

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

FIRST APPEAL NO. 2165 OF 2014

PRAKASH NIHALCHAND SOLANKI
VERSUS
SMT. KAVERI SANDEEP SHETE AND OTHERS

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Advocate for Appellants : Mr. Sushant V. Dixit.

Advocate for Respondent Nos.1 & 2 : Mr. S. L. Bhapkar.

...

CORAM : **V. K. JADHAV, J.**

RESERVED ON : 09th February, 2017.

PRONOUNCED ON : 27th February, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and decree dated 23rd September, 2014 passed by the Commissioner for Employee's Compensation and Judge Labour Court, Ahmednagar in Application W.C. No.1 of 2013, the original Respondent No.1 (Principal Employer) has preferred this appeal.

3 Brief facts giving rise to the present appeal are as follows:

- a) Deceased Sandeep was working as a skilled labour with Respondent No.5 (original Opponent

No.2) on daily wages of Rs.300/-. Respondent No.5 herein (original Opponent No.2) was running a shop of welding and deceased Sandeep being a skilled worker, was employed by him on daily wages of Rs.300/- as aforesaid. The Appellant / original Opponent No.1 is the owner of the factory named and styled as Nihal Tiles at Rahuri, MIDC, District Ahmednagar. On 21st September, 2012, the Appellant had given work on contract basis to Respondent No.5 (original Opponent No.2) for carrying out the work of Ferking in the industry. Thus, at about 10:30 to 11:00 am deceased Sandeep alongwith Respondent No.5 (original Opponent No.2) went to the factory of the Appellant and as directed started cutting the iron angles into pieces with the help of welding machine. It has contended that said cutting of iron angles required for the purpose tin shade. At about 01:30 pm on that day, the Appellant requested deceased Sandeep and the original

Opponent No.2 to remove the lid of drum. Thus, deceased Sandeep had started removing the lid of the drum with the help of welding machine as directed to him. All of a sudden, the said drum was burst due to the chemicals stored therein. In consequence of which, deceased Sandeep has sustained severe injuries on his head and other parts of the body and died on the spot. The legal representatives of deceased Sandeep, who were entirely dependent upon his income, approached to the Commissioner for Employee's Compensation, Ahmednagar and filed Application W.C. No.1 of 2013 for grant of compensation. It has contended that said accident had taken place out of and during the course of employment of deceased Sandeep with the Opponents. Deceased Sandeep was 25 years of age at the time of accident and he was drawing Rs.300/- as daily wages. Despite issuing the notice to the Opponents calling upon them to pay the

compensation, they failed to pay the compensation as claimed. Thus, the Applicants prayed to direct the Opponents to pay the compensation of Rs.8,46,000/- with interest @ 15% per annum from the date of accident alongwith 50% of penalty of the amount of compensation.

- b) Original Opponent No.2 though duly served, has failed to appear in the said proceedings before the Commissioner and hence, the hearing of the said application order to proceed *ex-parte* against him.
- c) Appellant (original Opponent No.1) has strongly resisted the application by filing the written statement at Exhibit C-5. Appellant / original Opponent No.2 has specifically denied the employer-employee relationship. It has also contended that the work as stated in the application, is not related to the trade or business of the Appellant. Deceased Sandeep was not the workman within the meaning of Section 2(dd) of

the Employee's Compensation Act, 1923
(hereinafter referred to as "the Act of 1923").

- d) On the basis of the pleadings, the learned Commissioner has framed the issues. The original Applicants have adduced oral and documentary evidence in support of their contentions. However, the Appellant / original Opponent No.1 has not adduced any oral and documentary evidence. The learned Commissioner for Employee's Compensation and Judge Labour Court, Ahmednagar vide its impugned judgment and decree dated 23rd September, 2014 in Application W.C. No.1 of 2013, partly allowed the application thereby directed the present Appellant to pay the amount of compensation of Rs.4,57,144.05 to the original Applicant Nos.1 and 2 with simple interest @12% from the date of accident till realization within one month from the date of award. So far as penalty is concerned, the learned Commissioner has

directed that the same needs to be decided separately after issuing show cause notice to the Opponents and further directed the Applicants to file separate proceedings in that regard. Hence, this appeal.

4 The learned counsel for the Appellant submits that deceased Sandeep was not the employee as defined under the Act of 1923. Deceased Sandeep at no point of time was employed by the Appellant in any capacity. The learned counsel submits that the Appellant is dealing in trade and business of manufacturing the tiles and the work as alleged assigned to deceased Sandeep through original Opponent No.2, was in the nature of carrying the repairs. Thus, the said work of welding was not the part of the trade and business of Appellant as admittedly in the factory owned by the Appellant, the tiles are manufactured. The learned counsel submits that the learned Commissioner fastened the liability on the Appellant as an employer of deceased Sandeep without taking recourse to the provisions of Section 12 of the Act 1923.

5 The learned counsel for the Appellant submits that the

Respondents / original Claimants have not sought any modification in the judgment and decree passed by the Commissioner by taking cross-objection or by filing the cross-appeal. In absence of cross-objection or cross-appeal, modification of the decree and grant of relief by the Appellate Court is without jurisdiction. The Appellate Court cannot do so even in exercise of powers under Order XLI Rule 33 of the Code of Civil Procedure.

6 The learned counsel for Appellant in order to substantiate his contentions placed reliance on the following cases:

- i) **Mahadeo Nivruti Chivate Vs. Sulochana Vasant Pawar (Smt.) & Ors.**, reported in, **2005 (1) CLR 957**,
- ii) **Municipal Board, Almora Vs. Jasod Singh and another**, reported in, **AIR 1960 Allahabad 468**,
- iii) **Central Mine Planning and Design Institute Ltd. Vs. Ramu Pasi and another**, reported in, **2006(2) Mh.L.J. 367**,
- iv) **New India Tannis Ltd. Vs. Auroral Singh Mojbi and another**, reported in, **AIR 1957 Calcutta 613**,

- v) **Kailash Chandra Vs. Union of India (UOI)**, reported in, **AIR 1961 SC 1346**,
- vi) **Barendra Prasad Ray and Ors., Vs. Income Tax Officer, 'A' Ward, Foreign Section and Ors.**, reported in, **AIR 1981 SC 1047**,
- vii) **Banarsi and others Vs. Ram Phal**, reported in, **(2003) 9 Supreme Court Cases 606**.

7 The learned counsel for the Respondents / original Applicants submits that deceased Sandeep was admittedly a contractor's labour. Deceased Sandeep was under the employment of original Opponent No.2 and the work of cutting the iron angles into pieces with the help of welding machine, was assigned to original Opponent No.2 / contractor by the principal i.e. the Appellant. The death of Sandeep as a result of accident arises out of the course of his employment. In view of the provisions of Section 12(1) of the Act of 1923, the Appellant is liable to pay the compensation. The learned counsel submits that the Workmen's Compensation Act underwent an amendment by the Act of 46 of

2000 whereby in the definition of “workman” the words “other than a person whose employment is of a casual nature and who is employed otherwise than for purpose of the employer's trade or business” were omitted. Thus, after the said amendment, the question whether the person works for the employer's trade or business or not are wholly immaterial and inconsequential. Now term “workman” under the Act of 1923 will simply mean “any person employed in any capacity as specified in Scheduled II”.

8 The learned counsel for Respondents / original Applicants submits that though the Commissioner has not referred specifically the provisions of Section 12 of the Act of 1923 in the impugned judgment and decree, however, the purport of the judgment and decree attracts the provisions of Section 12 (1) of the Act of 1923 and in no other manner, the liability could have been fastened on the Appellant being a principal employer to pay the compensation. The learned counsel submits that even in absence of appeal preferred by Respondents / Claimants or cross-objection taken by them, the Appellate Court is not powerless to deal with the relevant provisions and do the complete justice between the parties. Such power is unfettered. No prejudice is likely to be caused to the

Appellant as the pleadings of the Respondents / Applicants discloses each and every fact and the Appellant after considering the same has also taken a defence that deceased Sandeep was not its employee and he was the employee of original Opponent No.2.

9 The learned counsel for Respondents / original Applicants submits that in order to render a person liable, who has not directly employed the workman, liable to answer the claim for compensation. The conditions as mentioned under Section 12(1) of the Act of 1923, are required to be fulfilled and one of them is that the principal employer has in the course of or for the purpose of his trade or business contracted with any other person for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business. The learned counsel has further submits that the term “business” is of much larger import. The Appellant had contracted the original Opponent No.2 for carrying out the repairs of the tin shade by cutting the iron angles into pieces with the help of welding machine and further under the specific instructions of the Appellant, deceased Sandeep was trying to open the lid of the drum with the help of welding machine, the accident had taken place. The work undertaken by

Opponent No.2 was in respect of carrying out the repairs of the tin shade under which manufacturing process of preparing the tiles in the factory premises was going on. It was under the control of the Appellant and the Appellant being a principal employer, liable to compensate the death of deceased Sandeep.

10 The learned counsel for the Respondents / original Applicants in order to substantiate his contentions placed reliance on the following cases:

- i) **Satsang Vs. State of Jharkhand**, decided by the High Court of Jharkhand dated 29th February, 2008 (Coram: D. G. R. Patnaik, M. Karpagavinayagam, JJ.)
- ii) **State of Maharashtra Vs. Mahadeo Krushna Waghmode and others**, reported in, **1995 ACJ 166**,
- iii) **Managing Director, Orissa State Warehousing Corporation, Bhubaneswar, Vs. Smt. Gitarani Seal and another.**, reported in, **1991 LAB. I. C. 2476**,
- iv) **K. Kamalaveni and another Vs. Managing Director, Subbathal Spinning Mills (P) Ltd. and another.**

reported in, **2005 ACJ 443**,

- v) **Sarjerao Unkar Jadhav Vs. Gurinder Singh and another**, reported in, **1990 (2) Mh.L.J. 790**,
- vi) **Director, Xavier Institute of Social Service, Ranchi Vs. Mst. Etwari Devi and others**, reported in, **2003 (97) FLR 76**,
- vii) **Indian Rare Earths Ltd. Vs. Subaida Beevi**, decided on 14th July, 1981 by the Kerala High Court (Coram: George Vadakkal, Subramonian Poti, JJ.)
- viii) **Century Chemicals and Oils Private Ltd. Vs. Esther Maragatham**, decided on 31st January, 1997 in Appeal A.A.O. 1284 of 1992, by the Madras High Court (Coram: S. S. Subramani, J.)
- ix) **Koli Trikam Jivraj and another Vs. the State of Gujarat**, reported in, **AIR 1969 Gujarat 69**, (Gujarat High Court),
- x) **President, Iron Ore and Mining Works Cooperative**

Society Vs. Mungai Bai, decided on 30th July, 1986 by the Madhya Pradesh High Court, in Misc. Appeal No.344 of 1983).

xi) **Margaret Brooker Vs. Thomas Borthwick & Sons (Australasia), Ltd.**, reported in, **AIR 1933 Privy Council 225**,

xii) **Raghavan Vs. Soumini Amma**, reported in, **AIR 1957 Kerala 178**,

xiii) **Pratap Narain Singh Deo Vs. Shrinivas Sabata and another**, reported in, **AIR 1976 Supreme Court 222**,

xiv) **Sarbeswar Bhumali @ Sarbeswar Bhunimali Alias Bapi Bhunimal Vs. Ardhendu Kumar Roy**, decided on 16th September, 2009 by the Calcutta High Court (Coram: B. Bhattacharya, Prasenjit Mandal, JJ.),

xv) **Tadi Satyanarayana Vs. Maddhu Malla Roo**, decided on 11th September, 2007 by the Andhra Pradesh High Court (Coram: T. Chsurya Rao, J.)

xvi) **Hembai Vs. Bhilai Steel Plant**, decided on 10th July, 2007 by the Chhattisgarh High Court (Coram: Dhirendra Mishra, J.)

11 Admittedly, the Appellant is running a factory named and styled as Nihal Tiles at Rahuri, MIDC, District Ahmednagar for manufacturing the tiles. It has also not specifically denied that the Appellant had contracted with original Opponent No.2 for carrying out the repairs of the tin shades under which the aforesaid manufacturing process was being carried out and the said work involved cutting of the iron angles into pieces with the help of welding machine. Deceased Sandeep was under the employment of original Opponent No.2 as a skilled labour and he was carrying out the aforesaid work of cutting the iron angles into pieces in the aforesaid factory premises of the Appellant.

12 The Workmen's Compensation Act underwent an amendment by the Act of 46 of 2000 and in the definition of "workman" the words "other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business" were omitted. Thus,

after the said amendment, the question whether the person works for the employer's trade or business or not are wholly immaterial and inconsequential so far as the definition of “workman” is concerned. As per Section 2(dd) of the Act of 1923 now the term “workman” under the Act of 1923 will simply mean “any person employed in any capacity as specified in Scheduled II”.

13 In most of the cases relied upon by the learned counsel for Appellant, reference has been given to the definition of the “workman” prior to the amendment and thus, the casual nature of the employment and the purpose of employer's trade and business have been considered to some extent. Thus, the cases at serial Nos.(i) to (iv) relied upon by the learned counsel for the Appellant are prior to the amendment and cannot be made applicable to the facts of the present case wherein the accident had taken place in the year 2012.

14 The learned counsel for the Appellant, however, vehemently submitted that the requirement of Section 12(1) of the Act of 1923 is that the work to the execution of which the contract relates, must be one “which is ordinarily part of the trade or

business of the principal". The learned counsel submits that ordinarily part of the trade or business of the Appellant is to manufacture the tiles and the work of occasional repairs to the tin shade cannot be a part of the Appellant's trade or business. The learned counsel in order to substantiate his contentions placed his reliance in the case of *New India Tannis Ltd. Vs. Auroral Singh Mojbi and another* (supra), wherein para 15 of the judgment, the Calcutta High Court has made the following observations:

"15. I have already referred to the nature of the contract. I am free to confess that it may be said to satisfy the first part of S. 12(1) which speaks of a contract entered into "in the course of or for the purposes of his trade or business". It can. I think be legitimately said if a company, carrying on the business of manufacturing goods in a factory, enters into a contract for the purpose of some repairs to its machinery or the factory building, such contract is entered into in the course of and for the purpose of the company's trade or business. The requirement of the second part of the section, however, is altogether different. What is required there is that the work to the execution of which the contract relates, must be one "which is ordinarily part of the trade or business of the principal". I find it wholly impossible to hold that where a company carries on the business of manufacturing goods and requires a factory for performing the manufacturing process and the factory

requires a chimney, the work of occasional repairs to the chimney is a part of the ordinary trade or business of the company. The business of the company in such a case is to manufacture the goods which it produces. The manufacture may be done inside a factory and the factory may require a chimney which would occasionally need repairs, but repairing the chimney can in no view be a part of the company's trade or business, whether ordinarily or extraordinarily. In my view, the learned Commissioner was altogether wrong in holding against the appellant-company on the basis of a supposed admission in its written statement and equally wrong in his construction of the contract as also in the view taken by him of the nature of the work, for which the contract was entered into in relation to the appellant-company's business. The order made by him cannot possibly be upheld.”

15 In case of *K. Kamalaveni and another Vs. Managing Director, Subbathal Spinning Mills (P) Ltd. and another* (supra) relied upon by the learned counsel for the Respondents / Claimants, the Madras High Court has referred three judgments delivered by the Division Bench of the Kerala High Court wherein the term “trade or business” as used in Section 12(1) of the Act of 1923 has been interpreted with elaborate discussion. It was observed that both these terms are employed in the section would indicate that they connote different ideas and they do not cover the identical field,

"trade" as is generally understood means activities of buying and selling and the "business" is a term of much larger import. The word "business" atleast covers a continuous occupation involving liabilities to others. It is further observed that the work undertaken by the contractor was in respect of the business of the Company and if the accident occurred in the factory premises under the control of the Appellant, where its business was carried on, the Appellant being a principal employer liable to compensate the death of the worker. In this case, the factual finding is that a godown was constructed in the management mills of Respondent No.1 through Respondent No.2 – contractor and for constructing the roof of the building, the deceased was engaged and in the course of his employment, he died. Thus, considering the provisions of Section 12 (1) of the Act of 1923 as discussed above, the Madras High Court held that the provisions of Section 12(1) of the Act of 1923 stand attracted and the principal employer is liable to pay the compensation.

16 The learned counsel for the Appellant has placed his reliance in the case of *Kailash Chandra Vs. Union of India (UOI)* (supra), wherein the term "ordinarily" has been referred and

interpreted by the Supreme Court and in para 9 of the judgment it is observed that “ordinarily” means “in the large majority of cases but not invariable”. The learned counsel has further referred the case of *Barendra Prasad Ray and Ors., Vs. Income Tax Officer, 'A' Ward, Foreign Section and Ors.* (supra), wherein the Supreme Court had an occasion to interpret the expression “business”. However, in the above two cases, the above two terms i.e. “ordinarily” and “business” have been referred and interpreted in terms of the Railway Establishment Code and the Income Tax Act, 1961, respectively. However, in the second case of *Barendra Prasad Ray and Ors., Vs. Income Tax Officer, 'A' Ward, Foreign Section and Ors.* (supra) even by referring the provisions of the Income Tax Act, 1961, the Supreme Court in para 16 of the judgment held that the expression “business” does not necessarily mean trade or manufacture only. It is being used as including within its scope professions, vocations and callings from a fairly long time. In para 19 of the judgment, which the learned counsel for Appellant has failed to notice, the Supreme Court in the aforesaid cited case made the following observations:

“19. The word 'business' is one of wide import

and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income. We are of the view that in the context in which the expression 'business connection' is used in section 9 (1) of the Act, there is no warrant for giving a restricted meaning to it excluding 'professional connections' from its scope.”

17 In the instant case, deceased Sandeep met with an accidental death while carrying out the his work in the factory premises assigned to him by his immediate employer Opponent No.2. The Appellant had assigned the said work to original Opponent No.2, which is the ordinary party of his business.

18 The learned counsel for the Appellant has vehemently submitted that even assuming that a specific work of cutting of iron angles into pieces was assigned to deceased for the purpose of carrying out the repair of the tin shade, deceased Sandeep met with an accidental death while removing the lid of drum, which was not the part of the work assigned to him. I find no substance in these submissions for the reason that after the accident on that day itself,

the Appellant himself has informed to the police about the said accident wherein reference has been given that deceased Sandeep was removing the lid of the drum with the help of welding machine and he died due to smash of the said lid of the drum after the burst. Further I find no substance in the aforesaid submissions also for the reason that deceased Sandeep had no reason to remove the lid of the drum with the help of welding machine unless directed by the Appellant. The Appellant has also not stated in the information given in writing to the police about the incident that deceased Sandeep was removing the lid of the drum without any specific direction with regard thereto and met with an accidental death. On the other hand, it was reported to the police that Sandeep was carrying out the work of the said drum with the help of welding machine and during that process the lid of the drum hit on his head due to the burst of the drum.

19 On perusal of the impugned order, I find that though the facts are clearly emerging from the pleadings of both the sides, the learned Commissioner has not referred the provisions of Section 12(1) of the Act of 1923. The learned counsel for Appellant by relying upon the case of *Banarsi and others Vs. Ram Phal* (supra)

vehemently submitted that in absence of cross-objection or cross appeal, modification of the judgment and decree passed by the Commissioner is not permissible even by exercising the power under Order XLI Rule 33 of the Code of Civil Procedure. In para 15 of the said judgment, the Supreme Court has made the following observations:

“**15.** Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate court.

While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been

appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41.”

20 Even in view of the observations above, in my considered opinion, no prejudice or disadvantage is likely to be caused to the Appellant by modifying the judgment and decree passed by the learned Commissioner by taking recourse to the provisions of Section 12(1) of the Act of 1923. The facts emerging from the pleadings and the portion of the decree appealed against are so inseparable, the power under Order XLI Rule 33 of the Code of Civil Procedure are required to be exercised to do the complete justice between the parties.

21 The learned counsel for the Appellant in the alternate has submitted that the Appellant would not be liable to pay the interest and penalty. The learned counsel has placed reliance on

the case of *Sarjerao Unkar Jadhav Vs. Gurinder Singh and another* (supra), though relied upon by the learned counsel for Respondents, that in para 11 of the judgment, by referring the provisions of Section 12(1) of the Act of 1923, this Court held that the principal employer is liable for compensation and the compensation does not include interest and penalty. The learned counsel for Respondents, however, relied upon various judgments (supra), wherein the Supreme Court particularly in the case of *Pratap Narain Singh Deo Vs. Shrinivas Sabata and another* (supra) held that if the employer fails to make the provisional payment under Section 4(2), the employer is liable to pay the interest and penalty. Even on this point, in the cases of *Sarbeswar Bhuimali @ Sarbeswar Bhunimali Alias Bapi Bhunimal Vs. Ardhendu Kumar Roy* (supra), *Tadi Satyanarayana Vs. Maddhu Malla Roo* (supra) and *Hembai Vs. Bhilai Steel Plant* (supra), the Calcutta High Court, the Andhra Pradesh High Court and the Chhattisgarh High Court respectively have also taken a similar view. In view of the provisions of Section 12 of the Act of 1923, the principal employer is liable to pay the compensation for contractor's workman and thus, liable to pay the interest in case fails to pay the provisional payment under the

provisions of the Act of 1923.

22 In view of the above discussion, I do not find any substance in the appeal. However, the impugned judgment and decree requires modification in terms of the provisions of Section 12(1) of the Act of 1923. Hence, the following order:

ORDER

- I. The appeal is hereby partly allowed. No costs.
- II. The judgment and decree passed by the Commissioner for Employee's Compensation and Judge Labour Court, Ahmednagar in Application W.C. No.1 of 2013, is hereby modified in the following manner:
 - a) Opponent Nos.1 and 2 do pay an amount of Rs.4,57,144.05 (Rupees Four Lacs Fifty-Seven Thousand One Hundred and Forty-Four Rupees and Five Paisa only) jointly and severally to Applicant Nos.1 and 2 with simple interest @12% from the date of accident till realization of the entire amount.

- b) Opponent No.1 shall be entitled to be indemnified by Opponent No.2 and all questions as to the right to and the amount of any such indemnity shall be settled by the Commissioner.
 - c) The Opponents shall bear their own costs and also the costs of the appeal.
- III. Rest of the judgment and decree stands confirmed.
- IV. Decree be drawn up as per the above modification.
- V. Respondents / Claimants are permitted to withdraw the amount if deposited by the Appellant before the Commissioner.
- VI. Appeal is accordingly disposed of.
- VII. Pending civil applications stand disposed of.

[V. K. JADHAV, J.]