ABDUL BASIT @ RAJU & ORS. ETC. A

v.

MD. ABDUL KADIR CHAUDHARY & ANR.

(Special Leave Petitions (Crl.) Nos.6855-6857 of 2013)

SEPTEMBER 15, 2014 B

[H.L. DATTU AND S.A. BOBDE, JJ.]

BAIL:

Cancellation of bail – High Court cancelling the bail granted by it earlier – Held: The concept of setting aside an unjustified, illegal or perverse order is different from the concept of cancellation of a bail on the ground of accused's misconduct or new adverse facts having surfaced after the grant of bail which require such cancellation — An order granting bail can only be set aside on grounds of being illegal or contrary to law by the court superior to the court which granted the bail and not by the same court — In the instant case, cancellation of bail was not sought on grounds that the bail was obtained by the petitioners by gross misrepresentation of facts, misleading the court and indulging in fraud — The circumstances brought on record did not reflect any situation where the bail was misused by accused —Therefore, High Court could not have entertained the said petition and cancelled the bail on grounds of it being perverse in law – Code of Criminal Procedure, 1973 – ss.167(2), 439(2) and 352. C D E F

CODE OF CRIMINAL PROCEDURE, 1973:

s.362 – Cancellation by High Court of bail granted by it earlier – Held: The order for bail in the bail application preferred by the accused-petitioners finally disposes of the issue in consideration and grants relief of bail to the applicants – Since, no express provision for review of order granting bail G

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A *exists under the Code, High Court becomes functus officio and s.362 applies barring the review of judgment and order of the Court granting bail to the accused-petitioners - Even in the light of fact of misrepresentation by the accused-petitioners during the grant of bail, High Court could not have* B *entertained respondent/informant's prayer by sitting in review of its judgment by entertaining miscellaneous petition - judgment and order passed by High Court is set aside.*

Hari Singh Mann v. Harbhajan Singh Bajwa **2000 (4) Suppl. SCR 313 = (2001) 1 SCC 169;** *Bay Berry Apartments* C *(P) Ltd. and Anr. v. Shobha and Ors.* **2006 (7) Suppl. SCR 738 = (2006) 13 SCC 737,** *U.P. State Brassware Corporation Ltd. and Anr. v. Uday Narain Pandey* **(2006) 1 SCC 479; and** *Rashmi Rekha Thatoi and Anr. v. State of Orissa and Ors.*, **2012 (5) SCR 674 = (2012) 5 SCC 690 – relied on.**

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Raghubir Singh and Ors. etc. v. State of Bihar **1987 CriLJ 157;** *Gurcharan Singh and Ors. v. State (Delhi Administration)* **1978 (2) SCR 358 = (1978) 1 SCC 118;** *Puran v. Rambilas and Anr.*, **(2001) 6 SCC 318;** ***Dr.*** *Narendra* E *K. Amin v. State of Gujarat and Anr.*, **2008 (6) SCR 1149 = (2008) 13 SCC 584,** *Ranjit Singh v. State of M.P. and Ors.* **2013 (12) SCALE 190;** *Gian Singh v. State of Punjab* **2012 (8) SCR753 = (2012) 10 SCC 303;** *Central Bureau of Investigation v. V. Vijay Sai Reddy,* **(2013) 7 SCC 452 –** F **referred to.**

Case Law Reference:

1987 CriLJ 157	**referred to**	**para 18**
1978 (2) SCR 358	**referred to**	**para 18**
(2001) 6 SCC 318	**referred to**	**para 21**
2008 (6) SCR 1149	**referred to**	**para 21**
2013 (12) SCALE 190	**referred to**	**para 22**

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2000 (4) Suppl. SCR 313	**relied on**	**para 26**	A
2012 (8) SCR 753	**referred to**	**para 27**	
(2013) 7 SCC 452	**referred to**	**para 28**	
2006 (7) Suppl. SCR 738	**relied on**	**para 29**	B
(2006) 1 SCC 479	**relied on**	**para 29**	
2012 (5) SCR 674	**relied on**	**para 29**	

CRIMINAL APPELLATE JURISDICTION : SLP (Criminal) Nos. 6855-57 of 2013. C

From the Judgment & Order dated 16.07.2013 in CRLMC No. 226/2013 in BA No. 654/2013, CRLMC No. 227/2013 in BA No. 664/2013 and CRLMC No. 228 in BA No. 593/2013 of the High Court of Gauhati at Guwahati. D

Nitin Sangra, V.D. Khanna, Satyajit Saha, Subash Biswas for the Petitioners.

Vartika S. Walia (for Corporate Law Group), Shankar Divate for the Respondents. E

The Order of the Court was delivered

O R D E R

1. These Special Leave Petitions arises out of the judgement and order passed by the High Court of Gauhati at Guwahati in Crl. M.C. 226 of 2013 in B.A. No. 654 of 2013 (D/o), dated 16.07.2013, whereby and whereunder the High Court has cancelled the bail granted to the petitioners herein by the High Court. F G

2. A succinct recapitulation of the facts in the instant case is: On the complaint of one Tofail Ahmed alleging kidnapping of his son, P.S. Case No. 181/2011 was registered under Section 365 of the Indian Penal Code, 1860 (for short "the IPC") H

A at the Badarpur Police Station at Karimganj, Assam, dated 22.11.2012. Sessions Case No. 75 of 2012 arising out of the aforesaid was registered under Sections 365, 120B, 302 and 201 of IPC and Section 27 of the Arms Act against two accused-petitioners herein- Kamal Hussain and Mumin Uddin. B Further, another Police Case No. 126 of 2012 was registered under Section 365, 120B, 302, 201 of IPC and Section 25(1-B)(a), (2) and (3) of the Arms Act for threatening to commit murder of the witnesses in the aforesaid Sessions Trial against the petitioner accused persons herein and the corresponding C Sessions Case No. 182 of 2012 was committed. The accused-petitioners were in judicial custody. While the aforesaid two accused petitioners in Sessions Case NO. 75 of 2012 were acquitted, the Trial Court had enlarged accused petitioner-Abdul Basit on bail by order dated 24.01.2013.

D 3. The wife of the deceased preferred Writ Petition No. 4523 of 2012 before the High Court for the direction to investigating agencies in Police Case No. 126 of 2012 to investigate properly. The High Court took note of the fact that the Sessions Case No. 182 of 2012 is at the stage of framing E of charges and observed that depending upon the materials on record the Trial Court is at liberty to invoke Section 173(8) of the Code of Criminal Procedure, 1973 (for short, "the Code") requiring further investigation by an independent agency, more particularly the CID, by its order dated 29.01.2013.

F 4. The Trial Court in Sessions Case NO. 182 of 2012 directed further investigation by the CID, stayed the trial proceedings and rejected the bail application of accused-petitioners herein by a common order dated 18.02.2013.

G 5. Against the aforesaid order passed by the Trial Court, the accused-petitioners had approached the High Court with the limited prayer of grant of bail. The High Court being of the view that since direction of further investigation has been issued by the learned Sessions Judge, the charge sheet submitted H earlier by the police had become infructuous and the accused-

appellants were entitled to seek relief under Section 167(2), proviso (A)(1), by its order dated 12.03.2013 in Bail Application No. 593 of 2013 had granted bail to the three accused-applicants therein (the petitioners before us). On the basis of the aforesaid order of the High Court, three other co-accused-petitioners were released by order dated 20.03.2013 in Bail Application No. 654 of 2013. Subsequently, by order dated 20.03.2013 in Bail Application No. 664 of 2013, other three co-accused were enlarged on bail.

6. Aggrieved by the aforesaid three orders, the respondent herein approached the High Court by way of Crl. M.C. 226 of 2013 in B.A. No. 654 of 2013 and sought for cancellation of the bail granted to all the accused-petitioners herein on the grounds, *inter alia*, that the direction of learned Sessions Judge, Karimganj in Sessions Case NO. 182 of 2012 to the CID to conduct further investigation of the case under Section 173(8) of the Code does not tantamount to re-investigation or fresh investigation of the case and hence, did not render the chargesheet submitted by the police in the aforesaid case infructuous and therefore, could not have entitled the respondents to avail of default bail under Section 167(2)(a)(i) of the Code on the ground that chargesheet was not submitted within 90 days.

7. The High Court by a common judgment and order, dated 16.07.2013, has accepted the aforesaid ground and allowed the prayer of the respondent herein, thus cancelling the bail granted to all the accused-petitioners herein. While disposing of the matter the High Court, in paragraph 4 of the impugned judgement, has held as under:

> "...there would be no difficulty in holding that granting of bail contrary to law or contrary to law laid down by the Apex Court can constitute a valid ground for cancellation of bail already granted; this will no (sic) fall foul of Section 362 of the Code."

A 8. Aggrieved by the aforesaid cancellation of bail by the High Court, the accused-petitioners are before us in these petitions.

9. The impugned judgment and order is assailed by the B petitioners on the grounds, *inter alia*, that the High Court could not have entertained an application for cancellation of bail on grounds of misrepresentation as such objection could only be raised in an appeal by the informant-respondent. Further, that the said judgment and order cancelling the bail passed by the High Court tantamounts to review of the earlier order of the High C Court whereby it had granted bail to the petitioners and such review being barred by Section 362 of the Code renders the impugned judgment and order perverse and liable to be set aside.

D 10. *Per contra*, the respondents would support the judgment(s) and order passed by the High Court cancelling the bail granted to the petitioners.

11. We have heard the learned counsel appearing for the E parties and perused the documents on record including judgment(s) and order(s) of the Courts below.

12. The short question that falls for our consideration and decision is whether the exercise of jurisdiction by the High Court under Section 439(2) of the Code justified in the instant case.

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13. To appreciate the law on the issue, we would analyse provisions of the Code relevant for the disposal of this case.

14. Proviso (a) to Section 167(2) of the Code provides for release of the accused person in case of failure of the G investigating agency to complete the investigation in stipulated time. It reads as under:

"Section 167 - Procedure when investigation cannot be completed in twenty-four hours

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(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be to released under the provisions of Chapter XXXIII for the purposes of that Chapter;"

15. Section 439(2) of the Code provides for the powers of the High Court and the Court of Sessions regarding cancellation of bail granted to an accused person. It reads as under:

"Section 439 - Special powers of High Court or Court of Session regarding bail

A (1) * * *

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

B 16. Since the submission made by the parties center round the interpretation to be placed upon Section 362 of the Code, it may be necessary to have a glance at the same. The heading of Section 362 of the Code provides for the "Court not to alter judgment" and the provision operates as a bar for the court to C alter or review its decisions once pronounced. It reads as under:

"Save as otherwise provided by this Code or by any other law for the time being in force, no Court when it has signed its judgment or final order disposing of a case, shall alter D or review the same except to correct a clerical or arithmetical error.

17. It is trite that Section 167(2) creates a deeming fiction whereby the release of a person is equated to his release under Chapter XXXIII of the Code. However, an order for E release on bail under proviso (a) to Section 167(2) is not an order on merits but an order-on-default of the prosecuting agency. Such an order could be nullified for special reasons after the defect/default has been cured. The accused cannot, therefore, claim any special right to remain on bail. If the F investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled on an application by the prosecuting agency.

G 18. Under Chapter XXXIII, Section 439(1) empowers the High Court as well as the Court of Session to direct any accused person to be released on bail. Section 439(2) empowers the High Court to direct any person who has been released on bail under Chapter XXXIII of the Code be arrested H and committed to custody, i.e., the power to cancel the bail

granted to an accused person. Generally the grounds for cancellation of bail, broadly, are, (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation , (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in sixty days after the defect is cured by the filing of a chargesheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. However, in the last mentioned case, one would expect very strong grounds indeed. (*Raghubir Singh and Ors. etc. v. State of Bihar,* 1987 CriLJ 157)

19. The scope of this power to the High Court under Section 439(2) has been considered by this Court in *Gurcharan Singh and Ors. v. State (Delhi Administration),* (1978) 1 SCC 118.

20. In *Gurcharan Singh case (supra)* this Court has succinctly explained the provision regarding cancellation of bail under the Code, culled out the differences from the Code of Criminal Procedure, 1898 (for short, "old Code") and elucidated the position of law vis-à-vis powers of the Courts granting and cancelling the bail. This Court observed as under:

> "16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position under Section 498, Cr.P.C. of the old Code. That is to say, even if a Magistrate refuses to grant

A bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed
B to custody. In the old Code, Section 498(2) was worded hi somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under Sub-section (1) to be arrested and may commit him to custody. In other words, under
C Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This
D restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 489(2).Under Section 439(2) of the new Code a High Court may commit a person released on bail under
E Chapter XXXIIL by any Court including the Court of Session to custody, if it thinks appropriate to do so, it must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused, person has been
F admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily,' therefore, to that
G Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. *When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have*
H *cropped up except those already existed, it is futile for*

the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

21. In this context, it is profitable to render reliance upon the decision of this Court in *Puran v. Rambilas and Anr.,* (2001) 6 SCC 318. In the said case, this Court held that the concept of setting aside an unjustified, illegal or perverse order is absolutely different from the cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation. In *Dr. Narendra K. Amin v. State of Gujarat and Anr.,* (2008) 13 SCC 584, the three-Judge Bench of this Court has reiterated the aforesaid principle and further drawn the distinction between the two in respect of relief available in review or appeal. In this case, the High Court had cancelled the bail granted to the appellant in exercise of power under Section 439(2) of the Code. In appeal, it was contended before this Court that the High Court had erred by not appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench while affirming the principle laid down in *Puran case (supra)* has observed that when irrelevant materials have been taken into consideration by the Court granting order of bail, the same makes the said order vulnerable and subject to scrutiny by the appellate Court and that no review would lie under Section 362 of the Code. In essence, this Court has opined that if the order of grant of bail is perverse, the same can be set at naught only by the superior court and has left no room for a review by the same Court.

22. Reverberating the aforesaid principle, this Court in the recent decision in *Ranjit Singh v. State of M.P. and Ors.,* 2013 (12) SCALE 190 has observed that:

"20....There is also a distinction between the concept of setting aside an unjustified, illegal or perverse order and cancellation of an order of bail on the ground that the

A accused has misconducted himself or certain supervening circumstances warrant such cancellation. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court."

B 23. Therefore, the concept of setting aside an unjustified, illegal or perverse order is different from the concept of cancellation of a bail on the ground of accused's misconduct or new adverse facts having surfaced after the grant of bail which require such cancellation and a perusal of the aforesaid decisions would present before us that an order granting bail C can only be set aside on grounds of being illegal or contrary to law by the Court superior to the Court which granted the bail and not by the same Court.

24. In the instant case, the respondents herein had filed D the criminal miscellaneous petition before the High Court seeking cancellation of bail on grounds that the bail was obtained by the petitioners herein by gross misrepresentation of facts, misleading the Court and indulging in fraud. Thus, the petition challenged the legality of the grant of bail and required E the bail order to be set aside on ground of it being perverse in law. Such determination would entail eventual cancellation of bail. The circumstances brought on record did not reflect any situation where the bail was misused by the petitioner-accused. Therefore, the High Court could not have entertained the said F petition and cancelled the bail on grounds of it being perverse in law.

25. It is an accepted principle of law that when a matter has been finally disposed of by a Court, the Court is, in the absence of a direct statutory provision, *functus officio* and G cannot entertain a fresh prayer for relief in the matter unless and until the previous order of final disposal has been set aside or modified to that extent. It is also settled law that the judgment and order granting bail cannot be reviewed by the Court passing such judgment and order in absence of any express provision H in the Code for the same. Section 362 of the Code operates

as bar to any alteration or review of the cases disposed of by the Court. The singular exception to the said statutory bar is correction of clerical or arithmetical error by the Court.

26. In *Hari Singh Mann v. Harbhajan Singh Bajwa*, (2001) 1 SCC 169 a criminal miscellaneous petition was filed by the petitioner therein in a Writ Petition disposed of by the High Court. The High Court had not only entertained the said petition but also issued directions. In appeal, this Court annulled the judgment and order passed by the High Court on grounds that practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court as no review of a final order passed by the High Court is contemplated under the Code. This Court has observed as under:

> "9. There is no provision in the Code of Criminal Procedure authorising the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction. Such a power cannot be exercised with the aid or under the cloak of Section 482 of the Code.
>
> 10. Section 362 of the Code mandates that no court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or an arithmetical error. The section is based on an acknowledged principle of law that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes *functus officio* and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes *functus officio* the moment the official order disposing of a case is signed. Such an order

A cannot be altered except to the extent of correcting a clerical or an arithmetical error. The reliance of the respondent on *Talab Haji Hussain case* is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts under Section 561-A (Section B 482 of the new Code) has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. It is not disputed that the petition filed under Section 482 of the Code had been finally disposed of by the High C Court on 7-1-1999. The new Section 362 of the Code which was drafted keeping in view the recommendations of the 41st report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also D to the final orders other than the judgment.

11. The impugned orders of the High Court dated 30-4-1999 and 21-7-1999 which are not referable to any statutory provisions, having been passed apparently in a review petition in a criminal case are without jurisdiction E and liable to be quashed."

27. This Court in *Gian Singh v. State of Punjab,* (2012) 10 SCC 303 has extended the bar under Section 362 as a necessary check on inherent powers of the High Court under F Section 482. This Court has opined that the inherent power of the Court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail. This Court has observed as under:

"5. Section 362 of the Code expressly provides that no G court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error save as otherwise provided by the Code. Section 482 enables the High Court to make such order as may be necessary to give effect to H any order under the Code or to prevent abuse of the

process of any court or otherwise to secure the ends of justice. The inherent powers, however, as much are controlled by principle and precedent as are its express powers by statute. If a matter is covered by an express letter of law, the court cannot give a go-by to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction."

28. This Court in paragraph 30 of its decision in *Central Bureau of Investigation v. V. Vijay Sai Reddy,* (2013) 7 SCC 452 has cautioned that cancellation of bail necessarily involves the review of a decision already made, it should always be exercised very sparingly by the court of law.

29. It is a well settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a Court is bound to act within the four corners of the Statute. The statutory exercise of the power stands on a different pedestal than the power of judicial review vested in a Court. The same has been upheld by this Court in *Bay Berry Apartments (P) Ltd. and Anr. v. Shobha and Ors.*, (2006) 13 SCC 737, *U.P. State Brassware Corporation Ltd. and Anr. v. Uday Narain Pandey*, (2006) 1 SCC 479 and *Rashmi Rekha Thatoi and Anr. v. State of Orissa and Ors.*, (2012) 5 SCC 690. It is the duty of the superior courts to follow the command of the statutory provisions and be guided by the precedents and issue directions which are permissible in law.

30. In the instant case, the order for bail in the bail application preferred by the accused-petitioners herein finally disposes of the issue in consideration and grants relief of bail to the applicants therein. Since, no express provision for review of order granting bail exists under the Code, the High Court becomes *functus officio* and Section 362 of the Code applies herein barring the review of judgment and order of the Court granting bail to the accused-petitioners. Even though the cancellation of bail rides on the satisfaction and discretion of the Court under Section 439(2) of the Code, it does not vest

A the power of review in the Court which granted bail. Even in the light of fact of misrepresentation by the accused-petitioners during the grant of bail, the High Court could not have entertained the respondent/informant's prayer by sitting in review of its judgment by entertaining miscellaneous petition.

B

31. Herein, the High Court has assigned an erroneous interpretation to the well settled position of law, assumed expanded jurisdiction onto itself and passed an order in contravention of Section 362 of the Code cancelling the bail granted to the petitioners herein. Therefore, in our considered C opinion, the High Court is not justified in reviewing its earlier order of grant of bail and thus, the impugned judgment and order requires to be set aside.

32. The judgment and order passed by the High Court is D set aside. The interim order granted on 02.09.2013 by this Court granting bail to the accused-petitioners shall continue till the disposal of Police Case No.126 of 2012 corresponding to Sessions Case No.182 of 2012.

E 33. The Special Leave Petitions are disposed of in the aforesaid terms.

Rajendra Prasad SLPs disposed of.