochar in KPS-5 Rs.2,00,000/- and Rs.470/- short disclosure of income from other sources in regular return.      |
| 2002-03   | 5,01,210/-   | Rs.5,00,000/- peak cash credit of Harsh Kochar A/c in KPS-5 minus the cash balance in hand and Rs.1210 is for short disclosure of income from other sources in regular return. |
| Total     | 7,02,100/-   |                                                                                                                                                                                |

6. Subsequently, the assessee clarified on 19.04.2005 when he said to the following effect:

*“The record of KPS-5 is no way complete record and not a complete account. At this stage it is also not possible for me to give true and correct accounting of then recorded amount with evidence. Therefore, I considered the total amount of receipts and payments are of my account and all the transactions are mine and I have offered Rs.7.00 lakhs for taxation. Though the peak of this amount is hardly Rs.3.90 lakhs and my unexplained bank deposite is Rs.1.40 lakhs.*

*I preferred to disclose 7.00 lakh with a caution for*

*mistake and left out items if any. The detailed calculation is enclosed herewith as Annexure A & B.”*

7. The Assessing Officer further noticed the answer to question No.6 recorded during the course of search and the reply of the assessee which is as under:

*Qus:6 During the course of search and seizure operation carried on at your residential premises neither any pass book or cheque book are found. Please explain.*

*Ans: All are lying in the accounts section or in the Hotel Premises which are also being searched by the Income Tax Department.”*

8. The Assessee suffered a statement on oath on 21<sup>st</sup> of April, 2005. He said to the following effect:

*Qus 2: During the course of search and survey on 24.04.2003 a diary KPS-5 was found from your premises, in which the account of receipt and payment of cash is recorded. What do you want to say?*

*Answer: Captain Hardeo Singh used to write this diary. Whatever money he receive or paid he used to receive/pay on my instructions.”*

9. Hardeo Singh, who has written the notebook KPS-5, was produced by the assessee before the Assessing Officer. Hardeo Singh identified KPS-5 to be in his handwriting. In reply to question No.1 dated 11.04.2005 when cross-examined by the Assessing

Officer, he replied as under:

*Qus.1: From the perusal of accounts as per KPS-5 it is observed that you have deposited amount in cash in the names of some persons. Similarly, you have paid amounts in cash to others on various dates. Please explain how have you written their names for deposit and payment?*

*Answer: All the transactions of receipt and payments is written by me on the instruction/orders of Shri Harsh Kochar. The names of persons who have deposited money with me are written by me on the basis of their introduction given to me. But at the time of payment, I used to obtain the instruction of Shri Harsh Kochar and used to write the names of person to whom money was paid."*

10. In view of the above and other discussions, the Assessing Officer made addition of Rs.1,59,40,263/- as undisclosed income of the assessee. However, in appeal, the Commissioner of Income Tax (Appeals)-I, Patna [for short, 'CIT (A)'] deleted the additions made for the reason that the addition made by the Assessing Officer is based on documents found during the course of survey operation under Section 133A of the Act at the office premises of the appellant cannot form part of the assessment under Section 158 BC of the Act. It was the said order which was affirmed by the learned Tribunal holding that the person, who has recorded the book KPS-5, is not a person of the respondent, but the person of Sujata Hotel Pvt.



Ltd., a separate assessee. The document KPS-5 was impounded from the premises of the Sujata Hotel Pvt. Ltd., therefore, the addition made by the Assessing Officer in block assessment in the hands of the respondent on the basis of KPS-5 is against the provision of law and against the normal presumption that the person from whose premises the paper is collected is to explain the contents of the paper and not the assessee. It was held that the Assessing Officer travelled beyond his jurisdiction by asking the assessee to explain the details of those papers which he has not written and about which he has no idea who has written that paper. Therefore, the order of CIT (A) is fully justified order and does not require any intervention.

11. Learned counsel for the Revenue before this Court argued that the assessee has furnished return of the block assessment period on the basis of note book KPS-5 recovered during survey operations at the premises of Sujata Hotel Pvt. Ltd. where the office cabin of the assessee is located. The note book has been written by Sri Hardeo Singh, but at the instance of the assessee. Not only the note book KPS-5 was recovered but undisclosed SB A/C No.9266 was also recovered during the survey conducted at the office cabin of the assessee in the premises of Sujata Hotel Pvt. Ltd. Thus, the office cabin of the assessee in the Sujata Hotel Pvt. Ltd. is not a premises of a different assessee, but of the assessee himself. The assessee has based his return on the basis of the documents, so recovered;



therefore, the assessee cannot be permitted to assert that such documents could not be taken into consideration in the block assessment. It is also contended that there could not be any estoppel for taking into consideration such documents as he waived any protection when he voluntarily relied upon the note book KPS-5 and the passbook of S.B.A/c No.9266 while furnishing his block assessment return. Therefore, the learned CIT (A) as well as the Tribunal has gravely erred in law in holding that such document could not be taken into consideration by the Assessing Officer.

12. On the other hand, learned counsel for the assessee argued that Chapter XIV-B of the Act provides procedure for assessment of search cases. In terms of Section 158 BB of the Act, the undisclosed income of the block period shall be the aggregate of the total income of the previous years. Such undisclosed income is to be arrived at on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence. Therefore, it is contended that evidence recovered during the search alone which can be used by the Assessing Officer while making assessment and not the materials impounded during the survey of premises of another assessee. It is also contended that any submission of the assessee in respect of KPS-5 or the undisclosed Saving Bank Account is contrary to the Statute

and there cannot be any estoppel against the Statute. Therefore, the CIT (A) and the Tribunal rightly excluded the incriminating materials recovered during the survey operation from the premises of another assessee while framing block assessment of the assessee.

13. We have heard learned counsel for the parties and find that the learned CIT (A) and the Tribunal have gravely erred in excluding the evidence recovered from the premises of Sujata Hotel Pvt. Ltd. as the documents recovered from the premises of another assessee. Such finding is vitiated, *inter alia*, for the following reasons:

14. Firstly, the assessee has referred to note book KPS-5 and undisclosed Saving Bank Account No.9266 while filing his block return for the assessment years 2001-02 and 2002-03. Once the assessee has himself relied upon the documents, which are said to have recovered from the premises of another assessee though from the cabin of the assessee in such premises, the assessee is estopped to say that the documents cannot be referred to or relied upon for framing assessment.

15. There is no dispute that there cannot be any estoppel against the Statute, but once a provision is made for the benefit of an individual, such benefit can always be waived as there is no public interest involved in waiving such right. Even if, the documents were recovered from the premises of Sujata Hotel Pvt. Ltd., but the assessee having filed his return on the basis of such documents, he





cannot turn around to say that such documents cannot be referred to by the Assessing Officer while framing assessment for the block assessment. Reference is made to a decision of S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra, 1980 Supp SCC 53, wherein the secrecy of the voter was in question. The argument was that the principle of secrecy enshrined in Section 94 of the Representation of People Act having been enacted in public interest and it being a prohibition based on public policy, it cannot be waived. It was held that if the privilege conferred or the right created by the statute is solely for the benefit of the individual, he can waive it. It was held that if a privilege was granted for the benefit of an individual, in the instant case for the benefit of voter, even if it was conferred to advance a principle enacted in public interest nonetheless the person for whose benefit the privilege was enacted has a right to waive it because the very concept of privilege inheres a right to waive it.

16. In Commr. of Customs v. Virgo Steels, (2002) 4 SCC 316, the question examined was whether a mandatory requirement of a statute can be waived by the party concerned? The Court held as under :-

“9.....In *Vellayan Chettiar v. Govt. of Province of Madras, AIR 1947 PC 197 : 74 IA 223*, the Privy Council held that even though Section 80 CPC is mandatory, still non-issuance of such notice would not render the suit bad in the eye of the law because such non-issuance of notice can be waived by the party concerned. In the said judgment, the Privy Council held that the protection provided under

Section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right.

10. In the case of *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh*, AIR 1964 SC 1300 : (1964) 6 SCR 1001, this Court followed the judgment of the Privy Council in *Vellayan Chettiar*, AIR 1947 PC 197 : 74 IA 223, and held that even though the requirement of Section 35 of the Bengal Moneylenders Act is mandatory in nature, such mandatory requirement could be waived by the party concerned. On a true construction of Section 35 of that Act, this Court held that the said section is intended only for the benefit of the judgment-debtor and, therefore, he can waive the right conferred on him under the said section.

13. In *Martin & Harris Ltd. v. Vith ADJ*, (1998) 1 SCC 732, this Court while considering the provision of Section 21(1)(a) first proviso of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 negatived a contention advanced on behalf of the appellant therein that the said provision was for public benefit and could not be waived. It held that it is true that such benefit enacted under the said proviso covered a class of tenants, still the said protection would be available to a tenant only as an individual, hence, it gave the tenant concerned a locus poenitentiae to avail the benefit or not. It also held that the benefit given under the said section was purely personal to the tenant concerned, hence, such a statutory benefit though mandatory, can be waived by the person concerned.

14. From the ratio laid down by the Privy Council and followed by this Court in the above-cited judgments, it is clear that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of the person concerned and is for his benefit, the said person can always waive such a right.

15. Bearing in mind the above-decided principle in law, if we consider the mandatory requirement of issuance of notice under Section 28 of the Act, it will be seen that that requirement is provided by the statute solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, this section casts a duty on the officer to issue notice to the person concerned of the proposed action to



be taken. This is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus, this right of notice being personal to the person concerned, the same can be waived by that person.

16. If the above position in law is correct, which we think it is, M/s Virgo Steels, having specifically waived their right for a notice, cannot now be permitted to turn around and contend that the proceedings initiated against them are void for want of notice under Section 28 of the Act, so as to frustrate the statutory duty of the Revenue to demand and collect customs duty which M/s Virgo Steels had intentionally evaded.”

17. In another judgment reported as Union of India v. Pramod Gupta, (2005) 12 SCC 1, the question examined was as to whether, the interest under the provisions of Land Acquisition Act, 1894 can be waived. The Court held :-

“104. It may not, thus, be correct to contend that the said provisions are so imperative in character that waiver thereof is impermissible in law or would be against public interest. Grant of interest in terms of Section 28 of the Land Acquisition Act is discretionary. Only the rate of interest specified therein is mandatory. Section 34 of the Act ex facie, however, appears to be imperative in character as the word “shall” has been used. A discretion vested in the court, it is trite, may not be exercised where the right to claim interest has been waived expressly by the parties and/or their counsel. Even a mandatory provision of a statute can be waived.

111. It is, therefore, not correct to contend that there cannot be any waiver of the right to claim interest. Statutory provisions are made for payment of interest with a view to compensate a party which had suffered damages owing to a positive action or inaction of the other resulting in blockade of money which he would otherwise have received. A party which itself represents before the court of law that it would not claim interest with a view to obtain an order of stay which would be for its own benefit, in our opinion, could not be permitted to take advantage of its own wrong. (See *Sushil Kumar v. Rakesh Kumar, (2003) 8 SCC*

673, and *Laxminarayan R. Bhattad v. State of Maharashtra*, (2003) 5 SCC 413).”

18. A Constitution Bench in a judgment reported as *Supdt. of Taxes v. Onkarmal Nathmal Trust*, (1976) 1 SCC 766, held the benefit meant for a party can be waived. The Court held as under:-

“26. .... A procedural requirement imposed for the benefit or protection of one party alone has sometimes been construed as subject to implied exception that it can be waived by the party for whose benefit it is imposed. In that context, “waive” means that the party has chosen not to rely upon the non-compliance of the other party with the requirement, or has disentitled himself from relying upon it either by agreeing with the other party not to do so or because he has so conducted himself that it would not be fair to allow him to rely upon the non-compliance.

27. A distinction arises between the provisions which confer jurisdiction and provisions which regulate procedure. Jurisdiction can neither be waived nor created by consent. A procedural provision may be waived by conduct or agreement. In the case of *Kammins Ballrooms Co.*, (1971) AC 850, it was said that waiver arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is inconsistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be legal consequence of what he did. He is sometimes said to have “waived” the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition. This is also sometimes described as “election” rather than “waiver”. Another type of waiver debars a person from raising a particular defence to a claim against him. It arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising

it.

28. In the present case, the respondent cannot be said to have waived the provisions of the statute. There cannot be any waiver of a statutory requirement or provision which goes to the jurisdiction of assessment.”

19. The assessee when asked to explain as to why any passbook or cheque book was not recovered from the residential premises. The stand of the assessee is that all documents are lying in the Account Section of the Hotel premises. Therefore, the assessee has admitted that the passbook and the cheque book were kept by him in the premises of the Sujata Hotel Pvt. Ltd.

20. The document KPS-5 is in the handwriting of Hardeo Singh. Hardeo Singh in answer to question no.1, as reproduced above, has categorically deposed that all the transactions and payments is written by him on the instructions/orders of the assessee. The names of persons who have deposited money with him are written by him on the basis of introduction given to him. Similarly, the name of the persons to whom the money was paid was on the instructions of the assessee. When the assessee was confronted with the writing of KPS-5 by Hardeo Singh, he stated that he used to write this diary whatever money he received or paid. He used to receive/pay on my instructions. Therefore, KPS-5 is a document maintained on the instructions of the assessee though written by Hardeo Singh and kept in the premises of the Sujata Hotel Pvt. Ltd.



Therefore, the documents KPS-5 and S.B. A/C No.9266 were in the control of the assessee though physically they were in the premises of Sujata Hotel Pvt. Ltd. The diary KPS-5 and the passbook of S.B. A/C No.9266 found from the premises of the Hotel were in the control of the assessee himself.

21. Section 158BB of the Act empowers the Assessing Officer to frame assessment of the block period on the basis of evidence found as a result of search. As discussed above, the diary, KPS-5 and undisclosed passbook of the S.B. A/C No.9266 though recovered from the survey of the premises of Sujata Hotel Pvt. Ltd., but not only the assessee had made a statement that his passbook and the cheque book are kept in the Sujata Hotel Pvt. Ltd but had also relied upon them while submitting his Block Return and had taken the said stand in his reply to the questionnaire. Still further, the Assessing Officer can take into consideration the other materials or information as are available with the Assessing Officer and relatable to such evidence recovered during the search operation. Therefore, such documents can be taken into consideration by the Assessing Officer. The documents taken into consideration are related to the search operation at the premises of the assessee on the own admission of the assessee while replying to the questionnaire to explain the basis of his undisclosed income declared by him.

22. Though Section 158BB of the Act was amended by



the Finance Act 2002 with retrospective effect from 01.07.1995, but the documents recovered even when the search is illegal can be taken into consideration for framing assessment. Such is the view taken by the Hon'ble Supreme Court in the case of Director of Enforcement and others v. Director of Enforcement and others, [1985] 155 ITR 166 where the Court has held that the Courts have refused to exclude relevant evidence merely on the ground that it was obtained by illegal search and seizure. The Court held to the following effect:

“This Court in Pooran Mal v. Director of Inspection (Investigation) of Income-tax [1974] 93 ITR 505 (SC) held that “Courts in India and even in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure.” If, therefore, the view of the learned single Judge of the Calcutta High Court were to be accepted, meaning thereby that if the search is shown to be illegal, anything seized during such illegal search will have to be returned to the person from whose premises the same was seized. It would be tantamount to saying that evidence collected during illegal search must be excluded on that ground alone. This was in terms negated by the Constitution Bench. It has been often held that the illegality in the method, minor or initiation of a search does not necessarily mean that anything seized during the search has to be returned. After all, in the course of a search, things or documents are required to be seized and such things and documents when seized may furnish evidence. Illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the Court or the authority before which such material or evidence seized during the search shown to be illegal is placed has to be cautious and circumspect in dealing with such evidence or material. This is too well-established to necessitate its substantiation by a precedent.”

23. Such view was followed by the Rajasthan High

Court in the case of Commissioner of Income-Tax v. Kamal and Company, [2009] 308 ITR 129 (Raj).

24. Thus, we find that not only the survey was not illegal but also that the material collected was relied upon by the assessee himself to explain the basis of undisclosed income of Rs.7,02,100/- for assessment years 2001-02 and 2002-03 shown in his block return, and therefore clearly relatable to evidence found as a result of search, etc. and, thus, was rightly made basis to frame block assessment by the Assessing Officer.

25. At this stage, several judgments referred to by the learned counsel for the assessee need to be noticed. One of the judgments referred to in this regard is in the case of Commissioner of Income-Tax V. G. K. Senniappan [2006] 284 ITR 220 (Mad). In such case, the search was conducted on the premises of A. P. Shanmugaraj, whereas the survey was conducted in the business premises of the assessee. It was found that only the evidence found, as a result of search or requisition of books of account or other documents, at the time of search can form basis of for computation of undisclosed income.

26. Similar is the judgments in the cases of Commissioner of Income-Tax v. Soora Subramaniam HUF (Individual) [2013] 353 ITR 298 (Mad); and Commissioner of Income-Tax v. S. Ajit Kumar [2008] 300 ITR 152 (Mad), but all the



judgments have no applicability to the facts of the present case where the survey was, though in respect of a premises of a different assessee, but the assessee was a Director of the said Company and as per his statement he had kept all documents including the passbook of the Bank account and the cheque book in the premises of the Sujata Hotel Pvt. Ltd.. The assessee cannot say that such documents are unrelated to the search when the return was also filed on the basis of the materials recovered during the survey operation in the premises of the Sujata Hotel Pvt. Ltd. The judgments referred to by the learned counsel for the assessee are not applicable to decide the issues arising in the present case.

27. In view thereof, the first substantial question of law is answered in negative to hold that the Assessing Officer could take into consideration the note book KPS-5 and passbook of S.B. A/C No.9266 recovered from the premises of Sujata Hotel Pvt. Ltd. but from the office cabin which was in the control of the assessee.

28. So far second substantial question of law is concerned, though the judgment in G. K. Senniappan case (supra) in the different facts and is clearly distinguishable, but the interpretation given by Madras High Court cannot be extended to the facts of the present case where the premises surveyed is not alien to the assessee and when the assessee has filed return on the basis of documents recovered during survey.

29. Consequently, in respect of third substantial question of law, thus, we hold that the Tribunal has erred in upholding the deletion of the addition of Rs.1,59,40,263/- made by the Assessing Officer.

30. Consequently, the present Miscellaneous Appeal is allowed and that of the orders passed by the CIT (Appeals) and the Tribunal are set aside.

**(Hemant Gupta, J.)**

**I agree.**

**(Ramesh Kumar Datta, J.)**

Sunil/-

N. A. F. R.

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