IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 445 of 2004
With
CRIMINAL APPEAL NO. 1437 of 2004
AND
CRIMINAL APPEAL NO. 1438 of 2004

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI Sd/-
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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VIRJIBHAI MAVJIBHAI PATEL....Appellant(s)

Versus

STATE OF GUJARAT....Opponent(s)/Respondent(s)

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Appearance:

CRIMINAL APPEAL No.445 of 2004

MR MB PARIKH, ADVOCATE for the Appellant(s) No. 1

MS CM SHAH, APP for the Opponent(s)/Respondent(s) No. 1

CRIMINAL APPEAL No.1437 & 1438 of 2004

MS CM SHAH, APP for the Appellant(s) No. 1

MR MB PARIKH, ADVOCATE for the Opponent(s)/Respondent(s) No.1-2.

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 23/12/2015

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. All these appeals are preferred against judgment and order dated 4.3.2004 passed by learned Additional Sessions Judge, Amreli, in Sessions Case No.33 of 1994. By the said judgment, accused no.1 was convicted for offence punishable under Section 326 of the Indian Penal Code (for short, “IPC”) and ordered to undergo three years rigorous imprisonment with fine of Rs.5,000/- and, in default of payment of fine, further imprisonment of one month was imposed. Accused no.1 was also convicted for offence punishable under Section 135 of the Bombay Police Act and ordered to undergo four months rigorous imprisonment with fine of Rs.100/- and, in default of payment of fine, further simple imprisonment of five days was imposed. Accused nos.1 and 2 were acquitted of the charges of offence punishable under Section 504 read with Section 34 of IPC, while accused no.2 was acquitted from the charge of offence punishable under Section 307 read with Section 34 of IPC as well as Section 135 of the Bombay Police

Act. Being aggrieved by the impugned judgment, Criminal Appeal No.445 of 2004 is preferred by accused no.1 against his conviction, while Criminal Appeal Nos.1437 and 1438 of 2004 are preferred by the State for enhancement of sentence imposed upon accused no.1 and against acquittal of the accused persons from some of the charges levelled against them.

2. As all these appeals are arising out of the same judgment and since the evidence is common in all these appeals, the same are taken up for hearing together.

3. The case of the prosecution is that on 20.12.1993, when the complainant and one Dilubhai were passing near the house of the accused persons, the accused have started abusing them. The complainant asked them not to use such language. At that time, accused no.2 and two unknown persons started to give abuses to them and accused no.1 pointed a fire-arm towards them and, his son, accused no.2 was having dharia in his hand. At that time, one Pragji Virji has also reached the spot and inflicted dharia blow to the complainant. The complainant and other witness sustained injuries and they were taken to the hospital. The reason for the incident is

stated to be a previous quarrel with the relative of the complainant. With these allegations, complaint was filed with Vadiya Police Station being C.R.No.I-37 of 1993.

3.1 Upon filing of the complaint, investigation was carried out and the accused persons were arrested and charge-sheet was submitted in the Court of learned Magistrate. However, as the case was exclusively triable by the Court of Sessions, the same committed to Sessions Court. Thereafter, charges were framed against the accused persons. The accused pleaded not guilty and claimed to be tried.

3.2 During the trial, the prosecution had examined following witnesses;

Sr. No.	Name	Exh.
1	Jilubhai Jagubhai	7
2	Shaileshbhai Vrajlalbhai	9
3	Dhirajlal Shambhubhai	11
4	Sultan Husenbhai	13
5	Dr.Devshankar Jivrambhai Mehta	16
6	Dr.Mansukhlal Jivrajbhai Rathod	23
7	Dilubhai Suragbhai-Injured.	15
8	Harjibhai Parbatbhai Nandasana-IO.	35

3.3 The prosecution has also produced and relied upon following documentary evidence:-

Sr. No.	Description	Exh.
1	Original complaint of the complainant.	8
2	Panchnama of physical condition of the complainant.	10
3	Panchnama of the place of offence.	12
4	Panchnama of physical condition of the injured-Dilu Surag.	14
5	Certificate regarding injuries sustained by Dilu Surag.	17
6	Certificate regarding injuries of Jilu Jagubhai.	18
7	Report made by PSO, Vadiya to Medical Officer, PHC, Vadiya.	19
8	Report made by PSO, Vadiya to Medical Officer, PHC, Vadiya.	20
9	Case papers of Dilu Suragbhai.	21
10	Case papers of the complainant-Jilu Jagubhai.	22
11	Medical certificate of the complainant given by Medical Officer, Government Hospital, Rajkot.	24
12	Form of transfer of Jilu Jagubhai given by Medical Officer, Vadiya.	25
13	Medical certificate of the injured given by Medical Officer, Rajkot.	26
14	Form of transfer of Dilu Suragbhai given by Medical Officer, Vadiya.	27
15	X-ray plate of the injured-Dilu Surag.	28
16	Case papers of Rajkot hospital of the injured-Dilu Surag.	29
17	Case papers of Rajkot Hospital of the complainant-Jilu Jagubhai.	30
18	Yadi sent by Medical Officer, Vadiya to PSI, Vadiya.	36

19	Report dated 20.12.1993 of PSO, Vadiya Police Station.	37
20	DD of injured Dilu Suragbhai.	38
21	Notification of Additional District Magistrate.	40
22	Copy of extract of Rajkot Civil Hospital Police Chawki.	41
23	Extract of station diary.	42
24	FIR of Vadiya Police Station C.R.No.I-26/93.	43
25	Copy of extract of Vadiya Police Station Chapter Case No.68/93.	44
26	Copy of extract of Vadiya Police Station Chapter Case No.67/93.	45
27	Copy of extract of Vadiya Police Station Chapter Case No.66/93.	46
28	Copy of extract of Vadiya Police Station Chapter Case No.69/93.	47
29	Copy of extract of Station Diary dated 19.12.93 of Vadiya Police Station.	48
30	Copy of FIR of C.R.No.I-113/93 of Bhensan Police Station.	49
31	Copy of extract of Station Diary dated 20.12.93 of Rajkot Police Station.	50
32	Copy of FIR of C.R.No.I-36/93 of Vadiya Police Station.	51
33	Report of FSL, Junagadh.	52
34	Arrest panchnama of accused-Virji Mavjibhai.	53
35	Arrest panchnama of accused-Babubahi Virjibhai.	54

3.4 At the end of trial, the Court below recorded further statements of accused persons under Section 313 of Cr.P.C. and thereafter, passed the impugned judgment and order awarding the sentence, as aforesaid, and also acquitting the accused persons of some of the charges levelled against them.

Being aggrieved and dissatisfied with the impugned judgment of the trial Court, present appeals are preferred before this Court.

4. Mr.M.B.Parikh, learned advocate for the appellant-accused no.1 has taken us through the evidence and submitted that the impugned judgment and order is against the evidence on record. He submitted that the prosecution has failed to prove its case against the accused. He submitted that there are contradictions in the evidence of the prosecution witnesses and relying upon them accused no.1 could not have been convicted for the offence alleged against him. He also submitted that the injured witness had also attacked on Babubhai Virjibhai and a cross-complaint is filed by the accused no.1. He submitted that the injured witness has given different version before the police, in his evidence and before the doctor, therefore, he could not have been relied to convict the appellant. He also submitted that the complainant and the injured witness have not remained in the hospital for more than five days, and considering the nature of injuries, the trial Court has committed an error in convicting accused no.1 for offence under Section 326 of IPC. In this regard he has relied upon the definition of 'grievous hurt' which reads as under:-

"319. Hurt.--Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

320. Grievous hurt.--The following kinds of hurt only are designated as "grievous":-

First.-Emasculation.
Secondly.-Permanent privation of the sight of either eye.
Thirdly.-Permanent privation of the hearing of either ear.
Fourthly.-Privation of any member or joint.
Fifthly.-Destruction or permanent impairing of the powers of any member or joint.
Sixthly.-Permanent disfiguration of the head or face.
Seventhly.-Fracture or dislocation of a bone or tooth.
Eighthly.-Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

4.1 He further submitted that the injuries caused in the present case cannot be said to be grievous hurt, therefore, accused no.1 cannot be held guilty under Section 326 of IPC. He also submitted that accused no.1 is almost 102 years old at present and considering the fact that 22 years have passed after the incident, this Court may show some leniency towards the accused. He further submitted that if this Court finds the accused guilty of the offence, he is ready to pay some compensation to the victim. In this regard, he has pressed in service the decision of the Apex Court in ***"ANKUSH SHIVAJI GAIKWAD VS. STATE OF MAHARASHTRA"***, **2013 (6) SCALE 778** and decision of this Court in Criminal Appeal No.1552 of 2004, and submitted that as held therein, sub-

section (3) of section 357 of Cr.P.C. is empowering the Court to award compensation. In view of all these submissions, he prayed to allow this appeal.

5. On the other hand, Ms.C.M.Shah, learned APP appearing for the State has submitted that the order of conviction recorded against the appellant-accused no.1 is just and proper and she has supported the conviction recorded by impugned judgment. So far as Criminal Appeal No.1437 of 2004 is concerned, which is preferred for enhancement of sentence imposed on accused no.1, she has taken us through the evidence and contended that the trial Court has committed an error in imposing lesser sentence upon the accused inspite of voluminous evidence against him and contended that the trial Court ought not to have imposed such a lesser punishment. She also submitted that without appreciating the documentary as well as oral evidence available on the record of the case in its proper perspective, learned Judge has erred in imposing lesser punishment. She further submitted that the learned Judge has also erred in not properly appreciating the gravity of the offence committed by the accused while imposing the sentence and thereby committed grave error by imposing lesser punishment. She has taken us through the medical

evidence and submitted that it is a grievous hurt, therefore, sentence imposed upon the accused is required to be enhanced. She has taken us through the judgment and contended that since it is proved beyond reasonable doubt that the appellant-accused no.1 had caused injury, the sentence imposed upon the accused no.1 is not adequate and it is required to be enhanced. She also submitted that the trial Court has committed an error in not believing the version of the complainant and other witnesses and considering the medical evidence, sentence imposed upon him is required to be enhanced. She also submitted that the learned trial Judge has committed an error in taking lenient view while imposing sentence on accused no.1 and therefore, the sentence imposed is required to be enhanced. She also submitted that looking to the facts of the present case, when the prosecution has proved the case beyond reasonable doubt and when the learned Judge has also convicted the respondent-accused no.1, the learned Judge ought to have imposed appropriate sentence provided under the provision of IPC. Therefore, she submitted that Criminal Appeal No.1437 of 2004 may be allowed and the sentence imposed by the trial Court may be enhanced.

6. So far as Criminal Appeal No.1438 of 2004 is concerned,

which is preferred against acquittal of accused nos.1 and 2 from the charges of offence punishable under Section 504 read with Section 34 of IPC and acquittal of accused no.2 from the charges of offence punishable under Section 307 read with Section 34 of IPC as well as Section 135 of the Bombay Police Act, it is submitted by learned APP that acquittal is against law and evidence on record. She submitted that the learned Judge has erred in appreciating the evidence of the prosecution witnesses wherein the prosecution has established that the respondents-accused were guilty of the offence. She, therefore, submitted that by allowing this Criminal Appeal, impugned judgment acquitting the respondents-accused of the charges levelled alleged against them may be set aside.

7. Mr.Parikh, learned counsel for the respondents-accused has contended that the trial Court has rightly appreciated the evidence on record and acquitted the accused of some of the charges levelled against them. It is also submitted that so far as acquittal appeals are concerned, the law is well settled and by taking us through the impugned judgment, he submitted that this Court may not interfere with the impugned judgment and the acquittal appeal may be dismissed.

8. We have heard Mr.M.B.Parikh, learned advocate for the

accused persons and Ms.C.M.Shah, learned APP for the State. We have also gone through the evidence on record. For the purpose of deciding this appeal, it is necessary to refer to Sections 325 and 326 of IPC, which read as under :-

> *"325. Punishment for voluntarily causing grievous hurt.- Whoever,except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*
>
> *326. Voluntarily causing grievous hurt by dangerous weapons or means.--Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal,shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

9. Considering the evidence on record, it is rightly found by the learned trial Judge that the accused had attacked the victim and thereby caused the injuries and, therefore, accused no.1 is rightly convicted. However, considering the nature of

injuries and the definition of 'grievous hurt', in our opinion, the offence in question will not fall under Section 326 of IPC and accused no.1 is guilty of offence under Section 325 of IPC. Therefore, though we are in agreement with the view taken by the learned Sessions Judge while convicting accused no.1, considering the evidence on record, it can be said that the accused is guilty of offence under Section 325 of IPC and in our view, sentence of one year's imprisonment would be just and proper. However, taking into consideration the age of accused no.1 and the decision of the Apex Court in ***"ANKUSH SHIVAJI GAIKWAD VS. STATE OF MAHARASHTRA"***, **2013 (6) SCALE 778** and decision of this Court in Criminal Appeal No.1552 of 2004, we find it proper to award compensation to the victim in lieu of sentence as per sub-section (3) of section 357 of Cr.P.C. Therefore, looking to the special circumstances and the principles enunciated in the case of ***ANKUSH SHIVAJI GAIKWAD VS. STATE OF MAHARASHTRA***, **2013 (6) SCALE 778,** since accused no.1 has agreed to pay an additional amount of Rs.50,000/- towards compensation to the victim, if he pays such additional amount of compensation within a period of three months from today he is not required to undergo the period of sentence imposed upon him. Accordingly, Criminal Appeal No.445 of 2004 is partly allowed.

This view is taken considering the special circumstances and it may not be treated as a precedent.

10. So far as Criminal Appeal No.1438 of 2004 is concerned, which is preferred against acquittal of the accused persons of some of the charges levelled agaisnt them, we have heard learned APP for the State and learned advocate for the respondent-accused. We have also gone through the evidence on record and the impugned judgment. It is required to be noted that the principles which would govern and regulate the hearing of appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in a catena of decisions. In the case of **M.S. Narayana Menon @ Mani Vs. State of Kerala & Anr., (2006) 6 S.C.C. 39**, the Apex Court has narrated the powers of High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

> "54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well-settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

10.1 Further, in the case of **Chandrappa Vs. State of Karnataka, (2007) 4 S.C.C. 415**, the Apex Court laid down the following principles;

> "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:
>
> [1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
> [2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> [3] Various expressions, such as, substantial and compelling reasons, good and sufficient grounds, very strong circumstances, distorted conclusions, glaring mistakes, etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of flourishes of language to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.
>
> [4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

> [5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

10.2 Thus, it is a settled principle that while exercising appellate power, even if two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

10.3 Even in the case of **State of Goa V. Sanjay Thakran & Another, (2007) 3 S.C.C. 75**, the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under;

> "16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of

> material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

10.4 Similar principle has been laid down by the Apex Court in the cases of **State of Uttar Pradesh Vs. Ram Veer Singh & Ors, 2007 A.I.R. S.C.W. 5553** and in **Girja Prasad (Dead) by LRs Vs. State of MP reported in 2007 A.I.R. S.C.W. 5589**. Thus, the powers, which this Court may exercise against an order of acquittal are well settled.

10.5 In the case of **Luna Ram Vs. Bhupat Singh and Ors, (2009) SCC 749**, the Apex Court in paras-10 and 11 has held as under:

> "10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.
> 11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

10.6 Even in a recent decision of the Apex Court in the case of **Mookkiah and Anr. Vs. State, rep. by the Inspector of Police, Tamil Nadu, AIR 2013 SC 321**, the Apex Court in

para 4 has held as under:

> "4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be re-appreciate the entire evidence, though while choosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

10.7 It is also a settled legal position that in acquittal appeal, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of **State of Karnataka Vs. Hemareddy**, **AIR 1981, SC 1417**, wherein it is held as under:

> "...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

11. Thus, in case the appellate Court agrees with the reasons and the opinion given by the lower Court, then the discussion of evidence is not necessary. We have gone through the oral as well as documentary evidence on record. In our view, learned trial Judge has not committed any error while acquitting the accused persons of some of the charges levelled against them. Moreover, learned APP is not in a position to show any evidence on record so as to take a contrary view in the matter or to conclude that the approach of the Court below is vitiated by some manifest illegality or that the decision is perverse or that the Court below has ignored material evidence while acquitting the accused persons. Hence, we are of the considered opinion that the Court below has not committed any error in acquitting the respondents-accused of some of the charge levelled against them. We are in complete agreement with the reasonings given by and the findings arrived at by the Court below in the impugned judgment and, therefore, find no reasons to entertain this appeal and this

appeal is also required to be dismissed.

12. In view of above discussion, Criminal Appeal No.1438 of 2004 preferred by the State against acquittal of the accused persons is dismissed.

13. So far as Criminal Appeal No.445 of 2004 is concerned, the same is partly allowed. The impugned judgment and order dated 4.3.2004 passed by learned Additional Sessions Judge, Amreli, in Sessions Case No.33 of 1994 is modified and the appellant herein-accused no.1 is held guilty for the offence under Section 325 of IPC and ordered to undergo one year's rigorous imprisonment. However, looking to the fact that the incident in question is of 1993, at present accused no.1 is aged about 102 years and considering the principles enunciated in the case of ***ANKUSH SHIVAJI GAIKWAD VS. STATE OF MAHARASHTRA***, **2013 (6) SCALE 778,** since accused no.1 has agreed to pay an additional amount of Rs.50,000/- towards compensation to the victim, accused no.1 is directed to pay such additional amount of compensation within a period of three months from today. If accused no.1 pays such amount of compensation, he is not required to undergo the period of sentence imposed upon him, as aforesaid. Upon deposit of

Rs.50,000/- towards compensation by accused no.1, as aforesaid, the same shall be paid to the victim. If accused no.1 fails to pay the amount of compensation within three months from today, he shall surrender before the jail authorities to undergo the sentence as awarded by this Court.

14. In view of above order passed in Criminal Appeal No.445 of 2004, Criminal Appeal No.1437 of 2004 preferred by the State for enhancement of sentence imposed upon accused no.1 by the impugned judgment and order dated 4.3.2004 passed by learned Additional Sessions Judge, Amreli, in Sessions Case No.33 of 1994 is dismissed.

15. Bail bond, if any, of the accused stands cancelled. Record and Proceedings be sent back to the trial Court concerned forthwith.

Sd/-
(K.S.JHAVERI, J.)

Sd/-
(R.P.DHOLARIA,J.)

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