IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGNAL CIVIL JURISDICTION

WRIT PETITION NO. 2120 OF 2011

Shilpa Stock Broker
Pvt. Ltd. & Anr. .. Petitioners.

versus

Securities and Exchange Board
of India. .. Respondents.

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Mr. Janak Dwarkadas, Senior Advocate. with Mr. Zerick Dastur and Ms. Sneha Sheth i/by J. Sagar Associates for the Petitioners.

Mr. Darius J. Khambata, Additional Solicitor General of India with Dr. Poornima Advani, Mr. Ajay Khaire i/by The Law Point for the Respondents.

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Bombay High Court

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CORAM : DR.D.Y.CHANDRACHUD &
A. A. SAYED, JJ.

17 JANUARY 2012.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

The Securities and Exchange Board of India (SEBI) has framed on 20 April 2007 Guidelines for Consent Orders and for considering requests for composition of offences under the Securities and Exchange Board of India Act, 1992, The Securities Contracts (Regulation) Act, 1956 and the Depositories Act, 1996. These proceedings under Article 226 of the Constitution have been instituted for issuance of an appropriate writ striking down the requirement of the pendency of the court proceedings or an adjudication, contained in clauses 8, 11 and 17 of the Guidelines as being arbitrary and violative of Article 14 of the Constitution. In the alternative, the Petitioners seek a mandamus directing SEBI to read the requirement of pendency to mean and include pendency of the enforcement proceedings post adjudication. A mandamus is also sought

Bombay High Court

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directing SEBI to enforce the willingness conveyed in a letter dated 18 August 2010.

2. The First Petitioner is a Stock Broker registered under the SEBI (Stock Broker and Sub-Broker) Regulations, 1992. Sometime in October 2003 the Petitioner was charged by SEBI of having dealt with an unregistered Stock Broker while executing trades on behalf of one of its clients and of having carried out manipulative trades. By an order dated 30 December 2005 SEBI adjudicated upon the notice in exercise of powers conferred by Section 19 and suspended the certificate of registration of the First Petitioner for a period of one month. In a statutory appeal the Securities Appellate Tribunal by its decision dated 27 June 2006 held that the charge of engaging in manipulative trades was not sustained but upheld the finding of the Adjudicating Officer that the First Petitioner had dealt through an unregistered broker. The Tribunal substituted the penalty which was imposed by SEBI with a direction that the Petitioners shall be subjected to a monetary penalty of Rs.

Bombay High Court

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1 lakh. SEBI carried the matter in appeal to the Supreme Court under Section 15Z. By a judgment dated 21 April 2009 the Supreme Court allowed the appeal. The order of the Tribunal was set aside and that of SEBI was restored. A Review Petition was filed by the First Petitioner before the Supreme Court. During the pendency of the Review Petition, the First Petitioner filed an application to the Executive Director of SEBI for a settlement. The Review Petition was dismissed by the Supreme Court on 31 March 2010 both on the ground of limitation and on merits. By a communication dated 18 August 2010 SEBI informed the First Petitioner that the application filed for a consensual resolution was recommended by a High Powered Advisory Committee and was approved by a panel consisting of Whole Time Members of SEBI. However, since the Review Application was dismissed by the Supreme Court, the First Petitioner was advised to take appropriate steps if it wished to settle the matter under the Consent Scheme. The First Petitioner thereupon filed an Application for "permission/clarification" before the Supreme

Bombay High Court

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Court specifically stating therein that though the procedure for a settlement had been initiated during the pendency of the proceedings in the Review Petition, the Review Petition was dismissed before the out-come of the Consent Application could be communicated. The Application which was moved before the Supreme Court was dismissed as withdrawn by an order dated 21 January 2011. Following this, proceedings have been instituted before this Court under Article 226 of the Constitution on 18 October 2011 seeking reliefs which have been adverted to above.

3. Counsel appearing on behalf of the Petitioners submitted that (i) Under clause 7 of the Guidelines the process for obtaining a Consent Order can be followed where a criminal complaint has not yet been filed but is envisaged. SEBI is vested with the power to institute a criminal prosecution under Regulation 25. The word "envisage" in Regulation 7 would cover a situation where SEBI has the power to institute a criminal prosecution. Consequently, SEBI

Bombay High Court

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has jurisdiction to entertain the application filed by the First Petitioner for recording terms of consent notwithstanding the fact that the adjudication proceedings resulted in finality all the way upto the Supreme Court; and (ii) In the judgment delivered by the Supreme Court on 21 April 2009 the only issue that was considered was whether the Securities Appellate Tribunal had the power statutorily to substitute the penalty of suspension that was imposed by SEBI for a monetary penalty. The Supreme Court, it was submitted, did not consider as to whether the penalty that was imposed by SEBI would survive once one of the two articles of charge were found not to be established. Consequently, and to that extent, the doctrine of merger would have no application. The Petitioners had moved a Review Application before SEBI in 2009 on the ground that the suspension of the registration was disproportionate. Since the Review Application was pending before SEBI, SEBI would be within its jurisdiction in entertaining the application for recording terms of consent.

Bombay High Court

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4. On the other hand, it has been urged on behalf of the Respondents by the learned Additional Solicitor General that (i) The order passed by SEBI imposing a suspension of one month has merged with the decision rendered by the Supreme Court in Appeal. Consequently, once the adjudication proceeding has attained finality, SEBI cannot enter into terms as a regulator which would have the effect of negating the order passed by the Supreme Court; (ii) The Guidelines make a valid distinction between a case where a proceeding is pending and where a proceeding has been disposed of. The object of the Guidelines is to protect SEBI as a regulator from the cost, effort and time involved in pursuing lengthy litigation proceedings. A proceeding can be compromised by recording terms of consent so long as the proceeding has not resulted in finality and remains pending. Consequently, the Guidelines contemplate that a settlement can be recorded before the Securities Appellate Tribunal or before any other Court in which a proceeding is pending. The pendeny of proceeding constitutes a valid basis upon which the power to record terms

Bombay High Court

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of settlement is founded. Once proceedings have come to an end and have attained finality, as in the present case, upon the resolution of the civil appeal before the Supreme Court, there can be no occasion to file any terms; and (iii) The Guidelines which have been framed by SEBI are administrative in nature. The Guidelines only confer powers upon SEBI in appropriate cases to consent to the resolution of a dispute. No writ of mandamus can be issued under Article 226 of the Constitution directing SEBI either to compromise a proceeding or to resolve the dispute. SEBI as a regulator is required to consider an application for settlement in terms of the factors which are elucidated in Regulation 11 on the facts of each case.

The rival submissions now fall for consideration.

5. The legislative enactments which SEBI enforces as a regulator contemplate two streams of enforcement action. The first is the adjudicatory or civil process. The second is a criminal proceeding. In civil adjudication, adjudicatory powers

Bombay High Court

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are conferred upon SEBI. A decision rendered by the Adjudicating Officer is, in interim cases, subject to an appeal before the Securities Appellate Tribunal followed by a statutory appeal before the Supreme Court. A criminal action involves the filing of a complaint by SEBI before a competent criminal Court. SEBI issued Guidelines on 20 April 2007 to govern applications for consensual resolution of cases and proceedings and for considering requests for composition of offences. The object and purpose of the Guidelines is to achieve the goals of imposing appropriate sanctions and deterrence without the regulator being required to resort to litigation, which can be dilatory. Clause 4 of the Guidelines provides as follows :

> "Consent orders may provide flexibility of wider array of enforcement actions which will achieve the twin goals of an appropriate sanction and deterrence without resorting to a long drawn litigation before SEBI/Tribunal/Courts. Passing of consent orders will also reduce regulatory costs and

Bombay High Court

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would save time and efforts taken in pursuing enforcement actions. This effort could more effectively be used for pursuing cases which require the full process of enforcement action and for policy work."

Clause 5 of the Guidelines then stipulates thus :

"Therefore, it has been decided that all appropriate administrative or civil actions e.g. proceedings under sections 11, 11B, 11D, 12(3) and 15I of SEBI Act and equivalent proceedings under the SCRA and the Depositories Act, 1996 and other civil matters pending before Securities Appellate Tribunal (SAT) / courts may be settled between SEBI and a person (party) who may prima facie be found to have violated the securities laws or against whom administrative or civil action has been commenced for such violation. Compounding of offence may

Bombay High Court

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cover appropriate prosecution cases filed by SEBI before the criminal courts."

Clause **7** states that a consent order may be passed at any stage after a probable cause of violation has been found. However, in the event of a serious and intentional violation, the process should not be completed till the fact finding process is completed by way of investigation or otherwise. The clause stipulates further that an offence can be compounded after a criminal complaint is filed by SEBI. Where however a criminal complaint has not yet been filed but "is envisaged", the process for consent orders will be followed. Clause **8** deals with the procedure for consent orders where adjudicating proceedings are pending. A proposal by a person against whom proceedings have been initiated is to be referred to a High Powered Committee consisting of a retired Judge of the High Court and two external experts. The Committee has for its guidelines certain factors which are set out in Clause **11** of the Guidelines. Where the Committee finds that the terms of

Bombay High Court

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passing a consent order are acceptable, it has to forward them to the Adjudicating Officer for an order in terms of the consent terms. Clause 9 lays down the procedure for consent in other cases. Sub-clauses (I) and (II) of Clause 9 are as follows :

(I) Any person (party) who is notified or who has reasonable grounds to believe that a civil/ administrative proceeding may or will be instituted against him/her, or any party to a proceeding already instituted, may, at any time, propose in writing along with requisite waivers for an offer of consent. All communications in this regard should be addressed to the Division of Regulatory Action, Enforcement Department, SEBI, G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400 051, which would forward the same to the High Powered Committee.

Bombay High Court

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(II) Any person (party) who is notified or who has reasonable ground to believe that a criminal proceeding may or will be instituted against it, may, before filing a criminal complaint by SEBI before any criminal court, propose in writing along with requisite waivers for consent. All communications in this regard should be addressed to the Prosecution Division, Enforcement Department of SEBI at Mumbai, which would forward the same to the High Powered Committee."

Clause 17 provides for a settlement either before the Securities Appellate Tribunal or before a Court and is in the following terms :-

"17. Settlement before Securities Appellate Tribunal (SAT)/Courts

Where a matter is pending before SAT/Court, the same consent process will be undertaken and the

Bombay High Court

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draft consent terms recommended by the Committee and approved by the panel of two Whole Time Members will be filed before the SAT/Court. The SAT/Court may if found fit, pass an order in terms of the consent terms and subject to such further terms as the SAT/Court may find appropriate in the facts and circumstances of the case."

Clause **19** stipulates that the procedure stipulated in the guidelines has to be applied for considering proposals for composition of offences. However, a party who wishes to compound an offence has to file an appropriate application before the Court where the complaint is pending with a copy to the Prosecution Division in the Enforcement Department of SEBI. The proposal is considered by the High Powered Committee and once approved by a panel of Whole Time Members of SEBI it is to be placed before the competent court for appropriate orders.

Bombay High Court

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6. The Guidelines make it abundantly clear that an application for consensual resolution can be moved even before a proceeding is instituted under Clause 9 (I). An application for settlement can also be moved where a proceeding is pending. Any person who is notified or has reasonable grounds to believe that civil or administrative proceedings may be instituted against him or any party to a proceeding already instituted, is empowered to move a proposal with an offer of consent. Similarly, a person who has been notified or who has reasonable ground to believe that a criminal proceeding may or will be instituted against him, may, before before the filing of a criminal complaint by SEBI, propose a consentual resolution. Once a criminal complaint is filed it can only be compounded in accordance with law. Before a complaint is filed a person who has reasonable grounds to believe that he would be subject to criminal action, can move SEBI with an offer of settlement that will, if accepted, obviate the filing of a complaint. During the pendency of proceedings either before

Bombay High Court

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the Securities Appellate Tribunal or before a Court, the same consent process can be undertaken. SEBI, as a regulator has an enabling power to settle a dispute. The guidelines merely streamline the exercise of a power which already vests in a regulator. But SEBI cannot be compelled to settle a dispute. The object and purpose of the Guidelines is to enable SEBI to resolve disputes where the regulator does not consider it necessary to pursue adjudicatory or criminal remedies. The exercise of the discretion which is conferred on SEBI is structured by the considerations which are elaborated in Clause **11** of the Guidelines. The factors which are to be considered by SEBI are as follows :

i. Whether a violation is intentional;

ii. The party's conduct in the investigation and disclosure of full facts;

iii. The gravity of the charge : whether a charge involves fraud, market manipulation or insider trading;

Bombay High Court

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iv. History of non-compliance. Whether there is a good track record of the violator i.e. it had not been found guilty of similar or serious violations in the past;

v. Whether there were circumstances beyond the control of the party;

vi. Whether the violation is technical and/or minor in nature and whether the violation warrants penalty;

vii. Consideration of the amount of investors' harm or party's gain;

viii. Processes which have been introduced since the violation to minimize future violations/lapses;

ix. Compliance schedule proposed by the party;

x. Economic benefits accruing to a party from delayed or avoided compliance;

xi. Conditions where necessary, to deter future non-compliance by the same or another party;

xii. Satisfaction of claim of investors regarding payment of money due to them or delivery of securities to

Bombay High Court

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them;

xiii. Compliance of the civil enforcement action by the accused;

xiv. Whether the party has undergone any other regulatory enforcement action for the same violation; and

xv. Other factors necessary in the facts and circumstances of the case.

7. Whether a dispute should be resolved or whether the wider public interest in ensuring regulatory compliance requires that proceedings should be initiated and, if initiated should be followed to their logical conclusion, is a matter which falls within the discretion of SEBI. As a matter of first principle, a person against whom action has been initiated by SEBI or a person who apprehends that action will be initiated by SEBI has no vested right to insist that the dispute be resolved in terms of a consensual settlement. SEBI has been constituted as an expert regulator to ensure the stable and

Bombay High Court

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orderly functioning of the securities market. Acting as a regulator of the securities market, decisions taken by SEBI impact upon the economy and financial stability. SEBI is vested with statutory powers, in the public interest and the exercise of power must, therefore, be guided by the public interest that SEBI is vested with the power to protect. The considerations which are spelt out in clause **11** provide some indication of the nature of the power that is exercised. Amongst the circumstances which are to be borne in mind is whether the violation is intentional, the conduct of the party during the course of investigation, the gravity of the charge, the track record of the violator, whether a violation is technical or minor, the extent of harm that may be caused to investors, processes which have been adopted to minimize future violations, proposed compliance schedule, economic benefits that have accrued from delayed or failure in compliance, conditions necessary to deter future non-compliance, satisfaction of claims of investors and compliance of civil enforcement action. These factors indicate that the question as to whether

Bombay High Court

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a dispute should be resolved by a consensual settlement does not merely involve a private lis between the violator and the regulator but involves a consideration of wider issues of public interest. The securities market impinges upon investor wealth. Investors as a body represent the collective wealth of numerous individual investors. Trading on the Stock Exchanges and the business conducted by Stock Exchanges has a material impact on investors,both institutional and individual. Actions of stake holders in the securities market have consequences not merely for the role and position of the stake holder and his relationship with SEBI as regulator. Those actions have serious consequences for the overall well being of the securities market and those whose wealth and investment is impacted by the stock market. SEBI is vested with the power to protect and streamline the functioning of the securities market. A person who is alleged to be in breach of the Regulations or statutory provisions which are designed to protect the public interest can have no vested right either to insist upon SEBI settling a dispute or in enforcing compliance of the terms of a proposed

Bombay High Court

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offer of settlement.

8. If the matter is considered from this perspective, it is evident that the High Court in the exercise of its jurisdiction under Article 226 of the Constitution would not be justified in issuing a mandamus to SEBI to act upon a settlement or to accept a settlement as proposed. The guidelines which have been framed by SEBI are administrative in character. Since the judgment of the Supreme Court in G., J. Fernandez vs. State of Mysore and others [1] it has been a settled principle of law that if administrative guidelines issued by an authority have no statutory force, they can confer no right on an individual that could be enforced by a writ of mandamus. This principle was reiterated in a subsequent decision of the Supreme Court in J.R. Raghupathy and others v. State of A.P. and others [2]. But, apart from this position, it is equally fundamental, while analyzing the provisions of the guidelines to emphasise that where the guidelines have conferred a discretionary power

1 AIR 1967 SC 1753
2 (1988) 4 SCC 364

Bombay High Court

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upon SEBI to resolve a dispute which has still not reached the stage of adjudication or criminal action, or a dispute for that matter which is pending proceeding, it is for SEBI, on a considered view of all the circumstances of each case, to determine as to whether the dispute merits an amicable solution.

9. In the case of the First Petitioner, an order of adjudication was passed suspending its registration as a stock broker for a stipulated period. The order of the Adjudicating Officer was set aside by the Tribunal which substituted a monetary penalty. In the appeal which was filed by SEBI in the Supreme Court the order of the Tribunal was set aside and the order passed by SEBI came to be restored. There was a merger which resulted from the decision of the Supreme Court in the civil appeal. The First Petitioner moved the Supreme Court in a Review Petition and, during the pendency of the Petition, applied to SEBI for a settlement of the dispute. After the Review Petition was dismissed both on merits and on

Bombay High Court

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limitation, SEBI intimated to the First Petitioner that while it had approved the consent terms the First Petitioner may take appropriate steps if it desired to settle the matter under the Consent Scheme. SEBI acted fairly in the matter. The First Petitioner thereupon moved the Supreme Court in an Interim Application for that purpose which was also dismissed as withdrawn on 21 January 2011. The proceedings attained finality before the Supreme Court. The effect of the action which the First Petitioner now proposes before SEBI would be to negate the final judgment of the Supreme Court which has restored the penalty imposed by SEBI. SEBI, in our view, is justified in coming to the conclusion that since the Petitioner had canvassed its remedies against the order of suspension upto the Supreme Court, the proposal for settlement cannot be accepted once the proceeding had attained finality. Under clause 8 of the Guidelines, provisions have been made for the resolution of a dispute if an adjudication proceeding is pending. Under clause 9(I) a dispute can be resolved even at the stage when a person has reasonable grounds to believe

Bombay High Court

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that civil or administrative proceedings may or will be instituted against him. Similarly, under clause **9(**II**)** a person who has reasonable ground to believe that criminal proceedings may be instituted against him may before the filing of a complaint propose a resolution by consent. If a dispute is pending before the Tribunal or before a Court, Clause **17** envisages that a settlement has to be recorded before that Court in which the dispute is pending. If a criminal complaint is filed the Guidelines contemplate that an application for compounding has to be moved before the appropriate Court. Before a complaint is filed, the filing of a complaint can be obviated by moving SEBI for a resolution of the dispute in terms of the Guidelines. The submission of the Petitioners is that SEBI has still the power to launch a criminal prosecution and hence its jurisdiction to enter into a settlement has not ended. Clause **7** of the Guidelines states that where a criminal complaint has not yet been filed but is envisaged, the process for a consent order will be followed. According to the Petitioners, the expression "envisage" refers to what lies

Bombay High Court

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within the powers of SEBI even though SEBI (as in this case) does not propose to launch criminal proceedings. Even if such a broad meaning were to be ascribed to the provisions of Regulation 7, as is contended, even so it is impossible to accept that a proceeding which is no longer pending but which has attained finality upon a judgment of the Supreme Court can be reopened merely on the ground that a criminal complaint has not yet been filed but could hypothetically still be filed. Where a criminal complaint has not yet been filed, a person who has reasonable ground to believe that criminal proceedings may be instituted, may submit a proposal for consent. Where a civil adjudication has attained finality, the terms of consent (if agreed to by SEBI) can only be that a criminal proceeding may not be instituted. That situation does not as a matter of fact arise in the present case since SEBI has stated before the Court through the Learned Additional Solicitor General that it does not intend to launch any criminal prosecution. But, in any event, once the proceedings which have been instituted by SEBI culminated in a final order (in the present case of the

Bombay High Court

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Supreme Court), the plain consequence of that order must follow. A proceeding which has attained finality cannot be reopened in purported exercise of power to arrive at a settlement. A construction as is proposed by the Petitioners would also militate against the rationale for the guidelines. The guidelines are intended to enable SEBI to obviate recourse to time consuming proceedings in appropriate cases, so that its time and effort can be devoted to those cases which truly merit its attention. The guidelines do not become available to overturn a judicial verdict which has attained finality. Besides that would not advance the basic purpose of the guidelines, which was to obviate the time and effort of SEBI being spent in pursuing adjudication and litigation. Once litigation has taken place and a final judicial order has been passed by the Supreme Court, a settlement which would negate that order cannot be foisted on SEBI.

10. For these reasons, we are of the view that there is no merit in either of the submissions that are urged on behalf

Bombay High Court

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of the Petitioners. The Guidelines in so far as they mandate that proceedings should either be in contemplation or be pending before they can be resolved, are based on a valid rationale. The whole purpose of the Guidelines is to ensure that the time and effort of the regulator is devoted to cases which duly merit trial and enforcement. The Guidelines thus recognise an enabling power in SEBI to resolve certain cases which in the view of SEBI can be set at rest without compromising either an issue of principle or public interest. We have, therefore, come to the conclusion that **(i)** The Guidelines do not confer a vested right in any person to insist on the acceptance of a proposed settlement; **(ii)** In the present case, the adjudication which was initiated by SEBI had attained finality before the Supreme Court; and **(iii)** A proceeding which has attained finality, cannot be reopened and the attempt to enforce terms of consent would result in nullifying the effect of the order of the Supreme Court which is impermissible. In the circumstances, we do not find any merit in the Petition.

Bombay High Court

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11. The Petition is accordingly dismissed. There shall be no order as to costs.

12. Learned Counsel appearing on behalf of the Petitioners seeks a stay of operation of this judgment in order to enable the Petitioners to carry the matter further. Having regard to the fact that the Supreme Court by its judgment dated 21 April 2009 had set aside the order passed by the Securities Appellate Tribunal and restored the suspension of the licence of the First Petitioner as ordered by SEBI for a period of one month, it would not be proper for this Court to pass a direction contrary to the plain intendment of the judgment of the Supreme Court. Besides, there is no stay operating in these proceedings. Hence, stay refused.

(Dr. D.Y. Chandrachud, J.)

(A. A. Sayed, J.)

Bombay High Court

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Bombay High Court

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