

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH : BANGALORE**

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT  
AND  
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.371/Bang/2011
Assessment year : 2005-06

M/s. MSPL Limited, No.117, Baldota Bhawan (Annex), Maharishi Karve Road, Churchgate, Mumbai – 400 020. <b>PAN: AABCM 1040N</b>	Vs.	The Assistant Commissioner of Income Tax, Central Circle 2(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri J.D. Mistri, Senior Counsel & Shri Ketan K. Ved, CA
Respondent by	:	Shri Aseem Sharma, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	31.08.2023
Date of Pronouncement	:	08.09.2023

**ORDER**

*Per Laxmi Prasad Sahu, Accountant Member*

This appeal of the assessee is against the order dated 03.02.2011 of the CIT(Appeals)-V1, Bangalore for the AY 2005-06 on the following grounds of appeal:-

- “1.1 On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (A) failed to consider that the order of assessment passed by the Assessing Officer under section 143(3) r.w.s. 153A of the Act dated 31.12.2009 is void-ab-inito as the assessment has been made on the

appellant and not on the joint names of the persons in whose name the warrant exists.

- 1.2 The learned Commissioner (A) failed to consider that the Assessing Officer has to demonstrate that the notice issued on the appellant and further the proceedings initiated by him under section 153A of the Act is a valid one and conditions contemplated under section 132 are existing. The reasons recorded have to be given to the appellant to file its objections and then only an assessment can be proceeded with. The appellant contends that the satisfaction has not been recorded and thus the notice issued u/s. 153A of the Act is bad in law.
- 1.3 The learned Commissioner (A) failed to consider that the mandatory conditions for issuance of notice under section 153 A of the Act have not been complied like recording of reasons, having approval of the sanction by the higher authority and consequently the entire assessment is liable to be cancelled.
- 4.1 The learned Commissioner (A) ought to have allowed the aircraft expenses and depreciation on aircraft in full as claimed by the appellant.
- 4.2 The learned Commissioner (A) ought to have accepted the details provided by the appellant and refrained from considering the surmises and apprehension of the assessing authority to justify the percentage of disallowance of aircraft expenses as computed by him.
- 4.3 The learned Commissioner (A) ought to have accepted the details provided by the appellant and refrained from considering the surmises and apprehension of the assessing authority to justify the percentage of disallowance of aircraft expenses as computed by him.
- 5.1 The learned Assessing Officer has levied interest under section 234 B of the Act in the order of assessment passed under section 143(3) r.w.s 153A of the Act and the order does not indicate the rate, period and on what quantum the interest is levied and thus the computation of interest is not

discernable from the order. The additions made by Assessing Officer were not expected and have been made on the basis of erroneous assumption of law and facts and on this ground also the interest levied u/ s. 234B is not in accordance with law.

6.1 Without prejudice the disallowances are excessive, arbitrary and unreasonable and ought to be reduced substantially

7.1 For these and any other grounds that may be urged at the time of hearing of the appeal the appellant prays that the appeal may be allowed in full.”

2. The assessee has raised the following additional grounds:-

“1. The assessment order passed under section 153A is illegal and bad in law as it deals with disallowances, not based on any incriminating material found during the course of search.

2. The assessment order passed under section 153A is illegal and bad in law as it has been passed in breach of section 153D.

3. For the above and any other reasons which may be adduced at the time of hearing, it is prayed that the Order of the Assessing officer be directed to set aside.

4. The Appellant craves leave to add, to alter or amend all or any of the aforesaid grounds of appeal.”

3. Since the additional grounds are legal in nature, relying on the following the Hon'ble Supreme Court judgment in the case of *M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*, the additional grounds are admitted.

4. The brief facts of the case are that assessee is carrying on activities in mining, gas unit and windmill to generate power. The

assessee furnished return of income u/s. 139(1) of the Act on 31.10.2002 vide Ack. No.262 with ITO, Ward 1(2)(3), Mumbai. A search action u/s. 132 was conducted on 26.10.2007 in the case of Shri Narendra Kumar Baldota group. Certain documents were found and seized from the premises of the assessee. Accordingly, a notice u/s. 153A of the Act was issued on 06.08.2008 in response to the notice u/s. 153A, the assessee filed a letter (dated 20.08.2008) on 01.09.2008 stating that earlier return filed on 31.10.2002 be treated as a return in response to notice u/s. 153A. Thereafter, statutory notices were issued to the assessee. On perusal of the financial statements, the assessee was specifically asked to furnish income & expenditure as well as profits derived from its various activities and the assessee furnished the same. Further on perusal of the depreciation statement, it was observed that the asse has purchased an aircraft during the year costing Rs.8,93,31,393 and claimed depreciation for less than 180 days of Rs.1,78,66,279. The assessee was asked to furnish details of expenses incurred in this regard and to disallow depreciation for personal use of Directors and family members proposed @ 50% thereof including the operational expenses. The assessee submitted that aircraft was used for business purpose only and assessee has also paid the fringe benefit tax on the said expenses. The assessee was asked time and again to produce the log book, but the same was not produced and assessee filed details of operational expenses year wise. Therefore, the AO disallowed 50% of the operational expenses as well as depreciation on

aircraft and air strip, after considering the decisions relied on by the assessee.

5. Further, the AO asked the assessee to quantify disallowance u/s. 14A of the Act. The assessee furnished a statement working out disallowance at Rs.44,92,457 which was added to the income as agreed by the Id. AR.

6. The assessee filed appeal before the CIT(Appeals) and also detailed written synopsis. The submissions of the assessee was forwarded to AO for a remand report. The assessee filed rejoinders on the remand report and accepted that the personal trips worked out to 15% for the reasons that there is inadequate documentation to prove that the company used aircraft for the purpose of the business to the extent of 85%. The CIT (A) after considering the issue in detail, confirmed the order of the AO with regard to disallowance of Rs.1,05,85,948 on aircraft expenses and depreciation. Aggrieved, the assessee is in appeal before the Tribunal.

7. The Id. AR first argued on the additional ground No. 01 which is a legal ground and submitted that during the course of search & seizure proceedings, no incriminating material was found and the AO made the addition of aircraft expenses and depreciation on the basis of financial statements while completing the assessment u/s. 153A of the Act. He submitted that on the date of search there was no assessment/ reassessment pending before the AO. Therefore the completed assessment cannot be interfered by the AO without reference to any

incriminating material found during the course of search. Therefore, the addition made solely on the basis of financial statements and confirmed by the CIT(Appeals) is not correct and the assessment order is to be set aside. In support of his arguments, the Id. AR relied on the judgment of the Hon'ble Supreme Court in the case of *PCIT v. Abhisar Buildwell (P) Ltd.* [2023] 149 taxmann.com 399 (SC).

8. The Id. DR relied on the orders of the lower authorities and submitted that the addition made towards disallowance on aircraft expenses and depreciation, there may be some loose documents or statements recorded which has not been quoted by the AO in his order and only because of that the addition made u/s. 153A order cannot be deleted. He further submitted that during the assessment proceedings, the AO has given a categorical finding that assessee was asked to produce the log book repeatedly, in spite of the same the assessee did not file the log book which clearly shows that the personal use of aircraft cannot be denied. Accordingly, he submitted that the order of the CIT(Appeals) should be upheld.

9. Considering the rival submissions and perusing the entire material on record and the orders of authorities below, we note that the assessee filed its return of income u/s. 139(1) which was processed u/s. 143(1) of the Act. Further in pursuance of search conducted on 26.10.2007, notice u/s. 153A was issued to the assessee and in response the assessee offered the same return filed u/s. 139(1). The AO noted that the assessee has purchased an aircraft of Rs.8.93 crores

and depreciation has been claimed for less than 180 days of Rs.1,78,66,279. The assessee was asked to produce log book for personal use of aircraft repeatedly, which was not produced by the assessee during the assessment proceedings but it was produced during the appellate proceedings. The assessee submitted a statement of yearwise operational expenses of the aircraft and that the assessee had paid taxes on fringe benefit towards the same. From the assessment order, we note that the AO has not referred to any incriminating material found during the search for making disallowance on aircraft expenses and depreciation of Rs.1,05,85,948. In the assessment order, even there is no reference to any loose papers or statements recorded during the search proceedings. It clearly shows that there was no incriminating material found during the search for making disallowance in the order u/s. 153A. In the case of PCIT v. Abhisar Buildwell (P) Ltd. (supra) relied on by the ld. AR, we reproduce below the relevant part of the judgment :-

“2. The core issue involved in the present batch of appeals is the scope of assessment under section 153A of the Income-tax Act, 1961 (hereinafter referred to as the 'Act, 1961'). According to the Revenue, the Assessing Officer (hereinafter referred to as the 'AO') is competent to consider all the material that is available on record, including that found during the search, and make an assessment of 'total income'. Some of the High Courts have agreed with the said proposition. However, according to the respective assesseees and as per some of the High Courts' decisions, if no assessment proceeding is pending on the date of initiation of the search, the AO may consider only the incriminating material found during the search and is precluded from considering any other material derived from any other source.

4.1 The submissions on behalf of the assessee in a tabulated form thus are as under:

S. N .	Particulars	Assessment u/s 143(3) pending and abated	Reassessment u/s 147 pending and abated	Unabated assessments
i.	No Incriminating material found in search.	AO entitled to assess entire income, as pending regular assessment stood abated.	Scope of assessment u/s 153A must be restricted to grounds of reopening of assessment, which was pending on date of search and stood abated as a result of search. AO not entitled to go beyond scope of pending assessment.	No assessment u/s 153A in absence of any incriminating material. Originally concluded assessment which has attained finality cannot be disturbed more so when no material found in search.
ii.	No incriminating material found in search. Information/document from sources other than search available with AO	AO entitled to assess entire income, as pending regular assessment stood abated.	Scope of assessment u/s 153A must be restricted to: (a) grounds on which proceedings reopened; and (b) additional specific information coming to knowledge AO through modes other than search. AO not entitled to reopen entire assessment and undertake roving/fishing enquiries.	Assessment u/s 153A in absence of any incriminating material may be dropped. Post dropping of proceedings u/s 153A, Revenue may, basis other information, proceed u/s 147 and/or 263 subject to satisfaction of jurisdictional conditions under the said provisions.
iii.	Incriminating material found during search only on issue 'A'. No other information/material available or found from any external sources.	AO entitled to assess entire income, as pending regular assessment stood abated. AO also entitled to assess entire income and not just issue	Scope of assessment u/s 153A must be restricted to: (a) grounds on which proceedings reopened; and (b) issue A detected during search. AO not entitled to	Assessment u/s 153A to be restricted to: Issue A relating to which incriminating material is found during search. Original concluded assessment which has attained finality



		A.	reopen entire assessment and undertake roving/fishing enquiries.	cannot be disturbed, in context of issues in relation to which no documents are found in search.
iv.	Incriminating material found during search only on Issue 'A' Other information/material available or found from any external sources (not in search) in respect of Issue 'B'.	AO entitled to assess entire income including Issue A and/or Issue B.	Scope of assessment u/s 153A must be restricted to: (a) grounds on which proceedings reopened; and (b) issue A detected during search; and (c) issue B for which information available. AO not entitled to reopen entire assessment and undertake roving/fishing enquiries.	Assessment u/s 153A could only be done in respect of issue A relating to which incriminating material is found during search. On conclusion of assessment u/s 153A, Revenue may, on basis other information, proceed u/s 147 and/or 263.

4.2 Learned counsel for the respective assesseees have relied upon the following decisions of this Court as well as various High Courts in respect of their submission that no addition can be made in respect of completed assessment in absence of incriminating material:

Sl. No.	Name of case	Citation
1.	<i>CIT v. Sinhgad Technical Education Society</i>	[2017] 84 taxmann.com 290/250 Taxman 225/397 ITR 344 (SC): (2018) 11 SCC 490
2.	<i>Pr. CIT v. Saumya Construction (P.) Ltd.</i>	[2017] 81 taxmann.com 292/[2016] 387 ITR 529 (Guj.)
3.	<i>Pr. CIT v. Dipak Jashvantlal Panchal</i>	[2017] 88 taxmann.com 611/397 ITR 153/2017 (2) TMI 862 (Guj.)
4.	<i>CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd.</i>	[2015] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 (Bom.)
5.	<i>Pr. CIT v. Delhi International Airport (P.) Ltd.</i>	[2022] 140 taxmann.com 440/443 ITR 382 (Kar.)

6.	<i>Kabul Chawla (supra)</i>	
7.	<i>Pr. CIT v. Meeta Gutgutia</i>	[2017] 82 taxmann.com 287/248 Taxman 384/395 ITR 526 (Delhi)
8.	<i>Chintels India Ltd. v. Dy. CIT</i>	[2017] 84 taxmann.com 57/249 Taxman 630/397 ITR 416 (Delhi)
9.	<i>Sri. S.M. Kamal Pasha v. Dy. CIT</i>	[IT Appeal No. 155 of 2017, dated 2-8-2022]/2022 (8) TMI 966 (Karnataka)
10.	<i>Pr. CIT v. Jay Infrastructure and Properties (P.) Ltd.</i>	[Tax Appeal No. 740 of 2016, dated 10-10-2016]/2016 (10) TMI 1022 (Gujarat)
11.	<i>Smt. Jami Nirmala v. Pr. CIT</i>	[2021] 132 taxmann.com 267/[2022] 284 Taxman 141/ [2021] 437 ITR 573 (Orissa)
12.	<i>Smt. Smrutisudha Nayak v. Union of India</i>	[2022] 136 taxmann.com 162/286 Taxman 119/[2021] 439 ITR 193 (Orissa)
13.	<i>CIT v. Veerprabhu Marketing Ltd..</i>	[2016] 73 taxmann.com 149/388 ITR 574 (Cal.)
14.	<i>Pr. CIT v. Salasar Stock Broking Ltd.</i>	[G.A. No. 1929 of 2016, ITAT No. 264 of 2016, dated 24-8-2016] 2016 (8) TMI 1131 (Calcutta)
15.	<i>Pr. CIT v. Smt. Daksha Jain</i>	[D.B. IT Appeal No. 125 of 2017, dated 4-7-2019]/2019 (8) TMI 474 (Rajasthan)
16.	<i>Dr. A.V. Sreekumar v. CIT</i>	[2018] 90 taxmann.com 355/253 Taxman 428/404 ITR 642 (Ker.)

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6. It is the case on behalf of the Revenue that once upon the search under section 132 or requisition under section 132A, the assessment has to be done under section 153A of the Act, 1961 and the AO thereafter has the jurisdiction to pass assessment orders and to assess the 'total income' taking into consideration other material, though no incriminating material is found during the search even in respect of completed/unabated assessments.

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7.1 In the case of *Kabul Chawla (supra)*, the Delhi High Court, while considering the very issue and on interpretation of section 153A of the Act, 1961, has summarised the legal position as under:

Summary of the legal position

38. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. ....

.....

vii. Completed assessments can be interfered with by the AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

**7.2** Thereafter in the case of *Saumya Construction (supra)*, the Gujarat High Court, while referring the decision of the Delhi High Court in the case of *Kabul Chawla (supra)* and after considering the entire scheme of block assessment under section 153A of the Act, 1961, had held that in case of completed assessment/unabated assessment, in absence of any incriminating material, no additional can be made by the AO and the AO has no jurisdiction to re-open the completed assessment. In paragraphs 15 & 16, it is held as under:

"15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby; it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year, falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso

thereto says, that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the, six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A, of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of, the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is well settled as held by the Supreme Court in a catena of decisions that the heading of the, section can be regarded as a key to the interpretation of the operative portion of, the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153, the intention of the Legislature is clear, viz, to provide for assessment in case of search and requisition. When, the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment, should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, as held by the Rajasthan High Court in the case of *Jai Steel (India) v. Asst. CIT (supra)*, the earlier assessment would have to be reiterated. In case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act."

8. For the reasons stated hereinbelow, we are in complete agreement with the view taken by the Delhi High Court in the case of *Kabul Chawla (supra)* and the Gujarat High Court in the case of *Saumya Construction (supra)*, taking the view that no addition can be made in respect of completed assessment in absence of any incriminating material.

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**11.** As per the provisions of Section 153A, in case of a search under section 132 or requisition under section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under section 132 or requisition under section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfilment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

**14.** In view of the above and for the reasons stated above, it is concluded as under:

(i)	that in case of search under section 132 or requisition under section 132A, the AO assumes the jurisdiction for block assessment under section 153A;
(ii)	all pending assessments/reassessments shall stand abated;
(iii)	in case any incriminating material is found/unearthed, even, in case of

	unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and
(iv)	<p>in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.</p> <p>The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs.</p>
	<i>Civil Appeal Nos.7738-7739/2021, 7736-7737/2021, 7732-7735/2021 and 7740-7743/2021</i>

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10. Since in the case on hand, the AO has not referred to any incriminating material found during the search while making the impugned disallowance, respectfully following the above judgment of Hon’ble Supreme Court, we hold that no addition can be made in the absence of any incriminating materials.

11. Further we make it clear that during the remand proceedings & rejoinder the assessee itself/suo-moto accepted that the for inadequate of documentation company used the aircraft for personal use to the extent of 15% and 85% was used for the business purpose. Since it is agreed addition to the extent of 15% of the aircraft expenses by the

assessee itself, therefore, we direct the AO to calculate the addition in above terms and rest addition should be deleted.

12. The ld. AR has not argued on the other grounds raised, therefore they are left open.

13. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 08<sup>th</sup> day of September, 2023.

Sd/-

( GEORGE GEORGE K.)  
VICE PRESIDENT

Sd/-

(LAXMI PRASAD SAHU )  
ACCOUNTANT MEMBER

Bangalore,  
Dated, the 08<sup>th</sup> September, 2023.

*/Desai S Murthy /*

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar  
ITAT, Bangalore.