Contribution of the High Court of Delhi

to the Development of Law in 2011

Compiled by:

S. Muralidhar and J. R. Midha
Judges, High Court of Delhi
With the assistance of a team of law researchers

Prefatory Note

The Delhi High Court in 2011 had 42 Judges (including retirements and elevations). There were 39,432 institutions and 43,241 disposals. Over 3000 reportable judgments were delivered by the Judges sitting as Full Benches, Division and Single Benches.

The accompanying compilation has been prepared of only those judgments, selected by the judges themselves, which have in a significant manner contributed to the development of law.

This compilation was prepared for presentation at the National Judicial Academy, India (Bhopal) at the *National Conference of High Court Justices on the Contribution of High Courts and the Supreme Court to the Development of Law in 2011* on 18th February, 2012.

It is not possible at present, to accurately state whether any of the judgments in this compilation are either subject matter of an appeal or have been stayed.

LIST OF ABBREVIATIONS

AD	**-**	Apex Decisions
ARBLR	-	Arbitration Law Reporter
CompCas	-	Company Cases
CriLJ	-	Criminal Law Journal
CTR	**-**	Current Tax Reporter
D.B.	-	Division Bench
DE	**-**	Delhi
DLT	-	Delhi Law Times
DRJ	-	Delhi Reported Journal
F.B.	-	Full Bench
FLR	**-**	Factory Law Reporter
MANU	-	Manupatra
PLR	**-**	Punjab Law Review
PTC	**-**	Patents &Trademarks Cases
TAC	**-**	Transport and Accident Cases
TAXMAN	**-**	TAXMAN (Taxation Manual)

SUBJECT INDEX

TABLE OF CASES

16.	*Bhagwan Mahavir Education Society (Regd.) & Anr. v. DDA & Ors.* **(D.B.)**	MANU/DE/0968/2011	36
17.	*Bhagwan Singh Guleria v. Union of India & Ors.* **(D.B.)**	2011 (124) DRJ 442	71
18.	*Bhajan Singh Samra v. M/s Wimpy International Ltd.*	185 (2011) DLT 428	52
19.	*Bharat Heavy Electricals ltd. and Anr. v. DPC Engineering Projects Pvt. Ltd.*	184 (2011) DRT 292	12
20.	*Bharti Telemedia Ltd. v. Government of NCT of Delhi and Anr* **(D.B.)**	182(2011)DLT665	134
21.	*Bhole Baba Milk Food Industries Ltd. v. Parul Food Specialities (P) Ltd.*	177 (2011) DLT 109	186
22.	*Bhupender Singh v. The State (Govt. of NCT of Delhi)* **(F.B.)**	2011 (126) DRJ 1	116
23.	*Budh Singh & Sons v. Sangeeta Kedia*	185 (2011) DLT 580	254
24.	*Commissioner of Income Tax v. Ankitech Pvt. Ltd.* **(D.B.)**	MANU/DE/3415/2011	149
25.	*Commissioner of Income Tax v. Delhi Public School* **(D.B.)**	[2011] 203 TAXMAN 81	138
26.	*Commissioner of Income Tax v. Desiccant Rotors International Pvt. Ltd* **(D.B.)**	[2011] 201 TAXMAN 144 (Delhi)	140
27.	*Commissioner of Income Tax v. Easterm Medikit Ltd.* **(D.B.)**	[2011] 202 TAXMAN 572 (Delhi)	151
28.	*Commissioner of Income Tax (Central)-1 v. Manish Build Well Pvt. Ltd.* **(D.B.)**	184 (2011) DLT 611	131
29.	*C.I.T. v. Le Passage To India Tour & Travels Pvt. Ltd* **(D.B.)**	(2011)241CTR(Del)535	136
30.	*C.I.T., Delhi v. Ms. Mayawati* **(D.B.)**	183(2011)DLT617	143
31.	*C. I.T. v. Mohair Investment and Trading Co. P Ltd.* **(D.B.)**	184 (2011) DLT 23	142

98.	*Mehtab son of Shri. Mohd. Sabir v. Union of India*	FAO No. 60/1998	102
99.	*MIC Electronics Ltd. & Anr. v. Municipal Corporation of Delhi & Anr.* **(D.B.)**	2011 II AD(Delhi) 625	5
100.	*Milano Impex Private Ltd. v. Egle Footwear Pvt. Ltd*	2011 (124) DRJ 668	27
101.	*Mr. Arun Jaitley v. Network Solutions Pvt. Ltd*	181(2011)DLT716	125
102.	*Mr. Rajan Bihari Lal Raheja v. M/s Planman Consulting India Pvt. Ltd*	185 (2011) DLT 154	96
103.	*Murari v. State*	2011 (2) JCC 1233	84
104.	*Music Broadcast Pvt. Ltd. v. Super Cassettes Industries Ltd.* **(D.B.)**	183 (2011) DLT 23	180
105.	*Nand Kishore Garg v. Govt. of NCT of Delhi and Ors.* **(D.B.)**	MANU/DE/1953/2011	76
106.	*Naresh Kumar Jain v. Union of India and Ors* **(D.B.)**		75
107.	*National Cooperative Development v. Assistant Commissioner of Income Tax***(D.B.)**	MANU/DE/6642/2011	144
108.	*Naveen Kumar v. Smt. Khilya Devi & Anr.*	183 (2011) DLT 381	42
109.	*Neeraj @Babloo v. State (NCT of Delhi)* **(D.B.)**	185 (2011) DLT 236	105
110.	*Neeru Sharma & Ors. v. The State (NCT, Delhi) & Anr.*	MANU/DE/2352/2011	95
111.	*New India Assurance Co. Ltd. v. Sh. Satvir Verma & Ors.*	MANU/DE/4191/2011	242

165.	*T. R. Bhagat v. Director General of Central Excise & Ors.*	2011 (4) JCC 2667	121
166.	*Tata Sons v. Greenpeace*	178(2011)DLT705	169
167.	*Tata Sons Ltd. v. Manoj Dodia & Others*	2011 (46) PTC 244 (Del)	178
168.	*Teerthanker Mahaveer Institute of Management v. Union of India & Ors.*	MANU/DE/3814/2011	157
169.	*Ten XC Wireless Inc. v. Mobi Antenna Technologiesn (Shenzhen) Co. Ltd*	2011 (48) PTC 426 (Del.)	32
170.	*Tunda Ram Dagar v. State* **(D.B.)**	MANU/DE/1309/2011	115
171.	*Vijender Singh v. M/s Eicher Motors Limited*	Crl.M.C.No.1454/2011	98
172.	*Yogesh Duggal & Ors. v. State & Ors.*	179 (2011) DLT 557	258
173.	*Zafar-ul-Islam v. State* **(D.B.)**	182 (2011) DLT 738	106

ARBITRATION

ARBITRATION

S. 34, 39 of the Arbitration and Conciliation Act, 1996: Once arbitral proceedings had commenced, Courts should abjure interference with their progress. Since, the firm had not availed of its right to file Objections under Section 34 of the Act, objections filed by partner of Firm, were patently time barred.

Anita Garg v. M/s Glencore Grain Rotterdam B. V.

Citation: 2011(4)ARBLR59(Delhi), 182(2011)DLT365

Decided on: 11th August, 2011

Coram: **Vikramjit Sen**, Siddharth Mridul, JJ.

Facts: In the present matter the Ld. Single Judge dismissed the Appellant's Objections, challenging both the Interim Award and Final Award passed by The London Rice Brokers' Association (LRBA), under Section 34 of the Arbitration & Conciliation Act, 1996.

In the impugned Order, the learned Single Judge has, inter alia, held that the action before him was barred from consideration on the principles of *res judicata.*

Issue: Whether, principle of *res judicata* barred consideration of Objections under Section 34 of Arbitration & Conciliation Act?

Whether an award passed by an Arbitral Tribunal consisting of two Arbitrators is illegal?

Whether an Indian Court had jurisdiction to pass order under Section 9 of A&C Act and whether stay of arbitral proceedings was contemplated under the said provision?

Held: After the Award is pronounced by an arbitral tribunal, it becomes *functus officio*. A partner of a firm, such as the Appellant, cannot re-agitate an issue which has already been raised or could have been raised and decided by the Firm. It was found that Firm had not availed of its right to file Objections under Section 34 of the Act and hence, objections filed by Appellant, partner of Firm, were patently time barred.

Clause 11 of LRBA Contract was equivalent to Arbitration Clause between parties. There was nothing in this Clause which precisely or concisely indicated that arbitration by only two arbitrators was in contemplation. English Act, 1996 made appointment of Chairman optional except where Arbitral Tribunal comprises of even number of arbitrators.

The court held that after reading of the Arbitration & Conciliation Act it is clear that once arbitral proceedings had commenced, Courts should abjure interference with their progress. In the present matter Part I of the Act had been specifically excluded by parties they were well aware that resolution of disputes was always through arbitration under aegis of LRBA.

ARBITRATION

Award passed by authority shall be invalidated if it is contrary to specific provisions of relevant enactments and 'public policy' of India.

Delhi Metro Rail Corporation v. Simplex Infrastructures Ltd.

Citation: 2011(3)ARBLR307(Delhi)

Decided on: 26th August, 2011

Coram: Vikramjit Sen, **Siddharth Mridul**, JJ.

Facts: In the present matter a Single Judge upheld the Award of an Arbitral Tribunal whereby it was held that Appellant was wrong in deducting labour cess from final bill payment to be made to Respondent in respect of a contract for construction of a depot and workshop at Shastri Park, Delhi. Hence, the present appeal.

Issue: Whether an award passed by an Arbitral Tribunal can be set aside under section 34 of the Arbitration and Conciliation Act when the tribunal failed to appreciate that the BOCW Act, the Cess Act and the Cess Rules had come into operation prior to the contracts entered into between the Appellant and Respondent?

Whether the award passed by authority shall be invalidated if it is contrary to specific provisions of the abovementioned enactments?

Held: Award passed by authority shall be invalidated if it is contrary to specific provisions of relevant enactments and 'public policy' of India.

In the present matter Arbitral Tribunal as well as the learned Single Judge erred in law while allowing the claims of the Respondents and dismissing the Objections of the Appellant, and failed to appreciate that the BOCW Act, the Cess Act and the Cess Rules had come into operation before the contract was entered into.

The decision arrived at by the Arbitral Tribunal was patently illegal and contrary to the public policy of India and deserved to be interfered with in the proceedings under Section 34 of the Arbitration & Conciliation Act, 1996.

Appeals were allowed. Impugned Orders were set aside. Arbitral Awards were also set aside and the Registry was directed to refund to the Appellants, the amounts deposited by the Appellant in pursuance to the impugned Orders.

ARBITRATION

In case of contracts freely entered into with the State, the mutual rights and liabilities of the parties are governed by the terms of the contracts and the laws relating to contracts.

MIC Electronics Ltd. & Anr. v. Municipal Corporation of Delhi & Anr.

Citation: 2011 II AD (Delhi) 625

Decided on: 11th February, 2011

Coram: Vikramajit Sen, **Siddharth Mridul,** JJ.

Facts: The dispute between the parties arose when Respondent cancelled the contract entered into with the appellant on the ground of violation of terms and conditions of the contract. The appellant challenged the cancellation through a writ petition which was disposed of in light of an arbitration clause in the agreement between the parties. Arbitration proceeding were invoked and arbitrator appointed, but however, being aggrieved by the respondent's actions, the appellant filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 praying for interim protection against the respondents under Section 14(1)(c) read in conjunction with Section 41(e) of the Specific Relief Act, 1963.

The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 were against the order dismissing the application of the Appellant under Section 9 of the said Act for grant of interim relief against the respondents.

Issue: Whether the relationship between the parties, one of them being the State, could be said to be governed by private law principles only and not by the public law principles (Art. 14, non-arbitrariness)?

Held: The court observed that in case of contracts freely entered into with the State, there was no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms of the contracts, merely because it happened to be the State. In such cases, the mutual rights and liabilities of the parties were governed by the terms of the contracts and the law relating to contracts. It was seen that the contract in the present case was entered into pursuant to floating of tender and there was no compulsion on anyone to enter into the contract. Therefore, there can be no question of State power being involved in such a voluntary contract.

Further, in pursuit of the issue pertaining to the contract being determinable in its very nature and hence not being specifically enforceable, the court opined that the determination of legality or illegality of termination of contract was a matter to be determined in arbitral proceedings and not by the court.

Therefore, the court held that the learned Single Judge had correctly declined to grant interim relief as sought for by the Appellant in view of Section 14(1)(c) read in conjunction with Section 41(e) of the Specific Relief Act, 1963 and the appeal was without merit thus meriting dismissal.

ARBITRATION

Section 34 of the Arbitration and Conciliation Act, 1996; Building and other Construction Workers Act- Definition of contractor includes 'sub-contractor'.

Delhi Metro Rail Corporation Ltd. v. Gammon Rizzani (JV)

Citation: 2011 VII AD(Delhi) 230

Decided on: 26th August, 2011

Coram: Vikramajit Singh, **Siddharth Mridul**, JJ.

Facts: The present second appeal was filed by the appellant under Section 34 of the Arbitration & Conciliation Act, being aggrieved of the decision of the Ld. Single Judge to uphold the order of the Arbitral Tribunal, that ruled in favour of the respondent/claimant and held that the appellant/DMRC committed an error in deducting a labor cess from the final payment to be made to the respondent for having completed its part of the contractual duties.

Issue: Whether the appellant/DMRC was erroneous in deducting a labor cess from the final payment made to the respondent?

Held: The court observed that the main object of the Cess Act being the augmentation of revenues for the welfare of construction workers, there was nothing arbitrary or unreasonable in such a classification of construction activities and the requirement of deduction of cess at source, leviable on the cost of construction incurred by the employer, towards settlement of bills of contractors working on building and construction works, for the government departments and state agencies, was justifiable.

Furthermore, dealing with the issue of interpretation of the expression 'employer' in the Cess Act and Cess Rules, the court opined that the intention of the Legislature was not only to include the owner of the establishment but also the contractors, the respondent in the present case, who carried out the work of building or other construction work and was an employer for the purpose of the Construction Workers Act, 1996 and the Cess Act, 1996. Thus, there was no escape from the levy of cess for such contractors who had undertaken the building and other construction work in the establishment belonging to the Appellant/DMRC.

Therefore, in view of the above and the fact that Cess Act was made effective from the 3rd day of November, 1995, while the Cess Rules became effective from the 26th day of March, 1998, the court held that it had become incumbent upon the Appellant to deduct the cess from the bills of the Respondents and the conclusion arrived at by the Arbitral Tribunal and the learned Single Judge, while allowing the claims of the Respondents and dismissing the objections filed by the Appellant, was erroneous to the extent that the Cess Act, having come into force in Delhi in the year 2002, was not applicable to the contract entered into between the Appellant and the Respondents in the year 2000 and 2001 respectively.

Consequently, the decision arrived at by the Arbitral Tribunal was held to be patently illegal and contrary to the public policy of India and deserved to be interfered with, in the

proceedings under Section 34 of the A&C Act. For the above reasons, the appeals were allowed and the impugned orders were set aside.

ARBITRATION

Where 'arbitration clause' is present in an agreement, Civil Court shall have no jurisdiction to interfere in exclusive domain of Arbitration.

Dr. Devinder Kumar Gupta v. Realogy Corporation & Anr.

Citation: 2011 (125) DRJ 129

Decided on: 25th July, 2011

Coram: **Vikramajit Singh**, Siddharth Mridul, JJ.

Facts: The appellants filed the present appeal challenging the order of the learned Single Judge which held that the Court could not go into the controversy concerning the existence or validity of the Arbitration Clause invoked by one of the parties; nor could it issue an injunction restraining that party from continuing with the arbitration proceedings initiated by that party before the American Arbitration Association.

Issue: Whether a civil suit is not maintainable with regard to the existence or validity of an arbitration agreement?

Held: The court appreciated the celebrated judgment in Swenska Handels Banken v. Indian Charge Chrome Limited, 1994(2) SCC 155, while observing that the plaintiff by merely entering into other contracts with different parties cannot prejudice or defeat the rights of the different parties under the different contracts, particularly when the right of the foreign arbitration, as contemplated under Section 3 of the Foreign Awards Act, had been provided by Parliament as an indefeasible right in which the court, did not have any kind of discretion. The plaintiff by filing a plaint could not make the arbitration clause invalid or inoperative.

The court being in complete agreement with the learned single judge that the parties having agreed to resolve or adjudicate their disputes through arbitration, the plaint was liable to be rejected so as to compel the Plaintiff to raise its claims before the Arbitral Tribunal. The court also agreed and upheld that the impleadment of other parties was malafide and the plaint was liable to be rejected on grounds of misjoinder of parties because by virtue of Section 8 of the Arbitration and Conciliation Act, the court was duty-bound to refer the parties to arbitration. Since a commercial arbitration had uncontrovertibly been entered into between the Plaintiff and Defendant No.1 (domestic commercial arbitration) and Defendant No.2 (international commercial arbitration, the venue of which is Paris), the suit could not have been proceeded with. The Appeals were therefore dismissed.

ARBITRATION

Section 9 of the Arbitration and Conciliation Act, 1996- A court must have territorial jurisdiction with regard to the subject matter of the arbitration proceedings in a same way as determined in any suit.

Prima Buildwell Private Ltd. & Ors. v. Lost City Developments & Ors.

Citation: 2011 (3) ARBLR 350 (Delhi)

Decided on: 16th August, 2011

Coram: **Manmohan Singh,** J.

Facts: The present petition was filed under Section 9 of Act, 1996 by the petitioner seeking an interim order restraining the respondents from, appropriating the funds in the bank account of Cavern Hotel or seeking additional contribution from the petitioners or causing the respondent No.2 to make any payments to AI Furjan LIC, an affiliate of respondent No.1 or unilaterally operating the bank account of the respondent No.2, until conclusion of the arbitration proceedings, on the ground that the Joint Venture Agreement executed between the Respondents and the Petitioners, contained an arbitration clause according to which any dispute was to be finally and exclusively settled by arbitration in London under the rules of the ICC.

Issue: Whether the Court had jurisdiction to entertain the petition under Section 9 of the Arbitration and Conciliation Act, 1996 wherein the arbitration of a dispute takes place in England?

Held: Petition under Section 9 of 1996 Act had to be filed before a "Court" as defined in Section 2(1)(e) of 1996 Act, according to which Court should be such which was competent under law to decide questions forming subject matter of arbitration. Therefore, provisions of Section 2(1)(e) of 1996 Act would also be applicable to international commercial arbitrations outside India.

It was clear that while entertaining Section 9 of 1996 Act petition relating to international commercial arbitration, the Court must have territorial jurisdiction with regard to subject matter of arbitration proceedings in same way as determined in any suit. The joint venture agreement, governed by the laws of England and Wales, contained an arbitration clause according to which any dispute was to be finally and exclusively settled by arbitration in London under the rules of the ICC. Therefore this court was held to not have the territorial jurisdiction to entertain the same. Petition was thus dismissed with no order as to costs.

ARBITRATION

S. 48 of the Arbitration and Conciliation Act, 1996: A narrow meaning must be given under Section 48 proceedings for enforcement of a foreign award and only when the nation's "most basic notions of morality and justice" are violated, would the public policy doctrine be applied to refuse enforcement.

Penn Racquet Sports v. Mayor International Ltd.

Citation: 2011(1)ARBLR244(Delhi)

Decided on: 11th January, 2011

Coram: **Vipin Sanghi, J.**

Facts: This execution petition has been preferred under section 49 of the Arbitration and Conciliation Act, 1996 to seek the enforcement of a foreign award between the parties. The decree holder is a company based in Arizona, USA while the judgment debtor is an Indian company at New Delhi. The decree holder invoked the arbitration before the International Chamber of Commerce, Paris to seek the appointment of an independent arbitrator

Issue: Whether in the present case the foreign arbitral award can be enforced in India when it allegedly contravenes 'public policy of India' insofar as the interpretation to clause 2.2.2 given by the learned arbitrator goes against the spirit of the contract?

Held: The recognition and enforcement of a foreign award cannot be denied merely because the award is in contravention of the law of India. The award should be contrary to the fundamental policy of Indian law, for the Courts in India to deny recognition and enforcement of a foreign award. Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality.

The expression "Public Policy of India" as under in section 48(2)(b) of the Act carries a narrow meaning when compared to the meaning assigned to the same expression in the context of section 34(2)(b)(ii) of the Act. Therefore, a narrow meaning must be given under Section 48 proceedings for enforcement of a foreign award and affirmed the principle that only when the nation's "most basic notions of morality and justice" are violated, would the public policy doctrine be applied to refuse enforcement. The Court would not interfere with the award, unless it can be shown that the said interpretation is contrary to the contractual terms.

Foreign award in question is enforceable under Chapter I Part II of the Act, and the award is deemed to be decree of this Court.

ARBITRATION

Section 14 of the Arbitration and Conciliation Act, 1996: Mandate of an arbitral tribunal can be struck down under section 14 of the Act on the grounds of 'undue delay' on the part of the tribunal.

Ariba India Pvt. Ltd v. ISPAT Industries Ltd.

Citation: 2011(3)ARBLR163(Delhi)

Decided on: 4th July, 2011

Coram: **Vipin Sanghi**, JJ.

Facts: This petition has been filed under Section 14 of the Arbitration and Conciliation Act, 1996 to seek a declaration that the mandate of the arbitral tribunal stands terminated on the ground that the arbitral tribunal has failed to act without undue delay. There was a total delay of over a span of 4½ years. A further direction is sought for reconstitution of the arbitral tribunal with a direction that it continues the arbitration proceedings from the point where the existing arbitral tribunal had reached, and that it should conclude the proceeding within the next six months.

Issue: Whether the mandate of an arbitral tribunal can be struck down under section 14 of the Arbitration and Conciliation Act on the grounds of 'undue delay' on the part of the tribunal?

Held: The legislative intent is that the tribunal should act without undue delay. Merely because the Act does not fix a time limit within which the arbitral tribunal should render its award, it does not mean that the tribunal can display a casual or non-serious approach in the matter of conduct of the arbitral proceedings. It is the tribunal which has to control the proceedings by laying down definite time-lines and by enforcing strict adherence to them.

There may be occasional and genuine exceptional situations, when those times lines may be relaxed in the interest of justice and fair play, but by and large, those time lines should be strictly enforced even-handedly and consistently by the tribunal.

The institution of arbitration is created with the litigant, i.e. consumer of justice being the central figure. It is to provide judicial service to the litigating public, so as to preserve law and order in the society, that the courts have been established and all other alternate dispute resolution modes, including arbitration, have been evolved. Arbitration should not be allowed to become prohibitively expensive for the arbitrating parties, such that it defeats the very purpose of sending parties to arbitration.

The power to appoint an arbitrator is coupled with the duty to appoint an independent and impartial arbitrator, who would conduct the arbitral proceedings efficiently and diligently to achieve the desired result of early conclusion of the arbitral proceedings within reasonable costs and expenses. Petition allowed and the mandate of the arbitral tribunal stands terminated. Arbitral Tribunal reconstituted by court. Direction to the arbitral tribunal to render award in 6 months.

ARBITRATION

Petition under Section 9 of the Arbitration and Conciliation Act, 1996.

Bharat Heavy Electricals ltd. and Anr. v. DPC Engineering Projects Pvt. Ltd.

Citation: 184 (2011) DRT 292

Decided on: 13th October, 2011

Coram: **Valmiki J. Mehta**, J.

Facts: Contract granted to the respondent by the appellant was terminated upon allegation of default and failure to perform contract. Respondent invoked arbitration proceedings and filed petition under Section 9 of the Arbitration and Conciliation Act, 1996 on the ground that the termination notice was illegal and fabricated. Present appeal is against the orders of the Court below allowing the Section 9 petition and restraining the appellant from withholding with it the monies claimed by the respondent, under the subject contract as also other contracts.

Issue: Whether during the pendency of arbitration proceedings, an interim injunction can be granted which has the effect of causing payment of amounts to the petitioner in a petition under Section 9 of the Act?

Held: An order of injunction directing that a person cannot withhold the amount is in fact an order directing payment of the amount. Though a person cannot during the pendency of the arbitration proceedings recover and appropriate the amount which he claims to be due, however, there is nothing which prevents a person from withholding the amounts, recovering or appropriating the same.

In the present case, apart from showing that there were disputes, the impugned order did not discuss as to how at all a prima facie case arose in favour of the respondent. Merely because disputes existed, an injunction could not automatically follow. Every disputed question of fact requires trial, but it is only a bonafide disputed question of fact which entitles a party to get an injunction. If every disputed question of fact requires injunction then in all suits interim injunction will automatically follow because every suit has disputed questions of facts requiring trial.

It was thus held that since the impugned orders failed to correctly applying the triple tests of prima facie case, balance of convenience and irreparable injury, they were liable to be set aside and the appeals be allowed.

ARBITRATION

Section 9 of the Arbitration and Conciliation Act, 1996- Grant or refusal of interim injunction.

Amit Sinha v. Sumit Mittal and Ors.

Citation: 2011 (122) DRJ 273

Decided on: 3rd February, 2011

Coram: Vikramjit Sen and **Siddharth Mridul**, JJ.

Facts: The present Appeal was filed under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996, the appellant being aggrieved by the final judgment and order passed in the petition filed by the respondents under Section 9 of the Act. The dispute between the appellant and respondent arose when the appellant defaulted in payment of consideration as required under the Share-Purchase Agreement between the two parties for acquisition of the entire shareholdings of the respondent in Triveni Media Ltd(TML).

Issue: Whether the trial court had the requisite jurisdiction to grant interlocutory injunction, against the appellant, under Section 9 of the Arbitration and Conciliation Act, 1996?

Held: It was held that a case in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it, there cannot be any rational basis for withholding the injunction. Being essentially an equitable relief, the grant or refusal of an interlocutory mandatory injunction ultimately rested in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case.

In view of the consistent defaults in making the requisite payment to the respondent under the the agreement entered into between them, greater injustice would have resulted in withholding the grant of mandatory injunction to the respondent and as such the jurisdiction exercised by the learned Single Judge was in consonance with the powers vested in the Court within the meaning of Section 9 of the said Act.

Therefore, observing that the power to grant a mandatory injunction was available to the learned trial court, the findings of the Ld. Single Judge were upheld.

ARBITRATION

The judicial review in cases involving policy decision was limited to where the same was found to be arbitrary, unreasonable or actuated by malice.

M/s Metro Builders (Orissa) Pvt. Ltd. v. Indian Oil Corporation Ltd. & Ors.

Citation: MANU/DE/4142/2011

Decided on: 31st October, 2011

Coram: **Manmohan Singh,** J.

Facts: This petition has been preferred under Section 11 of the Arbitration and Conciliation Act, 1996 praying for appointment of an independent arbitrator to adjudicate the disputes between the parties and to quash the order passed by General Manager of the respondent No.1 appointing respondent No. 5, Shri Dinkar Pandit as an Arbitrator. It was contended that the decisions of the respondents to appoint the serving officer of the company may leave a room for partiality and therefore the independent and impartial appointment of an arbitrator is warranted. Hence, the present petition.

Issue: Whether there is a presumption of biasness in the cases of arbitrators who are former employees or employees of the Governmental Undertakings?

Held: The mere fact that the employee or former employee was nominated as arbitrator was not sufficient to ascribe bias. It had been pointed out that the said officer Mr. Pandit was the senior officer who had superannuated from the company. The said officer was unconnected with that of the department with which the contract was related. The petitioner nowhere alleged this or disputed this in order to substantiate his case on biasness. In these circumstances, the court found that having due regard to provisions of Section 11(6) as well as Section 11(8) coupled with the guidelines of the Apex Court which provided for the availability of the cogent evidence to support the case of biasness, in the absence of the same, there was no ground of bias or justifiable apprehension of bias which was made out to replace the existing appointment done as per the agreed procedure.

The judicial review in cases involving policy decision was stated to be very limited unless the same was found to be arbitrary, unreasonable or actuated by malice. It was difficult to infer any biasness in the present case, where there was a panel constituted by the respondents by naming three persons as their employees unconnected with the subject matter and the Petitioner, who had by its own inaction not selected one and thereafter the respondents chose Mr. Dinkar Pandit as one which cannot be faulted with.

Since, no ground was made out to replace the existing arbitrator and to exercise the jurisdiction under section 11(6) of the Act, petition was therefore dismissed without costs.

ARBITRATION

A party to a contract is not entitled to forfeit the security deposit on ground of default when no loss is caused to him in consequence of such default.

M/s Office Equipment v. M/s Power Grid Corp of India Ltd.

Citation: 177 (2011) DLT 550

Decided on: 4th January, 2011

Coram: **Mool Chand Garg,** J.

Facts: The appellants filed the present appeal being aggrieved by the order of the Ld. ADJ court that had allowed the objections raised by the respondents under Section 34 of the Arbitration and Conciliation Act against the grant of the Ld. Arbitrator directing the respondent to repay back the bid guarantee to the appellant, on the ground that the Ld. ADJ had acted beyond the scope of jurisdiction available to him inasmuch he had acted as an appellate court and the observations made by him were completely in contradiction to the factual statistics of the present case.

The dispute between the parties arose when a Letter of Award (LOA) dated 19.12.2001 was granted to the appellant by the respondent but however, all the terms pertaining to the contract were only settled on 04.01.2002. The Arbitrator observed that thus the contract could be said to have really come into existence only on 04.01.2002 and thereby, the application to furnish performance guarantee would start only w.e.f. 04.01.2002, to be furnished within 15 days thereafter. However, in the meanwhile, the respondent themselves decided to abandon the contract. The Arbitrator thus held that since the respondents had not suffered any loss on account of the conduct of the appellant and had themselves abandoned the contract, they could not have forfeited the bid guarantee amount and therefore granted an award in favour of the appellants directing the respondents to repay the bid guarantee amount to the appellants. This award was challenged by the respondent by filing objections under Section 34 of the Arbitration and Conciliation Act, 1996, which were allowed by the Additional District Judge vide impugned order, subject matter of the present appeal.

Issue: Whether the award passed by the Ld. Arbitrator deserves to be interfered with under S. 34 of the Arbitration and Conciliation Act, 1996?

Held: The court observed that for the purpose of an unforeseen liability and in particular, forfeiture of a bid guarantee or performance guarantee, the pre-requisite was 'suffering of a loss' (quantified or not) coupled with breaking of the contractual obligation by the party against whom the bid guarantee or performance guarantee was to be invoked. As observed by the arbitrator, in the present case, neither the respondent suffered any loss nor could the appellant be held guilty of breaking the terms of the contract.

The court held that questions determined by the arbitrator which arose for consideration were answered by the arbitrator in accordance with law and do not call for any interference as it

could not be said that anything said by the arbitrator could have been objected to by the respondent in accordance with the provisions of Section 34 of the Arbitration and Conciliation Act, 1996. Therefore, it could not be said that the award given by the arbitrator contravened the public policy as mentioned under Section 34(2)(b) of the Act, even if a wider definition was to be given to those provisions taking into consideration the judgment of the Apex Court in the case of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd*. hence, petition was dismissed as infructuous.

ARBITRATION

Section 9 of the Arbitration & Conciliation Act, 1996- Power of the Court extends to cases where an arbitral award exists, but cannot be enforced under Section 36 of the Act.

Steel Authority of India Ltd. v. AMCI PTY Ltd. & Anr.

Citation: 2011 VII AD(Delhi) 644

Decided on: 1st September, 2011

Coram: **Vipin Sanghi**, J.

Facts: The petitioner, Steel Authority of India (SAIL), preferred the present petition under Section 9 of the Arbitration & Conciliation Act, 1996 for securing the amount awarded in its favour by the International Court of Arbitration (ICC) along with future interest of 18% from the date of award till the date of payment, for breach of agreement due to non-supply of coal, by the respondent, on the ground that the respondent's intention was to try to avoid and delay the payment under the award granted.

Issue: Whether the petitioner can apply for interim protection, securing the payment of an arbitral award under Section 9 of the Act if objections against the award are pending consideration under Section 34 of the Act?

Held: The court opined that by virtue of Section 36 of the Act, an arbitral award could not be enforced where an application to assail the arbitral award under Section 34 of the Act was pending disposal. Therefore, the petitioner could not seek the relief that the respondents should pay the awarded amount to the petitioner as that would tantamount to enforcing the award which was still unenforceable. However, there was no impediment in directing the respondents to secure the awarded amount by furnishing adequate security to the satisfaction of the court.

In the present case, the fact that RDA, of which respondent No. 2 was a constituent, was running into losses, year after year, and was heavily indebted, was sufficient to justify the seeking of an order requiring the respondents to furnish a security. After all, whether the losses were being suffered by the respondents, year after year, with intention to obstruct or delay the execution of the award (in case the award was upheld), or without any such intention, the award may be reduced to a paper award, in case the respondents would go under. It would be no solace to a petitioner, who may not be able to eventually enforce the award because of the respondents becoming financially defunct, so as to obstruct the execution of the award.

The court observed that in proceedings under Section 9 of the Act, at the most, the provisions of Order 38 Rule 5 CPC would serve as the guiding principle for the court to exercise its discretion while dealing with a Section 9 petition and so long as the requirements set out in Order 38 Rule 5 CPC were generally satisfied, the court would not be unjustified in exercising its jurisdiction to require the respondent to furnish security. The bottom line, was

that the court be satisfied that the furnishing of security by the respondent was essential to safeguard the interests of the petitioner.

Consequently, the balance of convenience was held to be in favour of grant of the interim measure of protection to the petitioner against the respondent on the ground that the petitioner would suffer irreparable injury if the interests of the petitioner were not adequately protected. Hence, the court allowed the petition and directed the respondents to furnish security to the satisfaction of the court.

ARBITRATION

Section 11(12), Arbitration & Conciliation Act, 1996- Reference to Chief Justice in sub-section (6) shall be construed as a reference to the Chief Justice of India in international commercial arbitration.

M/s HRD Corporation v. GAIL(India) Ltd.

Citation: 184 (2011) DLT 390

Decided on: 3rd November, 2011

Coram: **Manmohan Singh,** J.

Facts: The petitioner, a Company registered under the laws of the State of Texas filed the present petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 for appointment of a substitute arbitrator as per Rule 11(2) read with Rule 10 of the ICADR rules in place of Late Mr. Justice N.N. Goswamy (Retd) and also praying that the remaining members of the said Tribunal be allowed to continue in office. Hence the petition.

Issue: Whether the High Court has the power to appoint a substitute arbitrator in an international commercial arbitration in terms of S. 11(6) of the Arbitration and Conciliation Act, 1996 read with Rule 10 and 11(2) of the ICADR?

Held: The court observed that when the legislative provision itself was clear and unambiguous in express terms and it was so plain that no other meaning could be ascribed to the same, then it would be futile to speculate the legislative intent. The power vested in the Chief Justice and Chief Justice of India was statutory and the same was vested by the statute. The said power could be delegated by the respective Chief Justice of the High Court to another judge of that High Court only and Chief Justice of Supreme Court to another Judge of Supreme Court only, thus, being purely statutory power vested in the appropriate cases by the statute. This court could not supplement or supplant the said power by assuming jurisdiction on the subject which falls within the domain of Chief Justice of India as per the provisions of Section 11 (6) read with Section 11(12).

The intent as emerging from the clear terms of the Section is that international commercial arbitration is put on the higher pedestral wherein the Chief Justice of India or his designate is the appointing authority and will continue to monitor the said disputes as the same being a commercial dispute wherein the commercial matters or monies of international parties are at stake and may require more circumspection, expertise and expeditious disposal of the arbitration leading to Supreme Court to appoint such arbitrators in its wisdom.

Hence, this court was held not competent to entertain the present petition seeking appointment of substitute arbitrator in the case of international commercial arbitration. Accordingly, the objection raised by the respondent is sustainable and is accepted. The petition is rejected being not maintainable.

- Section 15(2) provides that the substitute arbitrator is to be appointed according to the same rules which were applicable to the appointment of the arbitrator who is to be replaced.
- Sub-section (2) of Section 11 of the Act provides that in the absence of any agreed procedure for appointment of the arbitrator or arbitrators, sub-section (6) of Section 11 would apply whereunder a party may request the Chief Justice or any person or institution designated by him to take necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.
- By virtue of sub-section

BANKING AND INSURANCE LAW

Section 45 U and V of the RBI Act

M/S Richa Industries Ltd & Ors v. ICICI Bank Limited & Anr

Citation: MANU/DE/4011/2011

Decided on: 14th October, 2011

Coram: **Manmohan Singh**, J.

Facts: Plaintiffs filed suit for declaration, permanent injunction and damages against the defendants along with an application under Order XXXIX, Rules 1 and 2 CPC.

Held: Submission of the plaintiff that the derivative transactions cannot be entered into by the banks in cases of Rupee liability or otherwise in cases of loan is not correct as the bare perusal of the provisions which are cited at the bar including Section 45 U and V of RBI Act, circular dated 01.07.2010 of RBI, during the course of hearing itself make it evident that the Defendant or the other banks are empowered to enter into the derivative transactions on behalf of the client/ plaintiff. The clients like the plaintiffs having Rupee liability in the form of loan to the banks can authorize the banks to enter into such derivative transactions on their behalf.

CIVIL LAW

CIVIL LAW

Code of Civil Procedure, 1908 – Order XVIII Rule 4 - Guidelines for examination of witness through video conferencing

Milano Impex Private Ltd. v. Egle Footwear Pvt. Ltd.

Citation: 2011 (124) DRJ 668

Decided on: 25th May, 2011

Coram: **J.R. Midha,** J.

Held- The Delhi High Court laid down the guidelines for examination of a witness through video conferencing.

> "5. In the facts and circumstances of this case, the application is allowed and Mr. Olefirenko V.V. is directed to be examined through video conferencing on the following conditions:-
>
> (i) Evidence of the plaintiff shall be recorded through video conferencing between Delhi, India and Moscow, Russia.
>
> (ii) In Delhi, the video conferencing shall be conducted in the facilities available in the Annexe Block of the Delhi High Court.
>
> (iii) Mr. Girish Sharma, Registrar (Computers) of this court is appointed as the coordinator with regard to the technical aspects of video conferencing in the Indian High Commission, Moscow, Russia.
>
> (iv) The Indian High Commissioner at Moscow, Russia shall nominate a senior officer not below the rank of Deputy Secretary of India to facilitate video conferencing. The officer nominated by the Indian High Commission shall co-ordinate the video conferencing arrangements in Moscow, Russia and shall remain present at the time of recording of the evidence of the plaintiff.
>
> (v) The officer nominated by the Indian High Commissioner in terms of the direction at serial no.(iv) above shall ensure that apart from his own presence, the only counsel for the plaintiff is present at the time of video conferencing. He shall ensure that no manner of prompting by word or signs or by any other mode is permitted.
>
> (vi) The officer nominated by the Indian High Commission shall

verify the identity of the witness before commencement of his examination.

(vii) As soon as identification part is complete, oath will be administered by the respected Joint Registrar (J.R.) through the media as per Oaths Act, 1969.

(viii) The witness shall be examined during working hours of Indian Courts. The plea of any inconvenience on account of time difference between India and Russia shall not be allowed. However, the convenience of the Indian Consulate in Russia shall be taken into consideration in fixing the time and schedule.

(ix) The cross-examination, as far as practicable, be proceeded without any interruption and without granting unnecessary adjournments. However, discretion of the Court (J.R.) shall be respected.

(x) The Court (J.R.) may record any material remarks regarding the demur of the witness while on the screen and shall note the objections raised during recording of evidence.

(xi) The deposition of the witness shall be signed immediately in the presence of the nominated officer of the Indian High Commission. The said officer shall certify/attest the signatures of the witness.

(xii) The audio and visual shall be recorded at both the ends and copies thereof shall be provided to the parties at the expense of the plaintiff.

(xiii) The Indian Consulate in Moscow shall provide an official translator to facilitate the translation of questions from English language to Russian language and answers from Russian language to English language for the recording of evidence of witness in English language.

(xiv) The plaintiff shall bear the cost/expenses of the video conferencing. The expenses for the video conferencing to be undertaken in Moscow shall be informed to the plaintiff through counsel by the Indian High Commissioner. However, in case of any difficulty, the same may be communicated to the Registrar (Computers) of this Court by e-mail, who shall communicate the same to the plaintiff's lawyer in India.

(xv) The officer of the Indian High Commission to be nominated by

the Indian High Commissioner shall be paid a lump sum amount of Rs.50,000/- as honorarium, as stated by the learned counsel for plaintiff.

(xvi) The plaintiff shall deposit an amount of Rs. 10,000/- as cost of preparation of the certified copies with the Registry of this Court in the present case within two weeks from today. The Registry shall thereafter prepare certified copies of the entire record of the case, which shall be sent in separate folders clearly marked as order sheets; pleadings; applications; plaintiff's documents and defendant's documents. The same shall be forwarded to the office of Indian High Commissioner with the assistance of Ministry of External Affairs.

(xvii) This record shall be made available to the officer nominated by the Indian High Commissioner for the purpose of undertaking the video conferencing as it would be necessary for recording the statement and cross examination of the witness.

(xviii) In case, the defendants are desirous of being physically present in Moscow, Russia at the time of recording of the evidence, it shall be open for them to make arrangements on their own cost for appearance and their representation. The defendants shall ensure that prior intimation in this regard is filed in the Registry of this Court giving full particulars of the names of the persons as well as enclosing documents of authority in respect of the persons, who shall be representing them in the proceedings. The intimation in this regard as well as documents shall also be furnished to Indian High Commission in Moscow."

CIVIL LAW

Code of Civil Procedure, 1908 - Order XVIII Rule 2(3A) – Guidelines for drawing up written submissions

Kiran Chhabra v. Pawan Kumar Jain

Citation: 178 (2011) DLT 462

Decided on: 14th February, 2011

Coram: **J.R. Midha,** J.

Held- The Delhi High Court laid down the guidelines for drawing up the written submissions under Order XVIII Rule 2(3A) of the Code of Civil Procedure. The written submissions should comprise of the following:-

1. Brief list of dates.

2. Admitted facts.

3. Disputed facts.

4. The points to be decided should be duly formulated as questions or propositions.

5. In case issues have been framed, separate arguments on each issue are necessary unless two or more issues are such which can be more conveniently addressed together. The factual premises on which a particular argument is given has to be stated on each issue so that the proposition can be appreciated in that light.

6. For each proposition, after stating the factual premises on which a particular argument is given, there should be first the applicable statute which can even be excerpted.

7. **CASE LAW**

7.1 Case law may be cited not just as the legal database as a computer shows up on a query; but each judgment has to be examined and only the more relevant ones for each topic be cited.

7.2 The Court expects the lawyers to place all case laws, both for and against his case, so long as it is relevant to the proposition in question.

7.3 Judgments from the Supreme Court be placed first; those from our High Court be placed next; and those from other High Courts be placed thereafter.

7.4 In each grouping, the judgments are to be arranged in a reverse chronological order. This is in line with the law relating to precedents. Thereafter, for each decided case which appears to be important, a brief resume of the factual scenario in which the judgment was rendered, is necessary whereafter the relevant portion can be excerpted or described.

7.5 If there are older judgments which have been noticed in a later judgment, then the older judgment need not be cited. But if the later judgment merely follows and says nothing new, then the older judgment, which contains the reasoning and also lays down the law, should be cited and against the first (later judgment) it ought to be noted that it simply follows or approves a particular earlier judgment. In that event, the earlier judgment may be excerpted or discussed together with a brief resume of the factual scenario in that case.

7.6 After the judgments have been cited or portions excerpted, the ratio-decidendi of the judgment needs to be stated, for, it is the ratio-decidendi and not the conclusion, that is binding as a precedent.

8. If there is a contention of the opposite side, it must be answered, and not ignored or left for the court to look for an answer.

9. When all the points or proposition on which the arguments are addressed have been stated, there has to be a summing up so that the Court can get a fair idea of what the arguments are leading to.

10. Throughout these written arguments, page numbers and placitums of the documents or other material on the court record, and the reported judgments, must be given so that the Court can readily reach it in order to verify.

11. Lastly, keeping them brief is more helpful than giving a long mass of something which could even be incoherent. Structuring is most important. If an approach as this followed, the Court gets full assistance, much lesser time of the Court is consumed, and there is less likelihood of the Court falling into error.

12. The copies of the judgments with relevant portions highlighted to be filed with the written submissions.

13. A compilation of the photocopies of the relevant pages of the documents already on record with relevant portions highlighted be filed with the written submissions for ready reference and convenience of the Court.

CIVIL LAW

Code of Civil Procedure, 1908 – Section 35 - Assessment of Costs

Ten XC Wireless Inc. v. Mobi Antenna Technologies (Shenzhen) Co. Ltd.

Citation: 2011 (48) PTC 426 (Del.)

Decided on: 4th November, 2011

Coram: **J.R. Midha,** J.

Held- The Delhi High Court directed both the parties to submit their estimate of legal cost before commencement of the trial so that the parties have notice of the actual cost that the other side would be incurring in the course of litigation and the parties have an opportunity to take appropriate decision as to the manner in which to conduct the litigation. This process shall keep the cost in check and potentially eliminate the need for a detailed assessment at the end as well as the dispute as to the amount of the actual cost. The relevant portion of the judgment is as under:-

> "*Considering the high cost of litigation incurred by both the parties, this Court is concerned about the future cost of litigation. Both the parties are, therefore, directed to submit their estimate of future cost before the commencement of trial so that the parties shall have notice of actual cost that the other side estimate would be incurring in the course of litigation and the parties have an opportunity to take appropriate decision as to manner in which to conduct the litigation. Greater transparency about cost will promote access to justice. This process shall also keep the cost in check and potentially eliminate the need for a detailed assessment at the end as well as dispute as to the amount of the actual cost. The parties shall maintain a record of the Court time consumed by them and shall place the same on record at the time of final arguments. The Court Master shall also record the time consumed by each of the parties. This Court shall consider all these matters and shall pass appropriate order covering the entire gamut of the issue relating to costs at the stage of final arguments*."

CIVIL LAW

Fatal Accident Act, 1855 – Compensation for loss of life on account of collapse of building due to poor maintenance by the housing society

Shri Dina Nath Arora v. Govt. of NCT

Citation: CS(OS) No.325/2006

Decided on: 30th May, 2011

Coram: **Sunil Gaur,** J.

Held- It is the duty of the person responsible for the maintenance of the building to show that the building was kept in a proper condition and that its collapse was not due to any negligence since the persons responsible for the maintenance of the building are the only persons who are in a position to reveal the true state of affairs. Once the maintenance of the building in question is with society who is taking maintenance charges from its members/allottees of the flats in question and, therefore, it becomes the duty of society to have the periodical inspection of the common areas in the building in question carried out and to get the necessary repair done on the roof/tariff, etc. and in the eventuality of there being any repair work to be carried out by the allottees/occupants of the flat in question, society ought to have put them to notice.

Order 32, Rule 15, CPC- Court is empowered and under a mandatory duty to ensure representations to persons incapable of protecting their own interests.

Dr. Stya Paul v. The State and Ors.

Citation: MANU/DE/1386/2011

Decided on: 25th March, 2011

Coram: **Gita Mittal**, J.

Facts: Petitioner filed the present petition under Section 278 r/w S. 218 of the Indian Succession Act, 1925 praying for grant of Letters of Administration of his deceased brother's estate. Deceased petitioner is now represented by his wife and daughter. The present application is filed by the daughter contending the necessity of appointing a guardian *ad litem* for her mother who is incapable of protecting her interest when suing or being sued for reasons of mental inability and infirmity and would be unable to counter the challenge to the main petition.

Issue: Whether this Court is precluded from exercising jurisdiction while considering the application seeking appointment of a guardian *ad litem* on behalf of an unsound party?

Held: The importance of the inquiry which is to be conducted by the court cannot be sufficiently emphasised. The language of Rule 15 leaves no manner of doubt that every court, which is seized of proceedings in which there is a person who is said to be incapable of protecting her interests in relation to the proceedings. has the necessary power, as indeed a duty, to hold a preliminary inquiry to find if such a person was incapable and to take such steps as may be necessary to protect his interest.

The Court held that it is empowered to appoint a guardian in the event a person is adjudged to be of unsound mind. It further provided that even if a person is not so adjudged but is found by court on inquiry to be incapable to protecting his or her interest when suing or being sued or reason of any mental infirmity, an appropriate order hereunder can be passed.

Thus, it was found that wife of the petitioner, being the legal heir was legally incompetent of prosecuting the case and was therefore entitled to effective representation by appointment of guardian ad litem who would pursue her defiance of objection taken by Respondents or take considered view on conceding the same. The application was thus allowed and it was directed by the court to constitute a Board by medical experts for the purposes of conducting an examination of wife of deceased petitioner and submitting a report to this Court with regard to her mental status.

Sections 152 and 153, CPC- Court is empowered to check at any time, any clerical/ arithmetical errors or accidental slips in judgments, decrees or orders.

Major General Kapil Mehra & Ors. v. Union of India and Anr.

Citation: CM. 735/2011 in LA.APP. 149/2007

Decided on: 13th January, 2011

Coram: **Hima Kohli**, J.

Facts: The present application was filed by the appellants under Sections 152 and 153 read with Section 151 of the Code of Civil Procedure praying for inclusion of the court fee of 48 lacs affixed by them and grant of additional litigation expenses in the costs awarded vide judgment dated 24.12.2010. The appellants also sought to claim interest under Section 34 of the Land Acquisition Act against the enhanced compensation awarded by this court.

Issue: Whether the appellants are entitled to enhanced compensation and interest upon it, on account of an omission/arithmetical mistake made by the court?

Held: The fact that the appellants having affixed a hefty court fee on the memo of appeal, was inadvertently not taken note of and therefore the said omission was liable to be corrected by granting proportionate costs in favour of the appellants. However, inclusion of the entire court fee of 48 lacs was declined on the ground that the respondent could not be saddled with the entire court fees merely because the appellants assessed their entitlement to a grant of enhanced compensation.

Furthermore, Section 152 of the CPC stipulates correction of clerical or arithmetical mistakes or errors arising from any accidental slip or omission made by the court. However, where the court considered a legal provision and came to a wrong conclusion consciously thinking that conclusion to be correct and passed a wrong decree, it is evidently not an error arising from any accidental slip or omission but a mistake consciously committed and therefore cannot be corrected under Section 152 of the CPC. Hence, on the question of entitlement of interest under Section 34 of the Act, for it to be corrected, is beyond the scope of the provisions of Section 152 and 153 of the CPC and thus the issue could not be considered on merits.

CIVIL LAW

Intent of the legislature is translated into statutory provisions by enactment.

Bhagwan Mahavir Education Society (Regd.) & Anr. v. DDA & Ors.

Citation: MANU/DE/0968/2011

Decided on: 25th March, 2011

Coram: **Sanjay Kishan Kaul**, Sudershan Kumar Misra, JJ.

Facts: The claim of the petitioners for entitlement to land at pre-determined rates under the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 {'the said Rules' for short} for running of higher and technical education institutes, schools and hospitals gave rise to this batch of writ petitions. All the petitions are based on a common grievance that despite their cases for allotment of Nazul land being at advanced stages, the policy was abruptly changed leading to disposal of land only through public auction making the land less cheaper.

Issue: Whether in absence of any communication for allotment of land, mere recommendations of IAC could confer any right in the petitioners for allotment of land?

Held: Observing resolutions and file notings, it was observed by the court that even though it was consciously decided to keep the matter of whether to allot or not, in abeyance but following complaints about transparency, it was resolved that the said allotment should only take place by way of auction. To serve that purpose, necessary amendments were decided to be made to the said Rules.

The court opined that to constitute an enforceable right, the decision of the statutory authority had to be duly communicated. In the present case, there was no such communication. Referring to an Office Order issued by the Joint Director of Education, it was observed that the said order only provided for the decision of the Land Allotment Committee regarding allotment to private educational institutions to be followed. However, such a decision, could not be said to have violated the ultimate authority of the LG to decide whether to allot or not. In view of the aforesaid factual matrix, regardless of any internal decision taken prior to the final picture that may have emerged under the Rules, since no allotment had actually been made till then, it is the finally amended Rules which would govern the rights and obligations of the parties.

Thus the interpretation of Rules as according to the DDA was held to be the correct view and petitioners held to have no case in view of allotment not having matured in their favor prior to the amendments of the said Rules.

CIVIL LAW

Section 11 (iv) of Civil Procedure Code (C.P.C.) - A mixed question of fact and law cannot be addressed for the first time in the appeal stage.

Baker Oil Tools (India) Pvt. Ltd v. Baker Hughes Ltd. & Anr.

&

Mr. Hiroo Khushalani v. Baker Hughes Ltd. & Anr.

Citation: 2011 (47) PTC (Del)

Decided on: 3rd June, 2011

Coram: **Kailash Gambhir**, J.

Facts: The present appeal is filed by the appellant, under Section 96 of the Code of Civil Procedure, 1908, to challenge the judgment of the learned trial court whereby the suits filed by the respondents herein for specific performance, permanent injunction and damages were decreed in favour of the respondents and against the appellants. The appellants have challenged the validity of the Power of Attorneys authorizing the advocate to act in dual capacity as the respondent's constituted attorney as well.

Issue: Whether the appeal challenging maintainability of respondent's suit on the ground that the respondents were not entitled to a presumption under Section 85 and also on the ground of dual capacity of Advocate, can be allowed to succeed?

Held: On the question of validity of the two Power of Attorneys, the court held that if the execution and authentication of the Power of Attorney by a Notary Public is proved on record, then Section 85 mandates the Court to draw a presumption in favour of due and valid execution of such a Power of Attorney. However, such presumption is not a conclusive presumption and is rebuttable by the other party. In the present case, in the absence of any notarial seal on the Power of Attorney and candid and categorical statement of the respondent's own witness disputing and denying passing of any Board resolution for execution of the said Power of Attorneys, the court was of the view that the respondents could not claim the benefit of Section 85, Indian Evidence Act, and the appellants had succeeded in rebutting the presumption for the due execution and authentication of the two Power of Attorneys.

On the question of dual capacity, the court held that an Advocate cannot act in the dual capacity, that of a constituted attorney and an advocate. However, the plea raised by the appellants challenging maintainability of the suit filed by the respondents on the principles of dual capacity merited outright rejection, the same being a mixed question of law and fact and raised for the first time at the stage of appeal.

Hence upon consideration of whether the two suits could be dismissed on the above-said grounds alone, the court opined that considering that on merits the respondents succeeded

before the learned trial court, therefore, it would be a travesty of justice if the substantial rights of the respondents were allowed to be stultified on account of a procedural lapses. Holding that, the court was of the view that the present appeals should be remanded back to the learned trial court and a fresh opportunity was given to the respondents to cure the said technical defect.

CIVIL LAW

Order 21 Rule 54 or Rule 66 of the Code of Civil Procedure- A Court order allowing an auction sale without notice to judgment debtor is a nullity.

Pran Mohini v. Sheela Verma & Ors.

Citation: II (2011) BC 95

Decided on: 20th January, 2011

Coram: **Mool Chand Garg**, J.

Facts: This is an appeal by a mortgagor, who, in a suit for sale by mortgage, suffered a fraudulent ex-parte decree. It is the case of the appellant that even though the Court accepted her allegations that the said ex-parte decree was obtained fraudulently by the decree holder not having served notice upon the appellant at her correct address, the Ld. Trial court by way of the impugned judgment, confirmed the auction sale of the mortgaged property in favour of auction purchasers being Respondents No. 2 and 3 rather than setting it aside.

Issue: Whether confirmation of auction-sale during the pendency of the appellant's application under Order 21 Rule 90 CPC, is erroneous in nature?

Held: It was held by the court that when an ex-parte decree is set aside, parties stand relegated to the position that prevailed prior to the passing of the said decree. In such circumstances, the judgment-debtor has the right to apply to the court to set aside the sale under Order 21 Rule 90, on the ground of a material irregularity or fraud in publishing or conducting it, provided he can satisfy the court that he has sustained substantial injury by reason of such irregularity or fraud.

Thus, in the present circumstances, once the allegations of fraud being committed by the decree-holder was accepted by the trial court and the application of the appellant was pending under Order 21 Rule 90 CPC it was impermissible in law for the court to deal with the application of respondents No.2 & 3, the auction purchasers, for confirmation of the auction sale without disposing of the aforesaid application. However, the Ld. trial court did not follow the prescribed procedure while confirming the auction sale, in as much as, neither was a notice for proclamation of auction sale under Order 21 Rule 54 or Rule 66 of CPC was served to the judgment-debtor/Appellant, nor was the consent for sale obtained in writing from the appellant as under Order 21 Rule 68, CPC. Hence, appeal was allowed in light of the fact that the Executing Court had taken an erroneous view on the auction-purchaser's application and the auction sale not having been conducted in good faith was held to be invalid.

CIVIL LAW

Party should not suffer on account of fault of its counsel.

Faeel Ahmed & Others v. Islam Ahmed

Citation: 179 (2011) DLT 335

Decided on: 7th April, 2011

Coram: **S.L. Bhayana**, J.

Facts: The present petition under Article 227 of the Constitution of India was filed by the petitioner against the Trial Court order dismissing application to lead additional evidence, on the ground that failure to participate in suit proceeding was not wilful or deliberate.

Issue: Whether a party should suffer an adverse order on account of the fault of their counsel.

Held: In the present case, the Petitioners mainly contended that there was no willful or intentional absence before the Trial Court on their part and the absence was only caused on account of their previous counsel, who neither appeared nor informed the Petitioners regarding the matter. It was held that even though the petitioners were not vigilant and diligent in pursuing their case before the Trial court, yet they should not suffer due to the fault of their counsel who failed to appear on behalf of the petitioners to present their case. Petition was thus allowed subject to costs and the ex-parte decree set aside permitting the petitioners to contest the suit on merits.

CIVIL LAW

Section 151, CPC- Powers of the court under this provision cannot be invoked if an alternate remedy is available.

Lt. Col. S. D. Surie v. Paramount Enterprises and Ors.

Citation: FAO(OS) 502/2009

Decided on: 19th September, 2011

Coram: Badar Durrez Ahmed, **Siddharth Mridul**, JJ.

Facts: Right of the respondent to file amended Written Statement closed by the ld. Single Judge by order dated 8th April, 2008. The same was not challenged by the respondent in an appeal but by way of a revision application under Section 151, CPC. Present appeal was filed against the impugned order of the Ld. Single Judge, recalling the previous order dated 8th April, 2008 and allowing the respondent to file the written statement, in exercise of inherent powers under Section 151, CPC.

Issue: Whether the inherent jurisdiction of the Court under Section 151, CPC, can be exercised when a party has a remedy by way of an Appeal and has neglected to avail himself of the same?

Held: It was observed that the Courts cannot make use of the special provisions of the Section 151, where a party has a remedy provided elsewhere in the Code of Civil Procedure and he had neglected to avail himself of the same. Moreover, the inherent powers of the Courts are not to be used for benefit of the litigant who has remedy under the Code of Civil Procedure and the object of Section 151 CPC, is to supplement and not to replace the remedies provided for in CPC. Thus, Section 151 will not be available when there is a specific alternative remedy and the same is accepted to be a well settled principle of law.

In the present case, the order dated 8th April, 2008 could not be recalled by resort to Section 151 of the CPC after a period of one year had elapsed, and the said recall under Section 151 of the CPC was unwarranted and impermissible. Resultantly, the appeal was allowed and the impugned order dated set aside.

CIVIL LAW

Settlement agreements entered into through mediation cannot be rejected on flimsy pleas by the parties in dispute.

Naveen Kumar v. Smt. Khilya Devi & Anr.

Citation: 183 (2011) DLT 381

Decided on: 1st September, 2011

Coram: **A.K. Pathak**, J.

Facts: In the present suit for specific performance, disputes between the seller/Defendant no. 1 and property dealer/plaintiff were referred to the Delhi High Court Mediation and Conciliation Centre wherein an amicable settlement was arrived at by the parties after comprehensive mediation sessions. However the defendant no. 1 opposed the settlement subsequently on account of not being apprised of the terms of the settlement properly by either the mediator or her own counsel.

Issue: Whether the amicable settlement entered into by the parties can be rejected or discarded on flimsy objections raised by either of the parties to the settlement.

Held: It was held that in view of the fact that the amicable settlement was reached after extensive mediation sessions, was reduced in writing by the learned mediator and was signed not only by the parties but their respective counsels as well and no objections were raised by any of the parties until the next date before the court, if the plea of ignorance as taken by the defendant no. 1 were to be sustained, the very sanctity and purpose of an amicable settlement through the process of mediation would stand eroded. If amicable settlements were discarded and rejected on flimsy pleas, the parties would be wary of entering into negotiated settlements.

For the foregoing reasons the settlement agreement was held to valid and decree was passed in terms of the settlement agreement.

CIVIL LAW

Order 7 Rule 11 CPC- Defence of the defendants cannot be taken into account while considering rejection of a plaint.

M/s Spread Info Tech Consultants Pvt. Ltd.

v.

M/s. ZTE KANGXUN Telecom Company India Pvt. Ltd. & Anr.

Citation: MANU/DE/3905/2011

Decided on: 29th September, 2011

Coram: **A.K. Pathak**, J.

Facts: The present application was filed by the defendants seeking rejection of plaint in a suit for recovery on the ground that the plaint does not disclose any cause of action, inasmuch as, the plaintiff had suppressed material facts. The defendants alleged that the plaintiff's case was based on two agreements, namely a Cooperation Agreement and an Amendment Agreement, both being null and void, as on the date of alleged agreements the plaintiff company was not even in existence.

Issue: Whether plaint can be rejected on the basis of allegations made in the written statement?

Held: It was held that an application under Order 7 Rule 11 of the CPC for rejection of plaint has to be decided on perusal of plaint and documents filed along with it. A plaint cannot be rejected on the basis of allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to peruse the plaint as a whole to find out whether it discloses a cause of action or not. If the plaint discloses cause of action it cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Whether the plaint discloses cause of action is a question of fact which has to be gathered on the basis of averments made in the plaint and taking those averments to be correct as a whole together with the documents filed along with the plaint. If the case is based on documents the same have also to be read along with the averments made in the plaint to find out if there is any cause of action for filing the suit.

In the present case, it cannot be said that plaint does not disclose any cause of action and deserves to be rejected. Thus, application was dismissed.

Section 92, Civil Procedure Code, 1908- Trust/Society must exist and exist for a religious and charitable purpose.

B.K. Goel and Ors. v. Manohar Lal and Ors.

Citation: 2011 (124) DRJ 426

Decided on: 23rd May, 2011

Coram: **Sunil Gaur**, J.

Facts: The petitioners filed the present representative suit under Section 92 of the Code of Civil Procedure, praying for removal of Defendant No. 1 to 4 from the Trustee-ship from 'Mandir Madana and Sawan Das Dharmarth Trust' along with directions to the defendants No. 1 to 4 to render accounts and to deliver the possession of the trust properties, as disclosed in the plaint, to the new Trustees, on the ground that the aforesaid Trust was being mismanaged.

The dispute between the parties arose when the Statutes of Lord Radhakrishna and other articles were illegally removed from the Mandi Radhakrishna Temple, situated in Village Madana, Distt. Rohtak, Haryana, despite it being Trust property and exclusively for the use and enjoyment of the legal representatives of the Settler of Trust. Secondly a Piao/Piggi and agricultural land attached thereto was allowed to be illegally occupied by unauthorized occupants and the irregularities as to creating a new tenancy and sale of the properties belonging to Trust, came to light. Thirdly, the defendants refused to render the accounts of the Trust in February, 1984.

Issue: Whether the representative suit was maintainable under Section 92, CPC and whether the present court had the requisite jurisdiction to adjudicate upon it?

Held: The court observed that the primary requirements for maintaining a claim under Section 92, CPC was to establish the existence of a Trust and that it existed for charitable and religious purposes. Perusal of the documentary evidence on record i.e. Revenue Record as well as the Mutation record, clearly established the existence of the ‘Mandir Radha Krishan Madana Kala Trust’. The records also established that after having undergone a change in its nature and constituency, the Trust property under the ‘Mandir Radha Krishna’ stood transferred to 'The Mandir Madana and Sawan Das Dharmarth Trust'. Since it was a settled legal position that dedication of properties to charity need not necessarily have been through an instrument or grant, and could be established by cogent and satisfactory evidence, the existence of the 'The Mandir Madana and Sawan Das Dharmarth Trust' thus stood established. Furthermore, it was also proved through oral and documentary evidence, that the aims and objectives of the aforesaid Society were charitable and religious.

Thus the court opined that since both the primary conditions were satisfied, hence the Society was entitled to be considered within the definition of Public Charity under Section 92 of the

CPC and the plaintiff’s claim could not be rejected merely because the plaintiffs were concerned in the effective management of the Trust properties, being also the descendents of the original Trustees just as the defendants No. 1, 2 and 3 were. Thus the court decided the suit to be maintainable under Section 92 and plaintiffs having the locus standi to institute the present suit and also, as part of subject matter of Trust property was within jurisdiction of this Court and there was serious dispute about its management, the court held to possess the requisite territorial jurisdiction to entertain the suit.

Having decided so, the court, upon an in-depth scrutiny of the testimony of Defendent No. 4 (Secretary of the 'The Mandir Madana and Sawan Das Dharmarth Trust') further held that the aforesaid Trust was being grossly mismanaged and that the Trust properties were being misused for purposes other than religious or charitable and therefore directed the reconstitution of the Trust and its governing body by holding fresh elections and formulation of a scheme for effective management of the 'The Mandir Madana and Sawan Das Dharmarth Trust'. The suit was disposed of accordingly.

COMPANY LAW

COMPANY LAW

Section 397, 398, 111A of the Companies Act, 1956: Maintainability of composite petition

Charanjit Khanna v. Khanna Paper Mills Ltd.

Case Number: CO. A(SB)--9/2011

Decided on: 20th April, 2011

Coram: **Manmohan,** J.

Facts: The present appeal has been filed under Section 10F of the Companies Act, 1956 challenging the order passed by the CLB whereby the said petition was dismissed as not maintainable. However, the appellants were given liberty to file a petition for rectification of the register of members under Section 111A of the Act and in the event of their being successful in the said petition, they were granted further liberty to file a composite petition under Sections 397/398 of the Act. The CLB has given no finding/conclusion on the contentions raised by the Respondents while opposing the maintainability of the petition. Further, the CLB has not dealt with the amendment application filed by the appellants, except observing that it was infructuous.

Issue: Whether a composite petition under Section 397 and/or 398 read with Section 111A of the Act is maintainable?

Held: Where allegation of oppression and mismanagement is inexplicably intertwined with the issue of maintainability of the petition under Section 399 of the Act, a composite petition has to be held as maintainable. To ask a petitioner to file two separate petitions in such circumstances would not only be unfair but would also result in unnecessary delay.

All amendments which are necessary for determining the real question in controversy between the parties should be allowed provided it does not cause injustice or prejudice to the other side. Further, at the time of allowing the amendment application, the merit of the amendment is not to be considered and a liberal approach is to be adopted.

In the present matter, the CLB has not dealt with the amendment application filed by the appellants, except observing that it was infructuous.

The present appeal was allowed and the CLB is directed to take the amended composite petition on record

Section 536(2) of the Companies Act, 1956- The Court has an absolute discretion to validate the transfer of shares after presentation of the winding-up petition.

S. Chand & Co. v. M/S Bharat Carpets Ltd.

Citation: MANU/DE/6797/2011

Decided on: 24th November, 2011

Coram: **Manmohan,** J.

Facts: In this matter an application was filed by the propounders of the Scheme under Section 536(2) of the Companies Act, 1956 read with Rule 9 of the Companies (Court) Rules, 1959 seeking validation of purchase of shares after the winding up order has been passed by the court.

Issue: Whether the court could sanction the purchase of shares after the passing of a winding up order considering the scope and ambit of Section 536(2) of the Companies Act, 1956.

Held: It was held that the court had the discretion to validate transfer of shares executed after passing of the winding up order, but the said discretion was not an untrammeled one, as it had to be exercised on sound judicial principles. There was nothing in the Act which prohibited the Company Court from granting *post facto* sanction.

However, while validating a share transfer agreement, the Company Court, was to keep in view all surrounding circumstances and if it found that same was a *bona fide* transaction for the benefit of the company, then the same should be validated. But, however, before doing so the Company Court must have been satisfied that there was clear intent on the part of the purchasers to transfer the shares in question.

The Court was of the view that the share transfer agreement/MoU/deed of arrangement executed between the objectors/other transferors and the applicants-propounders were *bonafide* transactions for the benefit of the company in liquidation, hence it validated the transfer of shares, subject-matter of the present application, in favour of the applicants-propounders. Application was therefore allowed.

Section 433(1) and 434 of the Companies Act: The company court in the course of the winding up proceedings is not bound by a decree of the court (compromise decree) when it has to determine as to whether there exists a real debt or not.

M/S Nehru Place Hotels Limited v. M/S Bhushan Limited

Citation: [2011]166CompCas590(Delhi)

Decided on: 9th August, 2011

Coram: **Badar Durrez Ahmad,** V.K. Jain, JJ.

Facts: These appeals arise out of a common judgment by the learned Company Judge, whereby the appellants' petitions seeking winding up of the respondents (Bhushan Limited and Bhushan Steel and Stripes Limited) on the ground that the respondent companies were unable to pay their debts, were dismissed. These company petitions were founded on the basis of a compromise decree. It was contended by the Appellant that the charges mentioned in the decree were not being paid by the Respondent.

Issue: Whether the company court can go behind a compromise decree in order to ascertain as to whether a debt based on the same is legally enforceable or not and whether a *bona fide* dispute in respect of the debt can be raised notwithstanding the existence of a compromise decree?

Whether the impugned judgment of the learned Company Judge, particularly with regard to the nature of the debt and also the compromise decree, is binding on the civil court in the suits pending between the parties?

Held: The company court in the course of the winding up proceedings is not bound by a decree of the court when it has to determine as to whether there exists a real debt or not. While a decree of a civil court binds the parties to the decree and to that extent neither of them can wriggle out of it unless they are able to show that it was obtained because of fraud or collusion etc., in a winding up proceeding, it is not only an issue between a creditor and the company, but also involves the larger question of survival of the company itself which effects the rights and obligations of several other parties. Thus, while the debtor company may be estopped from resiling from its commitments under the compromise decree, it may not enable the creditor to seek winding up of the company on this ground alone.

The decision of the Ld. company Judge with regard to the debt is not binding on the civil court in the pending suits. It is clear that the winding up jurisdiction of a company court is a discretionary jurisdiction and does not, in fact, adjudicate the civil rights between a debtor and a creditor. Any observations made by the Ld. Company Judge in the impugned order with regard to the compromise decree, being contrary to the provisions of the Delhi Apartment Ownership Act, 1986 would not be binding on the civil court which is hearing the pending suits between the parties.

COMPANY LAW

Section 433, 439 of the Companies Act, 1956- Protection of interests of a creditor to whom any amount is due and payable.

Bhajan Singh Samra v. M/s Wimpy International Ltd.

Citation: 185 (2011) DLT 428

Decided on: 21st November, 2011

Coram: **Manmohan,** J.

Facts: The present petition filed under Section 433(e) read with Sections 434 and 439 of the Companies Act, 1956 stating that the respondent-company is unable to pay its debt as well as interest. The contention of the respondent company is that the said amount was part payment towards Share Application Money.

Issue: Whether share application money of Rs. 50,00,000/- constitutes a 'debt'?

Held: The concept that share application money is trust money gathers strength from Sections 69 and 73 of the Act in so far as the Scheme of the Act itself obligates the company crediting the money as Share Application Money to either forthwith issue shares or refund the monies at the earliest.

In the present case, the court opined that once a winding up notice is issued, it was not open to the respondent to state its willingness to issue shares. Hence, since the sum of Rs. 50,00,000 was neither refunded by the respondent nor converted into shares, it constituted a debt *in praesenti* or an unsecured debt which was due and payable to the petitioner.

Requisition of company shall be valid unless it causes a hiatus in management of such company.

IFCI Ltd. v. TFCI Ltd.

Citation: 2011 (124) DRJ 350

Decided on: 16th May, 2011

Coram: **Manmohan,** J.

Facts: The present appeal has been preferred by the appellant against the order of the Company Law Board whereby Company Petition filed by appellant company under Sections 398 and 402 of the Companies Act, 1956 was dismissed on the ground that the requisition dated 26th November, 2010 issued by the appellant was invalid on the ground that it did not bear the signature of the requisitionist and further that the notice issued by the appellant dated 15th December, 2010 for convening EOGM on 17th January, 2011, was a fraudulent act in utter violation of the directions contained in CLB's interim order dated 16th December, 2010 directing the parties to maintain status quo and the appellant taking no further steps for holding of EOGM before the next date of hearing.

The dispute between the parties arose when the appellant company (IFCI), owning 37.85% shares of the respondent company (TFCI), sent a requisition dated 26th November, 2010 to the respondent for convening an EOGM for the purpose of appointing four new directors and removal and replacement of one director on its Board, however, without a specific authorisation/board resolution to file such requisition. The respondent requested for the same but having received no response from the appellant, decided not to convene the EOGM. Appellant then on 15th December, 2010, initiated the process under Section 169(6) of the Act for convening the EOGM on 17th January, 2011 and simultaneously filed the abovesaid Company Petition.

Issue: Whether, requisition issued by IFCI dated 26th November, 2010 and EOGM dated 17th January, 2011 can be held to be invalid and illegal?

Held: The court held that the mere fact that the appellant did not reply to the respondent's query could not have led to the legal presumption by CLB that the requisition dated 26th November, 2010 was not signed as required under Section 169(3) of the Act and thereby was not authorised by the Board or that the Company Secretary of IFCI did not have the authority to requisition the EOGM. Consequently, if the appellant's Board minutes dated 29th November, 2001 was read in conjunction with Section 2(15), it was apparent that the Company Secretary of IFCI was authorised by its Board by a prior general authorisation to requisition an EOGM. Thus the court found it apparent that neither the authorship nor source of origin of the requisition was ever in doubt and therefore in view of the admission by the Board of TFCI that the requisition had been duly signed by the Company Secretary of IFCI,

the findings of CLB to the contrary in the impugned order was unsustainable and were thereby set aside.

The court also opined that CLB's finding that IFCI had played fraud upon it, was a finding based on mere presumptions and surmises and the reasoning as provided by CLB for observing so, was unsustainable.

Accordingly, the impugned order was set aside and the requisitions dated 26th November, 2010 as well as the EOGM dated 17th January, 2011 are held to be legal and valid. Moreover, subsequent appointment of five Directors by TFCI's Board on 22nd March, 2011 was set aside on the ground that the the subsequent requisition dated 1st April, 2011 seeking removal of three directors including CMD was not only an act of takeover of management of the respondent by the appellant but also constituted an act of mismanagement by the appellant.

The appeal was thus disposed of in the above terms.

CONSTITUTIONAL LAW

Need for legislation to protect domestic workers including women and children against exploitation.

Bachpan Bachao & Ors. v. Union of India & Ors.;

Shramjeevi Mahila Samiti v. State and Ors;

and;

Kalpana Pandit v. State

Citation: 177 (2011) DLT 198

Decided on: 24th December, 2010

Coram: **A.K. Sikri,** Ajit Bharihoke, JJ.

Facts: In all the three present writ petitions filed in public interest, the disturbing problem of child trafficking had been highlighted pertaining to how several thousand minors were being kidnapped and trafficked from various states and brought to Delhi and sold for the purposes of prostitution, begging, drug-peddling, slavery, forced labour including bondage, and for various other crimes and who were still stranded in various parts of Delhi against their wishes and waiting to be rescued. The main concern of all the counsel in these writ petitions was that there was no comprehensive legislation regulating the placement agencies so as to curb the menace and to protect the fundamental rights of the children.

Thus, prayer made herein was to direct the respondents to take appropriate measures for the immediate rescue and release of all such minor children. Further, prayer was also made to the effect that directions be issued to the respondent for the protection of fundamental rights of such children and for their proper rehabilitation, social reintegration and education who were released from various illegal placement agencies and other places in the NCT of Delhi. Direction was also sought to the effect that the respondent should formulate and to bring into immediate effect a specific and stringent law to deal with such illegal placement agencies.

Issue: How to have proper control of administration over the placement agencies so that the exploitation of children was obliterated/ minimized to the possible extent.

Held: Based on the suggestions made by the learned counsel for the petitioners in all the present writ petitions, the court gave the following directions summarized as under:

(i) Feasibility of having a comprehensive legislation to regulate problem of employment of children and adult women, who were working as domestic helps and the regulation of placement of agencies who provided such labour. Emphasis was laid on dealing with the lack of coordination and disconnect amongst the multiple statutes and multiple authorities under them.

There is no legislation to take care of the problem and multiple statutes with multiple authorities – for lack of coordination and disconnect among them – are not able to tackle the issue effectively. Therefore, there is a need to study this aspect, viz., Emphasis should be laid on. We are making these observations also for the reason that the existing laws do not provide and effective speedy remedial which could ensure that women and children are able to;

(a) Seek recovery and wages,

(b) Ensure freedom of movement,

(c) Access shelter option in case of abuse before being able to go home. Feasibility of having control of SDMs of the areas on these placement agencies should also be worked out.

(ii) Necessary guidelines should be issued or rules framed in this behalf to ensure that various enforcement agencies of different statutes are able to work in a coordinated and cooperative manner. If possible, a single window enforcement agency be created so that the the NGO on behalf of such victims are able to approach the said agencies instead of knocking the doors of different authorities.

(iii) For more effective implementation of the Juvenile Justice (Care and Protection of Children) Act 2000 and Delhi Commission for Women Act, following directions were issued:

(a) Labour Department would register all placement agencies within a finite period of time. Failure to register within that prescribed time would invite penal action which could be prescribed by this Court.

(b) The registration process would not only be for agencies located in Delhi but also for all the agencies, who were placing women and children in homes located in Delhi. This suggestion was made in view of the apprehension expressed during discussions with the Labour Department that as soon stringent laws were brought into effect in Delhi, the agencies may shift out to the NCR region.

(c) The registration information would require details of the agencies; number of persons, who were employed through the agencies, their names, ages and their addresses; details of the salaries fixed for each person; addresses of the employers; period of employment; nature of work; details of the Commissions received from the employers.

(d) The information should be available for access to the Child Welfare Committee as well as the Delhi Commission for Women. During the discussions, the Labour Department had indicated that the information would be put up on the website. Till such time, the information should not be put up on the website, the records may be made available by the labour Department to the Commission and the Committee.

The court also directed the respondent authorities to consider the following suggestions at the earliest:

Duties of the Commission and the Committee:

a) The Committee and the Commission would have a duty to go through the records provided by the Labour Department.

b) The Committee and the Commission would have to verify the information and the cases where information was found to be inadequate, seek further information from the placement agencies after duly summoning them. The Committee will be authorized to pursue the services of 'Childline', a service set up by the Ministry of Women and Child Development, Union of India and managed by NGOs to verify the information in appropriate cases. The Commission will identify agencies who would assist them in verifying information with respect to adult women.

c) The Committee and the Commission will entertain complaints made by the domestic worker herself/himself of through her/his guardian, NGOs managing 'Childline' services, the employer or the police in appropriate cases.

d) The Committee or the Commission shall decide the complaints made within a period of 30 days.

Adjudication of the Complaints:

The Committee and the Commission may hear the following types of cases:

a) Withholding of agreed wages;

b) Harassment including harassment by employer at the hands of the placement agencies;

c) Harassment and/abuse by placement agency proprietor/staff at their premises or at work place;

d) Non-compliance of the agreed terms;

e) Abusive working conditions which is beyond the physical capacity of the child in cases where persons between the ages 14 and 18 are employed.

f) Long hours of work;

g) Lack of basic facilities including medical care and food.

Powers of the Committee/Commission:

(a) A committee and the commission would have the powers to summon the placement agencies or the employer as the case may be on a complaint made by the domestic worker or her guardian or any person employing her;

(b) Direct payment of wages as per agreed terms and in appropriate cases impose fines;

(c) Direct payment of compensation in cases where severe injuries are caused to the domestic worker during the course of the work;

(d) Direct medical assistance;

(e) Direct the placement agency to comply with the agreement with the employer or return the commission where the terms are not complies with;

(f) Impose fines on the placement agencies where it is found that terms of the agreement are not followed;

(g) Direct legal aid to the child/woman where a criminal offence has happened;

(h) Direct employers to inform the local police or the Committee/Commission in cases where the domestic worker is missing within 24 hours;

(i) In cases where a domestic worker has been placed in a home against her wishes, enable her to leave her employment and direct the agency to return the commission paid by the employer back to the employer.

The present writ petitions were disposed of in the aforesaid terms.

CONSTITUTIONAL LAW

Article 217(2), Article 233 of the Constitution of India; Eligibility criteria for appointment of a person as a High Court Judge.

D.K. Sharma v. Union of India

Citation: MANU/DE/2036/2011

Decided on: 8th April 2011

Coram: **Sanjiv Khanna**, Manmohan JJ.

Facts: The Petitioner filed the present writ petition seeking to quash the recommendation of collegium of this Hon'ble Court recommending the appointment and elevation of Respondent No.3 (Mr. R.V.Easwar) as a Judge/Additional Judge of the High Court. The Petitioner contended that under Article 217(2)(b) only Advocates, who are actually practicing *in praesenti*, are eligible and can be considered for appointment as High Court judges and Respondent No. 3 did not meet this criteria.

Issue: Whether elevation of judicial members to the Delhi High Court is consistent with the eligibility criteria prescribed under Article 217(2)(a) and Article 233(2) of the Constitution?

Whether explanation (a) and (aa) to Article 217(2) of the Constitution added by 42nd Amendment Act, 1976 and 44th Amendment Act, 1978 are unconstitutional as they violate the basic structure of the Constitution, namely, separation of powers and independence of judiciary?

Held: Article 217(2) is different from Article 233, which prescribes the eligibility criteria for appointment of a person as a District Judge. An advocate of a High Court or of two or more such courts in succession is eligible under Article 217 (2) to be appointed as a Judge of the High Court. It is not necessary that the person to be appointed should be an advocate in praesenti when his name is recommended for appointment. Actual practice means "entitlement to practice". Eligibility, prescribed by Article 217(2), cannot be confused with, and is not synonymous with, "suitability", prescribed by Art. 217(1).

The court held that it was not required to examine other contentions raised by the petitioner vis-a-vis challenge to the explanations (a) and (aa) to Article 217(2) inserted by 42nd Amendment Act, 1976 and 44th Amendment Act, 1978. The question of constitutional vires was left open and was not needed to be decided in the present case as the respondent No.3 is otherwise eligible under Article 217(2)(b) without applying and taking benefit of Explanation (aa) thereto. Explanation (a) is not applicable.

No merit in the writ petition and the same is dismissed.

CONSTITUTIONAL LAW

Cinematograph Act, 1952 and Guidelines- Section 5B- Article 19(1)(a), 19(2)- Censorship of 'communally sensitive' documentary film

Srishti School of Art v. Chairman, CBFC

Citation: 178 (2011) DLT 337

Decided on: 9th March 2011

Coram: **Muralidhar,** J.

Facts: The Central Board of Film Certification directed four cuts in the documentary film *Had Anhad*, based on the legacy and teachings of poet-philosopher Kabir, on grounds of certain scenes promoting religious contempt, communal and anti-national attitude in exercise of its powers under Section 5-B, Cinematograph Act, 1952, relying upon Guidelines 2 (x), (xii), (xiii), (xv), (xvi), (xvii). In appeal, Film Certification Appellate Tribunal upheld three of the four excisions while granting the film a "V/U" Certificate. The Petitioner challenged these two orders directing excisions.

Issue: Whether the abovementioned scenes offend the said guidelines and Art. 19(1)(a) of the Constitution of India?

Held: The scenes in question do not offend any of the guidelines. In relation to pre-censorship of films, the Court reiterated that Article 19(1)(a) is to be given wide interpretation, and Article 19(2) strict and narrow. The state must show that the benefit from restricting the freedom outweighs the perceived harm. Mere portrayal of a social vice is not impermissible. Words and visuals are to be viewed in the context of the whole film and the overall message of the film is a relevant consideration. Merely because a scene may offend public feelings or involves inaccurate depiction of historical events, censorial intervention is not proper.

The Court further held, right to free speech in terms of Article 19(1)(a) includes the right to disseminate, debate and dialogue, witness, form and hold opinions, think autonomously, make informed choices without being influenced by the state.

Relying on *F.A. Picture International v. CBFC, AIR 2005 Bom 145*, the Court observed that to substitute decision of an expert body and reverse the findings of two forums was permissible where fundamental constitutional principles were being impinged.

Excisions directed were thus held to be constitutionally impermissible. The Court consequently quashed the orders of CBFC and FCAT and approved the film for unrestricted public exhibition.

CONSTITUTIONAL LAW

Territorial jurisdiction of the High Court under Art. 226

Sterling Agro Industries Ltd. v. Union of India

Citation: AIR 2011 Delhi 174, 181 (2011) DLT 658

Decided on: 1st August, 2011

Coram: **Dipak Misra CJ,** Vikramajit Sen, A.K. Sikri, Sanjiv Khanna and Manmohan, JJ.

Facts: The petitioner invoked the jurisdiction of the High Court under Article 226 of the Constitution of India and questioned the validity of an Order dated 9th July, 2010 passed by the Ministry of Finance dismissing its revision application. The Appellate Authority concurred with the view expressed by the Commissioner, Customs & Central Excise, Indore and approved the order passed by the Assistant Commissioner of Customs ICD, Malanpur(MP) who had expressed the view that no drawback facility is admissible to the petitioner as he had, by way of procuring duty free inputs, contravened the Central Excise Drawback Rules, 1995.

Issues: Whether the High Court of Delhi can issue a writ against a person or authority not located within its territories, simply because the quasi judicial tribunal which passed the impugned order is located within the territorial jurisdiction of the Delhi High Court?

Held: While entertaining a writ petition, the doctrine of *forum conveniens* and the nature of cause of action are required to be scrutinized by the High Court depending upon the factual matrix of each case.

An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of *forum conveniens*.

The conclusion that where the appellate or revisional authority is located constitutes the place of *forum conveniens* as stated in absolute terms by the Full Bench is not correct as it will vary from case to case and depend upon the *lis* in question. The Court answered the reference by partially overruling and clarifying the decision in *New India Assurance Company Limited v. Union of India* 2810 Del 43(FB).

Section 7B of the Industrial Disputes Act- The discretionary powers of the Central Government for making a reference to the National Tribunal are very wide and should be exercised liberally.

Bata India Ltd. v. Union of India (UOI) and Ors.

Citation: 2011 (130) FLR 739

Decided on: 23rd March, 2011

Coram: **Manmohan Singh,** J.

Facts: The present writ petition was filed by the petitioner under Articles 226 and 227 of the Constitution of India praying for quashing of the reference order passed by the Joint Secretary, Ministry of Labour, under the provisions of Section 7B of Industrial Disputes Act, 1947, on the ground that the shop managers were not workmen under Section 2(s) of Industrial Disputes Act and that the dispute between the parties in the present case, was not required to be referred to a National Tribunal.

Issue: Whether reference to the National Industrial Tribunal under Section 7B of the Industrial Disputes Act was warranted in the present case?

Held: It was observed by the court that a careful reading of Section 7B of the Act revealed that the Central Government's power to refer the industrial dispute to the National Tribunal was based on its sole opinion that the said dispute involves a question of national importance or are of such a nature that the industrial establishments situated in more than one State are likely to be interested or affected by such disputes. Dependent upon the satisfaction of the opinion of the Central Government, it was entitled to exercise this administrative discretion even upon satisfaction of one of the condition prescribed in the abovementioned provision, the two conditions being disjunctive. Therefore, the alternative second condition in Section 7 B of the Act could operate independently of the first condition.

In the present case, the proposed industrial dispute was attributable and relatable to the interest of larger section of employees working in the industrial establishments of the petitioner company. It was thus held, that the purpose of providing power to the Central Government for the constitution of National Tribunal would be defeated, if the cluster of disputes relating to the employees of the petitioner-organisation could not be clubbed for the purpose of adjudication. Therefore, it was held that the impugned notification or reference, having satisfied both the threshold requirements for formation of the opinion by Central Government for the reference, was not passed in violation of the provisions of Section 7 B of the Act

CONSTITUTIONAL LAW

The closure of temporary night shelters was unacceptable; Duty of State Government and Board to observe that shelter homes were established, run and maintained

Court on its own motion v. GNCTD

Citation: 2011 VII AD(Delhi) 29, 182 (2011) DLT 77

Decided on: 9th August, 2011

Coram: **Dipak Misra, CJ,** Sanjiv Khanna, J

Facts: Court issued order that for temporary urgent measure, new night shelters for accommodating further 5420 persons. Order was made functional and assured that all said night shelters were provided. Urban Shelter Improvement Board passed decision that shelter home would be shifted to appropriate alternative site with consultation of Board. Hence, this Petition

Issue: Whether the plans of accommodation was rightly implemented?

Whether, temporary night shelters were to be closed solely because there was expenditure despite stipulation in Master Plan 2021?

Held: There were no fans in shelter homes and drinking water as a consequence of which, occupancy rate had declined drastically. Therefore, Authorities could not ignore their responsibilities and they must meet basic requirements. It was expected that all Authorities shall work in harmony. Temporary shelter homes lack certain facilities and there is a risk factor; that the Board has no control over the caretakers; that there is need for making people aware and create motivation to use pucca shelter homes where the amenities can be created/improved; that the Board should come with a plan for new construction and simultaneously take over "un-used" buildings in the "MPCC" category lying vacant / unoccupied under various departments; that a joint and concerted effort is required to be undertaken by all the stakeholders and that certain more facilities have to be made available to the people for whom the night shelters have been made.

State Government was under an obligation to have permanent shelter homes. It was apprised that there were some permanent shelter homes and some were running in temporary tents. A shelter home is expected to give adequate shelter and has to be made habitable where of the conditions must be acceptable to a person to live with dignity. Fixing a tent is a very marginal percentage of infrastructure, however, making provisions for stay in an acceptable dignified manner in a shelter home is the warrant. There has to be a galvanized effort to see that the people who rot on the streets know about the shelter homes, the facilities available therein and are motivated to stay therein. As rightly suggested by the Committee, a concerted effort has to be made. The Board has a sacrosanct duty to perform. When there is an obligation to do certain things, it has to be done and there cannot be any kind of shirking or escape on the ground that certain amount is expended unnecessarily. Further, it was duty of State

Government and Board to observe that shelter homes were established, run and maintained and NGOs only assisted, they could not dictate

Hence, closure of temporary night shelters was unacceptable. Petitions dismissed.

Non-intrusively audio recording judicial proceedings.

Deepak Khosla v. Union of India

Citation: 182 (2011) DLT 208

Decided on: 9th August, 2011

Coram: **Dipak Misra, CJ**., Sanjiv Khanna, J.

Facts: The present writ petition was filed on behalf of the Petitioner under Art. 226 of the Constitution of India seeking a declaration that the Petitioner is entitled to non-intrusively audio record judicial proceedings which involved his participation before this court and to so record either himself or through his AOR.

Issue: Whether the Petitioner is entitled to non-intrusively audio record the judicial proceedings of which he is a party and therefore has a remedy under Art. 226 of the Constitution of India?

Held: Any kind of recording which is done in a Court of record of the Court proceedings, if is used before a higher forum in any judicial review must be authenticated recording, duly authenticated by the court. Presently there is no procedure available in the court for authenticating the audio or video recording of the court proceedings.

Permitting the Petitioner for recording of proceedings for his private use has its own dangers. We know that the technology for audio/video recording is advanced these days but the technology of fabricating such recording is equally advanced. Anybody can either delete the relevant portion from the recording or by creating similar frequency/pitch of voice in computer audio/video clips can be added in the recording. Therefore, a recording sought to be used for judicial review before any forum cannot be permitted by the court unless there is a set procedure for authentication of the recording and a copy of the recording is preserved in the court for comparison. Petitioner may use the recording for publication or show it to the media and claim that it was his right to tell the truth despite the recording being unauthenticated.

The Petitioner, in the present case, does not have a legal right which is provided for under any enactment, common law or by rules or orders which have the force of law. Therefore no *mandamus* can be issued. Writ petition dismissed.

CONSTITUTIONAL LAW

A person cannot be physically compelled to undergo a paternity test, but if he refuses, an adverse inference can be drawn.

Rohit Shekhar v. Shri. Narayan Dutt Tiwari & Anr.

Citation: I.A. Nos. 10394/2011 in CS (OS) No. 700/2008

Decided on: 23rd September, 2011

Coram: **Gita Mittal**, J.

Facts: The present application was filed by the plaintiff praying for direction to the defendant to undergo compulsory DNA testing after he refused to abide by a similar direction to undergo a DNA test, given earlier in another interim application. The plaintiff filed such an application under a suit for declaration that the plaintiff was the naturally born son of the defendant.

Issue: Whether the defendant can be physically compelled or be confined for submitting blood sample for DNA profiling?

Held: In light of the powers of the court as under Section 75(e) and Order 26 Rule 10A, CPC, to issue directions to hold scientific, technical or expert investigation, a matrimonial or civil court has the implicit and inherent power to order a person to submit himself for medical examination. However, before issuing such directions, the court would have to examine that the proportionality of the legitimate aims being pursued are not arbitrary or discriminatory or which may adversely impact the best interests of the child and that they justify the restrictions on the privacy and personal autonomy concerns of the person directed to be subjected to a medical examination. And, if despite the order of the court, the respondent refuses to submit himself to a medical examination, the court will be entitled to take the refusal on record and draw an adverse inference against him.

In view of the above observations, the court held that even though the defendant cannot be physically compelled to undergo DNA testing, refusal by the defendant can be put on record as willful, malafide, unreasonable and unjustified. The court would be at a liberty to construe the impact of such refusal and weight attached to it while evaluating the evidence produced by the parties, which then may be treated as corroborative evidence leading to the presumption that the result of the DNA profiling of the defendant's blood sample would have supported the plaintiff's claim.

CONSTITUTIONAL LAW

Article 226, Constitution of India- Writ jurisdiction being discretionary in nature, must not be exercised ordinarily.

Rajesh Kumar Gouhari v. Union of India & Ors.

Citation: 185 (2011) DLT 226

Decided on: 15th July, 2011

Coram: **Veena Birbal**, J.

Facts: By way of this petition under Article 226 and 227 of the Constitution of India, the petitioner has prayed for issuance of a writ in the nature of certiorari for quashing of a memorandum dated 19th August, 2008 and the departmental proceedings arising out of the same, on the ground that the said memorandum does not constitute alleged misconduct within the meaning of Ed.CIL Rules, 2003 and is only a counterblast to the petitions filed by the petitioner challenging the transfer order and alleging contempt against the respondents. The petitioner has also prayed for grant of appropriate compensation to him from the respondents for causing the alleged harassment and mental agony to him.

Issue: Whether a writ petition can be entertained against a mere show-cause notice or charge-sheet?

Held: A mere charge-sheet or show cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

In the present matter, it is not the case of petitioner that the charge sheet has been issued by a person who is not authorized or is without jurisdiction. Moreover, even though enquiry proceedings have been completed, no punitive action has yet been taken against the petitioner. Considering the material on record, it can't be said conclusively at this stage that the impugned memo is issued malafide or the allegations made therein if found true will not constitute misconduct as is alleged by petitioner. The court thus held that no interference was required at the present stage and writ petition was dismissed.

CONSTITUTIONAL LAW

Art. 21 of the Constitution of India: Grant of license for acquisition and possession of firearms was not a matter of fundamental right

People for Animals v. Union of India & Ors.

Citation: 180(2011) DLT 460(DB)

Decided on: 20th May, 2011

Coram: A K Sikri, **S. Ravindra Bhat**, JJ.

Facts: The applicants, National Rifle Assocation(NRA), in this case sought for clarification/modification of order passed by court below whereby entry no. 1(3) of Schedule II of notification was issued under section 2(i)(b)(vii) of the Arms Act, 1959 by the Central Government exempting air guns, air rifles and air pistols from all regulations and controls under the Act.

The Petitioner preferred a writ petition challenging the notification on the ground that it resulted in unhampered distribution, sale and possession of firearms in the country leading to disastrous results wherein guns were being used for killing or maiming animals or birds.

Issue: Whether possession and acquisition for firearms for protection of person or property falls within Art. 21 of the Constitution of India?

Whether the Applicants are necessary parties in the present writ petition?

Held: An order rejecting application for grant of license could become legally vulnerable if it was passed arbitrarily or capriciously or without application of mind. The citizens apply for grant of license for firearms mostly with the object of protecting their person or property but that was mainly the function of the State and hence the notification was set aside.

The matter of grant of license for acquisition and possession of firearms was only a statutory privilege and was not a matter of fundamental right under Art. 21 of the Constitution of India. Its grant is subject to his applying for a license and fulfilling the qualifications and criteria spelt out in the Act and Rules. They have at best, a right to apply for, and be considered for the grant of a license, subject to fulfilment of the prescribed qualifications.

The court held that the applications preferred by the Respondents were unmerited as Applicants were not necessary parties to the writ petition. The writ petition was filed in public interest, and had sought intervention of the court to enforce provisions of the Prevention of Cruelty to Animals Act, 1960 contending that in view of its enactment, and India's being signatory to various International Conventions and treaties, the impugned exemption notification had lost its legality and legitimacy. In such circumstances, particularly in exercise of public interest jurisdiction, to promote ecological standards, when no discernable impact of court directions are involved, it is not necessary to implead third parties such as the present applicants. Writ Petition dismissed.

CONSTITUTIONAL LAW

Person shall not claim seniority to person who is appointed and selected through direct recruitment under Rajya Sabha and Lok Sabha Secretariat (Recruitment and Conditions of Service) Rules.

Bhagwan Singh Guleria v. Union of India & Ors.

Citation: 2011 (124) DRJ 442

Decided on: 13th May, 2011

Coram: Dipak Misra, **C.J**., **Sanjiv Khanna,** J.

Facts: Petitioner, an Upper Division Clerk, claimed that Sub-Rule 2 to Rules 4 and 5 of Rules 1957 suffered from vires of excessive delegation and specific Rule 3, 8 & 9 of Rule, 1955 being violative of Articles 14, 16 & 98(3) of Constitution as unconstitutional. Petitioner's claim was that was senior to the persons who were appointed and selected for the post of Senior Assistant under the aforesaid Rules and that he had been wrongly denied promotion to the post of Assistant. Hence, this Petition.

Issue: Whether Rule 4(2) and 5(2) of the Rajya Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1957 suffered from *vires* of excessive delegation and Rule 3, 8 & 9 of the Lok Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1955, were violative of Articles 14, 16 & 98(3) of Constitution being unconstitutional.

Whether provision of post of Sr. Assistants in Rules,1955 was required to be quashed?

Held: It was opined by the court that Article 98 of Constitution empowered the President to make rules regulating recruitment and conditions of persons appointed to Secretariat staff of House of People or Council of States, after consultation with Speaker of House of People or Chairman of Council of States. Speaker was given complete authority for formulating rules and regulations of recruitment of service conditions of employees of Lok Sabha. Under the 1955 Rules framed under Article 98 of Constitution, it was abundantly clear that Speaker was really framer, operator and final interpreter of these Rules and consequently he could amend these Rules from time to time. Hence, it was held that Rules was validly made under Article 98(3) of Constitution and Rules or order issued did not fall foul and were not ultra vires on account of excessive delegation

In light of the fact of the present case, the court observed that the post of Senior Assistant was promotional post from grade of Assistant and recruitment to this post was also through direct recruitment. However, petitioners could not claim seniority to persons who were appointed and selected through direct recruitment having participated in examination and selection process. Therefore, there was no discrimination or violation of Article 14. Hence, Petitioner could not have placed in Higher scale of Rs. 2,200-4,000/ and provision for post of Sr. Assistants in Rules 1955 could not be quashed. Hence, no merit was found in the writ petitions and the same were dismissed.

Representation of People Act, 1951 or Conduct of Elections Rules, 1961: Election Commission's authority to consider complaints regarding the truthfulness or falsity of election expenses in cases of contesting candidates

Ashok Shankarrao Chavan v. Madhavrao Kinhalkar

Citation: MANU/DE/3885/2011

Decided on: 30th September 2011

Coram: **Dipak Misra, CJ.**, Sanjiv Khanna, J.

Facts: The petitioner has called in question the legal substantiality of an order passed by the Election Commission of India wherein the Commission has expressed the view that it has jurisdiction under Section 10A of the Representation of People Act, 1951 to embark upon the issue of alleged incorrectness or falsity of the return of election expenses maintained by the respondent, a candidate in election, under Section 77(1) and 77(2) lodged by him in exercise of power under Section 78 of the 1951 Act.

The petitioner was a returned candidate at general election to the Maharashtra Legislative Assembly and at that point of time he was the Chief Minister of Maharashtra. Certain complaints were filed before the Commission stating, inter alia, that the account submitted by the petitioner is not correct and there should be an enquiry against him under Section 10A of the 1951 Act. After notice, the present petitioner entered contest and raised a preliminary issue with regard to the maintainability of the nature of complaints before the Commission on the foundation that the Commission has no jurisdiction to go into the truthfulness or falsity of the expenditure.

Issue: Whether the Election Commission has the authority to consider complaints regarding the truthfulness or falsity of election expenses in cases of contesting candidates under the Representation of People Act, 1951 or Conduct of Elections Rules, 1961?

Held: Sub-section (a) of Section 10A takes care of the situation inasmuch as it provides for lodging an account of election expenses in the manner required by or under the Act. Their Lordships in ***L.R. Shivaramgowda v. T.M. Chandrashekar, AIR 1999 SC 252*** have analysed the scope and ambit of Rule 89 of Conduct of Elections Rules, 1961 and clearly laid down that the Rule enables the Election Commission to decide whether a contesting candidate fails to lodge the account of election expenses within the time and in the manner required by the Act and if an account is found to be incorrect or untrue by the Election Commission after enquiry under the Rule, it could be held that the candidate had failed to lodge his account within the meaning of Section 10A of the Act.

The Commission can go into the truthfulness or untruthfulness of the accounts. How far the Commission can go will be a question of degree. It will be in the realm of exercise of power. It is extremely difficult to say that Rule 89 basically has nothing to do with the provisions of

the Act and deals with adjective sphere totally discarding the substantive part. If Sections 77 and 78 and Rules 86 and 89 are appositely construed, it would be clear that there is a check with regard to the conduct of the contesting candidates as well as the elected candidates. A distinction has to be drawn for setting aside an election by the court and causation of an enquiry by the Commission.

The decision in ***L.R. Shivaramgowda*** (supra) is a precedent in the field and the Commission has correctly appreciated and understood the law laid down. The writ petition, being devoid of merit, stands dismissed.

Section 20 of Cable Television Networks (Regulation) Act, 1995- All television programs should adhere strictly to the Program Code in terms of content.

Star India Pvt. Ltd. v. Union of India

Citation: 185 (2011) DLT 519

Decided on: 30th September, 2011

Coram: **S. Muralidhar**, J.

Facts: In the present petition, the Petitioner challenged an order issued by the I&B Ministry directing the petitioner to strictly adhere to the Program Code in terms of Sections 5, CTNR Act, read with Rule 6 of the Cable Television Networks Rules, 1994 in reference to the telecast/re-telecast of two episodes of a program titled '*Sach Ka Saamna*' ('*SKS*'), adaptation of an international show titled '*The Moment of Truth*', being "vulgar, indecent and against good taste and decency" and adverse to Indian culture and ethos, on the ground that the said order was arbitrary, non-speaking, and without any cogent reasons.

Issue: Whether the order of the I&B Ministry, being a regulatory authority, was a valid exercise of statutory power?

Held: The Court observed that as there is no 'pre-censorship' of television programs and it is a medium with wide reach and one where it is difficult to restrict viewership, the Petitioner ought to have been more careful especially after it had been given ample warnings and opportunities to bring the program in conformity with the Program Code. The Court further held that deliberate erroneous time slotting of a programme for commercial gain ought not to be viewed lightly.

"For determining if a programme violates standards of good taste and decency [Rule 6 (1) (a) CTN Rules], contains anything obscene or defamatory [Rule 6 (1) (d)], maligns or slanders any individual in person or certain groups, segments of social, public or moral life of the country [Rule 6 (1) (i)], or contains anything that is unsuitable for unrestricted public exhibition [Rule 6 (1) (o)], the programme will have to be examined with reference to specific scenes, dialogues, visuals, their manner of presentation and 'subject matter treatment'." "The suitability of the content concerns two broad areas: suitability of **what** should be seen and suitability as to **who** should see it."

The Court found it reasonable for the I&B Ministry to have come to the conclusion that the overall theme of *SKS* required to be categorized as 'unsuitable for unrestricted public exhibition' in terms of Rule 6 (1) (o). Consequently, the warning administered to the Petitioner by the I&B Ministry by the impugned order was held to be justified as a valid exercise of statutory power.

CONSTITUTIONAL LAW

Article 22(5) of the Constitution of India- The detenu has the right to be furnished with the grounds of detention along with all the documents relied upon.

Naresh Kumar Jain v. Union of India & Ors.

Citation: 176 (2011) DLT 730

Decided on: 27th January, 2011

Coram: **Badar Durrez Ahmed**, V.K. Jain, JJ.

Facts: Through the present petition, the petitioner sought a writ of habeas corpus under Article 226 of the Constitution of India for being set at liberty after quashing of the detention order passed by the Respondent no.2 under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, on the main grounds of continued detention of petitioner being illegal, failure of the Respondent no. 2 to furnish documents relied upon despite specific requests and unexplained delay in passing of the detention order.

Issue: Whether the detention of the petitioner was tenable in law or not?

Held: On the question of whether the continued detention of the petitioner was illegal or not, it was held that if on the basis of cogent material before them, the detaining authority was satisfied that the detenu was likely to be released on bail upon the charge-sheet not being filed within the stipulated time and if the detenu were to be released there was real possibility that he would disappear, then such order for continued detention cannot be faulted upon merely because the petitioner was already in custody. The court further opined that the question of whether the time lag between the commission of the offence and the detention was enough to snap the reasonable nexus between the prejudicial activity and the purpose of detention depended upon the facts of each case. Where the seemingly long time taken for passing the detention order after the prejudicial act, is the result of full and detailed investigation and consideration of the facts of the case, the ground cannot be held to be remote and the detention cannot be held to be bad on that ground. Therefore, the delay in the present matter was not unreasonable or of such magnitude so as to have snapped the link between the alleged prejudicial activity and the detention.

However, even though the court justified the detention, it also held that supply of relevant documents, relied upon by the detaining authority, to the petitioner was pertinent and the failure to do so amounted to a denial of the right to make an effective representation irrespective of whether the detenu already knew the contents of the documents or not. And therefore on the basis of this ground, the continued detention of the petitioner was held to be illegal and his petition was allowed thereby directing the respondents to set the petitioner at liberty unless he was required to be in custody in some other case.

In the absence of establishing a legal right, a writ of mandamus is not to be issued to a public authority.

Nand Kishore Garg v. Govt. of NCT of Delhi and Ors.

Citation: MANU/DE/1953/2011

Decided On: 23rd May 2011

Coram: **Dipak Misra, CJ.,** Sanjiv Khanna, J.

Facts: The petitioners, as pro-bono publico, preferred the present writ petition under Article 226 of the Constitution of India for issuance of writ of mandamus commanding Delhi Electricity Regulatory Commission to issue tariff order approved by it. The said tariff order has not been issued by the Commission on the direction of the State Government and it is the case of the Petitioner that the non-issuance of the tariff order has resulted in detriment to the interest of the consumer.

Issue: Whether the State Government could have interdicted in the affairs of the Commission by asking the Commission not to issue the tariff finalized by it, in exercise of its power under Section 108 of the Electricity Act, 2003?

Whether the Commission had taken a final decision with regard to the determination of tariff order and what remained was the ministerial act of communication?

Whether this Court can issue a writ of mandamus to the Commission to pronounce the order/determination (if it has been determined) vide perusal of the order sheets and notes on the file?

Held: Observing that issuance of an order of prohibition by the State government to the Commission against the passing of tariff order in view of public interest was neither discernible nor evident or demonstrable, the court opined that the State Government could not have prevented the Commission from exercising its statutory powers and could have only issued policy direction not preemptory directions under Section 108 of the Electricity Act, 2003. Holding the communication of the present nature made by the State Government as absolutely unjustified, unwarranted and untenable, the same was accordingly quashed.

Dealing with the second issue, the court stated that while Section 64(3)(a) authorised the Commission to accept the application for tariff fixation with or without modification or certain conditions, Section 64(4) stipulated a two stage process; the first stage where the order was made and the second one when the order was communicated to the appropriate Government, authority, concerned licencee and to the person concerned. On an holistic and purposive reading of sub-sections (3) and (4) to Section 64, it was clear as crystal that the order had to be first made by the Commission and then within a specific period, i.e., seven days of making of the order, the same was to be communicated. The notings in the office note or a tentative draft order cannot constitute an order ‘made’ unless it was signed and the

Commission cannot be said to have become functus officio because of the notings or even a view expressed on the file. On a perusal of the aforesaid notings and the consultation process, there was no ounce of doubt that the tariff order was not signed and, hence, no order was made.

As regards the third issue, the court observed that in order to obtain a writ or order in the nature of mandamus, a person is required to satisfy the court that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought. In the absence of establishing a legal right, a writ of mandamus is not to be issued to a public authority. In the present factual matrix, the court was of the considered opinion that a writ of mandamus could not be issued to the Commission to pronounce/make its order on the basis of the notings or the consultation made on the file. The only direction, this Court was advised to issue was that the Commission shall determine the tariff after taking recourse to the due process of law under the 2003 Act. Writ petition was accordingly disposed of.

A regulatory body is required to function according to the parameters of the statute and the regulations in the field. Once there is no order relating to determination, no right has accrued in favour of any consumer and, therefore, a mandamus cannot be issued to give effect to the same. If a direction is passed to pronounce the order of determination on the basis of the notings on the file, even if it is assumed to be correct, it will be a direction contrary to the Act which is not permissible in law. The only direction, as advised at present, this Court can issue is that the Commission shall determine the tariff after taking recourse to the due process of law under the 2003 Act as that has become the warrant since in the meantime the term of the Chairman and one of the members is over. That is the limited mandamus this Court can issue.

It is not only baffling but also perplexing. It is shocking to the basic concept of prudence. The legislature has conferred regulatory power on a regulatory body. It has a sacrosanct purpose. The Chairman and the members are required to act within the parameters of the statute following the paradigm of a regulatory body. A regulatory body is not expected to create confusion. We have said so as we are reminded of saying “in this entire scenario one thing is singularly clear that there is enormous chaos and “confusion”. A Commission of this nature is expected to avoid confusion as it has the effect potentiality to lead to economic anarchy. When there is anarchy in the field of economy, there is a dent in the spine of the nation. A regulatory body has no right to do so by its own functioning. The members of the Commission should bear in mind that they have been conferred with immense responsibility. The 2003 Act requires that Commission should act in a particular manner. That is the intention of the legislature and the intention is of an imperative character. The Commission cannot give an indecent burial to the imperative mandate of the statute, corrode the integral scheme engrafted under it and defeat the legislative intendment. There may be a perceptual error by any adjudicating or regulating authority but there cannot be a functioning which would lead to a volcanic eruption by violation of the statute.

The Commission has to function with responsibility, intellectual integrity, consistent objectivity and transparent functionalism appreciating the essential nature of the regulatory body. We emphasize on intellectual integrity and transparent functionalism as we are totally

dissatisfied with the way the Commission has proceeded with the manner of determination. We may also note here that if a state of chaos and anarchy has ushered-in in the Commission the State Government is also responsible by unjustifiably intruding and encroaching on the functions of the Commission by interdicting. We have already held that the State Government has no power to restrain the Commission in the manner it has done.

CONSTITUTIONAL LAW

Section 19(3)(c) of the Prevention of Corruption Act, 1988- Revision, against a framing of charge order, being interlocutory in nature, is clearly barred.

Shri Anur Kumar Jain v. CBI

Citation: 178 (2011) DLT 501

Decided on: 29th March, 2011

Coram: **Dipak Misra (HCJ)**, Manmohan, J.

Facts: The petitioners had filed writ petitions for quashment of the orders of the learned Special Judge framing charges for the offence punishable under Prevention of Corruption Act, 1988 (for short 'the 1988 Act') along with or without charges for offence under India Penal Code. As the order of reference revealed, the learned Single Judge had taken note of the fact that some of the petitions were filed under Articles 226 and 227 of the Constitution of India and some petitioners had filed criminal revisions which were converted to writ petitions on such a prayer being made and further some writ petitions were filed after dismissal of the revision petitions as this Court had held that the revision petition for quashing of the charge framed under the 1988 Act was not maintainable.

As Dhingra, J. did not agree with the view about the maintainability of a writ petition and also noticed that divergent views had been expressed by two other learned Judges. therefore he framed the question in issue and referred the matter to the larger Bench.

Issue: Whether order on charge framed by Special Judge under provisions of Prevention of Corruption Act, being an interlocutory order, and when no revision against order or petition under Section 482 of Cr.P.C lies, can be assailed under Article 226/227 of Constitution of India.

Held: The court observed that their Lordships had rightly given a natural and not a wider meaning to the interlocutory order as the very purpose of the trial under the 1988 Act is the speedy disposal and to curb corruption, therefore in the court's considered opinion, the order of framing of charge under the 1988 Act was an interlocutory order and once it was held to be an interlocutory order no revision petition could have been laid before the High Court, under Section 401 read with Section 397(2).

the constitutional remedy under Article 227 of the Constitution of India would be available but the exercise has to be extremely limited. The power of supervisory jurisdiction by the High Court is to be exercised very sparingly and only in appropriate cases where judicial conscience of the writ court commands that it has to act lest there would be gross failure of justice or grave injustice would usher in. However, the writ court, under no circumstances can assume the role of appellate authority and re-appreciate the evidence.

Hence, the reference was answered in the folowing terms:

(a) An order framing charge under the Prevention of Corruption Act, 1988 was an interlocutory order.

(b) As Section 19(3)(c) clearly barred revision against an interlocutory order and framing of charge being an interlocutory order, a revision shall not be maintainable.

(c) A petition under Section 482 of the Code of Criminal Procedure and a writ petition preferred under Article 227 of the Constitution of India were maintainable.

(d) Even if a petition under Section 482 of the Code of Criminal Procedure or a writ petition under Article 227 of the Constitution of India was entertained by the High Court, under no circumstances an order of stay should have been passed, regard being had to the prohibition contained in Section 19(3)(c) of the 1988 Act.

(e) The exercise of power either under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India should be sparingly and in exceptional circumstances be exercised keeping in view the law laid down in similar line of decisions in the field.

(f) It was settled law that jurisdiction under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India could not be exercised as a “cloak of an appeal in disguise” or to reappreciate evidence. The aforesaid proceedings should be used sparingly with great care, caution, circumspection and only to prevent grave miscarriage of justice.

CRIMINAL LAW

Code of Criminal Procedure – Section 482 – Quashing of Criminal proceedings on the basis of compromise between parties cannot be allowed in case of grave offences against the society

R.N. Sharma v. C.B.I. with Harish Jain v. C.B.I.

Citation: II (2011) DLT (Crl.) 861

Decided on: 5th April, 2011

Coram: **Ajit Bharihoke,** J.

Held- Every criminal case cannot be quashed merely on the basis of compromise between the parties. The High Court, while exercising powers under Section 482 is under obligation to have regard to the gravity of the offence and if the crime committed is against the society, the High Court should refrain from quashing the criminal proceedings. The petitioners in furtherance of conspiracy have cheated a public sector bank which is a grave offence against the society and, therefore, not a fit case for quashing of the complaint.

Section 34, IPC- To establish a charge of common intention, meeting of minds before the commission of crime has to be necessarily established.

Murari v. State

Sandip@Sanju v. State;

Chandan@Chandu v. State;

Rakesh v. State;

Suresh v. State

Citation: 2011 (2) JCC 1233

Decided on: 28th April, 2011

Coram: **G. P. Mittal**, J.

Facts: The present appeal is against the order of conviction and sentence of the appellants under Section 302 read with Section 34, IPC, on the ground that the Ld. Trial court failed to appreciate that the police investigation was defective and that evidence against the appellants did not inspire confidence and were unworthy of reliance. The appeal is also against the finding of the trial court that the initial common intention being merely to teach a lesson to the deceased had progressed into common intention to cause death after the deceased became aggressive.

Issue: Whether the appellants can be held liable for committing murder of deceased either individually or collectively with the aid of Section 34, IPC?

Held: The court took into consideration all the prosecution evidence against the appellants including the chronology of events leading to the offence committed, alleged weapons of offence and injuries caused thereto and the testimonies of the chance eye witnesses, investigation officer and other witnesses and came to hold that even though an accused cannot be acquitted merely on the ground that the investigation was defective or tainted, however there being grave doubts in the prosecution case in the manner the occurrence took place, who participated in the assault and whether all five of the appellants were at all present at the spot during the incident, the appellants were entitled to the benefit of doubt.

Moreover, considering the aspect of the conviction of all appellants with the aid of Section 34, IPC, it was held that even though there may have been a common intention to teach the deceased a lesson or at the most to cause serious injuries on his person who himself was an aggressor having given danda blows to the five appellants but there was no common intention to cause injuries with the intention or knowledge to cause death of the deceased, given the facts of the present case.

The court thus held the order of the Ld. Trial court to be in error while convicting the appellants under Section 302 read with 34 IPC and acquitted them of the charges framed against them.

CRIMINAL LAW

Section 125(2) of Code of Criminal Procedure- Voluntary deductions have to be excluded while ascertaining net income for fixing amount of maintenance.

Chandni Sharma v. Gopal Dutt Sharma

Citation: 2011 V AD(Delhi) 493

Decided on: 26th May, 2011

Coram: **Hima Kohli**, J.

Facts: The present revision petition was filed by the petitioner, through her mother who was her natural guardian, under Sections 397/401 read with Section 482 of the Cr.PC praying for enhancement of the quantum of maintenance on the ground that the respondent (petitioner's father) misled the Ld. MM into excluding all deductions, both statutory and voluntary, while ascertaining his net income, and as a result the maintenance granted by the Ld. MM was not proportionate to the real income of the respondent.

Issue: Whether it was correct to exclude all deductions, both statutory and voluntary, while ascertaining the income of the respondent-father for determination of the quantum of maintenance payable to petitioner?

Held: The court held that in calculating the net income of the respondent, while the deductions towards income tax being statutory deductions can be excluded, however voluntary deductions such as house building allowance cannot be excluded.

Further Held: As the voluntary deductions are of such nature as to eventually benefit the respondent and his family, there is no good reason as to why the petitioner should be prejudiced in this regard, at the stage of determination of maintenance, just because she does not happen to be a part of the respondent's family. Accordingly, the submission made on behalf of the petitioner for enhancement of the maintenance fixed in the impugned order, was accepted and it was held that the same is liable to be revised.

CRIMINAL LAW

Negotiable Instruments Act – Sections 6, 7, 64, 72 and 138 – Jurisdiction of the Court to try the complaint – whether cheques drawn in Mumbai and deposited at a bank in Delhi and notice under Provision (b) to Section 138 issued from Delhi would confer jurisdiction on Courts at Delhi

Shree Raj Travels and Tours Limited v. Destination of the World

Citation: IV (2011) (BC) 681

Decided on: 21st September, 2011

Coram: **Pradeep Nandrajog, J.**

Held- A conjoint reading of Sections 6, 7, 64, 72 and 138 of the NI Act brings out that in order to attract penal provisions of Section 138, a cheque is required to be presented for encashment to the drawee bank and the payee bank acts merely as an agent of the payee/complainant for the purposes of presenting the cheque in question to the drawee bank. Therefore, no part of cause of action for the offence punishable under Section 138 arises in the Court within the local limits of which the payee bank is situated.

The expression 'giving of notice' occurring in proviso (b) to Section 138 of the NI Act means 'receipt of notice'.

Held that the notice demanding payment was posted from Delhi and that the cheque was deposited with the payee bank at Delhi would not constitute the acts contemplated as ingredients of an offence punishable under Section 138 NI act and, therefore, no part of the cause of action could be said to have accrued to the Complainant in Delhi

Section 138, Negotiable Instruments Act- At the stage of entertaining a complaint under Section 138 of the Act, the Court is only required to arrive at a prima facie opinion as to the territorial jurisdiction, on the basis of the averments made, without launching into a fact finding mission as to their correctness or otherwise.

G. E. Capital Transportation Financial Services Ltd.

v.

Lakhmanbhai Govindbhai Karmur

Creative Construction and Ors.

Vikrant Udhavji Naranaware

Habib Hothibhai Bambaniya

Rajendra Parihar

Bapuji Vhatkar

Citation: 2011 III AD(Delhi) 344

Decided on: 28th February, 2011

Coram: **Hima Kohli**, J.

Facts: In an earlier order, the complaint preferred by the petitioner under Section 138 of the Negotiable Instruments Act, 1881, was dismissed by the trial court on the ground of lack of territorial jurisdiction vested in Delhi courts to entertain and try the complaint. The present application was filed by the petitioner for quashing the same.

Issue: Whether the Petitioner's complaint was not maintainable in Delhi on account of the cheque for encashment being issued by a drawee bank located outside the territorial jurisdiction of Delhi?

Held: The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts, the acts being, drawing of the cheque, presentation of the cheque with the bank, returning of the cheque unpaid by the drawee bank, giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, and failure of the drawer to make payment within 15 days of the receipt of the notice. It is not essential that all the acts should be committed at the same locality. If the five acts are perpetrated in five different localities, any one of the courts exercising jurisdiction in one of the five localities can become the place of trial for the offence under Section 138 of the Act.

In the present case, there appears to be no ambiguity on the aspect of the right of the petitioner to file a complaint in a court in Delhi as a substantial part of the cause of action for filing the complaint prima facie appears to have arisen within the jurisdiction of the courts in Delhi.

Merely because a medical officer was not present, evidence of exhumation of a skeleton cannot be disbelieved.

Pati Ram v. State (NCT of Delhi)

Citation: MANU/DE/3835/2011

Decided on: 23rd September, 2011

Coram: S. Ravindra Bhat, **G.P. Mittal**, JJ.

Facts: The Present appeal was filed against the conviction of accused under Section 302/364/201, IPC. Amongst other grounds, conviction was challenged on the ground that evidence of recovery of skeleton of the deceased was made in absence of a medical officer as opposed to suggested medico-legal procedure.

Issue: Whether prejudice is caused to the appellant/accused if recovery of skeleton of deceased is made at the appellant's instance but in the absence of a medical officer?

Held: Since it is proved that the Appellant made a disclosure statement exhibiting his knowledge of Bhudev's skeleton and there was discovery of the skeleton confirming the Appellant's knowledge of burying Bhudev's skeleton in Chhotey Lal's fields, no prejudice can be said to have been caused to the Appellant due to the absence of a medical officer at the time of exhumation or the start of exhumation. The identity of the skeleton was also established by DNA fingerprinting. Therefore the circumstances established unerringly point to the guilt of the accused and are not capable of any explanation other than the one i.e. the guilt of the accused.

Section 32, Indian Evidence Act, 1872- Mental fitness of the deceased and truthfulness of her dying declaration cannot be challenged due to mere absence of a fitness certificate by the doctor.

Dharambir & Anr. v. State

Citation: MANU/DE/2851/2011

Decided on: 26th July, 2011

Coram: S. Ravindra Bhat, **G.P. Mittal**, JJ.

Facts: The present appeal was filed against the conviction of accused under Section 498A and 302/34, IPC. Amongst other grounds, conviction was challenged on the ground of an unreliable dying declaration and delay in sending FIR to the Area Magistrate under Section 157 Cr.P.C..

Issue: Whether an otherwise reliable and trustworthy dying declaration can be challenged in the absence of an express fitness certificate?

Held: Reliability of a dying declaration cannot be questioned merely on the basis of the presence/absence of the doctor's fitness certificate. What is required to be seen is whether the person recording/ hearing the dying declaration is satisfied that the person making the dying declaration is mentally fit. Thus even though the deceased was not recorded to be oriented but was recorded to be conscious, it would mean that she was not disoriented and thus her statement is sufficient to base conviction.

Further Held: Technicality ought not to outweigh the course of justice. The FIR being an otherwise positive and trustworthy evidence on record cannot be denounced and discarded on the ground that Section 157 Cr.P.C makes it obligatory on the officer in charge of the police station to send a report of the information received to a Magistrate forthwith, if the court is otherwise convinced of the truthfulness of the prosecution case.

Exception 1 to Section 300, Indian Penal Code- The onus is on the accused to prove grave and sudden provocation to avail the benefit of this provision.

Kali Charan & Ors. v. State

Citation: 2011 (124) DRJ 588

Decided on: 7th July, 2011

Coram: Badar Durrez Ahmed, **Veena Birbal**, JJ.

Facts: Present appeal is directed against the order of conviction and sentence of the appellants u/s 302/34 IPC and u/s 27 of the Arms Act, 1959 and challenges it on the ground that the accused committed the offence under sudden and grave provocation after being told by the daughter/sister that deceased was trying to rape her and was thus entitled to benefit under Exception 1 to Section 300, IPC.

Issue: Whether accused can claim the benefit of Exception 1 to Section 300 IPC?

Held: The court held that once the prosecution proves that the act committed by the accused had resulted in the death of a person, then to avail the benefit of the Exception 1 to Section 300, it is for the accused to prove that the provocation received by him was grave as well as sudden, was such as might reasonably be deemed sufficient to deprive him of self control and that the act of killing was committed whilst absence of control still existed and can reasonably be attributed to it.

In the present case, the accused persons succeeded in highlighting the circumstances in which they had lost control and out of grave and sudden provocation committed the offence. Upon the perusal of evidence, it shows that the deceased had tried to rape the daughter/sister of the appellants and thus it was not unusual on their part to lose the power of self control and to attack in those circumstances. The court was thus of the view that death of the deceased caused by the appellants' amounts to culpable homicide not amounting to murder because it was caused under grave and sudden provocation. The appeal was partly allowed and the conviction of appellants under Section 302/34 IPC was converted to one under Section 304 Part I read with section 34 of IPC.

S. 27 Evidence Act: Recovery of dead body at the instance of the accused is highly incriminating evidence.

Harvinder Singh v. The State (Govt. Of NCT)

Citation: 2011 (124) DRJ 110

Decided on: 2nd June, 2011

Coram: Badar Durrez Ahmed, **Veena Birbal**, JJ.

Facts: The present appeal was directed against the order of conviction and sentence of the Ld. Trial Court against the appellant under Sections 363/302/201/34 IPC, on the ground that the appellant had been wrongly implicated pursuant to a false disclosure statement alleged to have been made by the appellant.

Issue: Whether the disclosure statement leading to recovery of an otherwise concealed dead body is highly incriminating evidence against the accused?

Held: It was held that when a concealed dead body is recovered at the instance of the disclosure statement made by the accused, there are three possibilities; one is that the accused himself would have concealed it, second is that he would have seen somebody else concealing it, or the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities, the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by him. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.

In the present case, the recovery of body of the deceased at the instance of appellant showed that he had the knowledge regarding the body of the deceased lying in a 'ganda nala' at Chander Vihar in a gunny bag tied with a rope. This knowledge, as to the place of dead body and the manner in which it was kept, was exclusive to the accused. The appellant failed to explain when examined u/s 313 Cr.P.C as to how the dead body was lying at the place from where it was recovered. The cumulative effect of the above circumstantial evidence led by the prosecution proves the guilt of the appellant. The circumstances, not being capable of explaining any other hypothesis except the guilt of the accused, qualify as highly incriminating evidence against him. Thus, the appeal was held liable to be dismissed.

CRIMINAL LAW

Maintainability of Caveat filed under CPC in criminal proceedings

Deepak Khosla v. Union of India

Citation: W.P. (Civil) No.1703 of 2011

Decided on: 11th May, 2011

Coram: **A.K.Sikri**, M.L.Mehta, JJ.

Facts: The facts raised to the present appeal were that the petitioner herein filed a complaint with SHO, police station, Lodhi colony against certain persons alleging that those persons had committed offences under section 423 read with Section 120B, Section 409 read with section 120B, Section 477A read with section 109 Indian Penal Code. FIR was registered and the investigating officer conducted detailed investigation. According to the I.O., no offence was made out against any of the persons and on that basis he submitted cancellation report with the learned ACMM, Saket. The petitioner opposed this course of action chosen by the I.O and pleaded before the learned ACMM that cancellation report be not accepted. After hearing the arguments, the ACMM passed order holding that the cancellation report filed by the I.O. was not acceptable as prima facie offences were made out. ACMM, therefore, took cognizance of the offence under Section 423,409 and 477A IPC; further the ACMM also directed summoning of accused persons under section 204 CR.P.C

The petitioner feared that the accused persons may file petition under Section 482 of Cr.P.C. challenging the said Order. Apprehending that in case such a petition was filed by the aforesaid accused persons, they may seek and get an ex parte interim order, the petitioner wanted to put them to caveat. For this reason he lodged caveat petition under section 148A read with Section 151 of the CPC in this court.

Issue: Whether caveat filed under the provisions of CPC is maintainable in criminal proceedings?

Decision: The court held that it is not possible to issue any mandamus or direction to the High Court to make a provision for registering caveat even in respect of proceedings under the Code of Criminal Procedure. The court further held Cr.P.C. is enacted by the Parliament. It is for the legislature to make such a provision in Cr.P.C. in any case, no Mandamus of this nature can be issued as there is no vested right in the petitioner to claim such a provision or no legal obligation on the part of the High Court to frame such a rule. The court held insofar as present writ petition was concerned, there was no merit in the same and dismissed the same.

CRIMINAL LAW

Section 482, Code of Criminal Procedure, 1973 -- High Court is entitled to quash the criminal proceedings if maliciously instituted.

Neeru Sharma & Ors. v. The State (NCT, Delhi) & Anr.

Citation: MANU/DE/2352/2011

Decided on: 3rd May, 2011

Coram: **A. K. Pathak**, J.

Facts: Petitioners invoked Section 482 Cr.P.C. to seek quashing of the complaint case filed by the husband of Petitioner No. 1, alleging harassment and theft against her and her family as well as setting aside of summoning order whereby the Trial Court summoned the Petitioners under Sections 379/506/34 IPC.

Issue: Whether powers under S. 482 Cr.P.C. can be exercised to quash criminal proceedings instituted as a counterblast and to exert pressure on the accused?

Held: The court held that undoubtedly powers under Section 482 Cr.P.C. were to be exercised sparingly and only in exceptional cases and not as an appellate/revisional court. However, if it emerged from the record that the prosecution was launched in order to harass the accused by the complainant or to wreak personal vendetta, then High Court will be well justified in quashing the complaint in exercise of inherent powers under Section 482 Cr.P.C.

In the present case, the complaint of the Respondent no. 2 was concluded to be a counterblast to the complaint of the Petitioner No. 1 before the CAW Cell. The allegations made in the FIR as well as the fact that he virtually roped in entire family of the petitioner, itself shows that the present complaint was filed maliciously in order to exert pressure on the wife to come to terms with him. For the foregoing reasons, complaint case was held liable to be quashed.

CRIMINAL LAW

The law of defamation is a culmination of conflict between the right of the individual and the right of the society to be informed.

Rajan Bihari Lal Raheja v. M/s Planman Consulting India Pvt. Ltd. and M/s Outlook Publishing (India) Pvt. Ltd. & Ors.

v.

M/s Planman Consulting India Pvt. Ltd.

Citation: 185 (2011) DLT 154

Decided on: 13th September, 2011

Coram: **Ajit Bharihoke**, J.

Facts: The petitioners have preferred the present writ petitions challenging the cognizance taken and processes issued by the Metropolitan Magistrate on consideration of a prima facie case having being made out against the petitioners, based on the complaint of the respondents under Sections 500 and 501, IPC.

Issue: Whether the article published by the petitioners falls within the Ninth and Tenth Exception to the offence of defamation as defined under Section 499 IPC?

Held: The court observed that the law of defamation was a culmination of conflict between the right of the individual and the right of the society to be informed. On the one hand, there was a fundamental right of freedom of speech and expression guaranteed under the Constitution of India and on the other hand, it was the right of individual to his reputation and goodwill.

Perusal of the published article in dispute, it transpired that the content of the article was per se defamatory and derogatory to the image and name of respondent company. The author of the article had neither named the source of his information, nor made any attempt to verify the allegations made against the respondent No.1 before publishing the article. Therefore, at the present stage, the petitioner could not seek protection of having published the article in good faith as envisaged in the Ninth and Tenth Exception to Section 499 IPC.

Coming to the plea that the complaint filed by respondent No.1 was an attempt to overreach the order of the High Court with a view to curtail the freedom of speech and expression of the petitioners, the court opined that even though there could be no denial of the freedom of speech and expression, yet no person, even a journalist, had an unfettered right to make defamatory statements about a person to a third person or persons without having had lawful basis. Thus, while dealing with a private complaint, the concerned Magistrate only needed to be concerned about whether or not the allegations made in the complaint and the preliminary

evidence produced before the court, prima facie, made out commission of an offence of defamation by the accused.

Therefore, in view of the provisions of Section 7 of Press and Registration Act, 1867, the court held the petitioners to be prima facie liable for the publication of the alleged defamatory article, and there being no merit in their petition, it was accordingly dismissed.

However, in context of the second writ petition i.e. (Crl.M.C. No. 4234/2009) filed by the shareholders-cum-non executive directors against the summoning order issued by the Metropolitan Magistrate, the court held that since none of them were the author, printer, publisher or editor of the Magazin 'Outlook' nor did they exercise day to day control over the managerial, editorial or publishing functions of the said company, they could not be held vicariously liable for publication of the alleged defamatory article in view of provisions of Press and Registration Act, 1867. Hence, the writ petition filed by them was allowed and the complaint qua the shareholders-cum-non executive directors was quashed.

On reading of above noted article published in "Outlook" Magazine, it transpires that the content of the article is per se defamatory and derogatory to the image and name of respondent company. The author of the article has not named the source of his information. It is not the case of the petitioners that before publishing the article, any attempt was made to contact the respondent No.1 to verify the aforesaid allegation of short-term placement of students with a view to jack up the placement ratio. Therefore, at this stage, it cannot be said that the article has been published in good faith to bring the case of the respondent within the purview of Ninth and Tenth Exception to Section 499 IPC.

Negotiable Instruments Act – Section 138 – Issuance of a blank signed cheque - Person issuing a blank cheque was supposed to understand the consequences of doing so and he could not escape his liability only on the ground that blank cheques had been issued

Vijender Singh v. M/s Eicher Motors Limited

Citation: Crl.M.C.No.1454/2011

Decided on: 5th May, 2011

Coram: **A.K. Pathak,** J.

Held- Section 138 commences with the words "Where any cheque". The use of word "any" assumes significance. It shows that for whatever reason if a cheque is drawn on an account maintained by the drawer with its bank, in favour of any person for the discharge of "any debt or other liability", the ingredients of offence under Section 138 of the Act gets attracted in case cheque is returned dishonored for insufficiency of funds and the cheque amount is not paid within the statutory period despite service of notice. The legislature has been careful enough to record not only discharge in whole or in part of "any debt" but the same includes "other liability" as well. It was also held that the liability of the guarantor being co-extensive vis-a-vis principal debtor is of no significance and out of purview of Section 138 of the Act. The language employed in Section 138 of the Act clearly depicts the intention of legislation to the effect that wherever there is a default on the part of one in favour of another and in the event, a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. It was further held that when a blank cheque was signed and handed over, it means that the person signing it had given implied authority to the holder of the cheque, to fill up the blank which he had left.

Specimen handwritings which are taken from accused are not barred under any law and it shall be admissible in evidence.

Sapan Haldar & Anr. v. The State

Citation: 2011 VII AD (Delhi) 293

Decided on: 11th August, 2011

Coram: **Anil Kumar**, Suresh Kait, JJ.

Facts: The instant appeal being filed by appellants is against the order of conviction and sentence imposed on the accused persons under section 364A and 365 read with section 120 B of Indian Penal Code, on the ground that.

Issue: Whether specimen handwriting taken from the accused under Section 4 of the Identification of Prisoners Act, 1920 would be admissible or not?

Held: In a case in which the evidence is of a circumstantial nature, the circumstance relied upon must be found to have been fully established and consistent only with the hypothesis of guilt and must be entirely incompatible and exclude every reasonable hypothesis consistent with his innocence. While evaluating circumstantial evidence, if the evidence is reasonably capable of two inferences, the one in favor of the accused must be accepted. Courts must adopt a very cautious approach and should record a conviction only if the prosecution is able to prove that all the links in chain is complete. Any infirmity or lacuna in prosecution cannot be cured by false defense or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established.

Further Held: Section 73 of the Indian Evidence Act 1872 enables the Court to direct the taking of specimen handwritings, in matters pending before it. The direction is therefore, given by the Court for the purpose of enabling the Court to compare and not for the purpose of enabling the investigating or a prosecuting agency to obtain and produce as evidence in the case, the specimen handwritings for their ultimate comparison with the letter and the ransom note in question. Thus it certainly does not bar the police officials to take specimen handwriting for the purposes of investigation. The specimen handwritings which were taken from the appellant, Sapan Haldar is not covered the provisions of the Identification of Prisoners Act, 1920, and therefore since it is not specifically bared under any law, it will be admissible in evidence and cannot be made inadmissible on the ground that permission under section 5 of the said Act was not taken from the concerned Magistrate.

Anti Hijacking Act, 1982 – Section 3 – Meaning of "Hijacking"

Hari v. State

Citation: MANU/DE/1289/2011

Decided on: 29th March, 2011

Coram: **S. Ravindra Bhat,** G.P. Mittal, JJ.

Held- Handing over of an envelope containing a written message to the pilot to divert the aircraft or risk the lives and security of passengers of the crew, repeating the demand three times and specifically pointing to a class of explosives adding that he was a human bomb and had LTTE training amounts to intimidation within the meaning of Section 3 of the Act. With respect to the question as to whether the appellant can be said to have seized or exercised the control of the aircraft, the Court held that the Parliamentary intent was to outlaw use of force, or threat of its use, with the intent of disturbing the normal functioning of the flight, or its scheduled flight path. The history of international conventions, culminating in the 1970 convention, which is effectuated by the 1982 Act, was to strike at overt and covert acts of air piracy. Therefore, it would not be appropriate for the court to narrowly construe Section 3, as implying the offender taking direct control and flying the aircraft, or one of his associates doing so. It would be sufficient, if his intimidation compels the diversion of the schedule of the aircraft, its destination or scheduled time, or during the flight, the pilot or commander has to act on his bidding.

If recourse to a civil remedy is available in case of breach of a contractual agreement, criminal process cannot be allowed to be initiated merely to exert pressure on the party causing the alleged breach.

Ambience Commercial Developers Pvt. Ltd. & Anr. v. The State & Anr.

Citation: 2011 VIII AD(Delhi) 199

Decided on: 23rd August, 2011

Coram: **Suresh Kait**, J.

Facts: Through the present petition, the petitioner challenged the complaint and FIR lodged by respondent No.2 alleging criminal conspiracy and criminal breach of trust made thereafter to a civil suit also filed by the Respondent no. 2 in this Court, relating to a breach of contract, on the ground that the complaint in question was filed only with a view to harass and blackmail the petitioners and to create criminal proceedings with regard to the civil dispute.

Issue: Whether in a dispute of civil nature, the criminal court is justified to proceed with the matter if the criminal justice system is being used to settle the civil dispute?

Held: A matter essentially involving a dispute of a civil nature should not be allowed to be the subject matter of a criminal offence, the latter being a short-cut of executing a decree which is non-existent. The superior courts with a view to maintain purity in the administration of justice should not allow abuse of the process of Court. If it is a case of civil nature and the party wants to put pressure through lodging FIR, then the Court should come forward and exercise its power under Section 482 of the Code to quash the criminal proceedings.

Hence, the court was of the opinion that the present case being purely of a civil nature and the respondent No. 2 having already resorted to a civil remedy, he could not be allowed to misuse the criminal process to firther put the pressure upon the Petitioners. The FIR registered against the Petitioners was thereby quashed accordingly.

Section 340, Cr.P.C- Prosecution of persons filing false/fraudulent claims under Railway Claims Tribunal Act.

Mehtab son of Shri. Mohd. Sabir v. Union of India

Citation: FAO No. 60/1998

Decided on: 14th July, 2011

Coram: **Valmiki J. Mehta**, J.

Facts: Present appeal is against the order of dismissal of the claim petition filed by the appellant before the Railway Claims Tribunal for compensation for injuries allegedly sustained by him traveling as a bonafide passenger in a train.

Issue: Whether the appellant was a bonafide passenger in a train and sustained grievous injuries on account of an accident fall from the train?

Held: The court upheld the observation of the Railway Claims Tribunal that the appellant had failed to make out the requisite case that he was injured while travelling as a bonafide passenger of a train and that on the contrary there was a strong probability that the appellant suffered the injuries on account of either walking on or crossing the railway tracks.

Further Held: Practice of filing fraudulent claims for compensation against the Railways pursuant to the Railway Claims Tribunal Act, need to dealt with very strictly. Concerned Metropolitan Magistrate should take cognizance of complaints against such persons who attempt to defraud the railways, such as the appellant (through his father) and prosecute them under Section 340, Cr.P.C.

Note: Section 340, Code of Criminal Procedure, 1973 lays down the procedures in cases under Section 195 as:

(1) When upon an application made to it in this behalf or otherwise any court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that court, such court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) Record a finding to that effect;

(b) Make a complaint thereof in writing;

(c) Send it to a Magistrate of the first class having jurisdiction;

(d) Take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non-bailable and the court thinks it necessary so to do send the accused in custody to such Magistrate; and

(e) Bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a court by sub-section (1) in respect of an offence may, in any case where that court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the court to which such former court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed, -

(a) Where the court making the complaint is a High Court, by such officer of the court as the court may appoint;

(b) In any other case, by the presiding officer of the court.

(4) In this section, "court" has the same meaning as in section 195.

Section 73 of the Code of Criminal Procedure- Non- bailable warrants can be issued for procuring attendance of a person before the court to facilitate investigation.

J.S. Bhatia v. CBI

Citation: 2012 (1) JCC 401

Decided on: 18th March, 2011

Coram: **Mukta Gupta**, J.

Facts: Non-bailable warrants were issued against the petitioner being Director of Petitioner company for not joining investigation of alleged offences under Sections 7/8/13(2) r/w S. 13(1) (d), Prevention of Corruption Act, 1988 and 120B IPC i.e. causing of undue favour to a private party by public servants through middlemen. Through the present petition, quashing of the impugned order allowing issuance of non-bailable warrants passed by the learned Special Judge, CBI against the Petitioner, is sought.

Issue: Whether issuance of warrants to apprehend a person during investigation for his production before police in aid of investigation is justifiable.

Held: It was held that the Court must carefully examine the entire available record and the allegations directly attributed to the accused and if satisfied, it can issue non- bailable warrants for procuring attendance of the accused before the Court and on police remand being granted investigation can be carried out from such accused. However, arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of the case.

In the present case, the learned trial court, on consideration of the material placed, was conscious of the fact that the petitioner was evading the investigation despite several notices being served upon him and therefore, it was justified in issuing non-bailable warrants against him. Finding no illegality in the impugned order, the petition and application is dismissed.

CRIMINAL LAW

Rule 12 of Juvenile Justice (Care and Protection of Children) Act, 2000- The benefit of being a juvenile should be extended to the accused in borderline cases.

Neeraj @Babloo v. State (NCT of Delhi)

Citation: 185 (2011) DLT 236

Decided on: 16th November, 2011

Coram: S. Ravindra Bhat, **Pratibha Rani**, JJ.

Facts: The present application is filed by the Appellant praying for disposal of appeal against impugned order of conviction and sentence of the accused for an offence committed under Section 302 IPC, under Juvenile Justice Act on the ground that the appellant was below 18 years of age on the date of occurrence of the alleged offence.

Issue: Whether the appellant can be granted the benefit and protection available to a juvenile under the Rule 12 of Juvenile Justice Act?

Held: The Juvenile Justice (Care and Protection of Children) Act, 2000 prescribes the special procedure to deal with the offenders in conflict with law who have not completed the age of 18 years. Rule 12 of the Juvenile Justice (Care and Protection) Rules, 2007 prescribes the procedure to be followed in determination of age in cases concerning a child or a juvenile in conflict with law.

In the instant case, the only material available to determine the appellant's age were the school and college record wherein while the date and month of birth of the appellant was the same, two different years of birth emerged i.e. 1988 and 1986 respectively. As also according to the Ossification Test Report, the appellant's age was determined to be between 25-40 years. The Appellant was held to be below 18 years of age at the time of the commission of offence. In the circumstances of the Appellant having already spent more than 7½ years in jail, it was held that sending him to the Juvenile Justice Board at this stage would cause gross injustice to him and would also not sub-serve any public interest. Hence, the conviction recorded by the Trial Court was quashed.

The testimony of a witness can be relied upon if it remains unchallenged in cross examination.

Zafar-ul-Islam v. State;

Wahid Ahmed v. State;

Mazahar-ul-Islam v. State

Citation: 182 (2011) DLT 738

Decided on: 11th August, 2011

Coram: Badar Durrez Ahmed, **Manmohan Singh**, JJ.

Facts: The present appeals are directed against the conviction of the appellants and sentence of rigorous imprisonment for life under section 302/34 IPC, on the main grounds of the alleged dying declaration being unbelievable on account of not bearing the deceased's true thumb impression and the testimony of the child witnesses/daughters being unworthy of merit on account of being tutored. The appellants have also claimed alibis and challenged the police investigation as being improper.

Issue: Whether the appellants were correctly held to be guilty under Section 302 IPC?

Held: It was held to be a settled law that if the testimony of a witness in respect to a statement of fact remains unchallenged in cross examination, the same had to be believed and it was to be taken that the fact in question was not disputed. In the present case, the appellant failed to cross examine the doctor, upon the mental state and fitness of the deceased to give statement or the investigating officer, upon the thumb impression on the dying declaration of being that of the deceased. Therefore the testimony of the doctor and the investigating officer remaining unchallenged in cross examination, was worthy of reliance in evidence against the appellants.

Insofar as the testimony of the two child witnesses is concerned, it was held that both were natural witnesses and when witnesses depose in a natural manner, discrepancies are possible but if they are minor then such testimonies cannot be out rightly rejected. In the instant case, the appellants failed to show that the witnesses were tutored by other relatives and therefore their testimonies could not be rejected on this ground.

The other grounds of appeal were also rejected, the appellants having failed to prove their alibis and also establish the police investigation was improper. Therefore it was held the three accused, in furtherance of their common intention, committed the murder of deceased and were therefore not entitled to conversion of conviction from Section 302 to Section 304 IPC. Hence their appeal was dismissed having found no ground to interfere with the order of the learned trial court.

CRIMINAL LAW

Section 306 read with 107 of IPC- Careful scrutiny of facts in each case is necessary to determine whether the acts, amounting to cruelty meted out to the victim, actually induced suicide or not.

Raman Mahajan v. State & State v. Raman Mahajan & Anr.

Citation: 185 (2011) DLT 501

Decided on: 14th November, 2011

Coram: Ravindra Bhat, **Pratibha Rani**, J.

Facts: The present appeals have been filed against the order of the trial court on behalf of the State challenging the acquittal of the husband under Section 304B and mother-in law under Section 304B and 498A, IPC and on behalf of the husband/appellant challenging the conviction under Section 498A. While the state has challenged the trial court's failure to appreciate the factum of dowry death and mental cruelty and harassment meted out to the deceased by the husband and mother-in-law, the main contention of the husband/appellant is that the deceased's suicide was not due to mental or physical cruelty but her inability to reconcile with her sister's feelings of love for her husband.

Issue: Whether the appellant's conduct make out a case under Section 304B and 498A, IPC?

Held: The State's appeal against acquittal of the husband and mother-in-law under Section 304B was dismissed on the ground that the testimonies of the material witnesses in relation to dowry demands did not stand the test of credibility and trustworthiness and therefore no substantial or compelling reasons were made out meriting reversal of the Appellants' acquittal under Section 304B by the trial court.

In consideration of the husband/appellant's appeal, it was held that the degree of cruel behaviour under Section 498A ought to be so chronic and persistent, as to have driven the deceased to take the extreme step of suicide. In this context, unlike Section 113-B Evidence Act which mandates ("shall") a presumption against the accused in the case of unnatural death, Section 113-A enables the Court ("may") to draw a presumption if the death is suicidal, that it could be the result of abetment. This distinction is significant and underlines that Courts have to take case and context based decisions, having regard to all surrounding circumstances and proven facts.

Correspondingly, the acts, both covert and oust of the Appellants such as late-coming (short of chronic neglect), or spending more time with friends, or even being fond of drinking have not been shown to sufficiently possess the requisite intent to conclude beyond reasonable doubt that they were culpable and wanted the deceased (abet) to commit suicide. Moreover, perusal of the various letters written by deceased's sister as well as the diary of the deceased, there is little doubt that the appellant did not treat her with cruelty as to be guilty for the

offence under Section 498-A IPC. Therefore the husband’s appeal was allowed and he stood acquitted.

Section 27A, 37(1)(b)(ii) NDPS Act; Section 389, Cr.P.C- At the first stage of inquiry under the NDPS Act, it is neither necessary nor desirable to meticulously weigh the evidence to arrive at a finding in favour or against the accused.

Rajesh Bhalla v. State (NCT of Delhi)

Citation: 2011 Cri.LJ 2549

Decided on: 23rd December, 2010

Coram: **Hima Kohli**, J.

Facts: The present application is filed by the Appellant under Section 389 of the Code of Criminal Procedure praying inter alia for suspension of sentence during the pendency of the accompanying appeal against order of conviction and sentence under Section 27-A of the Narcotic Drugs and Psychotropic Substances Act, 1985, on basis of disclosure statement of co-accused and Appellant himself.

Issue: Whether the suspension of sentence sought by the Appellant is permissible within the stringent parameters laid down under Section 37(1)(b) of the NDPS Act?

Held: The court has to satisfy itself not only on the broad principles of law laid down for grant of suspension of sentence, but also of the parameters provided for under Section 37(1)(b)(ii) of the Act. The satisfaction that needs to be recorded at this stage is of 'reasonable grounds' and whether such grounds exist to grant suspension of sentence to the Appellant. A roving enquiry of the evidence relied on by the trial court is not required and the appellate court needs only satisfy itself that prima facie there exist grounds because of which the appeal, when heard, may result in a decision favourable to the Appellant.

In the present case, since the only piece of evidence on the record, to connect the Appellant to the offence, is the disclosure statements, which in themselves are not substantive pieces of evidence, there exist reasonable grounds to conclude that the Appellant is entitled to grant of suspension of sentence. Application for suspension of sentence was thus allowed.

Juvenile Justice (Care and Protection of Children) Act, 2000 – Section 7-A – The accused was found guilty by the Trial Court under Section 300 and was sent to the jail – Plea of juvenility was raised before this Court – The same was found to be genuine – the accused had already spent 8 years in jail – It would have been unreasonable to remit the matter back to the board – The Juvenile was awarded compensation as he (juvenile) was exonerated and had also suffered unlawful detention for 8 years – Rs.5 lakhs awarded as compensation

Subhash v. State

Citation: MANU/DE/1877/2011

Decided on: 31st March, 2011

Coram: S. Ravindra Bhat, **G.P. Mittal**, JJ.

Held- India became a signatory to the UN Convention on the Rights of the Child, 1989 and ratified it on 11.12.1992 pursuant to which the Juvenile Justice (Care & Protection of Children) Act, 2000 was conceived and enacted to align the countries domestic laws with the treaty obligations. The Act is a complete Code, prescribing a special procedure, and an entirely different set of standards to be adopted for juveniles (defined as those who have not completed 18 years of age, by Section 2 (k)) "in conflict" with law (i.e. a juvenile alleged to have committed an offence, by Section 2 (l)). By Section 6 (1) the Juvenile Justice Board is entitled to exclusively deal with all matters, including enquiry into allegations of the juveniles alleged to have committed offences. Whenever a Magistrate – who is not empowered under the Act to exercise jurisdiction – is of opinion that the accused brought before him is a juvenile he has to refer such matter and person to the Board.

In terms of Sections 14 and 15, Boards have exclusive jurisdiction to hold enquiries into allegations about juveniles having committed any offence. Boards have various options, to prescribe sanctions, including directing a juvenile to be sent to a special home for a period of three years.

If a question as to whether anyone is a juvenile arises, (by virtue of Section 7A) before any Court, it can consider evidence, and return findings in that regard. By reason of Section 7A (2), if the Court holds that the person is a juvenile, it has to forward the matter to the Board for passing appropriate orders or sentence, as the case may be. Section 18 mandates that a juvenile cannot be tried jointly with an adult.

Section 20 is an extremely important provision, it prescribes that when a criminal case is pending before a Court in revision or appeal, the Court (wherever the case was pending on the date of coming into force of the Act) can proceed with the matter, but if it is satisfied that the juvenile has committed the offence, refer the matter to the Board for appropriate orders.

It has been held in a series of decisions that if the incident occurred when the accused was a juvenile, even if he took that plea after conviction, and in appeal, he would be entitled to the benefit of Section 20 of the Act of 2000.

In this case, the facts would reveal that the accused juvenile suffered incarceration for over 8 years, i.e. nearly three times the maximum period prescribed under the Act, for sending a juvenile found to have committed an offence, to a special home, (which is 3 years). The report relied on by this Court –which has not been challenged by the State – indicates that he was about 15-16 years as on the date of occurrence. These facts reveal an extremely disturbing picture, pointing to violation of the procedure established by law, and illegal detention of Ramesh for 5 years. This failure was systemic, because neither the police, nor the prosecution, nor the counsel, or even the Court – all of whom had sufficient opportunity to observe the accused even thought it appropriate to consider, let alone explore the possibility of applying for determination of the age. There was a clear violation of his rights under Article 21 of the Constitution of India. In the instant case an inquiry into juvenility of the Appellant Ramesh @ Bori was ordered to be conducted by order dated 06.08.2009 passed by this Court. A perusal of the order dated 04.08.2010 shows that the age of the Appellant was found to be less than 23 years on 23.11.2009. The Appellant was, therefore, held to be not more than 18 years. In fact the Appellant was found to be more than 14 years but less than 15 years on the date of commission of the offence and was ordered to be released.

As per Section 7A sub-Section (2) of the Act if a Court finds a person to be a juvenile on the date of commission of the offence, the juvenile has to be forwarded to the Board for passing an appropriate orders and sentence and the sentence, if any, passed by a Court shall be deemed to have no effect. Unfortunately, the Appellant has already spent over eight years in jail far in excess of the maximum period of three years that too could have been spent by him in a special home as per Section 15 (1)(g). What do we do? Should we again send the Appellant to the Juvenile Justice Board to be dealt with in accordance with the provisions of Section 7-A sub-Section (2) of the Act of 2000 or should we end the proceedings here. The Division Bench of the Delhi High Court held that it would be a great injustice to direct the Appellant to face an inquiry again before the Board. The criminal proceedings were quashed and compensation of Rs.5,00,000/- was awarded to the appellant.

There can be no doubt that when confronted with a fact situation, as the circumstances have unfolded, uniformly court decisions have quashed proceedings, and deemed it appropriate not to remit the matter to the Board, as it would subserve no public interest. In this case too, such an order is the only possible direction in the ends of justice. Yet, the accused would labour under two strong disabilities of not having been exonerated on due determination and having suffered an unlawful detention, for over 8 years. In this case, as a restitutionary measure, the Court is of the opinion that the accused Ramesh should be entitled to some compensation. Having regard to all these circumstances, this Court directs the Govt. of NCT of Delhi to pay `5,00,000/- to the Appellant as compensation.

Juvenile Justice (Care and Protection of Children) Act, 2000 – Sections 2(1) & 7-A – Juvenile Justice (Care and Protection of Children) Rules, 2007 – Rule 12(3)

Jitender @ Jitu v. State

Citation: 2011 (124) DRJ 1

Decided on: 3rd June, 2011

Coram: **Badar Durrez Ahmed,** Veena Birbal, JJ.

Held- As per requirement of Rule 12(3) of the said Rules, appellant had neither matriculation or equivalent certificate, nor birth certificate from any school but certified copy of family register had been produced, which inducted appellant's date of birth to be 9th October, 1987 – However, there was some interpolation in year of birth although it appeared to be 1987 – As per opinion of Medical Board as prescribed in Rule 12(3) (b) of said rules, appellant's age on date of examination was between 25 and 28 years – However, as per Rule 12(3)(b) of the Rules, Court could give that benefit of one year margin on lower side in case exact assessment of age could not be done – Since the appellant was below age of 18 years as on date of incident, he was covered by definition of juvenile in conflict with law as given in Section 2(1) of the Act – Thus, appellant could be set at liberty after giving benefit of the Act because of fact that he had already been in custody for a duration beyond maximum period prescribed under the Act – Sentence awarded to him was set aside.

CRIMINAL LAW

Extradition Act, 1962 – Section 7 – Scope of Magisterial enquiry

Avtar Singh Grewal v. Union of India

Citation: 2011 VI AD (Delhi) 213

Decided on: 15th July, 2011

Coram: **Badar Durrez Ahmed,** Manmohan Singh, JJ.

Held- Section 7 of the said Act made it clear that scope of a Magisterial Inquiry under the said provisions could not be equated with a full-fledged trial - Magistrate had to see whether there was a prima facie case in support of the requisition - Magistrate was not required to go into a detailed examination of whether offence made out was culpable homicide not amounting to murder and as to whether it falls under one of the exceptions specified in Section 300 IPC or not - That was a subject matter of trial and could only be determined in a full-fledged trial - A prima facie examination revealed that indictment had been correctly made and that a prima facie case had been made out in support of requisition by Government of the United States of America – Therefore, Government of India should not refuse extradition in context of Article 8 of the said Treaty.

CRIMINAL LAW

Press and Registration of Books Act, 1867 – Section 7 - Code of Criminal Procedure - Section 482 - Quashing of a criminal complaint of defamation

Mr. Rajan Bihari Lal Raheja v. M/s Planman Consulting India Pvt. Ltd.

Citation: 185 (2011) DLT 154

Decided on: 13th September, 2011

Coram: **Ajit Bharihoke, J.**

Facts: On 30th June 2008, an Article was published in Outlook (English) magazine on the subject of rampant profiteering by bogus private educational institutes. In the said article, there was a reference to the Indian Institute of Planning and Management, alleging therein that the IIPM is inflating and fabricating the placement and salary figures offered to its students along with creating false hype regarding its infrastructure while charging a high tuition fee. It was further alleged that M/S Planman, a sister concern of IIPM, is also part of conspiracy to cheat unsuspecting students as it is providing short term placements to the students passed out from IIPM with a view to jack up the placement ratio. Ld. MM, on considering the complaint filed by M/S Planman, found a prima facie case punishable under section 500 & 501, IPC is made out and he issued processes. Hence, the appeal for quashing of complaint and summoning order.

Held: When the contents of the said article are per se defamatory, the defence that the case falls within the 9th and 10th exception to section 499 IPC as the article was published in good faith cannot be allowed by the High Court in a petition filed under section 482 Cr.P.C. because this claim relates to the merits of the case and the adjudication on this would require evidence, a subject matter of trial court.

In view of the provisions of Press and Registration Act, 1867, the petitioners belonging to the category of author, editor, publisher and printer are prima facie liable for the publication of the alleged defamatory article. However the other petitioners who are neither author nor editor nor publisher nor printer therefore, in view of the aforesaid observations, they cannot be prosecuted under principle of vicarious liability as the allegations against them are vague and do not contain the details on the basis of which it is alleged that aforesaid petitioners were involved in day to day control, working and management of the company and that they were in active supervision and control of the articles being published in “Outlook”. Thus complaint and summoning order qua these petitioners stands quashed.

Code of Criminal Procedure, 1973 – Section 313 - Death of a witness before recording of his cross-examination

Tunda Ram Dagar v. State

Citation: MANU/DE/1309/2011

Decided on: 28th March, 2011

Coram: S. Ravindra Bhat, **G.P. Mittal,** JJ.

Held- Held that the evidence of a witness who dies before his cross-examination is recorded, is admissible and can be used for the purpose of corroboration. However, the weight to be attached to such evidence would vary and depend upon circumstances of each case.

Identification of Prisoners Act, 1920 – Sections 4 and 5 – Whether the sample finger prints given by the accused during investigation under section 4 of the Identification of Prisoners Act, 1920 without prior permission of the Magistrate under Section 5 of the Act is admissible

Bhupender Singh v. The State (Govt. of NCT of Delhi)

Citation: 2011 (126) DRJ 1

Decided on: 30th September, 2011

Coram: **Dipak Misra, CJ.,** Anil Kumar, Sanjiv Khanna, JJ.

Facts: The appellants were convicted under Sections 302, 399, 392 and 34 of the Indian Penal Code by the trial court, against which they came in appeal before the High Court of Delhi. The evidence in the case was that of circumstantial nature and the only evidence cinching the guilt of the appellants was the report of the Finger Print Bureau matching the finger prints lifted from the tape recorder, found at the place of offence, with the sample finger print of the left middle finger of the appellant, Bhupender Singh. According to the appellant the said report is not admissible in evidence since the sample finger prints of the accused were taken without the permission of the Magistrate in contravention of the provision of the Identification of the Prisoners Act, 1920.

Held- Sections 4 and 5 of the Act deal with different spheres. Section 4 of the 1920 Act deals with taking of measurements, etc., of non-convicted persons and that is taken if the police officer so requires it and it has to be done in the prescribed manner. As far as Section 5 is concerned, it deals with the power of Magistrate to direct any person to be measured or photographed if he is satisfied that for the purpose of an investigation or proceeding under the Court, the same is necessary. Thus, two different compartments have been carved out since it is clearly discernible that there is a difference in the language employed in Sections 4 and 5 of the Act and therefore it was held that both the sections operate in different fields and are independent of each other. In view of the independent powers conferred upon a police officer under Section 4 of the Act, it was not obligatory to him to approach the Magistrate under Section 5 of the Act. Therefore, no illegality attaches to the specimen finger print impressions taken by the Investigating Officer.

Section 7 & 13(2) of the Prevention of Corruption Act- Demand and acceptance of illegal gratification

Shri Vijay Kumar Chadha v. CBI & Shri Daljeet Singh v. State (CBI)

Citation: 2011(3) JCC 1660

Decided on: 31st May, 2011

R.C. Kundu v. State (NCT of Delhi)

Citation: Cr. Appeal No. 256/2002

Decided on: 20th May, 2011

Coram: **M. L. Mehta, J**.

Facts: The Appellant/ Accused were convicted under Section 7 and 13(2) of the Prevention of Corruption Act, 1988 and were sentenced to undergo rigorous imprisonment of four years with fine of Rs. 500/- on each count. Both the sentences were to run concurrently. The main challenge in the present cases is centered around the analysis of the prosecution witnesses as done by the Ld. Special Judge.

Issue: Interpretation of the requirements of Section 7 and 13 of the Prevention of Corruption Act, 1988.

Held: Where at the trial it is proved that an accused has accepted or obtained or agreed to accept or attempted to obtain any gratification (other than legal remuneration), it shall be presumed unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain such gratification as a motive or reward as mentioned in Section 7 of the Prevention of Corruption Act, 1988. If the accused fails to disprove the presumption the same would stick and then it can be held by the Court that the prosecution has proved that the accused recieved the amount towards gratification.

In the present case, the presumption as drawn against the accused no. 1 could not be discharged by him by any means, i.e., neither from the cross-examinations of prosecution witnesses, nor by cogent and reliable defence. Moreover, even though it was true that no direct demand of bribe money was attributed to accused no. 2 (peon) by any witness, however, it was proved on record that he was present on all material times in company of the accused no. 1 (Junior Engineer), whenever there was conversation regarding bribe money between the accused no. 1 and complainant. Thus, even though it was to be assumed that bribe money was taken by the accused no.2 at instance and on direction of acuused no. 1, still his all acts of commission were held to be covered within ingredients of Section 7 and Section 13(1)(d) of the Act read with Section 120B of the Code.

Therefore in view of the analysis of the prosecution case, the court held to there being no infirmity and illegality in the judgment and order of the learned Special Judge and therefore no interference was required.

In determining the question of proper punishment in a criminal case, the court has to weigh the interest of the individual against the concern of the society after analysing the degree of culpability of the accused, its effect on others and the desirability of showing any leniency in the matter of punishment in the case.

Abdul Shahzad v. The State (Govt. Of NCT of Delhi)

Citation: MANU/DE/3517/2011

Decided on: 8th September, 2011

Coram: **Ajit Bharihoke**, J.

Facts: The appellant convicted under Section 394/34, IPC for robbery on knife-point (knife used by other co-accused) and sentenced for 7 years rigorous imprisonment, has filed the present appeal not challenging the order on merits but for leniency of sentencing.

Issue: Whether leniency in sentence can be awarded to the appellant taking in view the gravity of offence committed?

Held: Sentencing of an accused in a criminal matter is a serious exercise and the quantum of sentence imposed should be commensurate with the gravity of the offence committed by the accused and the circumstances under which the offence was committed.

The accused in the instant case was 27 years of age with two younger siblings as dependents and had already undergone imprisonment for 4 years and 10 months. Taking into account the nature of the offence committed by the appellant, the imprisonment of 7 years was held to be too harsh and reduced to 5 years.

Section 19 of the Prevention of Corruption Act, 1988- CFSL report is a very important piece of evidence and the sanctioning authority is expected to carefully consider the same, while considering the request for grant of sanction for prosecution.

K.C. Singh v. CBI

Citation: MANU/DE/3182/2011

Decided on: 10th August, 2011

Coram: **Ajit Bharihoke**, J.

Facts: The appellant, a public servant, was convicted by the Ld. Trial Court under Prevention of Corruption Act, 1988 for demanding illegal gratification from the complainant and subsequently accepting the same. Present appeal is filed against the orders of conviction and sentencing on the ground that the "sanctioning order" from the competent authority was vitiated in law on the ground of arbitrariness and non application of mind.

Issue: Whether in lieu of the sanction for prosecution being invalid, the cognizance taken by the learned Special Judge against the appellant is bad in law in view of Section 19 of the P.C. Act?

Held: The fact that sanctioning order is verbatim copy of the draft sanction order sent by CBI for perusal of the sanctioning authority and the mentioning of a wrong CFSL report in the final sanction order clearly establishes the factum of non application of mind as the CFSL report is a very important piece of evidence and the sanctioning authority was expected to carefully consider the same.

Since the sanction for prosecution accorded against the appellant is invalid, the cognizance taken by the learned Special Judge is bad in law in view of Section 19 of the Prevention of Corruption Act, therefore, the entire trial stands vitiated for want of a valid sanction and the appellant accordingly stands acquitted.

CRIMINAL LAW

Section 83(1) of Multi-State Co-operative Societies Act, 2002- Conduct of only a person who is or was entrusted with organization or management of society, can be called into question.

T. R. Bhagat v. Director General of Central Excise & Ors.

Citation: 2011 (4) JCC 2667

Decided on: 23rd September, 2011

Coram: **Ajit Bharihoke**, J.

Facts: This is a petition under Section 482 Cr.P.C. seeking quashing of the complaint under Section 9 of the Central Excise and Salt Act, 1944, alleging that the petitioner being Director of the accused company has indulged in evading Central Excise Duty by clandestinely removing/selling the office Machines. As such, he is sought to be prosecuted vicariously for the offences punishable under Section 9(1)(a), 9(1)(b) and 9(1)(bb) of the Central Excise Act alleged to have been committed by the company.

Issue: Whether, in the absence of any specific allegation, the Director of a company can be prosecuted for offences punishable under Sections 9(1)(a), 9(1)(b) and 9(1)(bb) of the Central Excise Act alleged to have been committed by the company?

Held: Since the language of Section 9AA(1) of Central Excise Act is exactly similar to Section 141 N.I. Act, the same principle of law would apply to the Director of the company in order to hold him vicariously responsible for an offence committed by the company under Section 9 of the Central Excise Act. Under the aforesaid section of the N.I. Act, the complainant is not only required to make a specific allegation that the person concerned was the Director of the company but he is also required to make specific allegation of fact indicating as to how and in what manner the said Director was in-charge of and responsible for the conduct of business of the company.

Since, in the instant case, allegations in the complaint as well as the pre-charge evidence, did not make out a case to hold the petitioner responsible for the offence of duty evasion committed by the company, the Hon'ble High Court ordered quashing of complaint and charges qua the petitioner

CYBER LAW

CYBER LAW

Cyber Squatting

Mr. Arun Jaitley v. Network Solutions Pvt. Ltd.

Citation: 181(2011) DLT 716

Decided on: 4th July, 2011

Coram: **Manmohan Singh, J.**

Facts: The plaintiff Mr. Arun Jaitley filed the suit for permanent injunction restraining the defendants from transfer of domain name WWW. ARUNJAITLEY.COM. The plaintiff's name carries enormous goodwill and reputation and is exclusively associated with the plaintiff. The Plaintiff wanted to book the domain www.arunjaitley.com but, the Defendants with *mala fide* intentions did not delete the said domain and also did not transfer the same to the Plaintiff and instead, transferred the said domain name to Defendant No. 3, which was an auction site for domain names.

Issue: Would the principles of trade mark law and in particular those relating to passing off apply to domain names?

Held: The domain names are protected under the law of passing off including a personal name due to the reason that the right to use ones own name is a personal right as against the right to use a trade mark which is merely a commercial right. The name ARUN JAITLEY is a well known name and by using the same as a domain name without any reason and sufficient cause, the defendants are violating of the ICANN policy. Cyber squatting is a crime against the laws and regulations of cyber law. There should be sufficient preliminary enquiry before registering the domain name as to whether the domain in question is the personal name of the applicant or his near relative by disclosing the identity of the person.

The defendant no. 3, its entities operating at the addresses namely portfolio Brains LLC, M/s Oversee.net are permanently restrained from using, promoting, advertisement or retaining or parting with the said domain name namely Arunjaitley.com and further restrained from adopting, using the mark, name in any of the extensions of the domain name in cyberspace wherein the name ARUN JAITLEY forms one of the feature. The said defendant no. 3 and its entities are directed to transfer the said domain name to the plaintiff with immediate effect.

To be shown to indulge in a pattern of getting domain names registered in bulk is sufficient to render the registration of domain names as being in 'bad faith'.

Stephen Koenig v. Arbitrator, National Internet Exchange of India & Anr

Citation: MANU/DE/6791/2011

Decided on: 14th December, 2011

Coram: **Dr. Muralidhar, J.**

Facts: Mr.. Jagdish Purohit filed a complaint before the .IN Registry of NIXI to the effect that the domain name 'internet.in' registered by the Petitioner, Mr. Stephen Koenig, was identical and confusingly similar to the registered trade mark 'internet' of Mr. Purohit, Respondent No. 2.The Petitioner responded to the notice issued to him and defended the domain name registration in his favour.

The dispute regarding the domain name 'internet.in' forms the subject matter of the present petitions under Section 34 of the Arbitration & Conciliation Act, 1996 directed against an Award passed by the learned sole Arbitrator appointed by NIXI whereby he concluded that the domain name 'internet.in' should be struck off and confiscated and kept by the .IN Registry.

The Petitioner has challenged the impugned Award primarily on the ground that it was contrary to the INDRP and further that the learned Arbitrator exceeded his jurisdiction in ordering the confiscation of the domain name by the .IN Registry when no such remedy is provided in Para 10 of the INDRP.

Prior to the Petitioner filing the present petition, Respondent No. 2 filed Suit No. 209 of 2006 in the court of the learned Additional District Judge, Delhi ('ADJ') challenging the Award to the extent that the learned Arbitrator had rejected the plea of Respondent No. 2 for transfer of the domain name in his favour. It has been numbered as a separate petition under Section 34 of the Act.

Issue: Whether the domain name 'internet.in' of the Petitioner herein was identical and confusingly similar to a trade mark of Respondent No.2 and whether he had registered the domain name in order to sell, transfer or rent it or to prevent other owners of the mark from reflecting the mark in a corresponding domain name?

Held: In terms of Para 10 of the INDRP if the complaint succeeds then it should result in the cancellation of the domain name registration in favour of the Registrant "or" in the transfer of the domain name to the complainant. In this case, as held by the learned Arbitrator, Respondent No. 2 had successfully made out a case for cancellation of registration of the domain name. However, the further order of the learned Arbitrator directing confiscation and

retention of the said domain name by .IN Registry is without any legal basis. There is no such provision in Para 10 of the INDRP. Going by the law explained by the Supreme Court in *MD,*

Army Welfare Housing Organization v. Sumangal Servies (P) Limited (2004) 9 SCC 619, the learned Arbitrator ought not to have transgressed Para 10 of the INDRP to make such an order.

It was also held that here was an obligation cast on the Registrant in terms of Rule 3 INDRP to ensure that "the registration of the domain name will not infringe upon or otherwise violate the rights of any third party." If indeed the Petitioner was getting a domain name registered using a generic word like 'internet' then at the bare minimum in order to demonstrate his *bona fide* intentions, he should have been able to show that he did make an effort to ascertain if he was conforming to the said requirement. The Petitioner appears to have made no such effort.

Further, the Petitioner had been shown to indulge in a pattern of getting domain names registered in bulk. This was sufficient in terms of Para 6 (ii) to render the registration as being in 'bad faith'. In the circumstances, the finding of the learned Arbitrator that in terms of Para 4 (iii) read with Para 6 (ii) INDRP, the Petitioner's registration of the domain name 'internet.in' was in bad faith does not warrant interference.

The challenge by Respondent No. 2 to the impugned Award in Suit No. 209 of 2006, which has been transferred to this Court, is hereby negatived and OMP No. 928 of 2011 is dismissed. OMP No. 132 of 2007 is disposed of by modifying the impugned Award to the limited extent indicated hereinbefore.

DIRECT AND INDIRECT TAXES

Sub-Rule (3) of Rule 46A of the Income Tax Rules, 1962- No evidence can be taken into account unless the Assessing Officer has had reasonable opportunity to examine and rebut the same.

Commissioner of Income Tax (Central)-1 v. Manish Build Well Pvt. Ltd.

Citation: Income Tax Appeal No.928/2011

Decided on: 15th November, 2011

Coram: Sanjiv Khanna, **R.V. Easwar,** JJ.

Facts: The appellant/Revenue file the present second appeal being aggrieved of the order passed by the Income Tax Appellate Tribunal dismissing the appellant's first appeal against the order of CIT (A) which had held that the Assessment Officer was wrong in adding 25% of the total value of the space whose booking was cancelled during the relevant year, on the basis of a single instance found wherein the assessee had forfeited 25% earnest money upon cancellation of a booking. The CIT(A) had held so, on the ground that, in the absence of any adverse material brought on record and on the basis of a specific case of forfeiture (and not cancellation of booking), no addition could have been made.

Issues:

1. Whether the assessing officer was not right in law in raising the adverse inference qua the cancellation charges amount to Rs.10,97,850/- retained by the respondent while adding it to its income for the relevant year which the respondent failed to explain to his satisfaction?

2. Whether the assessing officer wrongly held that the determination of income by the respondent on completion of its projects amounts to deferment of payment of taxes which is assessable annually under the existing tax law of the land?

3. Whether the addition of Rs.28,21,000/- made by the assessing officer to the income of the respondent for the relevant year based on percentage completion method was not correct as held by the ITAT?

4. Whether the undisclosed transfer charge/s received by the respondent from sale of space to its buyers was not liable to be added to its income @ 3.6% during the relevant year?

5. Whether the amount of Rs.3,82,94,536/- recoverable by the respondent for payment of stamp duty including the electrification charges for spaces sold out was not liable to be added back to its income being revenue in nature as held by the ITAT?

6. Whether the assessing officer incorrectly invoked the provision of Sec.68 of the Act, in the case of the respondent qua to the advances received by it for sum of Rs.1,61,67,000/- from

its buyers in the relevant year though it failed to lead positive evidence to rebut the statutory presumption under the law?

7. Whether the ITAT rightly upheld the action of the CIT (A) as correct in law while taking the evidence led by the respondent before him in to consideration without any opportunity in rebuttal to the assessing officer which the respondent did not furnish during the assessment proceeding?

Held: The court held that on the basis of averments made by the parties and issues raised, it was clear that the decision of the Tribunal was based on factual findings recorded by the CIT (A) with which it agreed. No material was brought before the Tribunal or before the High Court to disturb the factual findings recorded by the aforesaid authorities. The decision of the Tribunal was not therefore open to the challenge as being perverse. Further since the Tribunal's decision was based on findings of fact recorded on the basis of the entries made in the books of accounts, no question of law could be said to have arisen from the order of the Tribunal.

Thus, rejecting the admission of issues no. 1, 2, 3, 4 and 5 on the basis that they did not raise any substantial questions of law, the court only found a substantial question of law to have arisen from issues no. 6 and 7. Pertaining to issues no. 6 and 7, the court held that an error was coomitted by the Tribunal insofar as it proceeded to mix up the powers of CIT (A) under sub-section (4) of Section 250, while disposing of the assessee's appeal, with the powers vested in the Tribunal under Rule 46A. The court opined that the Tribunal erred in its interpretation of the provisions of Rule 46A vis-à-vis Section 250(4) and its view that since the CIT (A), by virtue of its conterminous powers over the assessment order, was empowered to call for any document or make any further enquiry as it thought fit, there was no violation of Rule 46A, was erroneous.

Therefore, the issues 6 and 7 were answered in favour of the revenue and against the assessee and issue relating to the addition made under Section 68 of the Act was restored to the CIT (A) to take a fresh decidion upon it, in accordance with law. Revenue's appeal was disposed off accordingly.

Section 14(iv)(vii) of the Central Sales Tax Act, 1956- Article produced must be distinct from the commodity involved in its manufacture.

M/s Metalite Industries v. Commissioner of Sales Tax

Citation: 176 (2011) DLT 792

Decided on: 24th January, 2011

Coram: A.K. Sikri, **M.L.Mehta**, JJ.

Facts: The petitioner filed the present petition challenging the order of Appellate Tribunal Sales Tax which dismissed its second appeal against the order of dismissal of his first appeal by the Additional Commissioner Sales Tax against the re-assessment order of the petitioner/assessee. The petitioner, dealing in iron and steel, sold cable trays to a purchasing dealer without charging tax, which was considered to be not allowable, as per registration certificate of the purchaser.

Issue: Whether the cable trays of the type which the petitioner prepared and sold would fall within Clause (vii) or any other Clause of Section 14(iv) of the Central Sales Tax Act?

Held: The test, to determine whether the said cable trays are within the meaning of 'manufactured' or not, would be to check whether the article produced (trays) are regarded as distinct from the commodity involved in its manufacturing, by those who deal in it in the trade. The expression 'manufacture' implies a change, but every change is not a manufacture. If the said article retains its original identity despite having undergone a degree of processing, it would not be within the meaning of 'manufactured'. To be 'manufactured', there must be transformation; a new and different article must emerge, having a distinctive name, character or use.

It was thus held that applying the aforesaid tests to the present case, the cable trays, perforated as well as ladder types, did not continue to remain the iron and steel plates only. Through the processes of manufacturing i.e. cutting, punching, slotting and galvanizing the metal plates were transformed into an ultimate product which was distinct and different i.e. cable trays. Therefore, the cable trays could not fit in the category of iron and steel plates as specified in Clause (vii) of sub-section (iv) of Section 14 and cannot be said to be declared goods within the meaning of Section 2(c) of the Act. Hence, the cable trays were held to be not iron and steel as per section 3 of the Second Schedule of Sales Tax Act, 1975 read with section 14(iv) of the Act and the petition was dismissed in favour of the Department/Revenue and against the petitioner.

The State Legislature has the legislative competence to levy an entertainment tax on all payments for admission to an entertainment through a direct-to-home (DTH)

Bharti Telemedia Ltd. v. Government of NCT of Delhi and Anr.

Citation: 182(2011)DLT665

Decided on: 5th September, 2011

Coram: **Badar Durrez Ahmed,** V.K. Jain, JJ.

Facts: The Petitioner has a single broadcasting service at Manesar for its operations which were launched in August 2008. Under a licence/permission granted by the Government of India, Ministry of Information and Broadcasting, Petitioner had set up a Hub which enables it to downlink signals from the satellites of various broadcasters of TV channels and to then uplink the signals to its own Ku Band (INSAT 4CR satellite) designated transponders for transmission of the signals in Ku band. These signals are received by the dish antennae installed at the subscribers' premises. Since these signals are in encrypted form they are decrypted by the Set-Top Boxes and the viewing cards inside these boxes enable subscribers to view the various TV channels on their TV sets. The service tax imposed on the Petitioner is under the Finance Act, 1994 in exercise of Parliament's exclusive power to levy a tax on services under Article 246(1) read with Entry 92C of List I of the VIIth Schedule to the Constitution of India.

These writ petitions raise common issues and are, therefore, being decided together. The challenge is to the constitutionality of the Delhi Entertainments and Betting Tax Act, 1996 to the extent it imposes a tax on entertainment through 'direct-to-home (DTH) service.

Issue: Whether the imposition of entertainment tax on DTH services, under the Delhi Entertainments and Betting Tax Act, 1996) and Rules the Delhi Entertainments and Betting Tax Rules, 1997 as amended by the Delhi Entertainment and Betting Tax (Amendment) Rules, 2010, is constitutional?

Held: By allowing the flow of content through their infrastructural setup, the Petitioners, are providing a service. For doing so they are subjected to service tax under the service tax regime put in place by Parliament in exercise of its legislative power under article 246 of the Constitution read with Entry 92C of List I of the VIIth Schedule thereto. Under the said Act, the subject matter of the tax is the entertainment provided by the content that flows through the petitioners' system. The DTH service provider, in a sense only acts as a conduit between the content providers (i.e., TV Channels) and the content viewers (i.e., subscribers). It is the entertainment derived from the content that is the subject matter of the tax under the said Act and not the service of enabling the flow of content through the DTH system. There is no scope of confusing one for the other.

Even if we assume that the concepts are intertwined, the strands can easily be separated by employing the aspect theory. The DTH system had two aspects – (1) a service aspect; and (2) an entertainment aspect. The former is taxed as a service under the service tax regime and the latter is subjected to tax as an entertainment under the said Act read with entry 62 of List II. They are two separate and distinct taxable events in respect of each of the two aspects. In respect of the service aspect, the taxable event is flow of content through the DTH system, whereas, in respect of the entertainment aspect, the taxable event is the entertainment from the content.

Thus, in whichever way the matter at hand is looked at, the conclusion is clear that the State Legislature had (and has) the legislative competence to levy an entertainment tax on all payments for admission to an entertainment through a direct-to-home (DTH) as contemplated in Section 7 and other provisions of the said Act. Consequently, the petitions are dismissed. The parties are left to bear their respective costs.

Receiving the commission from shopkeepers and not in foreign exchange from the tourists directly would not qualify for deduction under Section 80 HHD of the Income Tax Act

C.I.T. v. Le Passage to India Tour & Travels Pvt. Ltd.

Citation: (2011)241CTR(Del)535

Decided on: 8th April, 2011

Coram: **A.K.Sikri,** M.L.Mehta, JJ.

Facts: The Assessee Company is engaged in the business of tours and travels arrangement for foreign tourists visiting India. In addition to making the arrangements for transport, boarding and lodging, hotels, stay, site seeing, providing guides and escorts, the assessee had also taken tourists for shopping. For the said purposes, the assessee company had entered into arrangement with various shops to sell merchandise to the foreign tourists and in turn received commission from them for sending foreign tourists to their shops to buy the goods. During the year under consideration, the assessee company received a total amount of shopping commission of Rs.1,31,34,402/- from different shops and considered it as part of business receipt in its profit and loss account. On this amount the assessee also claimed deduction under Section 80 HHD of the Income Tax Act.

The Assessing officer excluded the shopping commission from the business profit and also from the total business receipts on the ground that under the provisions of Section 80 HHD of the Act, only the profit derived by the assessee from services provided to the foreign tourists was eligible for deduction.

The CIT (A), however, reversed the aforesaid order of the Assessing Officer and allowed the appeal filed by the assessee against the AO's order holding that the aforesaid shopping commission received by the assessee shall also be eligible for deduction under Section 80 HHD of the Act. The ITAT has concurred with the aforesaid view of the CIT (A).

Challenging this order of the Tribunal, the present appeal is preferred by the revenue under Section 260A of the Act which was admitted on the following question of law:-

Issue: Whether learned ITAT/CIT(A) erred in holding that commission earned on purchases made by the tourists from the shops as a part of the business receipts which would qualify for deduction under Section 80 HHD?

Held: It is clear from the case of ***Lotus Trans Travels P. Ltd. v. Commissioner of Income Tax*** that the expression "derived from" as occurring in Section 80HHD of the Act has been interpreted to mean that such an income should be the result of services provided to foreign tourists. To put it otherwise, the source of income should be generated directly from the foreign tourists. That is the first degree and not beyond that. Admittedly, the assessee was

receiving the commission from shopkeepers and not in foreign exchange from the tourists directly. Obviously, these ingredients were not satisfied in the present case.

The Assessee earned from the shop keepers in India who in turn may be earning from the foreign tourists in selling their merchandise. As far as assessee is concerned, he is receiving the shopping commission in Indian currency, that too, from Indian businessmen namely the shopkeepers. The pre-condition stipulated in 80 HHD of the Act is, therefore, not satisfied. We, thus, answer the question in favour of the revenue and against the assessee. In consequence, the order of the Tribunal and CIT (A) is set aside and that of the AO is restored.

Section 201(1) and (1A) of Income Tax Act- If it was found that estimate made by employer was incorrect, this fact would not inevitably lead to inference that employer had not acted honestly and fairly.

Commissioner of Income Tax v. Delhi Public School

Citation: [2011] 203 TAXMAN 81

Decided on: 31stOctober, 2011

Coram: A.K. Sikri**, Siddharth Mridul,** JJ.

Facts: The Assessee school was engaged in providing free educational facilities to the teachers/staff members. The Assessing Officer held the School to be liable to penalty under Section 201 (1) of the Act and therefore liable to pay interest under Section 201(1A) of the Act. On appeal, the CIT(A) came to the conclusion that the interpretation adopted by the AO was iniquitous. This was decision was appealed against and the ITAT, came to the conclusion that the Assessee was not an 'Assessee in default' under Section 201(1) of the Act and consequently not liable to interest under Section 201(1A) of the Act. Hence the present appeal.

Issue: Whether on the facts and circumstances of the case, the learned ITAT erred in holding that Assessee was not in default under Section 201(1) and not liable for interest under Section 201(1A) of the Income Tax Act, 1961.

Held: It was observed by the court that the Assessing Officer did not pay regard to Section 3(5) of the Income Tax Rules which stipulated for determination of cost of education in a similar institution or in near locality. In the present matter, TDS was deducted on "estimated income" of the employee, and the employer was not expected to step into the shoes of the AO and determine the actual income. Furthermore, under Section 191 of the Act the liability to pay the tax was that of the recipient, and that while forming this opinion the employer was undoubtedly expected to act honestly and fairly and, therefore, if it is found that the estimate made by the employer is incorrect, this fact alone, without anything more, would not inevitably lead to the inference that the employer has not acted honestly and fairly. Unless that inference can be reasonably raised against an employer, no fault can be found against him and it cannot be held that he has not deducted tax on the estimated income of the employee.

Further, it is noticed that the AO without application of mind proceeded with the determination of the value of the perquisite based on the survey operations in many other schools without reference to the "cost" of such education in a similar institution in or near the locality. Thus the very basis on which the assessment was finalized was held to be erroneous. Factually, the CIT(A) held that on the basis of the accounts maintained by the Assessee, the cost of education was less than `1,000/- per month per child and, therefore, the Assessee was also entitled to the benefit of the proviso to Rule3(5) of the Rules, 1962.

The ITAT was correct in coming to the finding that these were not fit cases for passing orders under Section 201(1) and consequently levying interest under Section 201(1A) of the Act. Resultantly, the substantial question of law proposed above was answered in favour of the Assessee and against the Revenue and the Appeals filed on behalf of the Income Tax Department were dismissed and the conclusions arrived at by the ITAT apart from the issues decided in the present order were accordingly reversed.

Section 37(1) of Income Tax Act, 1961- Any payment for infringement of patent, being purely compensatory in nature, could not be disallowed

Commissioner of Income Tax v. Desiccant Rotors International Pvt. Ltd

Citation: [2011] 201 TAXMAN 144 (Delhi)

Decided on: 11th July, 2011

Coram: **A.K.Sikri,** M.L.Mehta, JJ.

Facts: Present revenue's appeal was filed against the order of the Tribunal allowing payment of compensation paid by assessee to settle dispute and deduction of it from the assessee's total income holding it allowable expenditure under Section 37 of Act. The Respondent Assessee being engaged in the business of manufacturing of environmental control system exporting its products to one of its customers VENMAR for further sale. SEMCO Inc. USA had filed a suit against VENMAR for infringement of their registered patents in USA by selling the products of the assessee company and also instituted proceedings against the assessee company as well for infringement of registered patents.

The assessee company settled the dispute with SEMCO by making compensatory payment to it. However, the Assessing Officer took the view that the payment made to avoid any conviction by the court of law was not allowable as business expenditure. On this reasoning, the AO disallowed the payment of compensation paid by the assessee. Feeling aggrieved, the assessee preferred first appeal before the CIT (A). However, being aggrieved of CIT order, it went in second appeal before the tribunal. The order is not in favour of Assessee. Still aggrieved, the assessee went in appeal before the tribunal. The ITAT preferred the present appeal against the order of the Tribunal allowing the payment of compensation by the assessee.

Issue: i) Whether the tribunal erred in holding that the payment by the assessee to SEMCO vides settlement Agreement is not hit by the provision in Explanation 1 to Section 37 of the Income Tax Act, 1961?

ii) Whether the tribunal erred in deleting the addition of Rs.31257152/- paid on settlement of dispute which was incurred wholly and exclusively for the purposes of business?

Held: The court held that indisputably the expenditure incurred by the assessee was neither personal in nature nor capital in nature and it was incurred wholly and exclusively for purposes of business of assessee. Payment was made as a result of settlement and which payment was thus compensatory in character. The court accepted the submission of the assessee that the paramount and governing consideration behind such a settlement/agreement can be to avoid the expenses and uncertainty of further litigation. Furthermore, the settlement agreement contains a specific recital to this effect inasmuch as it records “whereas, in order to avoid the expenses or uncertainty or further litigation, the parties desired to settle and adjust

all differences and controversies among themselves subject to the terms of this Agreement." Secondly, payment made by the assessee was for "loss of goodwill and damages to its capital and for terminating of case US Courts" as is clearly mentioned in Clause (3) of the Agreement. Therefore, any payment for infringement of patent, being purely compensatory in nature, could not be disallowed as per law settled by Supreme Court in case of ***Prakash Cotton Mills (P.) Ltd. v. CIT***. It was an expenditure which was motivated purely by commercial purpose and would be allowable under Section 37(1) of the Act.

After considering the facts of the present case, the court was of the view that the order of the Tribunal did not call for any interference and both the question of law were answered in favour of the assessee. Thus, finding no merit in the appeal, it was accordingly dismissed.

Section 275(1)(a) of the Income-Tax Act; A provision must be construed harmoniously with the main enactment.

Commissioner of Income Tax v. Mohair Investment and Trading Co. P Ltd.

Citation: 184 (2011) DLT 23

Decided on: 30th September, 2011

Coram: A.K. Sikri, **Siddharth Mridul,** JJ.

Facts: The present appeal challenges the order of ITAT which allowed the appeal of the assessee against the penalty order levied by the Assessing Officer in consonance with the assessment order confirmed by the CIT(A) and also the ITAT.

The dispute arose when the Assessee-Company, operating in the business of shares and securities claimed exemption of an expenditure being interest on loans raised for acquiring shares of various companies. However, the Assessing Officer concluding that no deduction was allowable with respect to the expenditure incurred in relation to dividend income which was exempted from tax as per Section 14A and Section 115-O(5) of the Act, initiated penalty proceedings under Section 271(1)(c) of the Act. The assessment order was confirmed by the CIT(A) and the ITAT and thus a penalty order was levied upon the assessee. The present appeal is against the order of ITAT allowing the assessee to challenge the penalty order.

Issue: Whether learned ITAT erred in holding that penalty has been levied after expiry of limitation period as laid down under Section 275(1)(a) of the Income-Tax Act?

Held: The period of six months provided for imposition of penalty under Section 275(1)(a) starts running after the successive appeals from an assessment order has been finally decided by the CIT(A) or the ITAT as the case may be whichever period expires later. The proviso to section 275(1)(a) has only had the effect of extending the period of imposing penalty from six months to one year. Even so, a proviso is merely a subsidiary to main Section and must be construed in the light of the Section itself. Hence, the proviso to Section 275(1)(a) of the Act does not nullify the availability to the Assessing Officer of the period of limitation of six months from the end of the month when the order of the ITAT is received by the Assessing Officer.

In the present case the order of the ITAT was rendered within a period of six months from the order of the ITAT. Therefore the court decided the question of law as framed in favour of the Revenue and against the Assessee. In the circumstances the impugned order was set aside and the matter remitted back to the ITAT for a decision on the merits of the Appeal in accordance with law.

Gifts received from party supporters were not taxable under the Income Tax Act

C.I.T., Delhi v. Ms. Mayawati

Citation: 183(2011) DLT 617

Decided on: 3rd August, 2011

Coram: A.K. Sikri, **Suresh Kait,** JJ.

Facts: The Income Tax return for the Assessment Year 2003-04 was filed by the assessee on 06.08.2003 declaring total income of Rs.13,29,090/-. The Assessee enjoys the income from salary, house property and other sources. The Assessing Officer, on perusal of the return, found that during the year under consideration, the assessee had received gifts from different persons at different times and these gifts have become subject matter of the scrutiny at various levels including IT Department and additions have been made at the ends of the assessee and her family members in different assessment years.

The ITAT has upheld the finding of CIT (A) that the assessee has fully discharged not only her onus but also the burden cast on her by proving the identity of donors and their creditworthiness as well as the genuineness of the gift. Accordingly, the ITAT upheld the findings of CIT (A) deleting the additions made on account of the said gifts by the AO.

The present appeal is concerned only with the gifts which Assessing Officer noticed during the year under consideration. There is no evidence on record to prove that the assessee has favored the donor in any manner whatsoever by acquiring the gifts in question.

Held: The assessee has fully discharged her legal obligations by disclosing the identity of all the donors. Further, donors have proved their genuineness and capacity to make a gift. All assessees as well as the donors had appeared before the Registrar and the gifts are duly registered. All gifts are absolute and without any lien of anyone. There is no evidence on record to prove that the assessee has favoured the donor in any manner whatsoever by acquiring the gifts in question. The capacity of any person does not mean how much they earn monthly or annually, but the term capacity has divided term and that can be perceived by how wealthy he is. All the formalities, as per law are met by the assessee and donors as well. All the donors have admitted that they are great admirer of the assessee as she is working for the upliftment of poor people.

The occasion for making the gift and relationship with the donor are not very relevant, rather what is relevant is the genuineness of the transaction together with the identity and capacity of the donor to make the gift.

The Court therefore upheld the order passed by Income Tax Appellate Tribunal (ITAT) in favour of the assessee in that the gifts received from party supporters were not taxable under the Income Tax Act.

Section 36(1)(viii) of the Income Tax Act, 1961- Income should be "derived from" the business of providing long-term finance.

National Cooperative Development v. Assistant Commissioner of Income Tax

Citation: MANU/DE/6642/2011

Decided on: 28th November, 2011

Coram: Sanjiv Khanna, **R.V. Easwar,** JJ.

Facts: In the present matter seven appeals filed by the Assessee under Sec.260A of the Income Tax Act, 1961 against the orders of the ITAT passed on different dates and for different assessment years. The dispute arose when the Assessing Officer rejected the assessee's claim for deductions on the ground that the claimed items of income were not "derived from" the business of providing long-term finance within the meaning of the Section 36(1)(viii) of the Act as claimed by the Assessee.

Being aggrieved with the order of CIT(A) endorsing the view taken by the Assessing Officer, the assessee chose to appeal before the ITAT, which held that though the claimed items of income could be said to be "attributable" to the business of providing long-term finance, that was not sufficient to attract the provisions of Section 36(1)(viii) and that the condition in the Section that the income should be "derived from" the business of providing long-term finance was not satisfied. Hence, the assessee has preferred the present appeal.

Issue: Whether the items of income in respect of which the deduction was claimed, could be said to have been "derived" from the business of providing long-term finance?

Held: The court held that dividend received in interest through investment in redeemable preference shares (not amounting to a loan/advance made by the assessee to the company for interest) or interest earned on short-term deposits made during the interregnum period between disbursement of funds could not be considered as profit "derived from" the business of providing long-term finance; nor could the service charges on SDF loans qualify for the deduction as the loans were given by the Government through the assessee and funds of the assessee, himself were not involved.

Therefore, the court found no merit in the assessee's claim that the abovesaid amounts were profits "derived from" providing long term finance within the meaning of Section 36(1) (viii) of the Act read with clause (h) of the Explanation to the Section. The court, accordingly, answered the substantial question of law against the appellant and in favour of the Revenue.

Taxes 'wrongly' levied and collected should be refunded.

Indgalonal Investments & Finance Ltd. and Anr. v. Income Tax Officer

AND

Taksal Theaters Private Limited v. Assistant Commissioner of Income Tax and Anr.

Citation: 2012 I AD(Delhi) 544

Decided on: 3rd June, 2011

Coram: Dipak Misra, **Sanjiv Khanna,** JJ.

Facts: The petitioner filed the present writ petition praying for quashing of the order passed by the respondent no. 1, Income Tax Officer, rejecting the claim for refund of TDS for the period relevant to the assessment year 1994-95, on the ground that an amount was deducted as TDS during the abovesaid assessment period which was liable to be refunded to the petitioner.

Issue: Whether or not the petitioner had asked for refund or the assessed income entitled the petitioner to refund of TDS deducted on his net income?

Held: The court opined that when a statutory authority did not pass any order and failed to comply with the statutory mandate within reasonable time, they could not take the defence of laches and delay. Delay in such cases furnished the cause of action and right to the petitioner to approach courts as it was the respondent's statutory duty to act within a reasonable time. However, if the respondent had rejected the refund claim but the petitioner had kept quiet and thereafter approached the court after considerable delay, different consequence would flow.

In the present case, it was observed that once it was held that the petitioner had applied for and was entitled to refund of the TDS amount, then the delay in making the refund was attributable to the respondent and thus the respondent had deprived the petitioner of its money which was refundable as per statute. In view of aforesaid the writ petition was allowed and a writ of mandamus was directed to be issued directing the respondent to process the claim on merits for refund to the petitioner.

Conviction on account of non compliance of notice Section 2(35) of the Income Tax Act

Income Tax Officer v. Delhi Iron Works (Pvt.) Ltd.

Citation: [2011]198TAXMAN174(Delhi)

Decided on: 8th February, 2011

Coram: **A.K.Pathak,** J.

Facts: Respondent Company had been acquitted of the charge under Section 276-B of the Income Tax Act, 1961 by the Additional Sessions Judge on the ground that since notices qua the Director had been held defective, respondent can also not be convicted. It was further held that since no Individual Officer of Respondent was held responsible for deduction of the tax and its deposit with the department within the prescribed period, Respondent being a legal entity managed by its officers, cannot be held responsible.

Issue: Whether the acquittal of the Respondent first by the Trial Court and then by the ASJ was valid on the ground of non compliance of notice Section 2(35) of the Income Tax Act?

Held: In these facts, while deciding the appeals against acquittal, it was held that company is not a natural person but legal or juristic person but that would not mean that it is not liable to prosecution under Act. Juristic person is also subject to criminal liability under relevant law. Only thing is that in case of substantive sentence order is not enforceable and juristic person cannot be ordered to suffer imprisonment, however, other consequences would ensue, i.e. payment of fine etc. In absence of appointment of a Principal Officer, by issuing a notice by department, prosecution, if any, could only be launched against company. Additional Sessions Judge has committed an illegality by holding that Respondent company was entitled to acquittal for offence punishable under Section 276-B of Act since its Director had been acquitted for non-compliance of notice under Section 2(35) of Act.

A conjoint reading of Sections 194-A (4) and 204(iii) of the Act makes it clear that in case of a company, the company itself, including the Principal Officer of the company would be responsible to deduct the tax at source and deposit the same with the department. In case of contravention of Section 194-A company itself besides its Principal Officer would be liable for prosecution.

Impugned orders set aside and Orders of conviction restored.

Closing stock of erstwhile firm has to be accessed at market rate when introduced as stock-in-trade in a new business venture.

Madhu Rani Mehra v. C.I.T.

Citation: 179(2011) DLT 783

Decided on: 21st March, 2011

Coram: Sanjay Kishan Kaul, **Rajiv Shakdher, JJ.**

Facts: The Assessee, a partner of a firm, received stock-in-trade on dissolution of the firm. The said stock was valued at average cost price by the firm which was Rs 35,16,785/-, however, the market price of the firm's closing stock was Rs 49,19,491/-. The Assessee used said stock to start a proprietorship business and filed return for the a/y 1980-81. The Assessing Officer made an addition of Rs. 14,02,700/- by taking into account the difference in the market price and book value of the closing stock of the firm. The said addition was confirmed by the first Appellate Authority. On appeal, Tribunal held that the option to value stock at the lower denominator of cost or market was available only to a going concern and as the firm had dissolved, the stock had to be valued at the market value. Hence, instant appeal.

Issue: Whether the opening stock of the proprietorship concern is to be valued at the book value of the closing stock of the dissolved firm or at the market value?

Held: When a partnership firm is dissolved and one individual of the erstwhile firm continued to make a living out of a business and received stock of the firm, it was a capital asset in his hands. When that asset was introduced into a business as stock, it gets converted into stock-in-trade. The value of said stock would have to be the market value on the date of introduction. Hence, capital asset treated as stock-in-trade of proprietary business has to be valued at market value. Appeal was thus allowed.

Income Tax Appellate Tribunal has the power to recall an order in exercise of power under Section 254(2) of the Income Tax Act, 1961 in certain cases.

Lachman Dass Bhatia Hingwala Pvt. Ltd. v. Assistant Commissioner of Income Tax,

Citation: [2011]196TAXMAN563(Delhi)

Decided on: 24th December, 2010

Coram: **Dipak Misra**, **CJ**, A.K. Sikri, Manmohan, JJ.

Facts: The petitioner invoked the inherent jurisdiction under Articles 226 and 227 of the Constitution of India questioning the Order passed by the Income Tax Appellate Tribunal, Delhi Bench whereby the tribunal recalled the composite order passed by it on 17th June, 2009.

Issue: Whether the Income Tax Appellate Tribunal has the power to recall an order in exercise of power under Section 254(2) of the Income Tax Act, 1961?

Held: The tribunal, while exercising the power of rectification under Section 254(2) of the Act, can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and which error is a manifest error and it has nothing to do with the doctrine or concept of inherent power of review.

Relied on: *Commissioner of Income-Tax v. Honda Siel Power Products Ltd.,* [2007] 293 ITR 132 (Delhi),

Overruled: *Commissioner of Income Tax v. K.L. Bhatia,* [1990] 182 ITR 361 (Delhi)

Deeksha Suri v. Income-tax Appellate Tribunal and others, [1998] 232 ITR 395 (Delhi)

Karan and Co. v. Income-tax Appellate Tribunal, [2002] 253 ITR 131 (Delhi)

J.N. Sahni v. Income-tax Appellate Tribunal and others

Section 2(22)(e) of the Income Tax Act, 1961- Dividends, only in the hands of shareholders is taxable.

Commissioner of Income Tax v. Ankitech Pvt. Ltd.

Citation: MANU/DE/3415/2011

Decided on: 11th May, 2011

Coram: **A. K. Sikri**, Suresh Kait, JJ.

Facts: The appellant-Revenue preferred the present appeal against the order of the Tribunal (ITAT) which set aside the order of the CIT and Assessment Officer (AO) and held that even though the amount received by the Assessee Company by way of book entry was a deemed dividend within the meaning of Section 2(22)(e) of the Act, the same could not be assessed in the hands of Assessee Company, as it was not the shareholder in the company JGPL.

The dispute arose when the AO held that since the shareholders holding substantial interests in JGPL, also held substantial interests in the Assessee Company, to which JGPL had advanced many loans and advances, the amount received by the assessee from JGPL should be treated as deemed dividend within the meaning of Section 2(22)(e) of the Income Tax Act and be added to the income of the Assessee Company. The CIT had affirmed this view taken by the AO.

Issue: Whether the assessee who was not the shareholders of M/s. Jackson Generators (P) Ltd. (JGPL) could be treated as covered by the definition of 'dividend' as contained in Section 2(22)(e) of the Income Tax Act.

Held: The Court held that under normal circumstances, such a loan or advance given to the shareholders or to a concern, as in the present case, would not qualify as dividend. It had been made so only by legal fiction created under Section 2(22)(e) which relates to "dividend". Thus, by a deeming provision, it was the definition of dividend which was enlarged. Keeping this aspect in mind, the obvious conclusion was that the loan or advance given under the conditions specified under Section 2(22)(e) would also be treated as dividend. Legal fiction however, did not extend to a "shareholder". Hence, the fiction was necessary to be not extended further for broadening the concept of shareholders by way of legal fiction.

Under Section 2(22)(e), a concern (such as the Assessee), which was given the loan or advance was admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could have been treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of "deeming shareholder", then the Legislature would have inserted deeming provision in respect of shareholder as well, which did not happen.

The Court further observed that such loan or advance, in the first place, was not an income. Such a loan or advance had to be returned by the recipient to the company, which had given

the loan or advance. Therefore, it would be wrong to conclude that if the recipient was a shareholder by way of deeming provision then the income "was not taxed at the hands of the recipient".

The appeals were thus disposed of in favour of the assessee and against the appellant.

Section 263, Income Tax Act, 1961- Revision of order when allowed.

Commissioner of Income Tax v. Easterm Medikit Ltd.

Citation: [2011] 202 TAXMAN 572 (Delhi)

Decided on: 3rd June, 2011

Coram: **A. K. Sikri**, M.L. Mehta, JJ.

Facts: The appellant-Revenue filed the present appeal against the order of ITAT setting aside the order of the CIT, whereby it had been observed that since the respondent-assessee had commenced operations in the year 1994-95, he was not entitled to deduction under Section 80IB of the Income Tax Act and that the Assessment Officer (AO) was to make a fresh assessment. The ITAT rejected the observation made by the CIT on the ground that according to the correct position, the commencement year of operation was 1995-96 and thereby the assessee was entitled to the abovesaid deduction for the assessment year 2005-06. Hence the present appeal.

Issue: Whether the ITAT had erred in law holding that Assessee was entitled for deduction under Section 80IB of Income Tax Act for assessment year 2005-06.

Held: The Court held that where the issue of whether the commencement year of operation was 1994-95 or 1995-96, was not examined by the AO and only on this ground CIT had revised the order without giving his own findings, but directing the AO to do the necessary exercise, it was not proper for the Tribunal to have decided the same on merits, converting itself into a Court of first instance and deciding the factual aspect on which neither AO nor CIT(A) had returned any findings.

The Court thus held that the Tribunal was errant in going into the merits of the dispute while examining the validity of the CIT order and in annulling the order of the CIT passed under Section 263 of the Income Tax Act. Further, the Tribunal was also held to have erred in law in holding that the assessee was entitled for deduction under Section 80IB of the Act for the present assessment year i.e. 2005-06 as that aspect was still pending consideration by the AO.

The appeal was accordingly allowed and the order of the CIT was restored. However, it was made clear that the CIT had not given any findings that the operations of the assessee commenced for the Financial Year 1994-95. It was also clarified that the AO would only deal with the limited issue of admissibility of deduction under Section 80IB of the Act.

EDUCATION LAW

Minority Educational Institutions challenging the Delhi School Education Act and Rules- led to amendment by addition of sub rule 3A to Rule 96

Queen Mary v. Union of India

and

B.M Gange and Ors v. Union of India

Citation: 185(2011)DLT168

Decided on: 21st November, 2011

Coram: **Ravindra Bhat,** G.P. Mittal, JJ.

Facts: The Petitioners (six in all) are minority educational institutions, established and administered by Christian denominations, which fall within the expression "minority" under Article 30 of the Constitution of India. The Petitioner institutions have established schools, in the National Capital Territory of Delhi and are therefore regulated by the Delhi School Education Act, 1973 ("the Act"); and Rules framed under the Act (hereafter "the Rules").

The Petitioners allege that certain provisions of the Act and its Rules intrude on their right and power to administer the minority institutions they have established in view of the autonomy guaranteed to them under Article 30 of the Constitution.

Issue: Whether the Delhi School Education Act, 1973 and Rules framed thereunder intrude upon the fundamental right of the Petitioners enshrined u/Art. 30 of the Constitution of India?

Held: With respect to Rule 47 and Rule 64(1)(e), the Court held that these rules robbed the minority institutions of the choice to appoint personnel of their choice and inapplicable to them.

With respect to Rule 64(1)(g) and rule 75, the Court similarly held that they could not be binding upon minority schools, regardless of whether they are aided or not, because their autonomy in appointing teachers of their choice, could not be interfered with.

With respect to Rules 96 and 98, which provide for the presence of director nominated members in the selection committees of schools the Court distinguished itself from an earlier judgment of the same Court on these very provisions. In *S.S. Jain Sabha (of Rawalpindi) Delhi v. Union of India, ILR (1976) Del 61,* where the Court on perusal of Rule 96 (then unamended) had held that the presence of director- nominated members, was permissible in the selection committees of minority schools as long as they did not have voting powers. Consequent to this judgment an amendment was made to the same effect to rule 96 through clause 3-A to sub-rule 3 of Rule 96, which stated that director nominated members in selection committees of minority schools would not have any voting rights.

This Court, in the present judgment differed from *Jain Sabha* in the sense that it felt that even the presence of such director nominated members was intrusive and unnecessary. The Court was of the view that *there is no rationale why it should be made to suffer the participation of an outsider, whose presence is not wanted, in the first place, no matter whether that individual's views are not binding*

For these reasons, it is held that minority aided schools are not bound to adopt the composition of the recruitment committees indicated in Rule 96; they are to adhere to the rules applicable to unaided minority schools, i.e., Rules 127-128.

The offending provisions of the Act and its Rules have been provided below:

- ***Rules 47, 64 (1) (e)*** *which provide for the power to direct absorption of teachers rendered surplus in aided schools as a result of the institution being shut down or sections of it being closed into a minority educational institution;*

- ***Rule 64 (1) (b)*** *The power of the authorities to frame and promulgate Regulations which inter alia, permit the Director of Education (charged with the duty of regulating school education in Delhi) to require reservations for recruitment of teachers and employees in such minority schools;*

- ***Rule 96*** *which mandates the participation of Director-nominated members in the selection committees of such schools notwithstanding that Clause 3A in amending this Rule makes it clear that these nominated members will only be present as advisory members without any voting rights. It was submitted that the mere participation of outsiders, without the consent or volition of those in management of the minority institutions, in the selection process, was an intrusion of their absolute right under Article 30.*

Interpretation of any Statute or any rules and regulations framed under the Statute must depend on its text and context.

Teerthanker Mahaveer Institute of Management v. Union of India & Ors.;

Rama Medical College Hospital & Research Centre, Kanpur v. Union of India & Anr. ; and

School of Medical Science & Research, Sharda University v. Union of India & Ors.

Citation: MANU/DE/3814/2011

Decided on: 28th September, 2011

Coram: **Kailash Gambhir,** J.

Facts: By these petitions filed under Article 226 of the Constitution of India, the Petitioner institutes/medical colleges challenged the order of the Respondent Medical Council of India/Board of Governors whereby it had rejected the grant of additional intake of students in the MBBS course in the Petitioner institutes/colleges on the ground that they had yet not reached the stage of awarding a recognized MBBS degree to their first-batch students and also sought directions to direct the respondent to grant additional intake of the seats in their respective institutes in terms of Section 10A of the Indian Medical Council Act, 1956.

Issue: Whether the petitioners were entitled for the grant of increase in seats without reaching the stage of awarding MBBS degree?

Held: The court observed that while there was a dire need for the opening of new medical colleges by the Government or even by the private bodies to meet the aspirations of young students, it was equally important that there was no decline in the maintenance of standard of medical education. However, denying the required increase in seats to these medical colleges to ensure that highest standards are maintained in the medical colleges, was not the solution. Instead, it was necessary that the increase was permitted in admission capacity to the colleges subject to strict adherence to the laid down criteria and the regulations of the MCI.

Hence, in the light of the aforesaid issue, the Court did not find any merit in the argument that the petitioners were required to reach the stage of awarding the MBBS degree to qualify for increase in their admission capacity, and that the said policy having been followed for all the years in the past, had become a good practice acceptable in law.

The petition was allowed and the respondent MCI was accordingly directed to grant increase in the additional intake of students from 100 to 150 to all the petitioners institutes subject to, however, the condition that the petitioners fulfilled all other requirements and the criteria laid

down in the regulations and there being no deficiencies existing for granting the said increased intake in the admission capacity from 100 to 150 students in the MBBS course.

Delhi School Act, 1973- Schools cannot indulge in commercialisation of education.

Delhi Abhibhavak Mahasangh and Ors. v. Govt. of NCT of Delhi and Ors.

Citation: MANU/DE/3071/2011

Decided on: 12th August, 2011

Coram: **A. K. Sikri**, Siddharth Mridul, JJ.

Facts: The petitioners filed the present writ petition in the representative capacity on behalf of parents/students challenging the mid-session hike in fee and other charges announced by various unaided recognized private schools in Delhi, ranging from 60% to 100%, triggered as a result of implementation of 6th Pay Commission's recommendations warranting upward revision in the pay of school teachers and other staff and the subsequent permission granted by the Govt. of NCT, Delhi allowing such hike in the tuition and development fee with retrospective effect, i.e. from beginning of the session.

Issue: (1) Whether the provisions of Section 17(3) of the 1973 Act are ultra vires and whether the orders dated 11.02.2009 stipulating the increase in fee by the Department of Education (DoE), was legal and valid?

(2) Whether constitution of the Grievance Redressal Committee was illegal and whether it was necessary to constitute a permanent Committee to go into the annual accounts of different schools each year and on that basis allow the schools to increase fees, if it becomes necessary.

Held: The Court held that Section 17(3) of the Act, 1973 gave freedom to unaided-recognized schools to fix their fee at commencement of each academic session and file with the Director full statement of fees, as levied during the ensuing academic session. However, only restriction in fixing fees was that during academic session, there could not be further increase without prior approval of the Director and thus the provision did not suffer from any vires or arbitrariness and was not violative of Article 14 or 19(1)(g) of the Constitution of India and in fact struck a balance between the right of autonomy to the schools to fix their fee on one hand and duty cast upon the DoE to regulate the quantum of fee with limited purpose to ensure that the schools were not indulging in profiteering, on the other.

In the present case, because of the implementation of pay structure recommended by the 6th Pay Commission, all aided and unaided recognized schools in Delhi were obliged to hike the pay package of their teachers and staff members, thereby adding to their financial burden. As a result, while the schools wanted to increase the fee, PTAs on the other hand, maintained that some of the schools enjoyed robust financial health, sufficient to bear the additional monetary burden without a hike in the fee. This necessitated going into the records of each school, which being, time-consuming, the government issued the impugned orders as an interim measure, proposing to increase the tuition fee in the manner provided in the

abovesaid order. The Court held that such an order of the government could not be faulted with, more so as it was the result of requisite inquiry and fair hearing to all stakeholders.

Thus, in the exceptional circumstances in which such an order came to be passed, the increase in fees stipulated in the said orders as ad-hoc but strictly an interim measure, was legal and valid. However the Court opined that instead of appointing an ad-hoc committee to deal with the matter, there was a need to establish a permanent regulatory body/mechanism more so when, commercialization of and profiteering in education was not permitted.

The Court while disposing of the petitions also called for the constitution of a Committee to specifically look into as to how much fee increase was required by each individual school on the implementation of the recommendation of 6th Pay Commission, i.e., it were to examine the records and accounts of these schools and take into consideration the funds available at the disposal of schools at the time.

FULL BENCH DECISIONS

FULL BENCH

Letters Patent Appeal is not maintainable from a judgment passed in a writ petition under Article 226 of the Constitution of India while exercising criminal jurisdiction

C.S. Aggarwal v. State & Anr.

Citation: 2011 VIII AD (Delhi) 265

Decided on: 29th July, 2011

Coram: **A.K. Sikri,** Suresh Kait, M.L. Mehta, JJ.

Facts: The appellant had filed a Writ Petition invoking the jurisdiction of this Court under Article 226 of the Constitution of India read with Section 482 of the Cr.P.C. seeking appropriate writ for quashing an FIR lodged against him by the Economic Offences Wing, Crime and Railways, Delhi under the Indian Penal Code.

The said writ petition has been dismissed by the learned Single Judge of this Court and against that order LPA has been preferred by C.S. Agarwal. Another accused in the said FIR, D.K. Jain also filed LPA challenging the same judgment. The Division Bench heard the matter on this aspect and deemed it appropriate to refer the matter to the Full Bench.

Issue: Whether a Letters Patent Appeal is maintainable from a judgment passed in a writ petition under Article 226 of the Constitution of India while exercising criminal jurisdiction?

Held: The test is whether criminal proceedings are pending or not and the petition under Article 226 of the Constitution is preferred concerning those criminal proceedings which could result in conviction and order of sentence. If the FIR is not quashed, it may lead to filing of Challan by the investigating agency; framing of charge; and can result in conviction of order of sentence. Writ of this nature filed under Article 226 of the Constitution seeking quashing of such an FIR would therefore be "criminal proceedings" and while dealing with such proceedings, the High Court exercises its "criminal jurisdiction".

When writ petition is filed seeking quashing of FIR, Letters Patent Appeal would not be maintainable against the order passed by the learned Single Judge in such a writ petition as the learned Single Judge was exercising criminal jurisdiction while dealing with the same under Article 226.

Clause 10 of the Letters Patent reads as follows:

> *"10.* ***Appeals to the High Court from Judges of the Court*** *– And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order*

passed or made in the exercise of the power of Superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant of Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or Successors in our or their Privy Council, as hereinafter provided."

This clause clearly prohibits maintainability of an intra-court appeal if the impugned judgment is passed in exercise of:

1. Revisional Jurisdiction

2. The power of superintendence

3. Criminal Jurisdiction

FULL BENCH

Section 65(105)(zzzz) of the Finance Act, 1995 and Section 66 as amended by the Finance Act, 2010 are constitutionally valid.

Home Solutions Retails (India) Ltd v. Union of India & Ors.

Citation: 182 (2011) DLT 548, 2011 (187) ECR 261 (Delhi), 2011[24] S.T.R. 129

Decided on: 23rd September, 2011

Coram: **Dipak Misra, CJ.,** A.K. Sikri, Sanjiv Khanna, JJ.

Facts: The petitioner, a registered company, had taken commercial property / shops on rent for carrying on its retail business, by way of lease or licence and once the lease deed or the deed of licence is entered with the owner, there was no continuous flow of transaction between them. The premises that had been taken by the petitioner have been referred to in the petition and it was urged that in the case of the agreements that have been entered with the respective owners, the liability rests with the owners to pay the service tax but the owners insist upon the petitioner to make payment of the service tax.

Issue: Whether Section 65(105)(zzzz) of the Finance Act, 1995 and Section 66 as amended by the Finance Act, 2010 are constitutionally valid ?

Held: The provisions, namely, Section 65(105)(zzzz) and Section 66 of the Finance Act, 1994 and as amended by the Finance Act, 2010, are *intra vires* the Constitution of India. Further, the decision rendered in the first *Home Solution* case does not lay down the correct law. There is value addition when the premise is let out for use in the course of or furtherance of business or commerce.

When a premises is taken for commercial purpose, it is basically to subserve the cause of facilitating commerce, business and promoting the same. Therefore, there can be no trace of doubt that an element of value addition is involved and once there is a value addition, there is an element of service. They have to be read in conjunction.

The challenge to the amendment giving it retrospective effect was held to be unsustainable and the retrospective amendment is declared as constitutionally valid.

Overruled: *Home Solution Retail India Ltd. v. Union of India*, 158 (2009) DLT 722 (DB).

- **Section 66(105) (zzzz):** "*Taxable service means any service, provided or to be provided to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or furtherance of business or commerce.*

Explanation 1: (i)..., (ii)..., (iii)...,(iv) Vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce....."

- **[Post Amendment by the Finance Act, 2010]**

- **Section 66-Charge of Service Tax:** *"There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub clauses ….(zzzz)…. of Clause (105) of Section 65 and collected in such manner as may be prescribed."*

- **[Post Amendment by the Finance Act, 2010]**

Other Full Bench Decisions:

- ***Sterling Agro Industries Ltd. v. Union of India:…….Pg 63*** (Constitutional Law)

- ***Lachman Dass Bhatia Hingwala Pvt. Ltd. v. Assistant Commissioner of Income Tax…….Pg 148*** (Direct and Indirect Taxes)

INTELLECTUAL PROPERTY RIGHTS (IPR)

Section 29(4) of the Trade Marks Act, 1999

Tata Sons v. Greenpeace

Citation: 178(2011)DLT705

Decided on: 28th January, 2011

Coram: **Ravindra Bhat, J.**

Facts: The Plaintiff is the proprietor of the trademark TATA as well as the "T within a circle" device. The Dhamra Port Company Limited (DPCL)- a 50 - 50 joint venture of Larsen and Toubro limited and Tata Steel limited (a publicly listed company of which the Plaintiff is the promoter)- was awarded a concession by Government of Orissa to build and operate a port north of the mouth of river Dhamra in Bhadrak district, the petitioners claim that they had all the necessary environmental clearances as well. The defendants, Greenpeace International and Greenpeace India had made an online game by the title "Turtle v. TATA" which has been described thus: *"The aim of the video game is to help the yellow turtles eat as many little white dots as possible without running into Ratty (presumably after Ratan Tata, chairman of the Tata Group), matty, Natty or Tinku….while dodging the TATA demons if you eat a power pill, you will be gifted with superturtle powers to vanquish the demons of development that are threatening your home."* The Defendants had been raising concerns about the alleged probable dangers to the nesting and breeding of Olive Ridley Turtles by the proposed port at various quarters.

The plaintiffs argued that the use of T device and the Tata mark in the game, although not in the course of trade, will amount to trademark infringement of dilution or tarnishment. The Plaintiff relied upon Section 29(4) of the Trade Marks Act, 1999 and submitted that "use" of trademark is not confined merely to the Defendant engaging itself in a trade or commercial activity, but other forms of speech or representation, which would tarnish the Plaintiff's mark. In view of the above facts, the plaintiffs sought the Court to issue a temporary injunction under Order XXXIX, Rule 2, Code of Civil Procedure.

Greenpeace submitted that its use of the trademark and "T" device does not amount to trademark infringement, as it is not commercial usage, meant to profit or gain from the goodwill or reputation of such marks. It is alleged that a bare perusal of section 29(4) of the Trade Marks Act 1999 would show that it envisages the use of a registered trademark, for purposes of criticism, fair comment and parody so that such use would not amount to infringement of trademark

Issue: Whether the grant of temporary injunction would be appropriate in light of the alleged infringement of trademark under S. 29(4) of the Trade Marks Act?

Held: The Court in this regard agreed with GreenPeace and held that: "…use of a trademark, as the object of a critical comment, or even attack, does not necessarily result in infringement

If the user's intention is to focus on some activity of the trademark owners, and is "denominative", drawing attention of the reader or viewer to the activity, such use can prima facie constitute "due cause" under Section 29(4), which would disentitle the Plaintiff to a temporary injunction, as in this case. ….Through the medium of the game, the Defendants seek to convey their concern and criticism of the project and its perceived impact on the turtles habitat."

The defendant may – or may not be able to establish that there is underlying truth in the criticism of the Dhamra Port Project, and the plaintiff's involvement in it. Yet, at this stage, the materials on record do not reveal that the only exception – a libel based on falsehood, which cannot be proven otherwise during the trial- applies in this case. Therefore, the Court is of opinion that granting an injunction would freeze the entire public debate on the effect of the port project on the Olive Ridley turtles habitat. That, plainly would not be in public interest; it would most certainly be contrary to established principles.

The rule in *Bonnard* is as applicable in regulating grant of injunctions in claims against defamation, as it was when the judgment was rendered more than a century ago. This is because the Courts, the world over, have set a great value to free speech and its salutary catalyzing effect on public debate and discussion on issues that concern people at large. The issue, which the defendant's game seeks to address, is also one of public concern. The Court cannot also sit in value judgment over the medium (of expression) chosen by the defendant since in a democracy, speech can include forms such as caricature, lampoon, mime parody and other manifestations of wit. The defendant may – or may not be able to establish that there is underlying truth in the criticism of the Dhamra Port Project, and the plaintiff's involvement in it. Yet, at this stage, the materials on record do not reveal that the only exception – a libel based on falsehood, which cannot be proven otherwise during the trial- applies in this case. Therefore, the Court is of opinion that granting an injunction would freeze the entire public debate on the effect of the port project on the Olive Ridley turtles habitat. That, plainly would not be in public interest; it would most certainly be contrary to established principles. To recall the words of Walter Lippman *"The theory of the free press is not that the truth will be presented completely or perfectly in any one instance, but that the truth will emerge from free discussion"*

For these reasons, the Court is of opinion that the application for interim injunction has to fail.

Section 51(a) (ii) of the Copyright Act: Infringement

Super Cassettes Industries Ltd. v. Myspace Inc. & Another

Citation: 2011(48)PTC49(Del)

Decided on: 29th July, 2011

Coram: **Manmohan Singh, J.**

Facts: The Plaintiff claiming to be the owner of the copyright in the repertoire of songs, cinematograph films, sound recordings etc. filed this suit for restraining infringement of copyright, damages etc. alleging that defendant No. 1 (myspace.com), a social networking site, offering a variety of entertainment applications including sharing, viewing of music, images, cinematograph works, is infringing their copyrighted material.

The Plaintiff has sought interim relief from the court for an order of permanent injunction restraining the defendants, their officers, employees, agents, servants and representatives and all others acting on their behalf and in active concert or participation with them or any of them from reproducing, adapting, distributing, communicating, transmitting, disseminating or displaying on their website www.myspace.com, www.in.myspace.com or any sub-domain thereof or otherwise infringing in any manner the cinematograph films, sound recordings and/or the underlying literary or musical works in which the plaintiff owns exclusive, valid and subsisting copyright(s) and other interim reliefs.

Issue: Whether the Plaintiff is entitled to interim relief based on the facts and circumstances of the case?

Held: The acts of the defendants fall within the realm of an infringement under Section 51(a) (ii) of the Act because of the reason that the defendants are permitting the place which is place at webspace to the users at large. The international covenant wherein India is a signatory state can be utilized only for limited purposes of bridging the gap between national law and international to the extent that it is not repugnant with the national law.

Principles for the grant of temporary injunction as laid down by apex court in ***Dalpat Kumar & Anr. vs. Prahlad Singh & Ors.;*** **AIR 1993 SC 276** provides that the court must test the case of the parties on threefold tests: (a) Prima Facie Case, (b) Balance of Convenience (c) Irreparable Damage. In the present case, Plaintiff successfully made out the prima facie case and was also able to establish prima facie that the acts of the Defendants are infringing in nature. Balance of convenience lies also in favour of the Plaintiff. Therefore, Plaintiff held to be entitled to injunction against use of copyrighted mater by the Defendants.

Section 52(1)(a)& (b) of the Copyright Act: Doctrine of Fair Use/ Fair criticism

Super Cassettes Industries v. Mr. Chintamani Rao & Ors.

Citation: MANU/DE/4400/2011

Decided on: 11th November, 2011

Coram: **Vipin Sanghi, J.**

Facts: The plaintiff sought restraint against the defendant News Channel for violation of its copyright works in Cinematograph films & sound recordings. The defendant produced a defence of fair use and fair criticism as contemplated by Section 52(1)(a) and Section 52(1)(b) of Copyright Act. It was also contended that Cinematograph films & sound recordings are included in these sections for fair use.

Held: The Court held that cinematograph films and sound recordings are not included in Section 52(1)(a) and 52(1)(b) and wherever the legislature has found it necessary has provided the exceptional use of it. Therefore, it was ordered that the defendant will have to take license for the cinematograph & sound recordings works of plaintiff. The Court held that use of work by defendant channel cannot be said to be 'fair use' and Court discussed various principles encapsulating the fair use doctrine.

This was based on the case of S***uper Cassette Industries Ltd. V. Hamar Television Pvt. Channel*** wherein a Single Judge of this court had held that "*The right to make fair use or to deal fairly with the copyrighted work includes the right to criticize not only the style, but also as the underlying doctrine or philosophy of the copyrighted work. In this regard criticism could be both "strong" and "unbalanced". Such criticism by itself will not result in forfeiture of the defence of fair dealing. Malicious and unjustified criticism may give to the aggrieved party a cause for instituting an action for defamation but it would certainly not confer a right founded in copyright. (v) In ascertaining as to what would constitute reportage of "current events" or would fall within the ambit of "criticism" or "review", Courts ought to adopt a liberal approach; (vi) In discerning as to whether a person has made fair use of copyrighted work, the standard employed ought to be that of a "fair minded" and "honest person". In the case of musical works the test would be that of a "lay hearer"; (vii) While examining the defence of fair dealing, the length and the extent of the copyrighted work which is made use of, as indicated in clause 3 above, is important, however, it cannot be reduced to just a quantitative test without having regard to the qualitative aspect. In other words, enquiry ought to be made as to whether the impugned extract forms an essential part of the work of the person in whom inheres the copyright. This may be particularly true in the case of musical works where a few notes may make all the difference;"*

The defendant-India TV was restrained from either engaging in themselves, or from authorizing, the public performance / communication to the public, reproduction, recording, distributing, broadcasting or otherwise publishing or in any other way exploiting any

cinematograph films or sound recordings or other work or part thereof that was owned by the plaintiff-Super Cassettes Industries Limited. Applications allowed.

Adoption and use of a trademark by a concurrent user is not dishonest if distinguishability of goods is clearly demonstrable.

Champagne Moet & Chandon v. Union of India & Ors.

Citation: LPA No.588/2011

Decided on: 19th September 2011

Coram: **Dipak Misra,** Sanjiv Khanna, JJ.

Facts: In this intra-Court appeal, the assail was to the legal pregnability and substantiality of the order passed by the learned Single Judge, also upheld by the IPAB, dismissing the appellant's opposition to the trademark registration of the respondent, on the ground that goods being respectively manufactured and marketed by the parties were not the same or of the same description.

The dispute between the parties arose when the appellant, being a well known French company manufacturing wine under the registered (since 1982 and 1985) trademark 'Moet' and 'Moet & Chandon' since 1906 in 150 countries around the world, filed its opposition to the registration of the trademark 'Moet's' by the third respondent which was a well known restaurant named 'Moet's' coined from the name 'Mohit' since 1967. However, the Registering Authority rejected the challenge of the appellant on grounds of prior registration and directed the trade mark application of the third respondent to proceed to registration. On appeal, IPAB dismissed the appeal of appellant. Being dissatisfied, the appellant preferred an appeal before this Court who upheld the IPAB's order. Hence, the present LPA.

Issue: Whether in the present matter, there is an infringement of trademark of the appellant by the third respondent?

Held: The could observed that even though trans-border reputation was recognized but the conception of reputation in this regard was dependent upon nature of the products associated with the reputation, popularity and goodwill associated with a particular market (herein India). That apart, the type and number of people in India who possessed knowledge, awareness of the market were to be taken into consideration. In the present matter, the appellant did not have a mass market in India in 1950's and 1960's, whereas, the third respondent had filed the trademark application in 1986 in Class 29 for "meat, fish, poultry and game and meat extracts" different from products dealt with by the appellant; and had been using the said mark since 1967.

Moreover, the appellant catered to such clients who were elitist, educated and well read and could identify the appellant's good from the rest. The court opined that once there was a distinguishable species of goods catering to educated and discernible consumers and the difference was clearly demonstrable, it was well nigh impossible to hold that the adoption and use of the term 'Moet' by the third respondent was dishonest. Also as taken note of by

the learned Single Judge, the third respondent's registration in Class 16 remained unassailed and that there was also a phonetic similarity between the name of the partner of the respondent Mr. Mohit Bindra and 'Moet'.

Hence, the court held that the opposition by the appellant to the registration of the third respondent was not within the acceptable parameters and had been rightly dismissed by the DR, IPAB and correctly not interfered with by the learned Single Judge. Finding no merit in the appeal, it was dismissed.

Assignment of trademark without the goodwill of business but with the goodwill of trade mark is not an 'assignment in gross' to the retiring partners.

M/s. Amir Chand Jagdish Kumar (Exports) Ltd v. M/s. Hindustan Hing Supplying Co.

Citation: IA Nos. 3214/2006 & IA 3975/2006 in CS(OS) No.480/2006

Decided on: 26th November, 2010

Coram: **Anil Kumar,** J.

Facts: The plaintiff had filed the suit for permanent injunction seeking restrain against infringement and passing off goods by the defendant on the ground that the defendant had adopted an identical/deceptively similar trademark to that of the plaintiff. According to the plaintiff the said trademark along with its goodwill and reputation was acquired from its predecessor M/s. Amir Chand Jagdish Kumar in the year 2005 and the predecessor had adopted the said trademark in the year 1982. While the defendant asserted that his trademark was used by a partnership under the name and style of `New Bharat Hing Supplying Company' since 1952 and that subsequently some of the partners had retired and that the said trademark was assigned to the defendant, who then started the business under the name of 'M/s. Hindustan Hing Supplying Company' which was also dissolved in the year 2000 and after that date he is carrying on business as a sole proprietor of `Hindustan Hing Supplying Company'.

Issue: Whether the assignment of trademark without the goodwill of the business name would convey the right of proprietor used by predecessor in favor of assignee?

Held: The Court held that in the partnership business, if some of the partners retire from a business bearing the name of A and the retiring partner starts a new business in the name B, the goodwill associated with the name A may not be transferred to those retiring partners who would carry on the business in the name B, however, it may not be inferred that if the trademark which the partnership was using has been solely assigned to the retiring partners, then the goodwill of the trademark cannot be used by the retiring partner. If the trade mark is assigned to the retiring partners without any reservation, all the incidents of the trade mark solely assigned will also go to such retiring partners. (para 23)

It was further held that the assignment of trademark without the goodwill of the business but with the goodwill of trade mark is not an `assignment in gross'. Hence though the business name of the defendant is different from the name of the assignor, which was the earlier partnership firm of the defendant, however, the trade mark was assigned exclusively to the retiring partners and it pertained to the same product. Therefore if the goodwill of the business, goodwill of the mark and the type of the goods are different, the continuity symbolized by the mark may break. However, if the types of goods traded under the mark are same and some of the persons trading the goods under the particular mark are the same and

goods are not traded under the trademark by the strangers to the earlier business, the continuity will not be broken. (paras. 24 & 25)

Application of the defendant under Order 39 Rule 4 of the CPC was hence allowed and the interim order directing the defendant, his agent, distributors not to use the trade mark "Aeroplane and the device "Aeroplane" for spices and cereal including packaging was vacated. Interim application of the plaintiff under order 39 Rule 1 & 2 of CPC was therefore, dismissed.

Section 29(2), of Trademarks Act, 1999- If a registered trademark is used by a person, who is neither its proprietor nor has permission from the registered proprietor for its use, he infringes the registered trademark.

Tata Sons Ltd. v. Manoj Dodia & Others

Citation: 2011 (46) PTC 244 (Del)

Decided on: 28th March, 2011

Coram: **V. K. Jain,** J.

Facts: The present suit was filed by the plaintiff seeking permanent injunction, damages, rendition of accounts and delivery of infringing materials against the defendants, who were engaged in the business of manufacturing and selling weighting scales and spring balances under the trade mark 'A-One TATA' on the ground that the use of the aforesaid trademark amounted to infringement of the plaintiff's registered trademark 'TATA'. The Plaintiff claimed that its trade mark enjoyed an unparalleled reputation and goodwill and had acquired the status of a "well known" trade mark on account of continuance and extensive use over a long period of time and that the impugned mark of the defendants was inherently deceptive and constituted a misrepresentation to unwary consumers that goods of the defendants were either of the plaintiff company or approved by it.

Issue: Whether the defendant has infringed the Plaintiff's Trade mark under Section 29(4) of the Trade marks Act?

Held: The court observed that the existence of actual confusion or a risk of confusion was necessary for the protection of a well known trade mark. In determining whether a trademark was a well known mark or not within the local jurisdiction of a place, its reputation was necessary to be assessed. Mark "TATA" was a household name, not only in India but throughout the world and therefore was well-known as contemplated in Section 11 (6) of Trademarks Act, 1999 on account of its distinctiveness and residual goodwill and reputation. The court thus opined that the trademark TATA, when used as a word, mark or device or in conjunction with some other words, in relation to any goods or services was, therefore, likely to be taken as a connection between house of TATAs and the goods or services, which were sold under this trademark or a trademark which was similar to it.

Defendant incorporated the whole of the trade mark of Plaintiff by using the word "TATA" along with the word "A-ONE" on the products being sold by him and such a use was held to be very likely to cause confusion in the mind of the consumers, as to the source of the product offered to them and also give an impression that the mark being used by the Defendants was in some manner or the other associated with the registered trade mark of the Plaintiff company. By using the trade mark TATA, Defendant had tried to take an unfair advantage by encashing upon the brand quality and goodwill, which the mark TATA enjoyed in the market.

Thus, defendant was held to have infringed the trade mark of plaintiff under Section 29(1) and 29(2) of the Trade Marks Act, 1999 and a case of passing off was also made out against him. Hence, Defendant also infringed plaintiff's trade mark under Section 29(4) of the Trade Marks Act. Further, since the defendant was not a distributor/agent of any company belonging to Tata Group nor had he been permitted to use the aforesaid trade mark owned by the Plaintiff Company, use of that mark by him on his invoice was held to constitute infringement of the abovesaid trade mark. Thus the court granted permanent injunction in favour of the plaintiff and also awarded punitive damages amounting to Rs. 2 Lacs to the Plaintiff Company.

Copyright Board shall grant interim relief as per provisions of law and after giving the parties a meaningful opportunity of being heard.

Music Broadcast Pvt. Ltd. v. Super Cassettes Industries Ltd.

Citation: 183 (2011) DLT 23

Decided on: 1st September, 2011

Coram: **Vikramajit Singh**, Siddharth Mridul, JJ.

Facts: The appellant filed the present appeal challenging the order of the Copyright Board to the effect that it was powerless to grant any interim relief, or in other words, permit the exploitation of a copyrighted work on appropriate terms, during the pendency of proceedings under Section 31 of the Act.

Issue: Whether the Copyright Board possesses power to pass interim orders in proceedings under Section 31 of the Copyright Act, 1957

Held: The court observed that Section 31 of the Act postulateed the grant of a compulsory licence. According to the said provision, even though a compulsory licence was not an inherent right, however, that did not mean that interim orders could not be passed by the Copyright Board. In the factual matrix of the present case, the dispute had arisen between the parties because of a disagreement on the quantum of fees demanded or offered to be paid. The court opined that if interim relief was not granted, the immediate and direct consequence would be the complete frustration of the rights under Section 31 of the Act.

The court noted that if interim relief was to be rendered impermissible, the broadcasters would become disentitled to play any part of the repertoire of music owned by the copyright holder because of the latter's refusal to grant a licence. This would, in effect, have compelled the broadcaster, or any party similarly placed, into succumbing to the demands of the owners. Litigation does not come to an end in days or months but is protracted over years and sometimes decades. If, during the long period litigation remained protacted, a party was unable to play or broadcast music, even though it was willing to pay a reasonable fee for it, and even though there was no other reasons for the refusal to grant a licence, it would have no alternative but to eventually give up its action under Section 31 of the Act. The purpose of the enactment, in such a case would, therefore, be rendered futile and nugatory.

The court while it opined that an interim protection should be granted where the controversy concerned only the quantum of licence fee, also stated that the Board must, after giving the parties a meaningful opportunity of being heard, return an opinion on all the three factors and if it finds that all the three factors were in favour of the applicant, it should grant interim relief.

Law presumes the ownership of the trade mark to vest in the manufacturer who puts the mark on the product.

Double Coin Holdings Ltd. and Anr. v. Trans Tyres (India) Pvt. Ltd.

Citation: 181 (2011) DLT 577

Decided on: 20th April, 2011

Coram: **V.K. Jain,** J.

Facts: The present suit was filed by the plaintiff against the defendant, seeking injunction restraining the defendants in the suit from manufacturing, selling or advertising any goods or services using the trademark Double Coin or any other mark identical with or deceptively similar to the plaintiffs mark and holding themselves out as owners of the mark Double Coin. The plaintiff had previously filed a suit for cancellation of the trademark obtained by the defendant before the IPAB which was still pending adjudication.

The dispute arose when the plaintiff, a Chinese Tyre and Tube Company, selling its tyres under the trademark "Double Coin" across the globe and also supplying tyres to various dealers such as the defendant, in India, came to know that the defendants had registered the plaintiff's trade mark "Double Coin" in India in respect of tyres and tubes in its own name. The defendant challenged the plaintiff's suit on the ground that it had obtained registration with the consent of the plaintiff and to its full knowledge.

Issue: Whether injunction should be granted to the plaintiffs in the facts of the present case?

Held: The court observed that the ownership of a trademark as a general rule vested in the person, who puts the mark on the product. Mere use of the expression "imported by/brought to you by/marketed by" on the promotion and advertisements carried out by the importer/distributor/marketer of the goods was not sufficient to displace the presumption of ownership and goodwill of the brand vesting in the manufacturer of the product. Moreover, the Court was required to keep in mind that even a foreign manufacturer could acquire domestic goodwill in the trademark in addition to the goodwill which it enjoys in foreign market. The most important test in this regard was as to whether customer identified the trademark with the manufacturer or with the importer/distributor.

Admittedly, the tyres and tubes, which the defendant had imported from the plaintiff's agent, had the mark Double Coin and logo of the plaintiff's company on them during the process of manufacture and were sold in India by the defendant in the same condition in which they were imported, without concealing the origin of the product. Moreover, the customers purchasing these tyres, were transporters and not casual customers and it was not

as if the customers were unaware of the tyres being a Chinese product, manufactured by the plaintiff's company.

Thus the court held that the plaintiff being the first user of the trademark in question only had the legal right to use that mark and, therefore defendant, despite having a registration in its favour, did not have any legal right to use the said trademark on any tyre or tube which was not manufactured by the plaintiff as the customer-purchaser was likely to be deceived since he would assume that the tyres had been manufactured by the plaintiff though that would not be factually correct. The defendant was thereby restrained, during pendency of the suit before IPAB, from selling any tyre or tube bearing the trademark Double Coin or a mark deceptively similar to the aforesaid mark unless that product had been manufactured by the plaintiff's company. Therefore, the court allowed the application for interim injunction till the pendency of the suit.

Patents Act and Rules 2003, 'Request for Examination'- Sections 11B (1) and (4), Rule 24B

Nippon Steel Corporation v. Union of India

Citation: 2011 (46) PTC 122 (Del), 2011 III (Del) 226

Decided on: 8th February, 2011

Coram: **S. Muralidhar, J.**

Facts: An Indian National Phase Patent application was filed by the Petitioner within the time period of 31 months from the priority date as prescribed by Rule 20 (4) (i) of the Rules, as amended by the Patents (Amendment) Rules, 2006. Under Rule 24-B of the Rules a Request for Examination ('RFE') has to be made in terms of Section 11-B (1) of the Act within a period of 48 months from the date of priority of the application or the date of filing the application, whichever is earlier. Since the priority date in respect of the Petitioner's patent application was 9th February 2006, being the date of filing of the Japanese Patent application, the RFE had to be made on or before 9th February 2010.

Due to a docketing error at the office of the Petitioner's attorney, the deadline for filing the RFE in India was missed. Steps were taken on 28th October 2010 to rectify the said error by filing an application for amendment of the priority date of the subject application under Section 57 (5) of the Act. The amendment sought was to disregard the Japanese priority date of 9th February 2006 and to change the application's priority date to the international filing date of the PCT application i.e. 9th February 2007. The idea was that by making this amendment, the deadline for filing the RFE would stand extended to four years from 9th February 2007 and would expire on 9th February 2011. However, this request for amendment was rejected by the Controller of Patents and Designs as non-filing of RFE had meant a deemed withdrawal of the application under Section 11-B (4).

Held: The Court held, while Section 57 (5) of the Act does provide for amending the priority date, the power under Rule 137 cannot be invoked by the Office of the Controller of Patents in the circumstances of the present case to permit an amendment to a patent application that has already been 'withdrawn' by operation of Section 11-B (4) of the Act. Thus, the Court rejected the submission that the time-limits under Section 11-B (1) of the Act read with Rule 24-B of the Rules, notwithstanding Section 11–B (4) of the Act, are merely 'directory' and not mandatory. It held that the provisions of the Act and the Rules have to expressly reflect the legislative intent to permit relaxation of time limits, absent which such relaxation cannot be 'read into' the provisions by a High Court exercising powers under Article 226 of the Constitution.

To enjoy monopoly in use, a mark has to be essentially of a distinct character.

Radico Khaitan v. Carlsberg India Private Limited

Citation: 2011 (48) PTC 1 (Del)

Decided on: 16th September, 2011

Coram: **Manmohan Singh,** J.

Facts: Plaintiff filed the present application for interim injunction under Order 39, Rule 1 & 2 r/w Section 151, CPC, alongwith a suit for permanent injunction under Sections 29, 56 and 135 of the Trade Marks Act, 1999, against the defendant, engaged in manufacturing and marketing of alcoholic beverages more specifically beers, challenging the use of the mark/numeral 8 by the Defendant as a primary mark despite PALONE 8/OKACIM PALONE, being the Defendant's main brand, on the ground that the plaintiff had been using the mark '8 PM' in relation to whisky extensively since 1999. It was further alleged by the plaintiff that the conduct of the defendant was in violation of Plaintiff's statutory and common law rights, therefore, the Defendant be restrained from using the Numeral 8 in relation to their products.

Issue: Whether the present case warrants the grant of interim injunction on account of alleged infringement of trademark?

Held: The court opined that after testing numeral 8 on principles of honest trade practices as envisaged in Section 30 of the Act, in light of such overwhelming uses by other tradesmen coupled with the nexus of the numeral in trade, it can be safely said that use of the numeral by other persons including defendant in respect of alcohol or beers could not be said to be dishonest and would be protected by Section 30 of the Act. The court also observed that numerals like 8.5 or atleast 8 were a requirement of the trade denoting the strength of the alcoholic beverage.

In the present case, the competing trade marks were the plaintiff's '8 PM' in respect of whisky and the defendant's 'PALONE 8' in respect of beer. Even though the marks of both the plaintiff as well as the defendants were not identical and the defendant was not using the said trademark in relation to Whiskey and Mineral Water for which the plaintiff had obtained registration under the Trademarks Act, but at best they could be considered as deceptively similar as numeral 8 in both the trade marks was common.

Therefore, the court held that even though the defendant was not liable to be restrained from using the mark numeral-8 completely as prayed by the plaintiff in the injunction application, he was directed to use the mark in a different writing style and in a different colour other than golden colour to avoid any bleak chances of misrepresentation. The court also directed the defendant to use the mark PALONE and numeral-8 together in the same line and in the same size of lettering and fonts. The defendant was granted time to make such changes and

amendment in the packaging and advertisement material as well as in slogan ‘8 KA DUM’ if used by the defendant. The court further held that since the plaintiff had failed to satisfy the ingredients for grant of interim injunction, therefore the plaintiff’s application was dismissed.

Section 32, Trade Marks Act, 1999- The use of the mark does not automatically translate into distinctiveness.

Bhole Baba Milk Food Industries Ltd. v. Parul Food Specialities (P) Ltd.

Citation: 177 (2011) DLT 109

Decided on: 19th January, 2011

Coram: **Rajiv Shakdher,** J.

Facts: The present applications arise out of an initial suit filed by the petitioner seeking reliefs qua infringement of its registered trademark and copyright in relation to a dispute over the exclusive right to use the name of one of the reigning deities "KRISHNA". The plaintiff claims exclusivity over the abovesaid word mark and label mark which includes a pictorial depiction as well. Since during the course of the proceeding, the defendant placed on record an alternate representation of its trademark including alterations in the packaging, color scheme and manner of depiction of the word "KRISHNA", the dispute stood substantially narrowed to the usage of the word "KRISHNA" by the defendant.

Issue: Whether the mark has acquired sufficient distinctive character so as to qualify as a trade mark?

Held: The court opined that in order to come to a conclusion whether or not the mark had achieved a distinctiveness, it was required to be established that the trade origin got related only to the propounder of the mark and none other and also that the mark had sufficient distinctive character to become a trade mark.

In the present case, the court observed that it could not be said that the mark in question had attained a reputation which brought to mind only the plaintiff's product on a mere invocation of the word 'KRISHNA'. Moreover, substantial growth in sales alone could not necessarily transcend in the mark attaining a secondary distinctiveness of a degree which ought to give the owner of a common name, in this case, a deity's name, a right to monopolise its use to the exclusion of all others. Applying the test of distinction, the court held that a name as common as 'Krishna' in the cultural context of our country could not be considered to have achieved such a secondary distinctiveness in the plaintiff's case that it could be held to be inalienable related by the consumers to the plaintiff's product only.

Further, prima facie there was nothing to show that usage of impugned mark by defendant was dishonest or lacks any bonafide and further the packaging and colour scheme and manner of depiction of word KRISHNA was also offered to have been altered. Hence, the order of interim injunction was modified to the extent that the defendant was permitted to use the altered label mark keeping the prominence of "Parul's" and "Lord" same as that of "Krishna".

To establish copyright, a 'work' is required to satisfy the test of "skill, judgment and labour".

Syndicate of the Press of the University of Cambridge on behalf of the Chancellor, Masters and School v. B.D. Bhandari & Anr.

Citation: MANU/DE/7256/2011

Decided on: 3rd August, 2011

Coram: **A. K. Sikri**, Suresh Kait, JJ.

Facts: The present appeal was filed by the appellant against the judgment by the learned Single Judge, whereby the Judge dismissed the suit filed by the appellant to restrain the defendants (respondents in this appeal) from selling books published by them, being aggrieved of the fact that the books contained illegal and unauthorized *ad verbatim* reproduction of literary content of the grammar exercises and keys thereto given in units 1 to 120 of the appellants' publication titled "Advance English Grammar by Martin Hewings".

The Ld. Single judge had dismissed the suit of the appellant on the ground that there was no originality or invention displayed in composing grammar sentences or exercises and hence the appellant's work could not have been constituted as original literary, dramatic, or artistic works.

Issue: Whether the appellant's work was entitled to copyright protection and whether the work of the respondent in publishing the guides amounts to infringement of the appellant's copyright over the aforementioned English Grammar book.

Held: Pertaining to the first issue in dispute i.e. whether the appellant's work was entitled to copyright protection, the court observed that upon perusal of the contents of the book published by the appellant, it was apparent that while structuring the book to teach grammar to more advanced students of English as a self-study, the author had given equal importance to the practice exercises, which thus formed an integral and inseparable part of the book. In such a scenario, it held that the Ld. Trial court had erred in failing to appreciate the creativity, skill and judgment employed by the appellant/author in devising the exercises and thus upon the application of legal principles held that the appellant definitely had a copyright in the said work.

Dealing with the question of whether the appellant had relinquished its copyright by dedicating the same in public domain, the ourt held that merely because the book in question was prescribed by the University for its students, could not automatically mean that the author was snatched of its copyright or that the appellant had relinquished its rights through his own acts or omissions. Moreover, the defence of "fair use" under Section 52(1)(h) of the Act only provided to a teacher and pupil and not to a publisher such as the respondent in the present case. Had the defence been allowed to a publisher, it would encourage infringers and

lead to exploitation of copyrighted work for commercial gains and benefits. Hence 'Fair use' under Section 52(1)(h) of the Act could not be said to have had any application in the present case.

However the Court held that the intention of the respondent in authoring and publishing the notes in dispute, was only to provide a guide to the students to understand the books prescribed by the University. Furthermore, there was no attempt on the part of the respondents to represent to the public that any portion of the appellant's book was a work of the respondent. Thus, if the two works were to be taken together and considered as a whole, it could be conclusively established that the guide of the respondents was in the form of a review of the original work, and that thus there was no infringement of the copyright of the appellant.

Hence, the suit was decided in favour of the defendants/respondents and against the plaintiff/appellant and the order of the Ld. Single Judge was upheld to the extent that the respondent's guide was not an infringement of the appellant's work and was entitled to copyright protection of its own.

LAW OF CONTRACT

Section 16(C) of Specific Relief Act- A party can claim specific performance only if it is willing to perform its part of the contract.

Shri B.B. Sabharwal and Anr. v. Sonia Associates

Citation: 2011 (122) DRJ 98

Decided on: 14th January, 2011

Coram: **V.K. Jain**, J.

Facts: The present suit is for seeking specific performance of Agreement to sell entered into between the petitioner and the respondent for sale of property, or in the alternative, for recovery of Rs.40 lacs as damages, on the ground of respondent's failure to satisfy the conditions set out in the agreement for completion of sale transaction.

Issue: Whether the petitioner was entitled to a decree for specific performance?

Held: In view of the fact that the Agreement to Sell did not specifically provide for specific performance nor barred it and it provided for payment of twice the earnest money to the petitioner if the contract was breached by the respondent, the court held that it would not be correct to contend that only because such a clause exists, a suit for specific performance of a contract was not maintainable. Therefore, the plaintiff was entitled to seek specific performance even in the absence of a specific provision therefor, subject to his proving breach by the defendant and his readiness and willingness to perform his obligation in terms of the contract.

However, in the present case, even though it was established that a breach of contract had been committed by the respondent, the petitioner failed to establish his readiness and willingness to perform his part of the contract. The obligation of the plaintiffs to aver and prove his readiness and willingness to perform his part of the contract was observed to be a statutory obligation incorporated in Section 16(C) of Specific Relief Act, based on the principle of equity and fair play and required to be performed by the person who is seeking specific performance of the contract, irrespective of any default on the part of the other party to the agreement. In the present matter, the petitioner set up a false plea of payment which was never actually made to the defendant and therefore failed to satisfy his own statutory obligation under the contract.

The petitioner was therefore held to be not entitled to specific performance of the contract or Rs. 40 lacs as damages but the respondent was held liable to pay Rs. 10 lacs to the plaintiff based on the contractual agreement between the parties.

Pledged security cannot be appropriated by the pawnee without a mandatory notice under Section 176 of the Contract Act to the pawner.

GTL Limited v. IFCI Ltd. & Ors.

Citation: I.A. No. 11586/2011 in CS (OS) No. 1771/2011

Decided on: 29th August, 2011

Coram: **Manmohan Singh**, J.

Facts: The present interim application under Order 39 Rule 1 and 2, CPC, has been filed by the plaintiff seeking an order of injunction against the defendant no. 1 and 2 against sale of share pledged by the plaintiff to the defendant no. 1 and also another application under Order 2 Rule 2 CPC seeking relief to grant leave to the plaintiff to file suit for damages against the defendants, on the ground that the Defendant no. 1 had invoked the pledge made by defendants no. 3 (group company of plaintiff), without prior notice to the plaintiff under Section 176 of the Contract Act, 1872 and that the entire action of the defendant no. 1 was void ab initio being contrary to law.

Issue: Whether the plaintiff has any locus to file the present suit challenging the invocation of pledge by the defendant no. 1 without compulsory notice to plaintiff, in lieu of the alleged default on the part of defendant No.3 and plaintiff in restoring the stipulated security cover?

Held: The court observed that even though the failure of the defendant no. 3 and plaintiff (pawner) to raise the security cover to two times of the facility amount within the stipulated time despite being issued various notices, constituted an event of 'default' under Clause 13.1 (v) & (w) of the Facility Agreement, a right to redemption of the pledge still existed with the pawner till the time sale of the goods was made by the pawnee (defendant no. 1). Further, any sale effected by the pawnee, without giving notice mandatory under Section 176 of the Contract Act to the pawner, was vitiated and void as the right to sell is a qualified right which enures to the pawnee only after giving reasonable notice of sale to the pawner. Hence the suit against defendant no. 1 was held to be maintainable in view of the illegal invocation of the pledge and consequent unilateral sale of the pledged goods (plaintiff's shares) which amounted to forfeiture, impermissible under the law of pledge.

Further Held: On the question of whether the plaintiff had any locus to file the present suit, it was observed that the person who delivers the actual or constructive possession of goods as security for the payment of the debt and/or performance of a promise is defined as a bailor or pawner. In the present case, the plaintiff's shares being secured in the debt, his role in the agreement as a co-pawner or joint promissor could not be obviated. Thus both the defendant no. 3 and the plaintiff were entitled to redemption and the plaintiff, not being a stranger to the contract had the locus to file the present suit and was also one of the required noticee under Section 176 of the Indian Contract Act.

The factum of readiness and willingness to perform one's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances.

J.L. Gugnani (HUF) v. O.P. Arora &Ors.

Citation: 2011 IX AD(Delhi) 66

Decided on: 30th September, 2011

Coram: A.K. Sikri, **M.L. Mehta**, JJ.

Facts: This appeal was directed against the judgment dismissing the suit of the appellant for specific performance of contract on the ground that the plaintiff's stoppage of payment without any prior notice to the defendant amounted to the most fundamental and essential breach of the agreement i.e. the financial capacity to pay, and specific performance of such a contract cannot be granted when the agreement stood frustrated due to the appellant/plaintiff's conduct.

Issue: Whether the plaintiff is entitled to specific performance of the agreement to sell on account of his readiness and willingness to perform his part of the agreement.

Held: There is a distinction between readiness to perform the contract and willingness to perform the contract. Readiness may mean the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. The factum of willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and willing to perform his part of the contract.

The facts of the present case demonstrate that the petitioner was neither willing nor having the capacity to perform his part of the contract, having no financial capacity to pay the consideration in cash as contracted and intended to bide time which disentitles him to the specific performance of the contract, time being the essence of it.

Section 19(1) of the Copyright Act- There must be an execution of actual assignment agreement in writing.

Pine Labs Pvt. Ltd. v. Gemalto Terminals India Pvt. Ltd. and Ors.

Citation: 2011 VIII AD(Delhi) 380

Decided on: 3rd August, 2011

Coram: **A. K. Sikri**, Suresh Kait, JJ.

Facts: The appellant preferred the present appeals against the order of the Ld. Single Judge, that vacated the ad-interim ex-parte injunction passed in favour of the appellant on the ground that not only was the ownership claim of the source code by the appellant doubtful but also that the Master Agreement for Development Services (MSA) between the appellant and the defendant pertaining to the source code used in the software development, appeared to be an assignment in equity or an agreement to assign rather than actual assignment agreement.

As according to the facts of the case, the parties, in consideration of their growing business relationship, had entered into a "Master Agreement for Development Services" containing certain terms, on which the appellant was to provide certain services to the respondent. Further terms were to be set out in the Subsidiary Agreements which were to be agreed between the parties from time to time for each new project. Dispute between the parties arose when the respondent no. 1 sub-contracted one of its projects to the respondent No. 3 and the appellant, alarmed by the prospect of distribution of the source code of the software developed by it to the third party, filed the suit seeking restraint against infringement of its copyright in the aforesaid source code and mandatory injunction relating to enforcement of its moral right under Section 57.

Issue: Whether the agreement entered into between the parties was an agreement *in presenti* or an agreement to 'assign' only.

Held: The Court held that in plain meaning, the language used in Clause 7 of the agreement was *in presenti* whereby the appellants had assigned the copyright and other intellectual rights in the project material to the respondents, with the use of the word "assigns" and that made it clear that the respondent no. 1 would "be entitled" to all such rights which the appellant again assigned. The Court further held that Clause 7.2 enabling the respondent to obtain, defend and enforce its right in the project material assigned to the appellant, was only for the purpose of securing the respondent's position and could not be said to have a bearing to Clause 7.1 which was to be construed singularly to decide the purported issue.

The Court also rejected the observations made by the Ld. Single Judge pertaining to the contractual relationship being that of principal and agent between the parties as being contrary to the intent as expressed in Clause 18 and 20 of the MSA which made it clear that the agreement was not to be taken to create any joint venture, partnership or other similar

agreement and that both the parties were specifically leveled as “independent contractors” with further specific clarification that “neither party is or may hold itself out to any third party as being the agent of the other”.

Thus the Court while observing that the MSA being an ‘agreement to assign’ had no bearing upon the instant dispute and thus the respondent’s defence was all but crumbled, held that the ingredients necessary for grant of injunction against the use of the programme by the respondent, stood satisfied in favour of the appellant and thereby the appeal was allowed and the impugned order of the Ld. Single Judge set aside and upheld the injunction order passed earlier against the respondents.

LAW OF EVIDENCE

LAW OF EVIDENCE

Scope of Section 91 and 92 of the Evidence Act, 1872- "Best evidence rule"

Shailendra Nath & Anr. v. Kuldip Gandotra

Citation: 2011(180) DLT 769

Decided on: 13th May, 2011

Coram: Vikramajit Sen, **Siddharth Mridul**, JJ.

Facts: The present appeal was filed by the appellant against the order of the Ld. Trial court rejecting evidence of any oral agreement, between the parties, for the purpose of contradicting, varying, adding or subtracting from the terms of a written agreement, already entered into by the parties. The Appellants had entered into an Agreement to Sell with the Respondent in respect of a leasehold property wherein it was agreed that the appellants were to get the said flat converted into freehold. However, later it was urged that it was the responsibility of the Respondent to get the subject property converted from leasehold to freehold as per an oral agreement between the parties and since he had failed to complete his obligations under the Agreement to Sell, the contract stood rescinded on the ground that time was the essence of the contract.

Issue: Whether evidence of an oral agreement between the parties can be used to substitute, contradict or alter conditions as embodied in a written contract?

Held: As a well settled principle of interpretation, the Evidence Act forbids proving the contents of a writing other than by the writing itself. The doctrine described by the Supreme Court as "best evidence rule" is in reality a doctrine of substantive law, namely, that in case of a written contract all proceedings and contemporaneous oral expressions of the thing are merged in the writing and displaced by it. Thus an oral agreement as contended by the appellant to the effect that the Respondent would be responsible for getting the said flat converted into freehold is devoid of merit being contrary to Clause 4 of the Agreement to Sell which stipulates that the Appellant was to get the said flat converted from leasehold to freehold.

S. 118 of Evidence Act- Evidence of a child cannot be rejected per se but should be closely scrutinized.

Shama Parveen v. State (NCT of Delhi)

&

Tauhid Raza @Guddu v. State (NCT of Delhi)

Citation: 185 (2011) DLT 103

Decided on: 6th September, 2011

Coram: Badar Durrez Ahmed, **Veena Birbal**, JJ.

Facts: The present two appeals are filed against the order of the Ld. Trial court convicting and sentencing the appellants to life imprisonment under Sections 302/201/120-B IPC, on the ground that the appellants were falsely implicated and conspired against by the brother of the deceased in connivance with the police.

Issue: Whether the testimony of a child witness can be a credible piece of evidence?

Held: It is well settled that a child witness if found competent to depose to the facts and if found reliable, his/her reliable evidence can be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The only precaution which the court should bear in mind while assessing the evidence of a child is that the witness must be reliable and that there is no likelihood of the child having been tutored.

In the present case, the contention raised by the appellant/wife that her son was a tutored witness, there being a day's delay in his statement to the police, raised no force with the court. The fact that the child had deposed against his own mother and also stood the test of cross examination, his disposition was held to have had a ring of truth in it. Thus on the basis of such evidence of the child and also other evidence on record, motive and conspiracy between the appellants was clearly established and the findings of the Ld. Trial court were held to be correct. Appeals were found to be without merit and therefore dismissed.

Conviction can be based on circumstantial evidence only if circumstances are proved beyond doubt and evidence is unimpeachable.

Lakhan Singh @ Pappu v. The State of NCT of Delhi

Citation: MANU/DE/3603/2011

Decided on: 16th September, 2011

Coram: Pradeep Nandrajog, **Sunil Gaur**, JJ.

Facts: The appellant/accused was convicted and sentenced to imprisonment for life by the trial court for commission of murder relying on strong evidence of motive, last seen, recovery of the weapon of offence, extra judicial confession, and conduct of appellant/ accused. Thus, the present appeal.

Issue: Whether the mere absence of bloodstains on the recovered weapon of offence takes away the evidentiary value of such recovery?

Held: When the conviction of the appellant/accused is based on clinching and reliable evidence proving circumstances of motive, last seen, recovery of the weapon of offence, extra judicial confession, and conduct of appellant/ accused, then mere absence of bloodstains on the weapon of offence recovered after a considerable lapse of time cannot be said to have broken the chain of circumstantial evidence and such conviction cannot be successfully challenged on just this ground. This is because, the bloodstain may be indinguishable from the substrata or change color or be wiped off by the wind, rain, heat or light.

Finding no substance in the appeal, it was dismissed and conviction of the accused was accordingly upheld.

Section 32, Indian Evidence Act, 1872- Dying declaration made by deceased should inspire full confidence to base conviction of the accused.

Kanta & Ors. v. State

Citation: MANU/DE/7054/2011

Decided on: 14th November, 2011

Coram: Ravindra Bhat, **Pratibha Rani**, JJ.

Facts: The appellants in the present case, have challenged their conviction and sentence under Section 498-A/302/34 IPC on the ground that the dying declarations made by the deceased do not inspire confidence and that every unnatural death is not a dowry death or murder.

Issue: Whether the dying declarations made by the deceased can be relied upon for basing the conviction of the accused under Section 498A/302/34, IPC?

Held: It was held that on an application of the standard as laid down by the Supreme Court, the dying declaration should *'inspire full confidence of the Court in its truthfulness and correctness. The court, has always to be on guard to see that the statement of the deceased was not a result of either tutoring or prompting or a product of imagination....'*. (Ref: Khushai Rai v. State of Bombay; AIR 1958 SC 22). Even in cases of multiple dying declarations, conviction can be based if the statements are consistent in material particulars.

However, in the present case, none of the multiple dying declarations satisfied the tests of consistency both vis-a-vis their making, as well as the truth of their contents and reliance could not be placed on these dying declarations to base conviction for the offence punishable under Sec.302 IPC, which was thus set aside.

Further Held: Even though conviction of the appellants could not be sustained under Section 302 IPC, they were held guilty and convicted for having committed the offence punishable under Sec.304-B, the ingredients of 'dowry death' having being satisfied by the prosecution against the appellants. Presumption under Sec.113-B of the Evidence Act to the effect that when any one subjects a deceased wife to cruelty before her death shall presumed to have caused the dowry death if it is shown that soon before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry, is the presumption incorporated in Section 304-B IPC as well, which stood satisfied.

In view of above the court was of the considered view that the deceased was treated with cruelty by the appellants in her matrimonial home and that the appellants could be presumed to have committed the dowry death.

Requirement of doctor's endorsement as to mental fitness of deceased, while recording a dying declaration is merely a rule of prudence.

State (Govt. of Delhi) v. Smt. Sumitra & Ors.

Citation: MANU/DE/4049/2011

Decided on: 17th October, 2011

Coram: Pradeep Nandrajog, **Sunil Gaur**, JJ.

Facts: The present appeal lies before the court challenging the order of Ld. Trial court wherein the dying declaration of the deceased was discarded as being not trustworthy evidence against the accused on the ground that certification from a doctor regarding the mental fitness of the deceased was absent at the time of recording her statement.

Issue: Whether the respondent's acquittal while discarding the deceased's dying declaration was erroneous and unsustainable?

Held: The court observed that what was essential to be noted was that the person recording the dying declaration must have been satisfied that the deceased was in a fit state of mind. Where it was proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it could be acted upon provided the court ultimately held the same to be voluntary and truthful.

In the present case there was an apparent fatal omission by the trial court while appreciating the MLC declaring the deceased as conscious and oriented and fit for statement on the day of the incident, the unchallenged evidence of the SDM who recorded the deceased's statement, and also the failure of the respondent-accused to confront the abovesaid evidence. The court further opined that once the accused had failed to confront such testimony, she could not now legitimately assert that evidence regarding mental fitness of deceased at the time of recording of her statement was lacking.

Hence, in the instant case, the court found the dying declaration to be completely trustworthy and inspiring utmost confidence, with no iota of doubt about the mental faculty of the deceased to give the statement and held that the approach of the trial court, in whimsically discarding the resolute testimony of SDM, was not only patently perverse but had also resulted in grave miscarriage of justice. Hence, the court relying upon the dying declaration of the deceased, held the charge of murder as proved beyond all doubt against the respondent-accused. The appeal was therefore allowed and the impugned order of the trial court set aside, while convicting the respondent-accused guilty of murder and sentencing her to imprisonment for life.

LAW OF RENT

Section 14(1)(e) of Delhi Rent Control Act, 1958- If tenant discloses grounds and pleads a cause which prima facie is not baseless, unreal and unfounded, the Rent Controller is obliged to grant him leave to defend his case against the eviction sought by the landlord.

Jatinder Singh Nanra v. Sarita Rani

Citation: 2011 (124) DRJ 574

Decided on: 12th July, 2011

Coram: **P. K. Bhasin**, J.

Facts: The petitioner-tenant, being aggrieved of the eviction order issued against him as a result of dismissal of his leave application by the Additional Rent Controller, has filed the present revision petition under section 25-B(8) of the Delhi Rent Control, 1958, seeking leave to defend the eviction petition filed by the respondent-landlord.

Issue: Whether it is pertinent for a tenant to establish a strong case against the landlord at the stage of seeking the leave to defend itself?

Held: Rent Control legislations have been acknowledged to be pieces of social legislation which seek to strike a just balance between the rights of the landlord and the requirements of the tenants. As per Section 25B (4) & (5) of the Delhi Rent Control Act, 1958, burden placed on a tenant is light and limited. At the stage when the tenant seeks leave to defend, it is enough if he makes out a prima facie case and is not expected to substantiate his pleas which could be done only when he has been given an opportunity to contest the eviction petition and to adduce necessary evidence. The law only envisages the disclosure of facts and not the proof of such facts.

In the present matter, the petitioner - tenant was able to, prima facie, disclose such facts as would have disentitled the landlord from obtaining an order of eviction which was held to be enough at the time and the petition, therefore, succeeded. The impugned order passed by the Learned Additional Rent Controller was set aside.

Section 14(1)(e) of Delhi Rent Control Act, 1958- When a triable issue is raised, a duty is placed on the Rent Controller by the statute itself to grant leave.

Dharmath Aushdhalaya Parbandhak Committee v. Mool Raj Aggarwal

Citation: (2011) 163 PLR 9

Decided on: 4th May, 2011

Coram: **P. K. Bhasin**, J.

Facts: The petitioner-tenant, being aggrieved of the eviction order issued against him as a result of dismissal of his leave application by the Additional Rent Controller, filed the present revision petition under section 25-B(8) of the Delhi Rent Control, 1958, seeking leave to defend the eviction petition filed by the respondent-landlord.

The petitioner-tenant sought leave to contest the eviction petition on the ground that the property in question was situated in a residential area and thus cannot be used for a commercial purpose by the respondent and, therefore, his case that he required the tenanted premises for his bona fide use could not be accepted.

Issue: Whether the facts disclosed by the petitioner-tenant raise triable issues on account of which the revision petition for leave to defend deserves to be allowed?

Held: The point raised by the petitioner-tenant that the tenanted premises cannot be used as a shop at all being situated in a residential area requires consideration and in case it succeeds in establishing the same the respondent-landlord may not finally succeed in getting the tenanted premises vacated for running a shop therein. Since it cannot be said at this stage that the respondent requires the tenanted premises bona fide for opening a shop or not, he cannot be entitled to an order of eviction until the petitioner has been given an opportunity to contest the eviction petition and to adduce necessary evidence.

Therefore, the petition was allowed and the petitioner-tenant was granted leave to contest the eviction petition but only in respect of the plea that the tenanted premises cannot be used for running a shop.

Section 25B(5) of the Delhi Rent Control Act, 1958- An application seeking leave to defend has not to be decided as an eviction petition after full trial.

Satpal v. Sahi Ram

Citation: MANU/DE/2098/2011

Decided on: 27th May, 2011

Coram: **P. K. Bhasin**, J.

Facts: The petitioner-tenant, being aggrieved of the eviction order issued against him as a result of dismissal of his leave application by the Additional Rent Controller, filed the present revision petition under section 25-B(8) of the Delhi Rent Control, 1958, seeking leave to defend the eviction petition filed by the respondent-landlord.

The petitioner-tenant sought leave to contest the eviction petition on the ground that it was filed only to coerce the petitioner to increase the rent akin to other leased properties that the respondent was getting vacated and re-letting the same from time to time at higher rent-value.

Issue: Whether the facts disclosed by the petitioner-tenant raise triable issues on account of which the revision petition for leave to defend deserves to be allowed?

Held: The leave application filed by the petitioner-tenant was found to have raised triable issues which could not be decided without giving him an opportunity to substantiate the same by producing relevant material/evidence and cross-examining the landlord. Moreover, the circumstance of the landlord having increased the rent of other tenants did appear to bring an element of *mala fides* in his decision to initiate eviction case against the petitioner and in such cases it is justified to assume that eviction petition filed by the landlord against tenant appears to have been filed to increase the rent in respect of the tenanted premises. Thus having set aside the order of the Rent Controller, the petition was accordingly allowed and the petitioner was granted leave to defend the eviction petition.

Section 14(1)(e) of the Delhi Rent Control Act, 1958- Wherever another residential accommodation is shown to exist as available then the court has to ask the landlord why he is not occupying such other available accommodation to satisfy his need.

Dolly Chandra & Anr. v. Rameshwar Prasad

Citation: MANU/DE/3471/2011

Decided on: 8th September, 2011

Coram: **P. K. Bhasin**, J.

Facts: The petitioner-tenant, being aggrieved of the eviction order issued against him as a result of dismissal of his leave application by the Additional Rent Controller, filed the present revision petition under section 25-B(8) of the Delhi Rent Control, 1958, seeking leave to defend the eviction petition filed by the respondent-landlord.

The principal ground urged by the petitioners was that the respondent-landlord had let out the ground floor accommodation of the same property to another party not long before the filing of the present eviction petition and thus the respondent's requirement of the premises for his sons to start their intended business is not at all bona fide.

Issue: Whether the letting out the ground floor portion by the respondent-landlord to a new tenant before the filing of the present eviction petition is a triable issue and by itself is sufficient to grant leave to defend to the petitioners to contest the eviction petition?

Held: The availability of another accommodation may have an adverse bearing on the finding as to the bona fides of the landlord if he unreasonably refuses to occupy the available premises to satisfy his alleged need. Under the Rent Act, the landlord cannot be said to have an unfettered right to choose whatever premises he wants and that too irrespective of the fact that he has some vacant premises in possession which he would not occupy and try to seek to remove the tenant. Availability of such circumstance would enable the court drawing an inference that the need of the landlord was not a felt need or the state of mind of the landlord was not honest, sincere, and natural. In such circumstances the revision petition is entitled to succeed and the impugned order of the learned Additional Rent Controller was thus set aside accordingly.

Section 14(1)(b) of the Delhi Rent Control Act, 1958- To constitute a sub-letting, there must be a parting of legal possession by the tenant to a third party.

Mrs. Shakuntala Lall & Ors. v. Mrs. Suraj Kala Jain & Ors.

Citation: 2011 (126) DRJ 549

Decided on: 20th September, 2011

Coram: **Indermeet Kaur**, J.

Facts: The present eviction petition was filed under Section 14 (1)(b) of the DRCA by the petitioner-landlady against the respondent-tenant on the ground of sub-letting camouflaged under the cloak of a sham partnership between the respondent-tenant and a third party.

Issue: Whether there is sub-letting, assigning or parting with possession of the whole or part of the premises by the tenant?

Held: The word "sub-letting" necessarily means transfer of an exclusive right to enjoy the property in favour of the third party. A case for sub-letting is made out only if there is parting with possession by the lessee i.e. if the lessee-tenant to whom the possession had been given by the original lessor transfers possession to a third party. However, as long as the tenant retains the legal possession of the leased property himself, there is no parting with possession in terms of Section 14(1)(b) of the Act.

A conjoint reading of Section 14 (1)(e) read with Section 14 (4) of the DRCA shows that if the tenant inducts a partner in his business or profession and if this partnership is genuine, he may be permitted to do so; however if the purpose of such a partnership is only ostensibly to carry on a business or profession in partnership but the real purpose is of sub-letting of the premises to such other person who is inducted ostensibly as a partner then the same shall be deemed to be an act of sub-letting. However, unless and until both the ingredients i.e. the existence of the animus domini and corpus possession are established, a case of sub-letting is not made out.

Thus the petition was dismissed based on the observation that the partnership deed was correctly held to be a genuine document by the Tribunal; the contract not being a fraud or a camouflage to cover the actual transaction between the tenant and the alleged sub-tenant.

LIMITATION LAW

Limitation Act – Section 15(5) – Exclusion of the period of limitation during which the defendant was absent from India

Anis Ahmed Rushdie v. Bhiku Ram Jain

Citation: MANU/DE/4126/2011

Decided on: 31st October, 2011

Coram: **Pradeep Nandrajog,** Suresh Kait, JJ.

Held- The plaintiff instituted a suit for specific performance of an Agreement to Sell dated 20th December, 1970 on 3rd November, 1977. The period of limitation of three years for enforcement of the Agreement to Sell expired on 21st March, 1975. The plaintiff sought exclusion of the period of 6 years 7 months 28 days on the ground that the defendant was not in India during that period. The Division Bench of the High Court rejected the plea of the plaintiff on the ground that the defendant was not present in India on the date when the suit was filed and, therefore, the plaintiff was not entitled to the benefit of Section 15(5) of the Limitation Act. The relevant discussion is as under:-

"49. The origin of sub-Section 5 of Section 15 of the Limitation Act 1963 can be traced to the rule of private international law as discussed in Dicey's Conflict of Laws, 5th Edition (Page 398) and Halsbu's Laws of England 2nd Edition (Vol. VI Page 256) that Courts of any country would have jurisdiction to entertain actions in personam in respect of any cause of action or relating to contract wherever the cause might have arisen or wherever the contract was made, provided that at the commencement of the action the defendant was resident or present in that country and the provisions of the Statute of Limitation in force in the country where the action is instituted i.e. "Lex Fori" would apply to such actions and for which the period during which the defendant was not present in the country where action was initiated would be excluded while computing limitation. Those were the days when means of communication were poor and it was difficult to serve a party. We highlight that when aforesaid jurisprudence was developed, there was no internet, there was hardly any postal facility, transportation to foreign shores was by ships which would sail on the oceans and the seas with painfully slow speed. It was in that era that aforesaid jurisprudence relating to exclusion of time while computing limitation was conceived of."

"51. Sub-Section 5 of Section 15 of the Limitation Act 1963 was examined in detail by the Madras High Court in the decision reported as Rajamani v Meenakshisundaram (1999) 3 MLJ 757. The facts of the said case were that the appellant/defendant borrowed 2000 Singapore dollars from one R.S.Sundaram at Singapore, on 09.11.1975, promising to repay the same on demand to him with interest @ 18% per annum and executed a promissory note Ex.A-5 in said regards. On 03.07.1979, the promissory note Ex.A-5 was assigned in favour of the plaintiff, and on 11.07.1979 the plaintiff issued a notice to the defendant intimating to him the factum of the said assignment and demanding the payment of entire dues to him. When

the defendant did not pay the amount the plaintiff filed a suit for recovery of money. All this while, the defendant was residing in Singapore and did not visit India even once and was not present in India when the suit was instituted. On behalf of the defendant it was contended that the suit is barred by limitation. Per contra, it was submitted on behalf of the plaintiff that since the defendant was absent from India, the period of absence in its entirety had to be excluded while computing limitation as per Sub-Section 5 of Section 15 of the Limitation Act 1963. Holding that the presence of the defendant in India on the date when the suit was filed is a sine qua non for the application of Sub-Section 5 of Section 15 of the Limitation Act 1963, the suit was held to be barred by limitation and the reasoning is as under:-

> "15. So, it has to decided whether the plaintiff can sustain the suit, though the defendant had not returned to India on the date of filing of the suit. In the present case, admittedly, the cause of action had arisen in foreign country when the defendant was in Singapore. Even according to the plaintiff, the defendant was in Singapore on the date of the filing of the suit. The plaintiff himself has given the Singapore address of the defendant in the plaint. The Full Bench of this Court in Muthukannai v Andappa Pillai AIR 1955 Mad 96 has found in this regard that "the Courts in a country have jurisdiction to entertain action in personam in respect of any cause of action or wherever the contract has been made provided that at the commencement of the action the defendant was resident or present in that country." Again in the conclusion, the same has been insisted by the Full Bench of this Court. Moreover, the words used in Section 15(5) of the Limitation Act themselves suggest that the defendant should be present in India on the date of filing of the suit. Otherwise, the question of computing the period of limitation taking into consideration of the defendant's absence would not arise. If the defendant continues to be absent such a calculation is impossible for the purpose of limitation…….
>
> 16. In view of the above, the respondent/plaintiff cannot take advantage of the provisions of Section 15(5) of the Limitation Act, 1963 for the purpose of computing the period of limitation, and to say that the suit is not barred by limitation."
>
> (Emphasis Supplied)

52. In the instant case, the suit was admittedly filed on 03.11.1997, on which day the defendant was not present in India. (See the testimony of plaintiff No.1 Bhikhu Ram Jain noted in para 13 above). In view of the fact that the defendant was not present in India on the date when the suit was filed, it has to be held that the plaintiff was not entitled to the benefit of Sub-Section 5 of Section 15 of the Limitation Act 1963."

Limitation Act, 1963 – Section 5 – Delhi High Court Original Side Rules – Rules 2, 2(b) Chapter 4 - Delhi High Court Rules and Orders – Rule 5, Chapter 1 Part A(a), Vol.V, Rule 5(3) – Condonation of delay in refiling the suit

J.L. Gugnani v. M/s Krishna Estate

Citation: 184 (2011) DLT 410

Decided on: 21st July, 2011

Coram: **Gita Mittal, J.**

Held- Specific performance of agreement – Delay of 6 months – Plaintiff has conducted the case in grossly negligent manner and reasons propounded for explaining delay inspire no confidence at all – No explanation or prayer for condonation of delay in compliance with order within time granted for making good deficiency in Court-fee, is made in proceedings – Suit of plaintiff had become barred by limitation – Valuable rights have enured to defendant and application for condonation of delay cannot be considered lightly or allowed as a matter of course – Explanation given by plaintiff for delay in re-filing is not bona fide as no tenable grounds are disclosed by plaintiff.

MATRIMONIAL LAW

MATRIMONIAL LAW

Hindu Marriage Act, 1955 – Sections 13B, 13B(2) & 28

Ritu Perti Kapoor v. Vineet Perti

Citation: 2011 (7) AD (D) 20

Decided on: 22nd July, 2011

Coram: **Kailash Gambhir, J.**

Facts- Appellants filed the petition for divorce by mutual consent – First motion was allowed vide order dated 3.09.2009 – Second motion was jointly by the parties on 11.07.2009 but due to unavoidable circumstances both the parties could not appear together for recording of the joint statement – Trial Court vide order dated 2.4.11 dismissed the second motion on the ground of limitation as being beyond the statutory period of 18 months –

Issue – Whether the trial court erred in dismissing the second motion on the ground of limitation?

Held- Period of 6 to 18 months being provided in section 13B(2) is a period of interregnum which is intended to give the parties time and opportunity to reflect on their move as the parties may have second thoughts about their decision during this period – Period of 18 months cannot be treated as the limitation period after which the petition for second motion cannot be preferred – The courts while dealing with the petition under section 13B cannot forget that the courts are required to see the complete agreement of the parties for the dissolution of marriage – Courts cannot frustrate the purpose and intent of the said section by bringing in the technicalities of limitation, hence making the real provision incapacitated. – Order passed by the trial court is illegal and the same is accordingly set aside – Matter is accordingly remanded back to the learned trial court.

Hindu Marriage Act, 1955 – Section 24 - Maintenance – Affidavit of assets, income and expenditure from the date of the marriage of both the parties to be called for determining the maintenance

Puneet Kaur v. Inderjit Singh Sawhney

Citation: 183 (2011) DLT 403

Decided on: 12th September, 2011

Coram: **J.R. Midha, J.**

Held- During the pendency of divorce proceedings under Hindu Marriage Act, the wife is entitled to maintenance from the husband under Section 24 of the Hindu Marriage Act. It has been noticed that the husbands do not truthfully disclose their true income in the proceedings and, therefore, the Court has to assume the income of the husband to award maintenance to the wife. The Delhi High Court has culled out about 50 factors relating to the income, expenditure, assets, standard of living and lifestyle which can be taken into consideration for assessing the income of the husband. The Court directed both the parties to file the affidavit of assets, income and expenditure from the date of the marriage up to date along with all the relevant documents. This method of assuming the income from the expenditure, standard of living, lifestyle is a well recognized method used by Income Tax Authorities where the assessee does not truthfully discloses his income. The relevant portion of the said judgment is as under:-

> "7. In the facts and circumstances of this case, both the parties are directed to file their respective affidavits of assets, income and expenditure from the date of the marriage up to this date containing the following particulars:-
>
> 7.1 **Personal Information**
>
> (i) Educational qualifications.
>
> (ii) Professional qualifications.
>
> (iii) Present occupation.
>
> (iv) Particulars of past occupation.
>
> (v) Members of the family.
>
> (a) Dependent.
>
> (b) Independent.
>
> 7.2 **Income**

(i) Salary, if in service.

(ii) Income from business/profession, if self employed.

(iii) Particulars of all earnings since marriage.

(iv) Income from other sources:-

(a) Rent.

(b) Interest on bank deposits and FDRs.

(c) Other interest i.e. on loan, deposits, NSC, IVP, KVP, Post Office schemes, PPF etc.

(d) Dividends.

(e) Income from machinery, plant or furniture let on hire.

(f) Gifts and Donations.

(g) Profit on sale of movable/immovable assets.

(h) Any other income not covered above .

7.3 **Assets**

(i) Immovable properties:-

(a) Building in the name of self and its Fair Market Value (FMV):-

- Residential.
- Commercial.
- Mortgage.
- Given on rent.
- Others.

(b) Plot/land.

(c) Leasehold property.

(d) Intangible property e.g. patents, trademark, design, goodwill.

(e) Properties in the name of family members/HUF and their FMV.

(ii) Movable properties:-

(a) Furniture and fixtures.

(b) Plant and Machinery.

(c) Livestock.

(d) Vehicles i.e. car, scooter along with their brand and registration number.

(iii) Investments:-

(a) Bank Accounts – Current or Savings.

(b) Demat Accounts.

(c) Cash.

(d) FDRs, NSC, IVP, KVP, Post Office schemes, PPF etc.

(e) Stocks, shares, debentures, bonds, units and mutual funds.

(f) LIC policy.

(g) Deposits with Government and Non-Government entities.

(h) Loan given to friends, relatives and others.

(i) Telephone, mobile phone and their numbers.

(j) TV, Fridge, Air Conditioner, etc.

(k) Other household appliances.

(l) Computer, Laptop.

(m) Other electronic gadgets including I-pad etc.

(n) Gold, silver and diamond Jewellery.

(o) Silver Utensils.

(p) Capital in partnership firm, sole proprietorship firm.

(q) Shares in the Company in which Director.

(r) Undivided share in HUF property.

(s) Booking of any plot, flat, membership in Co-op. Group Housing Society.

(t) Other investments not covered by above items.

(iv) Any other assets not covered above.

7.4 **Liabilities**

(i) OD, CC, Term Loan from bank and other institutions.

(ii) Personal/business loan

(a) Secured.

(b) Unsecured.

(iii) Home loan.

(iv) Income Tax, Wealth Tax and Property Tax.

7.5 **Expenditure**

(i) Rent and maintenance including electricity, water and gas.

(ii) Lease rental, if any asset taken on hire.

(iii) Installment of any house loan, car loan, personal loan, business loan, etc.

(iv) Interest to bank or others.

(v) Education of children including tuition fee.

(vi) Conveyance including fuel, repair and maintenance of vehicle. Also give the average distance travelled every day.

(vii) Premium of LIC, Medi-claim, house and vehicle policy.

(viii) Premium of ULIP, Mutual Fund.

(ix) Contribution to PPF, EPF, approved superannuation fund.

(x) Mobile/landline phone bills.

(xi) Club subscription and usage, subscription to news papers, periodicals, magazines, etc.

(xii) Internet charges/cable charges.

(xiii) Household expenses including kitchen, clothing, etc.

(xiv) Salary of servants, gardener, watchmen, etc.

(xv) Medical/hospitalization expenses.

(xvi) Legal/litigation expenses.

(xvii) Expenditure on dependent family members.

(xviii)Expenditure on entertainment.

(xix) Expenditure on travel including outstation/foreign travel, business as well as personal.

(xx) Expenditure on construction/renovation and furnishing of residence/office.

(xxi) Any other expenditure not covered above.

7.6 **General Information regarding Standard of Living and Lifestyle**

(i) Status of family members.

(ii) Credit/debit cards.

(iii) Expenditure on marriage including marriage of family members.

(iv) Expenditure on family functions including birthday of the children.

(v) Expenditure on festivals.

(vi) Expenditure on extra-curricular activities.

(vii) Destination of honeymoon.

(viii) Frequency of travel including outstation/foreign travel, business as well as personal.

(ix) Mode of travel in city/outside city.

(x) Mode of outstation/foreign travel including type of class.

(xi) Category of hotels used for stay, official as well as personal, including type of rooms.

(xii) Category of hospitals opted for medical treatment including type of rooms.

(xiii) Name of school(s) where the child or children are studying.

(xiv) Brand of vehicle, mobile and wrist watch.

(xv) Value of jewellery worn.

(xvi) Details of residential accommodation.

(xvii) Value of gifts received.

(xviii)Value of gifts given at family functions.

(xix) Value of donations given.

(xx) Particulars of credit card/debit card, its limit and usage.

(xxi) Average monthly withdrawal from bank.

(xxii)Type of restaurant visited for dining out.

(xxiii)Membership of clubs, societies and other associations.

(xxiv)Brand of alcohol, if consumed.

(xxv)Particulars of all pending as well as decided cases including civil, criminal, labour, income tax, excise, property tax, MACT, etc. with parties name.

8. Both the parties are also directed to file, along with affidavit, copies of the documents relating to their assets, income and expenditure from the date of the marriage up to this date and more particularly the following:-

(i) Relevant documents with respect to income including Salary certificate, Form 16A, Income Tax Returns, certificate from the employer regarding cost to the company, balance sheet, etc.

(ii) Audited accounts, if deponent is running business and otherwise, non-audited accounts i.e. balance sheets, profit and loss account and capital account.

(iii) Statement of all bank accounts.

(iv) Statement of Demat accounts.

(v) Passport.

(vi) Credit cards.

(vii) Club membership cards.

(viii) Frequent Flyer cards.

(ix) PAN card.

(x) Applications seeking job, in case of unemployed person."

Christian Marriage Act, 1872 – Sections 3, 6, 9 and 66 – "Indian Christian" – Are those who being Indian nationals converted to Christianity

O.P. Gogne v. State (NCT of Delhi)

Citation: 2011 (3) DMC 23

Decided on: 26th July, 2011

Coram: **Suresh Kait, J.**

Held- After conversion into Christianity marriage does not fall under 'Sapinda' relationship – Respondents have rightly converted as per Section 3 of Act – Respondent No.2 has not committed any offence, being Government servant.

Respondents have converted to Christianity by getting themselves Baptised in Church before their marriage – Marriage took place between respondent Nos.2 and 3 in a Church under Sections 6 and 9 of the Christian Marriage Act – Marriage has not been challenged by either of the parties or Bishop of Church on ground that declaration made in affidavits before Church was false – Petitioner, Judicial Officer in DJS felt great dishonour out of this marriage and continuously dragging couple and fighting with tooth and nail – Respondent No.2 is son of petitioner and after marriage both respondent Nos.2 and 3 are happily living their marriage life – Courts are not meant to gratify feelings of personal revenge or vindictiveness or to serve ends of private party.

Special Marriage Act, 1954 – Sections 15, 24, 25 (iii) (a & b), 28, 39

Faheem Ahmed v. Maviya @ Luxmi

Citation: 178 (2011) DLT 671

Decided on: 8th April, 2011

Coram: **Kailash Gambhir, J.**

Held- Conversion of Religion from Hinduism to Islam – Respondent got prepared her conversion certificate because she wanted to marry appellant – To achieve this purpose, she did feign to have adopted another religion only for the purpose of worldly gain of marriage – Trial Court found that no suggestion was given by appellant to respondent that she practiced Islam or read Namaz or kept rozas – That even publication of name Maviya by respondent nowhere proved fact that she intended to change her religion from Hinduism to Islam – There was no conversion of respondent from Hinduism to Islam.

Solemnization of Marriage – Essential ceremonies of Nikah not performed by parties – Marriage amongst Muslims is not a sacrament but purely a Civil contract – There are no rituals or ceremonies which are essential for solemnization of Muslim marriage – Twin objectives which Muslim marriage seeks to achieve are legalization of sexual intercourse and procreation of children – Essence of Muslim marriage is mutual consent – Although Nikahnama was proved on record but nothing was proved on record to establish fact that essential requirement of offer and acceptance was made by parties in presence and hearing of witnesses.

Non-conversion of respondent from Hinduism to Islam – No valid marriage between parties – appellant and respondent never lived together as husband and wife after their alleged marriage and prior to registration – Such a marriage was clearly in contravention of Section 15(a) of the Act – Case of respondent squarely covered under Section 24(2) of Act i.e. null and void marriage and not Section 25 i.e. voidable marriage, being in violation of conditions specified in Clauses (a) to (e) of Section 15 of Act.

Sections 13(1)(ia) and (ib) and 28 of the Hindu Marriage Act, 1955- The factum of cruelty varies on a case to case basis.

Smt. Suman Khanna v. Shri Muneesh Khanna

Citation: 2011 (122) DRJ 439

Decided on: 18th February, 2011

Coram: **Kailash Gambhir**, J.

Facts: By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 the appellant seeks to set aside the judgment and decree allowing the petition filed by the respondent under Section 13(1) (ia) and (ib) of the Hindu Marriage Act on the ground of cruelty under Section 13(1) (ia) of the said Act.

Issue: Whether the acts surmised and proved by the respondent amount to 'cruelty' as envisaged under the Hindu Marriage Act for dissolution of marriage, or not?

Held: Cruelty has not been defined in the Hindu Marriage Act and rightly so as it is not possible to put this concept in a strait jacket formula. Cruelty can be physical or mental, intentional or unintentional. The present is a case of mental cruelty where the respondent husband has alleged that the behaviour of the appellant caused him mental pain, suffering and humiliation. But it cannot be lost sight of the fact that the normal wear and tear of married life cannot be stretched too far to be regarded as cruelty for the purposes of this section. The conduct complained of should be grave and weighty so as to satisfy the conscience of the court that the relationship between the parties has deteriorated to such an extent that it cannot be reasonably expected by them to live together without mental pain, agony and distress.

The incidents alleged in the present case are of a nature where apart from the actual physical assault by the brother and father of the appellant on different occasions, evidently the appellant was herself not fulfilling her marital obligations. The petition for divorce was filed by the respondent just within a period of almost two years from the date of the marriage demonstrating that the desiderata of matrimony, understanding and tolerance were abysmally amiss between the parties. Hence, in the present case, the persistent piquing conduct of the appellant and also her threats to commit suicide on two occasions, is antithetic to the natural love, affection, trust and conjugal kindness and can be said to have caused to the respondent mental pain, agony and suffering which amounts to mental cruelty as envisaged under Section 13(1) (ia) of the Act. Therefore finding no illegality or infirmity in the impugned judgment, the appeal was found to be without merit and thereby dismissed.

Guardians and Wards Act, 1890- Section 7 – Hindu Minority and Guardianship Act, 1956 – Section 6 - Constitution of India, 1950 – Article 226 – Writ of Habeas Corpus – custody of minor

Deepti Mandlaus v. State

Citation: 179 (2011) DLT 293 (DB)

Decided on: 5th April, 2011

Coram: **Badar Durrez Ahmed,** Manmohan Singh, JJ.

Held- Golden rule in all custody matters that welfare of child would be paramount – Issue of custody must always be addressed from stand-point of the child – 'A' was born in India and continues to be an Indian citizen – Guardianship Court in New Delhi already seized of custody matter before Canadian Court passed order – Petitioner wife like respondent No.2 husband is an Indian citizen – She is not alien to the Indian circumstances – Comity of Courts principle would not come to aid of petitioner – No illegality in custody, best interest and welfare of minor will be decided by guardianship Court, Delhi.

Protection of Women from Domestic Violence Act, 2005 - Section 2(a) – Meaning of "Aggrieved person"

Kusumlata Sharma v. State

Citation: 181 (2011) DLT 775

Decided on: 2nd September, 2011

Coram: **Mukta Gupta, J.**

Held- The Delhi High Court interpreted Section 2(a) of the Act and held that the women who are sisters, widows, mothers, single woman or living with the abuser are entitled to legal protection. Mother who was being maltreated and harassed by her son would be an aggrieved person if the said harassment was caused through the female relative of the son i.e. wife and the said female relative will fall within the ambit of the 'Respondent'. The Court relied upon the judgment passed by the Supreme Court in Sou Sandhya Manoj Wankhade's case and held that a complaint made by the mother-in-law being "aggrieved person" was maintainable

Protection of Women from Domestic Violence Act, 2005 - Section 2(s) – Meaning of "Shared Household"

Eveneet Singh v. Prashant Chaudhri

Citation: 171 (2011) DLT 124

Decided on: 20th December, 2010

Coram: **S. Ravindra Bhat, J.**

Held- In this case, the Court interpreted the meaning of the word "shared household" in Section 2(s) of the Act. The Court also distinguished this case from that of S.R. Batra v. Taruna Batra, (2007) 3 SCC 169.

The Court observed that, "It is thus apparent that Parliamentary intention was to secure the rights of aggrieved persons in the shared household, which could be tenanted by the respondent (including relative of the husband) or in respect of which the respondent had jointly or singly any right, title, interest, or equity."

The definition of "shared household" emphasizes the factum of a domestic relationship and no investigation into the ownership of the said household is necessary, as per the definition. Even if an inquiry is made into the aspect of ownership of the household, the definition casts a wide enough net. It is couched in inclusive terms and is not in any way, exhaustive.

If the Court can look beyond the facts, and in a given case, conclude that the overall conspectus of circumstances, suggests manipulation by the husband or his relatives, to defeat a right inhering in the wife, to any order under Section 19, such "lifting of the veil" should be resorted to. Therefore, the plaintiff indeed has a right of residence under the Act.

MISCELLANEOUS

Section 9(3) of Transplantation of Human Organs Act: Prior approval is necessary only from Authorization Committee of place of intended transplant and not from Authorization Committee of place of domicile of donor or recipient.

Sadhna Bhardwaj v. Department of Health and Family Welfare

Citation: 184(2011)DLT510

Decided on: 1st September, 2011

Coram: **Rajiv Sahai Endlaw, J.**

Facts: The petitioner, a resident of Delhi, is required to undergo kidney transplant and a donor from West Bengal has agreed to donate her kidney. The transplantation is to take place in Kolkata. The instant writ has been filed because the respondent herein has declined to grant a NOC to the petitioner on the ground that neither there is any relationship between the donee and the donor nor is there any proof of any linkage/association between them which caused suspicion of trade in human organs.

Issue: Whether the Authorization Committee of Delhi was within its power to consider these issues or it was just required to consider the legal and residential status of the petitioner in Delhi and is it for the competent authority in Kolkata i.e. place of intended transplant to consider the issues of relationship or linkage between the recipient and the donor?

Held: Relevant provision of law i.e. Rule 6B of The Transplantation of Human Organs Rules, 1995 envisages the Authorization Committees of the places of domicile of prospective donor and prospective recipient issuing either approval or NOC but the Authorization Committee of the place of intended transplant issuing approval and not an NOC.

There is difference between 'approval' and 'NOC'. While approval connotes a positive affirmation for an intended act, an NOC is a mere no-objection to the intended act. The expression used in Rule 6B is "approval or NOC". The appearance of word 'or' in between two things is meant to exclude one thing in favour of other.

The petitioner in the present case had approached the respondent only for an NOC and not for an approval. Rule 6B makes the approval mandatory only from the Authorization Committee having jurisdiction over the place of intended transplant. Ofcourse, Rule 6B envisages the Authorization Committee of the place of domicile of recipient when different from the place of intended transplant issuing approval or NOC, but in my opinion the question of the Authorization Committee when not approached for approval, insisting on evaluating the application for NOC as an application for approval or refusing NOC for non-satisfaction of criteria required to be fulfilled for according approval does not arise. The provision for the Authorization Committee of a place of domicile of recipient and which is not the place of intended transplant issuing approval appears to have been made merely to cover a contingency where the Authorization Committee of the place of intended transplant may

require the Authorization Committee of the place of domicile of recipient also to carry out certain evaluation. However, without the recipient approaching the Authorization Committee for approval it cannot insist upon adopting the procedure for according approval. It is only the Authorization Committee of the place of intended transplant which has been empowered to accord approval.

Thus, prior approval within meaning of Section 9(3) of Act is necessary only from Authorization Committee of place of intended transplant and not from Authorization Committee of place of domicile of donor or recipient.

Merely because respondent entertained doubts of commercial trade in human organs, it was no reason for respondent to exercise power which under Act and Rules had not been vested in them. There are other remedies available to Respondent for curtailing trade in human organs which they suspect but respondent cannot be permitted to do same by making applicants satisfy tests which applicants are not required to satisfy before Authorization Committee of a place which is not the place of intended transplant. Petition allowed.

MISCELLANEOUS

Section 83(2) of the Multi-State Cooperative Societies Act, 2002- Only the conduct of a person who is entrusted with the organization or management of the society, can be enquired into.

R.P. Keshari v. Central Registrar of Cooperative Societies & Anr.

Citation: MANU/DE/3730/2011

Decided on: 23rd September, 2011

Coram: **Sanjay Kishan Kaul,** Rajiv Shakdher, JJ.

Facts: The petitioner, an erstwhile consultant of the respondent, sought to impugn the show cause notice under Section 83(2) of the Multi-State Cooperative Societies Act, 2002, in the present writ petition filed under Article 226 of the Constitution of India, on the ground that the notice was issued to the petitioner on the basis of inquiry proceedings held without any hearing being granted to the petitioner.

The impugned notice called upon the petitioner to show cause why the petitioner should not be held to be responsible for causing deficiency in the assets of the respondents by breach of trust and wilful negligence.

Issue: Whether the show-cause notice issued, was completely without jurisdiction, in consideration of the provisions of Section 83 r/w Section 3(t) of the Multi-State Cooperative Societies Act, 2002?

Held: The court, while not examining the controversy on merit, only sought to determine the question of jurisdiction qua the show-cause notice.

The court observed that a plain reading of Section 83(1) of the Act entailed that the conduct of only a person who is or was entrusted with the organization or management of such society or who is or had at any time been an officer or an employee of the society, could be called into question. The petitioner's role, being engaged as a consultant, was only advisory, without having been delegated any financial or administrative powers. Thus a mere advisory role without having the authority to take decisions could not be held to make the petitioner a person entrusted with the organization or management of such society.

Further, the mere fact that a person has been an officer at any past period of time could not make him liable unless that past period when he was holding such a post was called into question. Since no conduct of the petitioner was found wanting, at the time when the petitioner was functioning as an Additional Managing Director and since the role which had been called into question was of the petitioner as a consultant, he was clearly held to be not covered under the provisions of Section 83(1) of the Act.

Hence, the impugned show cause notice issued to the petitioner was thus quashed qua the petitioner and the writ petition was allowed.

MISCELLANEOUS

Section 10, Minority Educational Institutions Act: The NOC under section 10 is not intended supersede NOC/approval/permission required for setting up an Educational Institution or for imparting education in a course or subject.

Medical Council of India v. Al Karim Educational Trust and Anr.

Citation: MANU/DE/3007/2011

Decided on: 26th April, 2011

Coram: **Rajiv Sahai Endlaw, J.**

Facts: The respondents are running a medical college with the intake capacity of 60 students for MBBS course in the Katihar town of the state of Bihar. In order to increase the intake capacity from 60 to 150, the respondent trust applied before the state government for 'Essentiality certificate' to be submitted along with application before MCI under 2002 Regulations. The respondents, in the absence of any reply from state government within 90 days, approached the "National Commission" which declared that the Competent Authority of Government of Bihar was deemed to have granted 'Essentiality Certificate' to Respondent No. 1 Trust under the deeming provision of section 10(3) of the Minority Educational Institutions Act, 2004 as it has not responded within 90 days of filing of application for NOC request.

This order of the National Commission has been submitted before the MCI instead of actual "Essentiality Certificate" by the respondent trust along with the application for increase of intake capacity. Hence, the Petition by the MCI.

Issue: Whether the NOC under Section10 of the Minorities Educational Institutions Act can be equated with the NOC/approval/permission required under any other Act/Rules/Regulations relating to Educational Institutions?

Held: The NOC under Section 10 of the Minority Educational Institutions Act cannot take the place of Essentiality Certificate. While issuing NOC under Section 10 of the Act, the Central/State Government is required to primarily test the Minority character of the proposed Institution, while issuing the Essentiality Certificate the Government is required to assess the desirability and feasibility of the proposed Medical College at the proposed location and the adequacy of the clinical material available.

There is nothing in the Minority Educational Institutions Act to suggest that the NOC under Section 10 is intended in supersession of NOC/approval/permission required for setting up an Educational Institution or for imparting education in a course or subject. Rather Section 10(4) provides that on grant / deemed grant of NOC, the applicant shall be entitled to proceed with the establishment of Minority Educational Institution "in accordance with the rules and regulations, as the case may be, laid down by or under any law for the time being in force"; recognizing thereby that grant of NOC does not obviate compliance with other

laws / rules / regulations for establishment of an Educational Institution. Subsequent insertion of “subject to the provisions contained in any other law for the time being in force” in section 10(1) vide 2010 amendment further places the matter beyond any pale of controversy.

There is no inconsistency between section 10 of the Minority Educational Institutions Act and the other Acts/Rules/Regulations/ prescribing NOC/approval/permission for establishment of Educational Institute to trigger the provisions of section 22 of the Minority Educational Institutions Act which gives a superseding effect to the provisions of aforesaid Act over other laws applicable to Educational Institutes. This is so because while the NOC under Section 10 is concerned only with the minority character, the approval / permissions / NOC under other Acts / Rules / Regulations are concerned with the very existence as an Educational Institution. Without qualifying as an “Educational Institution” there can be no tag of “minorities” by way of issuance of NOC under Section 10.

Article 30 of the Constitution of India only protects the right of minorities to retain the colour of minority to their Educational Institution and grants them certain privileges in the matter of administration thereof. However this minority tag does not give the card to the Institution to provide any lesser facilities and amenities as are required to be provided by a Non-Minority Educational Institution.

Section 10 of the Minority Educational Institutions Act, 2004 required NOC only for establishment of Minority Educational Institution. However, according to Respondent No.1 Trust, its Educational Institution already stands established with permitted intake of 60 students to MBBS course. What Respondent No. 1 Trust was now seeking was to enhance its intake capacity and not to establish new Institution.

Further, there was nothing in Minorities Educational Institutions Act to suggest, that even after NOC for establishing Minority Educational Institution had been issued, fresh NOC was required for introducing additional courses or for increase in intake capacity in course. This was more so, because character of Institution as Educational Institution established by Minority community would not change by introducing additional courses or by increase in admission capacity. Thus, for increase in admission capacity sought by Respondent No. 1 Trust, no NOC under Section 10 of the Act was required and axiomatically, question of deeming provision therein applying, also did not arise.

Therefore, order passed by National Commission for Minority Educational Institutions is liable to be set aside - Petition allowed.

MISCELLANEOUS

Section 4(1) (b) of the Employee's Compensation Act, 1923- Permanent total disability must not be taken as loss of 100% of the earning capacity of the workman.

New India Assurance Co. Ltd. v. Sh. Satvir Verma & Ors.

Citation: MANU/DE/4191/2011

Decision on: 10th October, 2011

Coram: **Valmiki J. Mehta,** J.

Facts: The appellant filed the present appeal under Section 30 of the Employee's Compensation Act, 1923, challenging the order of the Commissioner Workmen's Compensation awarding compensation to the Respondent/workman. According to the facts of the case, the workman's both legs were operated and an iron rod fixed in one of his legs, following an injury in an accident. The Commissioner Workmen's Compensation awarded compensation holding 100% disability qua the nature of the work.

Issue: Whether the 30% injury suffered by the workman could be considered as 100% loss of the workman's earning capacity?

Assessment of disability and compensation under Section 4, Employee's Compensation Act, 1923 by the Commissioner was justified?

Held: The court observed that the effect of the permanent total disability must not have been taken as loss of 100% of the earning capacity of the workman, unless it really resulted in such consequences and what was to be seen was actual loss of earning capacity as a result of the permanent partial disablement.

In the facts of the case, there was only 30% disability with respect to the workman's legs, as per the medical certificate, and therefore at best the loss of earning capacity could only be 50% compensation payable in terms of the formula contained in Section 4(1) (b) i.e., a lesser percentage of 50% or a lesser amount of 50% then as would be payable for compensation which is calculated under Section 4(1)(b). Since in the present case, there was no amputation of any of the legs i.e. the workman could use both the legs though with a 30% disability, accordingly, at the very best, compensation which could be allowed was 50% of the compensation which would be payable in terms of the entries nos. 20 to 22 of part II of the Schedule of the Act. Thus the court held that the Commissioner Workmen's Compensation had erred in giving of 100% loss earning capacity. Loss of income generating capacity should have been taken as only 50% and not 100%, inasmuch as, the workman could still do the work of a helper of a truck though of course his mobility would surely be affected as a result of weakening of his limbs. Hence, the award modified accordingly.

MOTOR ACCIDENT COMPENSATION LAW

Motor Vehicles Act, 1988 – Section 168 - Permanent disability arising out of the loss of sexual organs in a motor accident is in the range of 50-60%

Sunil Kumar v. Inder Singh

Citation: 2012 (1) TAC 126

Decided on: 30th September, 2011

Coram: **J.R. Midha, J.**

Held- The Delhi High Court examined the law with respect to the permanent disability arising out of the loss of sexual organs. Disability arising out of loss of sexual organs is not recognized as a Permanent Disability under Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which defines only five categories of disablement, namely, visual impairment, locomotor/orthopedic disability, speech and hearing disability, mental retardation and multiple disabilities. Schedule I of the Workmen Compensation Act, 1923 also does not consider the loss of sexual organs as a disability. The Court examined the American, Australian, British and South African law where the loss of sexual organs has been described as a permanent disability for assessment of compensation. The Court held the permanent disability arising out of the loss of sexual organs to be 50% to 60% for assessment of compensation.

Motor Vehicles Act, 1988 – Section 147 – Whether the three deceased persons who were going in the canter to purchase their buffaloes were sitting in the said vehicle as gratuitous passengers or were sitting in the cantor with the deemed goods - The persons travelling in the vehicle to purchase the goods shall be deemed to be with the goods – Hence, Insurance Company is liable to pay compensation

Oriental Insurance Co. Ltd. v. Hazara

Citation: MANU/DE/3060/2011

Decided on: 27th September, 2011

Coram: **Indermeet Kaur, J.**

Held- The liability of the insurance company extends to a person who is travelling in the vehicle with his goods or is carrying his articles with him. The whole purpose of sitting in this cantor was to go to the market to purchase the buffaloes and to come back with them in the same vehicle.

PROPERTY LAW

Transfer of Property Act, 1882 – Filing of a suit amounts to termination of lease under Section 106 of the Act - Tenancy stands terminated under general law on filing of a suit for eviction and thus even assuming that the notice terminating tenancy was not served upon the appellant (though it has been served as held) the tenancy would stand terminated on filing of the subject suit against the appellant/defendant

M/s. Jeevan Diesels & Electricals Ltd. v. M/s. Jasbir Singh Chadha (HUF)

Citation: 182 (2011) DLT 402

Decided on: 25th March, 2011

Coram: **Valmiki J. Mehta, J.**

Held- It has been held in various judicial pronouncements that the service of summons in the suit will be taken as the receipt of notice of the dissolution of the partnership or severing of the joint status in case of non service of appropriate notices and therefore such suits cannot be dismissed on such technical grounds – Similar logic can be applied in suits for possession filed by landlords against the tenants where the tenancy is a monthly tenancy and which tenancy can be terminated by means of a notice under Section 106 – Once we take the service of plaint in the suit to the appellant/defendant as a notice terminating tenancy, the provision of Order 7 Rule 7 CPC can then be applied to take notice of subsequent facts and hold that the tenancy will stand terminated after 15 days of receipt of service of summons and the suit plaint – This rationale ought to apply because after all the only object of giving a notice under Section 106 is to give 15 days to the tenant to make alternative arrangements. In my opinion, therefore, the argument that the tenancy has not been validly terminated, and the suit could not have been filed, fails for this reason also – Even the amendment to Section 106 by Act 3 of 2003 shows intention of Legislature that technical objections should not be permitted to defeat substantial justice and the suit for possession of tenanted premises once the tenant has a period of 15 days for vacating the tenanted premises – Tenancy was held to be validly terminated.

Sections 10, 20, Transfer of Property Act, 1882- Even if time is not of the essence of the contract, the court may infer that it is to be performed within a reasonable time.

Smt. Rani Sharma v. Ms. Sangeeta Rajani &Ors.

Citation: 179 (2011) DLT 12

Decided on: 28th January, 2011

Coram: A.K. Sikri, **M.L. Mehta**, JJ.

Facts: The present appeal was against the order of dismissal of the plaintiff's suit for specific performance based on the agreement to sell against the defendant, on the ground that it's execution was not subject to any time limit or contingent upon the purchase of the share of the daughters' property.

Issue: Whether the defendant can be restrained from dealing with the suit premises on account of an agreement to sell which has not been executed for more than four years?

Held: Court cannot be oblivious to the fact that a considerable period of over four years elapsed since the execution of the agreement without any action being taken by the plaintiffs to fulfil the terms and conditions of the contractual agreement and in the meantime not only have the prices of the suit premises risen to four times, but the co-owners (defendant's daughter) have also created third party interests in their shares of the premises. All this has made the completion of transaction beyond implementation and unenforceable. In such circumstances, the defendant is entitled to say that sale price has become unrealistic and she is no longer willing to suffer the transaction.

The court therefore held that the delay brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiffs. Hence, interference with the order of the Ld. Single Judge was declined and appeal was dismissed.

Benami Transactions (Prohibition) Act, 1988 – Sections 4 – Illustration (h) to Section 88 of the Indian Trusts Act -- 'Fiduciary' explained -- A father cannot misuse his position as a guardian of his child.

Adesh Kanwarjit Singh Brar v. Babli Brar & Ors.

Citation: 179 (2011) DLT 276

Decided on: 8th April, 2011

Coram: **V. K. Jain**, J.

Facts: In the present case, the suit property is alleged to have been purchased by the father in his own name using the funds of his minor child i.e plaintiff who on account of his tender age and being in control and under guardianship of his father was incapable of looking after his own interest. The present suit is instituted by the plaintiff challenging the gift-deed executed by the father later in favour of the plaintiff's mother, gifting her the entire suit property, claiming to be the absolute owner and to have self-acquired the suit property.

Issue: Whether acquisition of property by a natural guardian utilising funds of his child is hit by Section 4 of the Benami Transactions (Prohibition) Act, 1988.

Held: A Hindu father is the natural guardian not only for the person but also for the property of his minor child and so it cannot be disputed that the relationship of a father and a minor son is that of a guardian and a ward. Illustration (h) to Section 88 of the Indian Trusts Act, 1882 clearly shows that the guardian of a ward holds the position of a fiduciary vis-à-vis the ward and is duty bound to protect his interest. Consequently, the provisions of Section 88 of Indian Trusts Act would apply to such a relationship and a father, in his fiduciary character as the guardian of a minor child is duty bound to protect his interest, his position being akin to that of a trustee. He cannot gain any advantage for himself at the costs of and to the detriment of his child as he holds the property to the extent it is acquired from the funds of the minor, for the benefit of the minor. Therefore, such a transaction where property is purchased by the father in his own name though from the funds of his minor child cannot be said to be hit by Section 4 of the Benami Transactions (Prohibition) Act, 1988.

Rights of the purchaser when the seller was restrained from disposing property under Letters of Administration granted to him by the court.

Indian Associates v. The State and Ors.

Citation: 178 (2011) DLT 631

Decided on: 30th March, 2011

Coram: A.K. Sikri, **M.L. Mehta**, JJ.

Facts: While the application of Respondent No. 2, challenging the grant of Letters of Administration to the petitioner/administrator was still pending, the petitioner under the authority of LOA negotiated and entered into a sale transaction with the appellant. However, he expired during the pendency of the Test. Case. Present appeal is against the order of the Ld. Single judge dismissing the appellant's applications seeking its impleadment in place of deceased administrator or appointment of another administrator in place of the deceased administrator.

Issue: Whether the appellant is entitled to be impleaded in the pending Test. Case?

Held: A transferee from judgment debtor is presumed to be aware of the proceedings before the court of law. Unless a purchaser has made appropriate inquiry, he cannot establish his bona fides. If such an inquiry is not made, it would mean that the purchaser wilfully refrained from making the inquiry or grossly neglected to do so. Therefore, he should be careful before he purchases the property which is the subject matter of litigation.

The appellant entered into a sale transaction of immovable property vested in the administrator/ petitioner, knowing it to be void ab initio and illegal, firstly, because of the fact that there existed restrictions on the sale and transfer of the immovable property under the Urban Land Ceiling Act; secondly, because of absence of permission of the Court under Section 307(2) CPC and; thirdly, because of manifest lack of bonafide of the administrator to enter into this transaction in view of the subsisting objections by respondent no. 2.

Hence, being a party to such an unauthorized sale transaction does not entitle the appellant to have much say in the Test. case and the findings recorded by the Ld. Single Judge were not interfered with.

PROPERTY LAW

Transfer of Property Act, 1882 - Section 44 – Meaning of "Dwelling House"

Sunil Gupta v. Nargis Khanna

Citation: 185 (2011) DLT 760

Decided on: 6th September, 2011

Coram: **Valmiki J. Mehta, J.**

Held- Section 44 is meant to protect a dwelling house of an undivided family. However, one cannot be oblivious to the fact that the society has moved on - Today in metropolitan cities and megapolises, such as the capital Delhi, traditions and conservative attitude of the ladies not coming into contact with strangers is more or less a thing of the past – A family dwelling house is mostly non-existent as people live in flats in high rises or in small buildings – Privacy of course is zealously guarded, however, when properties are built on a plots in the form of flats, which can be occupied by different persons/families/entities - Traditional concept of an undivided family house has almost vanished - It is in accordance these contemporary realities the expression "dwelling-house" as found in Section 44 must be interpreted, of course, keeping in mind the peculiar facts and circumstances as would be found in the facts of each case – Once in part of the dwelling house there is a stranger then it results in the fact that the whole dwelling house is not with the family and then in such situation it cannot be said that an additional stranger cannot come in – Even under Section 44, it is not as if the dwelling house is permanently impartible – Thus the disability to take possession is only temporary till partition and therefore if there is already a stranger living in the house factually there is separation of a share of the dwelling house in which the tenant/stranger lives, though in law a partition by metes and bounds between co-owners has to take place – Therefore there has to be a balanced interpretation of Section 44 keeping in view the fact that the inability to take possession by a stranger/purchaser is only temporary till the interest purchased is separated and bound to be separated by partition.

Delhi Rent Control Act, 1958 – Sections 14(1)(e), 25 & 19 – Constitution of India, 1950 – Article 14

Budh Singh & Sons v. Sangeeta Kedia

Citation: 185 (2011) DLT 580

Decided on: 17th November, 2011

Coram: **Indermeet Kaur, J.**

Held- Bona fide requirement – Eviction – Doctrine of equality – Discrimination on purpose of letting out of a premises for a residential or non-residential purpose has been struck down – No distinction can be drawn where the landlord seeks eviction on ground of bona fide requirement as contained in Section 14(1)(e) of Delhi Rent Control Act – Eviction petition clearly and categorically disclosed bona fide need of landlady – premises in occupation of respondent is in a highly commercial area – landlady has not disclosed address from where she carried on business would not diminish her bona fide need – need may be of landlord or any member of family dependent upon him and landlord or such person has no other reasonable suitable accommodation.

The Supreme Court in the case of *Satyawati Sharma (dead) by LR's Vs UOI* struck down a certain part of provision of Section 14(1)(e) of the DRCA as being violative of the doctrine of equality embodied in Article 14 of the Constitution of the India; they are noted herein in below: Section 14(1)(e) of the 1958 Act is violative of the doctrine of equality embodied in Article 14 of the Constitution of India insofar as it discriminates between the premises let for residential and non-residential purposes when the same are required bona fide by the landlord for occupation for himself or for any member of his family dependent on him and restricts the latter's right to seek eviction of the tenant from the premises let for residential purposes only. However, the aforesaid declaration should not be misunderstood as total striking down of Section 14(1)(e) of the 1958 Act because it is neither the pleaded case of the parties nor the learned counsel argued that Section 14(1)(e) is unconstitutional in its entirety and we feel that ends of justice will be met by striking down the discriminatory portion of Section 14(1)(e) so that the remaining part thereof may read as under : "that the premises are required bona fide by the landlord for himself or for any member of his family dependent on him, if he is the owner thereof, or for any person for whose benefit the premises are held and that the landlord or such person has no other reasonably suitable accommodation." While adopting this course, we have kept in view well recognized rule that if the offending portion of a statute can be severed without doing violence to the remaining part thereof, then such a course is permissible *R.M.D. Chamarbaugwalla vs. Union of India (AIR 1957 SC 628) and Bhawani Singh vs. State of Rajasthan [1996 (3) SCC 105.* It is thus clear that now no distinction can be drawn between premises let out for a residential purpose or a non-residential purpose where the landlord seeks eviction on the ground of bonafide requirement as contained in Section 14(1)(e) of the DRCA.

'Rent' comprehensively included all payments agreed to be made by the tenant for use and occupation not only of the building and its appurtenants but also other amenities.

M/s Nesco Ltd. v. Shri Chandeep Kohli

Citation: R.S.A. No. 46/2009

Decided on: 20th May, 2011

Coram: Indermeet Kaur, J.

Facts: The appellant-tenant filed the present second appeal challenging the order of the first appellate court, that upheld the decision of the trial court granting a decree in the favour of plaintiff-landlord in a suit for possession of property, on the ground that the maintenance charges could not have been added to the rent amount and since the rent was less than the stipulated minimum, the civil suit filed by the plaintiff was not maintainable.

Issue: Whether the courts below adopted the right approach in construing Clause 2 of the Agreement to conclude that rent included all other charges such as the maintenance charges?

Held: The court observed that 'rent' was a term comprehensive enough to include all payments agreed to be made by the tenant for use and occupation not only of the building and its appurtenants but also other amenities. In other words, the term "rent" included not only the amount agreed by the tenant to be paid to the landlord for use and occupation of the building but also the maintenance charges. Since, it was in terms of the agreement between the plaintiff and the defendant, that the tenant was paying these maintenance charges to the maintenance agency henceforth, the charges necessarily formed a part of the 'rent' as rightly held by the both the two courts below. The substantial question of law having been answered in favour of the respondent and against the appellant, appeal was held to be without merit and therefore dismissed.

Delhi Land Reforms Act, 1954 – Section 55 – Validity of partition of land by joint Bhumidars by way of family settlement

Rajendra Mohan Rana v. Prem Prakash Choudhry

Citation: 2011 (8) AD (D) 153

Decided on: 1st September, 2011

Coram: Dipak Misra, CJ., **Sanjiv Khanna, J.**

Held- Family settlement resulting in partition of agricultural land is permissible and is not barred under Section 55 of the Delhi Land Reforms Act, 1954. Family settlements are recognized methods of affecting partition between family members and Section 55 does not prescribe that such settlements as void or illegal. Section 55 is not the sole prescribed mode and manner of partition of land between joint bhumidars.

Probate Court has the exclusive jurisdiction to entertain the challenge to grant of probate.

Chandra Prabha v. Satish Chand Sharma

Citation: 2011(125) DRJ 308

Decided on: 12th August, 2011

Coram: A.K. Sikri, **M. L. Mehta**, JJ.

Facts: The will dated 10th December 1937, executed by the father of the appellant, was proved before a Senior Subordinate Judge, Delhi on 14th December, 1940 and the probate came to be granted by the Court on 28th May, 1941. According to the will, a trust was created whereby the father's property were to be vested in his sons upon attaining majority, subject to conditions of maintenance, education and marriage of all his children including the appellant. The trust was extinguished on completion of the task assigned to it qua all the beneficiaries including the appellant. The appellant invoked the jurisdiction of the High court on original side challenging the probate granted by a Court of competent jurisdiction more than 60 years back.

Issue: Whether the rights of the beneficiary of the trust can be claimed after letters of probate have been granted and have attained finality and the trust is extinguished?

Held: The decision of the Probate Court is a judgment in rem. It binds not only the parties in the probate proceedings but also the entire world. The order granting probate remains in force and it is conclusive as to the execution and validity of the Will till the grant of probate is revoked. Probate is conclusive evidence not only of the factum, but also of the validity of the Will and after the probate has been granted, it is incumbent on a person who wants to have the Will declared null and void, to have the probate revoked before proceeding further. For this purpose, the Probate Court alone has exclusive jurisdiction and the Civil Court on original side or the Arbitrator does not get jurisdiction even if consented to by the parties. The Will clearly mentions that after the Testator's death, the properties were to go to his sons, subject to conditions i.e right of residence of his wife, marriage of his daughters, maintenance and education of all his children, including the appellant. The tasks assigned to the trustees stood performed as the limited rights and benefits of education, maintenance and marriage, accruing to the appellant had been accomplished and the trust had thus extinguished.

Court is obliged to ensure there are no legal impediments in the grant of probate.

Yogesh Duggal & Ors. v. State & Ors.

Citation: 179 (2011) DLT 557

Decided on: 31st March, 2011

Coram: **Mool Chand Garg**, J.

Facts: The present appeal was filed against the dismissal of probate petition filed by the appellant by the Ld. Trial court on the grounds of delay and lacuna in evidence regarding execution and attestation of the Will as per requirement of law and Will being shrouded in suspicious circumstances.

Issue: Whether the findings of the trial court were justified in relation to the execution, validity, contents and due attestation of the Will in question?

Held: It was held that the appellants failed to prove the due execution, attestation and registration of the will in question, there being not only material contradictions in the examination of the only attesting witness as regards witnessing the will being duly signed by the testatrix, but also his failure to satisfy an essential requirement of disclosing the presence of a second attesting witness to prove attestation in terms of Section 63(c) of the Indian Succession Act. Moreover, the Will being in English, the appellants also failed to show whether the testatrix being deaf, understood English or was aware of the contents of the Will and had signed the same after understanding the contents thereof. The appellants also did not explain why the will was got registered after 7 years and the further delay of 9 years after the death of the testatrix in filing of the present probate petition.

Hence in the present case, the delay of 9 years in filing the probate petition as well as non-compliance of Section 63(c) of the Indian Succession Act was held to be good reasons for refusal of grant of probate petition by the trial court and therefore no interference was held to be required. Appeal was accordingly dismissed.

RIGHT TO INFORMATION (RTI)

Clause (a) to Section 8(1) of the RTI Act: Disclosure and furnishing of information

Delhi Metro Rail Corporation v. Sudhir Vohra

Citation: 2011IAD(Delhi)369

Decided on: 1st August, 2011

Coram: **Dipak Misra, CJ,** Sanjiv Khanna, J. .

Facts: The respondent, an architect, filed an application under the Right to Information Act, 2005 requiring the Delhi Metro Rail Corporation Ltd. (DMRC) to give him "all structural drawings of both the pile foundation and the superstructure, including all steel reinforcement details, foundation details, engineering calculations and soil *tests*" pertaining to the cantilevered bracket of Metro Pillar No.67 which had collapsed on 12th July, 2009 resulting in the death of six persons and injury to many others. The Central Public Information Officer of the DMRC declined the information sought on the ground that it was intellectual property of the DMRC and considerable cost and time had been spent in preparing the design. The DMRC also claimed exemption from disclosure under Section 8(1)(d) of the RTI Act.

Being dissatisfied with the order passed by the CPIO and the first appellate authority, the respondent preferred an appeal before the Central Information Commission (CIC). The CIC repelled the submissions of the DMRC and expressed the view that the DMRC is 'State' and, therefore, it cannot decline to supply the information under Section 8(1)(d) of the RTI Act and that the exemption claimed under Section 8(1)(a) of the RTI Act could not be held to prejudicially affect the sovereignty and integrity of India or its security and strategic interests;

Being grieved by the aforesaid order, the DMRC invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. The learned Single Judge referred to Sections 8(1)(d) and 9 of the RTI Act and opined that there is no discretion to refuse when it comes to disclosure of information pertaining to a copyright vesting in the State and, therefore, the DMRC cannot refuse the information sought even if it might involve infringement of its copyright in the design pertaining to the cantilevered bracket of Metro Pillar No.67. Hence, the present LPA.

Issue: Whether the DMRC is exempted from disclosing the information pertaining to the cantilevered bracket of Metro Pillar No.67 which had collapsed on 12th July, 2009 under section 8(1)(a), (d) of the RTI Act?

Held: The information sought by the respondent is already within the public domain. There is no dispute over the facts that it is available on the internet. It was admitted before us that the drawing / details were available with the contractors, engineers, etc. They were not classified as secret or restricted documents. There may be facts / situations where a disclosure may affect the security, strategic, scientific or economic interests of the State but when there is no

need to enter into the arena for the purpose of interpreting the said situation in the obtaining factual matrix, we do not intend to dwell upon the said area.

Since, the design was given to the engineers, contractors, sub-contractors and other people working in the field, there has been disclosure earlier. Therefore, clause (a) to Section 8(1) of the Act is not attracted as the disclosure and furnishing of information cannot prejudicially affect the scientific and economic interests of the State.

Supplying the aforesaid information would not impair the process of investigation and prosecution of offenders more so when it is in the public domain. It is not shown how the furnishing of information would impede the investigation or prosecution of offenders.

Section 8(1)(j) of the Right to Information Act, 2005- No public authority can claim that any information held by it is "personal".

Jamia Milia Islamia v. Sh. Ikramuddin

Citation: 2011 X AD(Delhi) 257

Decided on: 22nd Novemer, 2011

Coram: **Vipin Sanghi, J.**

Facts: The respondent had sought information vide query No.1 as follows: *"Copies of Agreement/settlement between Jamia and Abdul Sattar S/o Abdul Latif & mania and Kammu Chaudhary in Ghaffar Manzil land"*. The PIO rejected the application of the respondent under the Right to Information Act, 2005 by stating that the information sought had no relationship to any public activity or interest and the same could not be disclosed under Section 8(1)(j) of the Act. The first appellate authority also affirmed the order of the PIO on the same grounds. However, the CIC allowed the appeal preferred by the respondent against the PIO order and directed the Public Information Officer (PIO) of the petitioner to provide the complete information available as on record in relation to query No.1 of the respondent. The present appeal is by the petitioner against the CIC order.

Issue: Whether the disclosure of the title documents of the petitioner/public authority/institution is exempted under Section 8(1)(j) of the RTI Act being 'personal information'?

Held: The Court considered the expression 'personal information' as mentioned in Section 8(1)(j) of the RTI Act and held that personal information means information personal to any other 'person' that public authority may hold. The Court observed that any public authority or institute was a juristic person but benefit of Section 8(1)(j) did not coame to their rescue in not disclosing information which pertains to activities of that institute. The information that was protected in Section 8(1)(j) could be of any other person that the institute may be holding for any purpose.

In the present case, the Petitioner University was a statutory body and a public authority. The act of entering into an agreement with any other person/entity by a public authority would be a public activity, and as it would involve giving or taking of consideration, which would entail involvement of public funds, the agreement would also involve public interest. Every citizen was entitled to know on what terms the Agreement/settlement had been reached by the petitioner public authority with any other entity or individual. The petitioner could not be permitted to keep the said information under wraps.

Hence, finding no merit in the appeal, it was accordingly dismissed.

Section 11 of the RTI Act: Interpretation and Scope

Arvind Kejriwal v. Central Public Information Officer & Anr.

Citation: 183 (2011) DLT 662

Decided on: 30th September 2011

Coram: Dipak Misra, CJ., **Sanjiv Khanna, J**.

Facts: The core contention of the appellant in the present appeal is that the expression "relates to or has been supplied by a third party and has been treated as confidential by that third party" in Section 11(1) of the Act should be read as "relates to and has been supplied by a third party and has been treated as confidential by that third party". In other words, the word 'or' used in Section 11(1) should be read as 'and'.

In support of the said contention, it is submitted that purposive and not literal interpretation is required and if a restricted or narrow interpretation is given then in all cases where information relates to third party, the Public Information Officer ("PIO" for short) would be required to issue notice to the third party or parties concerned. This may happen in most cases and it would make the Act unworkable.

Issue: Whether the term "or" may be read as "and" in regard to Section 11 of the Right to Information Act, 2005, i.e. third party information?

Held: The word "or" used in Section 11(1) cannot be read as "and" and it is not the requirement that the information must be given by the third party and must be furnished by the said party.

When PIO is of the opinion that the information may be confidential or is prima facie confidential, notice to the third party must be issued. This tests whether the information is confidential. Section 11(1) of Right to Information Act, 2005 requires and postulates that a notice to a third party before confidential information, which affects the right of privacy, is required to be furnished. Principles of natural justice should be complied with.

Section 11(1) postulates two circumstances when the procedure has to be followed. Firstly when the information relates to a third party and can be prima facie regarded as confidential as it affects the right of privacy of the third party. The second situation is when information is provided and given by a third party to a public authority and prima facie the third party who has provided information has treated and regarded the said information as confidential. The prodecure given in Section 11(1) applies to both cases.

The observation made in the present appeal should not be construed as binding findings on any of the said aspects.

SERVICE LAW

SERVICE LAW

Principle of Natural Justice/Principle of Estoppel

Akhilesh Kumar Verma v. Maruti Udyog Ltd.

Citation: 2011IXAD(Delhi)90

Decided on: 26th September, 2011

Coram: **V. K. Jain, J.**

Facts: The plaintiff was employed as an Executive with defendant No. 1, Company in June, 1984 and was promoted as Sr. Executive in the year 1989. The allegations in the plaint is that the defendant No.2, Managing Director of defendant No.1 company and defendant No.3, Divisional Manager of the company were involved in irregularities and corrupt practices and wanted the plaintiff to cooperate with them and when he declined to do so, they became hostile toward him and even transferred him.

Since no work was assigned to the plaintiff, upon transfer to Raigarh he proceeded on leave but the leave was not sanctioned. A charge-sheet was then served on him August, 1991 alleging unauthorized absence and disobedience of orders of the superiors. The plaintiff was dismissed from service of defendant No.1 vide order dated 27th June, 1992 upon noting of the findings of the inquiry.

The dismissal order has been challenged by the plaintiff primarily on the grounds that, 1) the Inquiry Officer was prejudiced against him and had stated that the inquiry was only a formality, 2) the domestic inquiry was used as a smokescreen to give a pre-determined verdict against the plaintiff, and 3) the inquiry was conducted in violation of principles of natural justice. The plaintiff has sought quashing of the domestic inquiry and his reinstatement in service and compensation for defamation, harassment and mental agony on account of wrongful dismissal.

The suit has been contested by defendant No.1, 2 & 5 who have taken a preliminary objection that since the plaintiff had earlier filed a suit seeking declaration and permanent injunction against his transfer, which was to no avail, the present suit on the same cause of action is barred by the principle of estoppel and is liable to be dismissed.

Issue: Whether dismissal of the plaintiff from service is bad in law being vitiated by bias on the part of the Inquiry Officer and the Competent Authority who dismissed him from service as it violates the principles of natural justice?

Whether the present suit is barred by estoppel?

Held: One of the cardinal principles of natural justice is that the deciding authority must be fair impartial and without any bias. The bias can be personal pecuniary and official. The test to determine whether the decision was influenced by bias or not, is as to whether there was a real likelihood of bias even though such bias, has not in fact taken place. If the Inquiry

Officer had, even before examining the merits of the charge against the plaintiff, decided/agreed to submit a report against him, this would indicate a pre-disposition to decide against the plaintiff and therefore would constitute bias. Of course, there must be a reasonable apprehension of such a pre-disposition and that apprehension needs to be based on cogent material.

Conversation (IO says to Plaintiff):

> "*Report to mujhe aapke khilaf hi banana hai, aapke khilaf enquiry hi issi liye institute hui hai, varna charges hi kya hain."*

The conversation between the plaintiff and the Inquiry Officer clearly indicates that the inquiry was conducted with a pre-decided mind and the Inquiry Officer who was an employee of defendant No.1-company was under instructions to submit a report against the plaintiff, irrespective of the merit of the charge against him. Since, the Inquiry Officer had during the pendency of the inquiry itself, decided to submit a report against the plaintiff it is obvious that he was biased against the plaintiff, presumably, on account of the pressure from his superiors to submit a report detrimental to the plaintiff. If the Inquiry Officer was biased against the plaintiff and was conducting the inquiry proceedings with a pre-decided mind, the inquiry proceedings as well as the findings recorded by the Inquiry Officer became tainted and vitiated.

The suit instituted previously by the plaintiff was with respect to his transfer whereas it is dismissal of the plaintiff from the service which has been challenged in the present suit. The inquiry report was not the subject matter of the previously instituted suit and therefore, the Court in which the previous suit was filed was not called upon to adjudicate on the validity of the dismissal of the plaintiff from service. The present suit is therefore not barred by the principle of estoppel.

The Plaintiff is awarded an all inclusive compensation amounting to Rs.15,00,000/- on account of his wrongful dismissal from service.

The power of judicial review, being a basic feature of the Constitution, under Article 226 and Article 227 of the Constitution of India is unaffected by the Constitution of the Armed Forces Tribunal.

Colonel A.D. Nargolkar v. UOI & Ors

Citation: 179(2011)DLT447

Decided on: 26th April, 2011

Coram: **Pradeep Nandrajog,** Suresh Kait, JJ.

Facts: The problem of delay in adjudication of disputes between members of an Armed Force and the Force in Civil Courts led to the establishment of the Armed Forces Tribunal with the pious hope that an exclusive Tribunal to decide disputes relating to Armed Forces would facilitate a speedy adjudication of disputes, but the establishment of the Tribunal has raised jurisdictional issues pertaining to the power of a High Court under Article 226 and Article 227 of the Constitution of India. In the present matter, writ petitioners have challenged orders passed by Armed Forces Tribunal, which had been constituted under Armed Forces Tribunal Act 2007.

Issue: Whether a writ of certiorari or any other writ of the like nature would lie under Article 226 of the Constitution of India against decision of the Armed Forces Tribunal?

Whether a High Court could exercise power of superintendence over Tribunal, under Article 227 of the Constitution of India?

Held: As per Entry 2 read with Entry 97 of List I of Constitution, legislative power vests in the Parliament to create the Armed Force Tribunal. Thereby, the Armed Forces Tribunal Act 2007 had been passed by Parliament. As provided under Act, Tribunal exercised Appellate Jurisdiction with respect to orders, findings or sentences of Court Martials and exercised original Jurisdiction with respect to service disputes. Proceedings under Article 226 would be in exercise of original jurisdiction of High Court whereas proceedings under Article 227 of Constitution would be supervisory proceedings.

It was held by the Court that the Armed Forces Tribunal, being manned by personnel appointed by the Executive, albeit in consultation with the Chief Justice of India cannot be said to be truly a judicial review forum as a substitute to High Courts which are constitutional courts and the power of judicial review, being a basic feature of the Constitution, under Article 226 and Article 227 of the Constitution of India is unaffected by the Constitution of the Armed Forces Tribunal. Further, Article 227(4) of the Constitution of India takes away only the administrative supervisory jurisdiction of High Court over the Armed Forces Tribunal and does not impact the judicial supervisory jurisdiction over the Armed Forces Tribunal. Thus, decisions by the Armed Forces Tribunal would be amenable to judicial review by High Court under Article 226 as also

Article 227 of the Constitution of India. Therefore, writ petitions against orders passed by Tribunal were maintainable. Petition disposed of. Matters listed for preliminary hearing.

Colour blindness or colour vision loss may be broadly stated to be total, moderate or partial; disability attributable to the service.

Sudesh Kumar v. UOI & Anr,

Citation: MANU/DE/1009/2011

Decided on: 22nd March, 2011

Coram: **Pradeep Nandrajog,** Suresh Kait, JJ.

Facts: The Hon'ble DB of the Delhi High Court has disposed of 5 petition together by this Common judgment. The common issue is related to colour blindness. The petitioners have served or are serving in different Central Para-Military Forces and each one of them suffer from colour blindness.

Through policy dated 17.5.2002, by Ministry of Home Affairs, it was decided that those members of the Central Para-Military Force who were inducted in service prior to 17.5.2002 and for whatever reasons the disability could not be detected then, would be retained in service and would also earn promotions, if otherwise fit, but those who were recruited after 17.5.2002 would be required to be invalidated in service after 4 years.

Issue: Whether colour blindness would be a reasonable ground for disqualification from service being treated as a disability and the said policy is arbitrary?

Held: The respondents have not been careful enough and indeed have been negligent not only at stage one when they inducted the petitioners in service by not subjecting them to a proper medical screening and had the respondents been careful, petitioners would have been told of their medical disability and this would have been at an age when all of them could have applied for public employment in such organizations where colour blindness is not a medical disability. Even at the second stage, by not correctly identifying the nature of the colour blindness suffered by them, the respondents have deprived them of a chance to serve in active duty, to wit, if anyone of them had congenital defects of the cone cells, he could volunteer active service from dusk to dawn. Thus, colour blindness or colour vision loss may be broadly stated to be total, moderate or partial.

It is true that a policy decision is in the exclusive domain of the State and can be struck down only when the same is ultra vires or unconstitutional i.e. is in violation of Article 14 or 16 of the Constitution of India, pertaining to a matter of service, no policy decision can be done away with unless so found.

The policy circular dated 17.5.2002 recognizes the principle of either legitimate expectation or estoppel, as observed by us in para 27 above. It recognizes a wrong done to the members of the force by inducting them in service ignoring the medical disability; the wrong being that had they been told at the time when they sought employment that they were ineligible for appointment in a Central Para-Military Force, these young men could

have found alternative employment on jobs where colour blindness was not an issue and not doing so and further throwing them out of jobs at an age when these young men became overage to seek public employment was to deprive them of a fair opportunity to seek public employment. The same principle on which policy circular dated 17.5.2002 was issued would equally apply where the Central Para-Military Forces would continue to be in the wrong due to negligence post 17.5.2002. In this context we find the policy decision dated 29.10.2008 being arbitrary and discriminatory in prescribing 17.5.2002 as the cut-off date as also the clarificatory policy circular dated 11.3.2011

A mandamus is issued to the respondents to promote Sudesh Kumar as a Sub-Inspector (Executive) with effect from the date person immediately below in the select panel was promoted and we hold that he would be entitled to all consequential benefits. Therefore, petitions were allowed and were disposed off in favour of the petitioners.

No evidence at all, nor any scientific explanation to show that a person suffering from Complete Androgen Insensitivity Syndrome (CAIS) and side effects of the prescribed medication would adversely affect the individuals job performance.

Faizan Siddiqui v. Sashastra Seema

Citation: 2011(124)DRJ542

Decided on: 3rd May, 2011

Coram: **Gita Mittal,** J R Midha, JJ.

Facts: SSB published an advertisement inviting applications for appointment to vacancies for the post of Constable (GD) Female to be filled from UP State. The Petitioner was found eligible and was issued an admit card for written examination conducted by the respondents. The Petitioner cleared the measurement stipulations and qualified physical standards test, physical efficiency test, written test and interview.

The candidature of the Petitioner was rejected on the ground that she was suffering from hormonal anomaly described as 'Disorder of Sexual Differentiation' for which she had already undergone necessary surgery and thereafter was placed on hormonal replacement therapy. The present petition assails rejection of her candidature on grounds of medical unfitness by medical examination committee.

Issue: Whether the rejection of candidature would be unjustified and bad in law in the absence of expert opinion or scientific material?

Held: It is unfortunate that all doctors of the CPMF who have been involved in reporting the Petitioners medical fitness in the organisation have used expressions like 'pseudohermophroditism', 'true hermaphrodite' and 'postoperative sequelea' as synonyms and interchangeable without paying any heed to the Petitioners medical condition or her fitness. The views of the treating expert find no place in the consideration. There is no evidence at all nor any scientific explanation before the respondents which could have enabled them to arrive at a conclusion that CAIS afflicted individuals experience severe side effects of the prescribed medication which would obviously effect the individuals job performance.

The purpose of medical examination is not to create a body of persons in the community who have been labelled as "medically unfit" without any material or basis. In the present matter, the decision of the respondents is based on no material at all, let alone relevant material.

Decision rejecting the petitioners candidature held to be completely arbitrary and irrational. An expert endocrinologist has certified that the Petitioner is entirely capable of performing the duties of a mahila SSB constable.

SERVICE LAW

The experience gained by diploma holders prior to their obtaining a degree could not be counted and their seniority must necessarily start from the date the degree is obtained.

M. A. Khan & Anr. v. New Delhi Municipal Council & Ors.

Citation: 2011 IX AD(Delhi) 409

Decided on: 19th October, 2011

Coram: **Sanjay Kishan Kaul,** Rajiv Shakdher, JJ.

Facts: The present case dealt with the issue of promotion from a Junior Engineer to an Assistant Engineer. The standard line of promotion in the NDMC was from a JE to an AE to an Executive Engineer (EE) to a Superintendent Engineer (SE) and then to a Chief Engineer (CE) and Engineer-in-Chief. The entry point for an AE was from two routes i.e. direct recruitment and departmental recruitment. The modified Recruitment Rules of NDMC were passed and the basic modification was that out of 75% posts, 50% of the total posts for diploma holders and 25% were for Graduate Engineers. Further, a sub-classification was made for the diploma holders who acquired the degree during the course of service.

The Appellants claimed that there was a separate line of promotion and only on acquiring the degree, promotion can be achieved and thus the seniority for being considered for promotion in this line should be based on the date of acquisition of the degree. Carving out a quota for such diploma holders who acquired degree during the course of service was based on the need to have accelerated promotional avenues so that more degree holders were available for manning the higher posts of SEs onwards for which only degree holders were eligible. The Respondents on the other hand laid challenge to the Seniority list on the grounds that as long as one acquires a degree and completes the necessary years of service post acquisition of the degree, a common pool of such persons would arise and thus the promotion of would be based on the entry into the cadre of a JE rather than the date of acquisition of the degree.

Issue: Whether seniority amongst persons holding similar posts in the cadre was to be determined on the basis of length of service or the date of acquiring the degree?

Held: The court, proceeding on one fundamental principle, observed that there could be more than one channel of promotion requiring different periods of service and different educational qualifications. If a person with lesser educational qualification became eligible under the rules to be promoted albeit after a delayed period of time, it would not make the rule arbitrary and the benefit could accrue to a person with higher qualification. Thus, the choice was with the candidate to avail of the route which was more beneficial to him but once he opted to join a stream of the degree holders then their seniority in this quota would alone be the criteria, i.e. the date of acquiring the degree and not the period rendered in service as a diploma holder, hence he would be placed at the bottom of the seniority list.

Therefore, since the appellants obtained the degree first, they came into the eligible pool earlier and were ranked higher than the respondants no. 2 and 3, for purposes of consideration for promotion. Thus the date of acquiring the degree being the material date with requisite period of service post acquiring the degree, modified seniority made the Appellants senior to the Respondents 2 and 3 and thus their promotion was upheld. Appeal was accordingly allowed.

The only right that an employee has in the matter of re-employment is the right to be considered.

Shashi Kohli v. Director of Education & Anr.

Citation: 179 (2011) DLT 440

Decided on: 29th April, 2011

Coram: **Rekha Sharma**, J.

Facts: The Petitioner filed the present writ petition, being aggrieved of not having been granted the benefit of re-employment despite a notification issued by the Government of Delhi, Directorate of Education, allowing re-employment to all retiring teachers upto PGT level till they attained the age of 62 years, on the ground of being without any cogent reason.

Issue: Whether the petitioner, having once ceased to be in the service of the respondent on attaining the age of 60 years, deserved to be re-employed up to the age of 62 years?

Held: The court after considering the facts and circumstances of the case observed that it was not the case, that respondent no. 2 had not considered the re-employment of the petitioner upto the age of 62, however such a consideration was not taken in pursuance to the Notification issued by the Government of Delhi, but in pursuance of a decision taken by the Working Committee of the Delhi Public School Society, that all teachers will remain in employment upto the age of 62 years unless found unsuitable on any ground. However, the petitioner was found unfit for re-employment and therefore was not re-instated.

In light of the present factual matrix, the court held that it was apparent from the Notification of GNCTD dated January 29, 2007 read along with the Notification dated February 28, 2007 on the one hand, and the Minutes of the meeting relied upon by the School on the other, that the Petitioner only had a right to be considered for re-employment and not to be re-employed per se, and the School was well within their rights to deny her re-employment.

The Court therefore dismissed the writ petition and held the action taken by the respondent No. 2 in not granting re-employment to the petitioner to be legal.

SERVICE LAW

Conditions regulating service and making changes therein are a matter of policy.

Suresh Kumar Sud & Ors. v. Union of India & Ors.

Citation: 181 (2011) DLT 183

Decided On: 21st July, 2011

Coram: **Rekha Sharma,** J.

Facts: The petitioners filed the present writ petition seeking quashing of the order of Respondent No. 3 (IIT, Delhi) cancelling its earlier notification enhancing the age of superannuation of scientific and design staff from 62 to 65 years, on the basis of its communications with respondent no. 1 clarifying that the Government's approval for the enhanced age of superannuation from 62 to 65 years was applicable only to the teaching staff and to none other category of employees though considered to be equivalent to teachers.

According to the facts of the case, respondent no. 3 i.e. IIT, Delhi, facing the shortage of teaching staff, started engaging the members of the scientific and design staff to take to teaching assignments. The first dispute arose when the pay scales of the teaching staff were raised but not of the research and design staff. However, through a previous writ petition which was decided in their favour, the pay-scales of the research and design staff were also raised. The second dispute (present) arose when respondent no. 1 decided to raise the retirement age of the teaching staff from 62 to 65 years, but not of those who were holding posts equivalent to teaching posts but not actually engaged in teaching and in furtherance of its decision, objected to the notification issued by respondent no. 3 raising the retirement age of its scientific and design staff from 62 to 65 years. Faced with the decision of respondent no. 1, respondent no. 3 withdrew its earlier notification giving rise to the present writ petition.

Issue: Whether the national level policy was to be applicable to the petitioners despite the distinction between them and the 'teaching staff'?

Held: The court observed that, in the present factual matrix, the petitioners and the teaching staff were two distinct classes of employees and the mere fact that they were appointed through the same open selection as the teaching staff with professional designations would not blur the distinction. Similarly, availing the services of scientific and design staff for teaching, merely because of the exigencies of the situation created by paucity of teaching staff, could not erase the distinction between the two. Such an act could not amount to merger of two distinct services, nor could it do away with the clear distinction between the two.

The court further opined that the respondent no. 3 had no power to alter the service conditions under the said Act and thereby could not have granted the superannuation benefit to the petitioners. Section 33 only empowered the respondents no. 1 and 2 to lay down the policy regarding service conditions of the employees of IITs including the petitioners. Therefore, the petitioners could not be allowed to derive any benefit from the policy decision

taken by the respondents 1 ad 2, enhancing the age of the teaching staff from 62 to 65 years as it had been confined only to the said class on account of shortage in the teaching staff and not for any other purpose. The Court, hence, dismissed the writ petition on the above stated reasons.

SERVICE LAW

An insurance policy is to be construed liberally in favour of the assured.

Sagrika Singh v. Union of India & Ors.

Citation: W.P.(C). 3850/2010

Decided on: 29th August, 2011

Coram: **Pradeep Nandrajog ,** Rajiv Shakdher, JJ.

Facts: The present writ petition arose from the dismissal of the petitioner's prayer before the Armed Forces Tribunal, seeking issuance of direction to the Army Group Insurance Fund (AGIF) for payment of disability benefit under the Army Group Insurance Scheme, on the ground that the disability benefit was only available to an officer whose service was cut short due to invalidment or release on medical grounds.

The petitioner had initially been appointed for 5 years as a Short Service Commissioned Officer in the Indian Army being attached with Army Medical Corps, and was later extended for another 5 years. However, before the extension expired she was detected with kidney malfunction and was thereby denied further extension of 4 years and released from service.

Issue: Whether the petitioner was entitled to a disability benefit on account of medical invalidation or not?

Held: The court observed that in the present factual matrix, the terms of engagement of the petitioner required the petitioner to serve for 14 years subject to fulfilment of the prescribed eligibility conditions, one of them being that the concerned officer should have been Shape-I Medical category. However, the petitioner not having qualified for the abovesaid category due to one kidney failure, was put in a low medical category and as a result was refused extension of further 4 years of service. Thus, the inevitable conclusion had to be that the extension by a further period of 4 years was undoubtedly a part of the petitioner's terms of engagement and that it were cut short only due to petitioner's medical invalidment.

The court further opined that under the Army Group Insurance Scheme, financial benefit was to be given either upon service being cut short before completion of terms of engagement or upon service being cut short with reference to the service applicable to that rank. Since the only reason that resulted in the tenure of engagement being cut short was the petitioner's failure to achieve Shape-I Medical category, a beneficial interpretation ought to have been placed upon the rules, office orders and the various paragraphs of the Army Group Insurance Scheme since the object of the fund was the welfare of Army Personnel and amongst others, one object was to provide financial benefits to individuals whose service was cut short due to invalidment or release on medical grounds before completion of the terms of engagement.

Hence, the Rule was made absolute and the court issued Mandamus to the respondent to pay the sum assured to the petitioner under the Insurance scheme.

Section 25F of the Industrial Disputes Act, 1947- There is no distinction in industrial law between a permanent employee and a temporary employee.

Subhash Chand v. Municipal Corporation of Delhi

Citation: 2011 V AD(Delhi) 154

Decided on: 21st April, 2011

Coram: **Rekha Sharma,** J.

Facts: In the factual matrix of the present writ petition, the petitioner, employed with the respondent as a muster roll monthly paid worker (chowkidar), was terminated from service for misconduct without having been served any chargesheet or a departmental inquiry initiated against him before such termination giving rise to an industrial dispute. The termination order was challenged before the Labour Court, which despite having given a finding in favour of the petitioner, simply awarded compensation instead of directing his reinstatement with consequential benefits. Hence, the present writ petition.

Issue: Whether the termination of service of the Petitioner without notice or inquiry, was illegal and unjustifiable?

Held: Relying on the decision in the case of Ram Narain vs. Management of Delhi State Civil Supplies Corporation Ltd., the court observed that as long as a person was employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, he was a workman under the Industrial Disputes Act, and was entitled to get the benefits under the Act. Further, even those workmen who were employed on muster roll on casual basis were covered under Section 25-F r/w Section 25-B of the Act and even their services could only be terminated by giving them notice subject to the condition that they had rendered more than 240 days of service in the year prior to the proposed termination.

The court after considering the facts and circumstances of the case observed that the Petitioner had worked with the Respondent for more than 7 years and in view of Section 25F of the Industrial Dispute Act, 1947, his services could not be terminated without giving him a one month notice. Keeping in view of the principles of natural justice the Court set aside the award passed by the Labour Court and passed the order of reinstatement of the Petitioner in service with full consequential benefits and disposed of the petition.

SICA, 1985

(Sick Industrial Companies Act)

SICA

Effect of discharge of reference by BIFR, on company's net worth becoming positive, on levy of income tax.

Director General of Income Tax (ADMN) & Anr, New Delhi

v.

Board of Industrial & Financial Reconstruction, New Delhi & Ors.

Citation: MANU/DE/1160/2011

Decided on: 23rd March, 2011

Coram: **Sanjay Kishan Kaul,** Rajiv Shakdher, JJ.

Facts: In these writ petitions the Petitioner seeks to recover its dues *de hors* the concessions incorporated in the sanctioned scheme with the net worth of the SIC turning positive and the reference pending before the BIFR being discharged. The Petitioner has laid an omnibus challenge under Article 226 of the Constitution of India to the orders passed by the Board for Industrial & Financial Reconstruction (BIFR), without taking recourse to an appellate remedy, available under Section 25 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

Issue: Whether discharge of the reference by the BIFR on the sick company's net worth becoming positive would entitle the Income Tax Department to recover its dues *de hors* the concessions of the scheme?

Held: The statement of objects and reasons encapsulated in SICA clearly provides that the intendment of the Legislature is that in order to overcome the ill effect of sickness such as loss of production, loss of employment, loss of revenue to central and state government and the blockage of illiquid funds of the bank and financial institutions given in the form of financial assistance; led to the enactment of SICA. The avowed object of enactment of SICA is not only to fully utilize the productive industrial assets and human resources but also to salvage the locked investible funds of banks and financial institutions in such sick industrial companies which were non-viable. Therefore, the legislature in its wisdom decided to enact a special law to deal with the industrial sickness.

Once a scheme is sanctioned according to the provisions of the SIC Act it has the force of law and is binding on all concerned. The Department cannot resile from the concessions made at the stage when the scheme was formulated and sanctioned merely because the net worth of the company at whose behest the scheme was sanctioned has become positive. That part of the sanctioned scheme which remains to be implemented will have to be implemented. A contrary view would result in disastrous consequences. Creditors, employees, shareholders, amongst other dramatis personae will pull in different directions, thus defeating the very

purpose for which the sanctioned scheme was formulated in the first instance. Petition dismissed.

Section 19 (1) of The Sick Industrial Companies (Special Provisions) Act, 1985- deals only with a provision made for financial assistance by way of "loans, advances or guarantees or reliefs or concessions or sacrifices" from the relevant entities.

M/s. Lords Chloro Alkali Limited v. M/s. Bharat Heavy Electricals Limited & Anr.

Citation: (2011) 108 SCL 64 (Delhi)

Decided on: 27th May, 2011

Coram: **Sanjay Kishan Kaul,** Rajiv Shakdher, JJ.

Facts: The present writ petitition was filed by the Respondent No. 1 company in light of its dues outstanding against the petitioner company, challenging the declaration of petitioner company as a sick company within the meaning of The Sick Industrial Companies (Special Provisions) Act, 1985, without issuance of prior notice to the respondant under Section 19(2) of the SICA, on the ground that the respondant company being a Central PSU, had to be treated as "State" within the meaning of Article 12 of the Constitution of India, and thus be covered within the meaning of "other authority" under Section 19(1) of the SICA.

Issue: Whether a Public Sector Enterprise/Undertaking, having dues outstanding in respect of a commercial transaction, from a sick company, falls within the definition of "other authority" for purposes of Section 19(1) of the SICA and is entitled to the benefit of sub-section (2) of Section 19 of the SICA of circulation of the scheme and entitlement to obtain its consent?

Held: The court observed that financial assistance by way of loans, advances or guarantees was a positive act by which some more amount or guarantee was given for rehabilitation of the company. On the other hand, reliefs, concessions, sacrifices were acts where something was given up, i.e., in respect of loans, advances, or guarantees by way of relief, concession or sacrifice. However, a pure commercial transaction of supply of goods and the corresponding entitlement to recover the balance unpaid price would, thus, not fall within this category and it was in that context that for the remaining unpaid price respondent No.1 was treated as an unsecured creditor as it was not an entity which had lent any money against security.

The court further observed that the provisions of Section 19 of the SICA were clear in their terms reflecting the intent of the legislature and there was no need to give it an extended meaning by seeking resort to provisions of Article 12 or Article 226 of the Constitution of India. The plain, literal and grammatical meaning had to be given effect to, without being inconsistent with any expressed intention or declared purpose of the SICA. The species specified in one category 'a public financial institution or State level institution or any institution or other authority', hence the expression 'any institution or other authority', takes its colour from a 'public financial institution or State level institution', and the petitioner could not be permitted to break and create a separate category of 'other institution' when the

word used was ‘or’prior to it. Therefore the respondent No. 1 was not covered within the definition of “other authority” under Section 19(1) of SICA thereby not being entitled to the notice under Section 19(2) of the SICA and hence, its entitlement was restricted to 10 per cent of the principal amount being in the category of an unsecured creditor.

The writ petition was accordingly allowed and the impugned order of the AAIFR dated 12.10.2010 set aside making the rule absolute.

TENDERS

5% of the bid security cannot be categorized as a reasonable pre-estimate of damages for a non-responsive bid and could not be forfeited.

Madhucon Projects Ltd. v. National Highways authority of India

Citation: MANU/DE/0852/2011

Decided on: 10th March, 2011

Coram: **Sanjay Kishan Kaul,** Rajiv Shakdher, JJ.

Facts: The Respondent floated a tender for the development and operation/maintenance of the four-laning of Ranchi-Rargaon-Jamshedpur section of NH-33 in the State of Jharkhand on DBFOT Annuity basis, where the bid of the petitioner was disqualified on account of Power of Attorney (POA) not being in the prescribed format as per format in Appendix III of the Request for Proposal and on the opening of the bid it was noticed that the date printed on the POA was of 12.08.2010 which was different from the date of signing being 19.08.2010.

Issue: Whether POA submitted by the Petitioner was defective/alleged defect could be termed as a technical irregularity or was it fatal to the bid?

Whether Respondent was entitled to encash the bank guarantee for the bid security amount treating the bid of the petitioner as non-responsive and whether clauses in RFP can be said to be penal in nature?

Held- The bid of the Petitioner was held to be responsive. A typographical error of a date in the POA when it is duly signed, accepted and notarized can at worst be a technical defect but the Petitioner could at best have been called to issue a clarification which in any case was available with Respondent No. 1 under the cover of the letter dated 23.11.2010 as per the certificate issued by the Notary Public.

Further, there is no question of encashing the bid security. In any case, 5% of the bid security cannot be categorized as a reasonable pre-estimate of damages for a non-responsive bid and could not be forfeited.

Writ Petition allowed.

TENDERS

State can choose its own methods and fix its own terms of invitation to tender.

Medical Point (I) Ltd v. Union of India

Citation: IV (2011) BC 622

Decided on: 8th August, 2011

Coram: **Sanjay Kishan Kaul,** Rajiv Shakdher, JJ.

Facts: The writ petition was filed challenging the rejection of the tender of the Petitioner for Gas Plasma Sterilizers by the Respondent No. 2 & 3 (AIIMS). The petitioner has alleged that the Respondent No. 2 & 3 have adopted Decision Oriented Systematic Analysis (DOSA) so as to make the tender conditions tailor made for Respondent No. 4. The main grievance of the Petitioner was concerning two clauses of the tender i.e. Clause 11 & 14 regarding the approval by US FDA, CE & EPA and the recommendation by IFU's of reputed Device Manufacturers.

Issue: Whether the requirement of approval by all the three agencies – US FDA, CE & EPA was tailor-made for Respondent No.4 ?

Held: It was held that the Petitioner had not come to the court with clean hands and had filed the writ petition only to delay the award of tender. An expert body of AIIMS had sat down to make the terms and conditions of the tender and they considered it appropriate to accept the certification of US FDA, the CE marking and the EPA certificate as a test of the product as India had no authority providing such norms. Therefore, it could not be said to be a mindless exercise to favour Respondent No. 4.

While dismissing the petition, the court further held that the State can choose its own methods to arrive at a decision and fix its own terms of invitation to tender, subject to the norms, standards and procedures laid down, which are not open to judicial scrutiny. (*Air India Ltd v. Cochin International Airport (2000) 2 SCC 617*)

Malice in law occurs when a person or an entity commits a wrongful act intentionally without just cause or reason.

RDS Projects Ltd v. Ratnagiri Gas and Power Pvt. Ltd. & Ors.

Citation: MANU/DE/4042/2011

Decided on: 17th October, 2011

Coram: Sanjay Kishan Kaul, **Rajiv Shakdher, JJ.**

Facts: In the factual matrix of the present case, the petitioner in a previous round of litigation had sought to challenge the cancellation/scraping of tender by the respondent no. 1, after the petitioner was declared as the lowest tenderer. However, the writ petition was subsequently withdrawn in view of the stand taken by the respondent no. 1 that it had exercised its rights as an owner under Article 28.1 of the 1st tender.

The present writ petition was filed by the petitioner being aggrieved with the change/amendment made in the fresh tender floated by the respondent no. 1 on the ground that the change/amendment, though subtle, was malicious, arbitrary, unreasonable and unfair and brought about only for the purpose of excluding the petitioner.

Issue: Whether the conduct of the respondent no. 1 shows malafide intention to frustrate the bid of the petitioner in respect of the tender floated by it?

Held: The court relying on West Bengal State Electricity Board v. Dilip Kumar Ray (2007) 14 SCC 568, observed that a person who inflicted an injury upon another person in contravention of the law was not allowed to say that he had done so with an innocent mind; he was taken to know the law, and he should have acted within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind was concerned, he may have acted ignorantly, and in that sense innocently.

In the present case, the petitioner despite having met the qualifying conditions to be eligible for award of the first tender and having been recommended by respondent no. 2 (GAIL) and respondent no. 3(EIL), was not granted the tender since the tender by itself had been cancelled by respondent no. 1(RGPPL) in exercise of its powers under Article 28.1 of the said tender. At the time of the 2nd tender, the respondent no. 1 called for bids only for those bidders who satisfied the new clause (amended version of clause 8.1.1.1 in the first tender), knowing fully well that the petitioner could not apply or be found eligible in respect of the new clause in the second tender as the qualifying work which the petitioner had executed, was a subject matter of two contracts and not a single contract; and that project was an offshore project as against one located in sea.

In light of the facts and circumstances, the court found it apparent that the new clause in the 2nd tender had been introduced only to exclude the petitioner, making it a clear case of malice in law which occurs when a person or an entity commits a wrongful act intentionally without

just cause or reason. The court also found no doubt in the theory that the decision taken by respondent no. 1 was pregnant with malice, and that it had been taken for considerations other than those which are in accord with good conscious, equity and fairness. The new clause was undoubtedly introduced in the fresh tender, (i.e., the 2nd tender), to completely oust the petitioner from bidding.

The court thus held the amended clause 8.1.1.1 (inserted in the 2nd tender), as bad in law and quashed the decision of the respondent no. 1 rejecting the bid of the petitioner in the 1st tender and annulling the bidding process in the 1st tender. However, the relief regarding an award of contract to the petitioner was not granted to the petitioner, as the court found itself unable to issue directions to a State or its instrumentalities, to award contracts to one or the other party no matter how aggrieved the party may be. Petition was thereby disposed off after awarding appropriate costs to the petitioner on account of litigation fees.