IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. II

Appeal No. C/964 & 965/2007

(Arising out of Order-in-Appeal No. 383 & 384/2007/MCH/AC/ Contract-Cell.07 dated 20.08.2017 passed by the Commissioner of Customs (Appeals), Mumbai-I).

Commissioner of Customs (Import), Mumbai	Appellant

Vs.

M/s Hindustan Construction Co. Ltd. M/s Nagarjuna Construction Co. Ltd.	Respondent

Appearance:

Mrs. P. Vinitha Sekhar, Jt. Commr. (AR)	for Appellant
Shri T. Viswanathan, Advocate	for Respondent

CORAM:

HON'BLE SHRI RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE SHRI RAJU, MEMBER (TECHNICAL)

Date of Hearing: 09.05.2018

Date of Decision: 25.05.2018

ORDER NO. **A/86528-86529/2018**

Per: Raju

The appellants M/s Hindustan Construction Co. Ltd. (M/s HCC) and M/s Nagarjuna Construction Company Ltd. (M/s NCC) entered into a Joint Venture (to participate in the bid for execution of work under "Phase II of J. Chokka(HCC-NCC JV) Rao Godavari Lift Irrigation Scheme" which was eventually granted to them by the Irrigation & C.A.D (PW) Department, Government of Andhra Pradesh. They sub-contracted the work for design, supply, model study, manufacturing, supply, erection, testing commission, operation and maintenance of electro-mechanical package for the initial setting up of Godavai Lift Irrigation Scheme, Phase II. M/s Jyothi Ltd. entered into contracts with C.K.D Blansko, Sigma Group a.s., and C.K.D. NoveEnergoa.s. for supply of equipments and setting up of the pump stations.In the meanwhile due to financial constraints of M/s Jyothi, NCC and HCC opened the LC with the foreign suppliers and made an application for registration under the project import under the category water supply project.The Adjudicating Authority denied the registration holding that there was no contract between the importer and the supplier and that the project is an irrigation project and not a water supply project.Aggrieved by the said order M/s. HCC and M/s NCC filed an appeal before the Hon'ble Commissioner of Customs (Appeal), Mumbai who set aside the Order in original and allowed their appeal. Hence this appeal has been filed by the revenue.

2. Ld AR argued that as per Regulation 4 of the PIR-1986 the assessment under the heading No. 98.01 shall be available only to those goods which are imported (whether in one or more than one consignment) against one or more specific contracts which have been registered in accordance with the PIR-1986. She argued that it obviously means that the contract should relate directly to those goods which are proposed to be imported. She argued that while the original contract was between Jyoti Ltd and foreign supplier the respondents cannot be registered under PIR 1986 as there exists no contract between the importer M/s. HCC / M/s NCC and the foreign supplier. She placed reliance on the judgement of Hon'ble Supreme Court in the case of Mihir Textiles Ltd. vs. Collector of Customs, Mumbai reported in 1997 (92) ELT. 9 (SC).

2.1 She further argued that Irrigation Project is a specific entry under CTH 98010012. The terms and conditions for availing the benefit of this entry and the rate of duty applicable for ‘irrigation project’ are different from that of a ‘water supply project’. ‘Water Supply Project’ is a different entry distinct from ‘Irrigation Project’ and falls under the general residual category Sl No. (6) as Other Projects and CTH 98010019. She argued that it is a settled law under the customs interpretative rules (Rule 3 (a)) that specific entry will always prevail over general/residual entry. She argued that the Hon’ble Supreme Court in the case of Bharat Forge & Press Industries (P) Ltd. vs. Collector of C. Ex. Reported in 1990 (45) ELT. 525 (SC) had held that only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. Reliance was also placed on the following decisions wherein the principle GeneraliaSpecialibus Non Derogant (General must not detract from the specific) has been upheld in classification matters.

a) Commissioner of C.Ex., Bhubaneswar-I vs. Champdany Industries LTd. reported in 2009 (241) ELT. 481 (SC).
b) DensonsPultretaknik vs. Commissioner of Central Excise reported in 2003 (155) ELT. 211 (SC).
c) Plasmac Machine Mfg. Co. Pvt. Ltd. vs. Collector of Central Excise reported in 1991 (51) ELT. 161 (SC).

2.2 She also relied on the decision in the case of M/s. Pratibha Industries wherein while discussing ‘drinking water supply projects’, tribunal discussed the scope of the term ‘water supply projects’. A reference was made to McGraw Hill Dictionary of Scientific and Technical Terms which states that ‘water supply engineering’ is concerned with the development of source of supply, transmission, distribution and treatment of water. Based on such references and taking into consideration the various definitions provided in the PIR-1986 and CTH 98.01 the Tribunal held that water supply project in respect of Project Imports would mean only water treatment plants.

2.3 She further argued that the essential requirement of the water supply project specified in SI. No. 26A of Notification No. 42/96-Cus dated 23.07.1996 and Notification No. 14/2004-Cus dated 08.01.2004 is that it should be capable of making the water fit for industrial or agricultural use. She argued that only projects like a which derive its source from the effluent water, brackish water etc., and treat it so as to make it fit for industrial or agricultural use are covered. She argued that ehe present Project is a Lift Irrigation Project which simply lifts/pumps/transports water from the river to the irrigation area. So it is not a project intended to make water fit for agricultural useand therefore it is not covered within the scope of Water Supply Project under SI. No. 26A of Notification No. 42/96-Cus dated 23.07.1996 and Notification No. 14/2004-Cus dated 08.01.2004. She argued that as per the ratio of M/s. Pratibha Industries Ltd. the same is not a water supply project.

2.4 She also placed reliance on the judgement of J.V.Gokal& Co. 2017 (348) ELT. 445 (Bom.) wherein it was held by the Hon'ble Bombay High Court that benefit of exemption was not available to Ductile pipes imported for the purpose of implementation of drinking water supply projects.She argued that exemptions are to be strictly interpreted. She placed reliance on following judgements.

a) Novopan India Ltd. vs. Collector of C.Ex and Customs, Hyderabad reported in 1994 (73) ELT. 769 (SC)
b) Liberty Oil Mills (P). Ltd. vs. Collector of Central Excise, Bombay reported in 1995 (75) ELT. 13 (SC)
c) Gammon India Ltd. vs. Commissioner of Customs, Mumbai reported in 2011 (269) ELT. 0289 (SC)
d) Star Industries vs. Commissioner of Customs (Imports), Raigad reported in 2015 (324) ELT. 659 (SC)

2.5 She argued that mere fact that a project has been certified by the Sponsoring Authority would not mean that the importer is automatically entitled to register the project and avail benefit of notifications. The benefit of exemption flows from the Notification and not from any Certificate. The Notifications contains in-built stipulations/conditions and the Certificate is merely one such condition. Therefore, no exemption can be granted to any goods merely on the basis on a Certificate if such goods are not found eligible as per the Notification. The pre-requisite of Certificate is a necessary condition but not a sufficient condition by itself. Whether or not the goods are exempt under the Notification has to be decided independently bases on what is explicitly provided in the Notification and not just going by any Certificate. All the conditions of the Regulations and Notifications have to be fulfilled for availing any benefit of duty.In the present case the project is not covered by the scope of the Notifications No. 14/2004. Hence the Appellate Authority's observations that since the duly constituted sponsoring authority (District Collector) have certified it as a water supply project the Department could not deny the project import benefit on technicalities does not appear to be correct.

2.6 She argued that the Hon'ble Supreme Court decision in the case of M/s Zuari Industries Ltd. is not applicable in this case. In the case of M/s Zuari Industries Ltd., the Hon'ble Supreme Court held that a power plant installed for a fertilizer project would be treated as a part of the entire fertilizer project and not a power project. However in the present case the appellants on the contrary are trying to take one part of the whole project i.e. Godavai Lift Irrigation Scheme and show the same as an individual project to claim exemption. Their whole argument is against the principles laid down by the Hon'ble Supreme Court in the case of M/s Zuari Industries Ltd. (Supra).

3. Ld counsel argued that the assessment of the imported goods under project import be finalized as it is extending the project import benefit and the department's present appeals be dismissed without going into the questions raised by the Department. He placed reliance on the following decisions:

(i) Jain Irrigation Systems Ltd. vs. CCE – 2016 (343) ELT 562 (T);Affirmed by Supreme Court in 2017 (345) ELT A70 (SC)

(ii) Eddy Cranes Engineers vs. CCE – 2018 TIOL 542 CESTAT MUM

3.1 Ld Counsel argued that according to the department, an importer can register contract with foreign suppliers alone under Regulations 4 and 5. He argued that the regulation 4 prescribes "*assessment under the said heading 98.01 shall be available only to those goods which are imported (whether in one or more than one consignment) against one or more specific contract, which have been registered with the appropriate Customs House in the manner specified in regulation 5….*"

> And regulation 5 provides that "*every importer claiming assessment of the goods falling under heading 98.01, ….., shall apply in writing to the proper officer….*"

He submitted that the Respondents (HCC) have entered into a contract with consortium of "M/s. Jyoti Ltd. and its consortium partners, namely C.K.D. Blansko and C.K.D. NoveEnergo (foreign suppliers)" placing a work order upon them for various pump stations under the Godavari Lift Irrigation Scheme project. Subsequently, M/s. Jyoti Ltd. and its consortium partners, namely C.K.D. Blansko and C.K.D. NoveEnergo have entered into separate contracts defining their respective roles and responsibilities as per the Contract with HCC. He submitted that the Respondents (NCC) have entered into a contract with consortium of "M/s. Jyoti Ltd. and its consortium partners, namely C.K.D. Blansko, Sigma Group a.s. and C.K.D. NoveEnergo (foreign suppliers)" placing a work order upon them for pump stations under the Godavari Lift Irrigation Scheme project. The Respondents (NCC) sought to register this contract with the Contract Cell. Subsequently, M/s. Jyoti Ltd. and its consortium partners, namely C.K.D. Blansko, Sigma Group a.s. and C.K.D. NoveEnergo have entered into separate contracts for their respective roles and responsibilities as per the Contract with NCC.

3.2 He argued that they submitted to customs all the contracts viz.,

(a) contract between Government of Andhra Pradesh and the respondents ;
(b) contract between respondent (individual) and M/s Jyoti Ltd.,
(c) contract between Jyoti Ltd. and the foreign supplier, as amended by addendum dated 12.4.06 making the respondents as party to the agreement

In other words, the contract under which the goods were imported, were too forming part of the application for registration of the contract, in additional to the contract between the respondents and Jyoti Ltd. Therefore, the objection that the contract under which goods were imported was not registered, is factually incorrect. The value of the imported goods mentioned in that agreement in the import agreement between Jyoti Ltd., the respondents and the foreign supplier were same as the value mentioned in the essentiality certificates issued by Sponsoring Authority.

3.3 He submitted that the instant case, the project is a water supply project and in fact the equipment is for water supply project for agricultural use as described in the corrigendum issued by the sponsoring authority. The Respondents were to supply the equipment/goods for various pumping stations covered in the Godavari Lift Irrigation Project. The sponsoring authority has stated that the supplies of goods for pumping stations by the Respondents under the project is eligible for the benefit of the Customs Notification No. 14/2004-Cus. dated 08.01.2004 and Tariff Heading 9801, after duly examining the nature of the goods imported by the Respondents for such supplies.

3.4 He argued that the goods imported in the present case is parts for setting up pumping stations for water supply project for irrigation. Exemption is available to machinery/equipment for the purpose of “water supply project for irrigation”. Certainly, parts of pumping stations used for pumping water from the river to the field is machinery/equipment for the purpose of “water supply project for irrigation”. Thus, the decision of the Tribunal in the case Pratibha is not invokable in the present case. He argued that the CESTAT in Pratibha (Supra) interpreted the definition of “drinking water supply project”, which is an inclusive definition, rather rigidly in a restrictive manner. Such an interpretation of an inclusive definition, is contrary to the following decisions of Supreme Court:

(i) CIT v. TajMahal Hotel - (1971) 3 SCC 550.
(ii) Regional Directors, ESIC v. High Land Coffee Works, (1991) 3 SCC 617
(iii) State of Bombay Hospital v. Mazdoor Sabha, (1960) 2 SCR 866

Further, a coordinate Bench vide Misc. Order No. 568/2007, dated 12-11-2007 in Appeal No. C/384/2007 (reported at Subhash Projects & Marketing

Ltd. vs. CC - 2008 (223) ELT 278 (T)) has referred the matter to Larger Bench and the Respondents understand that the reference is still pending for resolution by Larger Bench.

3.5 He argued that the project involved in the present case is covered by sl. no. 6 of Heading 9801. He argued that the project, namely, "Phase II of J. Chokka Rao Godavari Lift Irrigation Scheme" involved in the present case is covered by Entry No. 26A Water Supply Project under sl. no. 6 of Heading 9801. This has been confirmed by the Sponsoring Authority too, by issuing the essentiality certificates, which have not been questioned by the customs department. District Collector is the sponsoring authority in terms of Sl.No. 3C of the Table appended to the Project Import Regulations, 1986. He argued that the ground taken by the department that the project involved in the present case is covered under Sl. No. 2 of the Heading 9801 as Irrigation project is incorrect because this interpretation will render the entry no. 26A as redundant. The entry water supply project for agriculture use will invariably be an irrigation project too. He argued that even if It is assumed that the project in question is governed by the entry, irrigation project under Heading 98.01, such project will quality for the exemption under Notification No. 14/04-Cus, as the definition of water supply project mentioned in the said notification is satisfied in the present case. In this regard, reliance is placed on the decision of Supreme Court in HCL Ltd. vs. CC – 2001 (130) ELT 405 (SC).

3.6 He argued that the Sponsoring Authority has issued the recommendation letter only after considering the pumping stations to be imported by the Respondents. Since the Sponsoring Authority has specifically issued a corrigendum to its earlier recommendation letter and has suitably amended the scope of use of the goods, it can be said that the

Sponsoring Authority has after due consideration has recommended the project for the benefits of the PIR, CTH 98.01 and Customs Notification No. 14/2004-Cus. The Hon'ble Supreme Court in the case of Zuari Industries Ltd. v. CC - 2007 (210) ELT 648 (SC) had in favour of the assessee and held that the it is not necessary to examine those authorities on interpretation. *He argued that* the Customs authorities cannot go beyond the certificate of the sponsoring authority and deny the benefit of the Project Import once it is validly issued by the sponsoring authority. Further, the Revenue cannot go behind the certificate of the Project Authority and deny the benefit of the exemption under project import.

3.7 He pointed out that the decision of Supreme Court in Zuari (supra) has been followed by the CESTAT in the context of water supply projects, in the following cases:

a) CC vs. Rochem Separation System India Ltd.2015 (251) ELT 438 (T)
b) IMS Petrogas Ltd. vs. CC2017-TIOL-686-CESTAT-MUM

3.8 He further argued that the objection that the project in question is an irrigation project and not water supply project for agriculture was not a ground raised in the SCN dated 18.4.07. Reliance was placed in this regard on the decision of Supreme Court in CC vs. Toyo Engineering India Ltd. - 2006 (201) ELT 513 (SC).

4. We have considered rival submissions. The issues that need to be decided are

i) If the appellants can be granted registration when they are not direct party to the import contract.
ii) If yes, then If the items imported by them are classifiable as Irrigation project under heading 98010012 or as Water Supply Projects notified vide notification no 42/96 –Cusdt 23.7.96under heading 98010019

iii) If the appellants are entitled to benefit of the exemption notification 14/2004-Custom dated 8.1.2004

4.1 We find that the regulation 4 to Project Import Regulations 1986 reads as follows

> REGULATION 4. Eligibility. — The assessment under the said heading No. 98.01 shall be available only to those goods which are imported (whether in one or more than one consignment) against one or more specific contracts, which have been registered with the appropriate Custom House in the manner specified in regulation 5 and such contract or contracts has or have been so registered,
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> (i) before any order is made by the proper officer of customs permitting the clearance of the goods for home consumption;
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> (ii) in the case of goods cleared for home consumption without payment of duty subject to re-export in respect of fairs, exhibitions, demonstrations, seminars, congresses and conferences, duly sponsored or approved by the Government of India or Trade Fair Authority of India, as the case may be, before the date of payment of duty.

The regulation does not require the importer to enter into contract with foreign supplier. It merely require existence of a contract under which imports are made. Revenue is relying on the para 3 of Chapter 5 of the Customs Manual which states that the importer should have entered into contract with the foreign supplier. We are of the opinion that if the Project Import Regulation 1986 do not mandate any such condition the same can not be imposed by the terms of Customs Manual. Thus we hold that the Project can be registered under the regulation by the Appellants even if the appellants are not a direct party to import contract.

4.2 The next issue relates to the classification of the said goods. The entire scope of the project is defined in the letter dated26.2.2007 of the

Superintendent Engineer addressed to District Collector Warangal which reads as follows.

> "I have to submit that the Godavari Lift Irrigation Project is being implemented by Irrigation and C.A.D. Department under J. Chokka Rao Godavari Lift Irrigation Project Circle, Warangal. The J. Chokka Rao Godavari Lift Irrigation Project Phase-II has been taken up to provide immediate relief to the drought prone areas of Cherial, R.S. Ghanpur and Jangaon constituencies of Warangal District. It is proposed to lift 14 cumecs of water from Godavari River at Gangaram (V), Eturunagaram (M), Warrangal District, Andhra Pradesh with single steel pipeline with 3000mm, 2500mm, 2000mm diameter connecting i) from Intake to Dharmasagar via Bhimghanpuram, Salivagu, ii) from R.S. Ghanpur to Chittakodur via Aswaraopally, iii) from Dharamsagar to Tapaspally via Gandiramaram and Bommakur, to irrigate an ayacut of 2.85 lakh acres with 7 stage lifting in a distance of 196.85 Kms. To introduce flexibility in the system during operation each pipeline is supported by 2 Nos. of pump sets at each pumping station.
>
> The water conductor system of the scheme runs through the territories of Warangal District, Intermediate tanks of the viz. Bhimghanpuram, Salivagu, Dharmasagar, Ghanpur, Aswaraopally, Chittakodur, Gandiramaram, Bommakur and Tapaspally are in Warangal District and tanks are at distance about 100 km, 40 km, 18 km, 35 km, 66 km, 51 km, 81 km respectively from Warangal town."

This part of the project is described in detail in para 4.4.1 of the Project Report of Godavari Lift Irrigation Scheme as Water Conductor System. Thus in the entire project of Irrigation we are concerned with only the part of the project relating to 'Water Conductor System'. This 'Water Conductor System' only relates to the lifting of water from one point and through pump houses and pipelines supplying to the recipient tanks at destination. Thus the entire project may be of Irrigation, but the part we are dealing with is only related to movement and lifting of water from one point to another. Thus it cannot be called an irrigation project but it can only be called a Water Supply project in that sense. The other objection raised by revenue regarding the fact that the term 'Water Supply Projects', both under heading 9801 of the First Schedule to the Customs Tariff Act, 1975 as well as under notification has been qualified with the following explanation.

> *Explanation.* - Water Supply Project includes a plant for desalination, demineralization or purification of water or for carrying out any similar process or processes intended to make the water fit for agricultural or industrial use.

It has been argued by revenue that only the Water Supply Projects which in some manner purify the water or make it fit for specified purposes are covered by the expression 'Water Supply Projects'. Revenue has argued that since the project of the appellant is just lifting and supplying the water the same is not covered by the said expression. Revenue has relied on the decision of Tribunal in case of Pratibha Industries 2005 (188) ELT 433 which has been affirmed by Hon Apex Court as reported in 2015 (320)ELT A273 (SC). It is seen that the facts in the said case are significantly different. In the said case the goods imported were not machineries but were pipes and therefore they were not covered under chapter heading 9801. In the said case the decision was based on the definition drawn from McGraw Hill Dictionary as the term 'Water Supply Project' was not defined. In the instant case the goods imported are machineries and term 'Water Supply Project' has been described in the explanation. Thus the facts of case are different.

4.3 The next argument of revenue was that even if it is a water supply project it would merit classification as Irrigation project as it is part of an irrigation project. Reliance was placed on the decision of

Hon’ble Apex Court in case of ZUARI INDUSTRIES LTD, 2007 (210) E.L.T. 648 (S.C.). In the said case it was held that in a power plant is imported as a part of Fertiliser Plant than the entire project would be classified as Fertiliser plant. In other word if a power plant is imported along with the fertiliser plant as part of common project then it would be classified as fertiliser project.Hon’be Apex Court observed as follows

> 9. Firstly, on the facts we find that the assessee had given to the Sponsoring Ministry its entire Project Report. In that report they had indicated that for the expansion of the fertilizer project they needed an extra item of capital goods, namely, 6MW Captive Power Plant. In their application, the assessee had made it clear that the fertilizer project was dependant on continuous flow of electricity, which could be provided by such Captive Power Plant. Therefore, it was not open to the Revenue to reject the assessee’s case for nil rate of duty on the said item, particularly when the certificate says so. In the judgment of this Court in the case of *Tullow India Operations Ltd*. (supra), this Court held that essentiality certificate must be treated as a proof of fulfilment of the eligibility conditions by the importer for obtaining the benefit of the exemption notification. We may add that, the essentiality certificate is also a proof that an item like Captive Power Plant in a given case could be treated as a capital goods for the fertilizer project. It would depend upon the facts of each case. If a project is to be installed in an area where there is shortage of electricity supply and if the project needs continuous flow of electricity and if that project is approved by the Sponsoring Ministry saying that such supply is needed then the Revenue cannot go behind such certificate and deny the benefit of exemption from payment of duty or deny nil rate of duty. To the said effect is the judgment of the Calcutta High Court in the case of *Asiatic Oxygen Ltd*. (supra) in which it was held that the object behind the specific Heading 98.01 in Customs Tariff Act, 1975 was to promote industrialization and, therefore, the heading was required to be interpreted liberally. It was further held that, once an essentiality

certificate was issued by the Sponsoring authority, it was mandatory for the Revenue to register the contract.

10. Secondly, before us, it has been vehemently urged that although the essentiality certificate stood issued by the Sponsoring Ministry, there is non-application of mind by that Ministry with regard to the list of items appended to the certificate. According to the Department, the said list has not been countersigned by the competent authority in the Sponsoring Ministry. We do not find any merit in the said contention. The list consists of 14 items. The Department has accepted 13 out of 14 items as capital goods required for the fertilizer project, therefore, it cannot be said that the Sponsoring Ministry had not applied its mind to the list appended to the essentiality certificate. This point needs further clarification. The power plant in the conceptual sense or in the technical sense is certainly different from the fertilizer plant. However, when we come to Heading 98.01 of the Customs Tariff Act, 1975, the assessment is for the Project. As stated above, Heading 98.01 is the specific entry applicable in the case of the Project Imports. An item like a power plant could be in a given case an independent Plant. Generally, it is a stand-alone equipment. However, when it becomes a part of the entire Project/System, the same power plant can also become one of the items of capital goods. The essentiality certificate given by the Sponsoring Ministry has treated Captive Power Plant, in this case, as "capital goods" along with 13 other items. The assessee has also treated the Captive Power Plant as one of the capital goods required for the expansion of the fertilizer project. In the above circumstances, all the items in the list annexed to the certificate have been certified and recommended by the Sponsoring Ministry as the entire capital goods required for the substantial expansion of the fertilizer project. Therefore, in our view, the assessee is right in its contention that, in this case, 6MW Captive Power Plant is one of the items out of 14 items constituting capital goods required for the substantial expansion of the fertilizer project, and, therefore, it fell under Serial No. 226(i) as goods required for the fertilizer project entitled to the benefit of nil rate of duty.

11. Before concluding, we may point out that, on behalf of the Department, a large number of authorities were cited on

interpretation of entries in the Customs Tariff Act, 1975. It is not necessary to examine those authorities on interpretation. Suffice it to state that, Heading 98.01 is a specific entry. It is not a general entry. It is not a residuary entry. It needs to be liberally interpreted as it deals with industrialization. It has to be read in the context of the above Notification No. 11/97.

4.4 In the instant case the entire irrigation project has not been imported. Just one component of the irrigation project has been imported therefore the ratio of the said decision does not apply. Had the complete irrigation project been imported then all components forming part of the irrigation projects would have been classified as irrigation project. In view of above we hold that the project would be classifiable as 'Water Supply Project'. Since the project is classifiable as 'Water Supply Project' the benefit of the notification 14/2004-Cus will also be available.

5. Thus we do not find merit in revenue appeal and the same is dismissed.

(Pronounced in Court on 25.05.2018)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Sinha