

THE NEW BUS STAND SHOP OWNERS ASSOCIATION

v.

CORPORATION OF KOZHIKODE & ANR.

(Civil Appeal No. 6391 of 2009)

SEPTEMBER 18, 2009

[MARKANDEY KATJU AND ASOK KUMAR
GANGULY, JJ.]

Kerala Municipality Act, 1994 – s. 215 – Power of municipality to acquire and dispose of property – Corporation letting out shop rooms and executing agreement with the occupants-shop holders – Nature of agreement – Held: Agreement between the Corporation and the shop holders is an agreement for licence – Amount paid by shop holders is described as fees and not as rent either in s. 215 or in the conditions of licence – Intention of the parties is to create a licence and not a lease – Licensee was never given the exclusive possession – Corporation retained the exclusive possession of the shops which is clear from the conditions of the licence. – Stamp duty on licence agreement is governed by Entry 5(c) and not Entry 33 – Kerala Stamp Act – Schedule Entry 5(c), 33.

Appellant-Association of shop owners are occupying various shops and offices in the Municipality Bus Stand Building which is owned by the respondent-Corporation in the State of Kerala. Appellants were issued licenses in terms of s. 215 of the Kerala Municipalities Act, 1994 for the use of the shops constructed by the first respondent. Thereafter, licence agreements have been entered into with individual shop owners.

The question which arose for consideration in this appeal is whether the agreement under which the member of appellant-Association were granted shops, is

A an agreement for lease or it is a licence.

Allowing the appeal, the Court

B HELD: 1.1. From a perusal of s. 215 of the Kerala Municipalities Act, 1994, it appears that the charges which a licensee has to pay has been described as fees in ss. 215(2)(a), (3), (7) and (8) of the Act. The right of construction is solely that of the Municipality as it appears from s. 215(2)(a). Licence shall be granted by public auction or tender. The licensee has been specifically prohibited u/s.215(5) from letting out to any other person the space given to him. In the event of such letting out, the Secretary by an order may cancel the licence and in that event licensee will have to vacate the premises. [Para 12] [801-E-F]

D 1.2. The conditions of licence are very important apart from the statutory provision u/s 215 of the Act. It is made clear that the same is granted for a period of three years and it has been specifically stipulated that the amount the licensee has to pay is licence fee. [Para 13] [801-G]

F 1.3. In order to determine whether a document is a lease or licence, it is most important to consider the intention of the parties. Keeping in mind the terms and conditions of licence, to ascertain whether the agreement between the appellant-Association and the Corporation is a lease or licence, within the meaning of lease as defined u/s. 2(l) of the Kerala Stamp Act, the definition of lease u/s. s. 2(l) is to be considered. From the definition of lease under Act, one thing is clear that it must be an agreement in writing to cultivate, occupy, or pay or deliver rent for immovable property. [Paras 17 and 18] [803-C-D; 804-B]

H 1.4. To ascertain whether a document creates a

licence or lease, the substance of the document must be preferred to the form; the real test is the intention of the parties-whether they intended to create a lease or a licence; if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. [Para 26] [806-E-F]

Associated Hotels of India Ltd. vs. R.N. Kapoor 1960 (1) S.C.R. 368, relied on.

1.5. In the instant case, the amount which the shop holders are paying has not been described as rent either in s. 215 of the Act or in the conditions of licence. The said amount has been described as fees which is one of the vital features. It is found from the conditions of licence that exclusive possession is not given to the members of the appellant-Association and possession is always retained with the Corporation. Even though, exclusive possession is not a decisive test but the absence of exclusive possession is certainly one of the indications to show that the agreement is one of the licence and not of lease. Thus, relationship which is created between the Corporation and the shop holders is that of a licensor and licensee and not that of a lessor or a lessee. The stamp duty on licence agreement should be governed by Entry 5(c) of the Kerala Stamp Act, which is a residuary clause in the Schedule and not by Entry 33. Thus, both the judgments of the Single Judge and the Division Bench of the High Court are quashed. [Paras 19, 23, 33 and 34] [804-C; 805-D; 809-A-C]

P.A. Kuruvila and Ors. vs. State of Kerala decided on 15.12.1999 by Kerelan High Court; *Abdulrahiman vs. Tirur*

- A *Municipality 2001 (2) KLT 716; Associated Hotels of India Ltd. vs. R.N. Kapoor 1960 (1) S.C.R. 368; Mrs. M.N. Clubwala and Anr. vs. Fida Hussain Saheb and Ors. AIR 1965 SC 610; Board of Revenue etc. etc. vs. A.M. Ansari etc. AIR 1976 SC 1813; C.M. Beena and Anr. vs. P.N. Ramachandra Rao 2004 (3) SCC 595, referred to.*
- B

Errington vs. Errington and Woods (1952) 1 KB 290; Thomas vs. Sorrell (1673) Vaughan 351; Cobb and Anr. vs. Lane (1952) All E.R. 1199; Marchant vs. Charters (1977) 3 All E.R. 918, referred to.

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Case Law Reference:

	2001 (2) KLT 716	Referred to.	Para 2
	(1952) 1 KB 290	Referred to.	Para 20
D	(1673) Vaughan 351	Referred to.	Para 20
	(1952) All E.R. 1199	Referred to.	Para 24
	1960 (1) S.C.R. 368	Referred to.	Para 26
E	AIR 1965 SC 610	Referred to.	Para 28
	AIR 1976 SC 1813	Referred to.	Para 29
	(1977) 3 All E.R. 918	Referred to.	Para 30
F	2004 (3) SCC 595	Referred to.	Para 32

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6391 of 2009.

- G From the Judgment & Order dated 21.2.2006 of the High Court of Kerala at Ernakulam in Writ Appeal No. 1422 of 2004.

Anup G. Chudhari, June Chaudhari, Ajit Pudussery, K. Vijayan and Prabhat Kr. Rai for the Appellant.

K. Radhakrishnan, (for B.B. Singh), P.V. Dinesh, H.

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Mohan, P. Rajesh for the Respondents.

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The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. The subject matter of challenge in this proceeding is the judgment and order dated 21.02.2006 whereby the learned Judges of the Division Bench held that the controversy in this case is covered by the Division Bench judgment of Kerala High Court in O.P. No. 18225 of 1997, *P.A. Kuruvila and others vs. State of Kerala* decided on 15.12.1999 and also by another decision of the High Court in *Abdulrahiman vs. Tirur Municipality* – 2001 (2) KLT 716. In the judgment of the learned Single Judge of the High Court dated 8.7.2004, from which appeal was taken to Division Bench, the learned Single Judge also dismissed the writ petition by referring to certain judgments. In paragraph 5 of the judgment of the learned Single Judge it was held that looking at the nature of the arrangement between the parties it has to be held that it is a lease despite a different nomenclature being given to it.

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3. However, before this Court the matter has been argued at length. After hearing learned counsel for the parties the controversy between the parties appears to be that the appellant is an Association of New Bus Stand Shop Owners and they are occupying various shops and offices in the Municipality Bus Stand Building which is owned by the Corporation of Kozhikode in the State of Kerala (hereinafter referred to as “the Corporation”).

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4. The case of the appellant-Association is that for the use of the shops which were constructed by the first respondent, licences were issued to the appellant-Association in terms of Section 215 of the Kerala Municipalities Act, 1994 (hereinafter called “the said Act”). Pursuant to such licences issued by the said Corporation, licence agreements have been entered into

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A with individual shop owners.

B 5. By referring to the provision of Section 215 of the said Act and also the terms of the licence agreements, the learned counsel for the appellant submitted that they were all the time paying licence fee in accordance with the relevant statutory provisions at the time of renewal of the licences. Suddenly, the State of Kerala insisted that the said licences should be treated as lease and at the time of renewal of the same, stamp duty which is payable on lease has to be given.

C 6. In the counter affidavit which has been filed in this proceeding on behalf of the Municipal Authority, the following stand has been taken in paragraphs 4 and 5 of the said counter affidavit. The same are set out below:-

D "4. I beg to submit that the Government of Kerala vide letter
E No. 12980/E2/91/T.C. dated 04.07.1991 stipulates that
F while issuing shop rooms in shopping complexes owned
by Local Self Government Institutions, an agreement is to
be executed in stamp appear worth 2.5% of the total value
of annual license fee which was subsequently enhanced
to 5% through an amendment to the Kerala Stamp Act
through the Kerala Finance Bill, 1996 which came into
force w.e.f. 20.07.1996. I further beg to submit that almost
all licensees, including those in the I.G. Road Bus Stand
Shopping Complex complied with the direction and
submitted revised rent accordingly.

G 5. It is submitted that this respondent which comes under
the Local Self Government Department of the State
Government is bound to comply with the direction of the
State Government. I further beg to submit that an
enhancement to the tune of 20% on licence fee is being
effected while renewing agreement, which is accepted by
the licensees as well."

H 7. The State of Kerala also filed an affidavit wherein the

stand is that in the New Bus Stand Building at Indira Gandhi Road, Kozhikode the said Corporation for commercial purposes let out rooms which were offered and allotted to the bidders in a public auction. An amendment was introduced in the Kerala Stamp Act which came into effect from 29.07.1996. In the light of the said amendment, the Secretary of the said Corporation directed the occupants of the rooms to execute agreements on stamp papers worth 5% of the annual licence fee for continuous occupation of the rooms. In paragraph 4 of that affidavit it has been stated that State Government vide letter No. 12980/E2/91/TD dated 4.7.1991 stipulated that while letting out shop rooms in shopping complex owned by local self Governments, an agreement is to be executed on stamp paper worth 2.5% of the total value of annual licence fee. The said rate was subsequently enhanced to 5% as per amendment in the Kerala Stamp Act which came into force with effect from 29.07.1996. Accordingly, pursuant to the direction by the State Government, the Corporation informed all the licensees to execute agreement at the revised rate of 5%. In paragraph 5, it has been stated even though it is actually a licence, the nomenclature is not decisive. It is also stated that agreement creates a "lease" within the meaning of Transfer of Property Act. Alternatively, it was also urged even if the said agreement does not create a lease under Section 105 of the Transfer of Property Act, it will be covered within the definition of "Lease" under the Kerala Stamp Act, 1959 and reliance was placed on Section 2(1) (iii) of the said Act.

8. It was also stated that Entry 5(c) of the Kerala Stamp Act is not applicable in the facts of this case and the case of the appellant should be governed under Entry 33 of the Kerala Stamp Act.

9. Therefore, the main question which falls for determination before this Court is, whether the agreement under which the appellant-Association has been granted shops and is carrying on business is an agreement for lease or it is a

A licence. If it is lease then rate of stamp duty will be different and if it is licence, such duty will be different. Even though the State is insisting that the same is lease but the stand of the Corporation in its affidavit is that it is a licence.

B 10. In order to ascertain whether the licence granted to the appellant is actually a lease we must look into the statutory provisions under which it is granted and some terms and conditions of the licence.

C 11. Admittedly, the licence has been granted to the appellant-Association under Section 215 of the Kerala Municipality Act, 1994. The said Section is set out below:-

D *"215. Power of Municipality to acquire and dispose of property.-* (1) A Municipality may, with the previous sanction of the Government, acquire any property whether land or building within or without its Municipal area for any public purpose for providing any convenience, service or facility or may dispose of by sale or otherwise any property belonging to it or vested in it in the manner as may be prescribed.

E (2)(a) A Municipality may construct commercial or other buildings and let them out to the public who need them on licence and may charge such fees as it may fix for the use and occupation of the same, subject to such restriction as or limitations if any, as may be imposed by the Government in that behalf;

(b) *[xxx]

G Provided that after the said period, a licence may be renewed subject to such terms and conditions as may be fixed at that time;

H (c) In all cases except renewal of licence or rehabilitation of a licensee, licence shall be granted only by public auction or tender.

(3) Every licence under sub-section (2) shall contain terms and conditions governing the use and occupation of the building or room or space therein and the rate and time of payment of fees and such terms and conditions shall be reduced in writing in the form of an agreement in stamp paper of the appropriate value.

(4) No building or room or space let out under sub-section (2) shall be sub-let by the licensee to any person nor the nature of use changed without the prior approval of the Municipality:

Provided that the Municipality may at the instance of a licensee transfer the licence to any other person subject to such terms and conditions as it may deem fit to impose and upon such transfer, it shall be deemed to be a fresh licence for all purposes".

12. From a perusal of the said Section, it appears that the charges which a licensee has to pay has been described as fees in Sections 215(2)(a), 215(3), 215(7) and 215(8). The right of construction is solely that of the Municipality as it appears from Section 215(2)(a). It is also made clear that licence shall be granted by public auction or tender. The licensee has been specifically prohibited under Section 215(5) from letting out to any other person the space given to him. In the event of such letting out, the Secretary by an order may cancel the licence and in that event licensee will have to vacate the premises.

13. Apart from the aforesaid statutory provision under Section 215, the conditions of licence are also very important. It is made clear that the same is granted for a period of three years and it has been specifically stipulated that the amount the licensee has to pay is licence fee. Clause 6 of the licence condition is very important and reads as under:

"The Commissioner shall be in legal possession of the licensed premises and hence licensee shall not enjoy

A *the exclusive possession of the same. The licensee shall have the right only to use the premises as per the terms and conditions enunciated in this agreement.*

B The Commissioner or other Corporation Officers with or without workmen shall have right at all time to enter upon the said premises to view the conditions thereof and if any loss or damages are found it shall be lawful to the Commissioner to make good the loss in the manner prescribed in clause 4 (ii) & (iii)".

C (Emphasis supplied)

14. Clause 10 of the licence condition is also relevant and is set out below:

D "10. (i) The licence granted to the licensee under this agreement shall expire on the date specified in the agreement and he shall have no authority to use the premises thereafter and shall vacate the premises on the expiry of the licence.

E Provided that the authority competent may at its discretion renew the licence subject to such terms and conditions as it may fix, but such renewal of licence shall not be claimed as a matter of right.

F (ii) In case the licence of the premises is not renewed before the expiry of the licence under this agreement, the licensee shall vacate the premises on the expiry of the period of licence and further use of the premises by him shall be deemed to be unauthorized use and occupation".

G 15. Clause 12 of the said licence condition which is also relevant is set out below:

H "The licensee without written consent of the licensor, shall not transfer his right or give possession of the premises

to any other person under any circumstances".

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16. Clause 25 of the said licence condition which is also relevant is set out below:

"The licence hereby granted shall not create any interest or title over the property in favour of the licensee except for the beneficial enjoyment of the same during the period of licence".

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17. On a perusal of the provision of Section 215 and the aforesaid conditions of licence the intention of the parties is clear. It has always been held that in order to determine whether a document is a lease or licence what is most important to be considered is the intention of the parties. Keeping in mind the aforesaid terms and conditions of licence, if we try to ascertain whether the agreement between the appellant-Association and the Corporation is a lease or licence within the meaning of lease as defined under Section 2(l) of the Kerala Stamp Act, we have to consider the definition of lease under Section 2(l). Section 2(l) of the Kerala Stamp Act is thus set out below:-

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"S.2 (1) "lease" means a lease of immovable property, and includes also-

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(i) Marayapattom;

(ii) Kanapattom;

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(iii) an agreement or other undertaking in writing not being a counterpart of a lease, to cultivate, occupy, or pay or deliver *rent for immovable property*;

(iv) an agreement or other undertaking in writing, executed by the renters of abkari and opium farms.

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(v) any instrument by which tolls of any description are let;

(vi) any writing on an application for a lease intended

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A to signify that the application is granted; and

(vii) a patta;

(Emphasis supplied)

B 18. From the aforesaid definition of lease under the Kerala Stamp Act, one thing is clear that it must be an agreement in writing to cultivate, occupy, or pay or deliver rent for immovable property.

C 19. In the instant case, the amount which the shop holders are paying has not been described as rent either in Section 215 of Kerala Municipal Act or in the conditions of licence. The said amount has been described as fees which is one of the vital features in this case which persuade us to construe the agreement between the parties as one for licence and not of
D lease.

E 20. Reference in this connection may be made to the decision of the Court of Appeal in *Errington vs. Errington and Woods* - reported in 1952 1 KB 290. Lord Denning in deciding the issue whether an agreement is a lease or licence referred to the decision given by Chief Justice Vaughan in the seventeenth century in *Thomas vs. Sorrell* - (1673) Vaughan 351. In the said judgment, Chief Justice Vaughan outlined certain features of lease which are as follows:

F "A dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful." The difference between a tenancy and a licence is, therefore,
G that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will (see *Doe v. Chamberlaine and*
H *Lynes v. Snaith*), whereas if he had not exclusive

possession he was only a licensee.”

[(*Peakin v. Peakin*) 1895 – 2 I.R. 359]

21. Relying on the said principle, Lord Denning explained that the difference between a tenancy and a licence is that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not.

22. The position has been further elucidated by saying that it has to be ascertained whether the occupier has exclusive possession or not. The learned Judge also explained that the test of exclusiveness sometimes gives rise to misgivings and that the test of exclusive possession is by no means decisive.

23. In the instant case we have found from the conditions of licence that exclusive possession is not given to the members of the appellant-Association and possession is always retained with the Corporation. Even though, exclusive possession is not a decisive test but the absence of exclusive possession is certainly one of the indications to show that the agreement is one of the licence and not of lease.

24. Relying on *Errington* (supra), the Court of Appeal again dealt with this question in *Cobb and Another vs. Lane* – [1952] All E.R. 1199. Here also Lord Denning held that the distinction between lease and licence has become very important as several Rent Restrictions Acts have come into operation. The learned Judge held whether the agreement is a lease or a licence must depend on the intention of the parties. Therefore, in all such cases the following questions should be posed by the Court:

“...Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?...”

(Page 1202 of the report)

A 25. If we follow the said principle in the instant case, we
find that what was given to the shop holders was merely a
licence and not a lease.

B 26. Relying on those two decisions of the Court of Appeal,
this Court in *Associated Hotels of India Ltd. vs. R.N. Kapoor*
– 1960 (1) S.C.R. 368, discussed this issue in very lucid terms.
Justice K. Subba Rao, who was in minority, discussed this
question with a clarity which is often associated with His
C Lordship's opinion. The learned Judge referred to Section 105
of the Transfer of Property Act and then compared it with
Section 52 of the Indian Easements Act. After referring to those
two Sections and also after referring to the decision in
Errington (supra) the learned Judge pointed out the distinction
D between the lease and the licence by expressly approving the
tests laid down by Lord Denning and which may better be
quoted:

E "The following propositions may, therefore, be taken as
well-established: (1) To ascertain whether a document
creates a licence or lease, the substance of the document
must be preferred to the form; (2) the real test is the
intention of the parties – whether they intended to create
a lease or a licence; (3) if the document creates an interest
F in the property, it is a lease; but, if it only permits another
to make use of the property, of which the legal possession
continues with the owner, it is a licence; and (4) if under
the document a party gets exclusive possession of the
property, prima facie, he is considered to be a tenant; but
circumstances may be established which negative the
intention to create a lease...."

G (Page 384-385 of the report)

H 27. If we apply the aforesaid principles in the facts of case
in hand, we are bound to hold that the agreement between the
parties merely falls under the category of licence as the
licensee is never given the exclusive possession. The

Corporation retained the exclusive possession of the shops and this is clear from the conditions of the licence discussed above. A

28. Subsequently, in the case of *Mrs. M.N. Clubwala and Anr. vs. Fida Hussain Saheb and Ors.* – AIR 1965 SC 610, the same propositions have been reiterated by Justice Mudholkar in para 12 of the report after relying on the decisions in *Errington* (supra) and also *Cobb* (supra) and also the decision of this Court in *Associated Hotels of India Ltd.* (supra). The principle laid down by the learned Judge is as follows: B

“.....We must, therefore, look at the surrounding circumstances. One of those circumstances is whether actual possession of the stalls can be said to have continued with the landlords or whether it had passed on to the stall-holders. Even if it had passed to a person, his right to exclusive possession would not be conclusive evidence of the existence of a tenancy though that would be a consideration of first importance. That is what was held in *Errington v. Errington and Woods*, 1952-1 K.B. 290 and *Cobb v. Lane*, 1952-1 All E.R. 1199”..... C D

(Page 614 of the report) E

29. Also a three-Judge Bench of this Court in *Board of Revenue etc. etc. vs. A.M. Ansari etc.* - AIR 1976 SC 1813, relied on the decision in *Errington* (supra) and *Cobb* (supra) and expressively approved the opinion of Lord Denning in *Cobb* (supra) in paragraph 10. The same passage was approved by Justice Subba Rao (as His Lordship then was) in *Associated Hotels of India Ltd.* (supra). F

30. Reference in this connection can be made also to a later judgment of the Court of Appeal in *Marchant vs. Charters* – (1977) 3 All E.R. 918, where again Lord Denning reiterated these principles in a slightly different form by holding that the true test is the nature and quality of the occupation and not always whether the person has exclusive possession or not. The G H

A true test in the language of the learned Judge is as follows:

“.....It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?”

31. If we apply these tests in the facts of this case, it will be clear that the agreement between the parties is one for licence and not of a lease.

32. In a rather recent judgment of this Court in the case of *C.M. Beena and another vs. P.N. Ramachandra Rao* – 2004 (3) SCC 595, the learned Judges relied on the ratio in *Associated Hotels of India Ltd.* (supra) in deciding the difference between lease and licence. In paragraph 8 of the said judgment, learned Judges held that difference between lease and the licence is to be determined by finding the real intention of the parties from a total reading of the document, if any, between the parties and also considering the surrounding circumstances. The learned Judges made it clear that use of terms “lease” or “licence”, “lessor” or “licencor”, “rent” or “licence fee” by themselves are not decisive. The conduct and intention of the parties before and after the creation of relationship is relevant to find out the intention. The learned Judges quoted from the treaties of Evans and Smith on “The Laws of Landlord and Tenant” and of Hill & Redman on “Law of Landlord and Tenant” in support of their proposition.

33. Following the aforesaid tests and in view of the discussions made hereinabove, it is clear that the intention of the parties in the case is to create a licence and not a lease and the right of exclusive possession was retained by the Corporation. In that view of the matter, relationship which is created between the Corporation and the shop holders is that of a licensor and licensee and not that of a lessor or a lessee. The stamp duty on licence agreement should be governed by Entry 5(c) of the Kerala Stamp Act, which is a residuary Clause in the Schedule and not by Entry 33. A B

34. This appeal is, therefore, allowed. Both the judgments of the High Court, of the Single Judge and of the Division Bench are quashed. There shall be no order as to costs. C

N.J.

Appeal allowed. D