

Pradnya Bhogale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8834 OF 2018

VVF (India) Limited

a Company registered under the Companies

Act, 1956 having its registered office at

109, Sion (East), Mumbai – 400022

..Petitioner

Versus

1. The State of Maharashtra
through the Government Pleader,
High Court, Mumbai.
2. The Commissioner of Sales Tax
having his office at 8th Floor
Vikrikar Bhavan, Mazgaon
Mumbai – 400 010.
3. The Joint Commissioner of Sales
(H.Q.)-1, Maharashtra State,
having his office at Vikrikar Bhavan
Mazgaon, Mumbai – 400 010.
4. The Deputy Commissioner of Sales
Tax (E-627), Large Taxpayers Unit-3
having his office at Vikrikar Bhavan,
Mazgaon, Mumbai – 400 010.
5. The Joint Commissioner of Sales
Tax (Appeals-V) having his office at
Suburban Vikrikar Bhavan,
Bandra-Kurla Complex,
Bandra (East), Mumbai – 400 051.

..Respondents

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Mr. V. Sridharan, Senior Counsel a/w Jas Sanghavi I/b. PDS
Legal for petitioner.

Mr. V.A. Sonpal, Special Counsel a/w S. B. Kalel, AGP for State.

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**CORAM : S.C. DHARMADHIKARI &
M.S. KARNIK,JJ.**

**RESERVED ON : 14th FEBRUARY, 2019
PRONOUNCED ON : 8th NOVEMBER, 2019**

JUDGMENT (PER SHRI M.S. KARNIK,J.)

Rule. Rule is made returnable forthwith by consent
of the parties.

2. By this petition filed under Article 226 of the
Constitution of India the petitioner is challenging the impugned
letter dated 4.6.2018 issued by the Joint Commissioner of Sales
Tax. It is further prayed that an appropriate direction be issued
to respondent No.5-the Joint Commissioner of Sales Tax
(Appeals-V) to accept the petitioner's Appeal against the
Assessment Order dated 26.12.2017 without the payment of any
further payment of pre-deposit.

3. Brief facts of the case are as under :-

The petitioner is a public limited company engaged in the manufacture and sale of oleo-chemicals and personal care products such as toilet soaps, talcum powder, hand wash etc. The petitioner is duly registered under the provisions of the Maharashtra Value Added Tax Act, 2002 ('the MVAT Act' for short) and the Central Sales Tax Act, 1956 ('the CST Act' for short). The petitioner is also registered under the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2002 ('the Entry Tax Act' for short). The respondent Nos.2, 3, 4 and 5 are the officers exercising powers under the provisions of the MVAT Act, CST Act and the Entry Tax Act. The petitioner is involved in the inter-State purchase of natural gas from Dahej, Gujarat. The petitioner procures natural gas from sources located outside the State of Maharashtra. When petitioner is not able to sufficiently procure natural gas outside the State of Maharashtra, the petitioner procures natural gas locally within the State of Maharashtra.

4. In A.Y. 2013-14, the petitioner purchased natural gas from M/s. Bharat Petroleum Corporation Limited ('BPCL' for short) on an inter-State purchase basis from Gujarat against C-Forms. The petitioner was itself responsible for the transportation of the purchased natural gas from Gujarat to its unit. It is the case of the petitioner that they have been filing proper returns under the MVAT and the CST Acts and approximately been paying tax to the extent of Rs.19 Crores every year to the State of Maharashtra in the form of MVAT or CST.

5. With effect from 08.01.2003, the earlier Entry Tax Ordinance of 2002 (Mah. Ord. XI of 2002) was repealed and the Entry Tax Act was enacted. As per Section 3 of the said Act, an Entry Tax was levied on the entry of goods into a local area from outside the State of Maharashtra for use or sale or consumption therein. The said Entry Tax was levied only on goods that were specified in the Schedule to the Entry Tax Act. According to the petitioner, there was no residual entry in the Schedule to the Entry Tax Act.

6. It is further case of the petitioner that natural gas was not mentioned in the Schedule as enacted in 2003. The petitioner did not notice that vide Mah. Act No.8 of 2012 dated 25.04.2012 and with effect from 01.05.2012, Entry 16 namely 'Natural Gas' was added into the Schedule of the Entry Tax Act. As per the provisions of Section 6 of the Entry Tax Act read with Section 64 of the MVAT Act, an investigation was carried out by the Officers of the Sales Tax Department in the petitioner's premises from 15.11.2016 to 22.11.2016. During the course of the said investigation, the petitioner was issued show cause notice dated 22.11.2016 alleging that the petitioner has failed to properly discharge Entry Tax and file returns under the provisions of the Entry Tax Act for the Assessment Years 2012-13 and 2013-14 on the purchase of natural gas by the petitioner from BPCL in Gujarat. Further tax demands were made indicating that the petitioner was also liable for the levy of the applicable interest and penalty in relation to the demands in the subsequent years also.

7. The petitioner contested the proposed tax liabilities by way of reply dated 23.12.2016. However, in order to prove its bonafide, the petitioner without prejudice to any of its rights and contentions, undertook to pay Rs.3,64,24,388/- (i.e. Rs.2,32,37,249/- towards tax and Rs.1,31,87,139/- towards interest) under protest for the Assessment Year 2013-14. This payment of Rs.3,64,24,388/- towards the alleged Entry Tax liabilities was duly made by the petitioner on 08.12.2016 and 11.01.2017. The petitioner also revised its Entry Tax and MVAT returns under protest. This revision was done without prejudice to the petitioner's rights and contentions and under protest. It is the petitioner's case that under the MVAT Act set-off (subject to retention) was available to the petitioner in respect of any Entry Tax paid by it. Hence, the under protest revision of returns made by the petitioner was a precautionary measure taken without prejudice to its rights and contentions so as to ensure that the respondents could not deny set-off to the petitioner at a later stage on account of the fact that the petitioner had not claimed set-off in its returns. The petitioner's protest in relation

to the payments of tax and revision of returns was additionally lodged vide letters dated 22.11.2016 and 11.01.2017.

8. The petitioner thereafter received show cause notice dated 30.10.2017 in relation to the proposal to impose penalty upon the petitioner and other ancillary issues. The petitioner filed a reply in response to the said notice.

9. The show cause notice came to be adjudicated and by a Notice of Demand and Assessment Order dated 26.12.2017 a tax demand of Rs.10,44,54,708/-, interest demand of Rs.7,09,06,928/- and a penalty demand of Rs.10,44,74,708/-, totaling Rs.27,98,36,344/- was imposed on the petitioner. After adjustment of the amounts already paid by the petitioner, the amount held to be payable by the petitioner was to the extent of Rs.24,34,11,956/- .

10. The petitioner filed an Appeal against the said Assessment Order dated 26.12.2017. Section 26(6A)(c) of the MVAT Act provides for pre-deposit of 10% of the tax disputed by the appellant.

11. The respondents imposed a tax demand of Rs.10,44,54,708/- on the petitioner. The petitioner entirely disputes the tax demand imposed. However, during the course of the investigation, the petitioner was forced to make a payment of Rs.3,64,24,388/- (i.e. Rs.2,32,37,249/- towards tax and Rs.1,31,87,139/- towards interest).

12. At the time of filing of the Appeal against the Assessment Order the petitioner therefore was of the view that it was liable to pre-deposit 10% of the amount of Rs.10,44,54,708/-. Given that the petitioner had already deposited an amount of Rs.2,32,37,249/- towards tax, according to petitioner, the condition of pre-deposit of 10% of the total disputed tax demanded is fully complied with since the amount already deposited is greater than Rs.1,04,45,470.80 which is the 10% pre-deposit amount.

13. The petitioner tried to file an Appeal but the same was not taken on record as the respondent No.5 was of the opinion that payments made under protest during the course of

investigation proceedings had already been adjusted in the Assessment Order and that the petitioner would be liable to make an additional pre-deposit. By communication dated 8.6.2018 it was clarified by the respondent No.3 that the payments made under protest by the petitioner could not be considered as pre-deposit for the purposes of Section 26 (6A) and hence the petitioner would be required to make further additional pre-deposit to file its appeal.

14. It is the contention of learned Senior Counsel for the petitioner that the returns filed under protest can not be considered as acceptance of tax liability. He urged that petitioner clearly indicated its protest at the time of filing of its returns. It is not even the case of the respondents that the petitioner did not register its protest at the time of filing of the returns. Vide reply dated 23.12.2016 and letters dated 22.11.2016 and 11.01.2017 the petitioner had clearly indicated that it was not accepting the tax liability and in its view no entry tax was payable by it.

15. Learned Senior Counsel would further submit that the format for the filing of an entry tax appeal has been prescribed as Form 11 wherein the person filing the appeal is required to state the amount of tax admitted and the amount of tax in dispute. The petitioner had clearly stated that the entire tax liability of Rs.10,44,54,708/- alongwith interest and penalty was being disputed. Learned Senior Counsel says that the views expressed by the respondent No.3 in the impugned clarification clearly run contrary to the specific provisions of Section 26 (6A). Learned Senior Counsel would further urge that the respondents are not justified in taking a stand that once the appellant has filed returns and paid tax/interest as per the returns, he cannot be allowed to take a stand that even the tax amount, disclosed in the returns is “an amount of tax, disputed by him”.

16. Learned Senior Counsel placed reliance on the decision of the Madras High Court in the case of **E.I.D. Parry (India) Limited Vs. Assistant Commissioner (CT), Central Assessment Circle-I and Others** reported in 2002 (126) STC 449.

The Madras High Court held that payment made under protest disputing the liability of tax cannot be regarded as acceptance of the tax liability.

17. Learned counsel for the respondents on the other hand argued in support of the impugned clarification and contended that as the amount of Rs.3.64 Crores has been paid before the Assessment Order is passed and which is also disclosed in returns, the same cannot be considered for the purpose of computing the 10% mandatory pre-payment for appeals, in accordance with Section 26 (6A) of MVAT Act. The undisputed facts are that total tax assessed is Rs.10,44,54,708/- and that prior to the order of assessment, an amount of Rs.2,32,37,249/- was paid by the petitioner under protest. It is therefore urged that having paid the amount of Rs.3.64 Crores under protest, since this amount is paid before the Assessment Order is made, the respondents are justified in insisting for a pre-deposit on the basis of the tax liability subsisting as on the date of the Assessment Order against which Appeal is to be filed.

18. Heard learned counsel. Perused the memo of Petition and annexures. There is no dispute that the said amount of Rs.3.64 Crores has been paid under protest. The only question is whether this amount of Rs.3.64 Crores should be considered for the purpose of computing the 10% mandatory pre-deposit required for filing the appeal in accordance with the Section 26(6A) of the MVAT Act.

19. In the present case, the petitioner in appeal has admittedly challenged the assessment order and notice of demand dated 26th December, 2017, copy of which is at Exhibit 'H' to the writ petition. The total demand was Rs.27,98,36,344/- and after adjusting the amount already paid under protest, the demand was computed to the tune of Rs.24,34,11,956/-. The relevant part of the assessment order and the notice of demand read as under:-

**“The Mah. Tax on the Entry of Goods into local
Areas Rules, 2002
FORM 9
(See Rule 8 of the Maharashtra Tax on the Entry of
Goods into Local Areas Rules, 2002)
Order of Assessment of tax**

(under section 6 of the Maharashtra Tax on the
Entry of Goods into Local Areas Act, 2002 (Mah.
Act IV of 2003)

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The penalty u/s. 29(2A) of MVAT act r/w. u/s.
6 of entry tax on goods act 2002 levied at
Rs.104454708/-. The penalty u/s. 20(6) of MVAT
act r/w. u/s. 6 and rule 7(2A) of entry tax on
goods act 2002 levied at Rs.20000/- So total
proposed liability comes to Rs.243411956/-”

The Mah. Tax on the Entry of Goods into Local
Areas Rules, 2002
FORM 10

Notice of Demand

(See Rule 8 of the Maharashtra Tax on the Entry of
Goods into Local Areas Rules, 2002)

Office of the,
Dy. Commissioner of State Tax (E-627)
Large Taxpayer Unit 3
New Bldg. 3rd Floor, G. wing
GST Bhavan, Mazgaon-10
TEL-23760378

To,
M/s.VVF (INDIA) LTD.
109, OPP. SION FORT GARDEN,
SION (EAST), 29th ROAD, SION
MUMBAI-400 022

Entry tax R.C.No. - 27450909706E

1. Take notice that the tax, interest and/ or penalty payable by you for the import of 'Natural Gas' into Maharashtra during the period from 01/04/2013 to 31/03/2014 has been determined by me [Dy. Commissioner of State Tax (E-627), Mumbai.] under section 6 of the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2002 (Mah. Act IV of 2003).
2. The total amount of Rs.243411956/- should be paid into Government Treasury within 30 days from the date of service of demand notice.
3. If you do not pay the amount by the date specified above, the amount shall be recoverable as an arrears of land revenue.
4. If the amount is not paid without reasonable cause by the specified date, you shall also be liable to penalty under the said Act.
5. Any appeal against the order must be presented to the Appellate Authority in the manner laid down in section 6 of the said Act.

Deputy Commissioner of State Tax (E-627)
LTU-3, Mumbai

20. A perusal of the writ petition and particularly para 18 onwards reveals that the petitioner may raise an issue of interpretation of section 26(6A) of the MVAT Act, but in para 23 of the petition, the petitioner has rightly understood the matter to mean that it desired to file an appeal against the tax disputed

by it. Mr. Sridharan would like to read sub-section (6A) of section 26 in isolation, but in law it would be impermissible to do so.

21. The Maharashtra Value Added Tax Act, 2002 (MVAT Act) is an Act to consolidate and amend the laws relating to the levy and collection of tax on the sale or purchase of certain goods in the State of Maharashtra. The definitions under this Act are contained in Chapter I, which is titled as “PRELIMINARY”. Section 2 falling in this Chapter sets out some crucial definitions and the definition of the words “business”, “commissioner”, “dealer”, “goods” are extremely relevant. A perusal of these definitions would reveal as to how the incidence of tax would fall on the dealer. By sub-section (3) of section 3, it is stated that every dealer, who has become liable to pay tax under this Act, shall continue to be so liable until his registration is duly cancelled. How the calculation of the limit of turnover for liability to tax is to be done is specified in this section. Therefore, sections 3 to 9 falling under Chapter II styled as “INCIDENCE AND LEVY OF TAX” indicate as to how

the burden falls and how that is to be discharged. Chapter III is titled as “SALES TAX AUTHORITIES AND TRIBUNAL”. Section 10 appears therein and the authorities *inter alia* are the Joint Commissioner, Deputy Commissioner, Assistant Commissioner, Sales Tax Officer. The powers of these authorities are set out and one can usefully refer to section 14. Section 14 reads as under:-

“14. (1) In discharging their functions by or under this Act, the Tribunal and the Commissioner shall have all the powers of a Civil Court for the purpose of, -

- (a) proof of facts by affidavit;
- (b) summoning and enforcing the attendance of any person, and examining him on oath or affirmation;
- (c) compelling the production of documents; and
- (d) issuing commissions for the examination of witnesses.

(2) In the case of any affidavit to be made for the purposes of this Act, any officer appointed by the Tribunal or the Commissioner may administer the oath to the deponent.

(3) Without prejudice to the provisions of any other law for the time being in force, where a person, to whom a summons is issued by the

Tribunal or the Commissioner either to attend to give evidence or produce books of accounts, registers or other documents at a certain place and time, intentionally omits to attend or produce the books of accounts, registers or documents at the place and time, the Tribunal or, as the case may be, the Commissioner, may impose on him such fine not exceeding five thousand rupees as it or he thinks fit; and the fine so levied may be recovered in the manner provided in this Act for recovery of arrears of tax:

Provided that, before imposing any such fine, the person concerned shall be given a reasonable opportunity of being heard.

(4) When any documents are produced by a person or dealer on whom the summons was issued by the commissioner and the Commissioner is of the opinion that such dealer or any other dealer has evaded or is attempting to evade the payment of any tax due from him and the documents produced by such dealer or person are necessary for establishing the case against such dealer, the Commissioner may, for reasons to be recorded in writing, impound the documents and shall grant a receipt for the same and retain the same for so long as may be necessary in connection with the proceedings under this Act or for a prosecution:

Provided that, if the original documents are required by any statutory authority for any official purpose, then the said documents shall be made available to such authority for such purpose for such duration as may be required.”

22. A perusal of section 14 reveals as to how the Commissioners are permitted to call upon a person by issuance of a summons to produce the documents and equally, when any documents are produced by a person or dealer on whom the summons was issued by the Commissioner and the Commissioner is of the opinion that such dealer or any other dealer has evaded or is attempting to evade the payment of any tax due from him and the documents produced by such person or dealer are necessary for establishing the case against such dealer, the Commissioner can record reasons and impound the documents. Thus, very wide powers are conferred on the Sales Tax Authorities and it is not as if their acts are immune from challenge but there is an independent Tribunal set up to deal with and decide the vexed issues.

23. Much emphasis is placed on Section 26(6A) of the MVAT Act. The relevant portion of which reads thus :-

“(6A) No appeal against an order, passed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017, shall be filed before the appellate authority in first appeal, unless it is accompanied by the proof of payment of an aggregate of the following amounts, as applicable, -

(a) in case of an appeal against an order, in which claim against declaration or certificate, has been disallowed on the ground of non-production of such declaration or, as the case may be, certificate then, amount of tax, as provided in the proviso to sub-section (6),

(b) in case of an appeal against an order, which involves disallowance of claims as stated in clause (a) above and also tax liability on other grounds, then, an amount equal to 10 per cent, of the amount of tax, disputed by the appellant so far as such tax liability pertains to tax, on grounds, other than those mentioned in clause (a),

(c) in case of an appeal against an order, other than an order, described in clauses (a) and (b) above, an amount equal to 10 per cent, of the amount of tax disputed by the appellant.

(emphasis supplied by us)

(d) in case of an appeal against a separate order imposing only penalty, deposit of an amount, as directed by the appellate authority, which shall not in any case, exceed 10 per cent of the amount of penalty, disputed by appellant :

24. Chapter IV is titled as “REGISTRATION” and then follows Chapter V. The title of Chapter V is extremely relevant. It is titled as “RETURNS AND ASSESSMENT, ETC.” Therein appear sections 20, 22 and 23 to 25 so also sections 26 to 28. Therefore, when there is an assessment under section 23 and that assessment has to be carried out in the manner set out in that provision and an order is to follow, then, naturally, that order of assessment is capable of being rectified and reviewed.

Equally, it is that which is subjected to appeal. Therefore, an appeal under sub-section (1) of section 26 lies from every order except an order mentioned in sub-section (2) of section 26 and sub-section (2) of section 85. In other words, an appeal from every order passed under the MVAT Act or Rules or notification shall lie and what section 26 with its sub-sections tells us is that there is a finality attached to the orders in appeal by the Tribunal. The powers of the appellate authority are also set out. There is a power to grant stay of the order appealed against in full or part and that is to be found in sub-section (6) of section 26. While sub-section (6) was in force, together with the proviso and clauses thereof, it is apparent from a perusal of the same that a relief of stay was not automatic and it was never unconditional. It is, therefore, apparent that the power to grant stay was conditional upon securing of the tax. The language of sub-section (6) and its clauses is clear, inasmuch as, if an appeal was filed to the appellate authority or the Tribunal, they had a discretion to grant stay in full or in part subject to such conditions or restriction as it may deem necessary, including a

direction for depositing a part or whole of the disputed amount by the appellant. In the event the appeals were delayed, there was a requirement of deposit of the whole of the tax and that is clarified by clause (a) of sub-section (6) of section 26.

25. Therefore, when sub-section (6A) was introduced in the statute book after the Maharashtra Tax Laws (Levy, amendment and Validation) Act, 2017 was enacted, all the more, the legislature was aware of the existence of sub-section (6) of section 26. Sub-section (6A) provided that in case of appeal against an order, which involves disallowance of claims against declaration or certificate on the ground of non-production of such declaration or as the case may be, certificate, then, amount of tax as provided in the proviso to clause (a) of sub-section (6) of section 26 and in case of an appeal against an order, which involves disallowance of claims as stated in clause (a) of sub-section (6A) of section 26 and also tax liability on other grounds, then, an amount equal to 10% of the amount of tax disputed by the appellant so far as such tax liability pertains to tax, on grounds, other than those mentioned in clause (a) and

in case of an appeal against an order, other than an order, described in clauses (a) and (b) of sub-section (6A) of section 26, an amount equal to 10% of the amount of tax disputed by the appellant has to be deposited. Thus, the sub-sections impose pre-conditions for filing a first appeal particularly of annexing proof of payment of an aggregate of the amounts mentioned in the clauses of section 26(6A) of the MVAT Act. Therefore, when the language of clause (c) of sub-section (6A) of section 26 is interpreted in the light of the earlier provisions of the act and particularly Chapters I to VII, it is clear that there has to be a proof of payment of the aggregate of the amounts as set out in clauses (a) to (d) of sub-section (6A) of section 26 of the MVAT Act depending upon the nature of the orders challenged in appeal. It is only then the appeals can be filed and not otherwise. To then hold that an amount which was paid under protest at the time of investigation and assessment to tax, but before an order of assessment or before completion of assessment can be construed as payment in terms of sub-section (6A) of section 26 of the MVAT Act or compliance of sub-section

(6A) of section 26, would be doing violence to the plain language of the Act.

26. In the present case, the appeal is against an order. That order is an order passed under section 23. If it is that order which is appealable, then, all the sub-sections of section 23 and the assessment proceedings cannot be lost sight of. If already some amounts are paid, albeit under protest, they would be adjusted against the total tax liability and the demand to follow. The order, therefore, is a composite one. In the instant case, that order, copy of which is annexed to the petition, is passed by the Deputy Commissioner of Sales Tax. He had before him the request of the petitioner and the reply to the show cause notice, wherein, he was called upon to complete the VAT/CST assessment along with the entry tax for the financial year 2013-2014. That he completed and passed an order, copy of which is at Exhibit 'H' at page 66 of the paper book. This order must be read in its entirety to appreciate whether and what type of appeal would lie against it. It is, therefore, clear that if the petitioner/ appellant is aggrieved by it, it is an order of

assessment. At the end of the assessment, there is a tax liability. That is crystallised and a notice of demand is issued to the petitioner. When the appeal is against such a tax liability, the petitioner cannot contend that because a paltry amount was deposited under protest prior to the assessment and at the time of investigation, that be adjusted against the pre-deposit contemplated by section 26(6A) of as compliance with sub-section (6A) of section 26 of the MVAT Act. If this argument of Mr. Sridharan is accepted, it would mean that a payment under protest made at the time of investigation to avoid tax liability or to escape assessment would suffice and on the strength of that, the appeal would be entertained despite there being no proof of payment of the aggregate of the amounts as set out in clauses (a) and (b) of sub-section (6A) of section 26 of the MVAT Act.

27. To our mind, therefore, there is no merit in the argument of Mr. Sridharan and the adjustment, as requested by him, is impermissible in law. In the view that we have taken, the judgment of Madras High Court in the case of **E.I.D. Parry (India) Limited** (supra) has no application. While it is true that

payment under protest cannot be regarded as acceptance of the tax liability, that principle has no application to the instant case.

28. In this behalf, it will be useful to refer to the latest judgment of the Hon'ble Supreme Court in the case of **Tecnimont Pvt. Ltd. (formerly known as Tecnimont ICB Private Limited vs. State of Punjab and Ors.**, reported in **AIR 2019 SC 4489**. The Hon'ble Supreme Court has quoted extensively and with approval paras of the earlier judgments, particularly in the case of **Government of Andhra Pradesh vs. P. Laxmi Devi**, reported in **2008 4 SCC 720**.

29. The writ petition is, therefore, devoid of merits and liable to be dismissed. It is, accordingly dismissed. Rule is discharged with no order as to costs.

(M.S. KARNIK, J.)

(S.C. DHARMADHIKARI, J.)

At this stage, the petitioner's Advocate seeks time to comply with the provision enabling filing of an Appeal. The provision contemplates deposit of 10% of the amount of tax

disputed and until that is done the Appeal cannot be filed. Learned counsel submits that 4 weeks time be granted to comply with this condition.

2. Having heard both sides, we think that the request is reasonable. If the amount is paid within 4 weeks from today, the Appellate Court shall entertain the Appeal and decided it on merits in accordance with law. All consequences to follow.

(M.S. KARNIK, J.)

(S.C. DHARMADHIKARI, J.)