SUPREME COURT OF INDIA

Bhagwati Developers Private Ltd.

Vs.

Peerless General Finance Investment Company Limited

C.A.Nos.361-362 of 2005

(Dr.B.S.Chauhan and Fakkir Mohamed Ibrahim Kalifulla JJ.)

04.04.2012

JUDGMENT

DR.B.S.CHAUHAN, J.

1. These appeals have been preferred against the judgment and final order dated 24.11.2003 passed by the High Court of Calcutta in APO Nos. 346 and 347, by way of which the High Court rejected the claim of the appellant to maintain the Company Petition filed under Sections 397 398 of the Companies Act, 1956 (hereinafter referred to as the 'Act 1956').

2. Facts and circumstances giving rise to these appeals are that:

A. Shri S.K. Roy (Respondent No. 2) issued and allotted 30,000 shares of the Respondent No. 1 company to himself and his relatives, and being the majority share holder therein, hence acquired control over the respondent-company.

B. Shri Ajit Kumar Chatterjee (3.66% shares) and Shri Arghya Kusum Chatterjee (1.01% shares) filed Company Petition No. 222 of 1991 under Sections 397 and 398 of the Act 1956, before the High Court of Calcutta with the consent of M/s Bhagwati Developers Pvt. Ltd. (4.78% shares) (hereinafter referred to as `the appellant') and Shri R.L. Gaggar (7.61% shares), alleging mis-management and oppression.

C. Respondent No. 2 contested the said Company Petition by raising the preliminary issue of maintainability, stating that the valid shares held by the

petitioners and consenting parties therein, were valued at less than 10 per cent of the total shareholding, and thus, the petition itself was not maintainable. The Company Court Judge vide order dated 13/14.1.1992, dismissed the said Company Petition as not maintainable, allowing the aforementioned preliminary objection, without entering into the merits of the case.

D. Shri Ajit Kumar Chatterjee and Shri Arghya Kusum Chatterjee, both petitioners therein, filed two appeals being Nos. 40 and 35 of 1992 respectively, before the Division Bench of the Calcutta High Court challenging the dismissal of the Company Petition on the ground of maintainability. Both the appeals were consolidated and heard together.

E. On 16.11.1993, Shri Ajit Kumar Chatterjee joined the Board of Directors of the company and filed applications for withdrawal of the appeals. The Division Bench of the High Court, vide order dated 16.11.1993 allowed the said applications, and dismissed his appeal as withdrawn. A similar order was passed by the Division Bench on 18.11.1993 while allowing a similar application filed by Shri Arghya Kusum Chatterjee, and therefore, his appeal was also dismissed as withdrawn.

F. The appellant filed two applications before the Division Bench on 22.12.1993 for the purpose of recalling the order of dismissal of the said appeals, and for the transposition of the Chatterjee brothers as proforma respondents, whilst substituting the appellant as the sole appellant therein. The Division Bench, vide order dated 2.2.1995 dismissed the said application by a detailed judgment, labelling the appellant as a stranger having no locus standi whatsoever, and observing that as the appeal was no longer pending, the question of transposition of parties did not arise. Moreover, it was observed that there had been an inordinate delay in the filing of such an application.

G. Aggrieved, the appellant preferred S.L.P.(C) Nos. 19193 and 19217 of 1995 before this court, challenging the order dated 2.2.1995. This Court entertained the said petitions, granted leave, and disposed of the appeals vide judgment and order dated 26.4.1996, observing that the appellant may prefer independent appeals, challenging the judgment and order dated 13/14.1.1992, passed by the learned Single Judge, further stating that if such an appeal was infact filed, the same would not be dismissed by the Division Bench on grounds of limitation or locus standi. However, it would be open

for Respondent No.2 to contend, that the ground upon which the Company Court Judge had dismissed the Company Petition, was indeed just, i.e. the respondent could defend the order passed by the Company Court Judge. Further, the effect of withdrawal of the appeals by Chatterjee brothers on the appeals filed by the appellant, would also be examined. Additionally, the dismissal of the appeals as withdrawn, preferred by Chatterjee brothers, would not come in the way of the appellant raising such contentions as are permissible and available to it in law. This Court disposed of the said appeals without expressing any opinion on merit.

H. In pursuance of the order dated 26.4.1996 passed by this Court, the appellant preferred appeal Nos. 346 and 347 of 1996, which have been dismissed vide impugned judgment and order dated 24.11.2003. Hence, these appeals.

3. Shri Sunil Kumar Gupta, learned senior counsel appearing on behalf of the appellant, has submitted that the High Court, while dismissing the appeals filed by the appellant, failed to appreciate the judgment and order of this Court dated 26.4.1996, wherein this Court had held, that the issues of limitation and the locus standi of the appellant would not be questioned. The Division Bench of the High Court hence, ought not to have non-suited the appellants on the issue of locus standi. The Chatterjee brothers had withdrawn their appeals, and thus, the High Court has erred in its interpretation of the order of this Court in correct perspective, and has therefore, rendered the appellant remediless. Even if the said Company Petition had been withdrawn, the appellant with whose consent the Company Petition had been filed, was certainly entitled to revive the said Company Petition, and to challenge the order of the Company Court Judge before the Division Bench. It was not permissible for the Division Bench to dismiss the applications filed by the appellant without so much as going into the merits of the case, simply relying upon the earlier Division Bench judgment and order dated 16.11.1993. Such a course adopted by the High Court, has rendered the order of this Court dated 26.4.1996, a nullity. Thus, the appeals deserve to be allowed.

4. Per contra, Shri Ashok H. Desai, Shri Bhaskar P. Gupta, Shri Abhijit Chatterjee, Shri Jaideep Gupta, learned senior counsel appearing on behalf of the respondents, have opposed the appeal contending that Chatterjee brothers had withdrawn both their appeals, as well as Company Petition No. 222 of 1991. Therefore, it was not permissible for the appellant to move applications for impleadment and transposition. It is evident that such applications cannot be entertained where the Company Petition itself is not pending. Furthermore, the learned Single Judge had

rightly held, that the present appellant and Shri R.L. Gaggar, the consenting parties, were neither eligible nor competent to give such consent, as they did not possess valid shares. Moreover, one of them had given consent through the Power of Attorney holder, which is not in accordance with law. This Court, vide its order dated 26.4.1996 did not set aside the judgment and order of the High Court dated 16.11.1993. Thus, the same has rightly been relied upon by the High Court in its impugned judgment. The appeals are devoid of any merit, and are hence, liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

6. The right to apply for the winding up of a company is available, provided that the applicant satisfies the requisite requirements under Sections 397, 398 and 399 of the Act 1956, with respect to holding 10% shares in the total share-holding of the company. It is not necessary that the petitioner(s) must hold the same individually. Such a winding up petition can even be filed after obtaining the consent of other shareholders, so as to meet the requirement of having an aggregate of 10 per cent out of the total share-holding.

7. The said application is maintainable under Section 397, where the affairs of the company are being conducted in a manner that is prejudicial to public interest, or in a manner that is oppressive with respect to any member or members of the company. (Vide: M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja Anr., AIR 2008 SC 1738)

8. In Rajahmundry Electric Supply Corporation Ltd. by its Vice- Chairman, Appanna Ranga Rao v. The State of Andhra, AIR 1954 SC 251, this Court, while dealing with a case under Section 397 of the Act 1956 and Section 153(c) of the Indian Companies Act, 1913, which were analogous to the provisions of Section 397 of the Act 1956, held, that the issue of whether the petitioner had obtained consent of the members of the company in order to meet the requirements of holding 1/10th of the total shares, is to be examined in light of whether such a number was infact attained and maintained on the actual date of presentation of the Company Petition in court, and in the event that a member later withdraws consent, the same would not affect either the right of the applicant-petitioner to proceed with the application, or the jurisdiction of the court to dispose of it on merits.

9. In M/s. Dale and Carrington Invt. (P) Ltd. Anr. v. P. K. Prathapan Ors., AIR 2005 SC 1624, this Court dealt with the issue of transfer of shares without seeking the permission of the Reserve Bank etc. and held as under:

> " On the question of locus standi the learned counsel for the respondent cited Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao and others, AIR 1956 SC 213, wherein it was held that the validity of a petition must be judged from the facts as they were at the time of its presentation, and a petition which was valid when presented cannot cease to be maintainable by reason of events subsequent to its presentation. In S. Varadarajan v. Venkateswara Solvent Extraction (P) Ltd. and others (1994) 80 Company Cases 693, a petition was filed by the applicant and four others under Sections 397 and 398 of the Companies Act. During the pendency of the petition, the four other persons who had joined the applicant in filing the petition sold their shares thereby ceasing to be shareholders of the company. It was held that the application could not be rejected as not maintainable on the ground that the four shareholders ceased to be shareholders of the company. The requirement about qualification shares is relevant only at the time of institution of proceeding. In Jawahar Singh Bikram Singh v. Sharda Talwar (1974) 44 Company Cases 552, a Division Bench of the Delhi High Court held that for the purposes of petition under Sections 397/398 it was only necessary that members who were already constructively before the Court should continue to proceedings. It is a case in which the petitioner who had filed a petition died during the pendency of the petition. While filing the petition he had obtained consent of requisite number of shareholders of the company, among them his wife was also there. The Court further observed that since wife of the petitioner was already constructively a petitioner in the original proceedings, by virtue of her having given a consent in writing, she was entitled to be transposed as petitioner in place of her husband." (Emphasis added)

10. Section 399 of the Act 1956, neither expressly nor by implication requires, that the consent to be accorded therein, should be given by a member personally, as the same can also be given by the Power of Attorney holder of such a shareholder. Furthermore, the issue of consent must be decided on the basis of a broad consensus approach, in relation to the avoidance and subsistence of the case. The same must be decided on the basis of the form of such consent, rather on the substance of the same. There is hence, no need of written consent, or even of the consent being annexed with the Company Petition. (Vide: P. Punnaiah Ors. v.

Jeypore Sugar Co. Ltd. Ors., AIR 1994 SC 2258; and J. P. Srivastava and Sons Pvt. Ltd. Ors. v. M/s. Gwalior Sugar Co. Ltd. Ors., AIR 2005 SC 83)

11. In view of the above, the case at hand is required to be considered in the light of aforesaid settled propositions of law, which provide that where the Company Petition is filed with the consent of the other shareholders, the same must be treated in a representative capacity, and therefore, the making of an application for withdrawal by the original petitioner in the Company Petition, would not render the petition under Sections 397 or 398 of the Act 1956, non-existent, or non-maintainable. The other persons, i.e., the constructive parties who provide consent to file the petition, are in fact entitled to be transposed as petitioners in the said case. Additionally, in case the petitioner does not wish to proceed with his petition, it is not always incumbent upon the court to dismiss the petition. The court may, if it so desires, deal with the petition on merit without dismissing the same. Further, there is no requirement in law for the shareholder himself, to give consent in writing. Such consent may even be given by the power of attorney holder of the shareholder. If the shareholder who had initially given consent to file the Company Petition to help meet the requirement of 1/10th share holding, transfers the shares held by him, or ceases to be a shareholder, the same would not affect the maintainability and continuity of the petition.

12. The Company Court Judge dismissed the petition on merits, vide judgment and order dated 13/14.1.1992. Appeals were preferred, and the first appeal was withdrawn by Shri Ajit Kumar Chatterjee, vide order dated 16.11.1993.

13. The said application was also opposed by another appellant, namely, Shri Arghya Kusum Chatterjee. However, the court passed the following order:

> ?“In the instant case, as the applicant No. 1 goes out of the picture and the appeals in so far as the appellant No.1 stand dismissed for non-prosecution, the Company Petition is not maintainable and the appeals are also not maintainable in the same ground in view of the fact that with regard to two other appeals, one on the question of maintainability of the appeal and the other on the question of merit of the appeal. If the maintainability of the appeal could not be proceeded within that event the other appeal also could not be proceeded with.
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> Accordingly, when one of the parties in appeals does not want to proceed with the appeals the Court has no jurisdiction to compel that party to continue with the appeals against his will. Further, if that party is allowed to

> withdraw from the appeals and if it is evident that the petition itself could not be maintainable in the absence of that party in that event the entire petition and/or the appeal shall fail and could not be proceeded with under the law. Accordingly, both the appeals stand dismissed as the same could not be proceeded with because of the facts and circumstances stated above. The applications filed today are allowed."

14. The aforesaid order makes it clear that the Division Bench has reasoned, that if a party is allowed to withdraw from the appeal, and it is evident that in the absence of such party, the petition itself could not be maintainable, then the entire petition and/or the appeal shall fail, and cannot be proceeded with under the law. Such an observation has been made by the Division Bench without examining the issue of maintainability of the Company Petition on merits.

15. Another Chatterjee brother, namely, Shri Arghya Kusum Chatterjee withdrew his Appeal No. 40 of 1992, vide order dated 18.11.1993. The Court observed, that in view of the order dated 16.11.1993, no order was necessary, for the reason that if one appeal fails, the other cannot be maintained. The court further held:

> "We place it on record that the appellant No. 2 does not wish to proceed with the above appeals and also prays for dismissal of the applications under Sections 397 and 398 of the Companies Act which stand dismissed by the order passed by the learned Trial judge. So, it is placed on record that both the appellant Nos. 1 and 2 do not wish to proceed with the appeals which were already dismissed by us for non – prosecution on 16th November, 1993.
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> Accordingly, both the applications are disposed of."

16. Immediately after the said withdrawal of the appeals, the present appellant moved an application dated 22.12.1993, to recall the aforesaid orders dated 16.11.1993 and 18.11.1993, and for transposing the appellant in place of the Chatterjee brothers, while making them proforma respondents. The said application was rejected by order dated 2.2.1995, on the premise that the petitioners, as well as the constructive parties, i.e., the consent givers had not obtained their share holding validly. The appeals filed by the Chatterjees had been withdrawn. Thus, in light of such a fact-situation, the question of entertaining any application for either the addition or transposition of parties, could not arise. The court further made a distinction between the present case and Rajahmundry's case, observing that the facts of the case at hand, were quite distinguishable from those

in Rajahmundry's case, as in the latter, the consenting party had withdrawn its consent, while here, the constructive consenting party has withdrawn its case.

17. The appellant being aggrieved, preferred appeals before this Court, which were disposed of vide judgment and order dated 26.4.1996, giving liberty to the appellant to file an independent appeal against the order of the Company Court Judge dated 13/14.1.1992. Further, it was also open to the respondents to contend that the company petition itself was not maintainable for the reason given by the Company Court Judge, i.e. not having the requisite 10% share holding. The said order dated 26.4.1996, was passed at the behest of the respondents, with their consent, stating that they would not raise the issues of limitation, or of the locus standi of the appellant.

18. In view of the above, the appellant preferred the appeals which were dismissed vide impugned judgment and order dated 24.11.2003, relying upon an observation made by the Division Bench earlier, to the effect that, in view of the fact that the Chatterjee brothers had withdrawn their appeals, and that the Company Petition had been declared as not maintainable by the Company Court Judge, the question of entertaining any appeal with respect to the same, could not arise. After the withdrawal of the said appeals by the Chatterjees, the appellant did not have any right to proceed with the original application by any means, whatsoever.

19. The High Court in the impugned judgment, did not take into consideration the effect of the order of this Court dated 26.4.1996, and rendered the same a nullity, giving unwarranted weightage to the earlier orders of the Division Bench dated 16.11.1993 and 18.11.1993, for the reason that this Court, while passing an order on 26.4.1996, did not set aside those orders, and therefore, the same remained intact. Furthermore, the Court did not examine whether a petition filed in representative capacity can be withdrawn unilaterally by the party before the court, and what effect Order XXIII Rule 1 (5) CPC which provides that court cannot permit a party to withdraw such a case without the consent of the other parties, would have.

20. The courts have consistently held, that a suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The court therefore, must not normally grant permission to withdraw unilaterally, rather the plaintiff should be advised to obtain the consent of the other persons in writing, even by way of effecting substituted service by publication, and in the event that no objection is raised, the court may pass such an order. If the

court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware of the same, the said order would be an unjustified order. Such order therefore, is without jurisdiction. (Vide: Mt. Ram Dei v. Mt. Bahu Rani, AIR 1922 Pat. 489; Mt. Jaimala Kunwar Anr. v. Collector of Saharanpur Ors., AIR 1934 All. 4; and The Asian Assurance Co. Ltd. v. Madholal Sindhu Ors., AIR 1950 Bom.)

21. The relevant parts of the impugned order provided as under:

> I. Now the crucial question comes for consideration that when it is established fact as evident from the reading of the order of the Hon'ble Supreme Court that there was no existence of the original Company Petition since withdrawal of the Chatterjee brothers, can there be any existence of any appeal arising out of the said Company Petition and in our considered view the only answer to this crucial question must be in the negative.
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> II. According to the observation of the learned Single Judge the Company Petition was invalid and ineffective at the time of its institution, because, one of the Chatterjee brothers was not a member within the meaning of the Companies Act and at the same time one of the consenting parties namely, R.L. Gaggar had withdrawn his consent soon after filing of the original application and on both these counts, even if the Chatterjee brothers had not withdrawn, the Company Petition could not be accepted as a valid petition in the eye of law and we have already recorded that these findings of the learned Single Judge were upheld by the Division Bench while disposing of the petitions filed by the BDPL and even taking the risk of repetition it can be stated that the Hon'bIe Supreme Court did not interfere with the findings of the Division Bench in this regard while recording its order dated 26th April, 1996.
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> III. We are of the view that the order of the previous Division Bench dated 16th November, 1993 and 2nd February, 1995 were not touched by the Hon'ble Supreme Court regarding recognition of the withdrawal of Chatterjee brothers both from the appeals as well as from the original Company Petition and in that background the present appellant being a consenting party, and that consent too not being above legal scrutiny, has no legal right to proceed with the present appeals without the original application out of which the appeals arose and which is non-existent in the eye of law.

And finally, it was held as under:

> IV. Thus, for the reasons recorded hereinabove, we are of the view that the present appeals are not maintainable and on this ground alone the present appeals are liable to be dismissed and there is no requirement in the eye of law to enter into the other aspect of the matter touching maintainability of the original Company Petition.

22. In our humble opinion, the Division Bench has gravely erred in taking the aforesaid view, as the same renders the order of this Court dated 26.4.1996, a nullity. This Court had passed the order after hearing the present respondents on the basis of suggestions made, and concessions offered by them. It was in fact, suggested by the learned counsel appearing on behalf of the respondents, that if the appellant prefers such appeals in the High Court even now, the respondents shall not raise any objection on the ground of limitation, and that they would not also object on the ground of the locus standi of the consenting shareholders. Thus, the same makes it clear, that the right of maintenance of an appeal against the judgment of the learned Single Judge dated 2.2.1995, was in fact an offer made by the respondents themselves, with a further undertaking being provided by them with respect to the question of limitation and locus standi of the appellant, stating that the same would not be raised. What was granted to them, was only permission, to raise the contention that, as on the date of actual filing of the Company Petition before the company court Judge, the petitioners alongwith the constructing parties, had 10 per cent share holding out of the total stakeholding of the company .

> The aforesaid terms of this Court have made it crystal clear, that this Court was entirely oblivious of the fact that there had been two orders passed by the Division Bench, permitting the withdrawal of the appeals and further, dismissing the application of the appellant for recalling the said orders. If this Court did not set aside the said orders, we fail to understand the purpose of asking the appellant to file an appeal against the judgment and order of this Court dated 2.2.1995. Thus, by the impugned order, the High Court has rendered the entire exercise undertaken by this Court, a futile one. In our humble opinion, the Division Bench has hence, erred gravely.

23. We do not find any force in the submissions made by Shri Desai, to the effect that in view of Rule 88(2) of the Rules 1959, the CPC had no application to the facts of the instant case. Rule 88(2) reads, that a petition under Sections 397 and/or 398 of the Act 1956, shall not be withdrawn without the leave of the court, and

therefore, as per Shri Desai, the provisions of the CPC, as have been applied in the case on which Shri Gupta has relied upon, have no application in the instant case. Rule 6 reads as under:

> "Save as provided by the Act or by these rules the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these rules or the practice and procedure of the Court."
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24. It has been submitted by Shri Ashok H. Desai, learned senior counsel appearing on behalf of the respondents, that the phrase "so far as applicable", excludes the application of the CPC where a particular procedure is prescribed in the Rules itself, and as Rule 88(2) provides that any withdrawal will only be permitted with the leave of the court, no further requirement can be presumed.

25. We do not agree with such an interpretation, particularly with respect to a phrase, which has been considered by this Court time and again.

26. In City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, this Court held, that the aforesaid phrase means, "what is not either expressly provided for, or applicable by way of necessary implication, must be excluded".

27. Similarly, in the case of Maktool Singh v. State of Punjab, AIR 1999 SC 1131, this Court held, that this phrase means, that a court/authority can exercise power only to the extent that such powers are applicable. In other words, if there is an interdict against the applicability of the said provisions, the court cannot use such provisions.

28. If the interpretation given by the Division Bench of the High Court is accepted, it would not merely render the appellant remediless at whose instance, this Court had passed the order dated 26.4.1996, but would also defeat the doctrine embodied in the legal maxim, 'Ubi jus ibi idem remedium' (where there is a right, there is a remedy). This Court dealt with the aforesaid doctrine in Dhannalal v. Kalawatibai Ors., AIR 2002 SC 2572 and held, that "if a man has a right, he must have the means to vindicate and maintain it, and also a remedy, if he is injured in the exercise and enjoyment of the said right, and that it is indeed, a vain thing to

imagine a right without a remedy, for the want of a right and the want of a remedy, are reciprocal". (See also: Smt. Ganga Bai v. Vijay Kumar Ors., AIR 1974 SC 1126)

29. It was respondent no.1 who had suggested to this Court to dispose of the appeal filed by the appellant, while giving it liberty to file an appeal against the order of the Company Court Judge. Therefore, it was not permissible for respondent no.1 to agitate the issue with respect to the fact that as the Supreme Court had not set aside the orders dated 16.11.1993 and 18.11.1993, passed by the division bench of the Calcutta High Court, the same remained intact. Such an argument could not have been advanced by respondent no.1 before the division bench, in view of the legal maxim, 'Actus Curiae Neminem Gravabit i.e. an act of Court shall prejudice no man'. This Court dealt with the said maxim in Jayalakshmi Coelho v. Oswald Joseph Coelho, AIR 2001 SC 1084, and explained its scope, observing:

> "….where the order may contain something which is not mentioned in the decree would be a case of unintentional omission or mistake. Such omissions are attributable to the Court who may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits are required for such rectification of mistake."
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> The order of this Court dated 26.4.1996, if given strict literal interpretation, would render the appellant remediless, which is not permissible in law. (Vide: Rameshwarlal v. Municipal Council, Tonk Ors., (1996) 6 SCC 100).

30. In view of the above, we are of considered opinion that the Division Bench erred in holding that after the judgment of this Court dated 26.4.1996, it was permissible for the High Court to hold that the Company Petition under Sections 397/398 of the Act 1956, was non- existence in the eyes of law while placing reliance on the earlier judgments of the Division Bench of the High Court dated 16.11.1993 and 18.11.1993.

> Thus, the appeals are allowed, the impugned judgment and order of the High Court dated 24.11.2003 is hereby set aside and the matters are remanded to be decided by the High Court of Calcutta afresh giving strict adherence to judgment of this Court dated 26.4.1996. While deciding the case afresh, the Division Bench shall not take note of the earlier judgments of the High Court dated 16.11.1993 and 18.11.1993.

As the matters are pending since long, in the facts and circumstances of the case, we request the Hon'ble High Court to decide the appeals expeditiously preferably within a period of six month from the date of filing of certified copy of this judgment and order before the High Court. There shall be no order as to costs.