A COMMISSIONER OF CUSTOMS, HYDERABAD

v.

M/S. PENNAR INDUSTRIES LTD. & ANR.

(Civil Appeal Nos. 4444-4445 of 2005)

B JULY 31, 2015

[A.K. SIKRI AND N.V. RAMANA, JJ.]

Customs Act, 1962 – s. 25 – Exemption under Notification No.30/1997 – Claim of – Import of goods against C *advance licence – However, non-fulfillment of export obligation under the licence – No exports effected by exporting those goods so manufactured from the raw material that was imported duty free – Demand of duty by Revenue –* D *Assessee's case that it had arranged for third party export, thus fulfilled its obligation and was entitled to duty free imports – Said demand confirmed – However, tribunal set aside the same holding that the Director General of Foreign Trade had amended the licence permitting such export through third* E *party, it amounted to fulfilling the export obligations – On appeal, held: Since the conditions of the exemption notification are not fulfilled and law requires strict compliance of the exemption notification, assessee becomes liable to pay the import duty which was payable, but for the benefit of* F *exemption Notification No 30/1997, which was obtained by the assessee – Purport of the exemption notification is to advance the objectives of the EXIM Policy – When DGFT itself accepted the benefits of the assessee and carried out the amendment in the import licence and further that the* G *assessee could make the exports on the basis of the amendment; albeit through third party, such person should not be left high and dry – Thus, necessary amendments are needed in such notifications making appropriate provisions*

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to meet these types of eventualities – As regards charge of interest, as per the bond the assessee agreed to pay interest @ 24% pa – In the peculiar facts of the case, rate of interest reduced from 24% pa to 9% pa. – Order passed by the tribunal set aside.

Allowing the appeals, the Court

HELD: 1.1 In the instant case, advance licence was issued to the assessee in terms of para 7.4 of the EXIM Policy 1997-2000. It was in terms of this licence that the import of the specified material was permitted on the condition that the assessee is obligated to meet the export obligation as contained in the licence issued by the DGFT. No doubt, this obligation in the export licence, read with conditions contained in Notification No. 30/ 1997, puts the onus upon the assessee to make the exports of the products produced from the material so imported. However, it is the case of the assessee that for certain bona fide reasons (as the bona fides of the assessee have been accepted by the DGFT), as the assessee was not able to export same very goods produced by it from the material imported on which he was given exemption from payment of the import duty, the DGFT allowed the assessee to meet the export obligation through third party. [Para 14] [739-H; 740-A-D]

1.2 Insofar as DGFT is concerned, it has passed Order-in-Original dated 03.08.2011 holding that the export through third party would tantamount to fulfilling the export obligation contained in the licence. However, since the total import entitlement of the firm, as per the amended licences, worked to 2123.1538 MTs and the assessee had imported 2712.41 MTs, it resulted in excess import of 589.26 MTs. Therefore, only on this excess import, customs duty was payable, which was directed

A to be paid along with interest calculated @ 15% from the date of first import to the date on which last consignment of exports were effected by the assessee through third party. The DGFT, in its order, also mentioned that there was no misutilization of the raw
B material imported by the assessee and there was no violation of any other conditions of the licence causing Revenue loss at the cost of exchequer. The said Order-in-Original of DGFT was under the provisions of EXIM Policy. [Paras 15, 16] [740-D-H]
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1.3 Since the conditions of the exemption notification are not fulfilled and the law requires strict compliance of the exemption notification, the assessee becomes liable to pay the import duty which was payable, but for the
D benefit of exemption Notification No 30/1997, which was obtained by the assessee. [Para 19] [743-F-G]

1.4 The Government should bestow its consideration and make appropriate provision dealing with such
E situations. After all, the Exemption Notification No. 30/1997 has been issued to implement and effect the EXIM Policy provisions. Therefore, the purport of the exemption notification is to advance the objectives of the EXIM Policy. When the DGFT has itself accepted the
F benefits of the assessee and carried out the amendment in the import licence and further that the assessee could make the exports on the basis of the amendment; albeit through third party, such person should not be left high and dry. Therefore, necessary amendments are needed
G in such notifications making appropriate provisions to meet these types of eventualities. The Court is hopeful that the competent authority would look into these aspects and cater for such situations as well so that unnecessary hardship is not caused to the bona fide
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assessees as well. [Para 20] [743-H; 744-A-D] A

1.5 As regards charge of interest, as per the bond the assessee had agreed to pay interest @ 24% per annum. However, that would not take away the right to reduce the rate of interest if the ends of justice so warrant. In the peculiar facts of the case, more so when there was an amendment in the licence by the DGFT and DGFT has taken the view that export obligation is fulfilled, it is proper to reduce the rate of interest from 24% per annum to 9% per annum. Further, there should not be any penalty. [Para 21] [744-D-F] B C

Sheshank Sea Foods Pvt. Ltd., Karnataka v. Union of India & Ors. **1996 (8) Suppl. SCR 802: (1996) 11 SCC 755 – relied on.** D

Titan Medical Systems (P) Ltd. v. Collector of Customs, New Delhi **(2003) 9 SCC 133 – distinguished.**

Case Law Reference E

1996 (8) Suppl. SCR 802	**relied on.**	**Para 17**
(2003) 9 SCC 133	**distinguished.**	**Para 18**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4444-4445 of 2005. F

From the Judgment and Order Nos. A-304-305/WZB/2005/C-III dated 11.03.2005 of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal Nos. C/303 and C/304 of 2004. G

Yashank Adhyaru, Rupesh Kumar, Rashmi Malhotra, B. Krishna Prasad for the Appellant.

Gourab Banerji, Harsha Peechra, Charu Ambwani Vhom H

A Shah, Arjun Krishnan for the Respondents.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1.The respondent No.1 (hereinafter referred to as the 'assessee') had imported hot rolled non-alloy steel wide coils against an advance licence issued under the Duty Exemption Entitlement Certificate (DEEC) Scheme. The quantity of the said import was 2018.6 MTs. The imports were made on 03.03.1999 and 12.04.1999. At the time of imports, the assessee did not pay the import duty on the aforesaid materials taking umbrage under Notification No. 30/1997, as amended on 01.04.1997. This Notification allows actual users to import the raw material duty-free with the condition that the said material would be used by the importer itself and converted into specified finished goods and thereafter those goods would be exported as per the export obligations given in the advance licences. As per this obligation, the assessee was supposed to effect export of 1000 MTs cold rolled non-alloy steel (hard) coils and 1500 MTs of CRCA skin based steel strips/coils totalling 2500 MTs. The value pertaining to these exports was also specified in the licences. The exports were to be effected within the time limits mentioned therein, which was 02.09.2001, but was extended up to 02.09.2004.

2) It is an admitted case that the raw material was used by the assessee itself for manufacturing the specified products. However, no exports were effected by exporting those goods so manufactured from the raw material that was imported duty-free. As per the assessee, after manufacturing of the goods from the raw material, it was found that quality of those goods was not good enough for the purposes of exports. Therefore, instead of exporting this material, the assessee disposed of the said manufactured gods in the domestic market. At the same time, in order to meet the export obligation under the said licences, it arranged the export through one M/s. Steel

Company, Gujarat as its supporting manufacturer. M/s. Steel Company, Gujarat arranged the export performance through their agents M/s. Shirdi Industries Ltd., Mumbai. M/s. Shirdi Industries Limited in turn arranged for third party exports of cold rolled non-alloy steel coils through M/s. Essar Steel Ltd., Hazira, Surat, a merchant manufacturer. A quantity of 58.865 MTs and 176.5 MTs were exported vide Shipping Bill Nos. 1000051316 dated 17.05.2000 and 1000048872 dated 10.05.2000. These exports were made to Bangladesh via Mumbai Port. Further a quantity of 510.515 MTs was exported to Nepal by M/s. Steel Company, Gujarat vide Shipping Bill No. 68/DEEC/2000 dated 23.02.2000. On that basis, the assessee claimed that it had fulfilled its obligation.

3) The appellant/Revenue was not amused with the aforesaid manner of fulfilling the export obligation by the assessee. According to the appellant, conditions contained in Notification No. 30/1997 had not been complied with, by the aforesaid third party export, as the Notification in question mandated the export of that very product which was to be manufactured out of the imported raw material and, therefore, the exemption claimed under the aforesaid Notification was unjustified. The Revenue, thus, issued show-cause notice dated 30.03.2002 demanding the duty in the sum of 1,65,07,454 along with interest @ 24% from the date of clearance. The assessee submitted its reply bringing to the notice of the Revenue authorities the facts which have already been noted above. It was pleaded that the export through third party was as per Export-Import (EXIM) Policy and third party exports had not availed any of the export incentives. The aforesaid reply did not convince the Adjudicating Authority, namely, the Commissioner of Customs, who passed orders dated 31.03.2004 confirming the demand made in the show-cause notice. He also imposed a penalty of 10 lakhs.

4) Aggrieved by the aforesaid order of the Commissioner,

A the assessee filed appeal before the Customs Excise & Service Tax Appellate Tribunal (for short, 'CESTAT'). The CESTAT has, vide order dated 11.03.2005, allowed the appeal by arriving at a conclusion that Director General of Foreign Trade (for short, 'DGFT') had passed an order making B amendment in the licence issued under the DEEC Scheme which effectively changed the products. Amendment was also made in respect of nature of exports to be effected through third party exports. Therefore, when the DGFT had amended the licence permitting such an export through third party, it C amounted to fulfilling the export obligations as this changed position had to be reckoned. On that basis, allowing the appeal, the order of the Commissioner has been set aside. It is this order of the CESTAT which is under attack in the present D appeals filed by the Revenue.

5) The neat submission which is made by Mr. Yashank Adhyaru, learned senior counsel appearing for the Revenue, is that the amendment in the licences, as carried out by the DGFT, is totally inconsequential and extraneous to the issue E at hand. He argued that the matter pertains to levy of import duty. The exemption from payment of export duty is provided by Notification No. 30/1997 dated 1.4.1997 where a specific condition is attached to the effect that *'exempt materials shall* F *not be disposed of or utilized in any manner except for utilisation in discharge of export obligation or for replenishment of such materials and the materials so replenished shall not be sold or transferred to any other person'*. He argued that when admittedly this condition has G not been fulfilled by the assessee, the assessee cannot be allowed the benefit of Notification No. 30/1997. In respect of this plea, he referred to the judgment of this Court in ***Sheshank Sea Foods Pvt. Ltd., Karnataka*** v. ***Union of India & Ors.***[1]

H [1] (1996) 11 SCC 755

6) Mr. Gourab Banerji, learned senior counsel appearing for the assessee, refuted the aforesaid submission and supported the orders by arguing that the obligation to effect the export stood fulfilled by the assessee and since it was in terms of EXIM Policy, the assessee could not be fastened with any such liability. He also drew our attention to the proceedings which were taken out by the DGFT in this behalf. It was pointed out that DGFT had issued show-cause notice dated 20.10.2010 for initiating action for failure to complete the export obligation/failure to submit relevant information/documents. In this show-cause notice, the proceedings initiated by the appellant herein were also mentioned. The assessee had filed reply to the same and thereafter matter was adjudicated upon by the DGFT. After hearing, the Order-in-Original dated 03.08.2011 was passed by the DGFT. In this order, the DGFT has accepted that export through third party amounted to fulfilling the export obligation contained in the said licences. However, since the total import entitlement of the firm, as per the amended licences, worked to 2123.1538 MTs and the assessee had imported 2712.41 MTs, it resulted in excess import of 589.26 MTs. Therefore, only on this excess import, customs duty was payable, which was directed to be paid along with interest calculated @ 15% from the date of first import to the date on which last consignment of exports were effected by the assessee through third party. Predicated on this order, submission of Mr. Banerji was that since DGFT has also accepted the fulfillment of export obligation under the licences, there is no question of payment of any further import duties.

7) Another submission of Mr. Banerjee was that non-export of product manufactured from the said material was *bona fide* as it was found to be of inferior quality, not worthy of export, which *bona fides* was accepted by the DGFT as well, *thereby* permitting the amendment in the licence. Therefore,

A obligations under Notification No. 30/1997 should also be treated as fulfilled when the matter is to be looked into from this angle as well. Insofar as judgment in the case of ***Sheshank Sea Foods Pvt. Ltd.*** (supra) is concerned, Mr. Banerji argued that the said case pertains to the period prior to 1992 and
B there is a change in EXIM Policy now. On the other hand, he referred to another decision of this Court in ***Titan Medical Systems (P) Ltd.*** v. ***Collector of Customs, New Delhi***[2] to submit that it should be treated as a case of sufficient compliance.
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8) We have given our serious consideration to the respective submissions made by the learned counsel for the parties on either side.

D 9) Notification No. 30/1997 provides for *'Exemption to materials imported against advance licence with actual user condition'*. It is issued by the Central Government in exercise of powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 after arriving at a satisfaction that it is
E necessary in the public interest so to do. It exempts materials imported in India, against the advance licence with actual user condition in terms of para 7.4 of the EXIM Policy 1997-2000, from the whole of the duty of customs leviable thereon, including the additional duty leviable thereon under the Customs Tariff
F Act, subject to certain conditions mentioned in this Notification. In this behalf, we are concerned with condition Nos. (v) to (viii) as there is no dispute that other conditions have been satisfied. These conditions are reproduced below:

G "(v) that the export obligation is discharged within the period specified in the said certificate or within such extended period as may be granted by the Licensing Authority by exporting resultants products manufactured

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H [2] (2003) 9 SCC 133

in India which are specified in Part "E" of the said certificate (hereinafter referred to as resultant products) and in respect of which facility under rule 12(1))b) or rule 13(1)(b) of the Central Excise Rules, 1944 has not been availed in respect of materials permitted under the said license;

(vi) that the importer produces evidence of discharge of export obligation to the satisfaction of the Assistant Commissioner of Customs within a period of 30 days of the expiry of period allowed for fulfillment of export obligation, or within such extended period as the said Assistant Commissioner of Customs may allow;

(vii) exempt materials shall not be disposed of or utilized in any manner except for utilization in discharge of export obligation or for replenishment of such materials and the materials so replenished shall not be sold or transferred to any other person;

(viii) that in relation to an Advance Licence issued to a Merchant Ex-porter –

(a) the name and address of the supporting manufacturer is specified in the said licence and the bond required to be executed by the importer in terms of condition (ii) shall be executed jointly by the Merchant Ex-porter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification; and

(b) exempt materials are utilized in the factory of such supporting manufacturer in terms of condition (vii)."

10) This Notification also contains definition of *'materials'*, which reads as under:

"(i) "Materials" means -

A (a) raw materials components, intermediates, consumables, computer software and parts required for manufacture of resultant product specified in Part-E of the said certificate:

B Provided that the benefit of this notification shall apply to import of Acetic Anhydride, Ephedrine and Pseudoephedrine only against licences issued with the approval of Advance Licensing Committee in the office of the Director General of Foreign Trade;

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(b) mandatory spares within the value limit of (10%) of the value of the licence which are required to be exported along with the licence which are required to be exported along with the resultant product; and

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(c) packing materials required for packing of resultant product."

11) From the reading of this Notification, it becomes clear that the material which is imported has to be against an E advance licence with actual user condition in terms of para 7.4 of the EXIM Policy 1997-2000. It is not in dispute that the assessee was in possession of such an advance licence issued by DGFT and this licence was with actual user condition, F namely, the material so imported was to be used by the assessee itself in its factory for manufacturing the items specified therein. As per Condition No.(ii), the assessee was required to execute a bond at the time of clearance of the imported materials to pay on demand an amount equal to the G duty leviable, but for the exemption, on the imported materials in respect of which the conditions specified in this Notification have not been complied with, together with interest @ 24% per annum from the date of clearance of the said materials. The export obligation was contained in the licence issued by H the DGFT, which was to be adjusted during the period specified

in the said certificate or within such extended period, as may be granted by the licensing authority (DGFT in this case). The assessee was supposed to produce evidence of discharge of export obligation to the satisfaction of the Assistant Commissioner of Customs within a period of 30 days of the expiry of the period allowed for fulfillment of the export obligation or within extended period as allowed. Stringent stipulation is contained in Condition (vii), which is very significant and relevant for our purposes. The respondent was not supposed to dispose of or utilize the exempt materials in any manner except for utilization in discharge of the export obligation.

12) It would mean that not only the raw material imported (in respect of which exemption from duty is sought) is to be utilised in the manner mentioned, namely, for manufacture of specified products by the importer/assessee itself, this very material has to be utilised in discharge of export obligation. It, thus, becomes abundantly clear that as per this Notification, in order to avail the exemption from import duty, it is necessary to make export of the product manufactured from that very raw material which is imported. This condition is admittedly not fulfilled by the assessee as there is no export of the goods from the raw material so utilised. Instead, export is of the product manufactured from other material, that too through third party. Therefore, in *stricto senso,* the mandate of the said Notification has not been fulfilled by the assessee.

13) In such a scenario, whether amendment of the licence by the DGFT allowing export obligation to be fulfilled through third party would tantamount to meeting the requirement of the Notification becomes the central issue which needs to be answered. Some developments which have taken place, highlighted by the respondent, need to be mentioned at this stage.

14) In the present case, advance licence was issued to

A the assessee in terms of para 7.4 of the EXIM Policy 1997-2000. It was in terms of this licence that the import of the specified material was permitted on the condition that the assessee is obligated to meet the export obligation as contained in the licence issued by the DGFT. No doubt, this
B obligation in the export licence, read with conditions contained in Notification No. 30/1997, puts the onus upon the assessee to make the exports of the products produced from the material so imported. However, it is the case of the assessee that for certain *bona fide* reasons (as the *bona fides* of the assessee
C have been accepted by the DGFT), as the assessee was not able to export same very goods produced by it from the material imported on which he was given exemption from payment of the import duty, the DGFT allowed the assessee
D to meet the export obligation through third party.

15) It is also correct that insofar as DGFT is concerned, it has passed Order-in-Original dated 03.08.2011 holding that the export through third party would tantamount to fulfilling the export obligation contained in the licence. However, since the
E total import entitlement of the firm, as per the amended licences, worked to 2123.1538 MTs and the assessee had imported 2712.41 MTs, it resulted in excess import of 589.26 MTs. Therefore, only on this excess import, customs duty was
F payable, which was directed to be paid along with interest calculated @ 15% from the date of first import to the date on which last consignment of exports were effected by the assessee through third party. The DGFT, in its order, also mentioned that there was no misutilization of the raw material
G imported by the assessee and there was no violation of any other conditions of the licence causing Revenue loss at the cost of exchequer.

16) The aforesaid Order-in-Original of DGFT was under
H the provisions of EXIM Policy. It is held by this Court in

Sheshank Sea Foods Pvt. Ltd. (supra) that the same would not be binding on the customs authorities and as far as action taken under the Customs Act is concerned, the same is to be covered by the provisions of the Customs Act. The relevant discussion thereupon which takes note of the concerned provisions of the Act as well is reproduced below:

> "6. Learned counsel placed reliance upon a communication to all Collectors of Central Excise issued by the Central Board of Excise and Customs on 13-5-1969, on the subject of whether, in the event of the contravention of a post-importation condition of an import licence, it was open to the Customs authorities to confiscate imported goods under Section 111(o) of the Customs Act. The said communication stated that before Section 111(o) could be attracted there had "to be an exemption, subject to a condition, from a prohibition:. Where a valid licence has been issued, it is not a case of an exemption from the prohibition. Therefore, if a post-importation condition of a licence is contravened, it cannot be said that any condition of exemption is contravened. For the reasons stated above, the Ministry of Law have advised that it may not be possible to take action under Section 111(o) with respect to the conditions of the licence relating to the use of goods after they are cleared from the customs charge.
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> 7. Section 111(o) is the sheet-anchor of the respondents' case. It reads thus:
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> "111. *Confiscation of improperly imported goods, etc.* – The following goods brought from a place outside India shall be liable to confiscation –
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> xx xx xx

A (o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by
B the proper officer."

8. Section 111(O) states that when goods are exempted from customs duty subject to a condition and the condition is not observed, the goods are liable to confiscation. The
C case of the respondents is that the goods imported by the appellants, which availed of the said exemption subject to the condition that they would not be sold, loaned, transferred or disposed of in any other manner, had been disposed of by the appellants. The Customs authorities,
D therefore, clearly had the power to take action under the provisions of Section 111(o).

9. We do not find in the provisions of the Import and Export Policy or the Handbook of Procedures issued by the
E Ministry of Commerce, Government of India, anything that even remotely suggests that the aforesaid power of the Customs authorities had been taken away or abridged or that an investigation into such alleged breach could be conducted only by the licensing authority. That the
F licensing authority is empowered to conduct such an investigation does not by itself preclude the Customs authorities from doing so.

10. The communication of the Central Board of Excise
G and Customs dated 13-5-1969, refers to the breach of the condition of a licence and suggests that it may not be possible to take action under Section 111(o) in respect thereof. It is true that the terms of the said exemption notification were made part of the appellants' licences
H and, in that sense, a breach of the terms of the said

exemption notification is also a breach of the terms of the licence, entitling the licensing authority to investigate. But the breach is not only of the terms of the licence; it is also a breach of the condition in the exemption notification upon which the appellants obtained exemption from payment of customs duty and, therefore, the terms of Section 111(o) enable the Customs authorities to investigate."

17) The decision in the aforesaid case, which is of the Coordinate Bench, binds us.

18) Judgment in the case of ***Titan Medical Systems (P) Ltd.*** (supra), which was referred to by Mr. Banerji , has no relevance at all. In that case, one of the conditions of duty exemption scheme contained in Notification No. 116/88-CUS was for conversion of raw material into the resultant product involving substantial manufacturing activity. The Court considered the scope of *'substantial manufacture'* and held that assembly of various components into finished machines (ultrasound scanners in that case) amounted to substantial manufacture and it was not necessary that manufacturing of substantial amount of component is required. Obviously, the issue was altogether different which has no bearing on the controversy involved in the present case.

19) Since the conditions of the exemption notification are not fulfilled and the law requires strict compliance of the exemption notification, the assessee becomes liable to pay the import duty which was payable, but for the benefit of exemption Notification No 30/1997, which was obtained by the assessee.

20) Though we have rendered this decision keeping in view the legal position discussed above, at the same time, we deem it necessary to observe that the Government should bestow its consideration and make appropriate provision

A dealing with such situations. After all, the Exemption Notification No. 30/1997 has been issued to implement and effect the EXIM Policy provisions. Therefore, the purport of the exemption notification is to advance the objectives of the EXIM Policy. When the DGFT has itself accepted the benefits B of the assessee and carried out the amendment in the import licence and further that the assessee could make the exports on the basis of the amendment; *albeit* through third party, such person should not be left high and dry. Therefore, necessary amendments are needed in such notifications making C appropriate provisions to meet these types of eventualities. We are hopeful that the competent authority shall look into these aspects and cater for such situations as well so that unnecessary hardship is not caused to the *bona fide* D assessees as well.

21) Insofar as charge of interest is concerned, we are conscious of the fact that as per the bond the assessee had agreed to pay interest @ 24% per annum. However, that would not take away our right to reduce the rate of interest if the ends E of justice so warrant. In the peculiar facts of this case, more so when there was an amendment in the licence by the DGFT and DGFT has taken the view that export obligation is fulfilled, we deem it proper to reduce the rate of interest from 24% per annum to 9% per annum. Further, there shall not be any penalty. F

22) Setting aside the order of the Tribunal, the appeals are allowed in the aforesaid terms with no order as to costs.

Nidhi Jain Appeals allowed.