HON'BLE SRI JUSTICE S.V.BHATT

W.P. No.8794 OF 2003

ORDER:

Heard Mr.Meherchand Nori for petitioner and Mr.G.Ramachandra Rao for respondents.

The petitioner prays for writ of Certiorari to call for the records leading up to and inclusive of Order of 5th respondent in CPRM (M) MK-29-372 dated 16.09.1985, Order No.ED (HRD)-CO-CP3-062 dated 24.04.1996, Order GM (M)-MK-29-108 dated 14.06.2002 and quash the Orders as illegal, arbitrary and unconstitutional.

The circumstances relevant for disposing of the writ petition are as follows:

In the year 1992, the petitioner an employee of Fertilizers and Chemicals Travancore Limited/respondent No.1, was working as Depot Assistant at Kadapa Central Depot. While he was working at Kadapa, through order dated 25.11.1992, the petitioner was placed under suspension pending enquiry into the charges of misappropriation of 40.621 MTs of fertilizers found short in the Depot. On 26.02.1993, the charge sheet was issued with the following charges:

> I. While you were functioning as Depot Asst. at Cuddapah CD, the Stock Verficiation team from Marketing verified the stock of fertilizer in the CD during the period from 3.11.1992 to 10.11.92 and the following shortages materials have been reported.

	MT
Facumofos	25/700
DAP	14.400

Amm. Sulphate 0.512

As the only Depot Asst. in the CD assisting the Sr.Depot Officer in the functioning of the Depot and maintenance of official records therein, you are also responsible for the above substantial shortage of stock. It was found that you were holding sole charge of the CD on 4-9-92,5-9-92,6-10-92 and 7-10-92 ie., the days on which the SDO Sri Ramachandraiah was absent on leave.

It is alleged that you are misappropriated the stock of fertilizers found short as above either on your own or on collusion with the SDO Sri Ramachandraiah.

II (a) It is also alleged that yourself, along with the other staff of the Cuddapah CD, Viz., S/Sri Ramachandraiah, SDO and Murali Mohan Raju, Depot Attender were habitually taking bribe of Rs.1/- per MT of stock from FACT Contractor M/S Sri Rama Agencies, Transport and H&T Contractors, Cuddapah in respect of stock handled at the Railhead/Central Depot. In addition, yourself, along with the other Depot staff mentioned were habitually taking bribe from the Hamalis at the Depot @ Rs.5/- per lorry load of stock unload at the CD and Rs.10/- per lorry load of stock loaded for Dealers.

(b) While you were functioning as Depot Asst. in the Cuddapah CD, you used to issue stock unauthorisedly in collusion with the SDO Sri Ramachandraiah to Dealers without raising delivery challan and without receiving payment. It is noticed that in such cases delivery challans were raised after a lapse of 4/5 days, resulting in undue benefits to the dealers.

III. It is alleged that yourself, in collusion with SDO & Attender above mentioned, have unauthorisedly sold fertilizer sweepings from the Depot and misappropriated the sale proceeds.

IV. It is further alleged that you had resorted to lending money to Company's Contractor/Dealer M/S Sai Rama

> Agencies. In a specific instance, it is reported that you have lent a sum of Rs.85,000/- to the Contractor/Dealer and were receiving interest for the same @ Rs.2/- per Rs.100/- per month. Functioning as a Depot Asst. in the Depot, you should not have entered into such transactions as lending money to a Contractor/Dealer who had major business dealings with the Depot.

On 02.05.1993, the petitioner submitted explanation to the charge sheet dated 26.02.1993. The 5th respondent directed disciplinary proceeding into these charges. On 31.03.1995, the enquiry officer submitted the report and the copy of enquiry officer's report was given to petitioner for further reply, if any. The petitioner was exonerated of charges II and III but found guilty on charges I and IV. At appropriate stage of consideration the findings on these two charges are adverted to. On 16.09.1995, the 5th respondent dismissed petitioner from service. The appeal filed was against the dismissal order dated 16.09.1995 before the Executive Director and rejected through order dated 24.04.1996. It is matter of record that in respect of misappropriation for which the disciplinary proceeding was initiated the respondents also filed against petitioner FIR under Section 409 of IPC and the crime on investigation was numbered as C.C. No.77/99 before the II Additional Judicial First Class Magistrate, Kadapa. The learned Magistrate convicted the petitioner of charge of misappropriation, the petitioner against conviction filed Criminal Appeal No.112/98 before II Additional Sessions Judge at Kadapa. The Sessions Court through judgment dated 01.02.2002, acquitted the petitioner. Thereafter, on 17.05.2002, the petitioner represented to the

Chairman and Managing Director of 1st respondent company to take note of acquittal on merits by Criminal Court and requested for reinstatement into service. The Chairman and Managing Director rejected the request through communication dated 14.06.2002. Hence the writ petition.

Mr.Meherchand Nori appearing for petitioner contends that the charges are not intelligible, list of witnesses or documents was not furnished to petitioner and passing order of dismissal on the basis of a laconic enquiry/ proceeding resulted in prejudice to petitioner from the beginning. He contends that in fact, no enquiry was conducted and hence, the order of dismissal is illegal, violative of principles of natural justice and liable to be set aside. The right of appeal to the Executive Director is a valuable right and in spite of the petitioner raising several grounds, the appellate authority through a cryptic order rejected the appeal and on account of such dismissal of appeal, the petitioner suffered irreparable loss and hardship. The acquittal is not appreciated by the Chairman and Managing Director/ 1st respondent company in right perspective and rejection of representation dated 17.05.2002 is illegal, arbitrary and unconstitutional.

Counsel for petitioner contends that as against four charges two charges are held as not proved and in so far as the 1st charge is concerned, the misconduct alleged against petitioner has two facets, namely, whether there was shortage of 40.621 M.Ts fertilizers in Central Depot and the other facet is whether the petitioner misappropriated 40.621 M.Ts of fertilizers in collusion with Senior

Depot Officer. According to him, the disciplinary authority, the appellate authority and the reviewing authority have missed the forest for the wood, for the shortage of 40.621 M.Ts was recorded in the presence of the officers who inspected the Central Depot, Senior Depot Manager and the petitioner as well and the recording by itself is not misconduct attributable to him. Assuming that shortage in Ex.P.1 was recorded still the shortage cannot be treated as misconduct against the petitioner, for according to him, the petitioner was not assigned the responsibilities of receipts, arrivals and stock balances in the Central Depot. Further the determination of shortfall is factually incorrect, for the officers of respondents have not inspected the godowns in which the stock was maintained. Unless and until the stock at all the places is determined the respondents cannot presume that there is shortfall of stock and further petitioner is responsible for the shortfall. Further he contends that the misappropriation or collusion cannot be inferred from the mere existence of shortfall unless and until the misappropriation in collusion with the Senior Depot Manager is established as alleged in the charge or statement of imputation. According to him, there is no evidence on collusion between Ramcahandraiah i.e. Depot In-charge and petitioner. The shortfall of stock is determined basing on responsibilities of employee, the dereliction of duty etc. which resulted in shortfall. Unless and until the sequence as alleged in the statement on imputation is proved, the finding on charge No.1 is without evidence. He draws the attention of the Court to the enquiry officer report in paragraph 5.1.2 which reads as follows:

"The shortage of 40.621 M.Ts of fertilizers is not disputed by the charge sheeted employee. The contention of the employee is that he is not responsible for the shortage as Depot Officer is the custodian of stock as per the job specifications. Ex.P.1- verification report of PW.1 is signed by all Depot staff including charge sheeted employee. If the charge sheeted employee was not having any responsibility regarding the stock of the Depot, he would not have signed Ex.P.1 verification report. Some efforts were made by defence to show that the shortage might have occurred due to mistakes in the material delivery advises. The possibility of shortage due to mistakes in MDAs has been ruled out by DW.1's sales officer. The deposition of DW.1's sales officer, DW.2-Depot Officer and DW.3 Depot Attender in no way supports the defence theory. On the other hand, their oral evidence corroborates the inference of PW.1 investigating officer regarding the involvement of the charge sheeted employee. It is almost impossible to believe the contention of the charge sheeted employee that he was totally unaware of a huge shortage in the stock to the tune of about 40 M.Ts considering the nature of duty of charge sheeted Depot Assistant and his role in the transactions of the Depot. If the charge sheeted employee has put forward a positive defence theory instead of bare denial, its probabilities could have been considered. Whereas the charge sheeted employee has only raised the contention that even if there is any shortage, the Depot Officer alone is responsible for it as he is the custodian of stock. This contention is inconsistent with the evidence placed on record. Defence has also pointed out a number minor discrepancies and technical errors in the investigation. But the evidence of PW.1 investigating officer read as a whole appears to have a ring of truth and error of investigating officer not going to root of the matter would not warrant rejection of his evidence as a whole.

"In view of the above discussion of facts and circumstances, it is concluded that the charge sheeted Depot Assistant colluded with the Depot Officer in the misappropriation of stock detected as short during verification."

Mr.Meherchand Nori further contends that the findings now recorded are not even based on hearsay evidence, for according to him, as rightly pointed out by the learned Sessions Judge in Criminal Appeal No.112 of 1998 the responsibility of petitioner vis-à-vis the stocks in the Central Depot, the entrustment of custody, misappropriation etc. have to be proved with some evidence to apply the principle of preponderance applicable to a disciplinary proceeding viz. that there is some evidence to suggest that there is collusion between the petitioner and the Depot Manager thereby resulted in misappropriation of 40 M.Ts. He contends that the finding on a serious charge is without evidence and therefore, liable to be set aside. He alternatively contends that the reply given by the petitioner to the second show cause notice dated 29.12.1994 is not considered by the 4th respondent as well as in the appeal filed with several grounds before the Executive Director. He particularly draws the attention of the Court to the findings recorded by the learned II Additional Sessions Judge, Kadapa on these points, held otherwise:

"It is an admitted fact that fertilizers and chemicals Travancore Limited (FACT) is an undertaking of Government of India for manufacturing of various types of chemicals and fertilizers at Cochin of Kerala State. Fertilizers are stocked in various Depots in State of Andhra Pradesh for supply to registered dealers. Their depot is at Cuddapah. PW.1 is the Senior Sales Officer of Cuddapah Depot. A-1 is Depot Senior Manager, A.2 is Depot Assistant and A.3 is Depot attender. The learned

Magistrate acquitted A.3 disbelieving the evidence of PWs 1 to 9. The learned Magistrate also not found the appellant guilty for the offence U/s.408 and 109 of I.P.C. The Appellant (A-2) is only a Depot Assistant under accused No.1. A-1 who was Senior Depot Manager was incharge of fertilizers and Assets. A-1 is also controlling officer over his staff. Accused No.2 was originally for clerical work.

PW.1 in his evidence deposed in his cross-examination "A-2 is Depot Assistant, he is responsible for clerical work. He is maintaining records for stock and sales statements, receipt of cash and preparing reports and returns to the head office". Thus PW.1 who is senior sales officer admitted in his evidence about the functions of accused No.2 and his duties. Thus accused No.2 is attending to only clerical work such as maintaining accounts, writing letters, preparing back statements etc. and A-2 is not entrusted with stock or Depot keys. A-2 does not attend to delivery of stock to the dealers. PW.1 also admitted that at no point of time, there is inspection of stock by PW.1 or A.1. PW.1 in his evidence stated that on 21.10.1992 he inspected the Central Depot at Cuddapah and verified the stock of the fertilizers with book balance.

Ex.P.5 job specification dated 15-3-1968 clearly shows that A.1 is the custodian of the Depot. He is the custodian of cash and other assets of the Depot. He has control over other staff in the office. PW-1 deposed and admitted that A.2 is only Depot Assistant and he is responsible for maintenance of records and stocks, preparations of bank statements and returns. Ex.P-5 is marked by PW.1. Ex.P.5 Job specification MMC/2441/68, dated 15-3-1968 clearly shows that Depot Assistant has to maintain records, registers, correspondence, preparation of statement, cash memos preparations of periodical returns and reports. Thus A.2 is in view of Ex.P.5, responsible for clerical work for maintenance of records, registers, correspondence, preparation of periodical reports, returns. It shows that A.2 is not entrusted with stock. PW.1 admitted in his

> evidence that the fertilizers were being stocked in the godown of State Ware House Corporation and Central Ware House Corporation in Cuddapah. PW.1 further deposed that he did not inspect the stocks in those godowns. PW.1 deposed "I do not go to inspect the goods in the State Ware House Corporation and Central Ware House Corporation. No body, from our factory goes to inspect State Ware House Corporation and Central Ware House Corporation.
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> The case of prosecution thus rests only on the evidence of PW.1. His evidence exonerates A.2. He admitted that A.2 was not entrusted with stock at no point of time. When there is no entrustment of stock, the ingredients of section 409 of IPC will not apply. Section 409 of IPC contemplates "Entrustment" . Section 409 reads "Whoever being in any manner entrusted with property over any dominion over property". In this case A.2 is not entrusted with property either by A.1 or by PW.1, and he has no dominion over the property at any point of time, except for two days and in those two days also A.1 has not handover the stock to A.2. Hence, it is clear that A.2 was not entrusted with property. Thus the main ingredient of Section 409 of IPC with regard to entrustment was not proved by the prosecution."

and contends that the findings on charge No.1 are liable to be set aside. As regards Charge No.4 is concerned, he submits that the financial transaction, the findings on the Charge are based on surmises and conjectures, finally the imposition of punishment of removal from service is unjust, illegal, not based on material available on record and prays for setting aside the same.

He further contends that the file placed before the Court does not contain Ex.P.1 or the evidence of PW.1. Unless and until some evidence on alleged misappropriation is placed on record by the respondents, the finding that the petitioner in collusion with

Senior Depot Officer has misappropriated amount is unsustainable. He relies upon decisions in State of Uttaranchal v. Kharak Singh[1], Allahabad Bank v. Krishna Narayan Tewari[2] and Kumaon Mandal, Vikas Nigam Ltd v. Girja Shankar Pant[3] and he further contends that the punishment of dismissal is disproportionate and liable to be set aside.

Sri G.Ramchandra Rao contends that the petitioner ought to have availed the remedy of industrial dispute, and in the event a dispute is raised within reasonable time, all aspects would have been gone into by the Labour Court and the remedy of writ cannot be converted into a forum for deciding an industrial dispute particularly by examining the fact in issue. He submits that as a matter of fact on 18.07.2002, the petitioner filed a petition under Section 2 (A) of the Industrial Disputes Act before the District Labour Officer, Ernakulam and the respondent sent reply dated 25.10.2002 to the District Labour Officer, Ernakulam. The conciliation meetings held on 23.11.2002, 23.12.2002 and 26.02.2003. The petitioner deliberately avoided to pursue those proceedings and has filed the instant writ petition. He further contends that the order of dismissal was passed on 16.09.1995 and the appeal filed by the petitioner was dismissed on 24.04.1996. The petitioner did not challenge the proceedings immediately within reasonable time. The petitioner by reference to a representation filed on 17.05.2002, which was

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[1] (2008)8 SCC 236
[2] (2017) 2 SCC 308
[3] (2001) 1 SCC 182

rejected on 14.06.2002 has filed instant writ petition. The writ petition filed in the year 2003 suffers from laches. Replying to the contention that no enquiry was conducted, he produces the original record for inspection by this Court and has drawn the attention of the Court to proceedings before the Enquiry Officer. He contends that in fact, enquiry was conducted, witness was examined, documents marked and findings recorded by the enquiry officer *prima facie* show the guilt of petitioner on Charge No.1. The appellate authority no doubt, has passed a brief order still there should be a valid reason for this Court to remit the matter to appellate authority for consideration afresh. He contends that the acquittal by Criminal Court cannot be understood as effacing the findings recorded by the Enquiry Officer as concurred by the appellate authority from the material available before the Enquiry Officer. He prays for dismissing the writ petition.

I have heard the learned counsel and perused the record produced by the learned standing counsel.

The scope of judicial review against the orders imposing punishment pursuant to departmental enquiry is well established. The counsel for respondents does not dispute the ratio in the decisions referred to above. However, the applicability of those decisions to the case on hand is argued. For appreciating the objections raised by the petitioner and the omissions, if any from the record, I consider it appropriate to refer to the decisions relied upon by the petitioner.

In Kharak Singh's case (1 supra), the Apex Court held as under:

> "The following are some of the basic principles regarding conducting of departmental enquires: (i) The enquires must be conducted bona fide and care must be taken to see that the enquires do not become empty formalities; (ii) If an officer is a witness to any of the incidents which is the subject matter of enquiry or if enquiry was initiated on a report of an officer, then in all fairness he should not be the enquiry officer. If the said position becomes known after appointment of enquiry officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer; (iii) In an enquiry, the employer/department should take steps first to lead evidence against workman/delinquent charged and give an opportunity to him to cross-examine witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give an explanation about the evidence led against him; (iv) On receipt of enquiry report, before proceeding further, it is incumbent on the part of disciplinary/punishing authority to supply a copy of enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.
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> The enquiry officer in the present case acted as investigator, prosecutor and judge. Such a procedure is opposed to principles of natural justice and has been frowned upon by the Supreme Court.
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> The respondent was not furnished with required documents. Departmental witnesses were not examined in his presence. There is also no evidence to show that a copy of enquiry report was furnished to the respondent along with documents relied on in the report."

In Krishna Narayan Tewari's case (2 supra), the Apex Court lays down on the scope of judicial review as follows:

> Writ courts must be slow in interfering with findings of fact recorded by departmental authority on basis of evidence-

However, if findings are unsupported by evidence or are such as no reasonable person would arrive at, then writ court justified if not duty bound to examined matter- If enquiry itself vitiated for violation of principles of natural justice then writ court can interfere with disciplinary enquiry or resultant orders- Further, where authority (i) has not applied its mind; or (ii) has not assigned reasons for its conclusions then writ courts can interfere with orders of punishment, as in present case.

Wherever enquiry was deficient, procedurally or otherwise, High Court can remand matter back to authority for redoing same afresh- However, where there is long time-lag or such other supervening circumstances, writ courts consider it unfair or harsh or otherwise unnecessary to direct fresh enquiry or fresh order, High Court may exercise its discretion in not remanding matter

Respondent was employee of appellant- Disciplinary enquiry initiated against him and he was found to be guilty by enquiry officer- These findings were accepted by disciplinary authority and it imposed punishment of removal from service- Departmental appellate authority also accepted these findings – In challenge before High Court, these orders were quashed- Justifiability of

Contention of respondent that he was not given fair hearing was not rebutted by appellant- No proper appreciation of evidence by disciplinary authority nor has he recorded reasons for his conclusions- Appellate authority instead of recording its own reasons and independently appreciating evidence, simply reproduced findings of disciplinary authority- Enquiry Officer, disciplinary authority and appellate authority faltered in discharging their duties resulting in miscarriage of justice. Therefore, High Court was justified in interfering with orders passed by authorities.

In Kumaon Mandal, Vikas Nigam Ltd.'s case (3 supra), the Apex Court held as under:

"While in a departmental proceeding, the disciplinary authority is the sole judge of facts and the High Court may not interfere with the factual findings but the availability of judicial review even in the case of departmental proceeding cannot be doubted. Judicial review of administrative action is feasible and the same has its application to its fullest extent in even departmental proceedings where it is found that the recorded findings are based on no evidence or the findings are totally perverse or legally untenable. Judicial review of the adequacy or inadequacy of evidence is not permitted but in the event of there being a finding which otherwise shocks the judicial conscience of the court, it is a well-nigh impossibility to decry availability of judicial review at the instance of an affected person.

Apparel Export Promotion Council v. A.K.Chopra (1999) 1 SCC 759

It is a fundamental requirement of law that the doctrine of natural justice be complied with and the same has, as a matter of fact, turned out to be an integral part of administrative jurisprudence. The judicial process itself embraces a fair and reasonable opportunity to defend though, the same is dependant upon the facts and circumstances of each individual case. The facts in the present matter under consideration are singularly singular. The entire chain of events smacks of some personal clash and adaptation of a method unknown to law in hottest of haste.

Sayeedur Rehman v. State of Bihar (1973) 3 SCC 333

There was no basis on which the enquiry officer could have found that the charges against the respondent stood proved. The enquiry officer was not justified in coming to such a conclusion on the basis of the charge sheet only. If the records have been considered, the immediate necessity would be to consider as to who was the person who had produced the same and the next issue could be as regards the nature of the records.

> There is not a whisper in the enquiry report in that regard. There was no presenting officer. There was no list of witnesses. There was no mention of defence witnesses. Such a procedure cannot be said to be in consonance with the concept of justice. The High Court rightly held that it resulted in miscarriage of justice. The whole issue has been dealt with in such a way that it cannot but be termed to be totally devoid of any justifiable reason."

Now adverting to the case on hand, the petitioner is removed from service for proven misconduct of charges 1 and 4. I have perused the order of disciplinary authority and the explanation offered by the petitioner against the enquiry officer's report dated 25.02.1995. *Prima facie*, after going through the record, this Court is satisfied that on the finding recorded on charge I, the respondents rely upon the Panchanama recorded at the time of inspection and the evidence of PW.1 to hold petitioner guilty of this charge. Neither of these two documents is available in the file produced before the Court. Be that as it may, for the purpose of verifying whether the enquiry report reproduced what is borne out by a particular exhibit or the oral evidence of a particular witness can be verified only from the evidence brought on record by the management before the disciplinary enquiry. Further from the beginning the petitioner has been pointing out that the respondents in spite of directions in W.P. No.14079 of 1993 did not give copies of documents on which the allegation of misappropriation or collusion with the co-employee was canvassed. The disciplinary authority without referring to the objections raised by the petitioner, through order No. CPRM (M) MK-29-372 dated 16.09.1995 dismissed the petitioner from service. Reverting to the order of appellate authority, this Court is compelled to observe that the appellate authority has hardly bestowed required consideration on the grounds raised by petitioner while rejecting the appeal filed by the petitioner. The petitioner after acquittal on merits by the Criminal Court has placed the copy of judgment in Criminal Appeal No.112/98 before the 1st respondent and has requested the 1st respondent to re-examine the entire issue and prayed for justice. The revision/review was rejected through communication dated 14.06.2002. A look at all the orders and the material relied upon by the respondents and the objection raised by the petitioner against the evidence and the relevancy of the evidence for holding the petitioner guilty of these charges there is no application or appreciation by all the three authorities. However in a monotonous way the charges have been accepted by the disciplinary authority. I hasten to add that the above finding is recorded for the limited purpose of accepting the contention of Mr.Meherchand Nori that fair play and principles of natural justice have not been adhered to by the disciplinary authority, when it was pointed out before the appellate authority there should be independent consideration and decision on all the objections raised by the petitioner. In judicial review primacy to a few situations, sufficiency of evidence etc. are accepted in favour of disciplinary authority and it shall not be confused with a situation that everything that passed muster before the disciplinary authority ought to pass muster under judicial review as well. After going through the record, I am satisfied that before accepting guilt on these two charges, the respondents did not examine the statement of imputation, evidence, the preponderance of opinion, the evidence leads on the charges. The disciplinary proceeding has been pending from 1995, justice should not only be done, but seen to have been done. As held by the Apex Court, this Court cannot re-appreciate the evidence and come to independent conclusions on all objections pointed out by petitioner. If I undertake the objections pointed out by the petitioner, the same virtually amount to re-appreciating evidence and come to independent conclusion under Article 226 of the Constitution of India. Therefore, to avoid such course, this Court has no option except to direct the appellate authority to decide the appeal by examining the material in right perspective and pass orders on these two charges held against the petitioner keeping in view the decisions referred to above and evidence on record. The objection raised on the legality or otherwise the order impugned is tenable and sustainable. Having regard to the scope of judicial review and the duty of appellate authority to examine the appeal in its right perspective, since, is not satisfied in the case on hand, I am satisfied that the order No. ED (HRD)-CO-CP3-062 dated 24.04.1996 and order No. GM (M)-MK-29-108 dated 4.06.2002 are set aside and matter remitted to Executive Director for consideration and disposal of appeal in accordance with law and on the material available on record. The appeal shall be heard and decided without fail within eight weeks from the date of receipt of a copy of this order. The petitioner if so advised is given liberty to file additional grounds before the appellate authority within three weeks from the date of receipt of a copy of this order.

The writ petition is ordered as indicated above. No order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

S.V.BHATT,J

Date: 19-04.2017
Note:
C.C. in one week.
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