

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA  
CONSTITUTIONAL WRIT JURISDICTION**

**APPELLATE SIDE**

RESERVED ON: 16.02.2022  
DELIVERED ON: 25.03.2022

**CORAM:**

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM**

**AND**

**THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**MAT 783 OF 2017**

**A S L ENTERPRISES LTD.**

**VERSUS**

**THE SENIOR JOINT COMMISSIONER, SALES TAX, CENTRAL AUDIT  
UNIT & ORS.**

**WITH**

**MAT 784 OF 2017**

**A S L ENTERPRISES LTD.**

**VERSUS**

**THE SENIOR JOINT COMMISSIONER, SALES TAX, CENTRAL AUDIT  
UNIT & ORS.**

**WITH**

**MAT 786 OF 2017**

**MASCOM PETROCHEM PRIVATE LIMITED**

**VERSUS**

**The JOINT COMMISSIONER, COMMERCIAL TAXES, BURRABAZAR  
CIRCLE & ORS.**

**WITH**

**M.A.T. 792 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 5148 OF 2017)**

**I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 5151 OF 2017)  
M/S. VATECH WABAG LIMITED  
VERSUS  
DEPUTY COMMISSIONER COMMERCIAL TAXES, MIDNAPORE CHARGE  
& ORS.**

**WITH**

**M.A.T. 982 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 5956 OF 2017)  
I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 5961 OF 2017)**

**ARCL ORGANICS LIMITED  
VERSUS  
SALES TAX OFFICER, PARK STREET CHARGE & ORS.**

**WITH**

**M.A.T. 985 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 5958 OF 2017)  
I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 5963 OF 2017)**

**MUKUL AGARWAL  
VERSUS  
JOINT COMMISSIONER, SALES TAX, BEADON STREET CHARGE & ORS.**

**WITH**

**M.A.T. 986 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 5959 OF 2017)  
I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 5964 OF 2017)**

**UDIT COMMERCIAL PRIVATE LIMITED  
VERSUS  
JOINT COMMISSIONER, SALES TAX, CORPORATE DIVISION & ORS.**

**WITH**

**M.A.T. 1370 OF 2017**

**SHAKTI INDUSTRIES & ANR.  
VERSUS  
THE JOINT COMMISSIONER, COMMERCIAL TAXES, CHOWRINGHEE  
CIRCLE & ORS.**

**WITH**

**M.A.T. 1619 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 9655 OF 2017)**

**STYLISH PRECASET PRIVATE LIMITED  
VERSUS  
SENIOR JOINT COMMISSIONER OF SALES TAXES, BURRABAZAR  
CIRCLE & ORS.**

**WITH**

**M.A.T. 1664 OF 2017**

**I.A. CAN 1 OF 2018 (OLD NO. C.A.N. 720 OF 2018)**

**RAJAGARIA TIMBER PRIVATE LIMITED  
VERSUS  
JOINT COMMISSIONER, COMMERCIAL TAXES, JORABAGAN CHARGE &  
ORS.**

**WITH**

**M.A.T. 1751 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 9909 OF 2017)  
I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 9913 OF 2017)**

**ALLIANCE MILLS (LESSEES) LIMITED  
VERSUS  
SALES TAX OFFICER CENTRAL AUDIT UNIT-I & ORS.**

**WITH**

**M.A.T. 1752 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 9912 OF 2017)  
I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 9914 OF 2017)**

**ALLIANCE MILLS (LESSEES) LIMITED  
VERSUS  
SALES TAX OFFICER CENTRAL AUDIT UNIT-I & ORS.**

**WITH**

**M.A.T 1782 OF 2017**

**WITH**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 10240 OF 2017)  
DADHEECH INFRASTRUCTURE PRIVATE LIMITED**

**VERSUS**  
**JOINT COMMISSIONER, COMMERCIAL TAXES, CHOWRINGHEE CIRCLE**  
**& ORS.**

**WITH**

**M.A.T. 1786 OF 2017**

**TAPAN MAZUMDER**  
**VERSUS**  
**SALES TAX OFFICER, SILIGURI CHARGE & ORS.**

**WITH**

**M.A.T. 1787 OF 2017**

**I.A. CAN 1 OF 2019 (OLD NO. C.A.N. 6389 OF 2019)**  
**I.A. CAN 2 OF 2019 (OLD NO. C.A.N. 6390 OF 2019)**

**SHAKAMBAREE TRADERS PRIVATE LIMITED**  
**VERSUS**  
**SALES TAX OFFICER, BURTOLA CHARGE & ORS.**

**WITH**

**M.A.T. 1801 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 10106 OF 2017)**  
**I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 10107 OF 2017)**

**M/S. EMC LIMITED**  
**VERSUS**  
**SENIOR JOINT COMMISSIONER OF SALES TAX & ORS.**

**WITH**

**M.A.T. 1896 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 12153 OF 2017)**

**GEO PILING SOLUTIONS & ANR.**  
**VERSUS**  
**THE DEPUTY COMMISSIONER, SALES TAX, BHABANIPUR CHARGE &**  
**ORS.**

**WITH**

**M.A.T. 1897 OF 2017**

**ANANYA WOOD PRIVATE LIMITED  
VERSUS  
THE SALES TAX OFFICER, JORABAGAN CHARGE & ORS.**

**WITH**

**M.A.T. 1898 OF 2017**

**ANANYA WOOD PRIVATE LIMITED  
VERSUS  
THE SALES TAX OFFICER, JORABAGAN CHARGE & ORS.**

**WITH**

**M.A.T. 1899 OF 2017**

**ESSAR PROJECTS (INDIA) LIMITED.  
VERSUS  
DEPUTY COMMISSIONER OF COMMERCIAL TAXES & ORS.**

**WITH**

**M.A.T. 1936 OF 2017**

**OSCORP INDUSTRIES (PRIVATE) LIMITED  
VERSUS  
STATE OF WEST BENGAL & ORS.**

**WITH**

**M.A.T. 1937 OF 2017**

**OSCORP INDUSTRIES (PRIVATE) LIMITED & ANR.  
VERSUS  
STATE OF WEST BENGAL & ORS**

**WITH**

**M.A.T. 1958 OF 2017**

**MA AMBA SPONGE IRON (PRIVATE) LIMITED  
VERSUS  
DEPUTY COMMISSIONER OF COMMERCIAL TAXES & ORS.**

**WITH**

**M.A.T. 1991 OF 2017**

**I.A. CAN 1 OF 2018 (OLD NO. C.A.N. 222 OF 2018)**

**I.A. CAN 2 OF 2018 (OLD NO. C.A.N. 223 OF 2018)  
M/S. D.R. ELECTRICALS.  
VERSUS  
DEPUTY COMMISSIONER OF COMMERCIAL TAXES, CHANDNEY  
CHAWK CHARGE & ORS.**

**WITH**

**M.A.T. 2055 OF 2017**

**I.A. CAN 1 OF 2018 (OLD NO. C.A.N. 1405 OF 2018)**

**UNIVERSAL CONSTRUCTION COMPANY.  
VERSUS  
SALES TAX OFFICER, DURGAPUR CHARGE & ORS.**

**WITH**

**M.A.T. 2072 OF 2017**

**I.A. CAN 1 OF 2018 (OLD NO. C.A.N. 1185 OF 2018) (NOT IN FILE)  
I.A. CAN 2 OF 2018 (OLD NO. C.A.N. 1188 OF 2018) (NOT IN FILE)**

**BHARAT PHARMACEUTICALS & ANR.  
VERSUS  
THE SENIOR JOINT COMMISSIONER, COMMERCIAL TAXES & ORS.**

**WITH**

**M.A.T. 2073 OF 2017**

**SANJAY RAMPURIA  
VERSUS  
THE JOINT COMMISSIONER, COMMERCIAL TAXES, DHARMATALA  
CIRCLE & ORS.**

**WITH**

**M.A.T. 2152 OF 2017**

**APE POWER (PRIVATE) LIMITED  
VERSUS  
THE DEPUTY COMMISSIONER, COMMERCIAL TAXES, PARK STREET  
CHARGE & ORS.**

**WITH**

**M.A.T. 652 OF 2018**

**MURIDHAR RATANLAL EXPORTS LIMITED.  
VERSUS  
THE SENIOR JOINT COMMISSIONER, SALES TAX, LARGE TAX PAYERS'  
UNIT & ORS.**

**WITH**

**M.A.T. 676 OF 2018**

**SHREE VAISHANAVI ISPAT LIMITED  
VERSUS  
THE DEPUTY COMMISSIONER, SALES TAXES, LYONS RANGE CHARGE  
& ORS.**

**WITH**

**M.A.T. 684 OF 2018**

**MR. NAVIN SARAF  
VERSUS  
STATE OF WEST BENGAL & ORS.**

**WITH**

**M.A.T. 694 OF 2018**

**NORTH BROOK JUTE COMPANY LIMITED  
VERSUS  
SALES TAX OFFICER, CENTRAL AUDIT UNIT – I & ORS.**

**WITH**

**M.A.T. 669 OF 2017**

**SUPREME INDUSTRIES LIMITED  
VERSUS  
SENIOR JOINT COMMISSIONER, COMMERCIAL TAXES, CENTRAL  
AUDIT UNIT I & ORS.**

**WITH**

**M.A.T. 724 OF 2017**

**SUPREME INDUSTRIES LIMITED  
VERSUS  
SENIOR JOINT COMMISSIONER, COMMERCIAL TAXES, CENTRAL  
AUDIT UNIT I & ORS.**

**WITH**

**M.A.T. 791 OF 2017**

**M/S. VATECH WABAG LIMITED  
VERSUS  
DEPUTY COMMISSIONER, COMMERCIAL TAXES, MIDNAPORE  
CHARGES & ORS.**

**WITH**

**M.A.T. 1031 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 11996 OF 2017)**

**DVC EMTA COAL MINES LIMITED  
VERSUS  
JOINT COMMISSIONER, COMMERCIAL TAXES, ASANSOL CHARGE &  
ORS.**

**WITH**

**M.A.T. 1034 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 8991 OF 2017)**

**ANINDYA GHOSH  
VERSUS  
DEPUTY COMMISSIONER OF COMMERCIAL TAXES, HOWRAH CHARGE  
& ORS.**

**WITH**

**M.A.T. 1321 OF 2017**

**I.A. CAN 1 OF 2017 (OLD NO. C.A.N. 8989 OF 2017)**

**PRECISION ENGINEERS & FABRICATORS PRIVATE LIMITED  
VERSUS  
JOINT COMMISSIONER, COMMERCIAL TAXES, BEHALA CHARGE &  
ORS.**

**WITH**

**M.A.T. 2070 OF 2017**

**I.A. CAN 3 OF 2018 (OLD NO. C.A.N. 2796 OF 2018)**

**SHAMBHU PRASAD AGARWAL  
VERSUS**



**SENIOR JOINT COMMISSIONER, COMMERCIAL TAXES, LARGE TAX  
PAYER UNIT & ORS.**

**WITH**

**M.A.T. 373 OF 2018**

**I.A. CAN 3 OF 2019 (OLD NO. C.A.N. 4723 OF 2019)**

**PAULSONS DERMA PRIVATE LIMITED  
VERSUS  
SENIOR JOINT COMMISSIONER OF SALES TAXES, KOLKATA SOUTH  
CIRCLE & ORS.**

**WITH**

**M.A.T. 374 OF 2018**

**I.A. CAN 3 OF 2019 (OLD NO. C.A.N. 4722 OF 2019)  
(CAN NOT FOUND)**

**PAULSONS DERMA PRIVATE LIMITED  
VERSUS  
SENIOR JOINT COMMISSIONER OF SALES TAXES, KOLKATA SOUTH  
CIRCLE & ORS.**

**WITH**

**FMA 733 OF 2018**

**M/S. VATECH WABAG LIMITED  
VERSUS  
DEPUTY COMMISSIONER, COMMERCIAL TAXES, MIDNAPORE CHARGE  
& ORS.**

**WITH**

**FMA 912 OF 2019**

**POWER MECH. PROJECTS LIMITED  
VERSUS  
SENIOR JOINT COMMISSIONER, COMMERCIAL TAXES, DURGAPUR  
CIRCLE CHARGES & ORS.**

**WITH**

**FMA 914 OF 2019**

**I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 8992 OF 2017)**

**HARSH POLYFABRIC PRIVATE LIMITED  
VERSUS  
SALES TAX OFFICER, N.D. SARANI CHARGE & ORS.**

**WITH**

**FMA 915 OF 2019**

**I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 6086 OF 2017)**

**DIPANJAN MITRA & ANR.  
VERSUS  
DEPUTY COMMISSIONER OF COMMERCIAL TAXES, BHAWANIPORE  
CHARGE & ORS.**

**WITH**

**FMA 916 OF 2019**

**I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 6090 OF 2017)**

**DIPANJAN MITRA & ANR.  
VERSUS  
DEPUTY COMMISSIONER OF COMMERCIAL TAXES, BHAWANIPORE  
CHARGE & ORS.**

**WITH**

**FMA 918 OF 2019**

**I.A. CAN 2 OF 2017 (OLD NO. C.A.N. 8993 OF 2017)**

**ISLAND TRADING COMPANY PRIVATE LIMITED  
VERSUS  
COMMERCIAL TAX OFFICER, PARK STREET CHARGE & ORS.**

**Appearance:-**

**Mr. Boudhayan Bhattacharyya,  
Mr. Anil Kumar Dubey,  
Mr. Rajarshi Chatterjee,  
Ms. Sretapa Sinha**

**.....For the Appellants**

(in MAT 792/2017; MAT 982/2017; MAT 985/2017; MAT 986/2017; MAT  
1619/2017; MAT 1751/2017; MAT 1752/2017; MAT 791/2017; MAT  
373/2018;  
MAT 374/2018; & FMA 733 OF 2018)

**Mr. Anil Dugar**

**Mr. Rajarshi Chatterjee**

**.....For the Appellants**

(in MAT 783/2017 to MAT 786/2017; MAT 1370/2017; MAT 1664/2017;  
MAT 896/2017 to MAT 1898/2017; MAT 2072/2017; MAT 652/2018 &  
MAT 676 OF 2018)

**Mr. Sandip Choria,**

**Mr. Himangshu Kr. Ray**

**.....For the appellants**

(in MAT 1786 of 2017; MAT 1899 of 2017, MAT 1958 of 2017 and MAT 1991  
of 2017)

**Mr. J. Ahmed Khan,**

**Mr. T.A. Khan**

**.....For the appellant**

(in MAT 1787 of 2017)

**Mr. Vivekananda Bose**

**Mr. Avisek Guha**

**.....For the appellant**

(in FMA 915/2019 & FMA 916/2019)

**Mr. Piyal Gupta**

**.....For the appellant**

(in MAT 694/2018, MAT 669/2017, MAT 724/2017, MAT 1031/2017, FMA  
912/2019 & FMA 918/2019)

**Mr. Anirban Ray, Ld. Government Pleader,**

**Mr. Talay Masood Siddiqui,**

**Mr. S. Mukherjee,**

**Mr. Debasish Ghosh,**

**Mr. N. Chatterjee,**

**Mr. V. Kothari**

**.....For the State**

### **JUDGMENT**

***(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)***

1. These intra court appeals filed by the dealers who were registered under the provisions of the West Bengal Value Added Tax, Act 2003 (the Act) are directed against the judgment and order dated March 30, 2017 in M/s.

*Vatech Wabag Limited Versus Deputy Commissioner, Commercial Taxes, Midnapore Charge and Others* 69 Sales Tax Advisors 120. The appellants had filed the writ petitions seeking varied prayers and essentially in all the cases, the writ petitioners had challenged the vires of the second proviso to Section 84 (1) of the Act. The Learned Single Bench by judgment dated March 30, 2017, dismissed all the writ petitions and upheld the vires of the second proviso to section 84 (1) of the Act.

2. Mr. Bhattacharya, Learned Advocate appearing for the appellant *Vatech Wabag Limited*, the lead case broadly raised five contentions:-

2.1. The first being that payment of 15 % of the disputed tax under Section 84 is a compulsory extraction and partakes the colour of a separate levy/tax hence unauthorized by law. Secondly, it was contended that under certain circumstances the Act gives an opportunity to file appeal without prepayment which the revenue does not accept. Thirdly, the right to appeal is a substantive right which cannot be taken away, once the *lis* has started. Fourthly, the impugned provision is hit by the general principles of arbitrariness and unreasonableness, and, lastly the impugned provision infringes the fundamental rights guaranteed under Article 19(1)(g) as the restriction contained in the impugned provision is far from being reasonable and realistic.

2.2. Elaborating his submission, on the first contention, it is submitted that the word used in Section 84 is “payment” and not “deposit”. The impugned proviso to Section 84 (1) nowhere specifically mentions that the amount has to be returned to the dealer and even Section 62 of the Act which deals with refunds does not specifically mention that the prepayment made in terms of

the impugned provision has to be returned. Reference was made to the *P. Ramanatha, Advance Law Lexicon* to state that the payment is defined to be act of paying or that which is paid; discharge of a debt, obligations or duty; satisfaction of claim; recompense; the fulfillment of a promise or the performance of an agreement; the discharge in money of a sum due. Further it is submitted that the payment has no narrow technical legal meaning restricted to payment of money, as it signifies satisfaction of a claim. With regard to the meaning of the word “deposit”, it is submitted that the *Advance Law Lexicon* explains deposit to mean that there must be a liability to return it to the party by whom it is made, it is not a sum lent but a sum deposited. Relying upon the decision of the Hon’ble Supreme Court in ***Commissioner of Income Tax. U.P - II Versus Bazpur Co-operative Sugar Factory Limited***,<sup>1</sup> it is submitted that it has been clearly held that essence of deposit is a liability to return. Referring to the decision of the Hon’ble Full Bench of this Court in ***Secretary, West Bengal Council of H.S. Education Versus Soumyadeep Banerjee***,<sup>2</sup> it is submitted that the “deposit” cannot be synonymous with “payment”. It is submitted that insisting upon payment of 15 % of the disputed tax in terms of the impugned proviso is in the nature of a compulsory extraction and therefore it has to be in the nature of a tax however, the WBVAT has no provision to tax the right to appeal of an aggrieved dealer.

2.3. With regard to the second contention, it is submitted that Section 2(45) of the Act defines the term “tax”, Section 2(46) defines “tax due” and Section

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<sup>1</sup> (1988) 172 ITR 321

<sup>2</sup> AIR 2010 CAL 161 (FB)

2(49) defines “tax payable”. It is submitted that the “tax payable” is defined as tax payable under the Act on the sales or purchases but does not include tax due. “Tax due” is defined as the amount which becomes due as per any notice of demand, but after the date mentioned therein. It is submitted “tax due” is the quantum against which an appeal under Section 84 is filed and hence “tax due” is the “tax” as referred to in the impugned proviso. It is further submitted that by juxta posing clause (b) of the second proviso to Section 84(1) shows that if an appeal is filed after issuance of notice of demand but before the date mentioned in the said notice, then such appeals can be filed without making prepayment of 15 %, as the date has not yet passed.

- 2.4. The third contention is that appeal being a substantive right, cannot be taken away and/or modified retrospectively, unless expressly enacted to the said effect. To support such argument, reliance has been placed on the decision of the Hon’ble Supreme Court in ***H.K. Dada (India) Limited Versus State of M.P.*** <sup>3</sup> It is submitted that the impugned provision expressly states 01<sup>st</sup> day of April, 2015 to be the date for making prepayments for all appeals filed on or after such date, but such appeals which are filed on or after 01<sup>st</sup> April, 2015, all originated from various original proceedings much before such date, for which there is no specific enactment or intendment, on the part of the state legislature to make it retrospective. It is submitted that in all cases where the appeals were filed on or after 01<sup>st</sup> day of April, 2015, the original *lis* arose much before the said date, hence the substantive and vested right to appeal cannot be taken away and/or prejudicially modified under the facts and circumstances.

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<sup>3</sup> AIR 1953 SC 221

2.5. The fourth contention is that the provision is ultravires being hit by the general principles of arbitrariness and unreasonableness as contained under Article 14 of the Constitution of India, as the impugned provision fails to distinguish between the quantum of demands and all dealers are compelled to pay 15 % prepayment in order to file an appeal. Further the impugned proviso does not take into account the different kinds of assessments such an exparte assessment, best judgment assessment and assessments where dealer had reasonable opportunity of being heard and therefore the provision is arbitrary and unreasonable. To support such contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Shayara Bano Versus Union of India & Ors.***, <sup>4</sup>. It is further submitted that the Learned Writ Court while dismissing the writ petition placed heavy reliance on the decision of the Hon'ble Supreme Court in ***State of Madhya Pradesh Versus Rakesh Kohli and Another***, <sup>5</sup> and this judgment has been overruled on the same point in "*Shayara Bano*". "RiG-Veda" was referred to explain the doctrine of equality. Reliance was placed on the decision of the Hon'ble Supreme Court in ***Uttar Pradesh Power Corporation Limited Versus Ayodhya Prasad Mishra & Another*** <sup>6</sup>, for the proposition that equals cannot be treated unequally. For the same proposition, reliance was placed on the decision of High Court of Rajasthan, in ***State of Rajasthan Versus Khem Chand Sharma & Another*** <sup>7</sup>. To further support such contention of in-equal treatment, reliance was placed on the decision of the Hon'ble

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<sup>4</sup> (2017) 9 SCC 1

<sup>5</sup> (2012) 6 SCC 312

<sup>6</sup> (2008) 10 SCC 139

<sup>7</sup> [1992] (2) WLC 618

Supreme Court in ***Benette Coleman & Company Versus Union of India*** <sup>8</sup> and it is submitted that to treat all dealers equally with others who are unequal violates Article 14 of the Constitution. To buttress this submission further, reliance was placed on the decision of the Hon'ble Supreme Court in ***Indra Sawhney Versus Union of India.*** <sup>9</sup>

2.6. The final contention is that Article 19(6) lays down the restrictions hedging Article 19(1)(g) of the Constitution, should be reasonable however, in the case on hand the total restriction for not entertaining an appeal without 15 % prepayment is completely unreasonable, unjustified, especially in cases where draft order has not been served, the order is passed exparte or where there are complete or selective rejections of Books of Accounts and input tax credit (ITC). The Learned Advocate has drawn our attention to the legislation passed by several states in the country classifying them into three categories. Firstly in respect of state legislations which has granted power to relax/waive the prepayment, legislations where there is no power of waiver or relaxation and legislations where power has been granted to the Appellate Authority to exempt the dealer from the provisions or prepayment of the admitted as well as the disputed tax for good and sufficient reasons. Therefore, it is submitted that a holistic view is required to be adopted and if done so, it has to be held that the impugned provision requires to be declared as ultravires.

3. Mr. Dugar, Learned Advocate appearing for the other dealers submitted that the right of appeal is a vested and substantive right and that cannot be taken away by virtue of the impugned proviso. In support of such contention,

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<sup>8</sup> (1972) 2 SCC 788

<sup>9</sup> (1992) Suppl. 3 SCC 217



reliance was placed on the decision of the Hon'ble Supreme Court in ***M.P. Steel Corporation Versus Commissioner of Central Excise***.<sup>10</sup> It is further submitted that right of appeal accrues on the date of commencement of the *lis* which commences from the date when return is filed or the date by which return is required to be filed. In support of such contention, reliance was placed on the decision in ***Khazan Chand Nathi Ram Versus State of Haryana & Others***<sup>11</sup> and ***Deputy Commercial Tax Officer, Tribunal Central 1 Assessment Circle, Tirupur and Others Versus Cameo Exports and Others***<sup>12</sup>. Further it is submitted that the impugned proviso is detriment to the interest of the dealer who prefers an appeal against the order of assessment and in such circumstances giving retrospective operation to the impugned proviso will affect, alter and destroy the existing right of the dealer as it creates a new liability or obligation on the dealer to prefer the appeal and in such circumstances the impugned proviso has to be held to be prospective. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Jayam and Company Versus Assistant Commissioner & Others***<sup>13</sup>. Relying upon the decision of the Hon'ble Supreme Court in ***Technimont Private Limited Versus State of Punjab***<sup>14</sup> it is submitted that in case of genuine and extreme hardship, writ petition could be an appropriate remedy.

4. Mr. Khan, Learned Advocate appearing for the other dealers while adopting the arguments of the Learned Advocates, whose submissions we

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<sup>10</sup> MANU/SC/0484/2015

<sup>11</sup> (2004) 136 STC 261 (P & H)

<sup>12</sup> (2006) 147 STC 218 (Mad)

<sup>13</sup> (2016) 15 SCC 125

<sup>14</sup> (2019) SCC Online SC 1228

have noted above, contended that the provisions of Section 84 of the Act which has been challenged by the appellants would fall under the category of cases, where the proviso does not provide for any power to relax the rigour of requirement of prepayment of 15 % of the disputed tax and therefore, the only remedy available to the dealer is to invoke jurisdiction of this Court under Article 226 of the Constitution. The Learned Advocate placed reliance on the decision of the **High Court of Gauhati in Monoranjan Chakraborty Versus State of Tripura & Another**, <sup>15</sup> wherein it was held, the provision under the Tripura Sales Tax Act, 1976 directing the dealer to deposit 50 % of the tax or penalty as a precondition for entertainment of appeal or revision was harsh, oppressive and unjust, violating Article 14 of the Constitution. It is not disputed by the Learned Advocate that the said decision was overruled by the Hon'ble Supreme Court in **State of Tripura Versus Monoranjan Chakraborty**. <sup>16</sup> By placing reliance on the decision in the case of **Gujarat Agro Industries Company Limited Versus Municipal Corporation of the City of Ahmedabad & Others**, <sup>17</sup> and the decision in **Shyam Kishore & Others Versus Municipal Corporation of Delhi & Anothers**, <sup>18</sup> it is submitted that the Hon'ble Supreme Court in *Shyam Kishore* observed that the relevant Act be amended to make the position clear. Further it is submitted that distinguishing feature of the provisions which were under consideration of the Hon'ble Supreme Court was that, unlike Sales Tax Laws, including the VAT Act, there was no provision for payment of tax on self-assessment by filing returns. Reliance was also placed on the decision in the

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<sup>15</sup> (1991) 81 STC Page 291 (Guj)

<sup>16</sup> (2001) 10 SCC 740

<sup>17</sup> (1999) 4SCC 468

<sup>18</sup> (1993) 1 SCC 22

case of **Royal Insulation Private Limited Versus Commercial Tax Officer, Manali Assessment Circle, Chennai** <sup>19</sup> wherein the Division Bench of the High Court of Madras dealing with provisions insisting for prepayment for entertainment of appeal but not empowering the Appellate Authority to give any relief was deprecated and the State Government was advised to forthwith amend the provision to permit waiver or stay by the Appellate Authority of the pre-deposit amount. Therefore, it is submitted that taking clue from the decision in *Shyam Kishore* and *Royal Insulation*, the impugned proviso requires to be amended. The Learned Advocate placed reliance on the decision of this Court in **Shyam Sel and Power Limited Versus Union of India**, <sup>20</sup> which is a case which deals with Section 35 F of the Central Excise Act 1944, a provision enabling the appellate authority to dispense with the deposit. It is submitted that in the said decision the Hon'ble Supreme Court has enlisted the circumstances where under it would be necessary to dispense with such requirements. It is further submitted that in the case of **Manu Jayanti International**, <sup>21</sup> wherein appeal was filed by the dealer seeking enhancement of the amount refundable, the Appellate Authority mechanically insisted on prepayment of 15 % and fortunately the state agreed that in such a case insisting upon prepayment of 15 % does not arise. Similar was the case in **BJP Steel Star Engineering Private Limited**, <sup>22</sup> wherein the tribunal granted relief to the dealer. The Learned Advocate while adopting the argument of the other Learned Advocates that unequals are being treated equally, supplemented by contending that there may be several categories of

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<sup>19</sup> (2006) 147 STC 246 (Mad)

<sup>20</sup> MANU/WB/1394/2014 (Cal)

<sup>21</sup> RN-1137 of 2016

<sup>22</sup> 69 STA 100

dealers namely registered, un-registered or even a transporter who would be a dealer in terms of Section 80 (15) of the Act as well as casual traders, the dealer may be a defaulter or one who has complied with the statutory requirements, an assessment may be made *ex parte* or after hearing the dealer, the assessment orders may be reasoned or without reasons and assessment may arise from search and seizure or may be in the regular course. There may be cases where huge demands are raised by the assessing officer in an arbitrary manner and treating all such dealers equally is unreasonable, arbitrary and discriminatory.

5. The Learned Government Pleader after referring to the impugned provision submitted that the dealer is required to produce documents relating to proof of payment and not payment alone. The impugned proviso does not insist upon the payment of the entire demand, but only 15 % of the disputed tax. The provisions of the Act were amended by the West Bengal Finance Act, 2015 published in the Government Gazette dated 24.03.2015 by which significant changes were made to the various provisions of the Act and the rules framed thereunder and the impugned proviso was by way of substitution as could be seen from Section 16 of the West Bengal Finance Act 2015 by which the second proviso stood substituted. The impugned proviso states that provided further that no appeal for any period submitted on or after 01<sup>st</sup> day of April, 2015, shall be entertained by the said Authority unless it is satisfied that the applicant has produced the documents relating to proof of payment of full amount of tax, interest, penalty or late fee as the case may, as the applicant may admit to be due from him and 15 % of the amount of tax in dispute in such appeal. It is submitted that the substituted proviso be

deemed to be a provision under the Act for all purposes ever since the West Bengal Value Added Tax Act, 2003 came into effect. The substituted proviso also fixes a date from which the appeals will be entertained subject to fulfillment of conditions in clause (a) and (b) contained therein. Emphasis is laid on the word “entertained” and what would mean by entertainment of an appeal, Rule 141 of the WB VAT Rules 2005 has to be referred to. Further more in terms of Rule 141, prayer for stay can also be made. References were also made to be Rules 80 and 83 of the 2005 Rules. Reliance was placed on decision of the Hon’ble Supreme Court in **State of Madhya Pradesh Versus Rakesh Kohli & Anothers**, <sup>23</sup> for the proposition as to what are the principles the Court will have to take into consideration while dealing with constitutional validity of a taxation law. For the same proposition, reliance was placed on the decision of the Hon’ble Supreme Court in **Government of Andhra Pradesh and Others Versus P Laxmi Devi**. <sup>24</sup> To explain the effect of an amendment to a statute by substitution, reliance was placed on the decision of the Hon’ble Supreme Court in **Garikapati Veeraya Versus N Subbiah Choudhury & Others**. <sup>25</sup> Therefore it is submitted that if an amendment is made by substitution, it shall relate back and to be understood to have been in the same form ever since the inception of the statute. It is further submitted that the amended proviso which was substituted, fixes a cut-off date 01<sup>st</sup> of April, 2015, which would clearly show that pending appeals would not be affected by virtue of the substituted proviso. It is submitted that the object of this substituted proviso needs to be

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<sup>23</sup> (2012) 6 SCC 312

<sup>24</sup> (2008) 4 SCC 720

<sup>25</sup> AIR (1957) SC 540

taken into consideration. The impugned proviso which came to be substituted by the West Bengal Finance Act 2015, is one among the several provisions which were amended/substituted in the parent Act thereby bringing about a significant change in the scheme of the Act. To support such contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Union of India & Others Versus NITDIP Textiles Processors Private Limited & Anothers.*** <sup>26</sup>

6. The Learned Government Pleader placed reliance on the decision of the High Court of Patna in ***D.V.C. Bukaru Co-operative Stores Limited Versus State of Bihar,*** <sup>27</sup> where identical provision was upheld. It is submitted that in the said decision several decisions of the Hon'ble Supreme Court and other High Courts have been referred to and an identical provision was upheld. The decision of the High Court of Karnataka in ***Prakrith Builders Private Limited Versus State of Karnataka & Ors.,*** <sup>28</sup> was also pressed into service wherein identical provision under the Karnataka Sales Tax Act, 1957 was upheld. It is thus submitted that the second proviso having been substituted, in law, it would mean that it is repeal of the earlier provision and re-enactment and merely because it is retrospective, it cannot be held to be ultra vires or bad in law. Further it is submitted that the right to file an appeal by the aggrieved dealer remains intact and such statutory/vested right remains unaffected. With regard to the plea of hardships as raised by the appellants, it is not a matter which has to be considered while testing the vires of a statutory provision. The Learned Government Pleader placed

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<sup>26</sup> (2012) 1 SCC 226

<sup>27</sup> MANU/BH/0103/1998

<sup>28</sup> MANU/KA/0624/2008

reliance on the decision of the Hon'ble Supreme Court in ***Newtech Promoters and Developers Private Limited Versus State of UP and others***,<sup>29</sup> wherein the Hon'ble Supreme Court took into consideration similar provision insisting upon a pre-deposit and held the same to be valid as it will avoid unscrupulous and uncalled for litigation at the appellate stage. It is submitted that when a statute confers a right of appeal, while granting a right, the legislature can impose conditions for exercise of such a right, so long as the conditions are not onerous or unreasonable rendering the right almost illusory. It is submitted that the amended proviso, provides for producing proof of payment of 15 % of the disputed amount which cannot be said to be unreasonable or onerous. In any, event hardships cannot be a ground to test the constitutional validity of a statutory provision. Further it is submitted that several provisions of the Act and the rules were amended by the Finance Act 2015 and taking into consideration that the amended proviso should not impact the pending appeals, the legislature in its wisdom had fixed the date as 01<sup>st</sup> day of April, 2015 and the wisdom of the legislature will not be questioned by this court. Reliance was placed on the decision in ***Harinagar Sugar Mills Limited Versus State of Bihar & Others***,<sup>30</sup> and it is submitted that mere filing of the appeal does not absolve the appellant nor suspend their liability to pay the tax assessed during pendency of the appeal and it continues unless paid or set aside and any payment made during that period when liability subsists shall be in discharge of that liability as determined. Reliance was placed on the decision in ***Har Devi Asnani Versus***

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<sup>29</sup> (2021) SCC Online SC 1044

<sup>30</sup> (2003) 11 SCC 40

***State of Rajasthan & Others*** <sup>31</sup> wherein the pre-condition of payment of 50 % of the recoverable amount before entertaining a revision under Section 65 (1) of the Rajasthan Stamp Act 1998 was held to be constitutionally valid. By placing reliance on the decisions of the Hon'ble Supreme Court in ***Arun Kumar & Others Versus Union of India & Others***, <sup>32</sup> it was submitted that the said decision has explained doctrine of "reading down" and held that it is presumed that the statute is constitutionally valid and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. Further by referring to the said decision, it is submitted that, if the statute is clear, unambiguous and explicit it may not be permissible for the Court to read down something not intended by the statute. With the above submission, the Learned Government Pleader referred to the findings recorded by the Learned Single Bench and submitted that the order impugned in these appeals has correctly taken note of the legal principles and prayed for affirming the said order.

7. The Government Pleader by way of reply to the contentions of the appellants reiterated his submissions with regard to the meaning of the word "payment" as spelt out in the *Advance Law Lexicon* and referred to the decision in the case of *H.K Dada* and submitted that there is a date fixed in the impugned second proviso which shows the intention of the legislature very clearly. By referring to the decision in ***Uttar Pradesh Power Corporation (supra)*** it is submitted that Article 14 is designed to prevent

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<sup>31</sup> (2011) 14 SCC 160

<sup>32</sup> (2006) Income Tax Reports page 89 (SC)



discrimination and it seeks to prohibit a person or class of persons from being singled out from others similarly situated.

8. By way of reply, Mr. Bhattacharyya referred to Rule 80 of the Rules and submitted that the said rule does not speak about refund of any pre-deposit. Equally Rule 141 deals with stay of disputed amount of net tax and other circumstances and these rules cannot save the impugned proviso. It is submitted that decision in *Har Devi Asnani* referred to by the Learned Government Pleader is a case where “payment” or “deposit” was not the issue. Further in the decision in *Newtech Promoters* relied on by the Learned Government Pleader, it was admitted case of pre-deposit and therefore distinguishable. It is further submitted that the decision in *NITDIP Textile Processors* cannot be applied to the case on hand as the appellant’s case is that there is no qualification at all. On the same ground, the decision in *Arun Kumar* is also stated to be distinguishable. The Learned Advocate seeks to distinguish the decision in the case of *D.V.C. Bukaru Cooperative Stores* and *Prakrith Builders* by contending that those were cases in which the issue was not whether the amount to be paid is a “pre-deposit” or a “payment”. Further the Learned Advocate has drawn our attention to the enactments in other states where the powers to relax and waive have been provided.

9. Mr. Khan, Learned Advocate appearing for the appellants, in reply would reiterate his submissions by contending that sufficient safeguard has to be read into Section 14 of the Act. The Learned Advocate also reiterated his submissions by referring to paragraph 44 to 46 of the decision of the Supreme Court in *Shyam Kishore*. Further it is submitted that the argument of the State that expression “proof of payment” used in Section 84 of the Act

is nothing but word play and in essence it is payment, as without payment no proof is generated. Further Rule 141 cannot come to the aid of the State in any manner and such rule has come into effect from 01.04.2013, two years before the impugned proviso and such rule for all practical purposes becomes “otiose” with effect from 01.04.2015. Further it is submitted that use of the word “substitute” in the Finance Act cannot help the State as such word and other words like “omit” and “insert” are legislative commands having no reference to effective date of the amendment introduced by such command. The effective date is either provided for in the amending Act itself or notification separately issued. Further it is submitted that obtaining refund of any amount once paid is a herculean task and the reluctance of the authorities to effect refund of excess amount knows no bound. Further it is submitted that the Section 84 of the Act unambiguously states 15 % of the amount of tax in dispute and therefore the amount is paid only towards tax. Further on or after 01.04.2015, the dealer who prefers an appeal has to pay not only the admitted tax in full but 15 % of the tax in dispute and unless both conditions are fulfilled, the appeal will not be entertained. Therefore, it is submitted that the impugned proviso is liable to be struck down.

10. We have elaborately heard the Learned Advocates for the parties and carefully perused the materials placed on record.

11. The writ petitioners, who were unsuccessful in their challenge to the vires of the Second Proviso to Section 84(1) of the West Bengal Value Added Tax Act, 2003 (hereinafter referred to as “the Act” for brevity), are the appellants before us.

12. Section 84 of the Act deals with 'appeal against provisional or other assessment'. The said provision reads as follows:-

*“84. Appeal against provisional or other assessment.-(1) Any casual dealer or dealer may, in the prescribed manner, appeal to the Commissioner, the Special Commissioner, the Additional Commissioner or any person appointed under sub-section (1) of Section 6 to assist the commissioner as may be prescribed to exercise the power under the section against a provisional assessment or any other assessment, within forty-five days or such further period as may be allowed by the said authority for cause shown to his satisfaction from the receipt of a notice of demand in respect thereof:*

*Provided that where the total amount of tax, interest, late fee or penalty in dispute in an appeal is in excess of rupees twenty lakh such appeal may lie before an appellate forum as may be constituted by the Commissioner, consisting of one or more special Commissioner or Additional Commissioner or any person appointed under sub-section (1) of Section 6 to assist the Commissioner, and the appellate forum shall act as the appellate authority in disposing of such appeal under this section:*

*Provided further that no appeal for any period submitted on or after the 1<sup>st</sup> day of April, 2015, shall be entertained by the said authority unless it is satisfied that the applicant has produced the documents relating to proof of payment of-*

- (a) full amount of tax, interest, penalty or late fee, as the case may be, as the applicant may admit to be due from him, and*
- (b) fifteen per centum of the amount of tax in dispute in such appeal:*

*Provided further that where the payment of tax due from registered dealer stands deferred under Section 116, an appeal shall, notwithstanding that the tax admitted to be due from him has not been paid, be entertained.”*

13. In terms of sub-section (1) of Section 84 any causal dealer or dealer may, in the prescribed manner, appeal to the Commissioner, the Special Commissioner, the Additional Commissioner or any person appointed under sub-section (1) of Section 6 to assist the Commissioner, as may be prescribed, to exercise the power under the section against a provisional assessment or any other assessment within forty-five days or such further period as may be allowed by the authority for cause shown to the satisfaction from the receipt of the notice of demand in respect thereof.
14. The first proviso states that where the total amount of tax, interest, late fee or penalty in dispute in an appeal is in excess of rupees twenty lakh, such appeal may lie before an appellate forum as may be constituted by the Commissioner, consisting of one or more Special Commissioner or Additional Commissioner or any person appointed under sub-section (1) of section 6 to assist the Commissioner, and the appellate forum shall act as the appellate authority in disposing of such appeal.

15. The second proviso states that no appeal for any period submitted on or after the 1st day of April, 2015 shall be entertained by the said authority unless he is satisfied that the applicant has produced the documents relating to proof of payment of (a) full amount of tax, interest, penalty or late fee as the case may be, as the applicant may admit to be due from him and (b) 15% of the amount of tax in dispute in such appeal.
16. The third proviso states that where the payment of tax due from a registered dealer has been deferred under Section 116, an appeal shall, notwithstanding that the tax admitted to be due from him has not been paid, be entertained.
17. Several provisions of the Act were amended by the West Bengal Finance Act, 2015. The amendments were made in Sections 10, 14, 16, 19, 22, 24A, 30E, 33, 34, 34A, 36, 40, 47AA, 61, 84, 87, 87A, 93 and Schedule C to the Act.
18. Section 9 of the Finance Act, 2015 states that notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, the amendment made in the Principal Act by Clause (a) of sub-section (2) of Section 2 shall be deemed to have been made with effect from 2<sup>nd</sup> day of March, 2015 and accordingly, anything done or any action taken or purported to have been taken or done under the Principal Act on or after the said date shall, notwithstanding anything contrary contained in the judgment, decree or order of any court, Tribunal or other authority be deemed to be and to have always been for all purposes, as validly and effectively taken or done as if the said amendment had been in force at all material time.

19. Rule 80 of the West Bengal Value Added Tax Rules, 2005 (hereinafter referred to as “the Rules” for brevity) deals with manner of refund in consequence of order of appeal, revision, etc. It states that where any amount payable by a dealer in respect of any period on account of tax assessed, penalty imposed or late fee and interest determined is reduced in consequence of any order passed on reassessment, redetermination, appeal, revision or review, as the case may be, and if it is found that the amount payable is less than the amount paid for such period, including the amount recovered under Section 55, if any, the appropriate assessing authority or the appellate authority or revisional authority shall serve upon such dealer a revised notice in Form 27 or Form 27A or Form 28, as the case may be, specifying therein the amount paid in excess and the excess amount shall be refunded to the dealer by the appropriate assessing authority in accordance with sub-rule (4), sub-rule (5) and sub-rule (6) of Rule 59.

20. The proviso to Rule 80 states that where any amount of tax assessed, penalty imposed, late fee determined or interest determined in respect of a dealer for any period remains unpaid till the date of the order in consequence of which such refund arises, the appropriate assessing authority or the appellate authority or the revisional authority shall adjust the amount of excess payment towards the arrear tax, penalty, late fee or interest thereupon and if any amount still remains refundable, he shall satisfy the adjustment in the revised notice

21. Second proviso to Rule 80 confers power for recovery of the amount of tax, penalty, late fee or interest as an arrear of land revenue.

22. Rule 81 deals with manner of refund or adjustment of tax deducted at source in respect of works contract to a dealer having no liability to pay tax.
23. Rule 82 deals with refund arising out of rectification of the order determining interest.
24. Rule 141 deals with stay of disputed amount, net tax, etc. It states that where a dealer intends to have stay of realisation of the amount of net tax, interest, late fee or penalty disputed in an appeal filed before the appellate authority exercising jurisdiction over such a dealer shall pray for such stay in Form 68 and thereupon the realisation of the disputed amount of net tax, interest, late fee or penalty, shall upon entertainment of such appeal, be stayed till the disposal thereof.
25. Proviso to Section 141 states that where the appellate authority is satisfied that the registered dealer has not disclosed the actual amount of admitted net tax, interest or late fee in full in the appeal petition, he may direct for payment of the balance amount of admitted net tax, interest or late fee and thereafter, the stay for the balance portion of the disputed amount of net tax, interest, late fee or penalty shall be subject to such payment.
26. As mentioned above, the appellants have questioned the *vires* of the second proviso to Section 84(1) of the Act and were unsuccessful in their attempt leading to filing of these appeals.
27. In the preceding paragraph, we have noted the submission made by the learned Advocates for the appellants as well as the learned Government Pleader.

28. The following issues arise for consideration in these appeals:-

(i) *Whether insistence of protection of payment of 15% of the disputed tax as stipulated in the second proviso to Section 84(1) of the Act infringes/abrogates the vested right of appeal under Section 84(1), when such right accrues to a dealer on the date of filing the return; whether it would amount to compulsory extraction of “tax” before the same becomes due and payable?*

(ii) *Whether the second proviso to Section 84(1) infringes Article 14 of the Constitution of India, as it ignores the different categories and assessments and assesseees?*

(iii) *Whether the right of appeal conferred under Section 84(1) can be construed as an absolute right prohibiting the said legislature from imposing conditions for entertaining such an appeal?*

(iv) *What is the effect of substitution of second proviso to Section 84(1) of the West Bengal Finance Act, 2015?*

(v) *Whether the principles of “reading down” be applied while interpreting the second proviso to Section 84(1) and*

(vi) *Whether alleged hardship of a dealer would be a relevant consideration while considering the vires of a statutory provision?*

29. The sheet anchor of the argument of the learned Advocate for the appellant is that compelling the dealer to make payment of 15% of the disputed tax is a compulsory extraction and part takes the colour of a



separate levy/tax, which is not authorised by law. The second proviso to Section 84(1) states that no appeal for any period submitted on or after the 1st day of April, 2015 shall be entertained unless the applicant has produced document relating to proof of payment of the full amount of tax as admitted to be due by him and 15% of the amount of tax in dispute in such appeal.

30. The crucial word in the second proviso is “entertained”. The State while seeking to sustain the validity of the above provision, would contend that the right to prefer an appeal has not been affected by virtue of the second proviso and the condition, which is required to be complied with by the dealer for an appeal to be entertained has been stipulated in the second proviso and such condition can be imposed by the State legislature as it is within its legislative competence and the amount of 15% of the disputed tax cannot be stated to be either unreasonable or harsh on the dealers.

31. The case of the appellants is that the second proviso fixes the date as 1st April, 2015 and no appeal preferred after the said date will be entertained, unless the conditions stipulated in clause (a) and clause (b) of the second proviso are complied with.

32. By placing reliance on the decision in ***Hoosein Kasam Dada*** (supra), it is submitted that the pre-existing right to file an appeal under the earlier provision has not been destroyed by the amendment, as the right of the appeal from the decision of the lower authority become vested in a party when proceedings are first initiated and before a decision is given by the lower authority. In the said decision, it was held that right of appeal is not merely a matter of procedure, it is a substantive right, a right vested in a

party when the proceedings are first initiated and such vested right cannot be taken away, except by express enactment or necessary intendment. Further, it is contended that the pre-existing right of appeal should continue to exist and the proviso as it stood prior to its amendment of the Finance Act, 2015 would cover the exercise and enforcement of that right of appeal and amended proviso cannot prevent exercising such a right.

33. The Hon'ble Supreme Court in the said decision was testing the correctness to the amended proviso to sub-section (1) of Section 22 of the Central Provinces and Berar Sales Tax Act, 1947 and it was held that the amended proviso was prospective and the old law which continued to exist would apply and that the appeal should not have been rejected on the ground that it was not accompanied by satisfactory proof of payment of the assessed tax as in the said case, the appellant did not admit that any amount was due by it and therefore, it was held that under the section as it stood previously (before amendment) the appellant therein was entitled to file its appeal without depositing any sum of money. To the same effect, reliance was placed on the decision of the Division Bench of the High Court of Madras in ***Deputy Commercial Tax Officer, Tirupur Versus Cameo Exports*** <sup>33</sup>.

34. By referring to the above decisions, it is contended by the learned Advocates for the appellants an amendment to a provision dealing with a right of appeal can only be prospective, it cannot affect the right which is vested/crystallised in the dealers as such right accrued to them when the *lis* commenced, that is, the date of which the return was filed under the Act.

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<sup>33</sup> (2006) 147 STC 218 (Mad)

35. The answer to the argument advanced on behalf of the appellants lies in the very decisions themselves. It has been held that the amendment cannot be said to affect a pre-existing right of appeal without making the same retrospective by express words or necessary intendment. Thus, an amendment to such a provision could be made by the legislature, if the amendment is to be given retrospective effect, by expressly and clearly stipulating such intendment.

36. To be noted that Section 22(1) of the 1947 Act, which was subject matter of challenge in ***Hoosein Kasam Dada*** (supra) has not been given retrospective effect by an express provision or by necessary implication. The amendment to Section 84 of the Act by Finance Act, 2015 was by way of substitution, as Section 16 of the Finance Act, 2015 states, in Section 84(a) in sub-section (1), for the second proviso, the following proviso shall be substituted:-

*(a) full amount of tax, interest, penalty or late fee, as the case may be, as the applicant may admit to be due from him, and*

*(b) fifteen per centum of the amount of tax in dispute in such appeal.*

37. Decisions have been cited by the learned Government Pleader to show that when a provision is substituted in an enactment, it is deemed to be in force ever since the enactment was notified or in other words, it amounts to repeal of the existing provision or re-enactment of a new provision to take effect from the date on which the Act came into force.

38. The argument on behalf of the appellants is that merely because the Finance Act, 2015 uses the expression 'substitution', the impugned amendment cannot abrogate the substantive and vested right of the appellants, which had accrued in their favour on the date of filing the return under the provisions of the Act.

39. The argument of the learned Government Pleader is that sub-section (1) of Section 84 is the substantive law providing for a right of appeal to an aggrieved dealer and the provisos under the said provision are procedural and the State legislature is competent to impose conditions for entertaining an appeal and therefore, the impugned proviso does not in any manner abrogate the right of appeal provided under Section 84(1). Thus, we are to consider as to the distinction between a substantive law and the procedural law.

40. In ***Hitendra Vishnu Thakur Versus State of Maharashtra***,<sup>34</sup> the Hon'ble Supreme Court, while considering what are substantive and procedural laws, had laid down the scope of amending Act which was given retrospective effect. It was held that a statute which affects substantive rights is presumed to be prospective in operation unless made retrospective either expressly or by necessary intendment. A statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits. It was further held that law relating to forum and limitation is procedural in nature whereas law relating to right of action and right of appeal even though

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<sup>34</sup> (1994) 4 SCC 602

remedial, is substantive in nature. Every litigant has a vested right in substantive law, but no such right exists in procedural law. It was further held that a procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished. Further a statute which not only changes the procedure but also creates new right or liability shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

41. In ***Shyam Sunder Versus. Ram Kumar***,<sup>35</sup> it was held that repeal of an enactment is followed by a legislation such legislation does not affect the substantive rights of the parties on the date of suit or adjudication of suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of suit. It was further held that the said position in law would be different in the matters which relate to procedural law, but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment. Thus, the legal principles, which can be culled out from the above decision is that after a substantive law is amended, it would be prospective unless made retrospective either expressly or by necessary intendment. An amendment to a procedural law is always retrospective in operation unless it is enacted to be made only prospective. Therefore, we need to bear in

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<sup>35</sup> (2001) 8 SCC 24

mind the important distinction between substantive right to file an appeal and the procedure which has to be followed while exercising such right of appeal.

42. Section 84(1) of the Act provides for an appellate remedy to an aggrieved dealer. The said provision is a substantive law, which confers a right on an aggrieved dealer. The provisos contained in sub-section (1) of Section 84 regulate the procedure for exercising such right of appeal. The first proviso to Section 84(1) deals with procedural aspects in respect of an appeal in which the dispute is in excess of rupees twenty lakh and the authority, which will be disposing of such appeal as may be constituted by the Commissioner. The second proviso deals with the procedure to be adopted by the aggrieved dealer in cases where appeals are preferred on or after the 1st day of April, 2015. The second proviso is qualified by two conditions. The first of which being producing proof of payment of the full amount of tax, interest, penalty or late fee as the aggrieved dealer may admit to be due from him. Clause (b) requires the aggrieved dealer to produce proof of payment of 15% of the amount of tax in dispute in such appeal. The third proviso provides for the contingency when an appeal can be entertained, when the tax admitted to be due from a dealer has not been paid and the same stands deferred under Section 116 of the Act. Therefore, if the provisos to Section 84(1) are read together, will clearly demonstrate that the provisos enumerate the procedure to be followed by an aggrieved dealer while exercising his substantive right of appeal under Section 84(1) of the Act. In other words, if the right of appeal as provided under Section 84(1) could be entertained upon compliance of certain conditions by the

aggrieved dealer at the time of preferring an appeal, which would be a provision in the realm of procedural law. It can be further clarified by observing that Section 84(1) of the Act provides for the authority before whom the appeal can be preferred and the circumstances under which the dealer could exercise such right and the conditions to be followed by the dealer for availing such right are stipulated in the proviso, which are procedural in nature. Thus, the appellants cannot be heard to say that they have a vested right in a procedural law.

43. It was argued that the date fixed in the second proviso to Section 48(1) cannot have retrospective effect and would not apply to all cases where the *lis* (filing of return) commenced prior to the amendment. The second limb of the argument is that fixing the date as 1<sup>st</sup> day of April , 2015 is irrational and arbitrary.

44. With regard the contention regarding retrospectivity/ prospectivity, we have dealt with the same and held that the second proviso to Section 84(1) being a procedural provision would be retrospective as the statute clearly says so and there is a clear intendment to the said effect. Aggrieved dealers are not entitled to question the date fixed in the second proviso as being arbitrary and irrational. We find the date so fixed has utmost relevance and significance. The West Bengal Finance Act, 2015 had virtually overhauled the WB VAT Act, 2003. We had earlier noted the amendment brought about to various provisions. The amendments were by substitutions and insertions, the substitutions are more in number than the insertions. More importantly the second proviso to Section 84(1) was substituted. Principles of statutory interpretations are to be reckoned while considering

an amendment by substitution to be retrospective or prospective. In ***Sham Rao V. Perulekar Versus. The District Magistrate Thane, Bombay & two others***,<sup>36</sup> it was observed:

*“The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, than the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all.”*

45. Bearing in mind the above legal principles in mind we test the correctness of the contentions of the appellants that the impugned proviso cannot affect the vested right of the appellant which accrued in their favour prior to the amendment. Similar arguments were placed in Hindustan Petroleum corporation Ltd. (Supra), which were rejected holding thus:

*“But prior to that, it would be necessary to understand the scope of a proviso vis—vis the main provision in a section in the context of the decisions of the Hon’ble Supreme Court and in light of the principles of interpretation of proviso.*

*a) The normal function of a proviso is to except something out the enactment or to qualify something enacted therein which, but for the proviso, would be within the purview of the enactment. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. In other words, a proviso qualifies the*

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<sup>36</sup> AIR 1952 SC 324



*generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Further, a proviso cannot be construed as nullifying the enactment or as taking away completely a right conferred by the enactment.*

*b) In this regard, learned Author, Justice G.P. Singh has, in “Principles of statutory Interpretation”, enunciated certain rules collated from judicial precedents. Firstly, a proviso is not to be construed as excluding or adding something by implication i.e., when on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Secondly, a proviso has to be construed in relation to which it is appended i.e., normally, a proviso does not travel beyond the provision to which it is a proviso. A proviso carves out an exception to the main provision to which it has been enacted as a proviso and to no other. However, if a proviso is a statute does not form part of a section but is itself enacted as a separate section, then it becomes necessary to determine as to which section the proviso is enacted as an exception or qualification. Sometimes, a proviso is used as a guide to construction of the main section. Thirdly, when there are two possible construction of words to be found in the section, the proviso could be looked into to interpret the main section. However, when the main provision is clear, it cannot be watered down by the proviso. Thus, where the main section is not clear, the proviso can be look into to ascertain the meaning and scope of the main provision.*

c) *The proviso should not be so construed as to make it redundant. In certain cases, “the legislative device of the exclusion is adopted only to exclude a part from the whole, which, but for the exclusion, continues to be a part of it”, and words of exclusion are presumed to have some meaning and are not readily recognized as mere surplusage. As a corollary, it is stated that a proviso must be so construed that the main enactment and the proviso should not become redundant or otiose. This is particularly so, where the object of a proviso sometimes is only by way of abundant caution, particularly when the operative words of the enactment are abundantly clear. In other words, the purpose of a proviso in such a case is to remove any doubt. There are also instances where a proviso is in the nature of an independent enactment and not merely, an exception or qualifying what has been stated before. In other words, if the substantive enactment is worded in the form of a proviso, it would be an independent legislative provision concerning different set of circumstances than what is worded before or what is stated before. Sometimes, a proviso is to make a distinction of special cases from the general enactment and to provide it specially.*

d) *At this stage, this construction or interpretation of a proviso could be considered:-*

a) *In Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai [MANU/SC/0328/1965 : AIR 1966 SC 459], while dealing with the Bombay Tenancy and Agricultural Lands Act, 1948, the Hon’ble Supreme Court held, that a proper function of a proviso is to except or qualify something enacted in the*

substantive clause, which but for the proviso, would be within that clause.

b) In *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories* [MANU/SC/0194/1964 : AIR 1965 SC 980], while considering proviso to Section 6 of Trade Marks Act, 1940, it was observed that it would not be a reasonable construction for any statute, if a proviso which in terms purports to create an exception and seeks to confer certain special rights on a particular class of cases included in it should be held to be otiose and to have achieved nothing.

c) In *Kedarnath Jute Manufacturing Co. Ltd., v. the Commercial Tax Officer and Others* [MANU/SC/0290/1965 : AIR 1966 SC 12], it was observed that “the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment or to qualify something enacted therein, which, but for the proviso, would be within it”. [See “*Craies*” on Statute Law – 6<sup>th</sup> Edition – P. 217]. In this case, this Court was considering Section 5(2)(a)(ii) of Bengal Finance Sales Tax Act, 1941 and Rule 27-A of Bengal Sales Tax Rules.

d) In *Dattatraya Govind Mahajan and Others v. The State of Maharashtra and another* [MANU/SC/0381/1977 : AIR 1977 SC 915], a Constitution Bench of the Apex

*Court, while considering the amendment made to Maharashtra Agriculture Lands (Ceiling on Holdings) Act, 1961, in the context of Article 31B of the Constitution and the second proviso thereto, reiterated what was stated in Ishverlal's case, supra.*

*e) In S. Sundaram Pilai, etc, v. V.R. Pattabiraman [MANU/SC/0387/1985 : AIR 1985 SC 582], while dealing with the scope of a proviso and explanation to sub-section (2) of Section 10 of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, the Hon'ble Supreme Court held that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or qualifying some thing enacted therein which, but for the proviso, would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment, nor can it be used to nullify or set at naught the real object of the main enactment. Sometimes, a proviso may exceptionally have the effect of a substantive enactment.*

*After referring to several legal treatises and judgments, the Apex Court held in the above judgment as under:-*

*“43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:*

*(1) qualifying or excepting certain provisions from the main enactment;*

- (2) *it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;*
- (3) *it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and*
- (4) *it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.*

*f) The approach to the construction and interpretation of a proviso are enunciated in the following cases:-*

- a) In M. Pentiah & others v. Muddala Veeramallapa & others (MANU/SC/0263/1960 : AIR 1961 SC 1107), it was observed that while interpreting a section or a proviso, as in the instant case, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.*

b) *In Superintendent & Remembrancer of Legal Affairs to Govt. of West Bengal v. Abani Maity* (MANU/SC/0525/1979 : AIR 1979 SC 1029), the Apex Court observed that the statute is not to be interpreted merely from the lexicographer's angle. The Court must give effect to the will and inbuilt policy of the Legislature as discernible from the object and scheme of the enactment and the language employed therein. The words in a statute often take their meaning in the context of a statute as a whole. They are, therefore, not to be construed in isolation.

46. As already noted the second proviso to Section 84(1) is a procedural law, in which the appellants can claim no vested right. The Legislature in its wisdom, imposed a condition for entertaining an appeal with a view to safeguard the interest of revenue. We cannot be called upon to interpret the impugned proviso so as to make it redundant or useless. As already noted the judgment of the Hon'ble Supreme Court in **Hoosein Kasam Dada** can have no application to the cases on hand, so also the decision in **DCTO Versus. Cameo Exports**,<sup>37</sup> which was rendered following the reasoning in Hoosein Kasam Dada. Hence, we hold that the impugned Proviso has retrospective operation and all appeals filed on or after 1<sup>st</sup> day of April, 2015 will be entertained only if the conditions are complied with.

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<sup>37</sup> (2006) 147 STC 218 (Mad)

47. In **Anant Mills Co. Ltd. Versus. State of Gujarat** <sup>38</sup> the vires of Section 402(2)(e) of the Bombay Provincial Municipal Corporations Act as amended by Gujarat Act No.5 of 1970 was challenged. The said provision pertains to entertainment of an appeal by a person who had not deposited the tax due from him and who had not been able to show to the appellate forum that the deposit of the amount would cause him undue hardship, arising out of his own omission or default. The Hon'ble Supreme Court held that requirement about the deposit of the amount claimed as a condition precedent to the entertainment of the appeal did not have the effect of nullifying the right of appeal, especially when keeping in view the fact that discretion vested with the appellate court to dispense with the compliance of the requirement. It was further held that the said statutory provision sought to regulate the exercise of the right of appeal and therefore, the said provision was held to be not violative of Article 14 of the Constitution. It was further held that the right of appeal being a creature of a statute, without a statutory provision creating such a right, an aggrieved person is not entitled to file an appeal. Further, it was held that the legislature while granting the right of appeal can impose conditions for the exercise of such right. It was permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid and such condition merely regulating the exercise of right of an appeal was that the same is not to be abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It was further held that it was open to the legislature

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<sup>38</sup> (1975) 2 SCC 175

to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation.

48. In ***Seth Nand Law Versus State of Haryana***,<sup>39</sup> the Constitution Bench of the Hon'ble Supreme Court held that right of an appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory. In the said decision, the Hon'ble Supreme Court held that the condition regarding predeposit was not onerous.

49. In ***Chatter Singh Baid Versus Corporation of Calcutta***<sup>40</sup> the validity of a provision prohibiting entertainment of appeal altogether where tax was not paid has been upheld. In the said decision, **Section 183(A)** of the Calcutta Municipal Act, 1951 was considered and it was held that merely because the section impairs the right of appeal by imposing an onerous condition of deposit of consolidated rate payable up to the date of presentation of appeal on the valuation determined, it cannot be said the section was unfair, fanciful, oppressive and arbitrary. Further, it was held that the condition of deposit at the time of filing the appeal did not make the

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<sup>39</sup> (1980) Supplementary SCC 574

<sup>40</sup> AIR 1984 Cal 283



right of the appeal under Section **183(1)** of the said Act is nugatory or illusory.

50. In ***Narayan Chandra Ghosh Versus UCO Bank*** <sup>41</sup> the condition imposed in Section 18(1) of the SARFAESI Act, 2002 requiring a deposit in terms of the proviso to the said section before entertaining an appeal against the order of the Debts Recovery Tribunal was held to be a valid piece of legislation, on the ground that the legislature can impose conditions for exercise of such right of appeal so long as the conditions are not onerous, as to amount to unreasonable restrictions, rendering the right almost illusory and considering the conditions hedged in the said proviso to Section 18(1) of the SURFAESI Act, it was held to be not onerous.

51. In ***Hindustan Petroleum Corporation Ltd. Versus Union of India*** <sup>42</sup>, after referring to the above decisions, it was held that the condition imposed under Section 35F of the Central Excise Act, 1944 stipulating a requirement for deposit of the amount as condition precedent to the entertainment of appeal, was held to be valid and requirement of deposit of 7.5% of the duty in dispute was held to be not an onerous condition.

52. Learned Advocate appearing for the appellant had referred to the meaning of the word “payment” and “deposit” by referring to the Advance Law Lexicon. In our considered view, the proviso to Section 84(1) of the Act cannot be sought to be interpreted by referring to the meaning of the words “payment” and “deposit” as defined in the Advance Law Lexicon but are required to be considered by reading the entire provision as a whole along

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<sup>41</sup> (2011) 4 SCC 548

<sup>42</sup> (2016) 89 GST 285

with the scheme of the Act and not to read the two words viz., “payment” and “deposit” in isolation. Therefore, the reference to the meaning of these words as spelt out in the Law Lexicon cannot in any manner advance the case of the appellants.

53. The decision in the case of **Bazpur Sugar Factory** was pressed into service to explain as to what would be meant by deposit, which has essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it is made on the fulfilment of certain conditions. Firstly, the decision in the said case arose out of a proceedings under the Indian Cooperative Societies Act, 1921 and the question framed for determination was whether on the facts and circumstances, the Income Tax Appellate Tribunal was right in holding that the amount of Rs.5,15,863/- was not a revenue receipt liable to tax. Thus, considering the facts of the case of the assessee therein, with regard to the monies described as security deposit which was returned by the assessee as and when the empty bottles were returned, the Court went into the aspect as to whether the said amount as claimed by the dealer should be treated as a deposit for ascertaining as to whether they are liable to pay income tax or not. In our considered view, the said decision cannot in any manner assist the case of the appellant, as is distinguishable on facts.

54. Reliance was placed on the decision in the case of **Soumyadeep Banerjee**. The issue in the said case was whether a deposit, which was directed to be made by the examinees as precondition for production of answer scripts would create any right in favour of the WB Council and the claim to retain it altogether and if not, whether the Court has power to pass

at the time of final hearing the order of appropriation of costs from and out of the amount deposited. It was held that the pre-trial deposit made in a case is not the subject matter of the writ petition, as the challenge made by the writ petitioner was with regard to the validity and legality of evaluation of the answer script, not with regard to the incurring of the expenses. Further, it was held that under any stretch of imagination, the issue of deposit, can never be raised and if the Court asks for deposit in a *lis* as condition precedent, it is a matter of procedure as opposed to substantive law. We find that the decision in **Saumyadeep Banerjee** would support the case of the respondent and not that of the appellants.

55. In **Kisan Sahkari Chinni Mills Ltd.**, the question was whether administrative charges collected by the State Government under the enactment in question were to be included in the assessable value of molasses cleared by the sugar factories, who were respondents therein. It was held that under Section 4(4)(d)(ii) of the Central Excise Act, what is to be excluded from the assessable value is the amount of duty of excise, sales tax and other taxes and administrative charges which would be covered under the said provision as other taxes because it is a compulsory extraction made under an enactment and therefore, a duty or impost and impost must be held to be in the nature of a tax covered by the said provision. The said decision in no manner can assist the case of the appellants, as the second proviso to Section 84(1) being a procedural law for regulating the procedure to be followed by an aggrieved dealer for preferring an appeal under Section 84(1) cannot be construed to be a compulsory

extraction in the nature of a tax, but it is a condition imposed by the legislature, a condition precedent for exercising the statutory right of appeal.

56. Thus, as pointed out earlier in ***Hoosein Kasam Dada*** the validity of Section 22(1) of the Central Provinces and Berar Sales Tax Act, 1947 was challenged in which there was no date mentioned, as to which of those appeals will be entertained unless the amount of tax and penalty admitted by the assessee has been paid, whereas in the second proviso to Section 84(1), the date has been clearly mentioned as appeals to be submitted on or after the 1st day of April, 2015 such procedure is required to be adopted, making it clear that the second proviso will not affect pending appeals.

57. In fact in ***Hoosein Kasam Dada***, the Hon'ble Supreme Court held that though the right of appeal is a substantive right/vested right, such right cannot be taken away, except by express enactment or necessary intendment. Even assuming for arguments sake, the second proviso to Section 84(1) is to be treated as a substantive provision, such right is not an absolute right and could be taken away or subject to conditions, if there is an express enactment or necessary intendment. The second proviso clearly shows the necessary intendment and therefore, even assuming it is treated to be a vested right, the same can be modified and made exercisable subject to conditions.

58. In ***D.V.C. Bakura Cooperative Stores Ltd.***, the validity of Section 45(3) of the Bihar Finance Act, 1981 was challenged, which stated that no appeal shall be admitted unless the dealer objecting to an order of assessment has paid 20% of the tax assessed or full amount of tax admitted, whichever is greater. The said provision was upheld after referring to

various decisions holding that the right of appeal is a statutory right and it is open to the legislature to provide for remedy of appeal and also impose conditions in the matter of exercise of that right. In the said case, the argument as advanced before us was made contending that in other States, the enactments provide for a power to relax or waive such conditions and the impugned provision does not provide for such a contingency and therefore, the provision has to be read down to confer power on the authority power to relax or waive the condition. This argument was rejected by holding that merely because in some other States, the appellate authority has been given power to relax or waive the required deposit of the part of the tax assessed, it cannot be held that absence of such a provision in the Act in the State in question will not render it ultra vires.

59. In ***Khazan Chand and Others Versus State of Jammu and Kashmir*** <sup>43</sup> it was held that sales tax is the biggest source of revenue for a State and it is for the State to decide as to how and in what manner, it would raise its revenue and determine which particular transactions of sale or purchase of goods taking place within the State should be taxed and at what rates etc. It was further held that nature of things differ from State to State and it is for each State to determine the methods it will adopt to collect its revenue and if the provisions of the legislation of every State on a particular topic are to be identical in respect, there is no purpose in including that topic in the State List and it may as well be included in the Union List.

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<sup>43</sup> (1984) 56 SCC 214

60. Therefore, the argument of the learned Advocate for the appellants to draw inspiration from the enactment of the other State or read down the 2nd proviso to Section 84(1) of the Act does not arise. The principle of reading down can be applied if a provision is not clear or does not provide for certain contingencies and if a statute is clear more particularly a fiscal statute, the concept of reading down would be alien especially in the facts and circumstances of the cases before us. We also note that similar provision under the Karnataka Sales Tax Act, 1957 was upheld in ***Prakrith Builders Pvt. Ltd. Versus State of Karnataka*** <sup>44</sup>. Similar provision in Section 77(4) of the Orissa Value Added Tax Act, 2004 was upheld in ***Jindal Stainless Steel Versus State of Orissa*** <sup>45</sup>.

61. In the light of the above discussions, we hold that the second proviso to Section 84(1) of the Act is the procedure prescribed for preferring an appeal under Section 84(1) of the Act by an aggrieved dealer and condition imposed therein is not a compulsory extraction of tax and the State legislature was well within its jurisdiction to impose conditions for preferring appeals and on account of such condition being imposed, it neither infringes nor abrogates the statutory right of appeal granted to an aggrieved dealer under Section 84(1) of the Act and insistence upon producing of proof of payment of 15% of the tax in dispute cannot be regarded as compulsory extraction of tax, as the assessment has been completed and as long as the assessment is not set aside or modified, the

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<sup>44</sup> (2009) 19 VST 589

<sup>45</sup> (2012) 54 VST 1

tax due as computed would become due and payable. Accordingly, Issue Nos.1 and 3 are decided against the appellants.

62. For entertaining an appeal under Section 84(1), the dealer is required to produce proof of payment of 15% of the disputed tax in terms of the procedure prescribed in Clause (b) of second proviso to Section 84(1). It cannot be disputed by the appellants that on and after the order of assessment is passed and the tax is quantified the liability accrues. Mere filing of an appeal does not suspend the liability so determined. The liability would subsist until it is set aside or modified. Therefore, to state that the 15% is a compulsory extraction, is incorrect, as it is only a measure or quantification for the appeal being entertained. The dealer who complies with the condition and appeal being entertained is not absolved of his liability to pay the net tax, interest, late fee or penalty, and if the dealer desires protection in this regard, he has to resort to the remedy under rule 141 of the Rules which deals with power of the appellate authority to grant stay of realization of the amount of net tax, interest etc. upon an application in Form 68 being filed by the dealer. This power can be exercised by the appellate authority once upon entertainment of the appeal. In other words, unless the appeal is entertained upon compliance of the procedural requirement in the second proviso to Section 84(1), prayer for stay would not be maintainable. In this regard it is beneficial to refer to the decision of the Hon'ble Supreme Court in **Harinagar Sugar Mills Ltd.** [(2003) 11 SCC 40], wherein the Hon'ble Supreme Court held that mere filing of the appeal does not absolve the appellant nor suspends the liability assessed during the pendency of the appeal it continues unless paid or set aside.

63. It was argued by the learned Advocate appearing for the appellants that different categories of assessments and different categories of assessees have all been bunched together and inequals have been treated as equals. To explain the concept of equality, reference was made to **Rig Veda**. Reliance was also placed on the decisions in **Benette and Colomen & Khem Chand**. While testing the constitutional validity of a statute on the anvil of Article 14, it has to be seen as to whether there is discrimination, whether a person or class of persons have been singled out from others similarly situated. It is equally important to note that Article 14 does not prohibit classification as long as classification is based on legal and relevant circumstances.

64. Firstly, we need to consider as to whether the argument of the learned Advocates for the appellants stating that different types of assessments and different types of dealers have been treated alike. The argument deserves to be outrightly rejected for the simple reason that whatever may be the type of assessment, such as a best judgment assessment, an assessment after opportunity to the dealer etc., is an assessment under the provisions of the Act. Similarly, an assessee can be of different categories and a casual dealer can also be brought within the provisions of the Act. Therefore, the appellants' attempt to show discrimination is an attempt, which has to necessarily fail.

65. Section 84(1) of the Act is a provision, which provides for right of appeal to an aggrieved dealer. The substantive provision does not categories the types of assessment or types of assessees and it provides for a right of appeal to any casual dealer or dealer. Therefore, to draw a distinction which



in our view is an artificial distinction. What the appellants seek to do is to read something which is not contemplated under the statute. Therefore, such argument has to necessarily fail.

66. The decision in the case of **Khem Chand** cannot be applied to the case of the assessee as the matter pertains to whether the doctrine of equal pay for equal work was to be applied in the facts and circumstances of the said case.

67. The decision in **Benner Coleman & Co.**, is also distinguishable. In the said case, it was contended that in the case of newspapers operating on 10 or less than 10 page level, additional quota of paper has been given to increase their pages to 10, but the imposition of 10 page ceiling on newspapers operating on a page level above 10 was said to violate Article 19(1)(a) and Article 14 of the Constitution of India. While considering the said contention, it was held that the news print policy abridges the fundamental rights of the petitioners therein in regard to freedom of speech and expression and on facts, it was held that under the garb of distribution of newsprint, the Government has tended to control the growth and circulation of newsprint. As already held, the right of appeal conferred under Section 84(1) does not discriminate between different types of assessments and different types of assessee and confers such right on casual dealers and all other dealers and therefore, the question of considering as to whether at all there is any discrimination does not arise in the facts and circumstances of the case.

68. Reliance was placed on the decisions in **Ayodhya Prasad Mishra**, **Khem Chand Sharma** and **Benette Coleman**. These decisions have been

pressed into service to support the argument that equals cannot be treated unequally and equally well settled that unequals cannot be treated equally and if it is done, it would offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution of India. The argument of inequal treatment is predicated on the categories of assesseees and the types of assessments. In terms of provisions of the WBBAT, an assessee has been defined to also include a transporter or a casual trader. While testing the vires of the proviso to Section 84(1), we are required to examine as to whether the substantive law, namely, Section 84(1) seeks to draw any distinction as regards the varied categories of dealers/ assesseees or assessments. On a plain reading of Section 84(1), it shows that there is no distinction among the categories of dealers or the types of assessments. The provision deals with appeal against provisional or other assessments. Other assessments would include all categories of assessments as were enumerated by the learned Advocates for the appellant. Thus, in the absence of any classification or sub-classification of the category of dealers or types of assessments, the provision cannot be stated to be discriminatory. Furthermore, the provision states that any casual dealer or dealer may in the prescribed manner appeal to the authority specified therein. The term “dealer” has been defined under Act and undoubtedly, all the appellants before us will fall within the said definition. Assuming one of them is a casual dealer, he also stands covered by Section 84(1). The provision further takes note of the fact that a dealer may be aggrieved by an order of provisional assessment and, therefore, the legislature in its wisdom has granted appellate remedy even against provisional assessments. More

importantly, Section 84 uses the words “or other assessments”. The said words would bring within its umbrella all categories of assessments other than provisional assessments. Thus, the attempt of the appellants to bring in a theory of inequality is not tenable. Therefore, the decisions relied on would not assist the case of the appellant.

69. In the light of the above, we hold that the second proviso to Section 84(1) is neither discriminatory nor violative of Article 14 of the Constitution of India and accordingly.

70. It is contended by the learned Advocate for the appellant that the second proviso to Section 84 of the Act would fall under a category where no power is given to any authority to relax the rigour of such requirement as mentioned in the second proviso and therefore, the only remedy available to the dealer is to approach this Court under Article 226 of the Constitution. Reliance was placed on the decision in the case of **Shyam Kishore** wherein it was held that the appellate authority must be permitted to grant time to the assessee to effect payment when the appeal is to be heard and if necessary, the appeal can be adjourned to enable the assessee to comply with the conditions. It is submitted that after interpreting the statutory provision which was subject matter of challenge in the said case, the Hon’ble Supreme Court suggested for amendment of the relevant statute. The decision in **Shyam Kishore** pertained to interpretation of the provisions of Section 170 of the Delhi Municipal Corporation Act, 1957 which mentions the conditions of right to appeal. One of the conditions being that the appellant was to deposit the amount in dispute in the office of the Corporation. The Court interpreted the provision and noted that Section 170

deals with conditions of right to appeal and states that no appeal was to be heard or determined under Section 169 of the said Act, unless the conditions in Clause (a) and (b) of Section 170 of the said Act are complied with. Thus, it is clear that Section 170 of the said Act deals with the procedural law when the appeal is to be heard or determined. Thus, the question before the Court was as to when an appeal will be heard or determined. These words were interpreted by the Court by holding that in this statutory context of the said provision it is plausible to say that an appeal (Section 169 of the said Act) can be admitted or entertained, but only cannot be heard or disposed of without pre-deposit of the disputed tax.

71. In our considered view, the decision in ***Shyam Kishore*** cannot be applied to the facts and circumstances of the cases on hand. As noted earlier, Section 84(1) of the Act is the substantive right of the assessee to file an appeal. The manner, in which the appeal will be entertained, is stipulated in the proviso under Section 84(1) of the Act. There is marked difference between the words and phrases used in the Delhi Municipal Corporation Act and that of the WBVAT. Hence, the decision cannot be applied to the facts of this case. Equally this Court cannot enact a law and the duty of the Court is to interpret the law and as we find there is nothing arbitrary or unreasonable about the provisos to Section 84(1) the question of making a recommendation to the legislature for amending the Act does not arise. Equally the decision in the case of ***Royal Insulation*** wherein there was direction to the State Government to issue an ordinance amending Section 31 of the Tamil Nadu General Sales Tax Act, 1959 cannot be applied to the facts and circumstances of the case on hand. Reliance was placed on

the decision of this Court in ***Shyam Sel and Power Limited*** wherein the Court has referred to various decisions of the Hon'ble Supreme Court and enlisted the circumstances whereunder it would be necessary to dispense with the requirement of pre-deposit. The said decision arose out of a writ petition filed by an assessee challenging the order passed by the Customs, Excise and Service Tax Appellate Tribunal by directing the appellant therein to pre-deposit an amount of Rs. 60 lakhs as condition precedent for stay of the amount of duty and penalty which was payable by the assessee therein. Considering the facts of the case, the Court took into consideration various decisions where the Court had intervened in the matter of conditions imposed to pre-deposit certain sums of money. The observation and the findings of the Court are relatable to the facts of the said case where the assessee approached the Court complaining that the condition to pay Rs. 60 lakhs was onerous. We need to remind ourselves that the challenge before us is to the constitutional validity of the proviso to Section 84(1) of the Act and while deciding the same we are not expected to be guided by decisions which were rendered examining the correctness of the discretion exercised by the Tribunals and the Lower Authorities. Therefore, the decision cannot be made applicable to the facts and circumstances of the cases before us.

72. Reference was made to the decision in ***Monoranjan Chakraborty***. However, as admitted by the learned Advocate for the appellant that the said decision has been reversed by the Hon'ble Supreme Court, we cannot draw any reference from the decision of The Gauhati High Court which has been reversed.

73. The learned Advocates for the appellant pointed out that there are different categories of dealers and all dealers are being treated equally when they are unequal which is violative of Article 14 of the Constitution. Certain instances were pointed out wherein Appellate Authority under the Act has mechanically insisted upon the dealers to effect pre-deposit though it was an appeal filed by the dealer seeking enhancement of the claim for refund. It may be true that there might have been some stray instances where the Appellate Authority or the office of the Appellate Authority might have mechanically refused to entertain an appeal regardless of the fact that the appeal does not dispute any quantum of tax but disputes the computation done by the revenue with regard to entitlement for refund. However, we find such orders were reversed by the Tribunal, and rightly so. In any event, these stray instances cannot be taken as an anvil to test the vires of a statute.

74. Reliance was placed on the decision in **M.P. Steel Corporation** to buttress the submission that the substantive right of filing an appeal cannot be taken away by virtue of the second proviso. This argument was further expanded by placing reliance on the decision of **Khazan Chand Nathi Ram** and the decision in **Cameo Exports**. In the earlier part of this judgment, we have conclusively held that the second proviso to Section 84(1) being a procedural law does not in any manner impinge on the substantive right of appeal conferred by the aggrieved dealer under Section 84(1) of the Act. Therefore, the decision does not render support to the case of the appellant assessee. It was contended that the condition imposed in the second proviso is altogether a new provision, and it cannot have retrospective effect.

To support such contention, reliance was placed on the decision in **Jayam and Company**. In the said decision the Hon'ble Supreme Court held that in a fiscal legislation, the legislature has power to make provision retrospectively. The broad legal principles as laid down in **R.C. Tobacco Private Limited Versus Union of India** <sup>46</sup>, was relied on to enumerate the principles while testing a retrospective statute. It was held that,

- (i) A law cannot be held to be unreasonable merely because it operates retrospectively;
- (ii) The unreasonability must lie in some other additional factors;
- (iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;
- (iv) Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, courts will be justified in striking down the impugned statute as unconstitutional;
- (v) The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the past period;
- (vi) Length of time is not by itself decisive to affect retrospectively.

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<sup>46</sup> (2005) 7 SCC 725

75. After referring to several other decisions, the Hon'ble Supreme Court held that Section 19(20) of the Tamil Nadu Value Added Tax, 2006 is altogether a new provision introduced for determining the input tax in a specified situation i.e. goods are sold at a lesser price than the purchase price of goods and the provision being introduced for the first time to the detriment of the dealers cannot have retrospective effect. The decision in **Jayam and Company** is clearly distinguishable on the facts. Firstly, the Hon'ble Supreme Court held that it was altogether a new provision and the new provision would cause detriment to the dealers was held to be prospective. In the cases before us, we have been called upon to test the vires of a procedural statute which has been introduced by way of substitution, by the West Bengal Finance Act. It is settled legal principle that a procedural law is always retrospective unless a contrary intention is manifest in the provision itself. Therefore, the decision in **Jayam and Company** cannot be made applicable to the facts and circumstances of the cases on hand. The decision in **Technimont Private Limited** was referred to to support the contention that in case of genuine and extreme hardship writ petition could be an appropriate remedy. This issue does not arise for consideration in the cases on hand as we are to decide the validity of the impugned provision. In any event, if a dealer is of the view that he is entitled to move the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India without filing an appeal before the Appellate Authority, it is for such dealer to convince the Court as to why he is justified in not availing the alternate remedy and as to why he has approached the High Court under Article 226 of the Constitution. It is for the Court to then take a



decision as to whether the writ petition would be an appropriate remedy though there exists a statutory appellate remedy.

76. It was contended that the learned Writ Court while dismissing the writ petitions had placed heavy reliance on the decision in **Rakesh Kohli**, which decision has been overruled in **Shayara Bano**. It was held that in the decisions in **Rakesh Kohli** and other decisions, were read as being an absolute bar to use of “arbitrariness” as a tool to strike down legislation under Article 14 and the decisions were arrived at following the decision in **The State of A.P Versus McDowell and Co.** <sup>47</sup>, which was held to be per incuriam, and therefore, the judgments, following **McDowell** (including **Rakesh Kohli**), are no longer good law.

77. In our considered view, the tests which are to be applied to test the constitutional validity of a substantive law is not required to be applied to the cases on hand as we have conclusively held that the provisos to Section 84(1) are procedural. Therefore, the decision in **Shayara Bano** could be of no assistance to the submissions made on behalf of the appellants.

78. In **Newtech Promoters and Developers** [(2021) SCC online SC 1044], five questions were framed for consideration of which the following two questions would be of relevance to the present appeals:

- 1) Whether the Real Estate (Regulation and Development) Act, 2016, is retrospective or retroactive in its operation and what will be its legal consequences if tested on the anvil of the Constitution of India?

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<sup>47</sup> (1996) 3 SCC 709

2) Whether the conclusion of pre-deposit under proviso to Section 43 (5) of the 2016 Act for entertaining substantive right of appeal is sustainable in law.

79. The Hon'ble Supreme Court held the provisions of the 2016 Act to be retroactive in its operation. It was observed:

*Merely because enactment as prayed is made retroactive in its operation, it cannot be said to be either violative of Articles 14 of 19 (1) (g) of the Constitution of India. To the contrary, the Parliament indeed has the power to legislate even retrospectively to take into its fold the pre-existing contract and rights executed between the parties in the larger public interest.*

80. Before the Hon'ble Supreme Court it was argued that the substantive right of appeal cannot remain dependent on fulfillment of pre-deposit which is otherwise onerous on the builders alone and discriminatory amongst the stake holders as defined under the provisions of the 2016 Act. Both the contentions were discarded in the following terms:

*The submission in the first blush appears to be attractive but is not sustainable in law for the reason that a perusal of scheme of the Act makes it clear that the limited rights and duties are provided on the shoulders of the allottees under Section 19 of the Act at a given time, several onerous duties and obligations have been imposed on the promoters i.e. registration, duties of promoters, obligations of promoters,*

*adherence to sanctioned plans, insurance of real estate, payment of penalty, interest and compensation, etc. under Chapters III and VII of the Act 2016. This classification between the rights, duties and obligations cast upon the allottees/home buyers and the promoters and is in furtherance of the object and purpose of the Act to protect the interest of the consumers vis-a-viz, the promoters in the real estate sector. The promoters and allottees are distinctly identifiable, separate class of persons having been differently and separately dealt with under the various provisions of the Act.*

*Therefore, the question of discrimination in the first place does not arise which has been alleged as they fall under distinct and different categories/ classes.*

*The legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a late stage, it becomes difficult for the consumer/ allottee to get the amount recovered which has been determined by the authority and to avoid the consumer/ allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage could be saved from all the miseries which come forward against him.*

*At the same time, it will avoid unscrupulous and uncalled for litigation at the appellate stage and restrict the promoter if feels that there is some manifest material irregularity being committed or his defence has not been properly appreciated at the first stage, would prefer an appeal for re-appraisal of the evidence on record provided substantive compliance of the condition of pre-deposit is made over, the rights of the parties inter se could easily be saved for adjudication at the appellate stage.*

81. It was submitted by the learned Advocate for the appellant that the decision in **Newtech Promoters** is not applicable as it was admittedly a case of pre-deposit and not payment. This contention does not merit consideration as in the said decision the Hon'ble Supreme Court has referred to and relied on the decision in **Technimont Pvt. Ltd** <sup>48</sup> wherein the validity of Section 62(5) of the Punjab Value Added Tax Act, 2005 was upheld. The said provision is similarly worded as the impugned proviso to state that no appeal shall be entertained unless such appeal is accompanied by satisfactory proof of the prior minimum payment of twenty five per cent off the total amount of tax, penalty and interest, if any. Therefore, the decision in **Newtech Promoters** would apply with full force to the appeals on hand.

82. The Hon'ble Supreme Court further observed thus:-

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<sup>48</sup> AIR (2019) SC 4489

*It is indeed the right of appeal which is a creature of the statute, without a statutory provision, creating such a right the person aggrieved is not entitled to file the appeal. It is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi-judicial litigations and it is always be circumscribed with the conditions of grant. At the given time, it is open for the legislature in its wisdom to enact a law that no appeal shall lie or it may lie on fulfillment of precondition, if any, against the order passed by the Authority in question.*

*In our considered view, the obligation cast upon the promoter of pre-deposit under Section 43(5) of the Act, being a class in itself, and the promoters who are in receipt of money which is being claimed by the home buyers/ allottees for refund and determined in the first place by the competent authority, if legislature in its wisdom intended to ensure that money once determined by the authority be saved if appeal is to be preferred at the instance of the promoter after due compliance of pre-deposit as envisaged under Section 43(5) of the Act, in no circumstance can be said to be onerous as prayed for or in violation of Articles 14 or 19(1)(g) of the Constitution of India.*

83. The upshot of the discussion is that:-

1. Insisting the dealer to produce the proof of payment of 15% of the disputed tax in terms of the second proviso to Section

84(1) does not infringe/ abrogate the vested right of appeal under Section 84(1) of the Act and such proviso does not amount to compulsory extraction of tax as it is a procedural law, prescribing a procedure for the purpose of entertaining an appeal.

2. The second proviso to Section 84(1) of the Act does not infringe Article 14 of the Constitution as the substantive law namely, Section 84(1) of the Act does not provide for any categories of dealers or categories of assessments except two categories namely, provisional assessments and other assessments and the two categories in the dealers as casual dealer or any other dealer. Therefore, all categories of dealers have been brought under a single umbrella and they have been given right to file appeal against either a provisional assessment or other assessment. Thus, the attempt of the appellant to draw an artificial classification among the dealers is impermissible.
3. The right of appeal conferred under Section 84(1) of the Act has not been affected on account of the condition imposed under the second proviso to Section 84(1) which provides for the procedure to be adhered for entertainment of an appeal by an aggrieved dealer. The procedural law does not in any manner, impinge upon the vested right of the dealer conferred under Section 84(1) of the Act.

4. By virtue of the amendment brought about by West Bengal Finance Act, 2015, the second proviso to Section 84(1) of the Act stood substituted by the new proviso thereby, making the intention of the legislature clear that it never intended to keep alive the old proviso.
5. The principle of “reading down” cannot be applied when there is no ambiguity in the second proviso to Section 84(1) of the Act that apart the proviso being a procedural law, it is validly made applicable retrospectively, the dealers cannot claim any vested right in a procedural law and for several reasons the State legislature has sufficient freedom to impose conditions while prescribing the procedure for entertaining an appeal and insisting upon producing proof of payment of 15% of the tax in dispute is neither onerous or unreasonable.
6. The alleged hardship of a dealer cannot be of any relevance while considering vires of a statutory provision which has been held to be a reasonable condition and nothing onerous.

84. In the result, the appeals are dismissed and the constitutional validity of the second proviso to Section 84(1) is upheld. In cases where the appellants have prayed for consequential relief in the writ petitions by challenging show-cause notices or assessment orders, liberty is granted to such of those appellants to file the reply to the show-cause notices within 30 days from the date of receipt of the server copy of this judgment and order after which the concerned assessing authority shall proceed with the matter

in accordance with law. In cases where the appellants have challenged the orders of assessments, they are granted liberty to file appeal before the concerned appellate authority within 30 days from the date of receipt of the server copy of this order and if such appeal is filed and the conditions in Section 84(1) are complied with, the appellate authority shall entertain the appellants appeals without rejecting the same on the ground of limitation.

No Costs.

I agree.

**(T.S. SIVAGNANAM, J)**

**(HIRANMAY BHATTACHARYYA, J)**

*(P.A- SACHIN/PRAMITA)*