



R/SPECIAL CIVIL APPLICATION NO. 6517 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK

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Approved for Reporting	Yes	No

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SURAT MANAV SEVA SANGH
Versus
EMPLOYEES STATE INSURANCE CORPORATION

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Appearance:

MR DIPAK R DAVE(1232) for the Petitioner(s) No. 1

MS DIMPLE A THAKER(6838) for the Respondent(s) No. 1

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**CORAM: HONOURABLE MR. JUSTICE HEMANT M.
PRACHCHHAK**

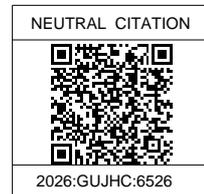
Date : 21/01/2026

ORAL JUDGMENT

1. Present petition is filed by the petitioner - Surat Manav Seva Sangh under Article 226 & 227 of the Constitution of India read with the provisions of the Employees' State Insurance Act, 1948 (hereinafter be referred to as "*the Act*") against the order dated 22.12.2017 passed under Section 45A of the Act as also the order dated 07.03.2018 passed under Section 45AA of the Act and the consequential show-cause notices each dated 21.01.2020 issued by the respondent herein for recovery of the dues towards damages and interest as determined by the respondent.

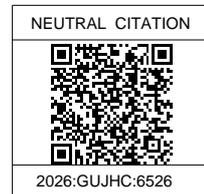
2. Facts giving rise to present petition in nut-shell are as under :-

2.1 That, the petitioner is a registered Trust under the provisions of



the Bombay Public Trust Act and is not doing any profit making activity but, is doing social welfare activity. That, the petitioner is giving free of cost food, education, shelter etc. to the needy and deserving persons in the society. That, the petitioner also runs medical activities and is committed to serve the down-trodden and poor people of the society.

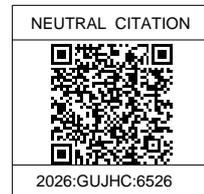
2.2 As a part of its charitable activity, petitioner has executed Memorandum of Understanding for the purpose of establishing pathology laboratory center in the premises of New Civil Hospital, Surat. That, the agreement has been executed between the petitioner and New Civil Hospital, Surat on 21.01.2011. As a part of the agreement, petitioner has constructed laboratory at the second floor of the existing MRI Center at New Civil Hospital, Surat. That, the petitioner has agreed to provide pathology laboratory services, M.R.I and dialysis center to the patients of civil hospital only at 50% less than the market rate. That, every day five patients as recommended by the civil hospital are provided pathological tests free of cost. That, as per the avowed object of the petitioner, citizens registered as poor patients having BPL card besides the above free of cost five patients, without any cap, are being provided free tests as referred by the Medical Superintendent. That, the petitioner does not provide independent pathology services but the pathological laboratory is solely attached to New Civil Hospital, Surat. It does not admit and/or conduct tests on the patients without reference to the Medical Superintendent and only those patients who are referred by the doctors either as indoor or outdoor, are diagnosed at pathology laboratory. That, the petitioner runs laboratory mainly on the basis of donations it received through the Trust and no profit is being made by



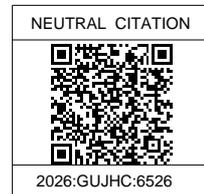
the petitioner out of the activity. On the contrary, petitioner shall have to put in huge funds through donations for the purpose of providing pathological services at half the market rate or free of cost, as the case may be. That, petitioner also provide free of cost food to the patients admitted in the civil hospital.

2.3 It is the case of the petitioner that, after the first execution of Memorandum of Understanding, further extension of Memorandum of Understanding came to be executed on 22.05.2015 on the same terms and conditions except some minor modifications. That, the petitioner has also executed Memorandum of Understanding for the purpose of dialysis for the patients admitted in the New Civil Hospital, which is provided free of cost to all the patients irrespective of their income. That, as per the the Act more particularly Section 1(5) of the Act, appropriate government shall have to notify the establishments which are covered from time-to-time under the provisions of the Act. So far as State of Gujarat is concerned, appropriate government i.e. State of Gujarat, has thought it fit not to include medical and educational institutions for the implementation of the Act and therefore, the Act is not applicable to New Civil Hospital, Surat.

2.4 It is the case of the petitioner that, on 26.11.2014 one Enforcement Officer from the office of the respondent visited the pathology laboratory center of the petitioner and instructed the person who was in charge of administration to fill Form I under the Act and it was conveyed to the petitioner that since the petitioner is covered under the Act and is not complying with the provisions of the Act, trustees shall be prosecuted under the Act if the petitioner does not accept the coverage. Accordingly, petitioner was compelled to fill



Form I on 26.11.2014 and on the same day itself, petitioner was issued code number. That, on 10.07.2015 petitioner was issued notice under Section 45A of the Act by which, calling upon the petitioner to pay the dues of ESI contribution right from August, 2010 until April, 2015. That, the petitioner pointed out to the respondent that without any authority such show-cause notice was issued and also contested the claim of the respondent. That, after 2-3 formal meetings, in pre-determined manner, the respondent passed an order on 22.12.2017 whereby, the respondent assessed contribution of Rs.03,29,145/- for the period from 01.12.2012 to 31.03.2014. That, though the petitioner pointed out to the authority that as such the petitioner is not covered under the provisions of the Act and it is providing hospital services, however, without any application of mind, without giving any finding; the respondent passed order under Section 45A of the Act. That, the petitioner preferred appeal before the respondent Director under Section 45AA of the Act after depositing 25% amount. In appeal also, without considering any aspect, mechanically, order passed under Section 45A came to be confirmed. No finding worth the name as to how and why the petitioner should be covered under the Act was recorded, and straightway, order dated 07.03.2018 came to be passed. The petitioner, at the relevant time, as law abiding citizen, paid deficit amount of Rs.02.46,845/-. That, just to harass the petitioner, in absolute illegal and mechanical manner, after a period of several years, show-cause notice was issued against the petitioner *inter alia* calling upon the petitioner to pay Rs.1,78,943/- towards interest under Section 39(5) read with Regulation 31A of the Act. Similarly, another show-cause notice was issued against the petitioner *inter alia* calling upon the petitioner to pay Rs.2,67,373/- towards damages under Section 85B read with Regulation 31C of the Act.

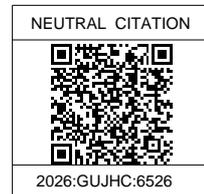


That, the petitioner therefore, felt harassed because of one-after-another proceedings and in fact is being harassed, has no option but to approach this Court challenging the illegal coverage of the petitioner made under the Act as also show-cause notices issued seeking damage and interest from the petitioner.

3. Being aggrieved by and dissatisfied with the illegal/arbitration action on part of the respondent as also two show-cause notices dated 21.01.2020 each issued by the respondent, the petitioner has preferred the present petition.

4. Heard Mr. Dipak R. Dave, learned counsel appearing for the petitioner-Trust and Ms. Dimple A. Thaker, learned counsel appearing for the respondent E.S.I. Corporation.

5. Learned counsel Mr. Dave has submitted that the impugned orders passed by the concerned authorities are illegal, unjust, arbitrary, erroneous and contrary to the facts and material on record and the provisions of the Act and therefore, are required to be quashed and set aside. He has submitted that the petitioner is a charitable trust and is not earning anything but in fact, out of the donations received from citizens of the country, noble petitioner cater the needs of poor and down-trodden people of the society and thus, the aim and object for which the petitioner conducts its affairs and the fact that the activity of Civil Hospital is outsourced to the petitioner, petitioner could not have been covered under the Act. He has submitted that the petitioner is being harassed constantly and one-after-another proceedings are being initiated against the petitioner without there being any fault on part of the petitioner. He has



submitted that after several years, now show-cause notices have been issued calling upon the petitioner to pay damages and interest, which are not only contrary to the provisions of the Act but, also on the face of it, pre-determines the entire subject matter. He has further submitted that from the facts obtaining on the record of this case, petitioner could not have been covered under the Act and even after coverage, petitioner cannot be asked to pay from the back date and thus, without any reason and without identifying the employees and beneficiaries under the Act, illegal orders under Sections 45A and 45AA of the Act have been passed.

5.1 Learned counsel Mr. Dave has submitted that the provisions of the ESI Act itself are not applicable as the petitioner being a charitable trust are running pathology laboratory and also providing facility of dialysis to the patients under the provisions and guidance of the Civil Hospital after entering into Memorandum of Understanding with Civil Hospital, Surat. He has submitted that looking to the definition of 'factory' under the provisions of Section 2(12) of the Act, the activities carried out by the petitioner do not fall under the definition of 'factory' because, the petitioner is not manufacturing or running any establishment but, the activities carried out by the petitioner fall under health and medical facility and under the category of 'hospital' and that was the contention raised before the concerned authority at the time of hearing, however, the concerned authority without considering the same has passed the mechanical order under Section 45A of the Act and subsequently under Section 45AA of the Act and on the basis of that, the respondent-Corporation has issued show-cause notices for recovery of the due amount towards contribution alongwith penalty without giving proper



opportunity to the petitioner. He has submitted that the petitioner has produced all the relevant documents before the respondent but, the respondent has just mentioned in the order that some loose papers were produced and no other relevant material was produced by the petitioner and thus, the respondent-Corporation has passed the order in a mechanical manner, which is erroneous, illegal and unjust. He has further submitted that a quasi-judicial authority while passing any order must record reasons in support of its conclusions but, herein the present case, on perusal of the order dated 22.12.2017 passed under Section 45A of the Act, which was confirmed in appeal by the appellate authority while exercising jurisdiction under Section 45AA of the Act no such reasons are recorded and therefore, under such circumstances, both the orders passed by the concerned authorities are in complete violation of the settled principles of law and in complete breach of the decision of the Hon'ble Apex Court rendered in case of **Kranti Association Pvt. Ltd. and Anr. v. Masood Ahmed Khan and Others**, reported in **[2010] 9 SCC 496**, more particularly, the observations made in paras-15 to 42, and under such circumstances, learned advocate Mr.Dave has urged that the present petition be allowed and the matter be remanded back to the concerned authority for deciding the issue afresh.

6. On the other hand, learned counsel Ms. Thaker appearing for the respondent-Corporation has raised serious objections with regard to the maintainability of the present petition and submitted that since there is alternate efficacious remedy available under the law, the present petition may not be entertained. In support of her submissions, learned counsel Ms. Thaker has submitted written submissions contending therein that the petition is not maintainable



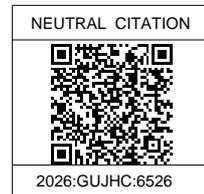
in law in view of the express statutory scheme under Section 75 of the ESI Act. She has submitted that the prayers sought by the petitioner relating to applicability, determination of contribution and consequential liabilities can be adjudicated exclusively by the Employees' State Insurance Court and by no other forum and despite the availability of an efficacious statutory remedy, the petitioner consciously failed to invoke Section 75 for several years, even while enjoying interim protection during the pendency of the present writ petition. She has submitted that the request made by the learned counsel Mr. Dave for remand is casual, belated and mala fide and made only with a view to frustrate the object and purpose of the ESI Act. She has submitted that the petitioner has already availed the statutory proceedings under Sections 45-A and 45-AA and has failed to produce any material to disprove the assessment of contribution, and now seeks, in the year 2026, a remand which would compel the Corporation to re-exercise powers that have become statutorily barred by limitation under Section 45-A(2) and such a course would confer an undeserved advantage upon the petitioner of evading statutory contribution merely by prolonging litigation. She has submitted that the Corporation, having exhausted its statutory jurisdiction and having become *functus officio*, cannot be directed to reopen concluded proceedings. What is impermissible directly under the statute cannot be permitted indirectly through the writ jurisdiction. A writ petition which itself is not maintainable cannot be used as a device to defeat statutory liability by seeking a remand barred in law.

6.1 Learned counsel Ms. Thaker has further submitted that Section 75(3) of the ESI Act expressly bars the jurisdiction of all other courts,



including the writ court, in respect of matters which are required to be decided by the Employees' Insurance Court under Section 75. Once the statute mandates adjudication by a specialized forum and creates an express bar, recourse to Article 226 for determination of such issues is jurisdictionally impermissible, except in cases of patent lack of jurisdiction or violation of fundamental principles of natural justice, none of which are pleaded or made out in the present case. She has submitted that it is settled law that writ jurisdiction under Article 226 ought not to be exercised where the statute provides an efficacious and exclusive alternative remedy, particularly in matters arising under the ESI Act. She has submitted that Section 75(2B) of the ESI Act mandates deposit of 50% of the amount claimed as a condition precedent for entertaining any application before the Employees' Insurance Court and the petitioner has consciously and deliberately avoided the statutory forum under Section 75 solely with a view to evade compliance with this mandatory pre-deposit requirement, and has instead invoked the extraordinary jurisdiction of this Court under Article 226 and such conduct of the petitioner amounts to a clear abuse of the writ jurisdiction and on this ground alone the petition is required to be dismissed. She has further submitted that it is a settled principle of law that writ jurisdiction cannot be used as a device to bypass or dilute statutory conditions attached to an efficacious alternative remedy. A litigant who deliberately avoids statutory obligations, including mandatory deposits, cannot seek equitable relief under Article 226 of the Constitution of India. Entertaining such petitions would defeat the legislative intent and undermine the statutory scheme of the ESI Act.

6.2 Learned counsel Ms. Thaker has further submitted that the



order passed under Section 45-A is dated 22.12.2017, and the appellate order under Section 45-AA is dated 07.03.2018, however, the petitioner approached this Court only in the year 2020, that too after participating in the statutory proceedings, suffering adverse determinations, depositing contribution in part, and continuing compliance under the ESI Act. She has submitted that such conduct of the petitioner clearly amounts to acquiescence, waiver and acceptance of statutory coverage under the ESI Act, and it is settled law that writ jurisdiction cannot be invoked to unsettle proceedings which have attained statutory finality, particularly after the petitioner has acted upon and complied with the impugned orders, and thus, the petition is liable to be dismissed on the ground of delay and laches alone. She has further submitted that interest and damages under the ESI Act are statutory and consequential liabilities which automatically flow from delayed payment of contribution and once the liability to pay contribution is determined and upheld under the Act, the levy of interest and damages does not require any separate adjudication on merits, as the same arises by operation of law under Section 85-B of the ESI Act read with Regulation 31-C of the ESI (General) Regulations, 1950 and therefore, the notices impugned in the present petition are purely consequential statutory notices, issued for recovery of amounts legally due, and do not give rise to any independent cause for invoking writ jurisdiction. She has further submitted that the orders passed under Sections 45-A and 45-AA of the Act have admittedly attained finality, having never been challenged before the Employees' Insurance Court under Section 75 of the Act, and once the foundational determination of contribution has become final and binding, the employer cannot indirectly assail the consequential levy of interest and damages by invoking writ



jurisdiction under Article 226. Such an attempt amounts to circumventing the statutory scheme of the Act and is impermissible in law. She has submitted that having accepted and deposited the principal contribution, the petitioner cannot selectively challenge only the consequential liabilities.

6.3 Learned counsel Ms. Thaker has further submitted that the record clearly shows that inspection was conducted, show cause notice was issued, personal hearing was granted, detailed order under Section 45-A was passed, and statutory appeal under Section 45-AA was heard, and therefore, no case of denial of opportunity or jurisdictional defect is made out and thus, remand cannot be ordered merely because a contention was not accepted or discussed to the petitioner's satisfaction. Remand to give a second inning is impermissible in writ jurisdiction. She has submitted that the contention of the petitioner with regard to remand, that too at the stage of final hearing after keeping the writ petition pending for 6 years in High Court, is legally untenable and contrary to the scheme of the Act. She has further submitted that Section 45-A(2) places an express limitation on the Corporation's power to determine contribution beyond five years. The provision is reproduced here for ready reference :

"SECTION 45A : Determination of contributions in certain cases

(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Social Security Officer or other official of the Corporation referred to in sub-section (2) of section 45 is [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment:



[Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard;]

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrears of land revenue under section 45B [or the recovery under section 45C to section 45-I].]

"Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable."

6.4 Learned counsel Ms. Thaker has submitted that any remand today, after more than five years of pendency of the writ petition, would compel the Corporation to re-exercise a power which the statute now prohibits. A writ court cannot direct a statutory authority to act contrary to the statute. She has further submitted that remand in the present case would nullify Section 45-A(2), defeat statutory limitation, reward delay caused during pendency of litigation and thus, what is directly barred by statute cannot be achieved indirectly through remand. She has submitted that remand would amount to abuse of article 226 since Article 226 is meant to advance legality, not to obliterate statutory limitations, reopen concluded proceedings, or permit tactical delay to defeat statutory consequences and thus, granting remand in the present case would set a dangerous precedent where employers can stall proceedings, enjoy interim protection, and later seek remand to invoke limitation and such exercise of writ jurisdiction would be contrary to constitutional discipline and legislative intent. She has submitted that remand today would require the Corporation to act contrary to Section 45-A(2); a constitutional court cannot direct a statutory authority to do what the statute forbids.



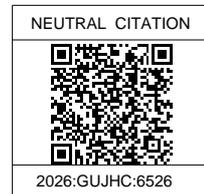
6.5 In support of her submissions, learned counsel Ms. Thaker has referred and relied upon the following decisions :

[I] **Jamnagar Municipal Corporation v. Regional Director, ESIC, 2006 (2) GLR 1391** (paras 13, 15 and 16), wherein this Court has categorically held that when a remedy under Section 75 of the ESI Act is available, recourse to writ jurisdiction is impermissible, and the petition deserves dismissal on the ground of statutory bar alone.

[II] **Employees' State Insurance Corporation v. Nagar Nigam, Allahabad, AIR 2024 SC 3011** (paras 24 and 25), wherein the Hon'ble Supreme Court has held that the High Court ought not to have exercised writ jurisdiction in the face of an adequate statutory remedy under the ESI Act.

[III] **M/s Accurate Labs v. Employees' State Insurance Corporation** (para 4), in Special Civil Application No. 13879 of 2020 wherein, this Court has reiterated that disputes relating to coverage and contribution must be adjudicated before the Employees' Insurance Court under Section 75, and not in writ proceedings.

6.6 Learned counsel Ms. Thaker has thus emphasized that in view of the above binding precedents, the present petition is liable to be dismissed as not maintainable and deserves dismissal and the interim relief granted earlier deserves to be vacated and no order of remand can be passed in law or on facts, if the petitioner, if aggrieved, must be relegated to the statutory remedy under Section 75 of the ESI Act and the petition, therefore, deserves to be dismissed with costs.



7. I have heard the learned counsel appearing for the respective parties and perused the material placed on record. I have also gone through the orders under challenge passed by the concerned authorities and also the show-cause notices issued by the respondent-Corporation. Considering the facts of the present case, the legal provisions of Section 2(12) of the Act is required to be looked into, whereby, a 'factory' is defined. Section 2(12) of the Act reads thus :

Section 2(12) : "factory" means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a railway running shed ;]

7.1 From the bare perusal of the definition of 'factory', it appears that *prima facie* the activities carried out by the petitioner Trust does not fall under the provisions of Section 2(12) of the Act and though this fact was proved by the petitioner before the respondent authority by leading cogent material, however, without considering the same the respondent authority has passed a mechanical order. On perusal of the order passed under Section 45A of the Act, it appears that it was not a speaking order passed by the respondent authority. Even while going through the order passed under Section 45AA of the Act, it appears that there was no justifiable reasons recorded by the appellate authority while passing the order and thus, in mechanical manner, the order was passed by the concerned authority.

7.2 At this juncture, the definition of 'factory' and 'manufacturing process' as defined under the provisions of the Factories Act, 1948 are required to be looked into, which read thus :



2(k) “manufacturing process” means any process for—

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal; or

(ii) pumping oil, water, sewage or any other substance; or

(iii) generating, transforming or transmitting power; or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or

(vi) preserving or storing any article in cold storage;

2(m) “factory” means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

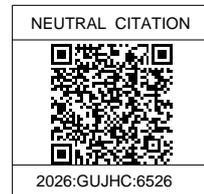
(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place.

Explanation I.—For computing the number of workers for the purposes of this clause all the workers in [different groups and relays in a day shall be taken into account;]

Explanation II.—For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;

7.3 Thus, the definition of ‘factory’ as defined under Section 2(12) of the ESI Act is required to be read alongwith Section 2(m) and 2(k) of the Factories Act, 1948, and in view of definition of ‘factory’ as



defined under different Acts, the petitioner Establishment does not fall under the definition of 'factory'.

8. So far as the decision referred and relied upon by the learned counsel Ms. Thaker in case of **M/s Accurate Labs (Supra)** in Special Civil Application No. 13879 of 2020 is concerned, now, it is well settled by the Hon'ble Apex Court in case of **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others reported in [1998] 8 SCC 1**. The relevant observation made in par-15 reads as under :

"15. Under Article 226 of the Constitution of India, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

8.1 Recently, this Court has considered and rendered the decision in case of **A.I. Desai vs. C.V. Som, IAS or His Successor in Office & Ors.**, in Special Civil Application No.8791 of 2008, more particularly the observations made in para-11. Even the order passed by this Court in First Appeal No.68 of 2007 is also required to be considered, more particularly the observations made in paras-11 to 14. Thus, considering the decision of the Hon'ble Apex Court as well as this Court as aforesaid, this Court is of the opinion that the present petition is required to be remanded back to the concerned authority for deciding the issue afresh.



9. In the result, the present petition is hereby partly allowed. The impugned orders under challenge as well as two show-cause notices each dated 21.01.2020 are hereby quashed and set aside. The matter is remanded back to the concerned respondent authority for deciding the issue afresh and the concerned respondent authority shall decide the same in accordance with law, after giving ample opportunity of hearing to all the concerned parties as expeditiously as possible. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

(HEMANT M. PRACHCHAK,J)

Dolly