Kerala High Court
Against The Judgment In Op ... vs By ... on 24 May, 2006

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

TUESDAY, THE 7TH DAY OF JUNE 2016/17TH JYAISHTA, 1938

WA.No. 116 of 2007 (B) IN OP.22918/1998

AGAINST THE JUDGMENT IN OP 22918/1998 of HIGH COURT OF KERALA DATED
24-05-2006
APPELLANT(S)/2ND RESPONDENT:

THE REGIONAL PROVIDENT FUND FINANCE COMMISSIONER,
EMPLOYEES PROVIDENT FUND ORGANISATION, KALOOR,KOCHI-682017.

BY ADVS.SRI.N.N.SUGUNAPALAN(SR)
SMT.T.N.GIRIJA, SC,EPF ORGANISATION

RESPONDENT(S)/PETITIONERS& RESPONDENTS 1,3 TO 7:
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1. KERALA SMALL INDUSTRIES DEVELOPMENT CORPN.LTD.,
TRIVANDRUM-695 001,, REPRESENTED BY THE MANAGING DIRECTOR.

2. THE GENERAL MANAGER,
SIDCO RAW MATERIAL DIVISION, GANDHI NAGAR,, KOCHI-682 020.

3. THE EMPLOYEES PROVIDENT FUNDS APPELLATE TRIBUNAL,
7TH FLOOR, SKY LARK BUILDINGS, 60, NEHRU PLACE,
NEW DELHI-19.

4. ERNAKULAM DISTRICT SIDCO WORKERS
UNION, REPRESENTED BY ITS SECRETARY, P.M.NAZEER,
S/O.P.K.M.MOHAMMED, CHAYAKODATH PARAMBU, CHALIKKAVATTOM,
VENNALA (PO).

5. STATE OF KERALA, REPRESENTED BY
THE COMMISSIONER & SECRETARY, LABOUR (H) DEPARTMENT,
SECRETARIAT, TRIVANDRUM.

6. LABOUR COMMISSIONER, HOUSING BOARD
BUILDINGS, SANTHI NAGAR, TRIVANDRUM-695 001.

7. ASSISTANT LABOUR OFFICER, IST CIRCLE,
KAKKANAD, COCHIN-682 020.

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8. CHIEF EXECUTIVE OFFICER,
  KERALA STATE HEAD LOAD WORKERS WELFARE BOARD, S.R.M.ROAD,
  COCHIN-682 017.

  R1 & 2   BY ADV. SRI.R.T.PRADEEP,STANDING COUNSEL
           BY SMT.K.K.RAZIYA,SC,SIDCO
           BY ADV. SRI.M.A.MANHU, SC, SIDCO
  R5 TO R7 BY GOVERNMENT PLEADER SRI. V.K. RAFEEQUE
  R8       BY ADV. SRI.KOSHY GEORGE, SC, KHLWWB
           BY ADV. SRI.P.V.JYOTHI PRASAD, SC, KHLWWB
           BY ADV. SRI.C.A.MAJEED, SC, KHLWWB
           BY ADV. SRI.RENIL ANTO KANDAMKULATHY,SC,KHLWWB
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THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 07-06-2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"CR"

P.R. RAMACHANDRA MENON & ANIL K. NARENDRAN, JJ.

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W.A. No. 116 of 2007

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Dated, this the 7th day of June, 2016

JUDGMENT

Anil K. Narendran, J.

This writ appeal is filed by the Regional Provident Fund Commissioner, Ernakulam, the 2nd respondent in O.P. No.22918 of 1998, challenging the judgment of the learned Single Judge of this Court dated 24.05.2009 in that original petition. The Kerala Small Industries Development Corporation (hereinafter referred to as 'SIDCO'), the 1st respondent herein, filed the said original petition challenging Ext.P7 order passed by the appellant herein and Ext.P9 order passed by the Employees Provident Fund Appellate Tribunal, New Delhi, the 3rd respondent herein; and for a declaration that the headload workers of the 4th respondent herein are the headload workers of Kadavanthara area, covered by the Kerala Headload Workers Act, 1978 and the Scheme framed thereunder, as disclosed from Ext.P13 certificate of registration issued by the Kerala Headload Workers Welfare Board, the 8th respondent herein, are not part-time workers of SIDCO and they do not come under the purview of Section 2(f) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'EPF Act').

2. The appellant herein filed counter affidavit opposing the reliefs sought for in the original petition. The 1st respondent herein filed reply affidavit, reiterating the contentions raised in the original petition. After considering the rival contentions, the learned Single Judge by the judgment dated 24.05.2009 set aside Exts.P7 and P9 orders, holding that, since provision being present in relation to provident fund under the Kerala Headload Workers Act and the said Act being assented to by the President, it is the said Act which would prevail over the earlier Central enactment, i.e., the EPF Act.

3. Feeling aggrieved by the judgment of the learned Single Judge, the appellant is before this Court in this writ appeal.

4. We heard the arguments of the learned Senior Counsel for the appellant, the learned Standing Counsel for respondents 1 and 2, the learned Government Pleader for respondents 5 to 7 and also the learned Standing Counsel for the 8th respondent.

5. SIDCO, a Government of Kerala undertaking, filed the original petition challenging the action of the appellant in extending the provisions of the EPF Act to the loading and unloading workers engaged at its Raw Materials Division at Gandhi Nagar, Kadavanthra. SIDCO initially approached the Government claiming exemption from the provisions of the Kerala Headload Workers Act and the Scheme framed thereunder, in respect of the headload workers engaged in its establishment. Based on the said request, the Government issued Ext.P1 letter dated 09.11.1998, informing that SIDCO not being a direct employer, would insist that the unattached headload workers, who have been doing loading and unloading operations for SIDCO should get themselves registered with the Local Committee of the Kerala Headload Workers Welfare Board in that area, under Rule 26A of the Kerala Headload Workers Rules, 1981 and that, the loading and unloading operations in SIDCO can be carried out by the headload workers deputed by the Local Committee.

6. Aggrieved by the said stand taken by the Government, the 4th respondent Union approached this Court in O.P.No.17553 of 1993, which was disposed of by Ext.P2 judgment, whereby the appellant was directed to proceed with the enquiry into the question of liability of SIDCO under the provisions of the EPF Act, as to the coverage of the headload workers engaged by SIDCO, and to take an appropriate decision after hearing the affected persons. Pursuant to Ext.P2 judgment, SIDCO was issued with Ext.P3 summons regarding the eqnuiry proposed to be conducted. On receipt of Ext.P3 summons, SIDCO submitted Ext.P4 statement before the appellant, contending that the headload workers engaged by them are not exclusively meant for their establishment and those workers are also being engaged for loading and unloading work by other establishments in Kadavanthra area.

7. During the enquiry conducted by the appellant herein, the Secretary of the 4th respondent Union was examined as PW1. On the side of SIDCO its Manager was examined. Exts. P5 and P6 are the deposition of those witnesses. As evident from Ext. P5 deposition, the Secretary of the 4th respondent Union has no case during the enquiry that the headload workers who are members of the Union are exclusively engaged by SIDCO. He has admitted that those headload workers are also being engaged by other establishments in the locality. After the enquiry, it was concluded in Ext. P7 order that, the headload workers engaged by SIDCO will come under the definition of 'employee' as defined under Section 2(f) of the EPF Act. In order to arrive at such a conclusion, the appellant herein relied on the settlement arrived at between the headload workers and SIDCO. Challenging Ext.P7 order, SIDCO filed Ext.P8 appeal before the Tribunal, which ended in dismissal by Ext.P9 order, by affirming the findings in Ext.P7 order. Challenging Exts.P7 and P9 orders, SIDCO filed O.P. No. 22918 of 1998 before this Court.

8. After considering the rival contentions, the learned Single Judge by the impugned judgment allowed the original petition, setting aside Exts.P7 and P9 orders. On the question of coverage of the

employees, the learned Single Judge held that, in view of the specific finding in Ext.P7 order, which was affirmed by the Tribunal in Ext.P9, that there have been several settlements between the 4th respondent Union and SIDCO from time to time; that the employees were getting bonus and compensation for working on holidays; and that they were doing works other than headload work, which is sufficient proof that the relationship of employer and employee was existing between them, it may not be open to re-appreciate the evidence and come to a different conclusion that the headload workers of the 4th respondent Union are not employees within the meaning of the EPF Act.

9. Insofar as the finding of the Appellate Tribunal in Ext.P9 order that the headload workers in question should be treated as the permanent employees of SIDCO, the learned Single Judge observed that the said finding is incongruous with the materials on record which unerringly show that the workers were only part-time employees, who were doing loading and unloading work not only for SIDCO, but also for others. Though it was sufficient to constitute them 'employees' going by the concept of 'employee' as found in the EPF Act, that may not be sufficient to constitute them permanent employees of SIDCO, which is a public sector undertaking.

10. The learned Single Judge noticed that, the finding in Ext.P7 order, in fact, is not that the headload workers are permanent workers of SIDCO. After referring to the decision of the High Court of Rajasthan in Railway Employees Association v. Union of India (1974 Lab.IC 133) it was observed in Ext.P7 order that, the fact that a person is a part-time employee and that he is not employed directly in connection with the work would not take him out of the ambit of the term 'employee' under Section 2(f) of the EPF Act. The definition embraces a part-time employee as also an employee and that, an employee can have more than one employer in private employment. Thereafter, it was concluded in Ext.P7 order that, the workers represented by the 4th respondent Union should, therefore, be treated as part-time employees of SIDCO within the definition of Section 2(f) of the EPF Act. Accordingly, it was held in Ext.P7 order that, the loading and unloading workers represented by the 4th respondent Union working within the premises of SIDCO Raw Materials Division are employees within the meaning of the definition in Section 2(f) of the EPF Act and are required to be enrolled as members under Para.26 of the Employees Provident Fund Scheme, 1952.

11. As discernible from Ext.P7 order, the appellant herein proceeded with the matter on the basis that an employee can have more than one employer in private employment, and that the headload workers in question are to be treated as part-time employees of SIDCO. The 4th respondent Union has not chosen to challenge the said finding in Ext.P7 order. However, the Tribunal while affirming Ext.P7 order concluded that the headload workers in question must be treated as permanent employees of SIDCO. As rightly noticed by the learned Single Judge, the said finding of the Tribunal in Ext.P9 order is incongruous with the materials on record which unerringly show that the workers were only part-time employees, who were doing loading and unloading work not only for SIDCO, but also for others.

12. The specific stand taken by the Kerala Headload Workers Welfare Board, the 8th respondent herein, in the counter affidavit filed in the original petition is that, the Kerala Headload Workers Act

is a complete code by itself providing welfare measures to headload workers, including provident fund, and that the headload workers registered under Clause 6A of the Headload Workers (Regulation of Employment and Welfare) Scheme, 1983 have a right to avail provident fund and other benefits under the said Scheme.

13. Clause 6 of the Headload Workers (Regulation of Employment and Welfare) Scheme deals with the procedure for regulation of headload workers on scheme areas. Sub-clause (1) of Clause 6 provides that, no headload worker who is not a registered headload worker under the provisions of the Kerala Headload Workers Rules, 1981 (i.e., Rule 26A) shall be allowed or required to work in any area to which the Scheme applies from the date of commencement of the functional operation of the Scheme in the area. Sub-clause (2) of Clause 6 provides further that, from the date of commencement of the functional operation of the Scheme in any area, no headload worker who is not permanently employed by an employer or contractor shall be allowed or required to work in any area to which the Scheme applies unless he is granted a further registration under the provisions of the Scheme.

14. Clause 6A of the said Scheme deals with registration of headload workers under the Scheme, at the commencement of the Scheme. As per Clause 6A, at the commencement of the Scheme in any area a headload worker who is not permanently employed by an employer or contractor and who is registered under the provisions of the Kerala Headload Workers Rules (i.e., Rule 26A) may submit his application in Form A to the Convener of the Committee concerned for registration in the Committee under the Scheme.

15. The specific stand taken by SIDCO in Para.18 of the original petition was that, the members of the 4th respondent Union are having registration under Rule 26A of the Kerala Headload Workers Rules as headload workers of Kadavanthra area, who have been issued with identity cards by the 7th respondent herein, after conducting necessary enquiry. Ext.P13 is the proceedings of the 7th respondent herein dated 25.06.1987 granting registration to the Secretary of the 4th respondent Union. Similar proceedings have been issued in respect of the remaining members of the 4th respondent Union and they have also been assigned with code numbers. We notice that, in the counter affidavit dated 13.09.1999 filed in the original petition, the appellant herein has not specifically denied or disputed the averments in Para.18 of the original petition with reference to Ext.P13 and similar proceedings regarding the registration granted to the members of the 4th respondent Union. Further, the said fact was also not disputed by the 4th respondent Union by filing counter affidavit in the original petition. As discernible from the impugned judgment, no such arguments were also raised before the learned Single Judge. In this writ appeal, though service of notice was effected by paper publication, none appeared for the 4th respondent Union. Therefore, the irresistible conclusions that could be drawn, based on the facts and circumstances as borne out from the pleadings and materials on record, are that the headload workers in question are part-time employees engaged by SIDCO at its Raw Materials Division at Gandhi Nagar, Kadavanthra; and that the said headload workers, who are doing loading and unloading work not only for SIDCO, but also for other establishments in that area, are registered headload workers of Kadavanthra area, having registration under Rule 26A the of the Kerala Headload Workers Rules, who have the right to avail provident fund and other benefits, based on their registration under Clause 6A of the Headload

Workers (Regulation of Employment and Welfare) Scheme.

16. The learned Senior Counsel for the appellant would contend that, even if the headload workers in question are registered under the Kerala Headload Workers Act, the same will not prevent the appellant from directing SIDCO to enroll such workers under the EPF Act.

17. In the impugned judgment, the learned Single Judge repelled the said contention of the appellant herein, holding that, since provision being present in relation to provident fund under the Kerala Headload Workers Act and the said Act being assented to by the President, it is the said Act which would prevail over the earlier Central enactment, i.e., the EPF Act. Therefore, in the teeth of clause (2) of Article 254 of the Constitution and the provisions of the Kerala Headload Workers Act and the Scheme framed thereunder, it may not be legal to call upon SIDCO to conform to the mandate of the EPF Act.

18. Therefore, the question to be decided is as to whether the provisions under the EPF Act and the Scheme framed thereunder is applicable in the case of the headload workers engaged by SIDCO at its Raw Materials Division at Gandhi Nagar, Kadavanthra, in view of the fact that the workers in question are essentially headload workers and the State Legislature has enacted the Kerala Headload Workers Act, 1978 besides the Headload Workers (Regulation of Employment and Welfare) Scheme in the year 1983.

19. Article 254 of the Constitution deals with situations where there is inconsistency between the laws made by the Parliament and the laws made by the Legislature of a State. Article 254 of the Constitution reads thus;

> "254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.- (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
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> (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:
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> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending,

varying or repealing the law so made by the Legislature of the State."

20. Clause (2) of Article 254 of the Constitution therefore mandates that, where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. However, going by the proviso to clause (2) of Article 254 of the Constitution, nothing in the said clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

21. In Regional Provident Fund Commissioner v. Sanatan Dharam Girls Secondary School (2007 (1) SCC 268) the question that arose for consideration before the Apex Court was whether the provisions of the State enactment, namely, the Rajasthan Non-Government Educational Institutions Act, 1989 having been enacted and received Presidential assent subsequent to the applicability of EPF Act, 1952 would have overriding effect in the State of Rajasthan, in view of clause (2) of Article 254 of the Constitution.

22. In Sanatan Dharam Girls Secondary School's case (supra), the educational institutions challenged before the High Court of Rajasthan, the order of the State Government dated 05.08.1987, implementing the provisions of the EPF Act to non-governmental aided institutions in the State and the consequential order dated 24.01.1998 transferring the existing provident fund amount from the State Treasury to the office of the Regional Provident Fund Commissioner. The High Court upheld the challenge, holding that the State Act would override the provisions of the EPF Act and that, the educational institutions fall under the exception as provided under Section 16(1)(b) of the EPF Act. By a separate order, the High Court has also upheld the contention of the educational institutions against the decision of the State Government directing them to deposit their contributions with the Regional Provident Fund Commissioner.

23. Before the Apex Court, it was contended on behalf of the Regional Provident Fund Commissioner that, the provisions of the EPF Act were made applicable from 06.03.1982 and till Act 1989 came into force from 01.01.1993, there was no State Act in force and, therefore, during the period from 06.03.1982 to 31.12.1992, the Central Act would apply. It was contended further that, the educational institutions which were already covered before the State Act of 1989 came into force continued to be covered by the EPF Act, even after the State Act of 1989 came into force. The decision of the Apex Court in M.P.Shikshak Congress V. Regional Provident Fund Commissioner (1999 (1) SCC 396) was relied on to buttress the said contention.

24. After considering the rival contentions, the Apex Court held that, the decision in M.P.Shikshak Congress case (supra) is distinguishable with regard to the contention of repugnancy and clause (2) of Article 254 of the Constitution. In the said case, the Act in relation to the State of Madhya Pradesh came into force prior to the application of the provisions of the EPF Act, 1952 to educational institutions and therefore the benefit of clause (2) of Article 254 was not available. However, in the

present case, admittedly the State Act has been enacted and has received the assent of the President subsequent to the applicability of the EPF Act, 1952 to educational institutions. Paras.36 and 37 of the judgment in Sanatan Dharam's case (supra) read thus;

> "36. In this context we may refer to the decision cited by the appellant in the case of M.P.Shikshak Congress v. Regional Provident Fund Commissioner (supra) in which it was stated that the provisions of the EPF Act apply in supersession of the State Act. This contention is not correct; the said case is clearly distinguishable on facts as has been noted in the judgment itself. The State Act did not provide for establishment of any Scheme as has been provided under the provisions of the State Act in the State of Rajasthan. In this regard, this Court noted as under:
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> "12. ... The Act did not even provide for any scheme for setting up a provident fund. The Act incidentally required that the institutional contribution to any existing provident fund scheme should be paid into the institutional fund set up under the said Act ..... "
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> 37. In addition to the above, the said case is also distinguishable with regard to the contention of repugnancy and Article 254(2) of the Constitution. In the said case, the Act in relation to the State of Madhya Pradesh came into force prior to the application of the provisions of the EPF Act, 1952 on educational institutions and therefore the benefit of Article 254 (2) was not available to it. In the present case, however, admittedly the State Act has been enacted and has received the assent of the President subsequent to the applicability of the EPF Act, 1952 on the educational institutions. In this regard, this Court in the said case noted as under:
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> "13. It was by reason of the notification of 06.03.1982 that the Central Act was extended to educational institutions. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, therefore, became applicable to educational institutions in the State of Madhya Pradesh for the first time on 06.03.1982. This was much later than the enactment of the State Act 20 of 1978. The parliamentary enactment, therefore, would prevail over the State Act 20 of 1978, assuming that the State Act of 1978 created or effected any scheme for provident fund. Article 254(2), therefore, has no application in the present case."
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> 25. In State of Kerala v. Mar Appraem Kuri Co. Ltd.

(2012 (7) SCC 106) a Constitution Bench of the Apex Court, in the context of the challenge made against sub-section (1a) of Section 4 of the Kerala Chitties Act, 1975 as repugnant to the provisions of the Central Chit Funds Act, 1982, under clause (1) of Article 254 of the Constitution, held that the question of repugnancy between the Parliamentary legislation and State legislation arises in two ways. First, where the legislations, though enacted with respect to matters in their allotted spheres, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, the Parliamentary legislation will

predominate, in the first, by virtue of non-obstante clause in clause (1) of Article 246; in the second, by reason of clause (1) of Article 254. The Apex Court held further that, clause (2) of Article 254 deals with a situation where the State legislation having been reserved and having obtained President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State legislation.

26. In Yogendra Kumar Jaiswal v. State of Bihar (2016 (3) SCC 183) the Apex Court held that, the ordinary rule is that when both the State Legislature as well as Parliament are competent to enact a law on a given subject, it is the law made by Parliament which will prevail. The exception which is carved out is under sub- clause (2) of Article 254 of the Constitution. Under sub-clause (2), where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament, then the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in the State.

27. In the instant case, both the EPF Act, 1952 and the Kerala Headload Workers Act, 1978 have been enacted by the Central and State Legislatures respectively, acting under the legislative powers available to it under Entries 23 and 24 of the Concurrent List in the Seventh Schedule of the Constitution. The Kerala Headload Workers Act received the Presidential assent on 28.9.1980. It is not in dispute before us that, the Kerala Headload Workers Act and the Scheme framed thereunder provide for welfare measures to headload workers, including provident fund, and that the headload workers registered under Clause 6A of the said Scheme have a right to avail such benefits. It is also not in dispute before us that, the provisions of the EPF Act are inconsistent with the provisions of the Kerala Headload Workers Act and the Scheme framed thereunder. In such circumstances, conclusion is irresistible that, in view of the mandate of clause (2) of Article 254 of the Constitution, the provisions of the Kerala Headload Workers Act, which is a later special enactment, which received Presidential assent on 28.9.1980 shall prevail in the State of Kerala, till the Parliament legislates under the proviso to clause (2) of Article 254 of the Constitution. In that view of the matter, we find no infirmity in the reasoning and conclusion of the learned Single Judge in the impugned judgment that, in the teeth of clause (2) of Article 254 of the Constitution and the provisions of the Kerala Headload Workers Act and the Scheme framed thereunder, it may not be legal to call upon SIDCO to conform to the mandate of the EPF Act .

In the result, the writ appeal fails and the same is accordingly dismissed. No order as to costs.

Sd/-

P. R. RAMACHANDRA MENON, JUDGE Sd/-

ANIL K. NARENDRAN, JUDGE kmd