



**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

S.B. Civil Writ Petition No. 802 / 2014

Shri Prakash Chand Dhadda, Prop. M/s. P.C. Dhadda & Co., 3815,
Laxmi Atithi Grah, Moti Singh Bhomion Ka Rasta, Johari Bazar,
Jaipur.

----Petitioner

Versus



1. The Income Tax Settlement Commission, Additional Bench – II,
9th Floor, Lok Nayak Bhawan, Khan Market, New Delhi through its
Secretary earlier Principal Bench.

2. The Commissioner of Income Tax (Central) Central – Revenue
Building, Statue Circle, Bhagwan Das Road, Jaipur.

3. The Deputy Commissioner of Income Tax, TDS, Central
Revenue Building, Statue Circle, Bhagwan Das Road, Jaipur now
jurisdiction with the Deputy Commissioner of Income-tax, Central
Circle – 2, Jaipur / The Assistant commissioner of Income-tax,
Central Circle – 2, Jaipur.

----Respondent

For Petitioner(s) : Mr.NM Ranka, Sr. Adv. with Mr.NK Jain

For Respondent(s) : Mr.Anil Mehta with Ms.Archana

HON'BLE MR. JUSTICE M.N. BHANDARI

Judgment

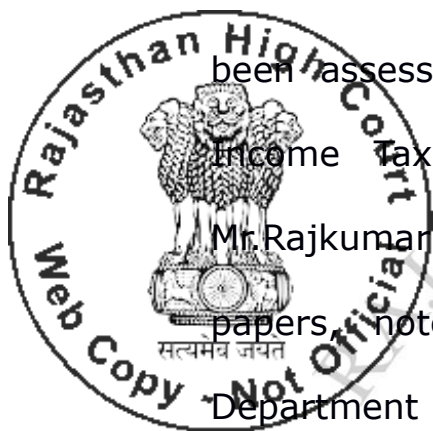
Date : 9th June, 2017

By this writ petition, a challenge is made to the order
dated 30th September, 2013 so as the notice of demand and



income tax computation dated 01st November, 2013. The further prayer is to accept the undisclosed income of Rs.10 lac or alternatively of Rs.25 lac, as earlier computed.

Learned counsel submits that the petitioner is carrying business of trading as well as manufacturing of emeralds on small scale level. He is maintaining regular books of account and had been assessed for income between Rs.1 lac to Rs.5 lac. The Income Tax Department conducted search at the place of Mr.Rajkumar Sharma on 12th November, 1997 wherein some loose papers, note books, currency notes, etc. were found. The Department gave notice to the petitioner under Section 158BD of



Income Tax Act, 1961 (for short "the Act of 1961"). The reply to the notice was given followed by submission of income tax return with NIL amount. The petitioner could reveal that Mr.Rajkumar Sharma has approached Income Tax Settlement Commission and his petition has been admitted. To avoid litigation and to have peace in mind, the petitioner also submitted an application before the Commission on 12th November, 1999 offering undisclosed income of Rs.5 lac with intimation to the Assessing Officer. The petitioner denied investment of Rs.3,36,50,000/- by way of money lending to earn interest. The Settlement Commission computed undisclosed income to be of Rs.17 lac after considering Rule 9 Report. The petitioner accepted the aforesaid, however, it was quashed by the High Court with remand of case on a writ petition filed by the Revenue.

Learned counsel has explained the facts of the case also. It is submitted that the petitioner was having business



relations with Mr.Raj Kumar Sharma, who was getting cut emeralds and sending it to the petitioner on approval basis for onwards sale. The petitioner was purchasing the emeralds and, if not approved, then to return it. The aforesaid has been considered to be a case of money lending and, therein also, the code of one was considered to be one lac. The decoding of the figure is based on presumption. The Revenue presumed money lending to Sohan Lal Sethi and Vimla Surana to the extent of Rs.10 crore and Rs.2 crore respectively by taking "1000" as 10 crore and "200" as 2 crore. No counter verification was made from those to whom money was alleged to have landed. At the best, the Revenue could have taken one equals to 1000. The brokers were not examined despite named therein. In view of the above, even the calculation of amount was made without counter verification and on hypothetical basis. The currency note of different denomination was taken as promissory note on surmises and conjectures. No evidence to receive interest was available. Addition in those circumstances can be made on "peak credit" basis and, as per the aforesaid, total comes to Rs.2,36,000/- instead of Rs.3,36,50,000/-.

It is further stated that on 20th November, 2012, the Settlement Commission directed the Revenue to check the calculation on "peak credit theory" but without receiving comment, the decoding was made by treating 1 equals to 1 lac. The currency notes were containing signatures of the petitioner, which could not have been if the money is to be advanced, rather it was a case of receiving emeralds on approval. In view of the



above, the Department failed to discharge its burden as per Section 132(4A) as well as under Section 69 of the Act of 1961. It is also stated that if the amount was advanced since 30th September, 1995 and onwards, there is no evidence to show repayment of it, which cannot happen in the case of money lending. All these aspects are relevant but were not considered by the Settlement Commission. The "peak credit theory" was also not applied though no objection for it was made by the Department. The order was passed with pre-determination. The Commission made an arbitrary, illegal and unsustainable order under Section 132(4) of the Act of 1961. It is mainly based on the order against Mr. Raj Kumar Sharma.

The Department has failed to produce any evidence to show it to be a case of money lending thus burden under Section 132(4A) of the Act of 1961 has not been discharged.

A reference of judgments of the Apex Court in the cases of **CIT Vs. SMS Investment Corpn Ltd.** reported in **(1994) 207-ITR-364 (Raj.)**, **173-ITR-393 (Raj.)**, **Jayanti Lal Patel Vs. ACIT** reported in **(1998) 233-ITR-588 (Raj.)**, **CIT Vs. Jayanti Lal Patel and others** reported in **144-CTR-305**, **Kishanchand Chellaram Vs. CIT** reported in **(1980) 125-ITR-713** and **Roshan-Di-Hatti Vs. CIT** reported in **(1977) 107-ITR-938** has been given.

It is submitted that the order of the Settlement Commission is otherwise based on presumptions. It is presumed that emeralds cannot be given on approval by recording on currency notes but can be on a plain paper. It has been referred in



para No. 12.12 of the impugned order and later on, in para Nos.15.1, 15.9 and so on.

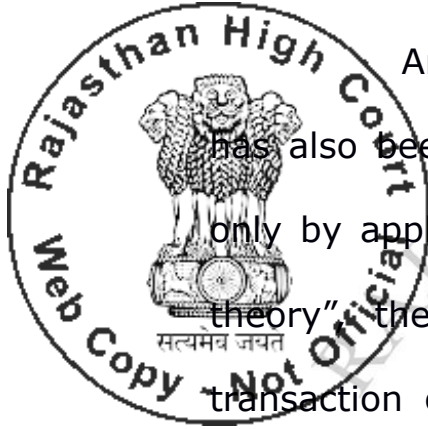
The Commission has recorded perverse finding. The Revenue failed to establish that it is not a case of sending emeralds on "Jakad" i.e. on approval basis but a case of money lending. The burden under Section 69 of the Act of 1961 has not been discharged by the revenue apart from the fact that no independent verification was made from the person noted in Rule 9 Report. The unexplained asset or investment was not noticed apart from the fact that no "Hundi" or any such document was found during the course of search. The missing links remained unanswered, thereby, not only that the factual and legal issues were not properly considered but the decoding of the figure by simplifying 1=1,00,000 is wholly illegal. The reference of a judgment in the case of Uma Charan Shani & Bros. Co. Vs. CIT reported in (1959) 37-ITR-270 (SC) has been given where it is held that suspicion, however grave, would not be taken place of proof.

The code of one could not have been taken equivalent to one lac, rather, as per the explanation given by Mr.Raj Kumar Sharma, it could have been taken 1 = 100 or 1 = 1000 but not 1 lac. The decoding of one = 1 lac is based on presumption thus the order needs interference.

Learned counsel further submits that telescoping or recycling is made for addition. It is by applying "peak credit theory" and is the practice in the State of Rajasthan. In a case of money lending, there exists convention of repayment in two



months. It has been duly noticed in Rule 9 Report. The amount otherwise rotates. The investment is thus to be computed on "peak credit theory" and it is consistently followed in the State of Rajasthan and all over India. The aforesaid has not been considered properly by the Commission. The calculation should have been made by applying "peak credit theory".



An alternate argument in reference to Rule 9 Report has also been given. The total amount comes to Rs. 9,71,460/- only by applying decoding of 1 = 1000. As per the "peak credit theory" the amount would be Rs.4,61,000/-against the total transaction of Rs.9,71,460/-. The "peak credit theory" was not accepted by the Commission as writing was on the currency notes and not on the document. The "peak credit theory" was ignored despite the fact that Assessing Officer had no objection for its application. The petitioner was even discriminated with other assesseees, who were assessed on "peak credit theory". It is also a settled law that tax is to be calculated on real income and not on imaginary or on hypothetical basis. Accordingly, the impugned orders deserve to be set aside.

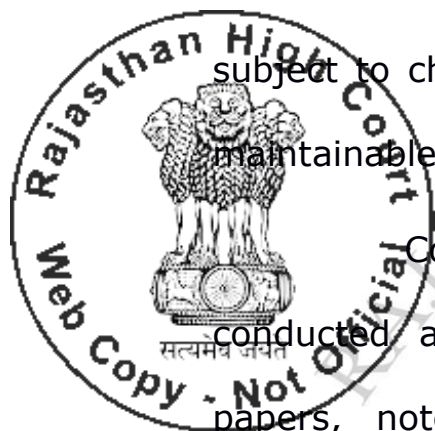
Learned counsel for the petitioner lastly contended that the object of Section 245C of the Act of 1961 is to give protected proceedings before the authorities. It has not been applied, rather, the Settlement Commission has made assessment of the case thus impugned order is opposed to the object of Section 245C of the Act of 1961. The prayer is accordingly to set aside the order.

A reference of judgments in the case of ***CIT Vs. Ravi Kumar (2007) 294-ITR-78 (P&H), CIT Vs.SC Sethi (2007)***



295-ITR-351(Raj) and **CIT Vs.Girish Chaudhary (2008) 296-ITR-619 (Delhi)** has been given.

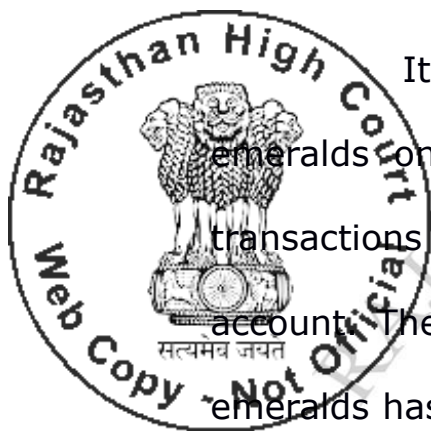
Learned counsel for the respondents has opposed the petition. A preliminary objection about maintainability of the writ petition has been raised. It is in reference to Section 245-I of the Act of 1961. The order of the Settlement Commission is not subject to challenge by way of appeal or review thus writ is not maintainable.



Coming to the facts, it is stated that a search was conducted at the place of Mr.Rajkumar Sharma where loose papers, note books, currency notes, etc. were seized. On examination of seized documents, the Department found various transactions with the petitioner. The currency notes were used with coded figure. On the currency notes, name of the petitioner was existing apart from other parties with a date on it. A notice under Section 158BD of the Act of 1961 was accordingly issued for the block period 01st April, 1987 to 12th November, 1997. The petitioner filed return on 11th November, 1999 disclosing his income to be NIL. An application before the Settlement Commission was submitted with undisclosed income of Rs.5 lac which was later on revised to Rs.10 lac. The petitioner was given several opportunities but he did not comply the summons issued under Section 131 of the Act of 1961. The Settlement Commission thereupon heard the matter and passed the order on 01st March, 2000. It was challenged before this Court by the Revenue. The writ petition was allowed with remand of the case. The case was heard afresh by the Settlement Commission.



Rule-9 Report explained modus operandi of the assessee. The examination of the currency notes and accounts slips attached with the currency notes disclosed the name of the person to whom money was advanced, date of advance and the period. The amount of advance was recorded in code. The advances were renewed bi-monthly.



It is stated that if Mr. Rajkumar Sharma used to send emeralds on approval basis i.e. "Jakad" to the assessee then transactions should have been recorded in his regular books of account. The assessee failed to show a single transaction where emeralds has been purchased. If emeralds are send on Jakad, it is recorded on papers and not on currency notes and is to be for short period, whereas, slips attached on the currency notes were showing by monthly date of renewal and it was for longer period.

The assessee has admitted that figure mentioned on the seized paper and documents is 1=100. This clearly shows ill-intention of the assessee otherwise in case of fair transaction, figures would not have been mentioned in code. The Settlement Commission has taken note of all the issues.

The issue of "peak credit theory" and the issue of decoding has been dealt with extensively in the impugned order. The issue of decoding was considered in the case of Parshvanath Sharebrokers Pvt. Ltd. also where search under Section 132 of the Act of 1961 was carried out. While answering the question No.20, a statement was recorded on 12th January, 2006 and it was accepted that code 1=1,00,00. The aforesaid strengthens the basis of decoding.



On a re-analysis of the seized materials in the form of exhibits, it was noticed that no date of repayment was available for many advances. The calculation of "peak credit theory" is applied for those entries for which dates of advance and repayment are available. The advances for which no dates are available are held to be not paid back till date of search. The calculation was made accordingly. The total of the same stands at Rs. 66,23,21,229.

Learned counsel further submitted that Mr.Raj Kumar Sharma and Mr.PC Dhadda were having close business dealings. Both of them adopted very rigid attitude. The grounds raised in the writ petition are otherwise factual in nature and interference in the order of Settlement Commission should not be made in view of the judgment of the Apex Court in the case of **Union of India & Ors. Vs. IND. Swift Laboratories Ltd.** reported in **2011(4) SCC 635**. The prayer is accordingly made to dismiss the writ petition.

I have considered rival submissions made by learned counsel for the parties and scanned the matter carefully.

The facts of the case have been given in detail thus need not to be reiterated other than which are relevant for consideration of the issues raised by learned counsel for the parties.

On a search conducted at the place of Mr.Raj Kumar Sharma, loose papers, note books and currency notes, etc. were seized. The material was containing name of the petitioner apart from others thus notice under Section 158BD of the Act of 1961



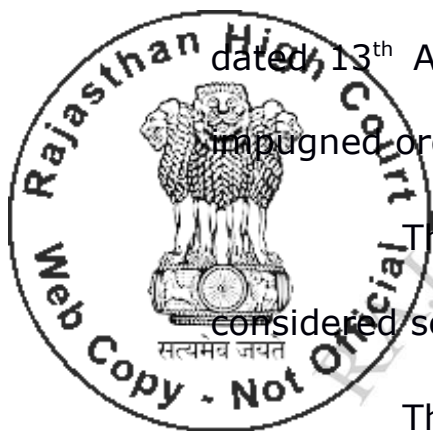
was given. Mr.Rajkumar sharma approached the Settlement Commission. The petitioner also approached the Settlement Commission after offering undisclosed income of Rs.5 lac which was then raised to Rs.10 lac. The Settlement Commission passed the order on 01st March, 2000 but it was challenged by the Revenue followed by remand of case by this Court vide its order dated 13th August, 2009 and finally it has been decided by the impugned order.

The petitioner has raised many issues and are considered separately.

The first issue is as to whether Mr.Rajkumar Sharma was giving emeralds to the petitioner on approval basis or it is a case of money lending.

The issue aforesaid is factual in nature and has been dealt with by the Settlement Commission with a detailed finding. The petitioner has contested the issue aforesaid by stating that emeralds were given on "Jakad". It is also stated that money lending could not be proved by the Revenue in Rule 9 Report thus burden under Section 132(4A) of the Act of 1961 has not been discharged. Reference of many judgments has been given. It is also alleged that burden under Section 69 of the Act of 1961 was not discharged by the respondents.

I find that the Settlement Commission has considered all the material produced before it and based on the aforesaid, finding has been recorded. It is not only after considering the fact that the material seized from Mr.Rajkumar Sharma were not only loose papers and note books but currency notes. It was showing

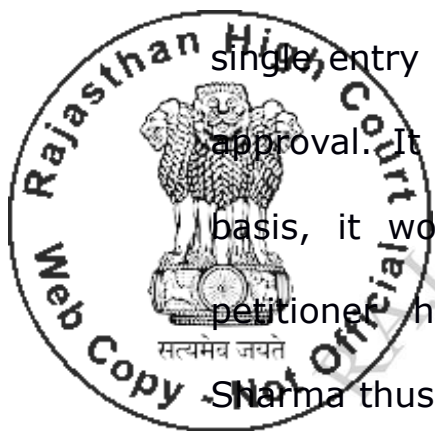




calculation of interest on bi-monthly basis and, for that, writing on different papers was showing calculation of interest. It was also found that if emeralds were given on "Jakad" basis, it cannot be for a long period because if emeralds are not approved, it would be returned. The seized documents were showing transaction for long duration. The books of account of the parties do not show a

single entry of purchase of emeralds said to have been given on approval. It cannot be that after sending emeralds on approval basis, it would not be purchased at any point of time. The petitioner has admitted business relation with Mr. Rajkumar Sharma thus material collected during the course of search cannot

be discarded. The Settlement Commissioner had meticulously considered the issue to find out as to whether it is a case of money lending or sending emeralds on approval. When the seized material itself is sufficient to establish the case apart from Rule 9 Report, no further evidence was required thus burden under Section 132(4A) as well as Section 69 of the Act of 1961 stands satisfied. It is also a fact that while denying money lending business, the petitioner had decoded the figure on the documents with help of Chartered Accountant and submitted that total amount involved in the money lending is Rs.9,71,400/- with peak amount of Rs.4,61,000/-. This itself proves that it is a case of money lending. Taking into consideration the fact aforesaid, finding of the Settlement Commission needs no interference on the issue aforesaid. It has been recorded after minute examination of material where the Revenue could prove its case and, thereby, discharged the burden. The finding of Settlement Commission that





seized material proves money lending needs no interference. It is moreso when the finding of fact recorded by the Settlement Commission cannot be interfered by this Court.

The view aforesaid is supported by the judgment of the Apex Court in the case of **Union of India & Ors. Vs. IND. Swift Laboratories Ltd.** (supra). Relevant part of the said judgment is quoted hereunder for ready reference :



An order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act. So far as the findings of fact recorded by the Commission or question of facts are concerned, the same is not open for examination either by the High Court or by the Supreme Court. In the present case the order of the Settlement Commission clearly indicates that the said order, particularly, with regard to the imposition of simple interest @ 10% per annum was passed in accordance with the provisions of Rule 14 but the High Court wrongly interpreted the same Rule and thereby arrived at an erroneous finding. So far as the second issue with respect to interest on Rs. 50 lakhs is concerned, the same being a factual issue should not have been gone into by the High Court exercising the writ jurisdiction and the High Court should not have substituted its own opinion against the opinion of the Settlement Commission when the same was not challenged on merits."



Para Nos.11.7 to 11.9 of the impugned order are quoted hereunder to show how the issue has been considered and reflects that finding has not been recorded based on presumption but is in reference to the material available on the record :



"11.7 The Scrutiny of these seized materials discloses that these papers/currency notes are having record of money lending transactions pertaining to Sh. P.C. Dhadda as P.C. Dhadda's name is appearing on several places on these papers particularly on all the currency notes. An examination of the currency notes and account slips attached with these currency notes discloses name of the person to whom advance of money has been made, date of advance, period for which advance has been renewed. The amount of advance has been recorded in code. The advances have been renewed in a bimonthly manner which is a common feature in the field of money leading business. The fact that these papers relate to money lending is established from page no. 43 of exhibit A-4 where the account of Bela Bansal is noted. On this paper 'interest to be seen' is noted. Similarly on page 1 of exhibit 3 which contains account of Rati Bansal "Interest receive back" is written.

11.8 It is found that all the figures of money lending business have been written in code. For example, on page no 43



exhibit A-4, account of Bela Bansal shows figure of 15 written in code. Two currency notes of Rs. 10 and Rs 5= Rs. 15 are attached and on both these currency notes and account paper, the date of lending is written as 12-10-96. Further there is a minus entry of 2.50 out of 15 leaving a balance of 12.50. On this page, bi monthly dates have been written as under:-



12-02-1996, 10-12-1996, 08-02-1997, 08-04-1997, 06-06-1997, 04-08-1997, 02-10-1997

11.9 It has been also written on this page that from 4-8 to 28-8=24 days, "Interest to be seen". This noting shows working of interest for the month of August 97. All these facts mentioned above indicate that the figure of 15 represent Rs. 15 Lakhs, which was initially lent on 12-10-96 and periodical interest has been charged bi-monthly. Thus, the currency notes of Rs. 10 stands for Rs. 10 lakhs and currency note of Rs. 5 stands for Rs. 5 lakhs. This fact is further confirmed from the noting mentioned regarding repayment of Rs. 2.50 lakhs leaving a balance of Rs. 12.50 lakhs."

The second issue is as to whether code of one should have been taken equal to 1000 or it is correctly taken equal to 1,00,000.

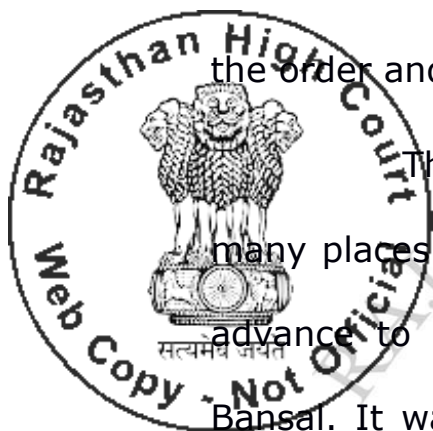


It is stated by learned counsel for the petitioner that Mr.Rajkumar Sharma explained code of 1=100 and 1=1000 but the Revenue as well as the Settlement Commission has taken it to be 1=1,00,000. It is alleged that decoding of figure is based on presumption.

To appreciate the issue aforesaid, I have gone through the order and material placed on record.

The Settlement Commission has drawn inference at many places to justify code of 1=1,00,000. It was in reference to advance to S.Kumar, Rajesh Maheshwari, Gendi Devi and Bela Bansal. It was presumed that they would not avail petty loan of Rs.1000/- or even less than it. The finding aforesaid is based on presumption. It is also admitted that evidence was not led by the Revenue by producing persons concerned to the transaction. It is, however, a fact that Mr.Rajkumar Sharma has used two codes by indicating 1=100 and other 1=1000. It could not be explained as to how two codes were used but merely for that reason, presumption cannot be drawn for using code 1 = 1,00,000. The revenue is required to discharge its burden.

The perusal of the order of the Settlement Commission shows decoding based on presumption than material on record. The decoding of 1=1,00,000 cannot be made on hypothetical basis thus while holding that the documents seized from Mr.Rajkumar Sharma are related to money lending, finding regarding decoding cannot be accepted, rather, matter needs to be remanded for passing fresh order limited to the issue of decoding.





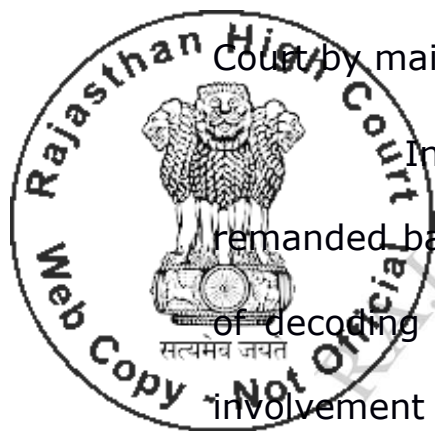
The third issue is as to whether "peak credit theory" should have been applied.

It is alleged by learned counsel for the petitioner that there is custom and convention of repayment of amount on bi-monthly basis and has been noticed in Rule 9 Report thus "peak credit theory" should have been applied. The "theory of peak credit" has not been applied by the Settlement Commission by giving detailed reasons. Under what circumstances, "peak credit theory" can be applied has also been explained. It has been noticed that apart from loose papers, currency notes were also recovered having writing and co-related to the transaction. The theory can be applied in the case of credit and debits unaccounted to avoid overlapping amount. In the instant case, currency notes were recovered having writing and is not a case of unaccounted debit and credit simplicitor, thus "peak credit theory" was not applied. The reasons given by the Settlement Commission to deny application of "peak credit theory" are well reasoned thus need not to be interfered. The Settlement Commission has referred that Assessing Officer is not against application of "peak credit theory", however, the order has to be read in totality and, otherwise, the Settlement Commission has to record its reason if "peak credit theory" is to be applied or not be applied, which exists in the case. Thus, the argument related to the application of "peak credit theory" cannot be accepted in the light of the detailed finding recorded by the Settlement Commission.

Learned counsel for the respondent/s has raised issue of maintainability of the writ petition against the order of



settlement commission but I do not find any substance therein. What has been barred is the appeal or review but not the remedy before this Court under Article 226 of the Constitution of India. The preliminary objection raised by learned counsel for the respondent/s cannot thus be accepted, rather, they had earlier challenge the order of the Settlement Commission before this Court by maintaining a writ.



In view of the discussion made above, matter is remanded back to the Settlement Commission to decide the issue of decoding afresh. It is while maintaining the finding regarding involvement of the petitioner in money lending and other issues, thus interference in the order is made limited to the issue of decoding.

Both the parties are directed to appear before the Settlement Commission on 03rd July, 2017. The Settlement Commission would be expected to decide the issue at the earliest and, if possible, then within a period of three months from the date given above. Till the fresh order is passed, the impugned order would not be given effect, rather, it will remain subject to final outcome of the order to be passed by the Settlement Commission on the limited issue on which case has been remanded.

The writ petition stands disposed of with the aforesaid.

(M.N. BHANDARI)J.

Preeti, PA