

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1132 OF 2013

IN

CRIMINAL APPEAL NO.715 OF 2013

Sudhakar Waman Chavan ... **Applicant**
V/s.

The State of Maharashtra ... **Respondent**

.....

Mr.Saurabh D. Butala with Mr.Amogh P. Khadye I/b. Mr.Harshad Bhadbhade, Advocate for the Applicant.

Mr.S.V.Gavand, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 28th FEBRUARY 2018.

P.C. :

1 This Criminal Application bearing No.1132 of 2013 is restored in view of the Judgment of the Honourable Apex Court in Criminal Appeal No.2 of 2018 dated 4th January 2018.

2 This is an application for stay to the effect and implementation of Order of conviction dated 01/06/2013 passed by the learned Special Judge, Thane in Special Case No.8 of 1997 and 5 of 1999 convicting the applicant/accused No.15 for offences

punishable under Sections 120-B of the Indian Penal Code read with Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 as well as for the offence punishable under Section 109 read with Section 409 of the IPC. Initially, the application was allowed by this Court vide Order pronounced on 14th March 2014 (Coram : A.R.Joshi, J.). The said Order was carried in Appeal i.e. Criminal Appeal No.2 of 2018 (Special Leave Petition (Cri.) No.5770 of 2014), which was filed by Deepak Dhondi Sawant. The said Criminal Appeal came to be allowed by common Order in the said Appeal as well as in Criminal Appeals Nos.3 and 4 of 2018 passed by the Honourable Apex Court on 4th January 2018. The relevant portion of that common Order read thus :

“Leave granted.

Heard the learned counsel for the parties. The interim stay of conviction granted by the High Court during the pendency of the appeal has been questioned in this appeal.

After hearing the learned counsel for the parties, we are of the opinion that the High Court has not considered the decision of this Court in the case of Lily Thomas Vs. Union of India & Ors. While dealing with the matter, in one of the matter.

In the appeal filed by the Balmukund Dattatraya Vhanugare, proper reasons have not been assigned, so as to grant stay of conviction.

We are not happy the way in which the conviction has been stayed by the High Court on the ground that it would be appropriate to permit the appellants to contest the election and to continue as MLA/Corporators etc. it could not have been the primary consideration with which the High Court should have approached the case. As such, we request the High Court to reconsider the matter afresh for granting stay of conviction in the light of decisions in Lily Thomas Vs. Union of India & Ors. and Ravikant S. Patil Vs. Sarvabhouma Sl. Bagali, in accordance with law.”

That is how the present application is being decided afresh.

3 The applicant, who at the relevant time was Chairman of the Standing Committee of the Thane Municipal Corporation and member of the Transport Committee of the said Corporation came to be prosecuted for several offences under the Indian Penal Code as well as the Prevention of Corruption Act, 1988 along with co-accused and ultimately, vide Judgment and Order dated 01/06/2013 passed in Special Case No.8 of 1997 with 5 of 1999, the learned Special Judge, Thane was pleased to convict the applicant/accused and he came to be sentenced for the offences of which he was found guilty. The operative portion of the impugned Judgment and Order read thus :

“ ORDER

The accused no.1 Arvind alias Narayan Vishnu Agashe, accused no.2 Mukund Shivram Kelkar and accused no.16 Kamlakar Vasudev Dixit are hereby convicted for an offence punishable under section 13(1)(d) read with section 13(2) of Prevention of Corruption Act and sentenced to undergo R.I. for three years each and to pay fine of Rs.10,000/- (rupees ten thousand only) each and in default to undergo S.I. for three months each.

The above accused no.1, 2, 16 are also convicted for an offence punishable under section 409 read with section 120B of the Indian Penal Code and sentenced to undergo R.I. for three years each and to pay fine of Rs.5,000/- (rupees ten thousand only) each and in default to undergo S.I. for two months each.

The accused no.4 Gangaram Dodha Indise, accused no.5 Devram Laxman Bhoir, accused no.6 Vilas Sitaram Samant, accused no.8 Dennis Lawrence D'Souza, accused no.9 Deepak Madhukar Deshmukh, accused no.10 Madan Shankar Mantri, accused no.12 Dilip Dharamveer Chopda, accused no.13 Sitaram Mahadev Ambekar, accused no.14 Ashok Govindrao Dingrani and accused no.15 Sudhakar Waman Chavan are hereby convicted for an offence punishable under section 120B of Indian Penal Code read with section 13(1)(d) read with section 13(2) of Prevention of Corruption Act and sentenced to undergo R.I. for three years each and to pay fine of Rs.10,000/- (rupees ten thousand only) each and in default to undergo S.I. for three months each.

The above accused no.4, 5, 6, 8, 9, 10, 12, 13, 14 and 15 are also convicted for an offence punishable under section 109 read with section 409 of the Indian Penal Code and sentenced to undergo R.I. for three years each and to pay fine of Rs.5,000/- (rupees ten thousand only) each and in default to undergo S.I. for two months each.

All the above said sentences shall run concurrently.

The period of detention undergone by each of the accused, if any, be set off against the sentence of imprisonment.

The documents belonging to the Thane Municipal Corporation and so also the companies which submitted the tenders, be returned to them respectively if they are seized from them, after expiry of appeal period after submission of its xerox copies.”

4 Heard the learned Advocate appearing for the applicant/appellant/accused. He argued that this Court may consider whether there is any cause of action to decide the instant application presently and if there is no cause of action, then liberty be granted to the applicant/accused to approach this Court as and when need arises. The learned Advocate for the applicant/accused drew my attention to the Judgment of the Honourable Apex Court in the matter of *Lily Thomas v. Union of India & Ors.*¹ and argued that what was challenged in the said matter was validity of Sub-Section 4 of Section 8 of the Representation of Peoples Act, 1961 and the said Writ Petition came to be allowed by the Honourable Apex Court. In submission of the learned Advocate for the applicant/accused, the said Judgment is in respect of the Members of the Parliament and the Members of the Legislative Assembly and as such, is not applicable to the Municipal Councilor. The learned Advocate then relied on Judgment in the

1 (2013) 7 SCC 653.

matter of ***Rama Narang v. Ramesh Narang***¹ and submitted that in the said matter, no reasons were specified for seeking stay to the conviction. The learned Advocate drew my attention to paragraph No.16 of the said Judgment to buttress his contention that with specific reasons and specified consequences, there can be stay to the conviction. The learned Advocate for the applicant placed reliance on Judgment of the Honourable Apex Court in the matter of ***Ravikant S. Patil v. Sarvabhuma S. Bagali***² and submitted that if attention of the court is drawn to the specific consequences, then conviction can be stayed in appropriate cases. Reliance is also placed on the Judgment of the Honourable Apex Court in the matter of ***State of Maharashtra v. Balakrishna Dattatrya Kumbhar***³ to submit that if irreparable loss to the applicant is demonstrated, then conviction can be stayed. With this, the learned Advocate for the applicant argued that the learned trial Court has not given any justifiable reason for convicting the present applicant of the offences with which he was charged. The learned Advocate submitted that as the impugned Judgment and Order of conviction is bereft of reasons on which the conviction is founded, the said needs to be stayed. For this purpose, reliance is placed on the Judgment of the learned Single Judge of the Honourable Orissa High Court in the matter of ***Sadarsan Sahani v. State of Odisha (Vig.)***⁴.

1 1995 DGLS (Soft.) 114.

2 (2007) 1 Supreme Court Cases 673.

3 (2012) 12 Supreme Court Cases 384.

4 2017 SCC OnLine Ori 634.

5 The learned Additional Public Prosecutor opposed the application by pointing out the reply filed by the State and submitted that as of now the applicant is neither the Municipal Councilor nor holder of any elective post and, therefore, there cannot be stay to the conviction as sought in the instant application.

6 I have carefully considered the rival submissions and also perused the material placed on record. The applicant herein, at the relevant time, was the Municipal Councilor and he came to be elected as the Chairman of the Standing Committee of the Thane Municipal Corporation. He was ex-officio Member of the Transport Committee of the Thane Municipal Corporation. The said Corporation purchased 30 bus chassis. Quotations were invited for bus body building. In all eight bidders validly applied. The Transport Committee rejected the lowest tender of M/s.Bharati Workshop, Kurla, Mumbai and awarded the contract to three Companies. Subsequently, there was a Legislative Assembly Question and investigation in the matter which ultimately, resulted in filing of the charge-sheet against the accused persons including the present applicant. After trial of the offences alleged against the present applicant and the co-accused, by the impugned Judgment and Order, the learned Special Judge was pleased to convict the applicant and accordingly he is sentenced as indicated in the opening paragraph of this Order.

7 Perusal of the application shows that stay to conviction sought by pleading reasons for the same as found in paragraph (h),(k) and (l) of the application. These reasons needs reproduction and read thus :

(h) It is submitted that the applicant is Corporator for last almost 25 years and had also contested election for Member of Legislative Assembly. The Applicant further intends to contest the election for the Member of Legislative Assembly from Owala-Majiwada constituency of Thane District. The Applicant most respectfully submits that the if the stay is not granted on conviction then not only the appellant will be disqualified as being a Corporator but will be further not able to contest the election for the post of M.L.A. in 2014 elections thus resulting in irreparable loss which can not be contested in terms of money. The Applicant states that the political career of the Applicant will come to an end if stay to conviction is not granted. The applicant states that even if finally the appeal is allowed the Applicant would suffer irreparable loss.

(k) The Applicant states that the Applicant also intends to contest the election for member of Legislative Assembly and if the conviction is not stayed the Applicant will not be able to contest the election in the year 2014 March.

(l) The Applicant states that if the stay is not granted then great harm and prejudice will be caused to the career of the applicant which can not be compensated in terms of money.”

8 Now, let us take a brief resume of the law on the aspect of stay to the conviction. In the matter of *Lily Thomas (supra)* the Honourable Apex Court held thus in paragraphs Nos.34 and 35 :

34. We do not also find merit in the submission of Mr. Luthra and Mr. Kuhad that if a sitting member of Parliament or the State Legislature suffers from a frivolous conviction by the trial court for an offence given under sub-section (1), (2) or (3) of Section 8 of the Act, he will be remediless and he will suffer immense hardship as he would stand disqualified on account of such conviction in the absence of sub-section (4) of Section 8 of the Act. A three-Judge Bench of this Court in *Rama Narang v. Ramesh Narang* has held that when an appeal is preferred under Section 374 of the Code of Criminal Procedure [for short the Code] the appeal is against both the conviction and sentence and, therefore, the Appellate Court in exercise of its power under Section 389(1) of the Code can also stay the order of conviction and the High Court in exercise of its inherent jurisdiction

under Section 482 of the Code can also stay the conviction if the power was not to be found in Section 389(1) of the Code.

35. In *Ravikant S. Patil v. Sarvabhouma S. Bagali*, a three-Judge Bench of this Court, however, observed (SCC p.679, para 15):

“15. It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the

contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction.”

In the aforesaid case, a contention was raised by the respondents that the appellant was disqualified from contesting the election to the Legislative Assembly under sub-section (3) of Section 8 of the Act as he had been convicted for an offence punishable under Sections 366 and 376 of the Indian Penal Code and it was held by the three-Judge Bench that as the High Court for special reasons had passed an order staying the conviction, the disqualification arising out of the conviction ceased to operate after the stay of conviction. Therefore, the disqualification under sub-section (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the Appellate Court under Section 389 of the Code or the High Court under Section 482 of the Code.”

9 In *Rama Narang (supra)*, the ratio of the Judgment can be found in paragraph No.19, which reads thus :

“19. That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of

conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code. We are, therefore, of the opinion that the Division Bench of the High Court of Bombay was not right in holding that the Delhi High Court could not have exercised jurisdiction under Section 482 of the Code if it was confronted with a situation of there being no other provision in the Code for staying the operation of the order of conviction. In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the

convicted persons does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the Appellate Court. But while granting a stay of (*sic.* or) suspension of the order of conviction the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company.”

10 In the matter of *Ravikant S. Patil (supra)*, following are the observations of the Honourable Apex Court in paragraph Nos.16.3 to 16.5 :

“**16.3** In *K.C.Sareen v. CBI*, it was held that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. It was further held that merely because the convicted person files an appeal to challenge his conviction, the court should not suspend the operation of the conviction and the court has a

duty to ; look at all aspects including the ramifications of keeping such conviction in abeyance. The Bench also noted that the evil of corruption has reached a monstrous dimension. While declining the prayer of the appellant for grant of an order of stay of conviction, the Bench observed that when conviction is on a corruption charge against a public servant, the appellate court should not suspend the order of conviction during the pendency of the appeal, even if the sentence of imprisonment is suspended. The Bench further observed that it would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision. These observations would equally apply when a prayer for stay of order of conviction is made so as to remove the disability to contest an election except, as already noted, in a very exceptional and rare case.

16.4 Lastly, reference may also be made to the decision of this Court in *State of Maharashtra v. Gajanan & Anr.*. In the said case, relying on the case of *K.C.Sareen*, it was reiterated that only in exceptional cases, the court should exercise the power of stay of conviction. Since the High Court in the said case had not pointed out any exceptional fact or looked into the ramification of keeping such conviction in

abeyance, the order of the High Court staying the conviction was set aside. In the cited case of *Union of India v. Atar Singh*, it was noted that the High Court had mechanically passed the order by suspending the conviction and the discretion ought not to have been exercised by the High Court by passing such an order suspending the conviction.

16.5 All these decisions, while recognising the power to stay conviction, have cautioned and clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences.”

11 In the matter of *State of Maharashtra v. Balakrishna Dattatrya Kumbhar (supra)*, the Honourable Apex Court in Paragraph No.15 has held thus :

“15. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined

whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done.”

12 It is thus clear that though the Appellate Court has powers to stay conviction, such powers are required to be exercised with great circumspection and caution. Special reasons are required to be stated for passing the order of staying conviction and the Court is required to satisfy itself that failure to stay conviction would result in gross injustice and irreversible consequences. The question of stay to the conviction under the Prevention of Corruption Act, 1988 was considered by the Honourable Apex Court in the matter of ***Sham Narayan Pandey v. State of U.P.***¹ and after reviewing the earlier Judgments, it is held thus :

“It may be noticed that even for the suspension of the sentence, the court has to record the reasons in writing under Section 389(1) Cr.PC. Couple of provisos were added under Section 389(1) Cr.PC pursuant to the recommendations made by the Law Commission of India and observations of this Court in various judgments, as per Act 25 of 2005. It was

1 (2014) 8 SCC 909.

regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the public prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice.

In Ravikant S. Patil v. Sarvabhuma S. Bagali, a three-Judge Bench of this Court has held that the power to stay the conviction should be exercised only in exceptional circumstances where failure to stay

the conviction would lead to injustice and irreversible consequences. In Navjot Singh Sidhu v. State of Punjab and another following Ravikant S. Patil case (supra), at paragraph-6, this Court held as follows:

6. The legal position is, therefore, clear that an appellate court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case.

In State of Maharashtra through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar referring also to the two decisions cited above, it has been held at paragraph-15 that:

15. the appellate court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the

purpose of which, the applicant must satisfy the court as regards the evil that is likely to befall him, if the said conviction is not suspended. The court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done.

In State of Maharashtra v. Gajanan and another and Union of India v. Atar Singh and another, cases under the Prevention of Corruption Act, 1988, this court had to deal with specific situation of loss of job and it has been held that it is not one of exceptional cases for staying the conviction.

In the light of the principles stated above, the contention that the appellant will be deprived of his source of livelihood if the conviction is not stayed cannot be appreciated. For the appellant, it is a matter of deprivation of livelihood but he is convicted for deprivation of life of another person. Until he is otherwise declared innocent in appeal, the stain

stands.”

These observations make it clear that in conviction under the Prevention of Corruption Act, 1988, there is deprivation of life of another person by the accused and unless and until he is declared innocent in the appeal such stain continues.

13 Now, let us examine the case in hand. The grounds for seeking stay to the conviction is found in the instant application are to the effect that political career of the applicant will come to an end, if stay to the conviction is not granted as the applicant intends to contest the election for the membership of the Legislative Assembly in the year 2014.

14 The learned trial Court has given the following findings on the points which were fell for consideration in the Special Case bearing No.8 of 1997 and 5 of 1999 :

Points	Findings
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- | | |
|--|---------------------|
| 1. Whether the accused no.1,2,3 and 16 were working as public servant in T.M.C. during the relevant period in the year 1992-93 ? | In the affirmative. |
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2. Whether the above said accused In the affirmative.
no.1,2,3 and 16 obtained pecuniary advantage for themselves or any other person, by corrupt and illegal means, by abusing their position as public servant, and caused loss to the T.M.C. in respect of public money to the tune of Rs.32,18,600/- by accepting tenders of Starlines Motor Industries Mumbai, Trimurti Motor Body Builders and In Coach Builders though Bharati Workshop had submitted the lowest tender in respect of the bus body building work of T.M.C. during the relevant period ?
3. Whether the accused no.4 to 15 had In the affirmative.
entered into conspiracy to do the above illegal act with public servant servants i.e. accused no.1,2,3 and 16 ?
4. Whether the prosecution proved that In the affirmative.
the accused no.1,2,3 and 16 were entrusted with the funds of the T.M.C. being the budgetary provisions of the Transport Department ?
5. Whether the accused no.1,2,3 and 16 In the affirmative.
had committed criminal breach of trust in respect of said funds of the T.M.C. ?
6. Whether the prosecution proved that In the affirmative.
accused no.4 to 11 and 15 being and members of the Transport Committee and accused no.12,13,14 being the beneficiaries had abetted the above said public servants in commission of above said offence of criminal breach of trust ?

7. Whether the accused no.1,2,3 and 16 are guilty for an offence punishable under section 13(1)(d) read with section 13(2) of Prevention of Corruption Act ? In the affirmative.
8. Whether accused no.1,2,3 and 16 are guilty for an offence under section 409 of the Indian Penal Code ? In the affirmative.
9. Whether the accused no.4 to 15 are guilty for an offence punishable under section 120B and 109 read with section 409 of Indian Penal Code ? In the affirmative.
- 10 What order ? As per the final order.

15 The affidavit filed by the State shows that at the present, the applicant is not holding any elective post. He contested the election to Thane Municipal Corporation held on 21/01/2017 as an independent candidate, but lost that election. The State has stated in its affidavit that the next election to the Member of Parliament is proposed in the month of April 2019 and election of Member of Legislative Assembly is proposed in September 2019.

16 The applicant is held to have abused the elective office as seen from the answers to the points for determination framed by the learned trial Court. In the matter of ***Shyam Narayan Pandey (supra)***, the Honourable Apex Court has held that such a conviction deprives the livelihood of others and the stain continues unless and until such convict is declared

innocent. This is not the stage to appreciate the evidence to decide whether conviction was not proper or whether the same is proper. One will have to examine whether at this stage, specific consequences are established which are likely to fall upon the applicant because of his conviction and whether the applicant would suffer irreversible consequences causing injustice to him if the conviction as recorded by the learned Special Judge is not stayed. No such special reason exists for stay to the conviction of the applicant recorded by the learned Special Judge. The prosecution has examined in all twenty witnesses in order to bring home the guilt to the accused persons and by appreciating the other evidence, the learned trial Court had recorded the conviction and the resultant sentence, which is the subject matter of appeal before this Court. Thus, the stain continues so far as conviction is concerned and there seems to be no special reason for staying conviction. Hence, the Order :

ORDER

- (i) The application is rejected.
- (ii) However, hearing of the appeal is expedited subject to the Judgment of the Honourable Apex Court in the matter of *Hussain & Anr. v. Union of India*¹

(A.M.BADAR J.)

¹ 2017 (5) SCC 702.