IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

WRIT PETITION NO.735 OF 2005

PETITIONER : Milton Plastics Limited,
a company registered under the Companies Act, 1956 and having its registered office at Asian Building, 4th Floor, R. Kamani Marg, Ballard Estate, Mumbai – 400 001.

..**VERSUS**..

RESPONDENTS : 1. Mudit Nagpal,
Deputy Commissioner of Income-tax, Circle 2(2), Mumbai, having his office at 5th floor, Room No.545, Aayakar Bhavan, M. K. Road, Mumbai 400 020

2. A. Selvaraj,
Commissioner of Income Tax, City II, Mumbai, having his office at Aayakar Bhavan, Maharshi Karve Marg, Mumbai-400 020.

3. Union of India
through the under Secretary, Ministry of Law Justice and Company Affairs, North Block, New Delhi- 110 101

Mr Ajaykumar R. Singh, Advocate for the Petitioner.
Mr Akhileshwar Sharma with Ms Shilpa Goel, Advocate for the Respondents.

CORAM : **DHIRAJ SINGH THAKUR AND VALMIKI SA MENEZES, JJ.**

PRONOUNCED ON : 13th MARCH, 2023.

JUDGMENT: (PER VALMIKI SA MENEZES, J.)

. By this writ petition invoking our jurisdiction under Article 226 of the Constitution of India, the Petitioner impugns Notice dated 22.03.2004 issued by the Respondent No.1 - Deputy Commissioner of Income Tax, Circle 2(2), Mumbai, under Section 148 of the Income Tax Act, 1961 (hereinafter referred as "the Act") alongwith order dated 04.03.2005 dismissing the Petitioner's objections to reopening of assessment for the Assessment Year 1997-98.

2. **Rule**. By consent of the parties, Rule is made returnable forthwith and the petition is heard finally.

3. The primary contentions raised in the writ petition are stated as under :

a) That the reopening of assessment, where it has been made under Section 143(3) of the Act, beyond a period of four years from the end of the relevant assessment year would be illegal, if the assessee had disclosed all material facts truly and fully during the previous assessment; that in the facts of the present case, the Assessing Officer had no jurisdiction to

reopen the case of assessment for the Assessment Year 1997-98, there being no suppression of any material, all of which was before the Assessing Officer, when previous orders of assessment had been passed.

b) In the light of the fact that all sale and lease back transactions made during the Assessment Year 1996-97, by the Petitioner, and since similar transactions were entered into leasing machinery to third parties during the Assessment Year 1997-98, which were different from the ones transacted in Assessment Year 1996-97, the Assessing Officer had no jurisdiction to reopen the assessment after depreciation allowance claimed by the Petitioner for the relevant assessment year had been examined by the Assessing Officer and had been accepted after scrutiny.

c) That in view of the issuance of notice under Section 142(1) of the Act dated 21.09.1999 by the Deputy Commissioner of Income Tax, Central Circle-11, Mumbai, during Assessment Year 1997-98 and the order of the Income Tax Appellate Tribunal, Mumbai (hereinafter referred as "the Tribunal") dated 26.03.2008, quashing the reopening notice

for the Assessment Year 1996-97, there was no jurisdiction vested in the Assessing Officer to proceed with reopening of the assessment for the very same period in the light of the specific findings of the Tribunal therein that reopening was invalid as there was no failure on the part of the assessee to disclose true and full material facts; the Petitioner contends that dismissal of his objections to the reopening of assessment amounts to a change of opinion renders the reopening of assessment invalid.

4. During the course of the hearing, we were of the view that production of communication dated 21.09.1999 issued by the Deputy Commissioner of Income Tax, Central Circle-11, Mumbai, issued to the Petitioner under Section 142(1) of the Act, in connection with assessment proceedings for Assessment Year 1997-98 should be made part of the record, to support the contention that in-fact the issue with regard to the claim of depreciation on the assets purchased from two entities, namely M/s. Gremach CNC Limited and M/s. Technology Plastics Limited, had been enquired into by the then Assessing Officer in a scrutiny proceedings for the

assessment year, we directed the revenue to file an affidavit with regard to the authenticity and genuineness of the communications relied upon by the Petitioner, who had then produced the same across the bar to answer our query. Time was granted to the Respondent to file its affidavit-in-reply till 07.12.2022.

On 06.12.2022, the Petitioner filed an affidavit supporting the production of copies of the communication dated 21.09.1999 of Deputy Commissioner of Income Tax, Central Circle 11, Mumbai, to the Petitioner calling for information under Section 142(1) of the Act for the Assessment Year 1997-98, which included requirements to furnish copies of the bills for addition fixed assets during the year under consideration alongwith the agreement for lease transactions and hire purchase entered into parties. Under the same affidavit, the Petitioner has also produced an order dated 26.03.2008 of the Tribunal for the Assessment Year 1996-97 to substantiate its contention that all disclosures for that relevant year had been made before the Assessing Officer, consequently, prompting the Tribunal to allow the Petitioner's

appeal and quash the reopening of assessment for that year.

No counter affidavit denying this factual position has been filed by the revenue before us. We have proceeded with the hearing of the matter on the basis of these uncontroverted facts.

5. We have heard Mr Ajaykumar R. Singh, learned Counsel for the Petitioner and Mr Akhileshwar Sharma, learned Counsel for the Respondents. We have perused the record of the petition and the additional affidavit of the Petitioner.

6. It is the Petitioner's contention that it filed its return of income for the previous year ended 31.03.1997 relevant to the Assessment Year 1997-98 on 01.12.1997, in which it disclosed two transactions with M/s. Gremach CNC Limited and M/s. Technology Plastics Limited, being sale and lease back transactions of machinery, on which it had claimed depreciation @ 100%, alongwith lease rental income on such assets from these two entities. It is further the case of the Petitioner that after the return was processed under Section 143(1)(a) of the Act, the case was taken up for scrutiny by the revenue by

issuing notice under Section 143(2) of the Act; That during the course of assessment, various information including details of the sale and lease back transactions of these two entities were called for by the revenue, which were furnished in the form of complete information by producing the relevant documents under cover of letter dated 24.01.2000 and letter dated 01.03.2000; That thereafter, the assessment for the year 1997-98 was completed in terms of Section 143(3) of the Act by an order dated 31.03.2000 allowing the depreciation claimed by the Petitioner on the assets purchased by it under the sale and lease back transactions.

That thereafter on 22.03.2004, the revenue issued a notice under Section 148 of the Act, claiming that some income of the Petitioner had escaped assessment and called upon the Petitioner to file a return, which the Petitioner did on 08.09.1998 without prejudice to its contention that reopening of assessment was impermissible. It is the Petitioner's submission that when the Respondent No.1 furnished reasons for issuing notice under Section 148 of the Act, under cover of letter dated 25.08.2004, the reasons disclosed that the claim of

100% depreciation made in the Assessment Year 1997-98 related to purchase of assets from the said M/s. Gremach CNC Limited and M/s. Technology Plastics Limited, and it was alleged that for the Assessment Year 1996-97, the Petitioner had entered into similar transactions, which were found to be a paper transactions, on which it claimed 100% depreciation. The revenue claimed that such depreciation was disallowed under Section 143(3) read with Section 147 of the Act, and on that count, proposed to reopen assessment for the year 1997-98.

7. The Petitioner further submits that in view of the judgment of the Hon'ble Supreme Court in ***GKN Driveshafts (India) Limited Vs. ITO, reported in (2003) 259 ITR 19 (SC)***, issuance of notice under Section 148 of the Act, for reopening of assessment was untenable on the basis that the parties with whom the sale and lease back transactions were entered into in the year 1996-97 were different from the parties with whom similar transactions were entered into during the Assessment Year 1997-98, and as such there was no ground for reopening of assessment as the same was beyond the period of four years from the end of the relevant Assessment Year. It was further the

Petitioner's contention that the assessee had not failed to disclose all material facts in previous assessment years, where all material and transactions were before the Assessing Officer disclosed truly and fully, and as such, the reopening of assessment after four years, was without any jurisdiction vested in the Assessing Officer. All these contentions were raised in the reply dated 22.09.2004 filed by the Petitioner to the notice for reopening of assessment.

8. It is further the contention of the Petitioner as raised in its additional affidavit dated 06.12.2022, that the revenue had issued a notice under Section 142(1) of the Act, on 21.09.1999 during original assessment proceedings for Assessment Year 1997-98, pursuant to which the Petitioner had filed submissions *vide* its letter dated 23.01.2000 and its letter dated 01.03.2000 submitting complete information about the sale and lease back transactions with M/s. Gremach CNC Limited and M/s. Technology Plastics Limited; Further that the reopening is now based on reassessment proceedings for the Assessment Year 1996-97, in which an order dated 30.03.2005 passed by the Assessing Officer has been quashed by the

Tribunal *vide* its order dated 26.03.2008, by holding the sale and lease back transactions for that year with M/s Krishna Vinyl Ltd. and M/s Krishna Organochem Ltd., had been considered in past assessments and there was no room for reassessment proceedings for that year. As noted by us, this fact has not been controverted by the Respondent.

9. The Petitioner then submits that its objections dated 22.09.2004 and 24.02.2005 to the impugned notice were disposed of by the impugned order dated 04.03.2005 rejecting the objections, which is impugned herein on the basis of above submissions. It is the Petitioner's submission that the impugned order is contrary to law and continuation of reassessment proceedings against the Petitioner for Assessment Year 1997-98 are completely without jurisdiction, void, non-est and illegal, and therefore, such action is arbitrary in violation of Article 14 of the Constitution of India.

10. In support of its contentions, the Petitioner has cited the judgments of this Court in ***Hindustan Lever Ltd. ..V/s.. R. B. Wadkar, Assistant Commissioner of Income-Tax and others***, reported in ***Vol. 268 ITR 332***, ***Jainam Investments ..V/s..***

Assistant Commissioner of Income Tax, (Writ Petition No.2760 of 2019 dated 24.08.2021), Ananta Landmark Pvt. Ltd. ..V/s.. Deputy Commissioner of Income-Tax and others, reported in ***(2021) 439 ITR 168 (Bom)*** and ***Purity Techtextile Private Limited ..V/s.. Assistant Commissioner of Income-Tax and another***, reported in ***(2010) 325 ITR 459 (Bom)***, to buttress the argument that the expressions "reason to believe" in Section 147 of the Act, to mean that the Assessing Officer would be required to mention enough details of tangible material which is new and not already disclosed in earlier assessments, to enable the Assessing Officer to cross the bar laid down in that provision.

11. On the other hand, Mr Akhileshwar Sharma, learned Counsel appearing for the Respondents supports the impugned order and argues that the material relied upon by the Assessing Officer to invoke Section 147 of the Act, was justified as the material relied upon had not been previously disclosed by the Petitioner in earlier assessments for the relevant years, and hence, reopening of assessment was justified.

12. This Court in Hindustan Lever Ltd. ..V/s.. R. B.

Wadkar, Assistant Commissioner of Income-Tax and others, dealt with the reasons recorded by the Assessing Officer. The relevant paras of the judgment are quoted as under :

> *"20. In the case in hand it is not in dispute that the assessment year involved is 1996-97. The last date of the said assessment year was March 31, 1997, and from that date if four years are counted, the period of four years expired on March 1, 2001. The notice issued is dated November 5, 2002, and received by the assessee on November 7, 2002. Under these circumstances, the notice is clearly beyond the period of four years.*
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> *21. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must*

> *be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced.*
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> ***22.*** *Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of the proviso to Section 147 of the Act, the Assessing Officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under Section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside."*

13. In Jainam Investments ..V/s.. Assistant Commissioner of Income Tax (supra), this Court has extensively dealt with the expression "reason to believe" in Section 147 of the Act and the manner in which the Assessing Officer is required to indicate with fair clarity the material that he relies upon which forms the basis for proceeding with reopening of assessment. Para 16 of the judgment reads thus :

> *"16 The Assessing Officer was aware of the fact that the script of Shreenath was allegedly a penny*

> *stock company as it is clear from the annual information report given by the Assessing Officer himself to petitioner alongwith the first notice. Therefore, there is no question of any further information on the same issue being treated as information so as to justify the reopening of the assessment. The expression "reason to believe" in Section 147 of the Act has been held to mean a cause or justification. It is also the position that at the stage when the Assessing Officer reopens an assessment, it is not necessary that the material before the Court should conclusively prove or establish that income has escaped assessment. But that does not mean that the Assessing Officer will not even mention enough details of tangible material that he has received for him to reopen the assessment. A general and bald statement, as stated in the reasons for reopening that Kolkata Investigation Wing have analyzed the trade data of identified 84 penny stocks and there are 13 penny stocks in which petitioner is found to be involved, has been made, is not enough. The Assessing Officer should have atleast indicated the details of the material that he had received and when he received."*

14. In Ananta Landmark Pvt. Ltd. ..V/s.. Deputy Commissioner of Income-Tax and others (supra), this Court dealt with jurisdiction of the Assessing Officer to issue a notice under Section 148 of the Act and in dealing with the provisions of sub-section (1) of Section 142 and Section 147 of the Act, has held thus :

> *"8. It is settled law that where the assessment is sought to be reopened after the expiry of a period of four years from the end of the relevant year, the proviso to Section 147 stipulates a requirement that*

there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Since in the case at hand, the assessment is sought to be reopened after a period of four years, the proviso to Section 147 is applicable.

It is also settled law that the Assessing Officer has no power to review an assessment which has been concluded. If a period of four years has lapsed from the end of the relevant year, the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been a failure to fully and truly disclose material fact. After a period of four years even if the Assessing Officer has some tangible material to come to the conclusion that there is an escapement of income from assessment, he cannot exercise the power to reopen unless he discloses what was the material fact which was not truly and fully disclosed by the assessee. If we consider the reasons for reopening, except stating in paragraph 3 that a sum of Rs.7,66,66,663/- which was chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary, there is nothing else in the reasons. In an unreported judgment of this Court in First Source Solutions Limited v. The Asst. CIT [2021] 438 ITR 139 (Bom); (Writ Petition No.2762 of 2019 dated August 31, 2021) relied upon by Mr. Pardiwalla, the Court held that a general statement that the escapement of income is by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment is not enough. The Assessing Officer should indicate what was the material fact that was not truly and fully disclosed to him. In the affidavit in reply, it is stated that the reassessment proceedings was based on audit objections. In another unreported judgment of this Court in Jainam Investments v. Asst. CIT [2021] 439 ITR 154 (Bom); Writ Petition No.2760 of 2019 dated August 24, 2021 relied upon by Mr. Pardiwalla, it is held that the reasons for reopening an assessment should be that of the Assessing Officer

> *alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. In Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC), also relied upon by Mr. Pardiwalla, the court held that in every case, the Income-tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has come to his notice he can reasonably believe that income had escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. Therefore, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income-tax Officer.*
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> *12. As regards ground No. (iii) that the Assessing Officer had not made any discussion in respect of those points on which assessment is reopened and hence, he has not formed any opinion and thus, the window of reopening of assessment will remain open for Assessing Officer on those points, these are also not the grounds in the reason for reopening. The entire case of respondent while issuing reasons for reopening is "failure to disclose truly and fully material facts".***"**

15. In Purity Techtextile Private Limited ..V/s.. Assistant Commissioner of Income-Tax and another (supra), this Court considered the jurisdictional conditions to be fulfilled under Section 147 of the Act in the formation of the belief by the Assessing Officer that income chargeable to tax had escaped assessment. Whilst dealing with the question of the bar of limitation of four years, this Court has held as under :

"12. Section 147 provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 163 assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. Under the first proviso, where an assessment has been made under sub-section (3) of section 143 or section 147 for the relevant assessment year, no action can be initiated under section 147 after the expiry of four years from the end of the relevant assessment year unless the income chargeable to tax has escaped assessment by reason of the failure of the assessee, inter alia, to disclose fully and truly all material facts necessary for his assessment, for that assessment year. The jurisdictional condition under section 147 is the formation of belief by the Assessing Officer that income chargeable to tax has escaped assessment for any assessment year. The reasons which are recorded by the Assessing Officer are crucial and it is on the basis of those reasons alone that the validity of the order reopening an assessment has to be decided. Where an assessment has been made under section 143(3), action can be initiated after the expiry of four years from the end of the relevant assessment year if the income chargeable to tax has escaped assessment because of the failure of the assessee to make fully and truly a disclosure of the material facts. The provisions of section 147 have been interpreted in a recent judgment of the Supreme Court in CIT v. Kelvinator of India Limited [2010] 320 ITR 561. The Supreme Court noted that after April 1, 1989 the power to reopen is much wider than earlier since the substantive part of section 147 only imposes one condition, namely, that the Assessing Officer must have reason to believe that income has escaped assessment. The Supreme Court held that none the less, a mere change of opinion would not justify the exercise of the power to reopen an assessment and there must be tangible material before the Assessing Officer to come to the conclusion that income has escaped assessment. The Supreme Court held thus

(page 564) :

> *". . . one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an inbuilt test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."*

Purity Techtextile Private Limited ..V/s.. Assistant Commissioner of Income-Tax and another (supra), whilst referring to the judgment of the Hon'ble Supreme Court rendered in ***CIT ..V/s.. Kelvinator of India Limited , reported in [2010] 320 ITR 561***, has held that it is only when the Assessing Officer records reasons which are based upon specific information, which constitutes the assessee's failure to make full and true disclosures of those material facts, that the revenue can assume jurisdiction under Section 147 to reopen

assessment.

16. Keeping these principles laid down by this Court in the afore quoted judgments in mind, we proceed to examine the legality of the impugned order.

It is clear from the order in appeal passed by the Tribunal for the Assessment year 1996-97, that the reopening proceedings for that year had been set aside for reasons that the two transactions of sale and lease back with M/s Krishna Vinyl Ltd. and M/s Krishna Organochem Ltd., had been in-fact disclosed with enough detail for that relevant Assessment Year. The Tribunal has further held that the reasons recorded by the Assessing Officer for issuing a reopening notice being information received from the Deputy Commissioner of Income Tax, which revealed that the said two transactions were not genuine would not be sustained as those two transactions in-fact formed part of the earlier assessment orders and depreciation had been claimed and allowed in the earlier assessment order. The Tribunal concluded that the reassessment proceedings are liable to quashed for the Assessment Year 1996-97. In their replies, the Petitioner has

specifically raised the contention that for the Assessment Year 1997-98, the assessee had entered into similar transactions with two other entities and that there was no allegation of non disclosure of primary facts in the notice nor was there any allegation that there was some new source of income, which had come to light to make the Assessing Officer believe that there was escapement of taxable income. In fact it is clear that the parties with whom the sale and lease back transactions were entered into by the Petitioner for the year 1996-97, were clearly different from the ones with whom similar transactions were entered into for the Assessment Year 1997-98, in which depreciation allowance was granted after detailed scrutiny. The Petitioner has produced before us the letter dated 21.09.1999 in reply to earlier notice under Section 142(1) of the Act, issued for reopening the Assessment Year 1997-98, wherein they were called upon to furnish the copies of bills for addition to fixed assets during that year and to furnish the copy of the agreement for lease transactions and hire purchase entered into the parties, which were in-fact furnished to the revenue, which granted the depreciation in the assessment order for that year.

17. From the above facts, we conclude that the Petitioner had disclosed all material facts for the Assessment Year 1997-98 including the transactions now referred to in the impugned notice under Section 148 of the Act. There was thus no foundational fact at all disclosed in the notice issued by the Respondent No.1 - Deputy Commissioner of Income Tax, Circle 2(2), Mumbaim to assume jurisdiction to reopen the case of the Petitioner for Assessment Year 1997-98, more so to get over the bar of limitation of four years. The objections raised by the Petitioner in its reply dated 22.09.2004, that the reasons cited in the notice dated 22.03.2004 issued by the Respondent No.1 that the reopening was based upon a change of opinion without there being any sufficient cause for arriving at that conclusion is justified and correct. The reasons cited for rejection of the objections in the impugned order dated 04.03.2005, namely the reference to the specific transactions of sale and lease back for the Assessment Years 1996-97 and 1997-98 clearly do not constitute material to justify reopening of the assessment. As held in the judgments of this Court quoted above, the notice must stipulate that there was a failure on the part of the assessee to disclose fully and truly material

facts necessary for its assessment and discovery of such new material, details of which are required to set out in the notice could be the only material to form the basis for assuming jurisdiction under Section 147 of the Act. In the present case, there is clearly a failure on the part of the Assessing Officer to set out such material that provided the basis for assumption of jurisdiction under Sections 147 and 148 of the Act. Such material not being available in the notice, the impugned notice dated 22.03.2004 is clearly without jurisdiction and the same is unsustainable. Consequently, the order dated 04.03.2005 rejecting the objections of the Petitioner is also unsustainable.

18. Accordingly, we proceed to quash and set aside the impugned notice dated 22.03.2004 and order dated 04.03.2005 impugned in the present case.

19. Rule is made absolute in terms of prayer Clauses (a) and (b). No costs.

(VALMIKI SA MENEZES, J.) (DHIRAJ SINGH THAKUR, J.)

TAMBE.