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**(2016) 12 MP CK 0044**  
**In the Madhya Pradesh High Court**  
**Case No : Writ Petition No. 7927 of 2016**

M/s. Goyal Developers

APPELLANT

Vs

Income Tax Settlement Commission

RESPONDENT

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**Date of Decision :** 16-12-2016

**Acts Referred:**

Income Tax Act, 1961 — Section 147, Section 148, Section 245D

**Citation :** (2017) 292 CurTR 425 : (2017) 1 MPLJ 678

**Hon'ble Judges :** Mr. S.C. Sharma and Mr. Rajeev Kumar Dubey, JJ.

**Bench :** Division Bench

**Advocate :** Sumit Nema and Mukesh Agrawal, Advocates, for the Petitioner

**Final Decision :** Disposed Off

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## Judgement

S.C. Sharma, J.—The petitioner before this Court who is an assessee Under the Income Tax Act, 1961, has filed this present writ petition being aggrieved by the Notice issued u/Ss. 147 and 148 of the Income Tax Act, 1961.

2. The contention of the petitioner is that for the assessment year 2010-2011 and 2011-2012, the petitioner has filed the audited returns u/S. 139(1) of the Income Tax Act, 1961 and was duly assessed u/S. 143(3) of the Income Tax Act, 1961. The assessment orders are on record. Petitioner's further contention is that respondent No.5 has approached the Settlement Commission and the Settlement Commission has passed an order on 10/5/2016 u/S. 245D(4) of the Income Tax Act, 1961 and based upon the information furnished by respondent No.5 - M/s. Divya Dev Developers Pvt. Ltd., the Assessing Officer has reopened the cases for assessment in respect of A.Y. 2010-2011 AND 2011-12. The petitioner has further stated in the Writ Petition that while the settlement proceedings were going on before the Settlement Commission, an application for intervention was preferred by the petitioner and the Settlement Commission has rejected the application preferred by the petitioner for intervention and has finally passed order dated 10/5/2016 in respect of respondent No.5. The petitioner's grievance is that based upon the order passed by the Settlement

Commission, proceedings have been initiated by issuing notice u/S. 148 of the Income Tax Act, 1961 and as the petitioner was not heard by the Settlement Commission, the notice issued by the Assessing Officer deserves to be quashed. Petitioner has further stated that the order passed by the Settlement Commission is bad in law as the petitioner was not heard at any point of time and certain income of respondent No.5 has been excluded from his total income on the ground that it belongs to the petitioner and, therefore, the order passed by the Settlement Commission is bad in law, being violative of principles of natural justice and fair play. The petitioner also stated that the order passed by the Settlement Commission is in violation of Section 245 D of the Income Tax Act, 1961 and deserves to be quashed.

3. On the other hand, a reply has been filed by the Income Tax Department and it has been stated in the reply that the question of staying the proceedings of reassessment does not arise and the notice issued by them u/s 148 is certainly a speaking order. The respondents have further stated that certain facts relating to escapement of income chargeable to tax was brought to the notice of the Assessing Officer and the Assessing Officer is proceeding in accordance with law against the petitioner and, therefore, the question of interference in the assessment proceedings does not arise.

4. Learned counsel for the petitioner has placed reliance upon the judgment delivered by the Hon'ble Apex Court in the case of Commissioner of Income Tax, Delhi v. M/s. Kelvinator of India Ltd., (C.A.No. 2009-2011 of 2003 decided on 18/1/2010) and his contention is that in similar circumstances the apex Court has dismissed the petition filed by the Income Tax Department against the judgment of the High Court by which the High Court has quashed the Show Cause Notice issued u/S. 147 of the Income Tax Act, 1961. It has been vehemently argued that the Show Cause Notice issued by the Assessing Officer is void ab initio because no reason has been assigned by the Assessing Officer.

5. Reliance has also been placed upon an interim order passed by the Division Bench of this Court in the case of Malay Shrivastava v. The Dy. Commissioner of Income Tax (W.P.No. 10241/2016 decided on 21/6/2016) and learned counsel has argued before this Court that in similar case, assessment proceedings have been stayed by the Division Bench of this Court.

6. Heard learned counsel for the parties at length and perused the record.

7. The undisputed facts of the case reveal that respondent No.5 has approached the Settlement Commission. Section 245L of the Income Tax Act, 1961 provides that proceedings before the Settlement Commission shall be deemed to be judicial proceedings. Section 245F provides that the Settlement Commission shall have all the powers of the Income Tax Authority which entails examination of evidence, issuing commissions and exercising all powers u/S. 131 of the Income Tax Act, 1961. It is also not in dispute that the petitioner did submit an application for intervention before the Settlement Commission, as respondent

No.5 has stated that certain part of income receipts were in respect of amount received by the petitioner and the Settlement Commission has dismissed the intervention application. The intervention application was filed on 28/2/2016. The intervention application was dismissed by the Settlement Commission and the Settlement Commission has passed a final order in the matter.

8. Section 147 and 148 of the Income Tax Act, 1961 reads as under :

"Section 147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum

amount which is not chargeable to income-tax ;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been under assessed ; or

(ii) such income has been assessed at too low a rate ; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

Explanation 3.-For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

Explanation 4.-For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.

Section 148. (1) Before making the assessment, reassessment or re-computation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :

Provided that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, re-assessment or re-computation as specified in subsection (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice :

Provided further that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or re-computation as specified in subsection (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

Explanation.-For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

9. Two Show Cause Notice were issued on 31/3/2016 and 21/3/2016 u/S. 148 for the assessment year 2010-2011 and 2011-2012. One of the Show Cause Notice for the assessment year 2011-2012 reads as under :

Office of The Assistant Commissioner of Income Tax (Central)-I

"Aayakar Bhawan (Main)" Room No.101, Opp. White Church, A.B. Road, Indore

Notice Under Section 148 of The Income Tax Act, 1961

PAN.AAFFG5813Q

dated 31/03/2016

To,

M/s. Goyal Developers, Indore

Sir/Madam,

Whereas I have reasons to believe that your income chargeable to tax for the assessment year 2010-11 has escaped assessment within the meaning of section 147 of the Income Tax Act 1961.

I, therefore, propose to assess/re-assess/re-compute the income/loss/depreciation allowance for the said assessment year and I hereby require you to deliver to me within 30 days from the date of service of this notice, a return in the prescribed form of your income for the said assesment year.

(Amit Kumar Soni)

Assistant Commissioner of Income Tax(Central)-I, Indore"

10. The other Show Cause Notice is per verbatim identical and it is in respect of the financial year 2011-2012.

11. Petitioner's grievance is that because of the order passed by the Settlement Commission the aforesaid Show Cause Notice has been issued and it is a non speaking Show Cause Notice. It is pertinent to note that the assessing officer has later on communicated "Record of reasons to believe under Section 148 of the Income Tax Act, 1961" for the assessment year 2010-11 as well as for the assessment year 2011-12. The reasons to believe for the assessment year 2010-11 reads as under :-

"Record of Reason to Believe u/s 148(2) of the Income Tax Act, 1961

Name of the Assessee

: M/s. Goyal Developers 47, MTH Compound, Indore

PAN

: AAFFG5813Q

A.Y.

: 2010-11

Search & seizure operations were carried out in the Apollo Group of Indore on 21.9.2012. This group is headed by Shri Nirmal Agrawal and Shri Anil Krishnadas Agrawal. M/s. Divya Dev Developers Pvt. Ltd. And M/s. Apollo Creations Pvt. Ltd. are the flagship concerns of the group.

During the course of search operations in the Apollo group cases, various incriminating documents were found and seized from the premises of the assessee, their associates and employees which clearly establish the modus operandi of taking on-money by the assessee group in various projects. The assessee group has also admitted and accepted the said modus operandi during the search as well as before the Hon"ble Income Tax Settlement Commission.

The assessee firm is engaged in business of Real Estate during the F.Y. 2008-09, the assessee firm decided develop and construct residential flats/plots at Village Nipania, Tehsil & District Indore. For this purpose it has started ratio deal with M/s. Divya Dev Developers Pvt. Ltd. For the land admeasuring 19.21 Acres (57169 sq.ft.) in the name of "UPTOWN APOLLO".

In the project "UPTON APOLLO", the land is owned by M/s. Goyal Developers. This land has been given for development to M/s. Divya Dev Developers Pvt. Ltd. For constructions and development of plots. M/s. Divya Dev Developers Pvt. Ltd. Was to receive 45% of the developed area.

The company has worked out the total unaccounted on-money receipts in respect of this project in Para 33 of the SOF before Hon''ble Settlement Commission, for A.Ys. 2010-11 to 2014-15 at Rs.55,50,89,760/- out of which the assessee has claimed that it has paid Rs.35,81,24,267/- to the land owners M/s. Goyal Developers as accounted income and balance Rs.19,69,65,493/- was the unaccounted receipts belonging to the assessee. The accounted receipt of Firm M/s. Goyal Developers is quantified year wise as per below :-

A.Y.

Number of Plots

Total Unaccounted Receipts Collected by M/s. Divya Dev Developers Pvt. Ltd.

Unaccounted Receipts collected on behalf of and paid to M/s. Goyal Developers

2010-11

37

17,16,77,580/-

17,16,77,580/-

2011-12

48

22,78,32,433/-

18,64,46,687/-

Therefore, it is clear and evident that M/s. Goyal Developers have received accounted on-money of Rs.17,16,77,580/- for A.Y. 2010-11.

In view of the above, I have reason to believe that income earned on account of on-money receipts in respect of the project "Uptown Apollo" which has not been incorporated in the books of account of the assessee M/s. Goyal Developers and the same Rs.17,16,77,580/- for A.Y. 2010-11 has been escaped from assessment as normal income within the meaning and scope of section 147 subject to 148 of the I.T. Act to assess or reassess income of the assessee for the concerned A.Y. in accordance with the provision of section 147 r/w. section 143(4) of the IT Act. Accordingly notice u/s 148 shall be issued after obtaining approval from the authority as prescribed u/s 151 of the Income Tax Act, 1961.

(Amit Kumar Soni)

Asstt. Commissioner of Income Tax (Central)-1, Indore"

12. This Court has carefully gone through the Show Cause Notice issued by the Assessing Officer and the Record of reasons to believe. The Show Cause Notice has been issued by taking into account the various incriminating documents which were found during search and seizure from the premises of the assessee, their associates and employees. Mere mentioning of certain facts by the Settlement Commission will not make the Show Cause Notice invalid. Not only this, the Settlement Commission while rejecting the intervention application has held as under :

"During the hearings before us the A.R. Reiterated the above arguments and also filed an affidavit from the directors of the applicant company in which the entire facts relating to payment of on money to Goyal Developers from the sale of flats coming into their share have been stated on oath. As the Assessing Officer of the applicant also happens to be the A.O. Of the Goyal Group he was asked to inform if Goyal Developer have disclosed any income on this account in their return and if not, whether the Department has contemplated any action in their case in view of the assertions made by the applicant. It was informed by the D.R. That proceedings u/S. 147/148 have been initiated in case of Goyal Developers on this issue. During the course of the proceedings u/S. 245D(4), Goyal Developers filed a petition on 28/3/2016 requesting that as the issue in question relates to them, they should also be made a party to the proceeding and an opportunity of being heard be given to them too before taking a decision in this matter.

In view of this development we consider it appropriate to deal with the intervention application filed by Goyal Developers first. In their intervention application M/s. Goyal Developers has opposed certain allegedly incorrect facts in the settlement application filed by M/s. Divya Deve Developers Pvt. Ltd., it has been submitted that any statement given by M/s. Divya Dev Developers Pvt. Ltd., regarding payment of any on money by them to M/s. Goyal Developers was absolutely shame and fake. An affidavit of Shri Pram chand Goyal, partner of Goyal Developers Indore along with (Annexure P/1 to P/7 have been filed. It has been prayed that intervention application be allowed, an opportunity of being heard be allowed to the intervenor and any false claim of payment of on-money made by M/s. Divya Deve Developers Pvt. Ltd., to M/s. Goyal Developers be disallowed.

We note that the jurisdiction of the Commission is confined to matters covered by a settlement application made by an applicant before us. In the settlement application, an applicant is required to make a full and disclosure of his income not disclosed to the AO, by bringing on record all material facts relevant for determination of his undisclosed income along with manner of having earned such income. The application is regarding settlement of applicants case and the proceedings before the Commission are not in the nature of appeals as an applicant can file settlement application only during the pending of assessment proceedings. Hence there does not arise any question of permitting intervention by another tax payer.

As per provision of Section 245D(4) the commission can pass an order which deems fit, which has to be in accordance with the provisions of the Act, there is no provision to add intervener to settlement application filed by an applicant. There is no provision to allow an opportunity of being heard to third party with whom the applicant had business dealings. In terms of Income Tax Settlement Commission (Procedure) Rules, 1997, the proceedings before the commission are not open to the public and other than applicant or his authorised representative or the income tax department, no third party can attend or intervene in such proceedings. In view of this, the application dated 28/3/2016 of M/s. Goyal Developer Indore is not being taken into consideration while finalizing the present proceedings.

13. The Settlement Commission, at page 46, has also observed as under :

"Since M/s. Goyal Developers is not a party to these proceedings, we refrain from giving any finding about taxability or otherwise of unaccounted receipts from Uptown Apollo Project in the hands of M/s. Goyal Developers. The department is free to complete proceedings initiated u/S. 148 in that case on the basis of information/evidence available and duly following provisions of law.

14. Thus, the order of the Settlement Commission makes it very clear that they have refrained themselves from giving any finding about taxability or otherwise of unaccounted receipts from Uptown Apollo Project in the hands of M/s. Goyal Developers - the petitioner. The Settlement Commission also observed that the Department is free to initiate proceedings u/S. 148 on the basis of information available that too after following due provision of law.

15. This Court is of the considered opinion that the Assessing Officer was justified in issuing a Show Cause Notice. The Show Cause Notice issued by the Assessing Officer fulfils the statutory requirements as the Officer was having reasons to believe that income chargeable to tax, has escaped assessment for that particular year. He has also formed an opinion in the matter and therefore, Show Cause Notice has been issued.

16. The Division Bench of this Court in the case of Malay Shrivastava v. The Dy. Commissioner, Income Tax & Ors., (W.P.No. 4046/2015) has dealt with a similar issue and paragraph 16, 17 and 18 of the order passed by the Division Bench reads as under :

"16. On the contrary, it is a fit case where the department should be granted liberty to proceed in the matter and thereafter take a decision after evaluating each and every aspect of the matter. This is also the principle laid down by the Supreme Court in the case of Vijaybhai N. Chandrani (supra) relied upon by the learned Counsel for the Revenue. In the said case, the Hon''ble Supreme Court has held that the assessee cannot be permitted to invoke writ jurisdiction of the High Court at the first instance without exhausting the statutory remedy available under the Income Tax Act. It was held by the Hon''ble Supreme Court in the said case that in the stage of assessment of the proceeding the High Court

ought not to have entertained the writ petition, instead should have directed the assessee to appear before the AO, permit him to take a decision and after framing of assessment order, the assessee should seek indulgence into the matter. In para 16 and 17 of the said judgment, Hon''ble Supreme Court has dealt with the matter in the following manner :-

"16. In the present case, the assessee has invoked the Writ jurisdiction of the High Court at the first instance without first exhausting the alternate remedies provided under the Act. In our considered opinion, at the said stage of proceedings, the High Court ought not have entertained the Writ Petition and instead should have directed the assessee to file reply to the said notices and upon receipt of a decision from the Assessing Authority, if for any reason it is aggrieved by the said decision, to question the same before the forum provided under the Act.

17. In view of the above, without expressing any opinion on the correctness or otherwise of the construction that is placed by the High Court on Section 153C, we set aside the impugned judgment and order. Further, we grant time to the assessee, if it so desires, to file reply/objections, if any, as contemplated in the said notices within 15 days" time from today. If such reply/objections is/are filed within time granted by this Court, the Assessing Authority shall first consider the said reply/objections and thereafter direct the assessee to file the return for the assessment years in question. We make it clear that while framing the assessment order, the Assessing Authority will not be influenced by any observations made by the High Court while disposing of the Writ Petition. If, for any reason, the assessment order goes against the assessee, he/it shall avail and exhaust the remedies available to him/it under the Act, 1961.

17. Keeping in view all these factors and the totality of the facts and circumstances of the case, we are of the considered view that at this stage it is not appropriate for us to interfere into the matter and quash the proceedings initiated. Instead the petitioner should appear before the AO, raise all objections and thereafter it is for the Assessing Officer to examine all aspects of the matter and take a decision in accordance with law. If the petitioner has any grievance still existing after such a decision is taken, i.e. After the amount is finalized, petitioner can challenge the same in accordance with law. In the present set of circumstances we are not inclined to interfere into the matter because for interfering into the matter we will be required to assess the material available on record and say that they are not sufficient enough to proceed in the matter and we find that when the assessment proceedings are still on discharging this function at this stage by this Court in a petition under Article 226 of the Constitution is not warranted.

18. The petition is therefore, dismissed.

17. The Hon''ble Supreme Court in the case of GKN Driveshafts (India) Ltd. v. Income Tax Officer and others (C.A.No. 7731/2002, decided on 25/11/2002) has

held as under :

"Heard learned counsel for the parties. Leave is granted. By the order under challenge, a Division Bench of the High Court at Delhi dismissed the writ petition filed by the appellant challenging the validity of notices issued under Sections 148 and 143(2) of the Income Tax Act, 1961. The High Court took the view that the appellant could have taken all the objections in its reply to the notices and that, at that stage, the writ petition was premature. Accordingly, the writ petition was dismissed on 31st January, 2001. Aggrieved by that order, the appellant is in appeal before us. Mr. M.L. Verma, learned senior counsel appearing for the appellant, submits that the impugned notices relate to seven assessment years; that during the pendency of these appeals, in respect of two assessment years, viz., 1995-96 and 1996-97, assessment has been completed against which appeals have been filed. Notices relating to the other five assessment years, viz., 1992-93, 1993-94, 1994-95, 1997-98 and 1998-99, are now the subject-matter of these appeals. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income tax Act is issued, the proper course of action for the above said to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking Order before proceeding with the assessment in respect of the above said five assessment years.

Insofar as the appeals filed against the order of assessment before the Commissioner (Appeals), we direct the appellate authority to dispose of the same, expeditiously. With the above observations, the civil appeals are dismissed. No costs."

18. In the light of the aforesaid judgments, this Court is of the considered opinion that under the provisions of the Income Tax Act, 1961 if certain facts have been brought to the notice of the Assessing Officer relating to escapement of income chargeable to tax, he is bound to reassess the income of the assessee of the relevant years. The assessee does have a remedy to file objection and related documents which may be provided by the Assessing Officer. Not only this, the Settlement Commission while deciding case of respondent No.5 has not given any finding in respect of tax-ability or otherwise or unaccounted receipts/income in respect of the petitioner and has held that the Department shall be free to complete the proceedings initiated u/S. 148 on the basis of information/evidence available and after following the provisions of law.

19. Resultantly, this Court is of the considered opinion that the order passed by the Settlement Commission dated 18/5/2016 does not warrant interference at the behest of the petitioner. The Settlement Commission, based upon the

documents submitted by the respondent No.5 has passed a final order. So far as notices which have been issued u/S. 148 for the assessment year 2010-2011 and 2011-2012 is concerned, the proper course of action for the petitioner is to file return and if he so desires, to seek reasons/documents for issuing such notices and in case any application is preferred for demand of material on the basis of which assessment has been done, the material shall be given to the petitioner enabling him to defend his case. The assessing Officer, after granting opportunity of hearing to the petitioner and after taking into account the objections and the material, shall pass a speaking order in accordance with law.

20. This Court does not find any reason to interfere with the order passed by the Settlement Commission at the behest of the petitioner which has been passed in respect of respondent No.5 nor does find any reason to interfere with the notices u/S. 148 of the Income Tax Act, 1961.

21. The assessing officer shall pass an order on merits without being influenced by the order passed by the Settlement Commission and without being influenced by the order passed by this Court by taking into account the material available on record.

22. Resultantly, the admission is declined.