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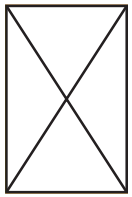

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VOLUME-3, PART-II

(CONTAINS GENERAL INDEX)

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ARBITRATION & CONCILIATION ACT, 1996—Award—Petitioner Challenged Award passed by Learned Arbitration—Plea taken, Contrary to specific directions issued by Court, learned Arbitrator has not, in fact, given reasons for conclusion in respect of different claims made by NNCC and has virtually repeated his earlier Award, which was set aside by Court—If claims(iii), (iv) and (v) were components of claim (xvii), then there was no justification for learned Arbitrator to have again awarded a separate sum of Rs. 2,00,000/- under claim (xvii)—Award itself was based on fictitious documents, which ought not to have been relied upon by learned Arbitrator—Per contra plea taken, learned Arbitrator has explained, both under claims (i) and (ii) and again under claims (iii) to (viii) that they were all components of all claims for profit and loss under claim (xvii)—Award in respect of claim (xvii) was not challenged by Petitioner on ground now urged and was therefore impermissible—HELD—Claims (i) to (viii) have been treated by learned Arbitrator to be components of claim (xvii) which is for a sum of Rs.6,40,000 towards loss of profit—It is not understood why if, indeed, claims (i) to (viii) are intrinsically and essentially components of claim for loss and profit then in addition to those claims, a separate sum of. Rs. 2,00,000 could be awarded under claim (xvii)-Learned Arbitrator has failed to give any reasons whatsover in awarding Rs.2,00,000 under claim (xvii) towards loss of profit, in addition to award in respect of claims (i) and (viii) which are stated to be components of claim for loss of profit—To that extent, it must be held that no reasons have been given by learned Arbitrator as regards claim (xvii) and impugned award to that extent is not in conformity with specific directions issued by Court—Consequently Award under claim (xvii) of Rs.2,00,000 in favour of NNCC is set aside—With GNCTD not making

available original documents before learned Arbitrator, it cannot be permitted to urge that learned Arbitrator proceeded on basis of fictitious documents—There was no way learned Arbitrator could have dealt with submission of fictitious documents in absence of original records—In view of long pendency of arbitration proceedings, Court is inclined to modify rate of interest and direct that GNCTD will pay NNCC simple interest @ 9% p.a from 28th October, 1993 till date of payment which shall not be later than eight weeks from today—Any delay in making payment beyond that period would attract simple interest at 12% per annum for period of delay.

Govt of NCT of Delhi v. Nav Nirman Construction Co. *2074*

— Section 11 and 34—Indian Registration Act, 1908—Section 17(1)(d) and 49—Indian Stamps Act, 1899—Section 35—Two premises were taken on lease by Respondent— Lease agreements were executed on a Rs.100/- stamp paper each and were unregistered—Lease agreements stipulated that term of lease shall be 12 years—As per Petitioners, lease agreements also stipulated that there would be a 36 months lock-in-Period w.e.f. 16.04.2007 to 15.04.2010 in which neither of parties could terminate lease—As per Petitioners, Respondent in violation of terms and conditions of lease agreement, by letter dated 20.01.2009, terminated lease agreement, paid rent only upto 31.01.2009 and abandoned shops on 30.03.2009—Petitioners before Arbitral Tribunal claimed rent for month of February and March, 2009 and also for unexpired period of lock-in-period—Arbitral Tribunal held that Respondent liable to pay rent for months of February and March, 2009 at agreed rate of Rs.1,24,000/- besides service tax and maintenance charges—With regard to issue pertaining to objection of Respondent that claim of Petitioner for payment for unexpired lock-in-period was hit by provisions of Indian Stamp Act and Indian Registration Act, it held that lease deed was insufficiently stamped and it compulsory required registration and as it was unregistered, it was inadmissible in evidence and clause of lock-in period could not be enforced—Award

challenged before High Court—Held—A document compulsorily required to be registered but not being So registered cannot be used as evidence except for any collateral purpose—A clause in a lease deed fixing or stipulating a term of lease or a fixed term of lock-in period is not a collateral purpose—Said clause would be one of main clauses of lease which in absence of registration would be inadmissible in evidence and unenforceable in law—Arbitral Tribunal has rightly held that clause vis-a-vis lock-in period cannot be called a collateral purpose and tenancy between parties was not fixed term tenancy but a month to month tenancy terminable by a notice on either side—Finding by Arbitral Tribunal that Respondent had vacated premises w.e.f. 01.04.2009 is purely factual—Powers exercised by Court while deciding objections under Section 34 of Act are not appellate powers—Court does not sit as a Court of appeal—Findings of Arbitral Tribunal are findings in a according with settled judicial principles and cannot be interfered with.

Bharat Lal Maurya v. Godrej & Boyce Mfg. Co. Ltd *2188*

ARMS ACT, 1959—Sec. 27—Allegations against the appellant-Sahil, as revealed in the charge-sheet, were that on 05.06.2010 at about 09.30.p.m. opposite house No.3266, Ranjeet Nagar, he and his associates (not arrested) attempted to rob complainant-Ajay Kumar of laptop at pistol point. In the process of committing robbery, he voluntarily caused hurt to complaint's son-Amit—The prosecution examined 13 witnesses to substantiate the charges and to establish the guilt of the appellant. In 313 statement, the appellant pleaded false implication and denied complicity in the crime. The trial resulted in his conviction as aforesaid. It is relevant to note that the appellant was acquitted of the charges under Section 25 Arms Act in the absence of sanction under Section 39 Arms Act and the State did not challenge the said acquittal—Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of interested

witnesses without independent corroboration. She forcefully argued that it was a case of mere quarrel and the appellant was falsely implicated in this case. Learned APP urged that the impugned judgment is based upon the cogent and reliable testimonies of the complainant and his son who had no prior animosity to falsely implicate—The witness deposed that he had seen the pistol at the spot and also at the police Station. He denied the suggestion that the accused was not present at the spot or was falsely implicated in the case—The appellant did not give any specific reasons to remain present near his house without any particular purpose—The appellant did not give plausible explanation to the incriminating circumstances in 313 statement—The appellant, did not examine any witness to prove the defence taken by him for the first time in his statement under Section 313—The prosecution has proved on record FSL report (Ex.PW-13/D) which showed that the pistol recovered from the accused was in working order. It is true that subsequently when the pistol was unloaded, it was found empty. It has come on record that the appellant was not at the time of commission of the crime and his associates succeeded to flee the spot. They were also allegedly armed with various weapons. Simply because the pistol (Ex.P-1) recovered from the accused was empty at the relevant time, it cannot be said that it was not a 'deadly' one particularly when Sahil was convicted under Section 27 of the Arms Act for using a weapon unauthorisedly without licence in violation of provision of Arms Act—Minor discrepancies and improvements highlighted by the appellant's counsel do not affect the basic structure of the prosecution case. The victims were not aware that the 'deadly' weapon with which the appellant was armed was loaded or not. 'Butt' of this weapon was used to cause hurt to the victim-Amit. For the purposes of Section 398 IPC, mere possession of the 'deadly' weapon is sufficient. This Court find no substance in the plea that Section 398 IPC is not attracted and proved—disposed of.

Sahil v. State *2306*

CODE OF CIVIL PROCEDURE, 1908—Suit for the permanent

injunction restraining infringement of trade marks and Copyrights, seeking damages and rendition of accounts—Defendants despite service failed to appear—Ex-Parte evidence led on behalf of the plaintiffs to Show that they are the subsidiares of the Walt Disney Company and have established themselve as creators and distributors of highly creative and entertaining animated motion pictures and television programes and whose unique characters namely Mickey Mouse, Minnie Mouse, Donald Duck, Daisy Duck, Goofy Pluto, Winnie the Pooh, Tigger, Hannah Montana, etc. stand registered as the trademarks of the plaintiffs across many countries including India—Allegation of the plaintiff that the defendants have infringed the copyrights and trademarks of the plaintiff by selling, trading and distributing a variety of bags with the plaintiff's trademarks and copyrights protected characters affixed on them—Report of the Local Commissioner appointed by the court confirmed that on inspection of the premises of the defendants, 40 school bags bearing the plaintiff's trademark were found—Held: Affidavit by way of evidence filed on record alongwith documents remains unrebutted. Report of the Local Commissioner supports the case put forward by the plaintiffs. Hence plaintiff is entitled to the injunction sought. As regards the damages to be awarded, since the defendants has deliberately stayed away from the present proceeding an inquiry into the accounts of the defendants for determination of damages cannot take place. However plaintiff still entitled to the punitive damages to the tune of Rs. 2 Lacs for a defendant who choose to stay away from the proceedings of the court, should not be permitted to enjoy the benefits of evasion of court proceeding.

Disney Enterprise, inc & Anr. v.Dhiraj & Anr. 2150

— Order Vll Rule 11, Order XXXIX Rules 1 & 2, Order XLI Rule 22, Order XLIII Rule 1, Section 151—Delhi High Court Act, 1966—Section 10—Trade Marks Act, 1999—Section 10 & 134(2)—Respondents filed a suit seeking a decree of permanent injunction to restrain defendants/appellants from manufacturing, selling etc. alcoholic beverages or any other

allied goods under impugned trade mark composing of 'Real' logo and label or any other trade mark/lable deceptively similar to plaintiff's trade mark comprising 'RICARD' logo and label which amounts to infringement of Registered trademark of respondents/plaintiffs and other connected reliefs-During pendency of appeal, defendants/appellants showed a new lable to Court and learned Single Judge concluded that old lable which was used by appellants was prime facie identical to label of respondents and restrained appellants from using old label which was subject matter of present suit during pendency of said suit—Regarding New label produced in Court, it was held that it still contains some essential features similar to respondents' label and in order to avoid any confusion or deception, appellants were allowed to use New lable subject to condition of Change of Navy Blue Colour—Order challenged in appeal before DB—Plea taken, second part of injunction order permitting appellants to use New label subject to condition of change of Navy Blue colour strips is materially erroneous and needs to be set aside—Respondents registered Trademark does not have any colour and hence to that extent, impugned order is misplaced as it has injuncted appellants from using colour Navy Blue—Held—A look at mark/lable in question would show that it cannot be said that New lable which is presently being used by appellants is identical to mark/lable of respondents—Essential features of two marks are different —Apart from blue bands used at top and bottom of lable, there is no other similarity in two marks—Essential feature of brand of respondent is circle shaded in red with number '45' Which is fused with a set of swirling scrolls/arms on either side—None of these features are reproduced in New brand/mark being used by appellants—Product of respondent is anise aperitif which is priced at more than Rs. 2, 000/- per bottle—Class of customers purchasing same would be entirely different from class who would purchase IMFL whisky of appellant which is priced around Rs. 60/- per bottle—New brand uses mark/trade logo of appellant's 'Real' very distinctively and clearly—Prime facie, it is not possible to stay that New label which was for first time filed in court by

appellants on 16.12.2008 infringers trademark of respondents—Order of learned single judge modifies permitting appellants use New mark/lable as filed by appellants in court on 16.12.2008 using Navy Blue colour.

Real House Distillery Pvt Ltd. & Anr. v. Pernod Ricard S.A. & Anr *2169*

— Section 20—Territorial jurisdiction—Principal office of defendant situated at Delhi —Entire cause of action arose at Udaipur where branch / subordinate office of the defendant situated —No part of cause of action arose at Delhi.

Swastik Polytek Pvt. Ltd. v. Oriental Insurance Company *2181*

— Order 7 Rule 11 and Section 115—Delhi Land Reforms Act, 1954—Section 33 and 42—Contract Act, 1872—Section 23—Limitation Act, 1908—Article 24,27,47 and 55 of Schedule—Trial Court dismissed petitioner's application for rejection of plaint—Order challenged before High Court — Plea taken, impugned order suffers from material irregularity : suit was barred by Section 33 and 42 of DLR Act, 1954 therefore Court lacked jurisdiction and case is barred by limitation—Held— Trial Court has considered both objections in impugned order — It has clearly reasoned that both these objections are mixed question of facts, which could be decided after a trial—It is not indeed it cannot be - contention of petitioner herein that issues are pure questions of law de hors facts of case—It cannot by any stretch of imagination be held that question of : (i) whether a document—which is basic of suit—is illegal in view of Delhi Land Reforms Act, and (ii) whether suit was filed on 01.08.2011 or on 02.08.2011 are only question of law—Latter question is ex facie issue of fact—Given same, impugned order, which rejects application under Order Vll Rule 11 and relegates party to trial on issues raised in application, is not one that warrants interference under Section 115 of Code—This Court finds no reason to interfere with impugned order—Petition is without merit and is accordingly dismissed.

Sanjay v. Ajit Singh Bajaj *2246*

—Suit for partition and permanent injunction between brothers and sisters. Parents died intestate. Preliminary decree passed defining share of the parties as 1/5th each. Since suit property only 100 sq. yards, parties unable to divide the same by metes and bounds. Held—Final decree passed defining share of all the parties as 1/5th each. Parties to endevourro sell the suit property within 3 months and in case they are unable to parties will have the right to execute the decree.

Munishwar Kumar v. Rakesh Kumar & Ors. *2081*

CONSTITUTION OF INDIA, 1950—Article 226; Income Tax Act, 1961, Section 245A To 245M: Petition challenging the majority decision of ITSC granting immunity to Respondent no.2 from imposition of penalty and prosecution on the ground that it is contrary to parameters laid down in S. 245H(1) and the ITSC has taken a perverse view of the facts and the evidence brought on record and therefore, it was permissible for this Court in writ proceedings to upstage the majority opinion of ITSC. HELD—It is important to note that the twin conditions for grant of immunity are (1) the applicant has cooperated with the Settlement Commission in the proceedings before it and (2) has made a full and true disclosure of his income and the manner in which such income was derived. Immunity can be granted only within the parameters of Section 245H(1) which requires full and true disclosure of income and co-operation from the assessee in the proceedings before the ITSC. Co-operation implies an act of volition on the part of the assessee; the present assessee "co-operated" in the proceedings before the ITSC only when faced with the reports submitted by the CIT. The ITSC, in our opinion was therefore not justified in taking a somewhat charitable view towards the assessee when it observed that it was at its "advice." made in a "spirit of settlement" that the assessee offered the entire bogus purchases of Rs. 117.98 crores as its income. Majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and prosecution was ritualistic, once the assessee disclose the

entire concealed income, ignoring the vital requirement that it is stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced. Petition allowed and majority view taken by ITSC quashed.

Commissioner of Income Tax (Central)-II v. Income Tax Settlement Commission & Anr. 2054

— Article 226; Income Tax Act, 1961, Section 142(2A): Scope of interference—Held-the question whether the accounts and the related documents and records available with the A.O. present complexity is essentially to be decided by the A.O. and in this area the power of the court to intrude should necessarily be used sparingly. It he finds that the accounts are complex, the court normally will not interfere u/a 226. The power of the court to control the discretion to refer the accounts for special audit was exercised objectively, as far as the accounts, records, documents and other material present before the A.O. would permit.

At & T Communication Services India (P) Ltd. v. Commissioner of income Tax-I & Anr. 2127

— Article 226—Petition seeking quashing of an order passed by Respondent 4 informing that the tenure of the lease of the period for the two lease contracts had expired and it was not possible to consider its request for extension of the contract. Held—Petitioner has remained completely silent about the letter issued by the respondents rejecting the extension of the subject contract. It is settled law that when a party approaches the High Court and seeks invocation of its jurisdiction u/a 226, it

must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary jurisdiction u/a 226 the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case of deliberate concealment or suppression of material facts on the part of the petitioner or if it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is well entitled to entertain the petition and dismiss it without entering into the merits of the matter. Petition dismissed.

Trans India Logistics v. Union of India & Ors..... 2200

—Article 226: Petitioner praying for staying hands of the respondent/bank from selling/auctioning the properties. Held - Petitioner maintained complete silence on the previous litigations with the bank in respect of the subject properties and orders passed by the Division Bench in earlier WP. It is settled law that the when a party approaches the High Court and seeks invocation of its jurisdiction u/a 226, it must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary jurisdiction u/a 226 the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case of deliberated concealment or suppression of material facts on the part of the petitioner or if it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is well entitled to refuse to entertain the petition and dismiss it without entering into the merits of the matter. Petition dismissed with cost of Rs. 20,000/-

R.L. Varma & Sons (HUF) v. Kotak Mahindra Bank Ltd. 2205

— Article 226: Petition praying that DDA be restrained from dispossessing them or enabling the Developer from engaging in any building project in the Kathputli Colony—Held—As the contention of the Petitioners that the layout plan approved by the DUAC does not meet the norms stipulated in the Delhi Master Plan 2021 and the said grievance has not been taken

on the ground that it is contrary to parameters laid down in S. 245H(1) and the ITSC has taken a perverse view of the facts and the evidence brought on record and therefore, it was permissible for this Court in writ proceedings to upstage the majority opinion of ITSC. HELD—It is important to note that the twin conditions for grant of immunity are (1) the applicant has cooperated with the Settlement Commission in the proceedings before it and (2) has made a full and true disclosure of his income and the manner in which such income was derived. Immunity can be granted only within the parameters of Section 245H(1) which requires full and true disclosure of income and co-operation from the assessee in the proceedings before the ITSC. Co-operation implies an act of volition on the part of the assessee; the present assessee "co-operated" in the proceedings before the ITSC only when faced with the reports submitted by the CIT. The ITSC, in our opinion was therefore not justified in taking a somewhat charitable view towards the assessee when it observed that it was at its "advice." made in a "spirit of settlement" that the assessee offered the entire bogus purchases of Rs. 117.98 crores as its income. Majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and prosecution was ritualistic, once the assessee disclose the entire concealed income, ignoring the vital requirement that it is stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced. Petition allowed and majority view taken by

ITSC quashed.

Commissioner of Income Tax (Central)-II v. Income Tax Settlement Commission & Anr. 2054

— Section 142(2A): Petition challenging the order of Assistant CIT directing special audit of Petitioners accounts u/s 142(2A) on three grounds; (i) the books of accounts were not called for or examined by the Assessing Officer and no special audit can be ordered without examining the books of accounts of the assessee (ii) no show cause notice was issued before ordering a special audit and thus there was a breach of rules of Natural justice (iii) there was complete non application of mind by the first respondent while according approval to the proposal for special audit in the petitioner's case. Held—Respondent no. 2 did require the Petitioner to show cause as to why special audit should not be directed, the show cause notice was replied to by the Petitioner, this contention of the Petitioner that no show cause notice was issued therefore fails. Held- S. 142(2A) does not require "books of accounts" to be examined by the A.O. It empowers the A.O with the previous approval of the Chief Commissioner or Commissioner of Income Tax, to direct the assessee to get the accounts audited if he is of the opinion that it is necessary to do so "having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue." Account used in the section does not refer merely to "books of account" of the assessee, it could include the books of accounts, balance sheets and all other records which are available to the A.O during assessment of proceedings. It is not possible to accept the contention that A.O. cannot direct a special audit under he examines the books of accounts. Held—there is no requirement that the approving authority has to record elaborate reasons for approval. Of course approval cannot be mechanical. Cannot be said that the CIT did not apply his mind to the proposal of special audit.

At & T Communication Services India (P) Ltd. v. Commissioner of income Tax-I & Anr. 2127

Act—1872—Section 8 Appellant challenged his conviction U/s 302 of Code for murdering his wife—Prosecution case squarely rested on circumstantial evidence which according to appellant not proved beyond reasonable doubt—One of the circumstances relied upon by prosecution was information given by the accused himself regarding committing murder of his wife.

Held:- The earliest information given by the accused himself is admissible against him as evidence of his conduct u/s 8 of the Evidence Act.

Krishan Ram v. State of The Nct of Delhi..... 2089

— Sec. 302, 34 read with Section 120B—Case of the prosecution is that Satdev Rathi was working Manager in the factory named K.N. Inter Plast Pvt. Ltd. Owned by one Kuldeep Singh Dalal. The five appellants were employed in the earlier said factory—Appellant Arun Kumar and Rani were in love with each other—Rani and Tarun started a quarrel in the factory in loud voice—It is also alleged that the deceased once found appellants Arun Kumar and Rani in objectionable condition in a vacant room inside the factory—Thereafter appellant Arun Kumar stopped coming to the factory as he was under the impression that his service had been terminated—Grievance of these two sets of appellants is alleged to have given them the motive to eliminate the deceased—As per plan Rani met the deceased at Tikri border in the evening and took him to a Tur field—Thereafter, appellants inflicted knife blows on the deceased and after killing him made good their escape—The appellants examined four witnesses in their defence—On appreciation of evidence, the Trial Court opined that the circumstantial evidence adduced by the prosecution was sufficient to draw an inference of guilt against the appellants for the offence of entering into a conspiracy and committing murder of the deceased—The prosecution relied on the circumstance of "last seen together" and the motive of committing the crime in support of their

case—Since this case rests on circumstantial evidence and the circumstantial of “last seen together” is one of the most important circumstance relied on by the prosecution his evidence assumes significance to determine the time of death and o test the veracity and credibility of the witnesses PW-3 and PW-13 on "last seen together"—PW-13 deposed that the deceased was working as a Manager in his factory M/s.K.N.Inter Plast Pvt. Ltd. for about last ten years. On 17.10.2008, he was going to Bahadurgarh via Kanjhawla-Nizampur Road. At about 7:00 p.m., while going towards Rohtak Road from village Nizampur, he noticed the deceased going towards Nizampur road along with appellant Rani. He also noticed the remaining four appellants, namely, Arun Kumar, Ram Prakash @ Guddu, Krishna Kumar @ Krishna and Prithvi Raj following them from a distance of about 50 mts. He testified that appellants, Arun, Ram Prakash @ Guddu, Krishna Kumar @ Krishna and Prithvi Raj were ex-employees. They had been expelled from the job due to their bad behaviour—He also testified that appellants Arun and Rani were seen in objectionable condition by the deceased. The deceased informed him about this act—It is well settled that where that prosecution case rests purely on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must, in the first instance be fully established; the circumstances should be of conclusive nature; the circumstances taken to-gether must unerringly point to the guilt of the accused; the circumstances proved on record must be incompatible with the innocence of the accused and from the complete chain of circumstances and it must be proved that in all probabilities, the offence was committed by the accused—The prosecution in order to connect the appellants with the commission of the offence and to exclude any other hypothesis except that the deceased's murder was committed by the appellants, relied on the following circumstantial evidence:(i) Evidence of last seen together;(ii) Recovery of some bloodstained clothes at the instance of appellants and recovery of there knives/ dagger at the instance of appellants

Arun, Kumar @ Krishna and Ram Prakash @ Guddu; and (iii) Motive for commission of the offence—The 'last seen together" theory assumes importance only when the time of death of the deceased is sufficiently established and it is proved that the deceased was last seen alive in the company of the accused and there was no possibility of any other person coming in between the time when the deceased and the accused were seen together and the time of his death. In the instant case, the exact time or even approximate time of death has not been crystallised—A perusal of the post mortem report (Ex.PW-8/A) shows that the post mortem on the dead body of the deceased was conducted on 18.10.2008 at 1:00 p.m. and the time since death was given as 41 hours. It would make the deceased's death on 16.10.2008 at about 6:00 a.m. However, the deceased was admittedly alive till the evening of 17.10.2008. For unexplained reasons, PW-8 changed duration since death from 41 hours to 22 hours in his court deposition. If that is accepted, the time of death would be about 3:00 p.m. On 17.10.2008. That is also not acceptable as the deceased was allegedly seen alive on 17.10.2008 at around 07:00-07:30 p.m. by PW-13. IT seems that Dr. V.K. Jha (PW-8) had performed his duties in a totally perfunctory manner as he appears to have given the time since death in the post-mortem report only on the basis of brief facts forwarded to him as also on the basis of rukka where initially the time of incident was mentioned between 05:00 p.m. on 16.10.2008 to 07:00 a.m. On 17.10.2008. The Court not inclined to rely much on the post mortem report (Ex.PW8/A) as also on the testimony of PW-8 regarding the time of the deceased's death.—The prosecution version as also he "last seen together" theory falls flat for other reasons also. It is difficult to comprehened that when a lady was luring a person who was her superior (Manager) in the same factory, that person would allow the lady to talk some other person so many times. Moreover, as per prosecution version, all the appellants were together after 7:30 p.m. Thus there could not have been any occasion for them to talk on mobile phone—There is another serious lapse in the investigation. As per the

prosecution version, the deceased possessed a mobile phone. The deceased's wife spoke to him at 6:00 p.m on 17.10.2008 and thereafter, his son also tried to speak to him. The deceased is started to have informed his wife that he would be back home in half an hour and thereafter his mobile phone got switched off. However, for unexplained reasons, the call details of the deceased's telephone were not obtained by the investigation officer. Since evidence of "last seen together" has been held to be otherwise unbelievable, this lapse on the part of the investigating officer further gives a dent to the prosecution version—In addition to the evidence of "last seen together", the prosecution also relies on the recovery of bloodstained knives Ex. P-1, P-2 and P-3 at the instance of the appellants Arun Kumar, Krishna Kumar @ Krishna and Ram Prakash @ Guddu respectively at the time of their arrest. Also, according to the prosecution appellant Arun Kumar was found to be wearing a black bloodstained pyjama—Similarly, the abovesaid three appellants also told the I.O. that they were wearing the same clothes that they were wearing now at the time of commission of the offence. In addition, they allegedly got recovered some bloodstained clothes from the room of one Phool Singh and one Om Prakash Sharma. It is not understandable that if they had opportunity to wash the bloodstains off some of their clothes, why would they not wash the remaining ones and would conceal the same simply to get them recovered later on to the police—The prosecution has led some evidence with regard to the motive. In their statements under Section 313 Cr.P.C., appellants Ram Prakash, Krishna Kumar @ Krishna and Prithvi Raj have denied that they ever misbehaved with the deceased after consuming liquor in the factory or that they were expelled from the services. They gave different dates for leaving the employment with M/s. K.N. Inter Plast Pvt. Ltd—The prosecution version is that appellant Ram Prakash, Krishan Kumar @ Krishna and Prithvi Raj had been expelled from the factory because of their misbehaviour with the deceased after consuming liquor. Similarly, as per prosecution version appellants Rani and Arun

Kumar were Counselled by the deceased for their objectionable behaviour in the factory and appellant Arun Kumar stopped reporting for work considering that he had been expelled, yet, employment records of the five appellants were not seized by the I.O. during the course of investigation. As per the prosecution case set up in the charge sheet which is reflected from the statements of the witnesses recorded under Section 161 Cr.P.C., the incident of the three appellants misbehaving with the deceased took place two to three years before the occurrence. However, in Court, evidence was led to the effect that the incident took place merely two-three months before the occurrence. The witness were also duly confronted with their statements under Section 161 Cr.P.C. In view of the prosecution version, seizure of the entire employment record to pin point the period of employment of the appellants was extremely important which was not done by the I.O. for the reasons best known to him. It is well settle that an accused is not expected to prove his defence beyond shadow of reasonable doubt. The absence of appellant Ram Prakash's name in the salary sheet for the month of June, 2008 makes his defence plausible which again creates doubt in the prosecution version—In view of the prosecution version, the employment records if seized would have provided some credence as to how and when the appellant's service were terminated or any of them stopped reporting for work—There could not be a motive strong enough for appellants Arun Kumar and Rani to have entered into any conspiracy to commit the gruesome crime as alleged. Otherwise also, it is very well settled that motive, however, strong is not enough to base conviction of the accused—In this view of matter, even if it is assumed that the possibly some grievance existed, the same is not sufficient to base appellants' conviction—Non-seizure of the employment records, non-obtaining of the call details of the deceased's mobile phone, non-recording of the statement of PW-13 at the time of recovery of dead body, discrepancy in the post mortem report and PW-8's testimony, though not significant individually, when read together with

the gaping holes create serious dobut about the motive theory—It is true that direct evidence of hatching a conspiracy is seldom available, yet at the same time, it is the bounden duty of the prosecution to prove the conspiracy by indirect or circumstantial evidence which must be clear, cogent and believable—Allowed. The judgment and the order on sentence are accordingly set aside. The appellants are acquitted of the charges framed against them.

Arun & Ors. v. State *2211*

— Section 302/34—Prosecution based its case on circumstantial evidence and the circumstances which accounted for the conviction of the appellants were namely that they had a motive to kill the deceased as they had a quarrel with him a few days before the body of the deceased was discovered by the police and they were also last seen with him and it was in pursuance of their disclosures and pointing out that the weapons of offence namely a dagger and a knife and the blood stained clothes of one of the appellants was recovered. Held: Only one tea vendor and a Constable assertedly had seen the appellants having a quarrel with the deceased and the accused persons were not known to both of them from before. In such circumstances it was incumbent upon the IO to have arranged the Test Identification Parade of the accused persons. The said failure alongwith the fact that the depositions of the tea vendor and the Constable were not consistent and completely reliable makes their identification of the accused persons in the court of not much value. Even otherwise the motive for the alleged murder appears to be very weak and illogical for the quarrel between the accused persons and the deceased was on such a trivial issue that the same cannot furnish a motive to do away with the deceased. Absence of strong motive in the present case, which is based completely on circumstantial evidence, is very relevant. Further the witness who assertedly informed the police that he had last seen the deceased and the accused together, denied having made any such statement and as such even the last seen theory is not substantiated. As

regards the recovery of a knife at the instance of one of the appellants, in the absence of detection of blood on it, it cannot be stated that it was used in crime, more so when it was never shown to the concerned doctor to seek his opinion whether the injury on the person of deceased could have been inflicted by it. Similarly the recovery of blood stained clothes and a dagger from the house of the other appellant is to be held to be very weak evidence for the prosecution has not led any evidence to show that the said clothes were worn by the said appellant at the time when the crime was committed. Suspicion howsoever strong against the appellants is not enough to justify their conviction for murder.

Mohd. Shahid v. State *2282*

— Sec. 393, 394 and 398— Arms Act, 1959—Sec. 27—Allegations against the appellant-Sahil, as revealed in the charge-sheet, were that on 05.06.2010 at about 09.30.p.m. opposite house No.3266, Ranjeet Nagar, he and his associates (not arrested) attempted to rob complainant-Ajay Kumar of laptop at pistol point. In the process of committing robbery, he voluntarily caused hurt to complaint's son-Amit—The prosecution examined 13 witnesses to substantiate the charges and to establish the guilt of the appellant. In 313 statement, the appellant pleaded false implication and denied complicity in the crime. The trial resulted in his conviction as aforesaid. It is relevant to note that the appellant was acquitted of the charges under Section 25 Arms Act in the absence of sanction under Section 39 Arms Act and the State did not challenge the said acquittal—Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of interested witnesses without independent corroboration. She forcefully argued that it was a case of mere quarrel and the appellant was falsely implicated in this case. Learned APP urged that the impugned judgment is based upon the cogent and reliable testimonies of the complainant and his son who had no prior animosity to falsely implicate—The

witness deposed that he had seen the pistol at the spot and also at the police Station. He denied the suggestion that the accused was not present at the spot or was falsely implicated in the case—The appellant did not give any specific reasons to remain present near his house without any particular purpose—The appellant did not give plausible explanation to the incriminating circumstances in 313 statement—The appellant, did not examine any witness to prove the defence taken by him for the first time in his statement under Section 313—The prosecution has proved on record FSL report (Ex.PW-13/D) which showed that the pistol recovered from the accused was in working order. It is true that subsequently when the pistol was unloaded, it was found empty. It has come on record that the appellant was not at the time of commission of the crime and his associates succeeded to flee the spot. They were also allegedly armed with various weapons. Simply because the pistol (Ex.P-1) recovered from the accused was empty at the relevant time, it cannot be said that it was not a 'deadly' one particularly when Sahil was convicted under Section 27 of the Arms Act for using a weapon unauthorisedly without licence in violation of provision of Arms Act—Minor discrepancies and improvements highlighted by the appellant's counsel do not affect the basic structure of the prosecution case. The victims were not aware that the 'deadly' weapon with which the appellant was armed was loaded or not. 'Butt' of this weapon was used to cause hurt to the victim-Amit. For the purposes of Section 398 IPC, mere possession of the 'deadly' weapon is sufficient. This Court find no substance in the plea that Section 398 IPC is not attracted and proved—disposed of.

Sahil v. State *2306*

— Sec 304 (ii),—Bihari Lal-appellant's father was found dead inside his house No.16/1644 E, Bapa Nagar, Karol Bagh, Delhi on 14.02.2011. Daily Diary (DD) NO.36A was recorded at 10.06 p.m.at Police Station Prasad Nagar on getting information from PCR that an individual who used to consume liquor had died inside his house.—During investigation, it

revealed that a quarrel had taken place between the deceased and the appellant on 14.02.2011. The Investigation Officer lodged First Information Report under Section 302 IPC on 18.02.2011. Statements of witness conversant with the facts were recorded—The prosecution examined 12 witnesses to establish the guilt—The trial resulted in his conviction under Section 304 (II) IPC—Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective—The circumstances do not point unerringly to the guilt of the appellant. They may at the most raise some suspicion, but suspicion, however, strong cannot take the place of proof—Post-mortem examination report reveals that the victims suffered 13 injuries on various body organs/parts Some injuries were inflicted by a sharp weapon and others were caused with blunt object. The death was a result of manual strangulation. All injuries were ante-mortem in nature, fresh in duration and were sufficient to cause death in the ordinary course of nature.—Apparently, the appellant was the only individual who was last seen with the victim inside the house. Only for fifteen minutes, the appellant was not inside the house and had gone to his sister-Rekha residing at 16/882 E, Bapa Nagar, Padam Singh Road, Karol Bagh. There is nothing on record to show if during these fifteen minutes any other individual had entered inside the house. The offence had taken place inside the privacy of a house where the appellant had all the opportunity to commit it. It is on record that after the quarrel, the appellant had gone after closing the door of the house and it was opened by him when he returned to the house with his sister-Rekha and the dead body was found—All these circumstances were within the special knowledge of the appellant and he under Section 106 Evidence Act was under legal obligation to explain. However, he did not give plausible explanation and failed to divulge his whereabouts during these fifteen minutes. Initially, his plea was that he was not present at the spot. He did not put any suggestion to PW-1 that he had left along with Rahul at about 05.30 p.m. PW-4 (Rahul) in his deposition merely stated that after appellant's father had started hurling abuses, he left the house of the

accused at around 05.30 p.m. He did not state that at that time, Rohit had also left the house along with him.—The appellant did not discharge the burden which had shifted to him under Section 106 Evidence Act. This silence forms an additional link the chain of circumstances. For the absence of an explanation from the side of the appellant, there was every justification for drawing an inference that the appellant was the author of injuries including strangulation—DD No.36A records that the victim had died a natural death inside the house as he was a habitual drunked. Apparently, the police was mislead. It was not a case of natural death as in post-mortem examination report, the cause of death was ascertained as 'asphyxia as a result of manual strangulation—The trial court has dealt with the mismatch in the probable time of death given in the post-mortem examination and for good reasons preference was given to ocular evidence over medical evidence which was advisory in nature—Certain description and contradictions highlighted by the appellant's counsel are inconsequential. Non-recovery of crime weapon i.e. lag of wooden stool, and recovery of blood-stained clothes which the appellant was wearing at the time of occurrence are not material. In the instance case, the prosecution relies on the 'last seen' theory. Here, there is practically no time lag between the time when PW-1 saw the deceased the accused/appellant together and the time the death was discovered. The time lag was about fifteen minutes only. Unnatural conduct; motive of the appellant to inflict injuries to the victims; and false explanation given in 313 statement to the incriminating circumstances are other strong circumstances taken cumulatively from a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and none else.—The alternative plea to modify the sentence order as the appellant has undergone substantial period of substantive awarded to him, it reveals that the sentences awarded to the appellant is RI for seven years, which cannot be termed unreasonable or excessive—Dismissed.

— Section 395—The prosecution case as revealed in the charge-sheet was that on 23.05.2009 at about 01.50 a.m. at House No. A-181, Gali No.6, Mandoli Extension, the appellans and their associates Aftab @ Daboo and Yamin @ Kalia committed dacoity. Daily Diary (DD) No. 7B was recorded at PS Mehrauli on getting information about the occurrence from PCR—Further case of the prosecution is that on 25.05.2009, Sakir, Mohd. Rahim, Mohd Harun (A-3), Mohd. Munir Bada, Dulal (A-2), Munir Chota (A-1) and Kamal were arrested by the police of Special Staff, South District, in case FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli. Various weapons were recovered from them. Their involvement in the instant case emerged in the disclosure statements made by them—The prosecution examined twenty-one witnesses to substantiate the charges against them. In 313 statements, the accused persons denied their complicity in the crimes and pleaded false implication. After considering the rival contentions of the parties and appreciating the evidence and other materials, the Trial Court, by the impugned judgment, held A-1 to A-3 guilty under Section 395 IPC. Aftab and Yamin @ Kalia were acquitted of the charges. State did not prefer any appeal against their acquittal. Being aggrieved and dissatisfied A-1 to A-3 have preferred the appeals—The appellants were arrested along with their associates in FIR No. 267/2009 under Section 399/402 IPC and 25 Arms Act, PS Mehrauli, by the police of Special Staff, South District on 25.05.2009—It is trite to say that the substantive evidence is the evidence of identification in the Court. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. Neither of the appellants claimed their presence

at any other particular place on the relevant time and date. They did not examine any of their family members or employers to prove their presence in their respective houses or places of work. The appellants had no reason to be present inside the victim's house at odd hours—Minor contradictions, discrepancies and improvements highlighted by the appellants' counsel do not stake the basic structure of the prosecution case due to clear identification by the complainant who had direct confrontation with the assailants for about ten minutes inside the house and had clear and reasonable opportunity to note their broad features—Exact number of assailants who were involved in the incident could not be ascertained during investigation—Minimum number of assailants required for conviction under Section 395 IPC is five which the prosecution failed to prove beyond doubt. Conviction under Section 395 IPC was not permissible. Since the victim was injured in committing the robbery by the assailants, the offence proved against A-1 to A-3 would be under Section 394 IPC. The conviction is accordingly altered to Section 394 IPC—None of them has any previous conviction though they are involved in some other criminal cases. Taking into consideration all the facts and circumstances, the sentence order is modified and substantive sentence of the appellants is reduced to eight years with fine Rs. 10,000/- each and failing to pay the fine to undergo SI for three months, each under Section 394—disposed of.

Munir @ Chota v. State (Govt. of NCT of Delhi) *2353*

INDIAN REGISTRATION ACT, 1908—Section 17(1)(d) and 49—Indian Stamps Act, 1899—Section 35—Two premises were taken on lease by Respondent— Lease agreements were executed on a Rs.100/- stamp paper each and were unregistered—Lease agreements stipulated that term of lease shall be 12 years—As per Petitioners, lease agreements also stipulated that there would be a 36 months lock-in-Period w.e.f. 16.04.2007 to 15.04.2010 in which neither of parties could terminate lease—As per Petitioners, Respondent in

violation of terms and conditions of lease agreement, by letter dated 20.01.2009, terminated lease agreement, paid rent only upto 31.01.2009 and abandoned shops on 30.03.2009—Petitioners before Arbitral Tribunal claimed rent for month of February and March, 2009 and also for unexpired period of lock-in-period—Arbitral Tribunal held that Respondent liable to pay rent for months of February and March, 2009 at agreed rate of Rs.1,24,000/- besides service tax and maintenance charges—With regard to issue pertaining to objection of Respondent that claim of Petitioner for payment for unexpired lock-in-period was hit by provisions of Indian Stamp Act and Indian Registration Act, it held that lease deed was insufficiently stamped and it compulsory required registration and as it was unregistered, it was inadmissible in evidence and clause of lock-in period could not be enforced— Award challenged before High Court—Held—A document compulsorily required to be registered but not being So registered cannot be used as evidence except for any collateral purpose—A clause in a lease deed fixing or stipulating a term of lease or a fixed term of lock-in period is not a collateral purpose—Said clause would be one of main clauses of lease which in absence of registration would be inadmissible in evidence and unenforceable in law—Arbitral Tribunal has rightly held that clause vis-a-vis lock-in period cannot be called a collateral purpose and tenancy between parties was not fixed term tenancy but a month to month tenancy terminable by a notice on either side—Finding by Arbitral Tribunal that Respondent had vacated premises w.e.f. 01.04.2009 is purely factual—Powers exercised by Court while deciding objections under Section 34 of Act are not appellate powers—Court does not sit as a Court of appeal—Findings of Arbitral Tribunal are findings in a according with settled judicial principles and cannot be interfered with.

Bharat Lal Maurya v. M/s Godrej & Boyce Mfg. Co. Ltd *2188*

INDIAN STAMPS ACT, 1899—Section 35—Two premises were taken on lease by Respondent— Lease agreements were

executed on a Rs.100/- stamp paper each and were unregistered—Lease agreements stipulated that term of lease shall be 12 years—As per Petitioners, lease agreements also stipulated that there would be a 36 months lock-in-Period w.e.f. 16.04.2007 to 15.04.2010 in which neither of parties could terminate lease—As per Petitioners, Respondent in violation of terms and conditions of lease agreement, by letter dated 20.01.2009, terminated lease agreement, paid rent only upto 31.01.2009 and abandoned shops on 30.03.2009—Petitioners before Arbitral Tribunal claimed rent for month of February and March, 2009 and also for unexpired period of lock-in-period—Arbitral Tribunal held that Respondent liable to pay rent for months of February and March, 2009 at agreed rate of Rs.1,24,000/- besides service tax and maintenance charges—With regard to issue pertaining to objection of Respondent that claim of Petitioner for payment for unexpired lock-in-period was hit by provisions of Indian Stamp Act and Indian Registration Act, it held that lease deed was insufficiently stamped and it compulsory required registration and as it was unregistered, it was inadmissible in evidence and clause of lock-in period could not be enforced— Award challenged before High Court—Held—A document compulsorily required to be registered but not being So registered cannot be used as evidence except for any collateral purpose—A clause in a lease deed fixing or stipulating a term of lease or a fixed term of lock-in period is not a collateral purpose—Said clause would be one of main clauses of lease which in absence of registration would be inadmissible in evidence and unenforceable in law—Arbitral Tribunal has rightly held that clause vis-a-vis lock-in period cannot be called a collateral purpose and tenancy between parties was not fixed term tenancy but a month to month tenancy terminable by a notice on either side—Finding by Arbitral Tribunal that Respondent had vacated premises w.e.f. 01.04.2009 is purely factual—Powers exercised by Court while deciding objections under Section 34 of Act are not appellate powers—Court does not sit as a Court of appeal—Findings of Arbitral Tribunal are findings in a according with settled

judicial principles and cannot be interfered with.

Bharat Lal Maurya v. M/s Godrej & Boyce Mfg. Co. Ltd *2188*

INDUSTRIAL COMPANIES (SPECIAL PROVISION) ACT, 1985—Section 15(1); Securitisation of Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 13(4), 13(9): KMBL filed an application for abatement of reference filed by Petitioner u/s 15(1) of SICA on the ground that KMBL held more than 3/4th in value of the outstanding secured debts of the petitioner and had also taken action u/s 14(4) of SARFAESI. BIFR allowed KMBL's application, Appeal to AIFR rejected. Hence the present petition. Interplay between section 13(9) of SARFAESI act and the third proviso of Section 15(1) of SICA. Petitioner's contention is that S. 13(9) of SARFAESI Act, when it refers to amount outstanding in respect of "financing of a financial asset" can only refer to three-fourth of the amount oustanding in relation to the financing of a financial asset whereas the third proviso to S. 15(1) of SICA when it refers to three fourth in value of the amount outstanding, mandates the calculation to be based on the "financial assistance disbursed to the borrower of such creditor". HELD-Satisfaction by a secured creditor of the condition laid down in S. 13(9) of the SARFAESI Act cannot automatically be taken as satisfaction of the condition prescribed in the 3rd Proviso to S. 15(1) of SICA for the simple reason that both conditions prescribe different thresholds. While section 13(9) of the SARAFAESI Act speaks of financing of "a financial asset", the 3rd proviso to section 15(1) of the SICA speaks of "financial assistance disbursed to the borrower of such secured creditors". The reference can only be to the total amount borrowed by the petitioner from all the secured creditors which is outstanding and therefore the enquiry should be to find if KMBL also satisfies the condition that it shall represent in value not less than 3/4th of the total amounts borrowed by the petitioner from all secured creditors. It is only then that it can fall within the

3rd proviso and apply to the BIFR for abatement of the reference of the petitioner's reference. Writ petition allowed. Order of BIFR and AIFR set aside, matter restored to BIFR.

Global Infrastructure Technologies Ltd. v. Kotak Mahindra Bank Ltd. & Ors. *2366*

INTELLECTUAL PROPERTY RIGHTS—Trade Mark—Present Injuncting—Plaintiffs field the present suit for permanent injunction, restraining infringement and passing off of trade dress rights, copyright, delivery up against the defendants—An exparte injunction was granted in favour of the plaintiff—As despite service none appeared on behalf of defendants, defendants no.1 to 4 were proceeded ex parte on 28.1.2014 and on 4.9.2013 defendant no.5 was deleted from the array of parties—In view of the fact that the plaints is duly supported by the affidavit of the authorized representative of the plaintiffs, it is not necessary to direct the plaintiffs to lead evidence in the matter and the plaint shall be treated as an affidavit—The plaintiff No. 1 has many sales and distribution office throughout the world. It is also pleaded in the plaint that in India, the plaintiff No. 1 operates through its subsidiary, Perfetti Van Melle India Pvt. Ltd., which is the plaintiff No. 2 herein. The plaintiff No. 2 has diversified and expanded its products portfolio to ready-business to-eat, packaged salty snacks—It is also started in the plaint that the plaintiff no. 1 owns and operates several websites including its primary website, www.perfettivanmelle.it, which provides detailed information about the company and its range of products available in different countries and is accessible by Internet users all over the World, including India, both within and outside the jurisdiction of this court—Counsel submitted that the 'Animal Kids ' packaging, the pack layout and overall design used by the defendants is identical to the plaintiffs' "STOP NOT" pack. It is further submitted that the defendants have lifted the entire artwork, layout, colour scheme, design and the individual features therein, in toto, from the plaintiffs' prior adopted and launched "STOP NOT" pack—On the basis of

the averments made in the plaint duly supported by an affidavit, which has remained unrebutted, the plaintiffs have been able to establish that they are registered proprietor of the trade-mark "STOP NOT" in class 30 of the Trademark Act and prior user of the "STOP NOT" trade dress. A comparison chart, illustrating the product images of plaintiff and defendants, exhibited as EX. p-3, evidence that the defendants have lifted the entire artwork, layout, colour scheme as well as design from the plaintiffs "STOP NOT" trade dress. Although the reports filed by both local commissioner reflect that no packets were found at the given addresses of the defendants which bore a similarity to the plaintiffs trade dress, however, the plaintiffs have placed on record "STOP NOT" look alike product packs. The Court is of the view, the use of the Animal Kid's packing by the defendants, which is a substantial reproduction of the plaintiffs "STOP NOT" trade dress, is likely to dillure the distinctive character of the plaintiff's packaging and the same is likely to erode the goodwill and reputation of the plaintiff—Suit decreed.

Perfetti Van Melles.P.A & Anr. v.
Anil Bajaj & Ors. *2083*

LIMITATION ACT, 1908—Article 24,27,47 and 55 of Schedule—Trial Court dismissed petitioner's application for rejection of plaint—Order challenged before High Court — Plea taken, impugned order suffers from material irregularity : suit was barred by Section 33 and 42 of DLR Act, 1954 therefore Court lacked jurisdiction and case is barred by limitation—Held— Trial Court has considered both objections in impugned order — It has clearly reasoned that both these objections are mixed question of facts, which could be decided after a trial—It is not indeed it cannot be - contention of petitioner herein that issues are pure questions of law de hors facts of case—It cannot by any stretch of imagination be held that question of : (i) whether a document—which is basic of suit—is illegal in view of Delhi Land Reforms Act, and (ii) whether suit was filed on 01.08.2011 or on 02.08.2011 are only question of

law—Latter question is ex facie issue of fact—Given same, impugned order, which rejects application under Order Vll Rule 11 and relegates party to trial on issues raised in application, is not one that warrants interference under Section 115 of Code—This Court finds no reason to interfere with impugned order—Petition is without merit and is accordingly dismissed.

Sanjay v. Ajit Singh Bajaj *2246*

PREVENTION OF CORRUPTION ACT, 1988—Section 7/13(1)(d) – Appellant, Divisional Head of PS Shalimar Bagh convicted for having demanded and accepted a bribe from the complainant for not involving and arresting him in a case regarding kidnapping of his maid servant—Prosecution, in addition to the trap proceedings, relied upon two tape recorded conversations in which the appellant assertedly made the demand of bribe from the complainant – Contention of the appellant that he was never entrusted with the missing report of the maid of the complainant and that the complainant had falsely implicated him because he himself was indulging in flesh trade and had even offered his services to the appellant to oblige him, which the appellant had refused. Held: Daily diary of PS Shalimar Bagh produced by the prosecution itself proves that the complainant had given a statement at the PS on 19.06.2002 that his maid had returned and that he does not wish to pursue the missing complaint any further. In such circumstances there was no motive for the appellant to have demanded a bribe from the complainant, two months later in August, 2002 for not registering a case of kidnapping against him and therefore the version of the complainant in this regard appears to be completely illogical. Further none of the two tape recorded conversations can be relied upon as corroborative evidence for the prosecution failed to get the device used for recording the said conversations, examined by an expert for ruling out the possibility of tampering. It is also to be taken note of that from the transcripts of neither of the two conversations, is it clear that the appellant had demanded a bribe. As regards the trap proceedings both the panch witnesses did not support the case of the prosecution

with respect to the demand of the bribe by the appellant and its acceptance thereof. Sole testimony of the complainant not sufficiently credible and reliable to return a finding of guilt against the appellant.

Ashish Kumar Dubey v. State Thr. CBI:..... 2331

TRADE MARKS ACT, 1999—Section 10 & 134(2)—Respondents filed a suit seeking a decree of permanent injunction to restrain defendants/appellants from manufacturing, selling etc. alcoholic beverages or any other allied goods under impugned trade mark composing of 'Real' logo and label or any other trade mark/lable deceptively similar to plaintiff's trade mark comprising 'RICARD' logo and label which amounts to infringement of Registered trademark of respondents/plaintiffs and other connected reliefs-During pendency of appeal, defendants/appellants showed a new lable to Court and learned Single Judge concluded that old lable which was used by appellants was prime facie identical to label of respondents and restrained appellants from using old label which was subject matter of present suit during pendency of said suit—Regarding New label produced in Court, it was held that it still contains some essential features similar to respondents' label and in order to avoid any confusion or deception, appellants were allowed to use New lable subject to condition of Change of Navy Blue Colour—Order challenged in appeal before DB—Plea taken, second part of injunction order permitting appellants to use New label subject to condition of change of Navy Blue colour strips is materially erroneous and needs to be set aside—Respondents registered Trademark does not have any colour and hence to that extent, impugned order is misplaced as it has injuncted appellants from using colour Navy Blue—Held—A look at mark/lable in question would show that it cannot be said that New lable which is presently being used by appellants is identical to mark/lable of respondents—Essential features of two marks are different —Apart from blue bands used at top and bottom of lable, there is no other similarity in two marks—Essential

feature of brand of respondent is circle shaded in red with number '45' Which is fused with a set of swirling scrolls/arms on either side—None of these features are reproduced in New brand/mark being used by appellants—Product of respondent is anise aperitif which is priced at more than Rs. 2, 000/- per bottle—Class of customers purchasing same would be entirely different from class who would purchase IMFL whisky of appellant which is priced around Rs. 60/- per bottle—New brand uses mark/trade logo of appellant's 'Real' very distinctively and clearly—Prime facie, it is not possible to stay that New label which was for first time filed in court by appellants on 16.12.2008 infringers trademark of respondents—Order of learned single judge modifies permitting appellants use New mark/lable as filed by appellants in court on 16.12.2008 using Navy Blue colour.

Real House Distillery Pvt. Ltd. & Anr. v. Pernod Ricard S.A. & Anr..... 2169

ILR (2014) III DELHI 2047
CRP

BABU LAL .....PETITIONER

VERSUS

ATUL KUMAR & ANR. ....RESPONDENTS

(NAJMI WAZIRI, J.)

CRP 147/2012 DATE OF DECISION: 03.02.2014
CM NO. 19684 OF 2012 (STAY)

Delhi Rent Control Act, 1958—Section 14(1)(e) and 25B(8)—Leave to defend application filed by tenant dismissed by SCJ-cum-RC—Order challenged before High Court—Plea taken, site plan filed by landlords is incorrect—Landlords have two additional properties which are lying vacant and landlords are not putting them to use and are harassing tenant by filing eviction petition—Landlord did not need accommodation as claimed as they had sufficient space available with them- There was no tenant—landlord relationship between parties therefore tenant cannot be evicted from premises—Sale deed vesting ownership on landlord was illegal and void—Landlords have sufficient alternative accommodation and as such there is no bona fide requirement—Held—Tenant is required to file a site plan of his own which would aid this Court in understanding lacunae in site plan filed by landlords—In eviction petition, landlord need not disclose alternative properties available to him if he is of view that alternate properties are unsuitable for them—Landlord's discretion and prerogative in this regard cannot be questioned, except insofar as it is not whimsical, ex facie or shockingly unreasonable—Tenant is not one to dictate to judiciary as to how it

can use property—Such liberty is not vested with either Court or tenant—When tenant himself admits to have been residing in premises for 100 years and also paying rent regularly, his argument that there was no tenant—landlord relationship is self defeating—In matters of landlord—Tenant relationship, question whether landlord has title to property pales into insignificance when tenant shows that he has been paying rent to eviction—Petitioner-In eviction petition, a Court proceeds on assumption that need of premises is genuine—Mere bald averments by tenant would not suffice, he would need to show ex facie reasons which would disentitle landlord from grant of eviction order—There is not material irregularity in impugned order warranting interference of this Court.

Important Issue Involved: The tenant is required to file a site plan of his own which would aid this Court in understanding the lacunae in the site plan file by the landlords.

In an eviction petition, the landlord need not disclose the alternate properties available to him if he is of the view that the alternate properties are unsuitable for him.

In matters of landlord-tenant relationship, the question whether the landlord has the title to the property pales into insignificance when the tenant shows that he has been paying rent to the eviction-petitioner.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr.S.K. Walia, Adv.

FOR THE RESPONDENTS : Ms. Rita Rana, Adv.

CASES REFFERED TO:

1. *Shiv Sarup Gupta* vs. *Mahesh Chand Gupta (Dr),* (1999) 6 SCC 222.
2. *Meenal Eknath Kshirsagar (Mrs)* vs. *Traders and Agencies* (1996)5 SCC 344.
3. *Prativa Devi* vs. *T. V. Krishnan* (1996) 5 SCC 353.

RESULT: Dismissed

NAJMI WAZIRI, J. (Oral)

1. The present revision petition filed under section 25 B(8) of the Delhi Rent Control Act (DRCA) impugns the order dated 31.5.2013 wherein the application for leave to defend was rejected by the SCJ-cum-RC, Tis Hazari Courts.

2. The brief facts required for consideration are that the respondents herein (landlords) filed for an eviction petition under section 14(1)(e) of the Act occupying the premises situated at Property No. 2834, Pucca Katra, Katra Khushal Rai, Kinari Bazar, Delhi- 6. The landlord filed the eviction petition claiming that the property was required for their own accommodation as they did not have sufficient accommodation for both their families. It is the case if the landlords that they do not have sufficient rooms to accommodate their entire family and require the tenanted premises; that in all they need about 10-14 rooms in order to accommodate all the members of their family. The landlords have given a detailed requirement on the number of rooms they need which is recorded in the impugned order.

3. In his application for leave to defend, the tenant contested the eviction petition on the ground that there was no bona fide requirement by the landlords and that the tenant has been in possession of the tenanted premises for 100 years and the tenant is aware of the fact that the landlord has additional accommodation which has not been put to use. The tenant claimed that the landlords are not the true owners of the property. The tenant further states that he does not consider the present respondents as his landlord, thereby negating the existence of a tenant-landlord relationship. The tenant alleges that the landlord has two other properties which should be occupied rather than evicting the tenant.

4. The case before the learned SCJ-cum-RC in the application for

leave to defend of the tenant was: (i) that the tenant has been in possession of the tenanted premises for 100 years and now he cannot be evicted; (ii) that the landlords had filed the eviction petition only to harass the tenant and they had no real bona fide need for tenanted premises; (iii) that the landlords had two other properties which were large enough to accommodate both their families; (iv) that the site plan filed by the landlords was incorrect. However, the tenant failed to file any site plan of his own to show the discrepancies in the site plan filed by the landlords.

5. The SCJ-cum-RC noted that while the tenant claimed that he paid a monthly rent of Rs. 25/- to the landlords and that his family including him had resided in the tenanted premises for 100 years, the tenant also claimed that there was no tenant-landlord relationship between the parties and that the respondents were not the owners of the tenanted premises. On the issue of the landlords having two other properties, the SCJ-cum-RC noted that the landlord submitted that the two addresses were of the same property but that was unsuitable for their use as they had only 5 rooms when the requirement was for more. On the contention of the tenant that he has been residing in the tenanted premises for over 100 years will not lead to a determination that the landlord's bona fide requirement for the premises is irrelevant or that such need fades away. On the tenant's contention of the absence of any tenant-landlord relationship the impugned order the argument is untenable since the tenant had admitted to residence in the property for over 100 years paying rent for it regularly. The issue of the sale deed of the landlord is void was not accepted by the learned SCJ-cum-RC as a tenant cannot challenge the title of the landlord.

6. The impugned order held that there were no triable issues raised by the tenant and accordingly the leave to defend application was disallowed. Hence, the present petition.

7. The counsel for the tenant assails the order passed by the SCJ-cum RC passing the eviction order and disallowing the leave to defend application on grounds that there was no bona fide requirement of the landlord; that the landlords have alternative properties which they are not putting to use and that the site plan filed by the landlords is incorrect. The counsel for the tenant vehemently contended that the landlords have failed on all counts to show that the eviction petition was filed out of

a genuine need and that the landlords have concealed material facts to the Court. The site plan filed by the landlords is argued to be incorrect by the counsel for the tenant, though this Court notices that the tenant has failed to bring on record any site plan to show the discrepancies in the site plan earlier filed by the landlords. The tenant is required to file a site plan of his own which would aid this Court in understanding the lacunae in the site plan file by the landlords. This Court finds that the tenant has failed to substantiate this argument with any document and concludes that there were no errors in the site plan on record.

8. The next contention of the tenant is that the landlords have two additional properties which are lying vacant and that the landlords are not putting them to use and are harassing the tenant by filing the eviction petition. The tenant has disclosed addresses of two other properties, which the impugned order has taken note of. However, in the present petition, the tenant has disclosed addresses of five properties more stating that these are properties located in and around Delhi which are all owned by the landlords. It is pertinent to point that the existence of these five properties which the tenant claims are owned by the landlord is not mentioned anywhere in the impugned order. The counsel neither makes any mention nor submits any details which may conclusively lead to this Court to believe that the properties mentioned are owned by the landlords. In an eviction petition, the landlord need not disclose the alternate properties available to him if he is of the view that the alternate properties are unsuitable for him. The eviction petition is not a public declaration or disclosure of all the immovable assets of the landlord and then and exercise of sifting through the ones' which are or could be deemed to be suitable as alternate accommodation. For any property to be considered alternately available, it has first to be available, i.e. in possession of the landlord and capable of being put to immediate use; thereafter only the issue of its suitability for the bona fide need arise. The landlord's discretion and prerogative in this regard cannot be questioned, except insofar as it is not whimsical, ex facie or shockingly unreasonable.

9. Another argument brought forward by the tenant was that the landlord did not need the accommodation as claimed as they had sufficient space available with them. It is settled law that tenant is not one to dictate to the judiciary as to how it can use the property. Such liberty is not vested with either the Court or the tenant. This Court and the Supreme Court has held time and again that the landlord, once having shown that

he genuinely needs the property, there can be no interference on how the property should be put to use. The Supreme Court in **Prativa Devi v T. V. Krishnan** (1996) 5 SCC 353 held:

> *"2. The landlord is the best judge of his residential requirement. He has a complete freedom in the matter. It is no concern of the courts to dictate to the landlord how, and in what manner, he should live or to prescribe for him a residential standard of their own.....There is no law which deprives the landlord of the beneficial enjoyment of his property."*

The Supreme Court in **Meenal Eknath Kshirsagar (Mrs) v Traders and Agencies** (1996)5 SCC 344 held that the landlord has liberty to occupy the premises so tenanted if the premises he is occupying is insecure or inconvenient. Under any circumstances, the landlord is the best judge of his residential requirement.

10. The landlord has explained for the two properties which were allegedly in the possession of the landlords. The impugned order records the reasons given and this Court sees no reason to interfere with the same. On the issue of the other five properties being disclosed, this Court finds the same to be a bald averment with no document or ex facie credible/compelling details brought on record to substantiate the argument. Therefore, this argument too is without basis and untenable and the Court cannot consider the landlord to be the owner of the five properties mentioned.

11. The counsel for the tenant contended that there was no tenant-landlord relationship between the parties therefore the tenant cannot be evicted from the premises. The argument was made right after the tenant claiming that his family had been in possession of the tenanted premises for over 100 years. The impugned order also records the tenant's submission that the tenant has been paying the landlord a monthly rent of Rs 25/- regularly and that there are no arrears. There is clear contradiction in the arguments on behalf of the tenant; his resistive argument is self-defeating because how could there not be a tenant-landlord relationship when the tenant himself admits to have been residing in the premises for 100 years and also paying rent regularly. Under the Rent Control Act, if the tenant admits to paying rent to the other party or treats the other party as their landlord, the tenant is estopped from later stating that he does not consider the other party as his landlord. It

is submitted by the counsel for the landlord that the tenant was paying rent initially but has failed to do so for the last 18 years. The default in payment of rent would not alter the landlord-tenant relationship.

12. The tenant's next contention was that the sale deed vesting ownership on the landlords was illegal and void. However, in matters of landlord-tenant relationship, the question whether the landlord has the title to the property pales into insignificance when the tenant shows that he has been paying rent to the eviction-petitioner. This Court is of the view that the relationship is established between the parties when the tenant has been paying rent to the landlord and the landlord has been collecting such rent in his own right and not on behalf of somebody. The learned counsel then argued that the property does not belong to the landlord but to the Government vide notification dated 18-12-1971 and the sale deed of the landlord is void; a fact, he contends, the learned SCJ-cum-RC failed to take due note of. This Court finds no credibility when such contentions are raised without producing anything to ex facie substantiate the argument. Furthermore, the tenant cannot challenge the title of the landlord of the suit property when he is still in possession of the tenanted premises.

13. The counsel for the tenant contended that the landlords have sufficient alternative accommodation and as such there is no bona fide requirement. The landlords, according to the counsel for the tenant, do not need as many rooms as they claims and the reasons mentioned in the eviction petition are false as the landlords have not substantiated these averments with documents. The counsel argues that the landlord has to show how his requirement is genuine in nature which, in the present case, the landlords have not. In an eviction petition, the Trial Court is required to be shown that the need for the tenanted premises is meant for use by the landlord and his dependants and that the landlord has no other suitable accommodation. The landlord is required to show that there is prima facie bona fide need for the premises while the tenant in his leave to defend application is required to show why the landlord is disentitled from evicting the tenant. A Court proceeds on the assumption that the need of the premises is genuine. Mere bald averments by the tenant would not suffice, he would need to show ex facie reasons which would disentitle the landlord from grant of an eviction order. The Supreme Court in **Shiv Sarup Gupta v Mahesh Chand Gupta (Dr),** (1999) 6 SCC 222 has dwelt in detail on what constitutes bona fide requirement

and what the tenant has to bring forth to the Court to be granted a leave to defend.

14. For the above reasons this Court is unpersuaded by the arguments on behalf of the petitioner-tenant to set aside the impugned order. The view taken by the Trial Court is based on the record and is a plausible view in law. There is no material irregularity warranting the interference of this Court. There is no merit in the petition and it is accordingly dismissed.

ILR (2014) IV DELHI 2054
WP(C) NO.

COMMISSIONER OF INCOME TAX (CENTRAL)-II **.....PETITIONER**

VERSUS

INCOME TAX SETTLEMENT COMMISSION & ANR. **....RESPONDENTS**

(S. RAVINDRA BHAT & R.V. EASWAR, JJ.)

W.P.(C) NO. 5262/2013 **DATE OF DECISION: 10.02.2014**

A. Constitution of India, 1950—Article 226; Income Tax Act, 1961, Section 245A To 245M: Petition challenging the majority decision of ITSC granting immunity to Respondent no.2 from imposition of penalty and prosecution on the ground that it is contrary to parameters laid down in S. 245H(1) and the ITSC has taken a perverse view of the facts and the evidence brought on record and therefore, it was permissible for this Court in writ proceedings to upstage the majority opinion of ITSC. HELD—It is important to note that the twin conditions for grant of immunity are (1) the applicant has cooperated with the Settlement

Commission in the proceedings before it and (2) has made a full and true disclosure of his income and the manner in which such income was derived. Immunity can be granted only within the parameters of Section 245H(1) which requires full and true disclosure of income and co-operation from the assessee in the proceedings before the ITSC. Co-operation implies an act of volition on the part of the assessee; the present assessee "co-operated" in the proceedings before the ITSC only when faced with the reports submitted by the CIT. The ITSC, in our opinion was therefore not justified in taking a somewhat charitable view towards the assessee when it observed that it was at its "advice." made in a "spirit of settlement" that the assessee offered the entire bogus purchases of Rs. 117.98 crores as its income. Majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and prosecution was ritualistic, once the assessee disclose the entire concealed income, ignoring the vital requirement that it is stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced. Petition allowed and majority view taken by ITSC quashed.

In the present proceedings under Article 226 of the Constitution of India, the revenue calls in question the majority view taken in the impugned order dated 8.2.2013

passed by the Income Tax Settlement Commission, Principal Bench, New Delhi, ("ITSC") granting immunity to the respondent No.2 from imposition of penalty and prosecution. **(Para 1)**

Chapter XIX-A of the Income Tax Act, 1961 consisting of sections 245A to 245M was inserted by the Taxation Laws (Amendment) Act, 1975, w.e.f. 1.4.1976. It provided for settlement of cases. Vast powers were conferred upon the Settlement Commission including the power to grant immunity to the assessee from prosecution and penalty. Once the Settlement Commission is seized of the settlement application, the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act in relation to the case of the applicant became vested in the Settlement Commission until a final order of settlement is passed in terms of section 245D(4). In settling the case of the applicant, the Settlement Commission shall, after granting an opportunity to the applicant and to the Commissioner of Income Tax concerned to be heard, and after examining such further evidence as may be placed before it or obtained by it, pass such order as it thinks fit on the matters covered by the applicant and any other matter relating to the case not covered by the applicant, but referred to in the report of the Commissioner of Income Tax. Under sub-section (5) of section 245D, the materials brought on record before the Settlement Commission shall be considered by the members of the concerned Bench before passing any order of settlement. Under section 245(1), the assessee may, at any stage of a case relating to him, make an application in such form and in such a manner as may be prescribed, and *"containing a full and true disclosure of his income which has not been disclosed before the assessing officer, the manner in which such income has been derived, the additional amount of income tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission ....."* and such an application shall be disposed of by the Settlement Commission in the manner

provided in the Chapter. Section 245B(3) provides for appointment of members of the ITSC from among "persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts". The power to grant immunity from prosecution and penalty is granted by section 245H(1) and is circumscribed by two conditions as will be evident by the sub-section which is as under :

"Power of Settlement Commission to grant immunity from prosecution and penalty.

245H*. (1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also [(either wholly or in part)] from the imposition of any penalty under this Act, with respect to the case covered by the settlement :"*

xxxx xxxx xxxx

It is important to note that the twin conditions for the grant of immunity are that (1) the applicant has cooperated with the Settlement Commission in the proceedings before it and (2) has made a full and true disclosure of his income and the manner in which such income was derived. There are other provisions in the section providing for withdrawal of the immunity in case it is later found that the same was obtained by concealing any particulars material to the settlement or by giving false evidence or if the applicant fails to comply with the payment schedule prescribed by the

Settlement Commission or with any other condition subject to which the immunity from penalty and a prosecution was granted. Section 245-I provides that the order of settlement shall be conclusive as to the matters stated therein and in respect of such matters, the assessee cannot be subjected to reassessment proceedings. **(Para 2)**

The revenue assails the majority opinion expressed by the ITSC on the ground that it is contrary to the parameters laid down in Section 245H(1). It is contended that the ITSC has taken a perverse view of the facts and the evidence brought on record and, therefore, it is permissible for this Court, in writ proceedings, to upstage the majority opinion granting immunity to the assessee from penalty and prosecution. **(Para 11)**

It seems to us that the criticism levelled by the revenue against the majority opinion of the ITSC granting immunity to the assessee is well-founded. Immunity can be granted only within the parameters of Section 245H(1) which requires full and true disclosure of income and co-operation from the assessee in the proceedings before the ITSC. Co-operation implies an act of volition on the part of the assessee; the present assessee "co-operated" in the proceedings before the ITSC only when faced with the reports submitted by the CIT. The ITSC, in our opinion, was therefore not justified in taking a somewhat charitable view towards the assessee when it observed that it was at its "advice", made in a "spirit of settlement" that the assessee offered the entire bogus purchases of Rs.117.98 crores as its income. Right from the beginning, as the seized material would show, the assessee was aware that the purchase of steel and cement from the five parties of Delhi and Gurgaon was bogus; it had no evidence that the goods were transported to it – it had, in fact submitted evidence

which established that the vehicles which allegedly carried the goods were not even registered with the transport authorities at the relevant time, that some of them were two-wheelers which were incapable of transporting cement and steel; the proprietors of those five firms had gone on record, on oath, that they issued bogus bills for a commission; there was immediate withdrawal of funds from the bank accounts of those firms after the cheques issued by the assessee were cleared, but there was no information forthcoming as to the destination of those funds leading to the inference that they came back to the till of the assessee; the addresses given by those firms were found to be non-existent. All this was known to the assessee, but still it did not make a full and true disclosure in the settlement application; it waited till the ITSC called for reports from the CIT which reiterated the aforesaid facts established by the seized material. It had no answer to the evidence, but in a desperate attempt tried to prove its innocence by filing valuation reports before the ITSC to show that the inflation of the expenses on purchase of cement and steel was only in the order of 15% of the actual consumption, which difference would be taken care by the offer of additional income of Rs.43.78 crores.

(Para 13)

The aforesaid factual position shows that the assessee took a chance – sat on the fence, so to say – by not coming clean in the settlement application and not disclosing income which it did not disclose before the assessing officer – and when the CIT's reports exposed its conduct in the proceedings before the ITSC, it was *"advised"* by the ITSC, *"in a spirit of settlement"* to offer the entire amount of bogus purchase of Rs.117.98 crores, which it accepted. We fail to see any spirit of settlement; that spirit ought to have been exhibited by the assessee in the application filed before the ITSC, as the law requires, and it is not enough if it is shown

in proceedings before the ITSC after being confronted with adverse reports, to which it had no answer. In **Ajmera Housing Co-operation and another v. CIT,** (2010) 326 ITR 642, the Supreme Court held that the fact that the assessee kept revising its application for settlement by disclosing higher income in the revised applications established that it did not make a full and true disclosure of income which it did not disclose to the assessing authority. In the circumstances, the assessee cannot be said to have "co-operated" in the proceedings before the ITSC. It did not voluntarily offer the additional income, being the difference between 117.98 crores and 39.53 crores. It first offered additional income of Rs.39.53 crores in the settlement application filed under Section 245-C(1); when the ITSC found, pursuant to the report filed by the CIT on 17.10.2012, that by the assessee's own admission, purchase invoices were bogus to the extent of Rs.43.78 crores instead of Rs.39.53 crores, the assessee made a further disclosure of Rs.4.25 crores. After all the reports were examined by the ITSC and after considering the evidence adduced by both the sides, it found that the assessee ought to have offered the entire amount of Rs.117.98 crores, being the bogus purchases of cement and steel from 5 parties as against Rs.39.53 crores offered by it. It was only at that stage, when cornered and when it was unable to rebut the evidence and the facts established by the evidence, that the assessee came forward with the additional income of Rs.78.45 crores, which when added to Rs.39.53 crores disclosed in the settlement application, aggregated to Rs.117.98 crores. In other words the assessee waited till the last moment to make the additional offer. This conduct of the assessee, far from showing co-operation in the proceedings before the ITSC, shows defiance and an attitude of a fence-sitter. The Member who expressed the minority view rejecting the claim for

immunity from penalty and prosecution has pertinently brought out this aspect of the assessee's conduct in the observations quoted hereinabove. We agree with his view that the assessee was all along quite aware that the entire amount of Rs.117.98 crores, being bogus purchase of cement and steel from 5 parties of Gurgaon and Delhi, was concealed income. There is ample evidence brought on record by the revenue in this behalf. Yet the assessee consciously chose not to offer the aforesaid amount as additional income – i.e. income which was not disclosed before the assessing officer – in the application filed before the ITSC under Section 245(1). The assessee has thus failed to satisfy the twin conditions of Section 245H (1) and was, therefore, not entitled to the immunity. The majority view expressed by the ITSC, with respect, goes contrary to the evidence on record and fails to take note of the contumacious conduct of the assessee despite an opportunity afforded by Chapter XIX-A of the Income Tax Act to errant assessees to come clean and turn a new leaf. The spirit of settlement was absolutely lacking; it may not be without justification to say that the assessee was indulging in abuse of a well-intentioned statutory provision. It is certainly open to the ITSC to grant immunity to an applicant from penalty and prosecution. This power, however, has to be exercised only in accordance with law i.e. on satisfaction of the conditions of Section 245H(1). We are constrained to observe that the majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and prosecution was ritualistic, once the assessee discloses the entire concealed income, ignoring the vital requirement that it is the stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much

larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced. **(Para 14)**

So far as the power of judicial review of the orders of ITSC is concerned, we need only refer to the following judgments of the Supreme Court: **R.B. Shreeram Durga Prasad v. Settlement Commission,** (1989) 176 ITR 169; **Jyotendrasinghji v. S.I. Tripathi & Ors.,** (1993) 201 ITR 611; **Shriyans Prasad Jain v. Income-tax Officer and others,** (1993) 204 ITR 616 and **Kuldeep Industrial corporation v. ITO,** (1997) 223 ITR 840. In **Jyotendrasinghji** (supra), the position was summed up as follows: -

"Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the Commission to make a particular order, unless the Commission itself chooses to give reasons for its order. Even if it gives reasons in a given case, the scope of inquiry in the appeal remains the same as indicated above, viz., whether it is contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (audi alterant partem) has been incorporated in section 245D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of

enquiry, whether by High Court under article 226 or by this court under article 136 is also the same – whether the order of the Commission is contrary to any of the provisions of the Act and if so, apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category has it prejudiced the petitioner/ appellant."

The impugned order of the ITSC (majority view) is contrary to the provisions of Section 245H(1).

In view of the foregoing discussion, we uphold the contentions of the revenue and quash the majority view of the ITSC granting immunity to the assessee from penalty and prosecution vide order dated 08.02.2013.

The writ petition is allowed with no order as to costs. **(Para 16)**

[An Ba]

APPEARANCE:

FOR THE PETITIONER : Mr. Rohit Madan, Sr. Standing Counsel with Mr. Akash Vajpai, Advocate.

FOR THE RESPONDENTS : Mr. C.S. Aggarwal, Sr Adocate with Mr. Prakash Kumar, and Mr. Sheel Vardhan Advocates.

CASES LAW REFERENCE:

1. *Ajmera Housing Co-operation and another* vs. *CIT,* (2010) 326 ITR 642.
2. *Kuldeep Industrial corporation* vs. *ITO,* (1997) 223 ITR 840.
3. *Shriyans Prasad Jain* vs. *Income-tax Officer and others,* (1993) 204 ITR 616.
4. *Jyotendrasinghji* vs. *S.I. Tripathi & Ors.,* (1993) 201 ITR 611.
5. *R.B. Shreeram Durga Prasad* vs. *Settlement Commission,* (1989) 176 ITR 169.

RESULT: Petition allowed.

R.V. EASWAR, J.

1. In the present proceedings under Article 226 of the Constitution of India, the revenue calls in question the majority view taken in the impugned order dated 8.2.2013 passed by the Income Tax Settlement Commission, Principal Bench, New Delhi, ("ITSC") granting immunity to the respondent No.2 from imposition of penalty and prosecution.

2. Chapter XIX-A of the Income Tax Act, 1961 consisting of sections 245A to 245M was inserted by the Taxation Laws (Amendment) Act, 1975, w.e.f. 1.4.1976. It provided for settlement of cases. Vast powers were conferred upon the Settlement Commission including the power to grant immunity to the assessee from prosecution and penalty. Once the Settlement Commission is seized of the settlement application, the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act in relation to the case of the applicant became vested in the Settlement Commission until a final order of settlement is passed in terms of section 245D(4). In settling the case of the applicant, the Settlement Commission shall, after granting an opportunity to the applicant and to the Commissioner of Income Tax concerned to be heard, and after examining such further evidence as may be placed before it or obtained by it, pass such order as it thinks fit on the matters covered by the applicant and any other matter relating to the case not covered by the applicant, but referred to in the report of the Commissioner of Income Tax. Under sub-section (5) of section 245D, the materials brought on record before the Settlement Commission shall be considered by the members of the concerned Bench before passing any order of settlement. Under section 245(1), the assessee may, at any stage of a case relating to him, make an application in such form and in such a manner as may be prescribed, and *"containing a full and true disclosure of his income which has not been disclosed before the assessing officer, the manner in which such income has been derived, the additional amount of income tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission ....."* and such an application shall be disposed of by the Settlement Commission in the manner provided in the Chapter. Section 245B(3) provides for appointment of members of the ITSC from among "persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating

to direct taxes and business accounts". The power to grant immunity from prosecution and penalty is granted by section 245H(1) and is circumscribed by two conditions as will be evident by the sub-section which is as under :

> ***"Power of Settlement Commission to grant immunity from prosecution and penalty.***
>
> ***245H****. (1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also [(either wholly or in part)] from the imposition of any penalty under this Act, with respect to the case covered by the settlement :"*
>
> xxxx xxxx xxxx

It is important to note that the twin conditions for the grant of immunity are that (1) the applicant has cooperated with the Settlement Commission in the proceedings before it and (2) has made a full and true disclosure of his income and the manner in which such income was derived. There are other provisions in the section providing for withdrawal of the immunity in case it is later found that the same was obtained by concealing any particulars material to the settlement or by giving false evidence or if the applicant fails to comply with the payment schedule prescribed by the Settlement Commission or with any other condition subject to which the immunity from penalty and a prosecution was granted. Section 245-I provides that the order of settlement shall be conclusive as to the matters stated therein and in respect of such matters, the assessee cannot be subjected to reassessment proceedings.

3. On 10.2.2010, a search was conducted under Section 132 of the Act in the business premises of the assessee herein (R-2) as part of the search of the group companies, including the residential premises of its directors. Several incriminating documents, cash and other materials were

seized. The incriminating documents are alleged to have contained evidence to show that the purchase of cement and steel aggregating to Rs.117.98 crores from 5 parties in Gurgaon and Delhi were bogus or false. The assessee filed an application before the Settlement Commission under section 245C(1) on 16.12.2011 in which it admitted that the purchase of cement and steel amounting to Rs.39.53 crores were not genuine and has to be taken as the income of the assessee which was not disclosed before the assessing officer in the block assessment relating to the assessment years 2004-05 to 2010-11.

4. In the course of the proceedings before the ITSC, a report was submitted by the CIT under Rule 9 of the Income Tax Settlement Commission (Procedure) Rules, 1999 on 24.9.2012. In this report the CIT sought a direction from the ITSC to conduct further enquiries and investigation as contemplated by sub-section (3) of section 245D and furnish a report. It would appear that the CIT in his letter dated 2.2.2012 had referred to certain enquiries made which revealed that the parties from whom the applicant had claimed to have made purchases of cement and steel were not trading in those goods at all; it was also pointed out that one Ashok Oberoi, the proprietor of all those concerns had stated on oath to this effect and had also admitted that they had issued bogus bills of steel, cement and TMT bars to the assessee without actually supplying those materials and that they had charged commission from the assessee at the rate of 10 to 15 paise per hundred rupees for issuing those bills. The report further pointed out that the address of the account holders mentioned in the bank statement of the five firms were found to be fictitious as also the names of the persons who introduced the account holders.

5. Another report was filed by the CIT on 17.10.2012 before the ITSC. The assessee was asked to explain as to how the genuine and bogus bills of the parties were identified, to which the assessee stated that they were separately filed and further submitted that in respect of TMT iron bar invoices claimed as genuine the corresponding dharam kanta receipts were also available. The assessee itself filed details in the form of a chart recording the bogus purchases admitted before the ITSC including the purchase invoices of iron bars where dharam kanta receipts were not available. This worked out to Rs.43.78 crores. Thus, though the assessee admitted Rs.39.53 crores in the application filed before the

ITSC under section 245C(1) as additional income not disclosed before the assessing officer, after the report filed by the CIT on 17.10.2012, the additional income was enhanced to Rs.43.78 cores, thus making a further surrender of Rs.4.25 crores on account of bogus purchases.

6. In the hearing which took place before the ITSC on 18.10.2012, apparently on the basis of the report filed by the CIT, he was directed to carry out a further enquiry in respect of the bogus purchases and to bring out the facts which are not acceptable to the revenue, after verification from the assessee. Pursuant to this direction, the CIT filed another report dated 10.12.2012 before the ITSC. In this report it was stated that the assessing officer was directed to give an opportunity to the assessee of cross-examining Ashok Oberoi, the main person who was said to have issued the bogus bills. The assessee was not able to cross-examine Ashosk Oberoi and the reasons thereof were also mentioned in the report of the CIT. The CIT further referred to the statement of Ashok Oberoi recorded on 16.11.2012 in which he confirmed his earlier statements and affidavits to the effect that the bills issued to the assessee were bogus bills and no material was in fact supplied against the same.

7. A final report was submitted by the CIT on 8.1.2013 in which it was stated that verification from the road transport authorities revealed that there was no proof that the registration numbers of the vehicles mentioned in the bills were used for transporting the cement and steel; in some cases, the registration numbers were those of two wheelers which were incapable of transporting the goods and in some cases the registration numbers were found to be of those vehicles registered with the transport authorities later than the relevant period in which they were claimed to have transported the goods. Some of the transport operators also stated, on cross verification with them, that they did not transport any material for the assessee.

8. When the ITSC took up the matter for hearing on 10.1.2013, the applicant was not able to controvert any finding recorded in the reports submitted by the CIT under section 245D(3). When it was asked by the ITSC to support its claim regarding transport of the goods, the assessee expressed its inability to do so on the ground that the matter was old and the records were not maintained. However, the assessee submitted certificates by a chartered engineer and a registered valuer in respect of some of the buildings constructed by it, on the basis of which it was

argued that the cement and steel actually consumed in the construction was less than what was shown in the books of account by only 15% and therefore the additional income disclosed by it in the settlement application would cover such excess consumption.

9. After examining the above aspect of the settlement proceedings, the ITSC observed in para 25 of its order (majority view) as under: -

> *"25. After examining the facts of the case and after taking into account the evidences submitted by both the applicant and the Department to substantiate their contentions, the Bench in the spirit of settlement advised the applicant to offer the entire purchase of Rs.117.98 crores of cement and TMT iron bars from 5 parties under consideration as additional income in place of Rs.39.53 offered by it."*

Thereafter on the last hearing which took place on 15.1.2013 the applicant submitted before the ITSC that it *"has agreed to offer the entire purchase of cement and TMT iron bars from the 5 parties for Rs.117.98 as additional income."* On the question of immunity from prosecution and penalty the ITSC (majority view) observed as under: -

> *"30. The applicant has prayed for immunity from prosecution and imposition of penalties under various provisions of the Income Tax Act. Considering the facts and circumstances of the case and the cooperation extended to the Commission during the proceedings before it, immunity is granted from prosecution and penalty imposable under the I.T. Act."*

10. The minority view is that the assessee is not entitled to immunity from penalty. It has been stated by the Member, who delivered the lone dissenting opinion, that the facts established that the applicant did not disclose its true and full income in the settlement application since it cannot be held with certainty that the applicant was not aware of the fact that it had claimed bogus expenditure of Rs.117.98 crores in the books of account. He further observed that the basic intent behind not offering full and true income in the settlement application is to suppress the taxable income. He expressed surprise that: -

> *"the applicant, which was fully aware of the fact that the clinching evidences indicating bogus expenditure claimed in its P & L account were found during search and post-search investigation*

as mentioned above, had not offered the entire suppressed income/ bogus expenditure for tax either before the search team or the Assessing Officer (AO) or Income Tax Settlement Commission (ITSC). Thus, it cannot be ruled out that there was no attempt by the applicant to evade tax even in its SA where one of the prime conditions for filing application is full and true disclosure of the income. Further, it is evident from the above discussion that the applicant has tried its best till end during the settlement proceedings also to justify its stand, however, the Ld. CIT has demonstrated and establishing that the applicant has claimed bogus expenditure of Rs.117.98 crores in its books of account as against admitted disallowance of Rs.39.58 in its SA. Hence, it can be concluded that the applicant has not offered Rs.78.45 crores voluntarily, however it has done so when it has no option except to do so. Thus, consequential disallowance of Rs.78.45 crores was made."

11. The revenue assails the majority opinion expressed by the ITSC on the ground that it is contrary to the parameters laid down in Section 245H(1). It is contended that the ITSC has taken a perverse view of the facts and the evidence brought on record and, therefore, it is permissible for this Court, in writ proceedings, to upstage the majority opinion granting immunity to the assessee from penalty and prosecution.

12. On behalf of the assessee it is submitted that the assessee has made a full and true disclosure of the income which it did not disclose before the assessing officer, in the proceedings before the ITSC and has also co-operated by offering such additional income in the proceedings before the ITSC in a spirit of settlement at the suggestion of the ITSC. According to him this conduct of the assessee satisfied the requirements of Section 245H(1).

13. It seems to us that the criticism levelled by the revenue against the majority opinion of the ITSC granting immunity to the assessee is well-founded. Immunity can be granted only within the parameters of Section 245H(1) which requires full and true disclosure of income and co-operation from the assessee in the proceedings before the ITSC. Co-operation implies an act of volition on the part of the assessee; the present assessee "co-operated" in the proceedings before the ITSC only when faced with the reports submitted by the CIT. The ITSC, in our

opinion, was therefore not justified in taking a somewhat charitable view towards the assessee when it observed that it was at its "advice", made in a "spirit of settlement" that the assessee offered the entire bogus purchases of Rs.117.98 crores as its income. Right from the beginning, as the seized material would show, the assessee was aware that the purchase of steel and cement from the five parties of Delhi and Gurgaon was bogus; it had no evidence that the goods were transported to it – it had, in fact submitted evidence which established that the vehicles which allegedly carried the goods were not even registered with the transport authorities at the relevant time, that some of them were two-wheelers which were incapable of transporting cement and steel; the proprietors of those five firms had gone on record, on oath, that they issued bogus bills for a commission; there was immediate withdrawal of funds from the bank accounts of those firms after the cheques issued by the assessee were cleared, but there was no information forthcoming as to the destination of those funds leading to the inference that they came back to the till of the assessee; the addresses given by those firms were found to be non-existent. All this was known to the assessee, but still it did not make a full and true disclosure in the settlement application; it waited till the ITSC called for reports from the CIT which reiterated the aforesaid facts established by the seized material. It had no answer to the evidence, but in a desperate attempt tried to prove its innocence by filing valuation reports before the ITSC to show that the inflation of the expenses on purchase of cement and steel was only in the order of 15% of the actual consumption, which difference would be taken care by the offer of additional income of Rs.43.78 crores.

14. The aforesaid factual position shows that the assessee took a chance – sat on the fence, so to say – by not coming clean in the settlement application and not disclosing income which it did not disclose before the assessing officer – and when the CIT's reports exposed its conduct in the proceedings before the ITSC, it was *"advised"* by the ITSC, *"in a spirit of settlement"* to offer the entire amount of bogus purchase of Rs.117.98 crores, which it accepted. We fail to see any spirit of settlement; that spirit ought to have been exhibited by the assessee in the application filed before the ITSC, as the law requires, and it is not enough if it is shown in proceedings before the ITSC after being confronted with adverse reports, to which it had no answer. In **Ajmera Housing Co-operation and another v. CIT,** (2010) 326 ITR 642, the

Supreme Court held that the fact that the assessee kept revising its application for settlement by disclosing higher income in the revised applications established that it did not make a full and true disclosure of income which it did not disclose to the assessing authority. In the circumstances, the assessee cannot be said to have "co-operated" in the proceedings before the ITSC. It did not voluntarily offer the additional income, being the difference between 117.98 crores and 39.53 crores. It first offered additional income of Rs.39.53 crores in the settlement application filed under Section 245-C(1); when the ITSC found, pursuant to the report filed by the CIT on 17.10.2012, that by the assessee's own admission, purchase invoices were bogus to the extent of Rs.43.78 crores instead of Rs.39.53 crores, the assessee made a further disclosure of Rs.4.25 crores. After all the reports were examined by the ITSC and after considering the evidence adduced by both the sides, it found that the assessee ought to have offered the entire amount of Rs.117.98 crores, being the bogus purchases of cement and steel from 5 parties as against Rs.39.53 crores offered by it. It was only at that stage, when cornered and when it was unable to rebut the evidence and the facts established by the evidence, that the assessee came forward with the additional income of Rs.78.45 crores, which when added to Rs.39.53 crores disclosed in the settlement application, aggregated to Rs.117.98 crores. In other words the assessee waited till the last moment to make the additional offer. This conduct of the assessee, far from showing co-operation in the proceedings before the ITSC, shows defiance and an attitude of a fence-sitter. The Member who expressed the minority view rejecting the claim for immunity from penalty and prosecution has pertinently brought out this aspect of the assessee's conduct in the observations quoted hereinabove. We agree with his view that the assessee was all along quite aware that the entire amount of Rs.117.98 crores, being bogus purchase of cement and steel from 5 parties of Gurgaon and Delhi, was concealed income. There is ample evidence brought on record by the revenue in this behalf. Yet the assessee consciously chose not to offer the aforesaid amount as additional income – i.e. income which was not disclosed before the assessing officer – in the application filed before the ITSC under Section 245(1). The assessee has thus failed to satisfy the twin conditions of Section 245H (1) and was, therefore, not entitled to the immunity. The majority view expressed by the ITSC, with respect, goes contrary to the evidence on record and fails to take note of the contumacious conduct of the assessee despite an opportunity afforded

by Chapter XIX-A of the Income Tax Act to errant assessees to come clean and turn a new leaf. The spirit of settlement was absolutely lacking; it may not be without justification to say that the assessee was indulging in abuse of a well-intentioned statutory provision. It is certainly open to the ITSC to grant immunity to an applicant from penalty and prosecution. This power, however, has to be exercised only in accordance with law i.e. on satisfaction of the conditions of Section 245H(1). We are constrained to observe that the majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and prosecution was ritualistic, once the assessee discloses the entire concealed income, ignoring the vital requirement that it is the stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced.

15. So far as the power of judicial review of the orders of ITSC is concerned, we need only refer to the following judgments of the Supreme Court: **R.B. Shreeram Durga Prasad v. Settlement Commission,** (1989) 176 ITR 169; **Jyotendrasinghji v. S.I. Tripathi & Ors.,** (1993) 201 ITR 611; **Shriyans Prasad Jain v. Income-tax Officer and others,** (1993) 204 ITR 616 and **Kuldeep Industrial corporation v. ITO,** (1997) 223 ITR 840. In **Jyotendrasinghji** (supra), the position was summed up as follows: -

> *"Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the Commission to make a particular order, unless the Commission itself chooses to give reasons for its order. Even if it gives reasons in a given case,*

the scope of inquiry in the appeal remains the same as indicated above, viz., whether it is contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (audi alterant partem) has been incorporated in section 245D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under article 226 or by this court under article 136 is also the same – whether the order of the Commission is contrary to any of the provisions of the Act and if so, apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category has it prejudiced the petitioner/ appellant."

The impugned order of the ITSC (majority view) is contrary to the provisions of Section 245H(1).

16. In view of the foregoing discussion, we uphold the contentions of the revenue and quash the majority view of the ITSC granting immunity to the assessee from penalty and prosecution vide order dated 08.02.2013.

The writ petition is allowed with no order as to costs.

ILR (2014) III DELHI 2074
OMP

GOVT. OF NCT OF DELHI ...PETITIONER

VERSUS

NAV NIRMAN CONSTRUCTION CO. ....RESPONDENT

(S. MURALIDHAR, J.)

OMP : 233/2007 DATE OF DECISION:10.02.2014

Arbitration & Conciliation Act, 1996—Award—Petitioner Challenged Award passed by Learned Arbitration—Plea taken, Contrary to specific directions issued by Court, learned Arbitrator has not, in fact, given reasons for conclusion in respect of different claims made by NNCC and has virtually repeated his earlier Award, which was set aside by Court—If claims(iii), (iv) and (v) were components of claim (xvii), then there was no justification for learned Arbitrator to have again awarded a separate sum of Rs. 2,00,000/- under claim (xvii)—Award itself was based on fictitious documents, which ought not to have been relied upon by learned Arbitrator—Per contra plea taken, learned Arbitrator has explained, both under claims (i) and (ii) and again under claims (iii) to (viii) that they were all components of all claims for profit and loss under claim (xvii)—Award in respect of claim (xvii) was not challenged by Petitioner on ground now urged and was therefore impermissible—HELD—Claims (i) to (viii) have been treated by learned Arbitrator to be components of claim (xvii) which is for a sum of Rs.6,40,000 towards loss of profit—It is not understood why if, indeed, claims (i) to (viii) are intrinsically and essentially components of claim for loss and profit then in addition to those claims, a separate sum of. Rs. 2,00,000 could

be awarded under claim (xvii)-Learned Arbitrator has failed to give any reasons whatsover in awarding Rs.2,00,000 under claim (xvii) towards loss of profit, in addition to award in respect of claims (i) and (viii) which are stated to be components of claim for loss of profit—To that extent, it must be held that no reasons have been given by learned Arbitrator as regards claim (xvii) and impugned award to that extent is not in conformity with specific directions issued by Court—Consequently Award under claim (xvii) of Rs.2,00,000 in favour of NNCC is set aside—With GNCTD not making available original documents before learned Arbitrator, it cannot be permitted to urge that learned Arbitrator proceeded on basis of fictitious documents—There was no way learned Arbitrator could have dealt with submission of fictitious documents in absence of original records—In view of long pendency of arbitration proceedings, Court is inclined to modify rate of interest and direct that GNCTD will pay NNCC simple interest @ 9% p.a from 28th October, 1993 till date of payment which shall not be later than eight weeks from today—Any delay in making payment beyond that period would attract simple interest at 12% per annum for period of delay.

Important Issue Involved: When the learned Arbitrator has awarded under claims which are intrinsically and essentially components of claims for loss of profit, then in addition to those claims, a separate sum cannot be awarded under claim for loss of profit.

When a party has not made available the original documents before the learned Arbitrator it cannot be permitted to urge that the learned Arbitrator proceed on the basis of fictitious documents.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sushil Dutta Salwan, Addl. Standing Counsel with Mr. Pratap Singh, Advocate

FOR THE RESPONDENT : Mr. Sandeep Sharma with Mr. Amit Choudhry, Advocates

CASES REFERRED TO:

1. *Krishna Bhagya Jal Nigam Ltd.* vs. *G. Harischandra Reddy* AIR 2007 SC 817.
2. *Bijendra Nath Srivastava* vs. *Mayank Srivastava* (1994) 6 SCC 117.
3. *M/s A.T. Brijpal Singh* vs. *State of Gujarat* AIR 1984 SC 1703.
4. *Hind Construction Contractor* vs. *State of Maharashtra* AIR 1979 SC 720.

RESULT: Disposed of

S. MURALIDHAR, J.

1. This is a petition by the Government of National Capital Territory of Delhi ('GNCTD') through its Executive Engineer, Irrigation and Flood Control Department praying that the Award dated 19th January 2007 passed by the learned Arbitrator be set aside.

2. The background to the present petition is that the Respondent, M/s. Nav Nirman Construction Co. ('NNCC') was awarded the work for construction of an inlet/outfall structure of a DDA storm water drain by letter dated 9th November 1992. Subsequently, an agreement dated 18th November 1992 was entered into between the parties. The stipulated date for completion of the work was 15th May 1993. The contract was, however, rescinded by the Petitioner on 1st September 1993 and the work was completed through another contractor.

3. NNCC filed Suit No. 2483 of 1993 seeking appointment of an arbitrator to adjudicate the disputes between the parties in terms of Clause 25 of the Agreement. Pursuant to an order dated 1st March 1999 passed by the Court in the aforementioned suit, the Chief Engineer, I & F Department of GNCTD, appointed Mr. A.S. Gahlawat, Chief Engineer

(Retd.) as the sole Arbitrator, who entered reference on 7th July 1999. NNCC filed its statement of claims and the GNCTD filed its statement of defence as well as counter claims ('CCs').

4. By an Award dated 12th May 2000, the learned Arbitrator allowed NNCC's claims and rejected the GNCTD's CCs. The objection to the Award filed by the GNCTD, in the form of OMP No. 218 of 2000, was allowed by the Court on 31st July 2002. While setting aside the Award dated 12th May 2000, the Court directed the learned Arbitrator to dispose of the claims and CCs afresh.

5. Pursuant to the aforementioned above order, the learned Arbitrator again entered upon reference, held further proceedings and passed a fresh Award dated 16th September 2002. The GNCTD objected to the Award by filing OMP No. 416 of 2002. On 18th January 2005, this Court passed an order in the said petition, adjourning it sine die, with a direction to the learned Arbitrator to resume the proceedings and give reasons for the findings returned in the Award dated 16th September 2002.

6. For the third time, the learned Arbitrator held several arbitration proceedings and passed the impugned Award dated 19th January 2007.

7. One of the first grounds urged is that, contrary to the specific directions issued by the Court in its order dated 18th January 2005, the learned Arbirtrator has not, in fact, given reasons for the conclusion in respect of the different claims made by the NNCC and has virtually repeated his earlier Award, which was set aside by the Court on 31st July 2002. Mr. Sushil Dutt Salwan, Additional Standing Counsel for GNCTD, referred to the decisions under claims (iii), (iv) and (v), which simply state that for the reasons in the said claims, reference should be made to the reasons already given under claims (i) and (ii). Mr. Salwan further submitted that if, indeed, the above claims were components of claim (xvii), then there was no justification for the learned Arbitrator to have again awarded a separate sum of Rs. 2,00,000 under claim (xvii).

8. Mr. Sandeep Sharma, learned counsel for the Respondent on the other hand, points out that the learned Arbitrator has explained, both under Claims (i) and (ii) and again under claims (iii) to (viii), that they were all components of all claims for profit and loss under claim (xvii). Mr. Sharma further submitted that the Award in respect of claim (xvii)

was not challenged by the Petitioner on the ground now urged and was therefore impermissible. He relied on the decision in **Bijendra Nath Srivastava v. Mayank Srivastava** (1994) 6 SCC 117. Mr. Sharma tried to explain that what was awarded under claim (xvii) was over and above claims (i) to (viii) since the concept of loss of profit was well recognized in terms of the law explained in **Hind Construction Contractor v. State of Maharashtra** AIR 1979 SC 720 and **M/s A.T. Brijpal Singh v. State of Gujarat** AIR 1984 SC 1703.

9. A perusal of the impugned Award shows that, indeed, claims (i) to (viii) have been treated by the learned Arbitrator to be the components of claim (xvii), which is for a sum of Rs. 6,40,000 towards loss of profit. The opening paragraph of the Award in respect of claim (xvii) states: "In consideration of the separate claims framed by the claimant and adjudicated by me being claim nos. 1,2,3,4,5,6,7,8, which are intrinsically and essentially components of this claim and have been decided accordingly in addition to the decision of this claim." It is not understood why if, indeed, claims (i) to (viii) are intrinsically and essentially components of the claim for loss of profit then in addition to those claims, a separate sum of Rs. 2,00,000 could be awarded under claim (xvii). The plea that such a ground was not urged by the Petitioner is not entirely correct since a challenge has been raised in the grounds to the validity of the Award in respect of claim (xvii). Also, while the law settled in the above decisions is unexplainable, the fact remains that the learned Arbitrator has failed to give any reasons whatsoever in awarding Rs. 2,00,000 under claim (xvii) towards loss of profit, in addition to the Award in respect of claims (i) to (viii), which are stated to be the components of the claim for loss of profit. To that extent, it must be held that no reasons have been given by the learned Arbitrator as regards claim (xvii) and the impugned Award to that extent is not in conformity with the specific directions issued by the Court on 18th January 2005 in OMP No. 416 of 2002. Consequently, the Award under claim (xvii) of Rs. 2,00,000 in favour of NNCC is hereby set aside.

10. As regards the Award in respect of claims (i) to (viii), the view taken by the learned Arbitrator that they were all individual components of larger claims for loss of profit is plausible. Although Mr. Salwan was critical of the award of depreciation under claim (vi), when such claim is viewed as a component of loss of profit, it is understandable why such claim was entertained. Further, once the learned Arbitrator found that

there was a breach of contract by the GNCTD, the reasons given for the award under claims (i) and (ii) would hold good for the award under claims (iii) to (viii). Consequently, this Court is not inclined to interfere with the impugned Award as regards claims (i) to (viii).

11. It must be noted that there is no objection by the Petitioner as regards the Award in respect of claims (ix) to (xi). Claims (xii), (xiii) and (xv) have been disallowed. The refund of earnest money under claim (xiv) was a logical extension of the finding of the learned Arbitrator regarding the illegal termination of the contract by the GNCTD. The refund of security deposit of Rs. 20,000 cannot, therefore, be said to suffer from any legal infirmity.

12. Mr. Salwan submitted that the Award itself was based on fictitious documents, which ought not to have been relied upon by the learned Arbitrator.

13. The Court finds that the above submission overlooks the fact that despite repeated opportunities, the GNCTD failed to produce the records before the learned Arbitrator, leaving him with no option, but to proceed on the basis of the documents on record. In particular, the Court would like to refer to the following paragraph in the preamble to the Award:

> "And whereas, the respondent sought repeated adjournments of the case before me for one reason or the other purportedly due to nonavailability of the relevant records at their end; engagement of counsel, proper briefing etc. etc. in the proceedings before me dated 4.2.2005, 26.2.2005, 11.3.2005, 23.3.2005, 8.4.2005, 4.5.2005, 24.5.2005, 6.6.2005, 20.6.2005, 8.7.2005, 22.7.2005, 3.8.2005, 14.10.2005, 5.11.2005 and 14.11.2005."

14. With the GNCTD not making available the original documents before the learned Arbitrator, it cannot be permitted to urge that the learned Arbitrator proceeded on the basis of fictitious documents. There was no way the learned Arbitrator could have dealt with the above submission in the absence of the original records.

15. For the same reason, the learned Arbitrator was also justified in rejecting the CCs of GNCTD.

16. On the question of award of interest under claim (xvi), it is seen that the learned Arbitrator awarded interest @ 18% p.a. in favour of the claimant with effect from 28th October 1993 till the date of payment. In view of the law explained by the Supreme Court in **Krishna Bhagya Jal Nigam Ltd. v. G. Harischandra Reddy** AIR 2007 SC 817, and in particular, in view of the long pendency of the arbitration proceedings, the Court is inclined to modify the above rate of interest and direct that the GNCTD will pay NNCC simple interest @ 9% p.a. from 28th October 1993 till the date of payment which shall not be later than eight weeks from today. Any delay in making payment beyond that period would attract simple interest at 12% per annum for the period of delay.

17. Consequently, the impugned Award dated 19th January 2007 of the learned Arbitrator is modified as under:

(i) The award of Rs. 2,00,000 under claim (xvii) is set aside.

(ii) The award of interest under claim (xvi) is modified by directing that GNCTD will pay NNCC simple interest @ 9% p.a. on the awarded amount from 28th October 1993 till the date of payment which shall not be later than eight weeks from today. For the period of any delay in making payment beyond that period, GNCTD will pay NNCC simple interest at 12% per annum on the awarded amount for the period of delay.

(iii) In all other respects, the impugned Award dated 19th January 2007 is upheld.

18. The petition is disposed of in the above terms. Decree sheet be drawn up accordingly.

ILR (2014) III DELHI 2081
CS(OS)

MUNISHWAR KUMAR ....PLAINTIFF

VERSUS

RAKESH KUMAR & ORS. .....DEFENDANTS

(G.S. SISTANI, J.)

CS(OS) NO. : 804/2012 DATE OF DECISION:12.02.2014

Code of Civil Procedure, 1908—Suit for partition and permanent injunction between brothers and sisters. Parents died intestate. Preliminary decree passed defining share of the parties as 1/5th each. Since suit property only 100 sq. yards, parties unable to divide the same by metes and bounds. Held—Final decree passed defining share of all the parties as 1/5th each. Parties to endevourro sell the suit property within 3 months and in case they are unable to parties will have the right to execute the decree.

As per the plaint, parties are close relations being real brothers and sisters. The parents of the parties died intestate. The father of the parties, during his life time, out of his own earnings and funds acquired the suit property bearing no.24/2014, West Patel Nagar, New Delhi, by way of registered Lease Deed executed by Land and Development Office in his favour. The father thereafter raised construction over the said property from his own funds and had been residing in the property. The suit property was thereafter converted from lease hold to free hold by the father of the parties vide Conveyance Deed dated 31.7.1997. The father died intestate leaving the parties as his only Class-I legal heirs. **(Para 2)**

Preliminary decree was passed on 4.12.2012, defining the share of the parties as 1/5th each in the suit property. **(Para 3)**

Learned counsel for the parties submit that the parties are unable to decide the mode of partition. Since the property is only 100 sq. yards, the same cannot be divided by metes and bounds. Accordingly, as prayed, a final decree is passed defining the share of all the parties as 1/5th share, each. Parties will endeavour to sell the suit property within three months and in case they are unable to do so, the parties would have a right to execute the decree.**(Para 4)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Amit Jagga, Adv.

FOR THE DEFENDANTS : Mr. Baldev Malik and Mr. Arjun Malik, Adv.

RESULT: Suit decreed.

G.S. SISTANI, J. (ORAL)

1. Plaintiff has filed the present suit for partition with respect to the property no.24/104, West Patel Nagar, New Delhi, and for permanent injunction.

2. As per the plaint, parties are close relations being real brothers and sisters. The parents of the parties died intestate. The father of the parties, during his life time, out of his own earnings and funds acquired the suit property bearing no.24/2014, West Patel Nagar, New Delhi, by way of registered Lease Deed executed by Land and Development Office in his favour. The father thereafter raised construction over the said property from his own funds and had been residing in the property. The suit property was thereafter converted from lease hold to free hold by the father of the parties vide Conveyance Deed dated 31.7.1997. The father died intestate leaving the parties as his only Class-I legal heirs.

3. Preliminary decree was passed on 4.12.2012, defining the share of the parties as 1/5th each in the suit property.

4. Learned counsel for the parties submit that the parties are unable

to decide the mode of partition. Since the property is only 100 sq. yards, the same cannot be divided by metes and bounds. Accordingly, as prayed, a final decree is passed defining the share of all the parties as 1/5th share, each. Parties will endeavour to sell the suit property within three months and in case they are unable to do so, the parties would have a right to execute the decree.

5. Suit stands decreed in above terms.

ILR (2014) III DELHI 2083
CS(OS)

PERFETTI VAN MELLES.P.A & ANR. ....PLAINTIFFS

VERSUS

ANIL BAJAJ & ORS. ....DEFENDANTS

(G.S. SISTANI, J.)

CS(OS) : 72/2013 DATE OF DECISION:17.02.2014

Intellectual Property Rights—Trade Mark—Permanent Injunction—Plaintiffs field the present suit for permanent injunction, restraining infringement and passing off of trade dress rights, copyright, delivery up against the defendants—An exparte injunction was granted in favour of the plaintiff—As despite service none appeared on behalf of defendants, defendants no.1 to 4 were proceeded ex parte on 28.1.2014 and on 4.9.2013 defendant no.5 was deleted from the array of parties—In view of the fact that the plaints is duly supported by the affidavit of the authorized representative of the plaintiffs, it is not necessary to direct the plaintiffs to lead evidence in the matter and the plaint shall be treated as an affidavit—The plaintiff No. 1 has many sales and distribution office throughout the world. It is also pleaded in the plaint that in India,

the plaintiff No. 1 operates through its subsidiary, Perfetti Van Melle India Pvt. Ltd., which is the plaintiff No. 2 herein. The plaintiff No. 2 has diversified and expanded its products portfolio to ready-business to-eat, packaged salty snacks—It is also started in the plaint that the plaintiff no. 1 owns and operates several websites including its primary website, www.perfettivanmelle.it, which provides detailed information about the company and its range of products available in different countries and is accessible by Internet users all over the World, including India, both within and outside the jurisdiction of this court—Counsel submitted that the 'Animal Kids ' packaging, the pack layout and overall design used by the defendants is identical to the plaintiffs' "STOP NOT" pack. It is further submitted that the defendants have lifted the entire artwork, layout, colour scheme, design and the individual features therein, in toto, from the plaintiffs' prior adopted and launched "STOP NOT" pack—On the basis of the averments made in the plaint duly supported by an affidavit, which has remained unrebutted, the plaintiffs have been able to establish that they are registered proprietor of the trade-mark "STOP NOT" in class 30 of the Trademark Act and prior user of the "STOP NOT" trade dress. A comparison chart, illustrating the product images of plaintiff and defendants, exhibited as EX. p-3, evidence that the defendants have lifted the entire artwork, layout, colour scheme as well as design from the plaintiffs "STOP NOT" trade dress. Although the reports filed by both local commissioner reflect that no packets were found at the given addresses of the defendants which bore a similarity to the plaintiffs trade dress, however, the plaintiffs have placed on record "STOP NOT" look alike product packs. The Court is of the view, the use of the Animal Kid's packing by the defendants, which is a substantial reproduction of the plaintiffs "STOP NOT" trade dress, is likely to dillure the distinctive character of the

plaintiff's packaging and the same is likely to erode the goodwill and reputation of the plaintiff—Suit decreed.

Important Issue Involved: The use of the 'Animal Kids' packaging by the defendants, which is a substantial reproduction of the plaintiffs' STOP NOT' trade dress, is likely to dilute the distinctive character of the plaintiff's packaging and the same is likely to erode the goodwill and reputation of the plaintiff.

[Ch Sh]

APPEARANCES:

FOR THE PLAINTIFFS : Mr Sushant Singh and Mr. P.C. Arya, Adv.

FOR THE DEFENDANTS : None

RESULT: Disposed of

G.S. SISTANI, J. (ORAL)

1. Plaintiffs have filed the present suit for permanent injunction, restraining infringement and passing off of trade dress rights, copyright, delivery up against the defendants. On 14.1.2005 while issuing summons in the suit an ex parte injunction was granted in favour of the plaintiff and against the defendants, restraining the defendants from marketing and selling their products in the packaging/wrapping with the trade dress, get-up and design of the plaintiff. As despite service none appeared on behalf of defendants, defendants no.1 to 4 were proceeded ex parte on 28.1.2014 and on 4.9.2013 defendant no.5 was deleted from the array of parties. In view of the fact that the plaint is duly supported by the affidavit of the authorized representative of the plaintiffs, it is not necessary to direct the plaintiffs to lead evidence in the matter and the plaint shall be treated as an affidavit. The documents filed by the plaintiffs stand duly exhibited.

2. As per the plaint, Sh.Sudhir D. Ahuja, is the constituted attorney of the plaintiff no.1 in India. A copy of the notarized power of attorney in favour of Mr.Ahuja has been exhibited as Ex.P-4. The Plaintiff No. 1 is stated to be a renowned company engaged in the manufacture, sale

and distribution of, inter alia, confectionery items including candies, toffees, mints, breath fresheners, chewing gum, bubble gum, lollipops etc. under various world famous trademarks. The products of the Plaintiff No. 1 are available in many countries of the world, including India, under well known trademarks such as ALPENLIEBE, ALPENLIEBE LOLLIPOP, BIG BABOL, CENTER FRESH, CHLOR-MINT, CHOCOLIEBE, CHUPA CHUPS, COFITOS, FRUITTELLA, HAPPYDENT WHITE, MARBELS, MENTOS, amongst others. The Plaintiff no. 2 entered the snacks segment with an innovative filled and non-fried ready-to-eat salty snacks product for the first time in India in 2011 with the launch of its 'stop not' range of snacks. All these products are available both within and outside the jurisdiction of this Hon'ble Court.

3. It is also pleaded in the plaint that the plaintiff No. 1 began its commercial operations in 1946 when its founders, brothers Ambrogio Perfetti and Egidio Perfetti opened Perfetti Dolcificio Lombardo in Lainate, near Milan in Italy. Its corporate name was subsequently changed to Perfetti S.P.A. In March 2001, the plaintiff No. 1 acquired Van Melle B.V. (founded in 1841 by Izaak Van Melle), a confectionery manufacturing company, to form the Perfetti Van Melle Group. The combined strength of the two entities formed one of the most formidable confectionery majors in the world, giving consumers the benefit of world class quality at affordable prices. The plaintiff No. 1 has its own manufacturing units in Italy, Bangladesh, Brazil, China, Indonesia, Turkey, Vietnam, Holland, U.S.A, Mexico, Russian Federation, Sri Lanka, Spain, and India. The plaintiff No. 1 has many sales and distribution offices throughout the world.

4. It is also pleaded in the plaint that in India, the plaintiff No. 1 operates through its subsidiary, Perfetti Van Melle India Pvt. Ltd., which is the plaintiff No. 2 herein. The plaintiff No. 2 is a company incorporated on 26 June, 1992 under the Companies Act, 1956. The plaintiff No. 2 has its main offices in Gurgaon and Delhi, and operates throughout India, and is the authorized user of all trademarks of the plaintiff No. 1 in India. The plaintiff No. 2, in effect, conducts its business using the know-how, technology, and the intellectual property rights of the plaintiff No. 1, and is rated as one of the best companies in India in the business of confectionery, chewing gum, bubble gums, etc. The plaintiff No. 2 has diversified and expanded its products portfolio to ready-to-eat, packaged salty snacks business. Documents evidencing the Plaintiff No. 2's business

activities and range of products for India are exhibited as Ex. P-5.

5. The suit has been filed through its director and Head – Legal, Sh.Harsh Arora, who has been duly authorized by the Board Resolution dated 7.12.2007 exhibited as Ex.P-6.

6. It is also stated in the plaint that the plaintiff no.1 owns and operates several websites, including its primary website, www.perfettivanmelle.it, which provides detailed information about the company and its range of products available in different countries and is accessible by Internet users all over the World, including India, both within and outside the jurisdiction of this Hon'ble Court. The Indian website of the plaintiffs is www.perfettivanmelle.in. Information about the plaintiff companies, their history, business, brands and products etc., as available on the aforementioned websites, are exhibited as Ex. P-7.

7. It is further stated in the plaint that over the years, the plaintiff No. 1 has introduced several products in the market, all of which have been well received all over the world, including India, and the corresponding names/trademarks have attained famous mark status. The annual worldwide turnover figures and advertisement expenses of plaintiff No.1 for the years 2001 to 2011 are given below:

Years	Annual Turnover figures (million USD)	Advertisement Expenses (million USD)
2001	1168	153
2002	1,261	130
2003	1,488	161
2004	1,704	201
2005	1,791	209
2006	2,074	239
2007	2,513	222
2008	2,918	250
2009	2,905	250
2010	3,021	248
2011	3,380	276
2012 (till October, 2012)	2500	225

8. It is further stated in the plaint that the plaintiff no. 1 adopted the trademark „STOP NOT. in the year 2009 for ready-to-eat packaged salty snacks, and launched the range of 'STOP NOT' brand snacks in India in April 2011 and "STOP NOT DISK" in 2012. Counsel for the plaintiffs has submitted that the trade dress, packaging and labels of the Plaintiffs' "STOP NOT" range of products are artistically created with distinctive designs thereon to distinguish the brand. Copy of the registration certificate for the "STOP NOT" mark and status of all "STOP NOT" marks of the plaintiffs are collectively exhibited as Ex.P-9.

9. Counsel for the plaintiffs submits that sometime in May 2012, the plaintiff came to know that the defendants were manufacturing and marketing savoury snacks under the name "Mr Bajaj Animal Kids". Counsel submits that the 'Animal Kids' packaging, the pack layout and overall design used by the defendants is identical to the plaintiffs' "STOP NOT" pack. It is further submitted that the defendants have lifted the entire artwork, layout, colour scheme, design and the individual features therein, in toto, from the plaintiffs' prior adopted and launched "STOP NOT" pack.

10. Counsel further submits that the plaintiffs sent a cease and desist notice to the defendants No. 1-3 on 23.05.2012, requiring the defendants to stop using the "Animal Kids" pack/label which was a nearly identical copy of the plaintiffs' "STOP NOT" pack and trade dress. The defendants sent a defiant reply on 13.06.2012 refusing to give up use of the offending product pack. Copies of the cease and desist notice served by the plaintiffs along with the defendants' reply are collectively exhibited as Ex.P-11.

11. I have heard counsel for plaintiffs and also perused the plaint and the documents which have been placed on record. On the basis of the averments made in the plaint duly supported by an affidavit, which has remained unrebutted, the plaintiffs have been able to establish that they are the registered proprietor of the trade-mark "STOP NOT" in Class 30 of the Trademarks Act and prior user of the "STOP NOT" trade dress. A comparison chart, illustrating the product images of plaintiff and defendants, exhibited as Ex. P-3, evidences that the defendants have lifted the entire artwork, layout, colour scheme as well as design from the plaintiffs' 'STOP NOT' trade dress.

12. Although the reports filed by both the local commissioners

reflect that no packets were found at the given addresses of the defendants which bore a similarity to the plaintiffs' trade dress, however, the plaintiffs have placed on record 'STOP NOT' look alike product packs.

13. In my view, the use of the 'Animal Kids' packaging by the defendants, which is a substantial reproduction of the plaintiffs. 'STOP NOT' trade dress, is likely to dilute the distinctive character of the plaintiff's packaging and the same is likely to erode the goodwill and reputation of the plaintiff. Having regard to the plaintiff's rights as a registered proprietor of 'STOP NOT' mark and as a prior user of the 'STOP NOT' trade dress, the suit is accordingly decreed in terms of prayers (a) to (c) of the plaint.

I.A. 542/2013

14. In view of the fact that the suit stands decreed, the present application stands disposed of.

ILR (2014) III DELHI 2089
CRL.A.

KRISHAN RAM **.....APPELLANT**

VERSUS

STATE OF THE NCT OF DELHI **.....RESPONDENT**

(KAILASH GAMBHIR & SUNITA GUPTA, JJ.)

CRL.A. : 1287/2011 **DATE OF DECISION: 17.02.2014**

Indian Penal Code, 1860—Section 302—Indian Evidence Act—1872—Section 8 Appellant challenged his conviction U/s 302 of Code for murdering his wife—Prosecution case squarely rested on circumstantial evidence which according to appellant not proved beyond reasonable doubt—One of the circumstances relied upon by prosecution was information given by

the accused himself regarding committing murder of his wife.

Held:- The earliest information given by the accused himself is admissible against him as evidence of his conduct u/s 8 of the Evidence Act.

As such, factum of accused himself going to police station without any threat or pressure and giving information about murdering his wife and the reasons thereof and then accompanying the police party to his house and pointing out towards the dead body and identifying the same to be of his wife are relevant circumstances and are admissible under Section 8 of the Evidence Act. **(Para 19)**

Important Issue Involved: The earliest information given by the accused himself is admissible against him as evidence of his conduct u/s 8 of the Evidence Act.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr.Ajay Verma, Advocate.

FOR THE RESPONDENT : Mr. Sunil Sharma, APP.

CASES REFERRED TO:

1. *Sunil Clifford Daniel* vs. *State of Punjab,* (2012)11 SCC 205.
2. *Ramesh Harijan* vs. *State of Uttar Pradesh,* (2012) 5 SCC 777.
3. *Sathya Narayanan* vs. *State rep. by Inspector of Police,* (2012) 12 SCC 627,
4. *Mrinal Das & Others.* vs. *State of Tripura,* (2011) 9 SCC 479.
5. *Ram Naresh @ Lala* vs. *State,* 2011 IV AD (SC) 534.
6. *Prithi* vs. *State of Haryana,* (2010) 8 SCC 536.

7. *Arvind @ Chhotu* vs. *State,* ILR (2009) Supp.(Delhi) 704.
8. *Trimukh Maroti Kirkan* vs. *State of Maharasthra,* (2006) 10 SCC 681.
9. *State of Rajasthan* vs. *Kashi Ram* (2006) 12 SCC 254.
10. *A.N. Venkatesh & Anr.* vs. *State of Karnataka,* 2005 SCC (Cri) 1938.
11. *State of U.P.* vs. *Satish* AIR 2005 SC 1000.
12. *C. Ronald & Another* vs. *Union Territory of Andaman & Nicobar Islands,* (2001) 1 SCC (Crl.) 596.
13. *State of Maharashtra* vs. *Suresh,* [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] (SCC pra 27).
14. *Koli Lakhmanbhai Chanabhai* vs. *State of Gujarat,* (1999) 8 SCC 624.
15. *Aghnoo Nagesia* vs. *State of Bihar,* AIR 1966 SC 119.
16. *State of T.N.* vs. *Rajendran* 1999, VIII AD (SC) 348 = (SCC para 6);.
17. *Gulab Chand* vs. *State of M.P.,* [(1995) 3 SCC 574 : 1995 SCC (Cri) 552] (SCC para 4).
18. *State of U.P.* vs. *Dr. Ravindra Prakash Mittal,* [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045].
19. *Ganeshlal* vs. *State of Maharashtra,* [(1992) 3 SCC 106 : 1993 SCC (Cri) 435.
20. *Nika Ram* vs. *State of H.P.,* [(1972) 2 SCC 80 : 1972 SCC (Cri) 635 : AIR 1972 SC 2077].

RESULT: Appeal dismissed.

SUNITA GUPTA, J.

1. Appellant was charged under Section 302 of the Indian Penal code for murdering his wife. He was convicted by learned Additional Sessions Judge vide judgment dated 23rd May, 2011, and order on sentence dated 31st May, 2011 in Sessions Case No.92/10/08 arising out of FIR No. 369/2008 u/s 302 IPC registered with PS Mehrauli whereby he was sentenced to undergo rigorous imprisonment for life and was further sentenced to pay a fine of Rs.5000/-, in default of payment of fine, to further undergo simple imprisonment for a period of six months.

2. The first information of the offence was lodged by the appellant himself on 19th July, 2008 at 8.15 a.m. at PS Mehrauli wherein he disclosed that he used to live in Bhatti mines and that on the previous night, at about 9:00 pm, he killed his wife Mrs. Kago @ Guddi by strangulating and thereafter, pushed her at the chowtri. She fell down with her face towards chowtri and that he remained in his room throughout the night and left the room at about 6:00 a.m. He further stated that he was scared of his in-laws, so he came to police station to tell the truth. This information was reduced to writing by Head Constable Babu Lal vide DD No. 3A. The copy of the DD-3A was handed over to Head Constable Rohtas, who along with Constable Manoj and accused, went to PP Bhati Mines. Head Constable Rohtas handed over the accused to In-charge PP Bhati Mines who made entry in Roznamcha in this regard. Thereafter, SI Govind Chauhan along with the Head Constable Rohtas Singh, Constable Manoj, Head constable Chandermani, Constable Sheeshpal and accused reached the spot, i.e., Murti ka Makaan, Sanjay Colony, Bhatti Mines. There, the deceased Kago@ Guddi was lying with her face towards chowtri in the room. Blood was oozing from the mouth and nose of the deceased. Blood was also lying near her head and legs. Daughter of the deceased, namely, Nazo was standing outside the door of the room. Inquiries were made from Nazo. Her statement Ex.PW-18/A was recorded which was countersigned by her maternal grandfather Meer Singh which culminated in registration of FIR. Further investigation was assigned to Inspector Balram. Inspector Balram got the scene of crime photographed. Blood lying near the dead body, earth control and blood stained cement were lifted from the spot and were seized vide Ex.PW15/A. The dead body was sent to AIIMS Hospital for post mortem. Site plan Ex. PW24/A was prepared. Accused was arrested. He was got medically examined. His nail clippings of fingers were taken. Exhibits were sent to FSL, Rohini. After completing investigation, charge sheet was submitted against the accused.

3. Charge for offence under Section 302 IPC was framed against the accused to which he pleaded not guilty and claimed trial.

4. In order to bring home the guilt of the accused, prosecution, in all, examined 25 witnesses. All the incriminating evidence was put to the accused. In his statement u/s 313 Cr.P.C., he admitted that he was

married to Kago @ Guddi in the year, 1990, however he denied that his relations with Guddi became strained after he started consuming liquor. It was admitted by him that he was residing with Kago and daughter Nazo in a tenanted room at Bhati Mines belonging to Smt. Murti Devi which was let out to him by Smt. Seeta for a sum of Rs. 200/- per month. Although at one stage, he denied that on the intervening night of 18th -19th July, 2008, he along with his wife was present in the rented accommodation while his daughter Nazo had gone to the house of her Bua but at other place, he admitted that when Nazo left for her bua.s house, she saw the appellant and Kago present in the room whereas in the morning when she returned back, he was not present in the room. He admitted that he had gone to the police station on 19th July, 2008 to lodge the report regarding murder of his wife, however, according to him, he was falsely arrested in the case. According to him, his wife had given him food in the evening and he had gone to work at 11 Murti near Dhaula Kuan. He returned back to his house at 4 a.m. and large number of persons were present there. He found his wife lying dead. His father-in-law and relatives were also present and he enquired from his father-in-law as to why no report was lodged with the police. Thereafter, he went to police post for lodging the report. As the police personnel at police post did not listen him, he went to police station and lodged the report. He was falsely implicated in this case. He examined DW-1 Arjun Singh in support of his defence.

5. Vide impugned judgment, the appellant was convicted and sentenced as mentioned above. The same has been assailed by the appellant by filing the present appeal.

6. We have heard Sh. Ajay Verma, Advocate for the appellant and Mr. Sunil Sharma, learned Additional Public Prosecutor for the State and have perused the record.

7. Challenging the finding of the learned Trial Court, it was submitted by learned counsel for the appellant that the testimony of PW-3 Nazo does not support the 'last seen' and possibility of someone else doing the crime is not ruled out. Prosecution has failed to establish beyond reasonable doubt that it is the accused who had committed the murder of his wife. PW-6 and PW-21 has not supported the case of prosecution. The prosecution witnesses rather prove the case of appellant that in the morning when the appellant returned back home after work, he found his

wife murdered. Nazo has confirmed that when she returned to the house in the morning, her father was not there. Moreover, although as per the report of the doctor, injuries No. 3,6,7 & 8 were possible by hands, fingers and finger nails and nail clippings of the accused were taken but nail clippings of the deceased were not taken. The FSL report does not prove the prosecution story. The so called DD relied upon by the prosecution that the appellant came to police station and confessed his guilt cannot be taken as circumstance against the appellant as the Investigating Agency failed to establish beyond reasonable doubt that there was a confession of the appellant. On the basis of DD-3A, appellant cannot be convicted for the murder of his wife. The Investigating Officer was aware of the fact that a judicial confession was required to be proved by the prosecution if it intended to rely upon the same. However, the Investigating Officer moved an application for recording the alleged confession after three months. Unexplained delay in moving the application for recording the confession cast doubt on prosecution story. Moreover, the accused had not made the alleged confession and, therefore, he refused to make any statement before the Magistrate. It was further submitted that the prosecution has tried to build its case that the appellant was a habitual drunkard and while drunk, he used to quarrel with his wife as a result of which, he killed her. The story is false as the MLC of the appellant does not reflect the presence of alcohol or that the appellant was drunk on 18th July, 2008. The burden of proving its case beyond reasonable doubt is on the prosecution and not on the accused. The learned Trial Court has wrongly taken into account that as the accused failed to rebut his innocence and wife of accused was murdered in rented accommodation on the next morning, therefore, the defence taken by the accused is false. The case is based on circumstantial evidence. The prosecution has failed to establish the guilt of the accused beyond reasonable doubt, as such, he is entitled to be acquitted.

8. Rebutting the submission of learned counsel for the appellant, it was submitted by learned Additional Public Prosecutor for the State that the prosecution case, although rests on circumstantial evidence but same has been proved beyond reasonable doubt. Nazo, daughter of the accused is the witness of 'last seen' on the date of incident. Furthermore, the fact that relation between the appellant and his wife were not cordial also stands proved by number of prosecution witnesses. Moreover, after committing the murder of his wife, the accused himself went to police

station and confessed his crime which was recorded by Head Constable Babu Lal by recording DD-3A and the same stands corroborated by number of other police officials. In fact, the police machinery itself was set in motion on the basis of this DD recorded at the instance of the accused. Police officials were not nurturing any ill-will against the accused for which reason they will implicate him by recording this DD. Moreover, once the factum of appellant being present with the deceased stands proved and the murder has taken place in the matrimonial home of the deceased, it was for the accused to explain as to how the death has taken place. Absolutely no explanation has been given. Rather the accused has tried to take a false plea of alibi by examining DW-1 which is an additional circumstance in the chain of circumstantial evidence. Under the circumstances, it was submitted that the impugned order does not suffer from any infirmity which calls for interference and appeal is liable to be dismissed.

9. We have given our considerable thoughts to the respective submissions of the learned counsel for the parties and have perused the record.

10. Post mortem examination on the dead body of Kago @ Guddi was conducted by Dr. Sukhdeep Singh (PW19) who found following anti mortem injuries on the person of the deceased:

1. Bruise bluish in colour 5x6 cms locate over right fronto temporal region.

2. Multiple scratches abrasions associated with bruise, reddish blue in colour over right lower cheek reaching below chin 6x4 cms in size, located 6 cms away from the mid line.

3. Multiple scratches abrasion 4 in number located in an area of 6x6 cms over right middle of neck reddish in colour located 6 cms away from the mid line.

4. Multiple scratch abrasion associated with bruise (reddish blue), 5x4 cms, 2 cms away from the left lip, 2 cms above the lower border of mandible.

5. Bruise, 4.5 cms x 3 cms, reddish blue located over the left border of mandible, 10 cms away from the mid line.

6. Abrasion, 1x1 cm reddish, 3 cm below the injury no.5.

7. Abrasion 3x1 cm, reddish, 4 cms below chin, vertically placed, 2 cms away from the mid line.

8. Multiple scratch abrasions, reddish, 6x4 cms area, located 3 cms above the left clavicle, 5 cms away from the mid line.

9. Abrasion associated with bruise reddish blue, 2x2 cms over the lateral aspect of left upper hip and 18 cms away from the mid line.

10. Bruise, 4x2 cms bluish over the lateral aspect of lower thigh, 9 cms above right knee.

11. Bruise 5x5 cms, bluish over the front of foreleg 8 cms below the right knee.

12. Abrasion 2x2 cms on the lower lateral back, reddish, located 21 cms from the mid line.

13. Abrasion 2x1.5 cms, reddish located over the right lateral aspect of right elbow.

14. Abrasion 2x1.5 cms, reddish located over the right lateral aspect of right elbow.

15. Abrasion 2x2 cms, over the back of middle of right thigh reddish in colour.

11. It was opined that the cause of death was combined effect of smothering, throttling and cerebral damage. As per the subsequent opinion Ex. PX-1, injury nos.1, 9, 10, 11, 12, 13, 14 & 15 are possible to be produced by fall on cemented edged chautri. Injury Nos.2, 3, 4, 6, 7 & 8 are possible to be produced by hands, fingers and fingernails. Injury No. 5 is possible to be produced by hands and fingers. Smothering, throttling and head injury are individually and collectively sufficient to cause death in ordinary course of nature. All the injuries were anti-mortem in nature. Thus, it becomes clear that Kago met a homicidal death. It is not even the case of accused that it was a case of suicide or accidental death.

12. The crucial question for consideration, therefore is, who is perpetrator of this crime.

13. There is no eye-witness to the commission of crime. The

present case is one of circumstantial evidence. Thus, there is a definite requirement of law that a heavy onus lies upon the prosecution to prove the complete chain of events and circumstances which will establish the offence and would undoubtedly only point towards the guilt of the accused. A case of circumstantial evidence is primarily dependent upon the prosecution story being established by cogent, reliable and admissible evidence. Each circumstance must be proved like any other fact which will, upon their composite reading, completely demonstrate how and by whom the offence had been committed. Hon'ble Supreme Court and this Court have clearly stated the principles and the factors that would govern judicial determination of such cases.

14. Reference can be made to the case of **Sanatan Naskar and Anr. v. State of West Bengal,** (2010) 8 SCC 249, where it was observed as follows:-

> *"27. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eyewitness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eyewitness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the accepted principles in that regard."*
>
> *28. A three-Judge Bench of Hon'ble Apex Court in* **Sharad Birdhichand Sarda v. State of Maharashtra,** 1984 (4) SCC 116 held as under:-
>
> > '152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is **Hanumant Govind Nargundkar v. State of M.P.,** AIR 1952 SC 343. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-

> > date, for instance, the cases of **Tufail v. State of U.P.,** (1969) 3 SCC 198 and **Ram Gopal v. State of Maharashtra,** (1972) 4 SCC 625. It may be useful to extract what Mahajan, J. has laid down in **Hanumant** case (supra):
> >
> > *"10.... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'*
>
> *153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned ¡°must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved"as was held by this Court in* **Shivaji Sahabrao Bobade v. State of Maharashtra,** *(1973) 2 SCC 793, where the observations were made:-*
>
> > *"19.... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.*
>
> *(2) the facts so established should be consistent only with the*

hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

15. In view of the aforesaid principles governing the case based on the circumstantial evidence, let us turn to the case in hand. The circumstances relied upon by the prosecution to bring home the guilt of the accused are:-

1. Information given by the accused himself regarding committing murder of his wife;
2. Motive
3. Last seen evidence;
4. Absence of any explanation by the accused;
5. Plea of alibi taken by the accused.

16. Each of the incriminating circumstance set up by the prosecution shall be dealt with one by one.

Circumstance No. 1

17. Police machinery was set in motion on the basis of DD No.3A recorded by HC Babulal, PW-15 who has unfolded that on 19.07.2008, accused Krishan Ram came to police station and stated that he lived in Bhati Mines. On the previous night, at about 9 p.m., he killed his wife Kago @ Guddi by strangulation and thereafter he pushed her at the chowtri. She fell down with her face towards chowtri and that he was

in his room in the night and left the room at about 6 a.m. He further informed that he was scared of his in-laws and so he came to the police station to tell the truth. His statement was reduced into writing in the roznamcha as DD No.3A, Ex.PW15/A. This DD was given to HC Rohtas. HC Rohtas has deposed that on receipt of DD No.3A, he along with Ct. Manoj and accused Krishan reached PP Bhati Mines at about 9.15 a.m where he handed over the accused to Incharge PP Bhati Mines SI Govind Chauhan where HC Chandermani was also present. It has come in their evidence that on interrogation, the accused told SI Govind Chauhan that he had killed his wife last night i.e. on 18.07.2008 and that the dead body of his wife was lying in his room and he can point out the room where the dead body was lying. Thereafter SI Govind Chauhan alongwith HC Chandermani, Ct. Shishpal and accused Krishan Ram reached the house of Murti, Sanjay Colony, Bhati Mines where two rooms were constructed. The accused pointed out the first room. He identified the dead body of his wife which was lying on the chautri of the room. The face of the dead body was down towards the ground. Blood was oozing from her mouth and nose and blood was also lying near the head and legs of the deceased. Testimony of all the police officials in regard to giving of this information by the accused himself and then taking the police party to his house and pointing towards the dead body of his wife is consistent and despite lengthy cross examination, nothing material could be elicited to discredit their testimony. The submission of learned counsel for the appellant that the accused had merely gone to police station to inform about the murder of his wife, where he was falsely implicated in this case does not appeal to reason inasmuch as although it was suggested to PW15-HC Babulal that appellant contacted Constable Manoj and at the instance of his relative and Constable Manoj, he was beaten and then statement was manipulated but the same was denied by HC Babulal. Rather it has come in the statement of witnesses that when accused came to police station, none of his relatives were present there. In fact, in his statement recorded u/s 313 Cr.P.C., he himself has taken the plea that when he returned to his house from his work at about 4 a.m., his relatives and father-in-law were present and he enquired from his father-in-law as to why he had not gone to the police. Thereafter, he went to police post for lodging the report. As the police officials of police post did not listen to him, he went to police station and lodged the report. It is not even his case that the report was manipulated by the police so as to involve him in this case. No animosity, ill-will or grudge has been

alleged against any of the police officials for which reason instead of recording the information regarding murder of his wife, they will implicate him in this case. The testimony of police personnel have to be treated in the same manner as testimony of any other witness. The presumption that a person acts honestly applies, as much in favour of police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good ground. (Vide **Karanjit Singh vs. State (Delhi Admn.),** (2003) 5 SCC 291; **C. Ronald & Another vs. Union Territory of Andaman & Nicobar Islands,** (2001) 1 SCC (Crl.) 596; **Sunil Clifford Daniel Vs. State of Punjab,** (2012)11 SCC 205.

18. The earliest information given by the accused himself is admissible against him as evidence of his conduct u/s 8 of the Evidence Act as held in **Aghnoo Nagesia v. State of Bihar,** AIR 1966 SC 119. The information given by the accused himself regarding murder of his wife finds confirmation from the subsequent chain of events which reflects that police officials left for the spot at about 9:15 a.m. and reached Murti's house, Sanjay Colony, Bhatti Mines where accused identified the dead body of his wife which was lying on the chowtri of the room. The face of the dead body was down towards the ground. Blood was oozing from the mouth and nose of the deceased and the blood was lying near the head and legs of the deceased. All this is admissible in evidence under Section 8 of the Evidence Act. In **A.N. Venkatesh & Anr. vs. State of Karnataka,** 2005 SCC (Cri) 1938, it was held that:

> *"By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simplicitor, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in* **Prakash Chand v. State (Delhi Administration)**. *Even if we hold that the disclosure statement made by the accused appellants (Ex. P14 and P15) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1,2,7 and PW4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused."*

19. As such, factum of accused himself going to police station without any threat or pressure and giving information about murdering his wife and the reasons thereof and then accompanying the police party to his house and pointing out towards the dead body and identifying the same to be of his wife are relevant circumstances and are admissible under Section 8 of the Evidence Act.

20. The submission of learned counsel for the appellant that the appellant did not confess to the police regarding murdering his wife, and, therefore, when the application for recording his statement u/s 164 Cr.P.C. was moved by the Investigating Officer, he refused to make any statement is devoid of substance. Sh. Sanjay Bansal, the then Metropolitan Magistrate (PW 25) has deposed that an application was moved before him on 03.10.2008 for recording the confessional statement of accused Krishan Ram by Insp. Balram. The accused however refused to make any statement as per the proceedings Ex. PW-25/A. The application itself was moved very belatedly by the Investigating Officer as it was moved on 3rd October, 2008, i.e., after a lapse of about 2 months of incident. This time gap was sufficient for the appellant to ponder over the consequences of admission of guilt. Moreover, there may be variety of the reasons which may have prompted the accused to refuse to make any confessional statement but from this fact alone, no presumption can be drawn that DD No. 3A was not recorded on the basis of information given by the accused to police.

Circumstance No. 2

The motive to commit crime is writ large, inasmuch as, in the first information given by the accused to the police, he himself has attributed the reason for murdering his wife as he suspected her character. Father of the deceased Meer Chand (PW1) has deposed that initially the accused kept his daughter well, but subsequently he started consuming liquor and thereafter the relation between his daughter and accused became strained and accused used to give beatings to her. Ram Pyari (PW2) is step mother of the deceased. Although, she did not support the case of the prosecution probably for the reason that accused is her real brother, but she also admitted that initially accused kept the deceased well, but

thereafter trouble started. She came to know that accused used to consume liquor and used to beat Kago. She also admitted that accused used to doubt on the chastity of Kago. Nazo (PW3) has also deposed that her mother was not having good character. She used to leave in the evening and did not return back for whole night. Her father used to suspect her character. Deepak Kumar (PW4), brother of the deceased also unfolded that accused-Krishan Lal used to consume liquor and used to quarrel with his sister. He further deposed that 4-5 days prior to the incident, his sister informed him that she had gone for work with his uncle's son and when she returned, accused gave her beatings saying that 'haram ki kamai kar kay lai hai'. Smt. Seeta (PW8), who let out the room to accused has also deposed that accused used to consume alcohol and used to quarrel with his wife. To the same effect is the testimony of PW22 Sunil Kumar, who also deposed that accused used to suspect the character of his wife. Under the circumstances, there is ample evidence available on record to show that accused used to suspect the chastity of his wife. There used to be frequent quarrels between them and that furnished a strong motive to eliminate the deceased.

Circumstance No.3

22. When the police officials reached the spot, Nazo, daughter of the accused met the police officials at the spot. At that time she made a statement Ex. PW3/A to the police alleging, inter alia, that she along with her parents was residing in a tenanted accommodation at Sanjay Colony Bhati Mines. They were six brothers and sisters. Except for her, her remaining brothers and sisters lived in Rajasthan with her grand-parents. Her father was a drunkard and was addicted to liquor and bhang. Her mother was not having good character. Sometimes she used to go for her work and did not return to her house. Her father used to suspect her mother's character and on this issue they used to quarrel with each other. He used to beat her mother and threatened to kill her. On 18.07.2008, after taking food at about 8 p.m., she had gone to the house of her maternal uncle Deepu, which was her daily routine. At that time her parents were talking to each other in the room. The next day, at about 7 a.m when she returned back to the room, she found the same bolted from outside. When she opened the door, she found her mother lying with her face towards the chowtri. She tried to get her up, but could not do so. She was under the impression that she is lying unconscious, as such she came out of the room and started weeping.

Her father was not present at the time. After some time, her father came along with police and informed the police, that on the previous night he strangulated his wife and went to police station in the morning. Her father had killed her mother. She prayed for action. This statement culminated in registration of FIR against the accused. However, when she appeared in the witness box, she did not support the case of prosecution in entirety, in as much as, she deposed that there was no quarrel between her parents. However, she reiterated that her other brothers and sisters used to reside in Rajasthan. She had gone to the house of her bua for sleeping and at that time her parents were present in the house. When she returned back at about 7:00 a.m. next day, she found her mother dead and her father was not there.

23. It is settled law that merely because a witness is declared as hostile, there is no need to reject his/her evidence in toto. The evidence of hostile witness can be relied upon, at least to the extent, it supports the case of prosecution. In **Sathya Narayanan v. State rep. by Inspector of Police,** (2012) 12 SCC 627, Hon'ble Supreme Court referred to its earlier decision rendered in **Mrinal Das & Others. v. State of Tripura,** (2011) 9 SCC 479 where while reiterating that corroborated part of evidence of hostile witness regarding commission of offence is admissible, it was held as under:-

> *"67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of prosecution. The evidence of a person does not become effaced from the record merely because he has*

turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."

24. Substantially similar view was taken in **Koli Lakhmanbhai Chanabhai Vs. State of Gujarat,** (1999) 8 SCC 624; **Prithi vs. State of Haryana,** (2010) 8 SCC 536; **Ramesh Harijan Vs. State of Uttar Pradesh,** (2012) 5 SCC 777. In view of the same, that part of testimony of Nazo that after taking dinner, she went to the house of her bua leaving behind her parents in the matrimonial home, is admissible in evidence.

25. The testimony of Nazo that she used to go to sleep at night in the house of her bua/maternal uncle finds corroboration from the testimony of PW1 Meer Chand (her maternal grand-father), PW4 Deepak Kumar, her maternal uncle and PW13 Jawahar Lal. All of them have deposed that Nazo used to sleep in the house of her maternal uncle, however PW22, brother-in-law of the accused, has deposed that Nazo used to go to her bua.s house to sleep. As such, although a slight discrepancy has appeared as to where Nazo used to go to sleep, whether in the house of her maternal uncle or aunt, but the fact remains that it stands proved that Nazo was not available in the matrimonial home during night and only accused and the deceased used to remain in the house. On the fateful day also, as per the testimony of Nazo, when she had left her house at about 8:00 p.m., her parents were talking to each other and in the morning when she returned back at about 7:00a.m. she found the door bolted from outside. She opened the kunda and found her mother lying on the floor. All this clearly showed that soon before her death the accused was 'last seen' with the deceased. When the police officials came along with the accused they found the deceased lying with her face towards chautri. Blood was lying near head and legs of the deceased. Nothing was found scattered so as to create a doubt that some unknown person has entered or tried to commit burglary or rob the house, in which process the entrant might have murdered the deceased. As such, there was reasonable proximity of time between these two events.

26. The legal position pertaining to appreciation of circumstantial evidence of 'last seen' has been summarised in a Division Bench decision titled as **Arvind @ Chhotu vs. State,** ILR (2009) Supp.(Delhi) 704, in the following words:-

"(i) Last-seen is a specie of circumstantial evidence and the

principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last seen theory has to be applied.

(ii) It is not necessary that in each and every case corroboration by further evidence is required.

(iii) The single circumstance of last-seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last seen.

(iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the solitary circumstance of last-seen, a conviction can be sustained.

(v) Proximity of place i.e. the place where the deceased and the accused were last seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.

(vi) Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last-seen theory.

(vii) The relationship of the accused and the deceased, the place where they were last seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife

were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last-seen theory.

The above circumstances are illustrative and not exhaustive. At the foundation of the last seen theory, principles of probability and cause and connection, wherefrom a reasonable and a logical mind would un hesitatingly point the finger of guilt at the accused, whenever attracted, would make applicable the theory of last-seen evidence and standing alone would be sufficient to sustain a conviction."

27. In **State of U.P. vs. Satish** AIR 2005 SC 1000 it was held as under:

"The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case, there is positive evidence that the deceased and the accused were seen together by witnesses-PW3 and PW5, in addition to the evidence of PW2."

28. In the instant case, the relationship of accused and deceased is that of husband and wife. The place of crime is the matrimonial home. The time the husband and wife were last seen was early hours of night. The accused himself went to give information admitting his crime. These factors unhesitatingly point the finger of guilt towards the accused. In this Court's opinion the prosecution was able to establish the 'last seen' theory as far as the appellant is concerned.

Circumstances No. 4&5

29. Undisputedly, the offence has taken place in the dwelling house where accused was residing along with the deceased and prosecution has been able to establish that the accused was last seen with deceased, then, under Section 106 of the Evidence Act, 1872 onus of proof was upon the accused to show as to how his wife had received injuries. Section 101 of the Evidence Act lays down the general rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is not intended to relieve it of that duty. However, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

30. The applicability of this provision has been explained by Hon'ble Supreme Court in **State of Rajasthan v. Kashi Ram** (2006) 12 SCC 254, where it was held as under:-

"The principle is well settled. The provisions of Section 106 of the Evidence Act, 1872 itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Re. Naina Mohd. AIR 1960 Mad 218.

There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt."

31. In this context, observations made by Hon'ble Apex Court in the case of **Trimukh Maroti Kirkan vs. State of Maharasthra,** (2006) 10 SCC 681 and particularly to paragraphs 15, 21 and 22 are reproduced as under:

"15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

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21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of the Hon'ble

Supreme Court. [**State of T.N. vs. Rajendran** 1999, VIII AD (SC) 348 = (SCC para 6); **State of U.P. vs. Dr. Ravindra Prakash Mittal,** [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] (SCC para 39 : AIR para 40); **State of Maharashtra vs. Suresh,** [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] (SCC pra 27); **Ganesh Lal vs. State of Rajasthan,** 1999, VII AD (SC) 558 = [(2002) 1 SCC 731 : 2002 SCC (Cri) 247] (SCC para 15) and **Gulab Chand vs. State of M.P.,** [(1995) 3 SCC 574 : 1995 SCC (Cri) 552] (SCC para 4)].

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes places in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In **Nika Ram vs. State of H.P.,** [(1972) 2 SCC 80 : 1972 SCC (Cri) 635 : AIR 1972 SC 2077] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khukhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In **Ganeshlal vs. State of Maharashtra,** [(1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In **State of U.P. vs. Dr. Ravindra Prakash Mittal,** [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene.

The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband illtreated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly Hon'ble Apex Court reversed the judgement of the High Court acquitting the accused and convicted him under section 302 IPC. In **State of T.N. vs. Rajendran,** [(1999) 8 SCC 679 : 2000 SCC (Cri) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9pm and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of crime."

32. **Ram Naresh @ Lala vs. State,** 2011 IV AD (SC) 534 was also a case where cause of death was asphyxia as a result of compression of neck by ligature. On facts it was found that it was homicidal death. Deceased was living with the accused and it was observed by this Court that it was for the accused to give explanation as to how the body of deceased was found lying on the sofa inside the room, which he failed to furnish and as such keeping in view totality of the circumstances it was held that the circumstances pointing to the guilt of the accused are completely inconsistent with plea of the innocence.

33. In view of the above, since the accused was last seen with the deceased, the burden of proof rest upon him to prove what had happened thereafter since those facts were within his personal knowledge. It was incumbent upon the appellant/accused to give explanation as to how Kago died, but he took up a stand of complete denial of his involvement in the crime and offered no explanation before Court, however, as stated above, his own conduct reflects that the police machinery itself was set in motion on the basis of information furnished by him to the police as

to under what circumstances his wife met homicidal death.

34. To dislodge the circumstantial evidence led against the appellant/accused, learned counsel for the appellant has placed reliance upon the plea of alibi and had drawn the attention of this Court to the evidence of Arjun Singh (DW1) to assert that the appellant had gone to work at 11 Murti, Dhaula Kuan on 18th July, 2008 at about 8:00 a.m. along with 4-5 other labourers where they worked till 3:00 a.m. in the next morning. They returned back at about 4:00 or 4:15 a.m. The deposition of this witness does not help the appellant, inasmuch as, although according to him 4-5 other labourers were there along with them to work at 11 Murti, Dhaula Kuan, however, he was not able to tell the name of any of the labourer. Moreover, even after he came to know that accused has been booked for murder of his wife in the evening of 19th July, 2008, he did not go to the police station to inform the police that accused was with him from 8:00 a.m. of 18th July, 2008 till 3:00 a.m. of 19th July, 2008, so much so, he even did not tell this fact to the relatives of the accused. Even the employer at whose place the accused allegedly had gone to work has not been examined to substantiate this plea. Moreover, testimony of this witness is contrary to the stand taken by the accused. In his statement recorded under Section 313 Cr.P.C. he had taken a plea that on 18th July, 2008 his wife had given him cooked food in the evening and that he had gone to his work at 11 Murti at Dhaula Kaun. Therefore, according to him, he was very much present at his house in the evening of 18th July, 2008, however, according to DW1-Arjun Singh, he along with the accused and 4-5 other labourers had gone to 11 Murti, Dhaula Kuan at about 8:00 a.m., therefore, a false plea of alibi has been taken by the accused which is an additional circumstance which goes against him and furnishes a link in the chain of circumstances appearing against the accused.

35. A feeble attempt was made by learned counsel for the appellant for submitting that although the nail clipping of the accused were taken, but no nail clippings of the deceased were taken and the FSL result did not reveal anything regarding the nail clipping of the accused, this can, at best, be said to be a lapse on the part of the Investigating Officer, which in the facts and circumstances of the case, coupled with the fact that ample evidence has come on record to establish the guilt of the accused, does not cast any dent on the prosecution case. Moreover, as per the subsequent opinion of Dr. Sukhdeep Singh, injury No. 2, 3, 6,

7 & 8 are possible to be produced by hands, fingers, and finger nails and injury No. 5 is possible to be produced by hands and fingers. It is not the case of accused that the injuries on the person of deceased were self inflicted. That being so, it was for him to explain as to how these injuries were sustained by the deceased.

36. Furthermore, the Investigating Officer of the case seized cemented concrete with blood, earth control cemented concrete, a pair of chappals belonging to the accused from the spot. Besides that, after the post mortem examination, the clothes of the deceased were handed over by the doctor to the Investigating Officer of the case. Nail clippings of the accused were taken. All these articles were sent to FSL. As per the report of FSL, Ex. PW7/A, blood was detected on cemented concrete, earth control cemented concrete and clothes of the deceased. As per report of the biology division, Ex. PW7/B, the species of origin was 'human' on the blood stained cotton, ladies shirt and dupatta. The blood group was opined to be of 'O' Group. All this goes to show that the theory of homicide is compatible with circumstances which stands established on the basis of evidence on record.

37. The circumstances viz giving of first information to the police by the accused himself regarding murdering his wife, his last seen together with the deceased, motive to do away with the deceased, medical evidence pointing the death to be homicidal, a false plea of alibi coupled with failure on the part of the accused to furnish any explanation, unerringly point towards guilt of the accused and are completely inconsistent with the plea of innocence.

38. In view of the above discussion and our appraisal and analysis of the evidence on record, we have no hesitation to hold that the prosecution has successfully established all the circumstances appearing in the evidence against the appellant by clear, cogent and reliable evidence and the chain of the established circumstances is complete and has no gaps whatsoever and the same conclusively establishes that the appellant and appellant alone committed the crime of murdering the deceased on the fateful day in the manner suggested by the prosecution. All the established circumstances are consistent only with the hypothesis that it was the appellant alone who committed the crime and the circumstances are inconsistent with any hypothesis other than his guilt.

39. In view of the above factual matrix and upon appreciation of

evidence, we find that the evidence has been appreciated by the trial court in consonance with the rules and procedure of law. The findings can neither be termed as perverse nor improbable.

We find no merit in the present appeal and the same is dismissed accordingly. Copy of the judgment be supplied to the concerned Jail Superintendent for information of the appellant.

ILR (2014) III DELHI 2114
CRL.A.

HARI SINGH YADAV ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. : 464/2004 DATE OF DECISION: 18.02.2014

Prevention of Corruption Act, 1988—Sec 7 and 13(2) read with-Section 13 (1)(d)—Prosecution unable to prove beyond doubt that accused made demand of bribe on any particular date as a motive or reward for doing or forbearing to do any official act—Evidence lends credence to the version of accused that tained money was thrusted by the complainant in his pocket to implicate him.

Held: in the absence of any definite evidence of demand of bribe, acceptance of tainted money by the appellant, under unusual circumstance is a mere suspicion which cannot be a substitute for proof. Settled legal preposition is that mere receiving of

money divorced from the circumstance under which it was paid is not sufficient to base conviction. The prosecution is required to prove that the money was accepted on demand. The demand and acceptance of the amount as illegal gratification is sine qua non for constitution of the offence under the Act.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Pawan Kumar, Advocate with Mr. Nitin Kumar, Advocate.

FOR THE RESPONDENT : Mr. P.K. Sharma, Standing Counsel for CBI with Mr. A.K. Singh & Mr. Bakul Jain, Advocates.

CASES REFERRED TO

1. *'Narendra Champaklal Trivedi* vs. *State of Gujarat.,* 2012 (7) SCC 80.
2. *'Rajesh Bhatnagar* vs. *State of Uttarakhand.,* 2012 (7) SCC 91.
3. *'Narayana* vs. *State of Karnataka.,* 2010 (14) SCC 453.
4. *'Subbu Singh* vs. *State.,* 2009 (6) SCC 462.
5. *'Surendra Singh Beniwal* vs. *Hukam Singh and ors..,* 2009 (6) SCC 469.

RESULT: Appeal allowed.

S.P.GARG, J.

1. Hari Singh Yadav (the appellant) impugns a judgment dated 17.05.2004 of learned Special Judge, Delhi in RC No. 38 (A)/98, CC No. 125/2001 by which he was convicted under Section 7 and 13 (2) read with Section 13 (1)(d) of PC Act. By an order dated 18.05.2004, he was awarded rigorous imprisonment for two years with fine Rs. 5,000/- under Section 7 and rigorous imprisonment for three years with fine Rs. 5,000/- under Section 13(2) read with Section 13(1)(d) of the PC Act. The substantive sentences were to operate concurrently.

2. In brief, the prosecution case is that on 13.07.1998, Gurcharan

Singh lodged a written complaint with CBI alleging demand of bribe of Rs. 5,000/- by Hari Singh Yadav, Sub Inspector, PS Mehrauli from his sister Harbans Kaur for not implicating her and her husband in a false case. It was further alleged that due to failure to pay the bribe, Harbans Kaur and her husband were implicated in a case under Sections 107/150 Cr.P.C. for which a notice was delivered to appear before SDM on 14.07.1998. When the complainant and his sister contacted the accused on 13.07.1998 in his office, he repeated the demand of Rs. 5,000/- which on request was reduced to Rs. 15,00/- to be paid in the evening. Since the complainant was not willing to pay the bribe, he lodged the complaint with CBI. Further case of the prosecution is that the investigation was assigned to Insp. A.K.Singh who organised a trap team and arranged two independent witnesses Bajrang Bali and Devender. The complainant was introduced to both the independent witnesses as well as to the trap team members. The complainant produced a sum of Rs. 1,500/- in the form of 15 GC notes in the denomination of Rs. 100/- each. After noting down the numbers of GC notes in the handing over memo, the notes were treated with phenolphthalein powder and a practical demonstration was given to all trap members. The powder treated notes were kept in the left side shirt pocket of the complainant with the direction to hand over the same to the accused on his specific demand of bribe and not otherwise. Devender was directed to act as shadow witness and to remain as close as possible to see the transaction of bribe money and to overhear the conversation between the complainant and the accused. He was further directed to give a signal by scratching his head with both hands after the transaction was over. After completing and recording pre-trap proceedings, the trap team left CBI office at 04.10 P.M. and reached at police station Mehtrauli at about 05.15 P.M. Further case of the prosecution is that the complainant and shadow witness Devender were directed to proceed inside the police station. Other team members were directed to take suitable position in the nearby area. Trap Laying Officer (TLO) and independent witness Bajrang Bali took suitable position. Complainant and Devender met the accused inside the police station and had formal conversation. Thereafter, the accused at the request of the complainant and shadow witness showed them the police station. They all came out of it and went to Verma Bakeries situated opposite to the police station. While moving outside the police station, the accused had a conversation regarding demand of bribe with the complainant. It was further alleged that all of them took cold drinks at the bakery shop. While

moving out of the shop, the accused demanded the bribe amount from the complainant by opening the mouth of the right side pocket with the help of his right hand fingers and directed him to put the bribe amount inside the pocket and the complainant did that accordingly. As soon as the transaction was over, the shadow witness gave a pre-appointed signal and on receiving it, the trap team rushed towards the accused and apprehended him at the stairs of the shop. When confronted, the accused admitted having demanded and accepted the bribe amount of Rs. 1,500/- from the complainant. Bajrang Bali recovered the tainted amount of Rs. 1,500/- from the right side pant pocket of the accused. Thereafter, hand wash, pocket wash, etc. were conducted and post-raid proceedings were completed. During investigation, statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against the accused; he was duly charged and brought to trial. The prosecution examined nine witnesses. In 313 statement, the accused pleaded false implication and examined eight defence witnesses. After hearing the rival contentions of the parties and on appreciation of the entire evidence, the Trial Court, by the impugned judgment, held the appellant perpetrator of the crime mentioned previously. Being aggrieved and dissatisfied, the appellant has preferred the appeal.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of the interested witnesses without independent corroboration. PW-Bajrang Bali and PW- Devender did not support the prosecution on material aspects and resiled from their previous statements. The appellant had never demanded any bribe from the complainant or his sister any time and it was never accepted voluntarily by him. The investigation is highly faulty and tainted and no proper verification was made to ascertain the antecedents of the complainant and his sister who were involved in number of criminal cases. The recovery of the tainted money is suspect. No independent public witness was associated at any stage of the investigation. Learned Standing Counsel for CBI while supporting the judgment urged that the complainant had no ulterior motive to lodge complaint with CBI. There was a specific demand of Rs. 1,500/- which was paid and accepted by the appellant and he was caught red handed. Evidence and the test carried out go a long way to show that the tainted amount was recovered from the possession of the

appellant . accused. The recovery part has gone totally unchallenged. Presumption under Section 20 of the PC Act is attracted and the appellant has failed to dislodge it. Minor discrepancies in the statements of the witnesses do not affect the core of the prosecution case i.e. demand and acceptance of money. Reliance was placed on **'Narendra Champaklal Trivedi vs. State of Gujarat.,** 2012 (7) SCC 80, **'Rajesh Bhatnagar vs. State of Uttarakhand.,** 2012 (7) SCC 91, **'Subbu Singh vs. State.,** 2009 (6) SCC 462, **'Surendra Singh Beniwal vs. Hukam Singh and ors..,** 2009 (6) SCC 469 & **'Narayana vs. State of Karnataka.,** 2010 (14) SCC 453.

4. Admitted position is that on 13.07.1998, Hari Singh Yadav was posted as Sub Inspector in police station, Mehrauli. It is also not denied that he had instituted a kalandra under Sections 107/150 Cr.P.C. against the complainant's sister and her husband for which she had received a notice on 12.07.1998 for appearance before the concerned SDM on 14.07.1998. It is also not in dispute that SI Hari Singh Yadav was the Investigating Officer in case FIR No. 345/98 under Section 324/34 IPC registered on 22.06.1998 against Karamvir @ Kalu and others for causing injuries to Dinesh Sada. The prosecution has examined relevant witnesses to prove that on 13.07.1998, complaint (Ex.PW-2/A) was lodged by PW-2 (Gurcharan Singh) against the appellant for demanding a bribe of Rs. 5,000/- which was reduced to Rs. 1,500/- from his sister Harbans Kaur. It is also not in dispute that after registration of the case, CBI constituted a trap team to apprehend the appellant red handed. The pre-trap proceedings (Ex.PW-2/C) have been proved beyond doubt by the complainant; panch and shadow witnesses.

5. PW-5 (Bajrang Bali) who joined the trap as panch witness deposed that at around 05.00 or 05.15 P.M., as instructed, complainant and Devender went to the police station Mehrauli to contact the accused. After about 10 / 15 minutes, they came out of the police station along with the accused and proceeded towards a canteen outside the police station. After 8 or 10 minutes, he was informed that the accused had already been trapped. He was not aware as to how and in what manner the accused was trapped. Since PW-5 (Bajrang Bali) did not support the prosecution, Spl. Public Prosecutor for CBI cross-examined him after seeking Court's permission. When confronted with the statement (Ex.PW-5/X), Bajrang Bali denied to have made any such statement to CBI. He denied that he had noticed the complainant and Hari Singh Yadav talking

with each other while coming out from the police station Mehrauli. He further denied that the complainant . Gurcharan Singh after coming out of the shop put tainted money in the right side pocket of the pant of the accused or that PW-Devender gave a pre-appointed signal by scratching his head with both hands. He admitted recovery of ` 1,500/- from the pant of the accused Hari Singh Yadav by him. In the cross-examination, he disclosed that he and Devender were dropped by Inspector, CBI at their residences. He was unable to read, write or understand English. He further admitted that public had protested for arresting the accused without any reason. Needless to say panch witness - PW-5 (Bajrang Bali) did not opt to support the prosecution and completely resiled from the statement (Ex.PW-5/X). No ulterior motive was assigned to him for deviating from the previous statement. The cross-examination of the witness did not yield any fruitful result.

6. PW-4 (Devender) associated as shadow witness participated in the pre-trap proceedings and deposed that after reaching at police station at about 05.10 P.M., as directed, he and the complainant went to the room of the accused. The complainant, after exchanging greetings had a conversation with him. He was unaware as to what was the said conversation. Thereafter, as suggested by the accused, they went out and had cold-drinks at a shop outside the police station. During conversation at the said shop, the accused told the complainant to come again and then he would talk to him. Thereafter, complainant gave him empty bottles along with Rs. 100/- to pay to the shop owner. When he was making payment at the counter, the complainant and the accused came back towards him. He overheard the complainant telling the accused 'paise rakh lo aap' and the accused replied 'abhi nahi baad me aana tum'. Thereafter, complainant told him 'paise de ke aao hum bahar khare hain'. When he came out after making the payment, complainant told him that he had given the money and suggested him to give the signal. On that, he gave the signal to the trap party. He did not see the complainant giving money to the accused. Since this witness gave statement in conflict with his previous statement, he was cross-examined by Spl. Public Prosecutor. He admitted that in the police station, he was introduced as the nephew of the complainant brought by him to see the police station. He further admitted that thereafter police station was shown to him by the accused. He was unable to admit or deny that while moving outside the police station, the accused said 'Thana to dekh liya ab jo kaam maine kaha tha

who bhi kiya ke nahin, paise laye ho?.. He admitted that complainant said 'ha sahab jitne aapne kaha tha utne hi laya hun ab meri bahan ka dhyan rakhna'. He further admitted that accused said .arey ab to dosti ho gai hai pura dhyan rakhenge, chalo kuch thanda vagera pee kar aate hain tumhara bhatija bhi aya hai ise kuch pila doon'. Thereafter, complainant said 'thik hai sahab mujhe kuch jaldi hai. He denied the suggestion that when they were moving out of the shop, Hari Singh Yadav directed the complainant 'lao ab paise de do' and opened the mouth of right side pocket of his pant with his fingers and signaled him to put the money inside the pocket. In the cross-examination by the accused, he disclosed that he did not know English and was unable to understand the conversation in English. He was confronted with his statement (Ex.PW-4/X) where there was no mention of 'paise rakh lo aap, abhi nahi baad mein aana tum'.

7. The shadow witness gave inconsistent version and did not depose if demand of bribe at any stage was made by the accused in his presence from the complainant or that the complainant pursuant to the demand gave the money to the accused or it was accepted by him. He was categorical to say that no money was paid by the complainant in his presence and he did not give any pre-appointed signal to the raiding team. The cross-examination of the witness did not bring out anything material to connect the accused with the demand of money. No explanation was given by the prosecution regarding the improvements made by the witness for which he was confronted with his statement (Ex.PW-4/X).

8. PW-1 (Harbans Kaur) at whose instance her brother PW-2 (Gurcharan Singh) approached CBI to apprehend the accused red-handed herself did not go to the office of CBI to lodge complainant. On 20.06.1998, a quarrel had taken place between her tenant -Dinesh Sada and neighbour -Karamvir @ Kalu in which Dinesh Sada sustained injuries. PW-1 (Harbans Kaur) informed the police and control room about the occurrence and Dinesh Sada was taken for medical examination. PW-1 (Harbans Kaur), in her deposition, disclosed that no action was taken in that matter by the police officials of PS Mehrauli. On 22.06.1998, she called her brother . Gurcharan Singh and informed him about police officials of PS Mehrauli for not taking any action against Karamvir @ Kalu. Thereafter, she, her brother and Dinesh Sada went to the police station at around 08.00 P.M. On enquiry, they came to know that the case was assigned to SI Hari Singh Yadav. She informed that after great

persuasion, Hari Singh Yadav agreed to register FIR No. 345/98 under Section 324/34 IPC at 08.40 P.M. There are no allegation of demand of illegal gratification by the accused from PW-1 (Harbans Kaur) or the injured for lodging FIR. PW-1 (Harbans Kaur) and her brother . Gurcharan Singh had no business to persuade SI Hari Singh Yadav to register the case for the said incident. Dinesh Sada, the victim who has not been examined had no complaint whatsoever against the police officials. Anyhow, the complainant and his sister had no complaint against SI Hari Singh Yadav till 22.06.1998. In her deposition, PW-1 (Harbans Kaur) did not disclose as to when and where any bribe was demanded by the accused after 22.06.1998. She merely stated that from 23.06.1998 onwards, the accused started harassing and demanding Rs. 5,000/- and threatened to arrest her husband and son -Ravinder Singh in some false case or spoil their future if demand was not met. She further testified that Hari Singh Yadav kept on visiting her time and again for bribe on daily basis. She, however, did not divulge and explain as to what was the motive to demand bribe from her when he (SI Hari Singh Yadav) had already registered the case vide FIR No. 345/98 under Section 324/34 IPC. He had not registered any case against her or her family members on 23.06.1998 or soon thereafter. She admitted that she did not lodge any complaint to the SHO/ Addl. SHO or any other authority for such demand. In the cross-examination, she admitted that she had visited the police station on 23.06.1998 and subsequent to that also. However, no complaint in writing was ever lodged against the accused for harassment or demand of bribe. On 12.07.1998, Harbans Kaur received a notice from PS Mehrauli to appear before Sh.Praveen Dutt, Patiala House Courts, on 14.07.1998. She alleged that Hari Singh Yadav himself came at her residence to deliver the said notice. The prosecution, however, did not collect any evidence if notices (Ex.PW-7/DA & Ex.PW-7/DB) were delivered personally by SI Hari Singh Yadav to Harbans Kaur on 12.07.1998. Contrary to that, the accused examined DW-1 (Const. Shri Pal) who categorically on oath deposed that notices (Ex.PW-7/DA & Ex.PW-7/DB) were served by him as process server on 11.07.1998. He elaborated that at first instance Harbans Kaur had refused to accept the notices and threatened that she would teach a lesson to SI Hari Singh Yadav who had got issued the said notices. PW-6 (A.K.Singh), TLO, admittedly did not verify during investigation as to who had served the said notices under Sections 107/150 Cr.P.C. for appearance on 14.07.1998. He did not record the statement of the process server of the police station regarding

service of the notices and did not obtain the copy of entry in relevant V-B register. PW- Harbans Kaur did not allege if at the time of delivery of the notices, any bribe was demanded from her on 12.07.1998. After receipt of process / notices, she called her brother Gurcharan Singh, at her residence, on 13.07.1998; both went to Police Station Mehrauli and met SI Hari Singh Yadav. Allegedly the appellant demanded Rs. 5,000/- from them which was subsequently reduced to Rs. 1,500/-. He told them that their failure to pay the bribe, had forced him to file a false kalandra against her and her husband. They were directed to bring the demanded amount by the evening. Again, no complaint was lodged to the concerned SHO for the said demand. It is not explained as to why PW-1 and her brother had gone to Hari Singh Yadav in the police station when he had already prepared the kalandra and PW-1 was directed to appear before the Court concerned on 14.07.1998. It is unclear as to how the appellant could have assisted the victim in the said kalandra which was already pending for 14.07.1998 before the concerned Court. Strange enough, on the same day, PW-2 (Gurcharan Singh) wrote a complaint (Ex.PW-2/A) and reached CBI office at around 12.00 Noon or 01.00 P.M. Without verifying the contents of the complaint, FIR (Ex.PW- 6/A) was registered on the directions of Sh. Anil Kumar, SP, Incharge of ACB then and there. PW-6 (A.K.Singh) without verifying the truth in the allegations immediately decided to lay a trap and arranged panch witnesses PW-4 (Devender) and PW-5 (Bajrang Bali) line-men from Delhi Vidyut Board.

9. As per PW-2, he and PW-4 (Devender) went to the office of the accused at around 05.15 P.M. After exchange of greetings, Hari Sigh Yadav enquired about the shadow witness "Yeh tere sath mein kaun hai? Ise sath me lekar kyon aye ho". He replied "Bhatija hai isne kabhi thana nahin dekha is liye isko saath laya hun". On that accused replied "chalo main ise thana dikhata hun". He said "thik hai sahab mujhe jaldi hain thora jaldi kar dena". He further deposed that thereafter the accused took Devender to show the police station and he accompanied them. Thereafter, they all moved outside the police station. Thereafter, accused said "thana to dikha diya ab jo kaam kaha tha paise vagera laye ke nahin". To that, he replied "aapne jo kaha tha utne hi laya hun ab meri bahen ka dhyan rakhna". Thereafter, the accused replied "arey ab to dosti ho gai hai aapki bahen ka pura dhyan rakhenge chalo kuch thanda vagera pi kar atey hai. Tumhara bhatija bhi aya hai ise bhi kuch pila dun". He replied "thik hai sahab thora jaldi karna mujhe jaldi hai". Thereafter, the accused took

them to Verma Bakeries and ordered three cold drinks, for which payment was made by the accused. When they came outside the shop, the accused said "La ab paise de do". Thereafter, the accused opened the mouth (opening) of right side pocket of his pant with his right hand fingers and signaled him to put the money into his pocket. On that, he put the money in the right side pocket of the pant of the accused. The shadow witness Devender gave signal to the raiding party. This version narrated by the complainant does not find support from PW-4 (Devender) and panch witness PW-5 (Bajrang Bali). They have given divergent version of the incident which is not at all in consonance with the story put by the complainant. There is inconsistency as to at which place demand of bribe was made. Apparently, even as per the testimony of this witness, the appellant soon after exchange of greetings did not ask him to pay the bribe. Rather the appellant took the shadow witness Devender to the police station along with the complainant. Only when they were coming out of the police station, the appellant confirmed if the witness had brought the demanded money. Even at that time, no such money was demanded and paid to the appellant. Rather they went outside the police station and enjoyed cold drinks at Verma Bakeries. The payment of the cold drinks was made by the accused. When they came out of the shop, the complainant was allegedly asked to give the money. There was no sound reasons for the appellant to delay the receipt of bribe amount and instead of accepting it in secrecy in his room, to get it in the open place outside the shop of Verma Bakeries. The place and manner in which the bribe is said to have been offered and received makes the prosecution story wholly opposed to ordinary human conduct. There are conflicting statements as to who had made the payment for the cold drinks. PW-4 (Devender) disclosed that the said payment was made by the complainant who handover Rs. 100 and the empty bottles of cold drinks to return and make the payment. In the cross-examination, PW-2 (Gurcharan Singh) also admitted that before 13.07.1998, he had not lodged any complaint against the accused for causing harassment to her sister and his family members and demanding bribe either to SHO or Addl. SHO of Police Station Mehrauli or any superior officer. PW-6 (Insp. A.K.Singh) did not corroborate complainant's version that he had travelled to the police station in his car and claimed in the cross-examination that they had left CBI office in official vehicle only.

10. PW-1 (Harbans Kaur) admitted in the cross-examination that

she was aware of a police case registered against her brother Gurcharan Singh. She also admitted that one kalandra under Section 107/151 Cr.P.C. was pending trial against her and her son Ravinder Singh. She got a case under Section 506 IPC registered against her husband Mahinder Singh. She further admitted that she was involved in a criminal case under Sections 324/307 IPC. She expressed her ignorance if FIR No. 127/2000 under Section 324 IPC PS Mehrauli was registered against her and her son. She admitted that one kalandra under Section 107/150 Cr.P.C. of the year 1999 was pending against her and her son and the other party in the Court of Sh. Parveen Dut, Special Executive Magistrate. Admittedly, she was called on several occasions during the period w.e.f. 13.07.1998 till date in the police station. She denied that during the said visits she was warned by the police to stop indulging in criminal activities or threatening people. She admitted that the kalandra instituted against her was decided about 11 months after the date of registration. She admitted that similar kalandra was registered against the other party namely Kalu and others and they were simultaneously proceeded in the Court of Special Executive Magistrate. PW-2 (Gurcharan Singh) also admitted pendency of a criminal case under Section 307 IPC PS Badarpur against him. He volunteered to add that it was converted under Section 308 IPC and was compromised. PW-6, the Investigating Officer did not investigate all these facts. He did not verify if the kalandra had been put in the Court of SDM on 26.06.1998 duly forwarded by the SHO. The appellant examined DW-4 (Insp.Jagdish Parsad), Addl. SHO PS Mehrauli in June / July 1996 and disclosed that there were number of complaints against Harbans Kaur and her family members from the residents of Pahari Chhatter Pur. DW-5 (ASI Surender Kumar) also deposed on similar lines. Apparently, PW-1 and PW-2 were frequent visitors to the police station and the police officials were aware of their antecedents and their involvement in some cases. Kalandra under Section 107/150 Cr.P.C. of the year 1999 was also issued by some other police officials against her and her son. No complaint whatsoever regarding demand of bribe was ever lodged by them before any concerned authority prior to 13.07.1998. The appellant had no motive or reason to demand bribe from the complainant or his sister on 13.07.1998 as he had already implicated Harbans Kaur and her son in a kalandra under Section 107/150 Cr.P.C. which was pending before the concerned SDM for 14.07.1998. The said kalandra had already been issued by the appellant after being forwarded by the SHO concerned in the Court on 26.06.1998. The notice issued by

the concerned SDM had already been delivered for appearance on 12.07.1998. In this scenario, he could not have assisted or helped Harbans Kaur in the said kalandra in any manner. There was, thus no occasion for the complainant and his sister to pay a bribe of Rs. 5,000/- to the appellant. It appears that institution of proceedings in kalandra prompted the complainant to approach CBI after due deliberations to lay a trap to implicate the appellant with whom they had prior acquaintance. The complainant has got an animus against the appellant and had motive to lodge the report. The appellant was caught by CBI on 13.07.1998 and the recovery of the tainted money was effected from his pocket. The circumstances and facts reveal that complainant had prior acquaintance and familiarity with the appellant and used to meet him in connection with cases registered for or against her sister. Admittedly, he had gone to the police station to get a case registered on 20.06.1998, when a quarrel took place between Dinesh Sada and Karamvir @ Kalu. The appellant without asking any favour or consideration registered the case against Karamvir @ Kalu. Undoubtedly, on 13.07.1998, the complainant along with PW-4 (Devender) visited the police station. The shadow witness PW- Devender has also corroborated the complainant's version to the extent that the appellant not only showed him the police station in the company of Gurcharan Singh but also entertained them at Verma Bakeries where they consumed cold drinks. He was aware about the institution of kalandra under Section 107/150 Cr.P.C. against the complainant's sister. He had no valid and sound explanation to have close association / nexus with the complainant whose sister was facing proceedings under Section 107/150 Cr.P.C. and to entertain him and his associate / companion even to the extent of showing the police station during office hours and serving them cold drinks. The undesirable conduct was opposed to the duties entrusted to him and was unbecoming of a police officer on duty.

11. The prosecution was, however, unable to establish beyond reasonable doubt that the appellant made a demand of bribe on any particular date as a motive or reward for doing or forbearing to do any official act in the exercise of his official functions.

12. The Court has no reason to disbelieve recovery of the tainted money from the pocket of the appellant in view of the consistent version of the panch witness and TLO including that of PW-4 (Devender),

shadow witness in this regard. The bribe amount was not accepted by the appellant with his right or left hand. It was even not counted by him. The TLO did not explain as to why the hand washes of the fingers of right and left hands were taken in post-raid proceedings when the appellant had not taken the money himself. The appellant having familiarity / intimacy with the complainant by this time had no reason to suspect foul play and to ask the complainant to put the money in his pocket by opening its mouth with his right fingers at a public place. It lends credence to the appellant's version that the tainted money was thrusted by the complainant in his pocket to implicate him. This possibility cannot be ruled out as the complainant was nurturing grudge against him for instituting proceedings under Sections 107/150 Cr.P.C. against his sister Harbans Kaur. In the absence of any definite evidence of demand of bribe, acceptance of tainted money by the appellant, under unusual circumstance is a mere suspicion which cannot be a substitute for proof. Settled legal preposition is that mere receiving of money divorced from the circumstances under which it was paid is not sufficient to base conviction. The prosecution is required to prove that the money was accepted on demand. The demand and acceptance of the amount as illegal gratification is sine qua non for constitution of the offence under the Act.

13. In view of the above discussion, the appellant deserves benefit of doubt. The appeal is accepted. Conviction and sentence are set aside. Bail bonds and surety bonds stand discharged. Trial Court record be sent back forthwith.

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AT & T COMMUNICATION SERVICES INDIA (P) LTD. .....PETITIONER

VERSUS

COMMISSIONER OF INCOME TAX-I & ANR. ....RESPONDENTS

(S. RAVINDRA BHAT & R.V. EASWAR, JJ.)

W.P. (C) NO.811/2012 DATE OF DECISION: 21.02.2014

A. Income Tax Act, 1961—Section 142(2A): Petition challenging the order of Assistant CIT directing special audit of Petitioners accounts u/s 142(2A) on three grounds; (i) the books of accounts were not called for or examined by the Assessing Officer and no special audit can be ordered without examining the books of accounts of the assessee (ii) no show cause notice was issued before ordering a special audit and thus there was a breach of rules of Natural justice (iii) there was complete non application of mind by the first respondent while according approval to the proposal for special audit in the petitioner's case. Held—Respondent no. 2 did require the Petitioner to show cause as to why special audit should not be directed, the show cause notice was replied to by the Petitioner, this contention of the Petitioner that no show cause notice was issued therefore fails. Held- S. 142(2A) does not require "books of accounts" to be examined by the A.O. It empowers the A.O with the previous approval of the Chief Commissioner or Commissioner of Income Tax, to direct the assessee to get the accounts audited if he is of the opinion that it is necessary to do so "having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue." Account used in the

section does not refer merely to "books of account" of the assessee, it could include the books of accounts, balance sheets and all other records which are available to the A.O during assessment of proceedings. It is not possible to accept the contention that A.O. cannot direct a special audit under he examines the books of accounts. Held—there is no requirement that the approving authority has to record elaborate reasons for approval. Of course approval cannot be mechanical. Cannot be said that the CIT did not apply his mind to the proposal of special audit.

The contention put forth on behalf of the petitioner against the order for special audit in the petitioner's case is threefold; (i) the books of account were not called for or examined by the Assessing Officer and no special audit can be ordered without examining the books of account of the assessee as without such an examination the Assessing Officer would not be in position to assess the nature and complexity of the accounts; (ii) no show cause notice was issued before ordering a special audit and thus there was a breach of the rules of natural justice and ; (iii) there was complete non-application of mind by the first respondent while according approval to the proposal for special audit in the petitioner's case. In support of this contention, our attention was drawn to the decisions of the Supreme Court in **Rajesh Kumar & Ors. Vs. Dy. CIT** (2006) 287 ITR 91 and **Sahara India (Firm). Vs. Commissioner Of Income-Tax And Another** (2008) 300 ITR 403, as also the judgment of this Court in **DDA Vs. UOI** (2013) 350 ITR 432. **(Para 8)**

So far as the contention that there was no valid show cause notice issued by the A.O. under Section 142(2A) is concerned, we find no merit in the same. As already pointed out, even in the petitioner's letter dated 31.10.2011, addressed to the respondent in response to various notices issued by the latter and with reference to the subsequent discussions held in the course of the hearing which took place on 19.10.2011, the petitioner has submitted an

elaborate reply in paragraph 9 of the letter under the caption "show cause as to why special audit under Section 142(2A) of the Act should not be conducted in the instant case". This paragraph clearly refers to the request made by the respondent on 19.10.2011 to the petitioner to show cause as to why special audit should not be conducted because of the nature and complexity in the financial statements. The letter then proceeds to elaborately raise objections to the show cause notice, supported by case law. The objections run into more than five pages. The petitioner in these objections has harped that there was no complexity in its accounts and that the provisions of Section 142(2A) not only require complexity in the accounts, but also require that there must be some prejudice to the interests of the revenue. The petitioner also objected to the show cause notice on the ground that application of mind is required by the tax officer in order to reach an objective satisfaction and the requirement of Instruction No. 1076 dated 12.07.1997 issued by the CBDT was quoted in the letter. In the light of these detailed objections it is ideal on the part of the petitioner to contend that no show cause notice was issued by the A.O. Section 142(2A), before insertion of the first proviso by the Finance Act, 2007, w.e.f. 1.6.2007, did not contemplate any show cause notice. Even so the Supreme Court in the case of **Rajesh Kumar** (supra) held that since an order directing special audit entails civil consequences, the principles of natural justice in the form of hearing have to be complied with, though the hearing need not be elaborate. It was also held that the notice to show cause may contain the approval issues that the A.O. thinks to be necessary and need not be elaborate or detailed ones. This view was affirmed by the larger Bench of the Supreme Court in **Sahara India (Firm) Vs. CIT** (supra). The requirement of the first proviso that there should be adherence to the rules of natural justice and that the assessee should be given an opportunity of being heard before issuing a direction for special audit is satisfied in the present case. The respondent no.2 did require the petitioner to show cause as to why a

special audit should not be directed in this case on 19.10.2011; the show cause notice was replied to by the petitioner by a letter dated 31.10.2011. The contention of the petitioner that no show cause notice was issued therefore fails. **(Para 13)**

The next contention to the effect that the books of account were not called for and examined by the A.O. and therefore the direction for special audit is bad in law is also without merit. As already pointed out while referring to the contention of the learned standing counsel for the Income Tax Department, sub-section (2A) of Section 142 does not require the "books of account" to be examined by the A.O. It empowers the A.O., with the previous approval of the Chief Commissioner or Commissioner of Income Tax, to direct the assessee to get the accounts audited if he is of the opinion that it is necessary to do so " having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue.....". It has been held by a Division Bench of this Court in **Rajesh Kumar, Prop. Surya Trading Vs. Dy.CIT** (2005) 275 ITR 641, that the expression "accounts" used in the section does not refer merely to "books of account" of the assessee; it could include the books of account, balance sheets and all other records which are available to the A.O. during the assessment proceedings. It refers to the other records available with the A.O. not only in the course of the assessment proceedings but also at any stage subsequent thereto. It was held that the expression "accounts" cannot be confined to books of account as submitted by the assessee, as it would amount to giving an interpretation which completely defeats the very object of the section. It was further held that the fact that the accounts of the assessee are subject to audit under some other statute is also no ground to hold that in such a case the A.O. cannot direct a special audit. It was observed that in addition to the books of account, the A.O. may also take into consideration such other documents related thereto and which would be

part of the assessment proceedings. This judgment was followed by another Division Bench of this court in **Central Warehousing Corporation** (supra). In the light of these authorities, it is not possible to accept the contention that the A.O. cannot direct a special audit unless he examines the books of account. **(Para 14)**

The other contention is that there was non-application of mind by the respondent no.1 while according his approval to the proposal for special audit. We do not think that this contention is justified at all. The terms of reference sent by the respondent no.2 were before him. There is no requirement that the approving authority has to record elaborate reasons for approval. Of course, approval cannot be mechanical. We find that the approval was forwarded through the Additional CIT, Range-2, New Delhi, under cover of letter dated 28.11.2011. In this letter there is also a reference to the related parties' transaction and to the assessee's detailed reply dated 31.10.2011. The CIT had before him the views of the respondent no.2 as also those of the petitioner as to what it had to say in reply. The approval was accorded by the CIT on 23.12.2011. It cannot, therefore, be said that the CIT did not apply his mind to the proposal for special audit. The contention of the petitioner to the contrary is not accepted. **(Para 17)**

In the view we have taken, we do not consider it necessary to examine the contention of the petitioner based on alleged interpolation of entries in the order sheet on 14.10.2011 and 19.10.2011. **(Para 19)**

In the result the writ petition and all connected applications are dismissed with no order as to costs. **(Para 20)**

B. Constitution of India, 1950—Article 226; Income Tax Act, 1961, Section 142(2A): Scope of interference—Held-the question whether the accounts and the related documents and records available with the A.O. present complexity is essentially to be decided by the A.O. and in this area the power of the court to intrude should necessarily be used sparingly. It he finds that the accounts are complex, the court normally will not interfere u/a 226. The power of the court to control the discretion to refer the accounts for special audit was exercised objectively, as far as the accounts, records, documents and other material present before the A.O. would permit.

The question whether the accounts and the related documents and records available with the A.O. present complexity is essentially to be decided by the A.O. and in this area the power of the court to intrude should necessarily be used sparingly. It is the A.O. who has to complete the assessment. It is he who has to understand and appreciate the accounts. If he finds that the accounts are complex, the court normally will not interfere under Article 226. The power of the court to control the discretion of the A.O. in this field is limited only to examine whether his discretion to refer the accounts for special audit was exercised objectively, as far as the accounts, records, documents and other material present before the A.O. would permit. There must be valid material before the A.O. from which he apprehends that there is complexity. As to what material would make the accounts complex is essentially for the A.O. to determine and unless his decision can be attacked on the ground of perversity or absolute arbitrariness or mala fide, it should not be interfered with. In the present case we are satisfied that the accounts including the documents, records and other material before the A.O. did make the issues for his decision complex requiring a special audit. We are accordingly not inclined to accept the contention of the assessee to the contrary. **(Para 16)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Jayant K. Mehta, Adovcate.

FOR THE RESPONDENTS : Mr. Balbir Singh Sr. Standing

Counsel with Shri Abhishek Singh Baghel Adv.

CASES REFERRED TO:

1. *DDA* vs. *UOI* (2013) 350 ITR 432.
2. *Sahara India (Firm).* vs. *Commissioner Of Income-Tax And Another* (2008) 300 ITR 403.
3. *Rajesh Kumar & Ors.* vs. *Dy. CIT* (2006) 287 ITR 91.
4. *Central Warehousing Cooperation* vs. *Secretary, Department of Revenue & Ors.* (2005) 277 ITR 452.
5. *Rajesh Kumar, Prop. Surya Trading* vs. *Dy.CIT* (2005) 275 ITR 641.

RESULT: Petition dismissed

R.V. EASWAR, J.

1. In the present proceedings, under Article 226 of the Constitution of India, the petitioner challenges the order dated 26.12.2011 passed by the Assistant Commissioner of Income Tax, Circle 2(1), C.R. Building, I.P. Estate, New Delhi, directing a special audit of its accounts under Section 142(2A) of the Income Tax Act, 1961 for the assessment year 2008-2009.

2. The petitioner is a wholly owned subsidiary of AT&T Communication Services International Inc, USA and was incorporated on 23.04.1996. It is engaged in three business segments, namely; (i) Market research, administrative support and liaison services; (ii) Network connectivity services; and (iii) Managed network services. In respect of the assessment year 2008-2009, the petitioner filed E-return of income declaring a total income of Rs.6,95,74,835/- on 30.09.2008. A notice under Section 143(2) of the Act was issued on 06.08.2009, asking the petitioner to furnish the computation of income and the notes thereto, copies of the balance sheet, profit and loss account and the notes thereto, audit report and also to furnish reasons and make disclosures in support of the various claims made in the return. On 11.01.2010, an enquiry was initiated by issue of notice under Section 142(1) of the Act and several explanations were sought with respect to the return of income and the various claims made by the assessee, and other clarifications. The notice

issued on 12.08.20101, again under Section 142(1), called upon the petitioner to furnish the details as per the earlier notice dated 11.01.2010 and also required the petitioner to file the audit report along with balance sheet, profit & loss account and the computation of income. The petitioner was also directed to file the history of its income tax assessments for the past two years together with copies of the assessment orders. This requirement was complied with by the petitioner on 01.09.2010. On 04.07.2011, the respondent no.2 (Assessing Officer) issued another notice under Section 142(1) calling upon the petitioner to furnish, inter alia, copies of the balance sheet, profit & loss account, computation of income and the audit report for the assessment year 2008-2009. Under cover of a letter dated 12.07.2011, the petitioner complied with several requirements as directed by the Assessing Officer by the aforesaid notices. On 14.10.2011, another notice was issued by the Assessing Officer under Section 142(1), calling upon the petitioner to submit information in respect of ten points raised by him which included the names and addresses along with ledger accounts in respect of the advances from customers as per Schedule "1" and details of transactions made with related parties along with the valuation of debtors together with copies of the ledger accounts. By this notice, the respondent called upon the petitioner to submit the information on 18.10.2011. However, since the notice was received by the petitioner only on 18.10.2011, it appears that a request was made to the Assessing Officer to take up the hearing of the case on 19.10.2011, which was accepted by him.

3. On 31.10.2011, the petitioner made detailed submissions in writing before the Assessing Officer through its letter of the said date. This letter referred to the notices issued by the Assessing Officer under Section 142(1) and Section 143(2) as well as the hearing which took place on 19.10.2011. The information was given under various heads. In paragraph 9 of the said letter, the petitioner referred to the request of the Assessing Officer on 19.10.2011 to show cause as to why a special audit under Section 142(2A) of the Act should not be conducted in the petitioner's case having regard to the nature and complexity in the financial statements of the petitioner, and then proceeded to make submissions objecting to the proposal. The objections were made in some detail; predominantly they were based on the premise that there was nothing "complex" or "convoluted" in the financial statements of the petitioner so as to justify the conduct of a special audit, that the financial statements were duly

audited by the statutory auditors after verification of the books of account and other relevant documents without any adverse remark or finding and that the transactions entered into by the petitioner and the income and expenditure in relation thereto were in the course of normal business operations. The submissions were sought to be supported by reference to case law.

4. On 28.11.2011, the Assessing Officer, the respondent no.2 herein, submitted the terms of reference for special audit in the case of the petitioner as also in the case of M/s. AT & T Global Network Services Pvt. Ltd., to the Commissioner of Income Tax, Delhi-1, New Delhi (Annexure P-19). The terms of reference were actually submitted by the Additional Commissioner of Income Tax, Range-2, New Delhi through whom it is required to be submitted by the Assessing Officer. So far as the petitioner is concerned, the terms of reference for special audit were as follows:

> ***"(ii) AT&T Communication Services India Pvt. Ltd.***
>
> Related party transactions with AT&T Global Network Services Pvt. Ltd.
>
> The mode of computation has to be worked out.
>
> ***(Brief facts: As per Annexure "E")***
>
> *Opportunity given to the assessee vide Order Sheet entries dated 19/10.2011 & 14/11/2011 as per provisions of the Act, to explain its position regarding complexities and Special Audit. In response to the same, the assessee's submitted its reply on 31/10/2011 & 16/11/2011 respectively, which is placed on record."*

Annexure "E" enclosed to the aforesaid letter of the Additional CIT was in the following terms:

> ***"(ii) AT&T Communication Services India Pvt. Ltd.***
>
> ***Brief Facts: (Annexure " E")***
>
> *The related party transactions relates to sale of Service Income; the Net Income is reported as per debit of costs as per issue involved in the allocation of costs for intergroup charges in the case of its sister concern AT&T Global Network Services Pvt. Ltd. dealt with at point No.1 of this note.*

> *This assessee is an associated party of AT&T Global Network Services Pvt. Ltd. and is engaged in same of line of business, hence, both the assesses are referred together for Special Audit."*

5. In addition to the terms of reference made by the Additional CIT on 26.11.2011, which was itself based on the terms of reference for special audit as forwarded by the respondent no.2, which in turn was a joint reference in the case of the petitioner as well as in the case of AT& T Global Network Services Pvt. Ltd., the following terms of reference regarding the special audit in the case of the petitioner were sent by the respondent no.2 to the respondent no.1 through proper channel. In this letter, the respondent no.2 stipulated the following terms of reference in the petitioner's case as under:

> *" 1. The assessee has shown revenue/income of Rs.16,39,22,134/-, Rs,1,02,31,081/- and Rs.25,91,859/- as sale of services to group concerns namely, M/s AT&T Communication Services International Inc., USA, M/s AT&T Solutions Inc., USA and M/s AT&T Singapore Pte. Ltd. respectively. The auditor may identify the method/accounting standard applied for recognition of income on this account and also report on the correctness of the income recognised.*
>
> *1. The assessee has claimed expenses of Rs.3,94,60,579/- incurred in foreign currency on salary and other perquisites. The auditor may report whether this expenditure relates to assessee's business and whether this expenses is paid to assessee's employees.*
>
> *2. The assessee has shown purchase of equipment of Rs.2,47,69,200/- in foreign currency. The auditor may identify the income reported by the assessee in respect of this equipment and identify the equipment. The auditor may also report whether any foreign exchange fluctuation has arisen on this transaction and whether it is on a revenue or capital account.*
>
> *Yours faithfully,*
> *Sd/-*
> *A.K.Dhir*
> *Asst. Commissioner of Income Tax,*
> *Circle 2(1), New Delhi."*

6. On 23.12.2011, the Commissioner of Income Tax, Delhi-1, New Delhi, who is the first respondent herein accorded his approval to the special audit proposed in the case of the petitioner and appointed M/s. T.R. Chaddha, Chartered Accountant, Kuthiala Building, Connaught Place, New Delhi as the special auditors.

7. It is noteworthy that in the approval accorded by the respondent no.1, by letter dated 23.12.2011, there is reference to the terms of reference dated 16.12.2011, sent by the respondent no.2 herein.

8. The contention put forth on behalf of the petitioner against the order for special audit in the petitioner's case is threefold; (i) the books of account were not called for or examined by the Assessing Officer and no special audit can be ordered without examining the books of account of the assessee as without such an examination the Assessing Officer would not be in position to assess the nature and complexity of the accounts; (ii) no show cause notice was issued before ordering a special audit and thus there was a breach of the rules of natural justice and ; (iii) there was complete non-application of mind by the first respondent while according approval to the proposal for special audit in the petitioner's case. In support of this contention, our attention was drawn to the decisions of the Supreme Court in **Rajesh Kumar & Ors. Vs. Dy. CIT** (2006) 287 ITR 91 and **Sahara India (Firm). Vs. Commissioner Of Income-Tax And Another** (2008) 300 ITR 403, as also the judgment of this Court in **DDA Vs. UOI** (2013) 350 ITR 432.

9. One subsidiary contention raised on behalf of the petitioner was that there was an interpolation in the order sheet relating to the proceedings before the Assessing Officer on 14.10.2011 and 19.10.2011 so as to make it appear as if there was an examination of the books of account by the Assessing Officer before proposing a special audit. The submission is that there was in fact no examination of the books of account of the petitioner.

10. The learned standing counsel appearing for the revenue submitted that Section 142(2A) refers only to ".....nature and complexity of the accounts of the assessee....." and it does not refer to "books of account", and that the word "accounts" is broader than "books of account" as held by the Supreme Court in **Rajesh Kumar** (supra). He further submitted that the complexity of the accounts would be clear from the information supplied by the petitioner in its letter dated 31.10.2011

(Annexure P-13) written in response to the various notices issued by the Assessing Officer. He pointed out that the Assessing Officer in the terms of reference made vide letter dated 16.11.2011 has recognized the need to identify the method and the accounting standard applied for recognition of income from sale of services to group concerns. Reference is also made to paragraph 2 of the order passed by the respondent no.2 under Section 142(2A), which is the impugned order, in which there is a discussion of the complexities in the accounts of the assessee including the complexity in the matter of attributing and allocating the costs incurred by the petitioner against three type of telecommunications services rendered by the petitioner which gave rise to its revenues. The discussion also includes the method to be adopted in apportioning the infrastructure costs, last mile charges and the inter group charges against the revenues. According to the learned senior standing counsel, these complexities are sufficient to justify the reference to a special audit. In this behalf reliance was placed on a judgement of this court in **Central Warehousing Cooperation Vs. Secretary, Department of Revenue & Ors.** (2005) 277 ITR 452.

11. The learned standing counsel also pointed out that the special audit is now completed and the audit report is ready with the special auditor. He also pointed out that the other company of the same group, namely, AT&T Global Network Services Ltd., in which case also a special audit was approved, did not object to the same and that as a result of the special audit in that case, substantial tax evasion was detected. So far as the allegation of interpolation in the order sheet entries made on 14.10.2011 and 19.10.2011 is concerned, the learned standing counsel pointed out that by the notice dated 14.10.2011 issued under Section 142(1) of the Act, the respondent no.2 had inter alia called for the ledger accounts relating to the advances received from customers and those relating to the debtors and related parties and it was these ledger accounts, which were subjected to examination by the A.O. on 19.10.2011. He denied that there was any interpolation in the order sheet entries.

12. We have carefully considered the material on record in the light of the rival submissions, but find no merit in the writ petition.

13. So far as the contention that there was no valid show cause notice issued by the A.O. under Section 142(2A) is concerned, we find no merit in the same. As already pointed out, even in the petitioner's

letter dated 31.10.2011, addressed to the respondent in response to various notices issued by the latter and with reference to the subsequent discussions held in the course of the hearing which took place on 19.10.2011, the petitioner has submitted an elaborate reply in paragraph 9 of the letter under the caption "show cause as to why special audit under Section 142(2A) of the Act should not be conducted in the instant case". This paragraph clearly refers to the request made by the respondent on 19.10.2011 to the petitioner to show cause as to why special audit should not be conducted because of the nature and complexity in the financial statements. The letter then proceeds to elaborately raise objections to the show cause notice, supported by case law. The objections run into more than five pages. The petitioner in these objections has harped that there was no complexity in its accounts and that the provisions of Section 142(2A) not only require complexity in the accounts, but also require that there must be some prejudice to the interests of the revenue. The petitioner also objected to the show cause notice on the ground that application of mind is required by the tax officer in order to reach an objective satisfaction and the requirement of Instruction No. 1076 dated 12.07.1997 issued by the CBDT was quoted in the letter. In the light of these detailed objections it is ideal on the part of the petitioner to contend that no show cause notice was issued by the A.O. Section 142(2A), before insertion of the first proviso by the Finance Act, 2007, w.e.f. 1.6.2007, did not contemplate any show cause notice. Even so the Supreme Court in the case of **Rajesh Kumar** (supra) held that since an order directing special audit entails civil consequences, the principles of natural justice in the form of hearing have to be complied with, though the hearing need not be elaborate. It was also held that the notice to show cause may contain the approval issues that the A.O. thinks to be necessary and need not be elaborate or detailed ones. This view was affirmed by the larger Bench of the Supreme Court in **Sahara India (Firm) Vs. CIT** (supra). The requirement of the first proviso that there should be adherence to the rules of natural justice and that the assessee should be given an opportunity of being heard before issuing a direction for special audit is satisfied in the present case. The respondent no.2 did require the petitioner to show cause as to why a special audit should not be directed in this case on 19.10.2011; the show cause notice was replied to by the petitioner by a letter dated 31.10.2011. The contention of the petitioner that no show cause notice was issued therefore fails.

14. The next contention to the effect that the books of account were not called for and examined by the A.O. and therefore the direction for special audit is bad in law is also without merit. As already pointed out while referring to the contention of the learned standing counsel for the Income Tax Department, sub-section (2A) of Section 142 does not require the "books of account" to be examined by the A.O. It empowers the A.O., with the previous approval of the Chief Commissioner or Commissioner of Income Tax, to direct the assessee to get the accounts audited if he is of the opinion that it is necessary to do so " having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue.....". It has been held by a Division Bench of this Court in **Rajesh Kumar, Prop. Surya Trading Vs. Dy.CIT** (2005) 275 ITR 641, that the expression "accounts" used in the section does not refer merely to "books of account" of the assessee; it could include the books of account, balance sheets and all other records which are available to the A.O. during the assessment proceedings. It refers to the other records available with the A.O. not only in the course of the assessment proceedings but also at any stage subsequent thereto. It was held that the expression "accounts" cannot be confined to books of account as submitted by the assessee, as it would amount to giving an interpretation which completely defeats the very object of the section. It was further held that the fact that the accounts of the assessee are subject to audit under some other statute is also no ground to hold that in such a case the A.O. cannot direct a special audit. It was observed that in addition to the books of account, the A.O. may also take into consideration such other documents related thereto and which would be part of the assessment proceedings. This judgment was followed by another Division Bench of this court in **Central Warehousing Corporation** (supra). In the light of these authorities, it is not possible to accept the contention that the A.O. cannot direct a special audit unless he examines the books of account.

15. In the case before us the A.O. has taken the view that there is complexity in the accounts of the assessee. He has referred to the three segments or sources of revenue of the petitioner and has held that it is required to identify the method and the relevant accounting standard applicable for recognition of income from these revenues and also to ascertain the correctness of the income recognized. Paragraph 2 of the order passed under Section 142(2A) on 26.12.2011 contains a detailed discussion as to the complexity of the accounts. The profit and loss

account, balance sheet and the computation of the income were before the A.O. It can hardly be disputed that the profit and loss account and the balance sheet fit the description of " accounts". The complexity arising out of such accounts is the difficulty in allocating the expenses incurred by the petitioner against the three segments of revenues namely; (i) market research, administrative support and liaison services; (ii) network connectivity services and (iii) managed network services. The A.O. further proceeds to state in the impugned order that the allocation of costs/ expenses impacts the profit and loss account (and the ultimate profit figure) and the method and the basis for such allocation is required to be verified and examined by the special auditor. The other complexity adverted to by the respondent is the plea taken by the petitioner that the overseas payments cannot be characterized as fees for technical services but represented purchase price of goods and services and therefore there was no obligation on its part to deduct tax under Section 195. Yet one more complexity is the nature of the other costs debited in the profit and loss account which include infrastructure costs, last mile charges and inter group charges. The precise nature of these costs is required to be ascertained not only from the legal aspect but also from the accounting aspect, to determine the applicability of Section 40(a)(ia). One more important issue which according the A.O. is quite complex is the "last mile charges". Noting that this is a heavily capital intensive project and the capitalised infrastructure is eligible for depreciation, the respondent has observed that the assessee has deducted the entire last mile charges from the services revenue thereby nullifying any income on this score. According to him the inclusion of the last mile charges in the profit and loss account as a debit, when the capitalised infrastructure cost is eligible also to depreciation, may amount to double deduction. Whether this would amount to double deduction is an aspect which the special audit was required to examined.

16. The question whether the accounts and the related documents and records available with the A.O. present complexity is essentially to be decided by the A.O. and in this area the power of the court to intrude should necessarily be used sparingly. It is the A.O. who has to complete the assessment. It is he who has to understand and appreciate the accounts. If he finds that the accounts are complex, the court normally will not interfere under Article 226. The power of the court to control the discretion of the A.O. in this field is limited only to examine whether his discretion

to refer the accounts for special audit was exercised objectively, as far as the accounts, records, documents and other material present before the A.O. would permit. There must be valid material before the A.O. from which he apprehends that there is complexity. As to what material would make the accounts complex is essentially for the A.O. to determine and unless his decision can be attacked on the ground of perversity or absolute arbitrariness or mala fide, it should not be interfered with. In the present case we are satisfied that the accounts including the documents, records and other material before the A.O. did make the issues for his decision complex requiring a special audit. We are accordingly not inclined to accept the contention of the assessee to the contrary.

17. The other contention is that there was non-application of mind by the respondent no.1 while according his approval to the proposal for special audit. We do not think that this contention is justified at all. The terms of reference sent by the respondent no.2 were before him. There is no requirement that the approving authority has to record elaborate reasons for approval. Of course, approval cannot be mechanical. We find that the approval was forwarded through the Additional CIT, Range-2, New Delhi, under cover of letter dated 28.11.2011. In this letter there is also a reference to the related parties' transaction and to the assessee's detailed reply dated 31.10.2011. The CIT had before him the views of the respondent no.2 as also those of the petitioner as to what it had to say in reply. The approval was accorded by the CIT on 23.12.2011. It cannot, therefore, be said that the CIT did not apply his mind to the proposal for special audit. The contention of the petitioner to the contrary is not accepted.

18. In the course of the arguments it was submitted on behalf of the petitioner that the assessing officer referred the matter to the Transfer Pricing Officer under Section 92 CA of the Act on which the latter did make an addition of Rs.1.53 crores on account of transactions with the petitioner's associated enterprises and it was at that stage the assessing officer made a reference to special audit; the suggestion was that the exercise was uncalled for since the direction of the TPO was binding on the AO in any case. Statutorily, the AO is empowered to refer the accounts to the special auditor "at any stage of the proceedings" – S.142(2A); there is no bar, and there is nothing in the sub-section which makes its provisions subject to the powers of the TPO. The reference to special audit cannot be held to be contrary to law on that score.

19. In the view we have taken, we do not consider it necessary to examine the contention of the petitioner based on alleged interpolation of entries in the order sheet on 14.10.2011 and 19.10.2011.

20. In the result the writ petition and all connected applications are dismissed with no order as to costs.

ILR (2014) III DELHI 2143
ITA

KOSTUB INVESTMENT LTD. .....APPELLANT

VERSUS

COMMISSIONER OF INCOME TAX ....RESPONDENT

(S. RAVINDRA BHAT & RAJIV SHAKDHER, JJ.)

ITA 10/2014 DATE OF DECISION: 25.02.2014

Income Tax Act, 1961—Section 37(1)—Expenditure charageable under profit and gains of business or profession—Burden of showing expenditure would be wholly and exclusively for the purpose of business is upon the assessee—Personal expenditure cannot be claimed as business expenditure—No intent seen in the Statute which prescribes that only expenditure strictly for business can be considered for deduction—Decision to deduct necessarily to be case dependent.

Income Tax Act, 1961—Section 37(1)—Expenditure chargeable under profit and gains of business or profession—Expenditure of Rs.23,16,942/- under the head "Education and Training Expenses"—Incurred on higher education (MBA course in U.K.) of son of Directors—Whether qualified for deduction under Section 37(1)—Decision to deduct necessarily to be case dependent—Beneficiary worked in the company for one year before opting higher education, bonded himself to work for a further five years after finishing MBA and higher education linked to assessee's business—Held: Yes Chosen subject of study would aid and assist the company and is aimed at adding value to its business—Assessee entitled to deduction under Section 37(1).

This Court has considered the materials on record. There can be no doubt that the burden of showing that expenditure would be wholly and exclusively for the purpose of business under Section 37(1) is upon the assessee and that personal expenditure cannot be claimed as business expenditure. The question is whether these twin requirements are said to have been satisfied in the circumstances of this case. The first is what are the materials on record? The assessee furnished its resolution authorizing disbursement of the expenses to fund Dushyant Poddar's MBA. It secured a bond from him, by which he undertook to work for five years after return within a salary band and he had in fact worked after graduating from the University for about a year before starting his MBA course. In Natco Exports (supra), the student had applied directly when she was pursuing her graduation. There was a seamless transition as it were between the chosen subject of her undergraduate course and that which she chose to pursue abroad. In the present case, the facts are different. Dushyant Poddar was a commerce graduate. The assessee's business is in investments and securities. He wished to pursue an MBA after serving for an year with the company and committed himself to work for a further five years after finishing his MBA. There is nothing on record to suggest that such a transaction is not honest. Furthermore, the observation in **Natco Exports** (supra) with respect to a policy appears to have been made in the given context of the facts. The Court was considerably swayed by the fact that the Director's daughter pursued higher studies in respect of a course completely unconnected with the business of the assessee.

Such is not the case here. Dushyant Poddar not only worked but – as stated earlier – his chosen subject of study would aid and assist the company and is aimed at adding value to its business. **(Para 8)**

Whilst there may be some grain of truth that there might be a tendency in business concerns to claim deductions under Section 37, and foist personal expenditure, such a tendency itself cannot result in an unspoken bias against claims for funding higher education abroad of the employees of the concern. As to whether the assessee would have similarly assisted another employee unrelated to its management is not a question which this Court has to consider. But that it has chosen to fund the higher education of one of its Director's sons in a field intimately connected with its business is a crucial factor that the Court cannot ignore. It would be unwise for the Court to require all assessees and business concerns to frame a policy with respect to how educational funding of its employees generally and a class thereof, i.e. children of its management or Directors would be done. Nor would it be wise to universalize or rationalize that in the absence of such a policy, funding of employees of one class – unrelated to the management – would qualify for deduction under Section 37(1). We do not see any such intent in the statute which prescribes that only expenditure strictly for business can be considered for deduction. Necessarily, the decision to deduct is to be case-dependent. **(Para 9)**

[LB]

APPEARANCES:

FOR THE APPELLANT : Ms. Prem Lata Bansal, Sr. Advocate with Sh. Ram Avtar Bansal and Sh.Naman Nayak Advocate.

FOR THE RESPONDENT : Sh. Sanjeev Sabharwal, Sr. Standing Counsel with Sh. Ruchir Bhatia, Jr. Standing Counsel.

CASES REFERRED TO:

1. *Natco Exports Pvt. Ltd.* vs. *CIT,* 2012 (345) ITR 188.
2. *Mustang Mouldings P. Ltd.* vs. *ITO,* 2008 (306) ITR 361.

Result: Appeal allowed.

S. RAVINDRA BHAT

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1. The present appeal is directed against an order of the Income Tax Appellate Tribunal ("ITAT") dated 09.01.2012, and involves decisions on the following question of law framed at the time of admission:

> *"Did the Tribunal fall into error of law in holding that the appellant's claim that the amount has been spent during the Assessment Year 2006-07, for the higher education of Sh. Dushyant Poddar, a son of its Director, was not liable as "business expenditure" under Section 37 of the Income Tax Act?"*

2. For the year under consideration, the appellant company (hereinafter referred to as assessee) filed its return declaring loss at Rs. 2,08,72,440/- under the normal provisions and book profit at Rs.1,35,42,270/- under Section 115JB of the Income Tax Act, 1961 ("the Act"), on 24.11.2006. In the Profit and Loss Account annexed to the return of income, assessee had claimed a sum of Rs. 23,16,942/- as expenses incurred under the head "Education & Training Expenses". These expenses had been incurred by the assessee on higher education of Shri Dushyant Poddar, an employee of the company, who happens to be the son of the Directors Shri Lalit Poddar and Smt Saroj Poddar, for undertaking an MBA Course in the U.K.

3. During the assessment proceeding, the Assessing Officer ("AO") required the assessee to justify its claim with respect to the said expenses. The assessee produced the extract from the minutes of the meeting of the Board of Directors dated 10.02.2005 in which decision was taken to send Dushyant Poddar for further study in U.K. and also the Employment Bond entered into with him. The assessee explained to the AO that Dushyant Poddar was a Graduate having completed his B.Com (H) from Delhi University and working with it (i.e. the assessee) for a salary of

Rs. 10,000/- p.m. Since he was a brilliant student and the company was in need of Manager (Marketing) who could study the mood of the investment market and the prospects taking into consideration the economy of India and other advanced countries and an individual who could also take decisions with respect to investment in shares and securities, the Board of Directors in the meeting held on 10.02.2005 took a conscious decision to send Dushyant Poddar for pursuing the course of MBA from U.K. and to incur the expenditure up to the extent of Rs. 30 lakhs on his study and training.

4. The assessee also stated in the resolution that on coming back to India after completion of the studies, Dushyant Poddar will serve the assessee company at least for 5 years on a remuneration as mutually agreed with the Board of Directors subject to minimum of Rs.10,000/- and maximum of Rs. 25,000/- p.m. The assessee relied on a resolution of the Board of Directors to say that in the event of breach of bond, suitable action for recovery of the amount would be taken against Dushyant Poddar. He also furnished the bond, as required. Eventually, Dushyant Poddar was sent to U.K. for further study. The assessee incurred an expenditure of Rs. 23,16,942/- during the year under consideration.

5. The AO in his order refused to accept the assessee's contentions and rejected the argument that the sum of Rs. 23,16,942/- could be claimed as a deduction under Section 37 of the Act. Aggrieved by this disallowance, the assessee carried the matter in appeal. The CIT (Appeals) upheld the disallowance in the appellate proceedings. The CIT examined the bond furnished by Dushyant Poddar and observed that it was on plain paper and the other query – as to what was the employee's response to the University's query with respect to funding for education – remained unanswered. The CIT (Appeals) also was influenced by the fact that the bond was executed on 01.04.2005 after Dushyant Poddar had been selected for completing his MBA from the U.K. University. In view of these reasons, the assessee's appeal was rejected. The further appeal to the ITAT was dismissed by the impugned order. In the impugned order, the ITAT relied upon the reasoning of the previous decision of this Court in **Natco Exports Pvt. Ltd. v. CIT,** 2012 (345) ITR 188, particularly the observations that while claiming such deductions, a distinction has to be made between personal expenditure and that which is incurred for the purpose of business. The ITAT's view – that in the absence of any policy in the company to fund the higher education – the applicant's

aspirations can be believed, except in the case of benefit accruing to Dushyant Poddar, the son of a Director. In these circumstances, the disallowance was upheld.

6. In support of the appeal, the assessee argues that the requirement spelt out in **Natco Exports** (supra) has to be seen contextually. In that case, the course opted for by the employee– daughter of a Director – had no relation with the assessee's business. She, unlike Dushyant Poddar, had not taken-up employment with the assessee company and had chosen to apply for higher educational studies directly from the University. It was in the context of such facts that the decision in **Natco Exports** (supra) was rendered. Learned counsel relied upon a judgment of the Bombay High Court in **Sakal Papers Private Limited v. Commissioner of Income Tax,** 1978 (114) ITR 256 for the proposition that even in the absence of commitment or contract or bond, an expenditure which is otherwise proper cannot be disallowed to the company, especially when it can result in the trainee securing a degree that would be of assistance to the assessee. Likewise, the expenditure incurred for pursuit for higher studies by a partner which can yield beneficial results to the company was held to be business expenditure under Section 37 in **Commissioner of Income Tax v. Kohinoor Paper Products,** 1997 (226) ITR 220 (MP). Learned counsel also relied upon the decision of the Karnataka High Court in **CIT v. Ras Information Technologies (Pvt) Ltd.,** 2011 (12) Taxman 158 (Kar).

7. Learned counsel for the revenue relied upon **Natco Exports** (supra) and submitted that the onus to show that the expenditure would accrue to the advantage of the assessee's business has to be discharged first and that while doing so, expenditure which is otherwise personal cannot be generally allowed to be deducted. It was submitted that in **Natco** Exports (supra), the decision of the **Bombay High Court in Sakal** (supra) was noticed and the Court further held that **Sakal** (supra) stood distinguished by **Mustang Mouldings P. Ltd. v. ITO,** 2008 (306) ITR 361. It was submitted that given these decisions and the fact which emerged from a cumulative reading of the AO and the CIT (Appeals), the impugned order cannot be termed as erroneous and does not call for interference.

8. This Court has considered the materials on record. There can be no doubt that the burden of showing that expenditure would be wholly

and exclusively for the purpose of business under Section 37(1) is upon the assessee and that personal expenditure cannot be claimed as business expenditure. The question is whether these twin requirements are said to have been satisfied in the circumstances of this case. The first is what are the materials on record? The assessee furnished its resolution authorizing disbursement of the expenses to fund Dushyant Poddar's MBA. It secured a bond from him, by which he undertook to work for five years after return within a salary band and he had in fact worked after graduating from the University for about a year before starting his MBA course. In Natco Exports (supra), the student had applied directly when she was pursuing her graduation. There was a seamless transition as it were between the chosen subject of her undergraduate course and that which she chose to pursue abroad. In the present case, the facts are different. Dushyant Poddar was a commerce graduate. The assessee's business is in investments and securities. He wished to pursue an MBA after serving for an year with the company and committed himself to work for a further five years after finishing his MBA. There is nothing on record to suggest that such a transaction is not honest. Furthermore, the observation in **Natco Exports** (supra) with respect to a policy appears to have been made in the given context of the facts. The Court was considerably swayed by the fact that the Director's daughter pursued higher studies in respect of a course completely unconnected with the business of the assessee. Such is not the case here. Dushyant Poddar not only worked but – as stated earlier – his chosen subject of study would aid and assist the company and is aimed at adding value to its business.

9. Whilst there may be some grain of truth that there might be a tendency in business concerns to claim deductions under Section 37, and foist personal expenditure, such a tendency itself cannot result in an unspoken bias against claims for funding higher education abroad of the employees of the concern. As to whether the assessee would have similarly assisted another employee unrelated to its management is not a question which this Court has to consider. But that it has chosen to fund the higher education of one of its Director's sons in a field intimately connected with its business is a crucial factor that the Court cannot ignore. It would be unwise for the Court to require all assessees and business concerns to frame a policy with respect to how educational funding of its employees generally and a class thereof, i.e. children of its management or Directors would be done. Nor would it be wise to universalize or rationalize that

in the absence of such a policy, funding of employees of one class – unrelated to the management – would qualify for deduction under Section 37(1). We do not see any such intent in the statute which prescribes that only expenditure strictly for business can be considered for deduction. Necessarily, the decision to deduct is to be case-dependent.

10. In view of the above discussion, having regard to the circumstances of the case, this Court is of the opinion that the expenditure claimed by the assessee to fund the higher education of its employee to the tune of Rs. 23,16,942/- had an intimate and direct connection with its business, i.e. dealing in security and investments. It was, therefore, appropriately deductible under Section 37(1).

11. The AO is thus directed to grant the deduction claimed. The impugned order and that of the lower authorities are hereby set aside. The appeal is allowed in the above terms. No costs.

ILR (2014) III DELHI 2150
CS (OS)

DISNEY ENTERPRISE, INC & ANR. ...APPELLANT

VERSUS

DHIRAJ & ANR. .....DEFENDENT

(G.S. SISTANI, J.)

CS (OS) : 1025/2012 DATE OF DECISION: 25.02.2014

Code of Civil Procedure, 1908—Suit for the permanent injunction restraining infringement of trade marks and Copyrights, seeking damages and rendition of accounts—Defendants despite service failed to appear—Ex-Parte evidence led on behalf of the plaintiffs to Show that they are the subsidiares of the Walt Disney Company and have established themselves

as creators and distributors of highly creative and entertaining animated motion pictures and television programmes and whose unique characters namely Mickey Mouse, Minnie Mouse, Donald Duck, Daisy Duck, Goofy Pluto, Winnie the Pooh, Tigger, Hannah Montana, etc. stand registered as the trademarks of the plaintiffs across many countries including India—Allegation of the plaintiff that the defendants have infringed the copyrights and trademarks of the plaintiff by selling, trading and distributing a variety of bags with the plaintiff's trademarks and copyrights protected characters affixed on them—Report of the Local Commissioner appointed by the court confirmed that on inspection of the premises of the defendants, 40 school bags bearing the plaintiff's trademark were found—Held: Affidavit by way of evidence filed on record alongwith documents remains unrebutted. Report of the Local Commissioner supports the case put forward by the plaintiffs. Hence plaintiff is entitled to the injunction sought. As regards the damages to be awarded, since the defendants has deliberately stayed away from the present proceeding an inquiry into the accounts of the defendants for determination of damages cannot take place. However plaintiff still entitled to the punitive damages to the tune of Rs. 2 Lacs for a defendant who choose to stay away from the proceedings of the court, should not be permitted to enjoy the benefits of evasion of court proceeding.

I have heard counsel for the plaintiff carefully. The affidavit by way of evidence which has been filed and also the documents which have been placed on record, are unrebutted. The relevant list of all registrations of the plaintiffs have been marked and exhibited as Ex.PW-1/2. Copy of the legal proceeding certificates of trade-mark registrations have been collectively exhibited as Ex.PW-1/3, also the copies of the relevant extracts of the trade mark registrations of the plaintiffs' characters have been collectively

exhibited as Ex.PW-1/4, which would show that the plaintiffs are the registered proprietors of the trade mark and the characters. The plaintiffs have also been able to establish based on the copyright registration certificates, collectively exhibited as Ex.PW-1/5, that they hold copyrights over the characters, across the world, including India; and the plaintiffs alone have the right to reproduce or authorize or licence its re-production either in two or three dimensional forms. Plaintiffs have also been able to establish before the Court that they enjoy enormous goodwill and also that they have been vigilant in protecting their rights. Copies of the orders passed in favour of the plaintiffs have been filed and collectively exhibited as Ex.PW-1/8. The local commissioner has also filed his report, wherein he states that on inspection he found more than 40 school bags bearing the plaintiff's trademark. The local commissioner has also filed supporting photographs along with the report. **(Para 16)**

The plaintiff has also claimed damages for loss of reputation, business and cost of proceedings. It is trite to say that the defendant has deliberately stayed away from the present proceedings with the result that an enquiry into the accounts of the defendant for determination of damages cannot take place. In the case of **Time Incorporated v. Lokesh Srivastava and Anr.** Reported at 2005 (30) PTC 3 (Del) where apart from compensatory damages of Rs.5 lakhs, punitive damages have also been awarded, it would be useful to reproduce paras 7 and 8 of the said judgment, which are as under :-

> "7. Coming to the claim of Rs.5 lacs as punitive and exemplary damages for the flagrant infringement of the plaintiff's trade mark, this Court is of the considered view that a distinction has to be drawn between compensatory damages and punitive damages. The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in

such unlawful activities. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case in hand itself, it is not only the plaintiff, who has suffered on account of the infringement of its trade mark and Magazine design but a large number of readers of the defendants' Magazine 'TIME ASIA SANSKARAN' also have suffered by purchasing the defendants' Magazines under an impression that the same are from the reputed publishing house of the plaintiff company.

8. This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade marks, copy rights, patents, etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In **Mathias v. Accor Economi Lodging, Inc.,** 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional

> purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions who they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs.5 lacs only which can be safely awarded. Had it been higher even this court would not have hesitated in awarding the same. The Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement." **(Para 17)**

I am in agreement with the aforesaid submission of learned counsel for the plaintiffs that damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where a defendant who appears in Court and submits its account books would be liable for damages, while another defendant who, chooses to stay away from court proceedings would escape the liability on account of failure of the availability of account books. A party who chooses not to participate in court proceedings and stays away must, thus, suffer the consequences of damages as stated and set out by the plaintiffs. There is a larger public purpose involved to discourage such parties from indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. R.C. Chopra, J. has very succinctly set out in **Time Incorporated's** case (supra) that punitive damages are founded on the philosophy of corrective justice. **(Para 18)**

Important Issue Involved: A defendant who chooses to stay away from the proceedings of a court, is not to be permitted to enjoy the benefits of evasion of court proceedings.

[An Gr]

APPEARANCE:

FOR THE PLAINTIFF : Mr.Aditya Kutty, Advocate

FOR THE DEFANDANT : None

CASES REFERRED TO:

1. *Time Incorporated* vs. *Lokesh Srivastava and Anr.* Reported at 2005 (30) PTC 3 (Del).
2. *Mathias* vs. *Accor Economi Lodging, Inc.,* 347 F.3d 672 (7th Cir. 2003).

RESULT: Suit decreed

G.S. SISTANI, J. (Oral)

1. Plaintiffs have filed the present suit for permanent injunction, restraining infringement of trademarks and copyrights, passing off, dilution, damages, rendition of accounts of profits and delivery up.

2. Summons were issued in the suit and in the application filed by the plaintiffs under Order 39 Rules 1 and 2 the following interim order was passed on 18.4.2012:

> "I have heard counsel for the plaintiffs and also perused the plaint, application and the documents filed along with the present plaint. I am satisfied that it is a fit case for grant of for ex parte ad interim injunction. Accordingly, till the next date of hearing, defendants, their principal officers, Directors, agents, franchisees, servants and licensees are restrained from marketing, offering for sale, selling, advertising, distributing – directly or indirectly – dealing in any products, including bags such as school bags, travel bags, bearing the word mark or character device or artistic works as identical or deceptively similar to the trade mark or copyrights of the plaintiffs including but not limited to Mickey Mouse, Minnie Mouse, Winnie The Pooh , 'Pooh' and any other character/mark/ device/ artistic work of the plaintiffs. Plaintiffs shall comply with the provisions of Order XXXIX Rule 3 CPC within two weeks from today."

3. The summons issued to the defendants remained unserved, although the Local Commissioner, who was appointed in the matter and had visited the premises of the defendants, submitted in his report that the defendants were aware of the pendency of the present suit. Since the defendants were keeping out of the way of accepting service, the plaintiffs filed an application under Order 5 Rule 20 CPC for substituted service. The defendants were thereafter served through publication in the newspaper 'The Statesman' and 'Dainik Jagran'.

4. Despite substituted service the defendants did not enter appearance, consequently they were proceeded ex parte on 10.1.12013.

5. Plaintiffs have filed the affidavit by way of ex parte evidence of Sh.Vishal Ahuja, the authorized signatory and lawful attorney of the plaintiffs. The affidavit has been marked as Ex.PW-1/A. The deponent has deposed on the lines of the plaint. It has been deposed by him that he has the power of attorney which authorizes him to file the suit. The power of attorney and other documents in relation to authorization are collectively exhibited as Ex.PW-1/1.

6. PW-1 has deposed that the plaintiff No. 1, Disney Enterprises Inc., is a corporation organized and existing under the laws of the State of Delaware in the United States of America, having its principal place of business at 500 South Buena Vista Street, Burbank, California 91521-0874, USA. It is also deposed that the plaintiff No.2, The Walt Disney Company (India) Pvt. Ltd, is the master licensee in respect of the Plaintiff No.1's copyrights and trademarks for promotion, publishing and merchandising purposes in the territory of India (hereinafter referred to as "DEI material"). Plaintiff No.2 is a Company registered in India having its registered office located at 4th Floor, Peninsula Tower – I, Ganapatrao Kadam Marg, Lower Parel, Mumbai – 400013 and its branch office located at C-301, Third Floor, Ansal Plaza, HUDCO Place, Andrews Ganj, New Delhi - 110049. It is also deposed that on account of being the master licensee of the Plaintiff No.1, the Plaintiff No. 2 is responsible for granting licenses for commercial exploitation of the Plaintiff No.1's copyrights and trademarks in India. Thus, any infringement or piracy of

the Plaintiff No.1's rights in its copyrights and trademarks, would detrimentally affect the Plaintiff No.2's business interest in India. Hence, the Plaintiff No.2 is an affected and interested party whenever the Plaintiff No.1's rights are infringed / violated in India.

7. PW-1 further deposed that the Plaintiffs are subsidiaries of The Walt Disney Company which is a leading and diversified international family entertainment and media enterprise. The Plaintiffs have established themselves in various businesses, particularly as creators and distributors of highly creative and entertaining animated motion pictures and television programmes, whose unique characters have achieved mythic proportions in popular culture. PW-1 has deposed that globally prominent characters forming an important part of the Plaintiffs bundle of intellectual property assets include, but are not limited to, Mickey Mouse, Minnie Mouse, Donald Duck, Daisy Duck, Goofy, Pluto, Winnie the Pooh, Tigger, Hannah Montana, etc. (hereinafter collectively referred to as "DISNEY Characters"); and that these DISNEY Characters have appeared in several motion pictures and television programmes for over eighty years now and have a huge fan-following of their own, cutting across all territorial, age and gender barriers.

8. PW-1 has next deposed that the Plaintiff No.1 has come to be recognized for the distinctive flavor of its work and has proven itself as a force to reckon with, not only in the entertainment industry but in every business it has ventured into. In addition to providing entertainment services, Plaintiff No.1 has enhanced the popularity and relatability of its protected characters, trademarks, trade name and service marks by building theme parks and spawning toys, books, bags, apparel and merchandise industry which revolves around these characters, trademarks, trade name and service marks. The degree of association of the DEI Materials, particularly Character Names, Character Devices or Characters with the Plaintiffs is so intense that any reference to these would lead a substantial part of the relevant public to recognize, acknowledge and associate the same exclusively with the Plaintiffs and the Plaintiffs alone. Moreover, irrespective of whether the goods and services are provided by the Plaintiffs themselves, or through its licensees, use of the DEI Materials in relation to any business, goods or services signifies the highest standards of quality and integrity. It is also deposed that the public has come to link such products which carry the Plaintiff's Marks with attributes such as unassailable integrity, highest levels of excellence, impeccable and

unimpeachable quality and value for money.

9. PW-1 has also deposed that the reputation and goodwill of the Plaintiff's Characters and trademarks spill over into every business that the Plaintiffs have ventured into, be it travel, real estate, management and design services, print and publishing industry, consumer goods and merchandising, internet and direct marketing, interactive media like gaming and mobile applications or educational services, apparel, beverages, clothing, giftware, novelty items, sports equipments, bags etc.

10. The witness has further deposed that to protect the DEI Materials, the Plaintiff has registered hundreds of Trademarks across many countries including India. It is also deposed that the characters "Mickey Mouse" and "Minnie Mouse" have been held to be extremely popular and famous world over and hence were accorded the status of „well known marks.. It is deposed that being the holder of the Trademarks over the DEI Materials, only the Plaintiff has the right to authorize usage or issue licenses related to the Trademarks. A list of all relevant registrations of the Plaintiff is attached and exhibited as Ex.PW-1/2. Copies of Legal Proceeding Certificates of the Trademark registrations are collectively exhibited as ExPW-1/3. In addition, copies of the relevant extracts of the trademark registrations of the Plaintiff's Characters, are also collectively exhibited as ExPW-1/4.

11. PW-1 has further deposed that to protect the DEI Materials, the Plaintiff also holds hundreds of Copyrights over the characters across the world including India. The plaintiff being the exclusive owner of Copyrights over them has the right to reproduce or authorize/ license its reproduction in either two dimensional or three directional forms. Copies of the Copyright Registration Certificates of the Plaintiff's character guide have been collectively exhibited as Ex.PW-1/5.

12. PW-1 has also deposed that every licensed product (including packaging) of the plaintiffs bears a permanently affixed copyright notice (generally ©Disney) and/or trademark notice as may be communicated by the Plaintiffs to the Licensee in writing. The authorized/ genuine merchandise of the Plaintiffs.]bears the name, address and country of origin of the Licensee on permanently affixed labels. Furthermore, authorized goods of the Plaintiff also contain certain statutory declarations such as name and/or address of the manufacturer/packer, retail sale price, quantity of goods, consumer helpline number etc. The photographs

of authorized goods bearing such authentication features have been filed along with the suit have been collectively exhibited as Ex.PW-1/6. Copy of a sample agreement executed between the Plaintiff No. 2 and prospective licensees have also been filed along with the suit and the same have been exhibited as Ex.PW-1/7.

13. It is also deposed that given the Plaintiffs' enormous goodwill, various entities have in the past often attempted to illegally encash on the Plaintiffs' reputation by unauthorizedly using their protected marks. It is also deposed that in the proceedings initiated by the Plaintiffs to protect their statutory and common law rights in the said marks, the courts have repeatedly safeguarded the Plaintiffs' rights and passed orders in their favour, copies of such orders have been filed and collectively exhibited as Ex.PW-1/8.

14. The witness has deposed that defendant No.1, Dhiraj is the proprietor of Defendant No.2 and lives at 5752, Singhara Chowk, Factory Road, Nabi Karim, New Delhi- 110055; and the defendant No.2 Dhiraj Bag House, which is the front for illegal activities of Defendant No. 1 is located at 5752 Singhara Chowk, Factory Road, Nabi Karim, New Delhi-110055. It is deposed that defendant No. 1 is in charge of defendant No.2 and is responsible for selling, wholesale distribution, trading, stocking and dealing in interalia a variety of bags, such as school bags, carry bags etc.

15. The witness has further deposed that in April 2012, the Plaintiffs were informed by their market sources that the Defendants herein are engaged in retailing, offering for sale, selling, trading, wholesale distribution and other dealings in a variety of bags bearing the Plaintiff's DEI Materials, without Plaintiff's permission. To verify the information, one Mr. Neeraj Dhaiya was deputed by the plaintiff to visit Defendant No.2 and verify the Defendant's involvement in such blatant infringement. On 03.04.2012, Mr. Neeraj visited defendant No.2 and reported that defendants were engaged in sale and distribution of goods with the Plaintiffs' trademark and copyright protected Characters affixed on them such as "Mickey mouse", "Minnie Mouse", "Winnie the Pooh" etc. And upon receipt of the investigation undertaken by Mr. Neeraj Dahiya, the present suit was filed.

16. I have heard counsel for the plaintiff carefully. The affidavit by way of evidence which has been filed and also the documents which

have been placed on record, are unrebutted. The relevant list of all registrations of the plaintiffs have been marked and exhibited as Ex.PW-1/2. Copy of the legal proceeding certificates of trade-mark registrations have been collectively exhibited as Ex.PW-1/3, also the copies of the relevant extracts of the trade mark registrations of the plaintiffs' characters have been collectively exhibited as Ex.PW-1/4, which would show that the plaintiffs are the registered proprietors of the trade mark and the characters. The plaintiffs have also been able to establish based on the copyright registration certificates, collectively exhibited as Ex.PW-1/5, that they hold copyrights over the characters, across the world, including India; and the plaintiffs alone have the right to reproduce or authorize or licence its re-production either in two or three dimensional forms. Plaintiffs have also been able to establish before the Court that they enjoy enormous goodwill and also that they have been vigilant in protecting their rights. Copies of the orders passed in favour of the plaintiffs have been filed and collectively exhibited as Ex.PW-1/8. The local commissioner has also filed his report, wherein he states that on inspection he found more than 40 school bags bearing the plaintiff's trademark. The local commissioner has also filed supporting photographs along with the report.

17. The plaintiff has also claimed damages for loss of reputation, business and cost of proceedings. It is trite to say that the defendant has deliberately stayed away from the present proceedings with the result that an enquiry into the accounts of the defendant for determination of damages cannot take place. In the case of **Time Incorporated v. Lokesh Srivastava and Anr.** Reported at 2005 (30) PTC 3 (Del) where apart from compensatory damages of Rs.5 lakhs, punitive damages have also been awarded, it would be useful to reproduce paras 7 and 8 of the said judgment, which are as under :-

> "7. Coming to the claim of Rs.5 lacs as punitive and exemplary damages for the flagrant infringement of the plaintiff's trade mark, this Court is of the considered view that a distinction has to be drawn between compensatory damages and punitive damages. The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and

infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case in hand itself, it is not only the plaintiff, who has suffered on account of the infringement of its trade mark and Magazine design but a large number of readers of the defendants' Magazine 'TIME ASIA SANSKARAN' also have suffered by purchasing the defendants' Magazines under an impression that the same are from the reputed publishing house of the plaintiff company.

8. This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade marks, copy rights, patents, etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In **Mathias v. Accor Economi Lodging, Inc.,** 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions who they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs.5 lacs only which

can be safely awarded. Had it been higher even this court would not have hesitated in awarding the same. The Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement."

18. I am in agreement with the aforesaid submission of learned counsel for the plaintiffs that damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where a defendant who appears in Court and submits its account books would be liable for damages, while another defendant who, chooses to stay away from court proceedings would escape the liability on account of failure of the availability of account books. A party who chooses not to participate in court proceedings and stays away must, thus, suffer the consequences of damages as stated and set out by the plaintiffs. There is a larger public purpose involved to discourage such parties from indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. R.C. Chopra, J. has very succinctly set out in **Time Incorporated's** case (supra) that punitive damages are founded on the philosophy of corrective justice.

19. For the reasons stated above, the plaintiffs have made out a case for grant of decree as prayed in the plaint. Accordingly, the order dated 18.04.2012 is confirmed and the suit is decreed in favour of the plaintiffs and against the defendants. Plaintiffs are also entitled to damages to the tune of Rs.2.0 lacs. Decree sheet be drawn up accordingly.

I.A.Nos.6935/2012 & 16906/2012

In view of the order passed in the suit, the present applications stand disposed of.

ILR (2014) III DELHI 2163
C.R.P.

MISHRA LAL **....PETITIONER**

VERSUS

RAMESH CHANDER **.....RESPONDENT**

(NAJMI WAZIRI, J.)

C.R.P.25/2014 **DATE OF DECISION :28.02.2014**
CM APPLS NO. 3846-47/2014

Delhi Rent Control Act, 1958—Evicting—Petitioner filed revision against order of ARC directing eviction of petitioner from property in question—Plea taken, respondent/landlord is using adjacent shop which was earlier allegedly being used by his to run his own business—Subsequent development would show that petitioner was actually in possession and use of said adjacent property—Hence, petitioner has no bonafide need of any additional space or of tenanted premises for carrying out his business as proposed in eviction petition—Held—Photographs which have now been sought to be accused in these proceedings pertain to a situation which existed when application for leave to defend was filed—Therefore, proposed " additional evidence" has to be and is cautiously rejected—Landlord has two married daughters who although settled in their respective matrimonial homes, continue to visit their father every fortnight or so, hence they would need space/ accommodation for themselves—To contend that simply because daughters have married need to have additional rooms or retain accommodation for them is not essential, is not acceptable—In these circumstances, it cannot be said that landlord's bonafide need is not proven—Petition is without merit and is frivolous.

The Trial Court has taken into consideration the circumstance that the landlord has two married daughters who, although settled in their respective matrimonial homes, continue to visit their father every fortnight or so, hence they would need space/accommodation for themselves. This Court is of the view that in some ways the expectation of a married daughter from her father increases. He remains an emotional embankment for her, his responsibilities as a social elder do increase. Socially and as the head of the paternal family he is expected to provide appropriate accommodation to his visiting married daughters, sons-in-law, their extended families, etc. Therefore, for one to contend that simply because daughters have married the need to have additional rooms or retain accommodation for them is not essential, is not acceptable. Indeed, daughters marry they are not married off. Familial and sociological security requires that married daughters should be provided adequate accommodation, if not at least retain their accommodation in their parental homes. In these circumstances, it cannot be said that the landlord's bonafide need is not proven. This Court concurs that no triable issues were raised in the leave to defend and finds that the impugned order does not suffer from any infirmities. The petition is without merit and is frivolous. It is dismissed with costs of Rs.25,000/- to be deposited in Prime Minister's Relief Fund within the next two months.**(Para 4)**

Important Issue Involved: For one to contend that simply because daughters have married the need to have additional rooms or retain accommodation for them is not essential, is not acceptable.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. K.V.S. Gupta, Mr. N.K. Bhambri and Mr. Gaurav Kaushik, Advocates.

FOR THE RESPONDENT : None

CASES REFERRED TO:

1. *Sandeep Kumar* vs. *Nihal Chand* 207 (2014) DLT 104.
2. *Seshambal (Dead) through LRs.* vs. *M/s. Chelur Corporation Chelur, i*n Civil Appeal No. 565 of 2005.

RESULT: Dismissed with costs of Rs. 25,000/-

NAJMI WAZIRI (Open Court)

1. This is a revision petition against the order of the ARC directing eviction of the petitioner from property bearing No.5026-5028, Roshanara Road, Delhi. There are 25 grounds raised by the petitioner. However, the impugned order has found none of them substantial enough to be considered triable. The petitioner has been directed to vacate the premises vide the impugned order passed on 30.08.2013. The 25 grounds are as under:

"a) That the petitioner is neither the owner, nor the landlord;

b) That the Will dated 24.06.1963 executed in favour of the father of petitioner is forged and fabricated;

c) That the petitioner has deliberately concealted the alternate properties owned by him and his son;

d) That the adjoining ground floor shop is in the possession of the petitioner and not his son;

e) That the petitioner is doing property dealing from the ground floor shop under the name and style of "M/s Shakti Properties";

f) That the son of the petitioner is not running any shop at the ground floor but is rather doing his own business;

g) That the petitioner has not disclosed the nature of the business run by his son from the ground floor shop;

h) That the petitioner is comfortably residing at the first floor whereby he needs no further accommodation;

i) That the site plan of the petitioner is wrong and not in accordance with the factual position;

j) That the petitioner has deliberately not filed any site plan of

the portions respectively occupied by him and his son, nor has disclosed the details like municipal number etc. of these properties;

k) That there is no dispute between the petitioner and his son and rather both of them are residing together;

l) That the petitioner is no handicapped and thus has not filed any documentary evidence in support thereof;

m) That neither the son, nor the daughters of the petitioner are his dependents;

n) That the provisions of Section 14(1)(a) DRCA are not applicable as the only applies to residential tenancies and premises;

o) That the sole motive behind the filing of the petition is to evict him by all means possible;

p) That the petitioner has a malafide design to evict him so as to sell the tenanted shop or re-let the same at higher rent;

q) That the tenanted shop is his only accommodation and source of livelihood;

r) That he has paid regular rent to the petitioner up till 2008 whereafter the petitioner has been refusing and avoiding to accept the same;

s) That the petition is a counter blast to his petition U/s 27 DRCA, which was allowed by concerned RC on 08.07.2011;

t) That the petitioner is a chronic litigant who has previously filed the frivolous petition U/s 19(1)(a), Slum Area (Improvement & Clearance) Act against him for seeking eviction;

u) That the premises is not lying locked since December 1999 and is rather being regularly used;

v) That the petitioner has taken contrary stand regarding the user of the tenanted shop by alleging on one side that it is lying locked since December 1999 and on another side alleging that it is being misused by M/s. Corrosion Prevention Systems;

w) That the petitioner has caused substantial damage to the

tenanted shop by his acts and omissions whereby water seeps into it, which once has caused a fire whereby he suffered a loss of Rs. 2 Lakhs;

x) That he has been allotted any alternate plot by the MCD; and

y) That the petitioner has contradicted himself by alleging on one side that the electricity connection is in the name of the respondent while on other hand, he says that the respondent has not paid electricity charges since January 2004."

2. Counsel for the petitioner reiterates each of the grounds before this Court. Additionally he has tried to bring on record photographs to show that respondent/landlord is using an adjacent shop which was earlier allegedly being used by his son to run his own business under the name and style of "M/s Shakti Properties". He submits that the subsequent development would show that the petitioner was actually in possession and use of the said adjacent property. Hence, the petitioner has no bonafide need of any additional space or of the tenanted premises, for carrying out his business as proposed in the eviction petition. He further submits that son and father already have the first and second floors with them and thus do not need additional space. Learned counsel for the petitioner relies upon **Seshambal (Dead) through LRs. Vs. M/s. Chelur Corporation Chelur,** in Civil Appeal No. 565 of 2005 which says that subsequent events can be brought on record for consideration in the revision petition. He also relies upon the judgment by this Court in **Sandeep Kumar Vs. Nihal Chand** 207 (2014) DLT 104 which permits taking into consideration subsequent events and documents in the revision petition. However, both these judgments hold that the court ought to proceed cautiously apropos the subsequent change in the facts, circumstances and events. It is not in dispute that the photographs which have now been sought to be adduced in these proceedings, pertain to a situation which existed when the application for leave to defend was filed. Indeed, the impugned order itself, in paragraphs 15 and 17, specifically traces the arguments sought to be advanced through the photographs as additional evidence. Therefore; the proposed "additional evidence" has to be and is cautiously rejected.

3. The learned counsel then contends that there is no requirement for the landlord for additional space since the space on the first and second floors is sufficient for him and his son. In this regard, the Court

would not lose site of the relationship between son and the father which are stated to be so strained that they do not talk with each other and are living in utmost silence between themselves. This Court is of the view that there can be no greater disquiet for a father, suffering from 50% physical disability - proof of which has been brought on record, that he be not on talking terms with his son, causing him much anguish and pain at the evening of his life, coupled with the challenge of having to start his own business to support himself and his wife.

4. The Trial Court has taken into consideration the circumstance that the landlord has two married daughters who, although settled in their respective matrimonial homes, continue to visit their father every fortnight or so, hence they would need space/accommodation for themselves. This Court is of the view that in some ways the expectation of a married daughter from her father increases. He remains an emotional embankment for her, his responsibilities as a social elder do increase. Socially and as the head of the paternal family he is expected to provide appropriate accommodation to his visiting married daughters, sons-in-law, their extended families, etc. Therefore, for one to contend that simply because daughters have married the need to have additional rooms or retain accommodation for them is not essential, is not acceptable. Indeed, daughters marry they are not married off. Familial and sociological security requires that married daughters should be provided adequate accommodation, if not at least retain their accommodation in their parental homes. In these circumstances, it cannot be said that the landlord's bonafide need is not proven. This Court concurs that no triable issues were raised in the leave to defend and finds that the impugned order does not suffer from any infirmities. The petition is without merit and is frivolous. It is dismissed with costs of Rs.25,000/- to be deposited in Prime Minister's Relief Fund within the next two months.

ILR (2014) III DELHI 2169
FAO(OS)

REAL HOUSE DISTILLERY PVT. LTD. & ANR. .....APPELLANTS

VERSUS

PERNOD RICARD S.A. & ANR. ....RESPONDENTS

(PRADEEP NANDRAJOG AND JAYANT NATH, JJ.)

FAO (OS) NO.163/2010 DATE OF DECISION:05.03.2014
CM APPL. 18319/2010
(CROSS OBJECTION)

Code of Civil Procedure, 1908—Order VII Rule 11, Order XXXIX Rules 1 & 2, Order XLI Rule 22, Order XLIII Rule 1, Section 151—Delhi High Court Act, 1966—Section 10—Trade Marks Act, 1999—Section 10 & 134(2)—Respondents filed a suit seeking a decree of permanent injunction to restrain defendants/appellants from manufacturing, selling etc. alcoholic beverages or any other allied goods under impugned trade mark composing of 'Real' logo and label or any other trade mark/lable deceptively similar to plaintiff's trade mark comprising 'RICARD' logo and label which amounts to infringement of Registered trademark of respondents/plaintiffs and other connected reliefs-During pendency of appeal, defendants/appellants showed a new lable to Court and learned Single Judge concluded that old lable which was used by appellants was prime facie identical to label of respondents and restrained appellants from using old label which was subject matter of present suit during pendency of said suit—Regarding New label produced in Court, it was held that it still contains some essential features similar to respondents' label and in order to avoid any confusion or deception, appellants were allowed to use New lable subject to condition of Change of Navy Blue

Colour—Order challenged in appeal before DB—Plea taken, second part of injunction order permitting appellants to use New label subject to condition of change of Navy Blue colour strips is materially erroneous and needs to be set aside—Respondents registered Trademark does not have any colour and hence to that extent, impugned order is misplaced as it has injuncted appellants from using colour Navy Blue—Held—A look at mark/lable in question would show that it cannot be said that New lable which is presently being used by appellants is identical to mark/lable of respondents—Essential features of two marks are different —Apart from blue bands used at top and bottom of lable, there is no other similarity in two marks—Essential feature of brand of respondent is circle shaded in red with number '45' Which is fused with a set of swirling scrolls/arms on either side—None of these features are reproduced in New brand/mark being used by appellants—Product of respondent is anise aperitif which is priced at more than Rs. 2,000/- per bottle—Class of customers purchasing same would be entirely different from class who would purchase IMFL whisky of appellant which is priced around Rs. 60/- per bottle—New brand uses mark/trade logo of appellant's 'Real' very distinctively and clearly—Prime facie, it is not possible to stay that New label which was for first time filed in court by appellants on 16.12.2008 infringers trademark of respondents—Order of learned single judge modifies permitting appellants use New mark/lable as filed by appellants in court on 16.12.2008 using Navy Blue colour.

Important Issue Involved: The Class of customers purchasing product anise aperitif priced at more than Rs. 2,000/- per bottle would be entirely different from class who would purchase IMFL whisky priced around Rs.60/- per bottle. Therefore, it is unlikely to deceive or cause confusion in relation to goods.

When a comparison of two marks shows that the essential features of the two marks are different, it is not possible to say that lable of defendant infringes trademark of the plaintiff.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. P. N. Mishra, Senior Advocate instructed by Ms. Mahima Sinha and Mr. Arunav Patnaik, Advocates.

FOR THE RESPONDENTS : Mr. Hemant Singh, Mr. Sachin Gupta and Ms. Shashi Ojha, Advocates.

CASES REFERRED TO:

1. *T.V. Venugopal* vs. *Ushodaya Enterprises Ltd. & Anr* (2011) 4 SCC 85.
2. *Heinz Italia & Anr.* vs. *Dabur India Ltd.* (2007) 6 SCC 1.
3. *Kellogg Company* vs. *Pravin Kumar Bhadabhai & Anr.* 62 (1996) DLT 79 (DB).
4. *R.G.Anand* vs. *M/s.Delux Films& Ors.* AIR 1978 SC 1613.
5. *M/s. Atlas Cycle Industries Ltd.* vs. *Hind Cycles Limited,* (1973) ILR Delhi 393.
6. *Kaviraj Pandit Durga Dutt Sharma* vs. *Navaratna Pharmaceutical Laboratories* AIR 1965 SC 980.
7. *Taw Manufacturing Coy. Ltd.* vs. *Notek Engineering Coy.Ltd. & Anr.* (1951) 68 Reports of Patent Cases 271(2).

RESULT: Allowed

JAYANT NATH, J.

1. The present appeal is filed under Order XLIII Rule 1 Code of Civil Procedure read with Section 10 of the Delhi High Court Act against order dated December 15, 2009 passed by the learned Single Judge in IA No.12700/2008 filed by the respondent under Order XXXIX Rules 1 and 2 read with Section 151 CPC and IA filed by the appellant being IA

No.16299/2009 under Order VII Rule 11 CPC for dismissal of the plaint on ground of lack of territorial jurisdiction of this court.

2. The respondents have filed a suit seeking a decree of permanent injunction to restrain the defendants/appellants from manufacturing, selling, etc.alcoholic beverages or any other allied goods under the impugned trade mark comprising of 'REAL' logo and label or any trade mark/label deceptively similar to the plaintiffs. Trade mark comprising 'RICARD' logo and label which amounts to infringement of registered trade mark of the respondents/plaintiffs and other connected reliefs.

3. Respondent No.2 is a wholly owned subsidiary of respondent No.1. Respondent No.1 claims to have been formed in 1974 and claims to be world No.2 in wines and spirits market having strong international presence having a turn over to the tune of Euro 6.4 billion in the year 2006-07. It is stated that its products are sold under internationally renowned and acclaimed brands in 110 countries. 'RICARD' is stated to be a light, natural refreshing beverage which was formulated in 1932. It's an anise flavoured aperitif marketed under a distinctive 'RICARD' logo/label. The logo/label is stated to comprise several distinctive features which constitute a unique, distinctive and impressionable trade mark. It is stated that 'RICARD' and its anise flavoured aperitif is bottled and marketed under the said label which comprises following features which together constitute a distinctive, impressionable and unique trade mark.

The logo comprises of the following features:-

i. the logo comprises of stylized acanthus leaves with silver background and blue leafy outline;

ii. a circular device having red background and blue border with the numeral "45" in white colour is depicted upon the central section of the shield device;

iii. a set of swirling scrolls of silver ribbons with blue borders unfold outwardly from either side of the red circular device with "APERITIS" and "ANISE" printed thereon in blue bold letterings."

The essential features of the RICARD label are as follows:-

i. The vertically elongated label comprises a colour combination of white, blue, silver and red;

ii. The label has an overall white background with two broad blue bands appearing upon the upper and lower sections, each having a silver and blue thick border;

iii. The trade mark RICARD appears in thick & bold white letterings against blue background upon the upper blue band whereas "FRANCE" appears in interspersed white bold letterings upon the lower blue band;

iv. The central section of the label has a white background with thin silver vertical pin stripes, upon which the RICARD logo as described hereinabove is depicted;

v. The lower section below the blue band contains descriptive matters in blue and red letterings against white background."

4. The said 'RICARD' logo and label which is also pictorially depicted in the plaint is stated to be a registered trade mark in several countries in favour of respondent No.1. It is also said to be registered in India in the name of respondent No.1.

5. It is further stated that the copyright in the original artistic work is also protected in India since FRANCE is a signatory and member of Berne Convention.

6. The plaint gives a detailed description of the turnover, goodwill, reputation, investment made in the brand etc. For the purpose of the present order it may not be necessary to reproduce the said details.

7. It is stated that in the first week of September 2008, the respondents came to know that the appellants were selling and offering for sale their whisky under the trade mark "REAL's" contained in bottles having same/similar trade mark as „RICARD. aperitif. The alcoholic beverage is stated to bear labels and logo which are deceptively similar and a colorable imitation of the respondents. 'RICARD' and of the logo and label. Hence the present suit was filed where it was urged that the said use of deceptively similar label or logo by the appellants would inevitably lead to a confusion/deception among consumers. It was urged that the adoption and unauthorized use by the appellants of the impugned trade mark constitutes (a) infringement of trade mark (b) passing off (c) infringement of copyright (d) dilution and (e) unfair competition.

8. The appellant entered appearance and denied the averments of

the respondents. It is stated that the appellants are part of 'Real Group of Companies' which was established in 1947 by setting up a vegetarian restaurant at Panaji, Goa by the name 'Cafe Real'. The business expanded and in 1961 the business of manufacturing aerated waters under the brand name 'Real Drink' and other trading was commenced. The word 'Real' has been pre-fixed in each and every company so incorporated to give it a distinctive trade mark of the Real Group of Companies. The logo 'R' is which is also used is stated to have developed in the year 1974. The manufacture of IMFL and county liquor is stated to have commenced in 1974. It is stated that the Real Group of Companies is making Palm Feni, Cashew Feni under the brand name „Real. and IMFL such as whisky, brandy, rum using its label of 'Real' with a logo "R" with a crown on it. The products are stated to be sold and consumed only in the State of Goa. It is further stated that the appellants do not manufacture or offer for sale or distribute any anise flavoured aperitif of flavor akin or similar to the respondents, product. It is further stated that the label of the appellants and respondents are not similar.

9. On December 16, 2008 the learned Single Judge directed that the appellants are permitted to use the earlier labels till December 31, 2008. After the said date the appellants were permitted to market their products under a new label which was shown in the court on that day which is purple and white in colour (this new label produced in court by the appellant on December 12, 2008 is hereinafter referred to as 'New label').This order was passed clarifying that the said order did not mean that the court accepted the stand of the appellants regarding the new label produced in court on that day.

10. On September 24, 2009 a statement was made by the learned counsel for the plaintiffs that he does not press the present suit in relation to passing off and infringement of copyright. On that date arguments were heard and judgment was reserved. Later vide order dated March 19, 2010 it was clarified that the respondent does not press the relief of passing off only.

11. The learned Single Judge vide judgment dated December 15, 2009 concluded that the old label which was used by the appellants was prima facie identical to the label of the respondents and restrained the appellants from using the old label which was subject matter of the present suit during the pendency of the said suit. Regarding the New

label produced in Court on December 16, 2008, the learned Single Judge directed that the New label still contains some essential features similar to the respondents, label and in order to avoid any confusion or deception, the appellants were allowed to use the New label subject to the condition of change of the Navy Blue colour. It was clarified that the appellants could use the said strip in any other colour except Dark Navy Blue Colour. Further application of the appellants under Order VII Rule 11 CPC being IA No.16299/2009 was dismissed holding that this Court had prima facie jurisdiction to try the present suit under Section 134(2) of the Trade Marks Act and the issue raised by the appellants was mixed question of law and facts and could not be dealt with in an application under Order VII Rule 11 CPC.

12. Hence the present appeal has been filed challenging the said order dated December 15, 2009.

13. The respondents have also filed cross-objections under Order XLI Rule 22 read with Order XLIII Rule 1 CPC challenging the directions of the learned Single Judge permitting the appellants to use the modified "Real" label (New label) in any other colour other than Navy Blue.

14. This Court on April 15, 2010 passed the following order regarding the New label:-

> "On a visual appearance of the two labels, we do not find any similarity between them. However, the learned Single Judge has injuncted the Appellants from using the navy blue colour on its label.
>
> We are of the opinion that if there is no similarity between the two labels, an injunction on the use of navy blue colour cannot be allowed as a matter of course. It is difficult to imagine that the respondents have a copyright over the use of navy blue colour on the labels of all alcoholic beverages.
>
> We, therefore, stay the operation of the impugned judgment and order until the disposal of the appeal."

15. The matter was heard on February 19, 2014 and judgment was reserved. Parties were given an opportunity to file written submissions. Needful has been done.

16. Learned counsel for the appellants at the outset submitted that

they do not intend to use the original label on the basis of which the suit was filed and to that extent, the injunction order passed by the learned Single Judge dated December 15, 2009 is not challenged. However, stress is laid that the second part of the injunction order permitting the appellants to use the New label subject to the condition of change of the Navy Blue colour strips is materially erroneous and needs to be set aside.

17. Learned counsel for the appellants has strenuously urged in Court and in the written submissions that the blue label which is being used by the appellants on its IMFL whisky is an intrinsic part of its trade mark and over a period of time the consumers of 'Real Blue Whisky' have come to associate with the blue colour in the label of the whisky of the appellants.

18. It is further urged that the respondents, registered trade mark does not have any colour and hence to that extent, the impugned order is misplaced as it has injuncted the appellants from using the colour Navy Blue. It is further urged that the get up of the label of the appellants is common to the trade and numerable labels of alcoholic and other beverages have blue colour with white. It is urged that the respondents cannot claim any exclusivity over the use of such features. It is further urged that the product of the respondents aperitif is priced at more than Rs. 2,000/- per bottle whereas the whisky of the appellants is priced at Rs. 60/- per bottle and therefore is only manufactured and consumed by the lower income bracket in the State of Goa only. It is urged that it is highly improbable and unlikely that the respondents, high class consumers intending to buy aperitif will be deceived by the Real House Whisky of the appellants. It is also highly improbable that a consumer who has an intention to buy an aperitif would end up buying a whisky.

19. Learned counsel for the respondents has stated in the Court and in the Written submissions that the appellants, have slavishly copied the label/mark of the respondents with dishonest intention which tentamounts to infringement of the registered trade mark of the respondents. With regard to the old label of the appellants it is stated that it is a blatant imitation which proves dishonest intention with ulterior and unethical motive to trade upon the goodwill and reputation of the respondents, products. It is further urged that even the New label which was produced before the learned Single Judge has retained combination of features that were originally copied by the appellants from the registered label/mark of

the respondents. It is urged that the New label has been rightly injuncted by the learned Single Judge. It is further urged that the label, mark, registration of respondents, is without any colour limitation. Hence, in view of Section 10 of the Trade Marks Act it therefore, extends to all colours. Hence the infringement would be there in case of imitation in any colour combination and to that extent, it is urged that the learned Single Judge erred inasmuch as he permitted the appellants to use the modified label in colours other than Navy Blue. Hence, it is urged that the present appeal be dismissed and the cross-objections may be allowed and the permission granted by the impugned order to the appellants permitting the appellants to use the New label under a colour other than Navy Blue be modified and the appellants be restrained from using the New label in any colour.

20. Learned counsel for the respondents relies upon judgment of the Hon'ble Supreme Court in the case of (2011) 4 SCC 85 **T.V.Venugopal vs. Ushodaya Enterprises Ltd. & Anr.** where the Hon'ble Supreme Court held that the adoption of the word "Eenadu" is ex facie fraudulent and a mala fide attempt from the inception inasmuch as the appellant in that case is stated to have wanted to ride on the reputation and goodwill of the respondent company. The Hon'ble Supreme Court held that permitting the appellant to carry on its business would in fact be putting a seal of approval of the court on the dishonest, illegal and clandestine conduct of the appellant. The Court further held that honesty and fair play ought to be the basis of policies in the world of trade and business. Reliance is also placed on the judgment of the Hon'ble Supreme Court in the case of (2007) 6 SCC 1 **Heinz Italia & Anr. vs. Dabur India Ltd.** where the court reiterated that principles of similarity could not be very rigidly applied and that if it could be prima facie shown that there was a dishonest intention on the part of the defendant in passing off the goods, an injunction should ordinarily follow. Learned counsel for the appellants also relies upon the judgment of the Hon'ble Supreme Court in the case of AIR 1965 SC 980 **Kaviraj Pandit Durga Dutt Sharma vs. Navaratna Pharmaceutical Laboratories** where the court held that where there is an imitation, no evidence is required to establish that the plaintiff's rights are violated. Reliance is also placed on the judgment of the Hon'ble Supreme Court in the case of AIR 1978 SC 1613 **R.G.Anand vs. M/s.Delux Films& Ors.** where the Court held that one of the surest and safest test to determine whether or not there has

been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

21. In the present case as far as the first label that was subject matter of the suit filed by the respondents is concerned, there is no controversy surviving inasmuch as learned counsel for the appellants has clearly stated that the appellants have stopped using the said label. Hence to that extent the injunction order passed by the learned Single Judge would need no interference.

22. We now come to the New label which was filed in court by the appellants. The impugned order permits the appellants to use the said New label provided the colour scheme of the said label is changed from Navy Blue to some to other colour. We may have a look at the two labels which are now subject matter of the present dispute.

23. The learned Single Judge has relied upon observations of the Court in the case of (1951) 68 Reports of Patent Cases 271(2) **Taw Manufacturing Coy. Ltd. vs. Notek Engineering Coy.Ltd. & Anr.** relevant portion of which reads as follows:-

> *"A trademark is infringed if a person other than the registered proprietor or authorised user uses, in relation to goods covered by the registration, one or more of the trademark's essential particulars. The identification of an essential feature depends partly upon the Court's own judgment and partly upon the burden of the evidence that is placed before the Court."*

24. Similarly, the learned Single Judge also places reliance on the judgment of this court in the case of (1973) ILR Delhi 393 **M/s. Atlas Cycle Industries Ltd. v. Hind Cycles Limited,** were this Court held as under:-

> *"In an action for an alleged infringement of a registered trade mark, it has first to be seen whether the impugned mark of the defendant is identical with the registered mark of the plaintiff. If the mark is found to be identical, no further question arises, and it has to be held that there was infringement. If the mark of the defendant is not identical, it has to be seen whether the mark of the defendant is deceptively similar in the sense it is likely to deceive or cause confusion in relation to goods in respect of which the plaintiff got his mark registered. For that purpose, the two marks have to be compared, 'not by placing them side by side, but by asking itself whether having due regard to relevant surrounding circumstances, the defendant's mark as used is similar to the plaintiff's mark as it would be remembered by persons possessed of an average memory with its usual imperfections', and it has then to be determined whether the defendant's mark is likely to deceive or cause confusion".*

25. A look at the mark/label in question would show that it cannot be said that the New label which is presently being used by the appellants is identical to the mark/label of the respondents.

The next step that would arise is as to whether the mark is deceptively similar with the mark of the respondents in the sense that it is likely to deceive or cause confusion in relation to goods in respect of which respondents have got their mark registered. If we compare the two marks, it is clear that the essential features of the two marks are different. Apart from blue bands used at the top and bottom of the label, there is no other similarity in the two marks. The essential feature of the brand of the respondents is the circle shaded in red with the number "45" which is fused with a set of swirling scrolls/arms on either side. None of these essential features are reproduced in the New brand/mark being used by the appellants.

26. In the above context, reference may also be had to the observations of a Division Bench of this High Court in the case of 62

(1996) DLT 79 (DB), **Kellogg Company vs. Pravin Kumar Bhadabhai & Anr.** where in paragraph 22 the Court held as follows:-

> *"Having dealt with the contention of imperfect memory of the customer, we shall now deal with the class of purchasers, which is also an important factor. Who are the persons who go to purchase 'Kelloggs' Corn flakes? Prima facie, in our opinion, these people belong to a middle-class or upper middle class and above who are fairly educated in English and are able to distinguish "Kelloggs" and what is not "Kelloggs". In American Jurisprudence (2d) (Trade Marks) (Supp) para 19 (page 178) it is said that it is necessary to note the fact: "that customers for fasteners are sophisticated and discerning, that defendant acted with good faith."*

27. Similarly, reference may also be had to the observations made in paragraph 28 of the said judgment which reads as under:-

> *"In the result, on our prima facie conclusions, we reject the plea of similarity or likelihood of confusion, we reject the plea of fraud as well as the one based on imperfect memory. We are of the view, prima facie that even though the get up is similar, the different names Kellogg's and AIMS ARISTO prominently displayed, make all the difference and this Is not a fit case for interference with the order of the learned Single Judge refusing injunction."*

28. In the present case also the product of the respondent is anise aperitif which is priced at more than Rs. 2,000/- per bottle. The class of customers purchasing the same would be entirely different from the class who would purchase the IMFL whisky of appellant which is priced around Rs. 60/- per bottle.

29. In the present case also the New brand uses the trade mark/ trade logo of the appellant's REAL very distinctively and clearly.

30. Prima facie, it is not possible to say that the New label which was for the first time filed in Court by the appellants on 16.12.2008 infringes the trademark of the respondents.

31. We, hence modify the order of the learned Single Judge to the said extent. We permit the appellants to use the New mark/label as filed

by the appellants in Court on 16.12.2008 using the Navy Blue colour. The cross objections of the respondents are dismissed.

32. As no arguments have been addressed on the impugned order dismissing the IA No.16299/2009 under Order 7 Rule 11, CPC, the judgment of the learned Single Judge dismissing the said application is upheld.

ILR (2014) III DELHI 2181
CS(OS)

SWASTIK POLYTEK PVT. LTD. .....PLAINTIFF

VERSUS

ORIENTAL INSURANCE COMPANY .....DEFENDANT

(G.S. SISTANI, J.)

CS(OS) : 1480/2010 DATE OF DECISION:12.03.2014

Code of Civil Procedure, 1908—Section 20—Territorial jurisdiction—Principal office of defendant situated at Delhi —Entire cause of action arose at Udaipur where branch / subordinate office of the defendant situated —No part of cause of action arose at Delhi.

Held, first part of the explanation to section 20 of CPC, deals with the situation where a corporation merely has a sole or a principal office. In such a situation, obviously the place where the sole or the principal office of the corporation is situated, will have jurisdiction. The second part of the explanation deals with a situation wherein the cause of action arises at a place where the corporation has its branch/ subordinate office and as per the explanation, court at such place where the subordinate office is situated, alone will have the territorial jurisdiction to entertain the suit. Plaint Returned.

[Di Vi]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Mukesh Sharma, Advocate.

FOR THE DEFENDANT : Mr. Bhaskar Tiwari, Advocate.

CASES REFERRED TO:

1. *NTPC [General Manager] & Anr.* vs. *Lt. Col. A.P.Singh (Retd.) & Anr.,* 156 (2009) DLT PAGE 572.
2. *Sunil Goel* vs. *Oriental Insurance Co. Ltd.,* 154(2008) DLT 1.
3. *New Moga Transport Co.* vs. *United India Insurance Co. Ltd. & Ors.,* 2004 4 SCC 677.
4. *Patel Roadways Limited Bombay* vs. *Prasad Trading company,* (1991) 3 SCR 91.

RESULT: Disposed of.

G.S. SISTANI, J (ORAL)

1. The plaintiff has filed the present suit for recovery of Rs.1,24,11,770/-. Issues were framed in this case on 09.10.2013. Issue No.2, which is to be treated as a preliminary issue, reads as under:-

> "(ii) Whether this Court has territorial jurisdiction to entertain the present suit? **OPP"**

2. The necessary facts to be noticed for disposal of issue No.2 are that the plaintiff is a Company carrying on its business at Udaipur. The plaintiff Company had obtained a loan from State Bank of Bikaner and Jaipur from Udaipur and the Bank had financed running the business of the plaintiff. The plaintiff got insured the factory building, plant machineries, electronic and other installations from the defendant for a sum of Rs.60 lakhs vide fire policy bearing No.827/1999 for the period 08.11.1998 to 07.11.1999 and for raw material, finished goods, stock in process and packing material for a sum of Rs.15 lakhs for the period 30.01.1999 to

29.01.2000 vide policy No.938/1999. A devastating fire took place in the factory of the plaintiff on 24.10.1999 in which almost the entire factory building, plant machineries, installations, raw material and finished goods were reduced to ashes resulting into heavy losses to the plaintiff. The matter was reported to the local Police on 20.10.1999. The extent of losses was informed by the plaintiff to the defendant on 26.10.1999. The insurance claim was lodged in the Branch Office of the defendant at Udaipur, which was eventually rejected by the defendant. Consequent thereto the present suit has been filed.

3. According to the defendant, no part of cause of action has arisen within the territorial jurisdiction of this Court. It is contended that the factory of the plaintiff is situated at Udaipur. Loan was granted from Udaipur at the behest of the Bank. The insurance policy was obtained from the Udaipur office of the defendant. The premium was paid by the Bank from Udaipur to the branch office of defendant at Udaipur. The accident took place at Udaipur and the claim of the plaintiff was rejected by the Udaipur office of the defendant.

4. Per contra, learned counsel for the plaintiff has laboured hard to agitate that the letter of rejection is based on the opinion of the Surveyor who was appointed at New Delhi and the cancellation and the rejection of the claim is based on the opinion of the Head Office and also issued by the Head Office. Reliance is also placed on a letter dated 03.10.2000 addressed to the plaintiff which refers to the claim being put up to the Head Office. Reliance is also placed on a letter of 13.02.2000 to show that a Surveyor had been appointed in the matter from Delhi. Reliance is also placed on a communication of 18.09.2001 which refers to the fact that the competent authority has repudiated the claim, to show that the competent authority is situated at New Delhi. Reliance is also placed on the explanation to Section 20 of the Code of Civil Procedure to show that a Corporation shall be deemed to carry on business at its sole or principal office and the Head Office of the defendant being at Delhi, it is contended that this Court would have territorial jurisdiction in the matter.

5. I have heard counsel for the parties and considered their rival submissions. Counsel for the plaintiff has placed reliance on Section 20 of the Code of Civil Procedure, which reads as under:

"20. Other suits to be instituted where defendants reside or

cause of action arises.-

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation -- A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations

(a) A is a tradesman in Calcutta.B carries on business in Delhi.B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods

either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory note payable on demand and deliver it to A.A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects,

the suit cannot proceed without the leave of the Court."

6. The explanation to Section 20 CPC on which counsel for plaintiff has sought to place reliance, takes into account two situations. First part of the explanation deals with the situation where a corporation merely has a sole or a principal office. In such a situation, obviously the place where the sole or the principal office of the corporation is situated, will have the jurisdiction. As opposed to this, the second part of the explanation, deals with a situation wherein the cause of action arises at a place where the corporation has its branch / subordinate office, and as per the explanation to section 20, the Courts at such place where the subordinate office is situated, alone will have the territorial jurisdiction to entertain the suit.

7. Although counsel for plaintiff has laboured hard to persuade the court that the case of the plaintiff would be covered under the first part of the explanation on the ground that since the principal office of the defendant is situated at Delhi, the courts in Delhi would have territorial jurisdiction, in my view, this argument of the plaintiff is erroneous and misplaced. In my considered opinion, the latter part of the explanation to section 20 is squarely applicable to the present case at hand, as the cause of action has arisen at Udaipur, where the branch / subordinate office of the defendant is situated and hence, it is the courts at Udaipur that will have the jurisdiction.

8. In the case of **Patel Roadways Limited Bombay Vs. Prasad Trading company,** (1991) 3 SCR 91 the Supreme Court of India had considered similar argument. It was held as under:

> *"The explanation applies to a defendant which is a corporation which term, as seen above, would include even a company such as the appellant in the instant case. The first part of the explanation applies only to such a corporation which has its sole or principal office at a particular place. In that event, the courts within whose jurisdiction, the sole or principal office of the defendant is situate will also have jurisdiction inasmuch as even if the defendant may not be actually carrying on business at that place, it will be deemed to carry on business at that place because of the fiction created by the explanation. The latter part of the explanation takes care of a case where the defendant does not*

> *have a sole office but has a principal office at one place and has also a subordinate office at another place. The words "at such place" occurring at the end of the explanation and the word "or" referred to above which is disjunctive clearly suggest that if the case falls within the latter part of the explanation it is not the Court within whose jurisdiction the principal office of the defendant is situate but the court within whose jurisdiction it has a subordinate office which alone shall have jurisdiction "in respect of any cause of action arising at any place where it has also a subordinate office."*

9. Similar view has been expressed in the case of **New Moga Transport Co. Vs. United India Insurance Co. Ltd. & Ors.,** 2004 4 SCC 677. The relevant portion of the judgment reads as under:-

> *"10. On a plain reading of the Explanation to Section 20 CPC it is clear that the Explanation consists of two parts : (i) before the word "or" appearing between the words "office in India" and the words "in respect of", and (ii) the other thereafter. The Explanation applies to a defendant which is a corporation, which term would include even a company. The first part of the Explanation applies only to such corporation which has its sole or principal office at a particular place. In that event, the court within whose jurisdiction the sole or principal office of the company is situate will also have jurisdiction inasmuch as even if the defendant may not actually be carrying on business at that place, it will be deemed to carry on business at that place because of the fiction created by the Explanation. The latter part of the Explanation takes care of a case where the defendant does not have a sole office but has a principal office at one place and has also a subordinate office at another place. The expression "at such place" appearing in the explanation and the word "or" which is disjunctive clearly suggest that if the case falls within the latter part of the explanation, it is not the Court within whose jurisdiction the principal office of the defendant is situate but the court within whose jurisdiction, it has a subordinate office which alone has the jurisdiction ïn respect of any cause of action arising at any place where it has also a subordinate office."*

10. A Single Judge of this Court in the case **NTPC [General Manager] & Anr. Vs. Lt. Col. A.P.Singh (Retd.) & Anr.,** 156 (2009) DLT PAGE 572, has also held as under:-

> *"9. Thus it is clear that where the cause of action takes place within the jurisdiction of the subordinate office, it is only the Court situated at that place where the suit can be brought. I, therefore, consider that the trial Court wrongly came to conclusion that the Court at Delhi had jurisdiction. In the instant case, it was specifically provided in the Contract that the Court at Bhagalpur would have the jurisdiction. The entire cause of action had taken place within Bhagalpur."*

11. Counsel for the plaintiff has relied on **Sunil Goel vs. Oriental Insurance Co. Ltd.,** 154(2008) DLT 1, in support of his argument that a Corporation shall be deemed to carry on business at its principal office and hence, the Courts within the territorial jurisdiction of which the principal office is situated, will have jurisdiction to entertain the case.

12. In the light of the settled law by the Apex Court, the judgment of the Single Judge of this Court relied upon by counsel for the plaintiff, can be of no benefit to the plaintiff.

13. Admittedly, as detailed above, the plaintiff is carrying on its business at Udaipur. The insurance policy was obtained by the plaintiff at Udaipur. The statement of claim was filed by the plaintiff at Udaipur office of the defendant. It may also be noticed that even as per the understanding of the plaintiff, the Court at Udaipur was the Court of competent jurisdiction which is evident from the fact that after a petition filed before the National Consumer Disputes Redressal Commission (NCDRC) was rejected on the ground that it raises complicated questions, the plaintiff approached the State Commission at Udaipur.

14. In addition thereto, the plaintiff also filed a petition under Section 11 of the Arbitration & Conciliation Act, 1996 at the Courts in Jodhpur. The argument of learned counsel for the plaintiff that the claim was rejected by the Head Office and the communication sought to be relied upon by the learned counsel can be of no benefit to the plaintiff as the letter dated 18.09.2001 has been issued by the Branch Office at Udaipur although the letter head shows that the Head Office of the Company is situated at New Delhi. Merely because the Head Office processed the

claim of the plaintiff or that a Surveyor was appointed from New Delhi, by itself would not confer jurisdiction on the Courts in New Delhi.

15. Since no part of cause of action has arisen within the territorial jurisdiction of this Court and having regard to the settled law as laid down by the Supreme Court, the issue No.2 which is the preliminary issue is decided against the plaintiff. Resultantly, the plaint is liable to be returned to the plaintiff to be filed in the competent Court of jurisdiction within four weeks of its being returned to the plaintiff.

ILR (2014) III DELHI 2188

OMP

BHARAT LAL MAURYA .....PETITIONER

VERSUS

GODREJ & BOYCE MFG. CO. LTD .....RESPONDENT

(SANJEEV SACHDEVA, J.)

OMP 132/2014 DATE OF DECISION:13.03.2014

Arbitration and Conciliation Act, 1996—Section 11 and 34—Indian Registration Act, 1908—Section 17(1)(d) and 49—Indian Stamps Act, 1899—Section 35— Two premises were taken on lease by Respondent— Lease agreements were executed on a Rs.100/- stamp paper each and were unregistered—Lease agreements stipulated that term of lease shall be 12 years—As per Petitioners, lease agreements also stipulated that there would be a 36 months lock-in-Period w.e.f. 16.04.2007 to 15.04.2010 in which neither of parties could terminate lease—As per Petitioners, Respondent in violation of terms and conditions of lease agreement, by letter dated 20.01.2009, terminated lease agreement, paid rent only upto 31.01.2009 and abandoned shops

on 30.03.2009—Petitioners before Arbitral Tribunal claimed rent for month of February and March, 2009 and also for unexpired period of lock-in-period—Arbitral Tribunal held that Respondent liable to pay rent for months of February and March, 2009 at agreed rate of Rs.1,24,000/- besides service tax and maintenance charges—With regard to issue pertaining to objection of Respondent that claim of Petitioner for payment for unexpired lock-in-period was hit by provisions of Indian Stamp Act and Indian Registration Act, it held that lease deed was insufficiently stamped and it compulsory required registration and as it was unregistered, it was inadmissible in evidence and clause of lock-in period could not be enforced— Award challenged before High Court—Held—A document compulsorily required to be registered but not being So registered cannot be used as evidence except for any collateral purpose—A clause in a lease deed fixing or stipulating a term of lease or a fixed term of lock-in period is not a collateral purpose—Said clause would be one of main clauses of lease which in absence of registration would be inadmissible in evidence and unenforceable in law—Arbitral Tribunal has rightly held that clause vis-a-vis lock-in period cannot be called a collateral purpose and tenancy between parties was not fixed term tenancy but a month to month tenancy terminable by a notice on either side—Finding by Arbitral Tribunal that Respondent had vacated premises w.e.f. 01.04.2009 is purely factual—Powers exercised by Court while deciding objections under Section 34 of Act are not appellate powers—Court does not sit as a Court of appeal—Findings of Arbitral Tribunal are findings in a according with settled judicial principles and cannot be interfered with.

A document that is compulsorily required to be registered and is not registered is inadmissible in evidence. A document compulsorily required to be registered but not being so

registered cannot be used as evidence except for any collateral purpose. A collateral transaction must be independent of and divisible from the transaction to effect which the law requires registration. A collateral transaction must be a transaction not itself required to be effected by a registered transaction. Some examples of collateral transaction in transactions pertaining to landlord- tenant would be the relationship between the parties, nature of premises, purpose of letting, rate of rent. An unregistered lease deed can be looked into for the purposes of ascertaining any of the above collateral purposes but not for enforcing a term of the lease. **(Para 14)**

A clause in a lease deed fixing or stipulating a term of the lease or a fixed term of lock-in-period is not a collateral purpose. The said clause would be one of the main clauses of the lease which in the absence of registration would be inadmissible in evidence and unenforceable in law. The Arbitral Tribunal has rightly held that the clause vis-a-vis the lock-in-period cannot be called a collateral purpose and the tenancy between the parties was not a fixed term tenancy but a month to month tenancy terminable by a notice on either side. **(Para 15)**

The powers exercised by the Court while deciding objections under Section 34 of the Act are not appellate powers. The Court does not sit as a Court of appeal. If the Arbitral Tribunal has taken a plausible view, the Court while dealing with objections under Section 34 would not substitute its view for the view of the Arbitral Tribunal even in a case where the Court were to come to a conclusion that a different view is possible from the view taken by the Arbitral Tribunal, provided the view taken by the Arbitral Tribunal was a plausible view. The Court entertaining objections under Section 34 is not to appreciate or re-appreciate the evidence for the purposes of returning a finding of fact. The findings of fact returned by the Arbitral Tribunal are not to be interfered with unless they are perverse or erroneous on the face of the record. No such perversity or error apparent

has been pointed out in the present case. The findings of the Arbitral Tribunal that the agreement being unregistered and insufficiently stamped and thus inadmissible in evidence and further that no clause of the said agreement can be enforced, are the findings in accordance with the settled judicial principles. **(Para 22)**

Important Issue Involved: A clause in lease deed fixing or stipulating a term of the lease or a fixed term of lock-in-period is not a collateral purpose. The said clause would be one of the main clauses of the lease which in the absence of registration would be inadmissible in evidence and unenforceable in law.

The powers exercised by the Court while deciding objections under Section 34 of the Act are not appellate powers. The Court does not sit as a Court of appeal. If the Arbitral Tribunal has taken a plausible view, the Court while dealing with objections under Section 34 would not substitute its view for the view Arbitral Tribunal even in a case where the Court were to come to a conclusion that a different view is possible from the view taken by the Arbitral Tribunal, provided the view taken by the Arbitral Tribunal was a plausible view.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Ms. Sneh Lata Srivastava, Advocate

FOR THE RESPONDENT : Mr. Vikas Tiwari, Advocate with Mr. Raji Abraham, AR of the Respondent

CASES REFERRED TO:

1. *SMS Tea Estates Pvt. Ltd.* vs. *Chandmari Tea Company Pvt.Ltd.* 2011 (14) SCC 66).
2. *K.B. Saha and Sons Pvt.Ltd.* vs.. *Development Consultant Ltd.* 2008 (8) SCC 564.

3. *Mcdermott International Inc.* vs.. *Burn Standard Co. Ltd.* 2006 (11) SCC 181.
4. *ONGC Ltd.* vs. *Saw Pipes Ltd.* (2003) 5 SCC 705.
5. *Maharashtra Seb* vs. *Sterilite Industries (India)* 2001 (8) SCC 482.
6. *Arosan Enterprises Ltd.* vs. *Union of India* [(1999) 9 SCC 449].
7. *Madanlal Roshanlal Mahajan* vs. *Hukumchand Mills Ltd.* [AIR 1967 SC 1030 : (1967) 1 SCR 105].
8. *Union of India* vs. *A.L. Rallia Ram* [AIR 1963 SC 1685 : (1964) 3 SCR 164].
9. *Champsey Bhara & Co.* vs. *Jivraj Balloo Spg. and Wvg. Co. Ltd.* [(1922-23) 50 IA 324 : AIR 1923 PC 66]

RESULT: Dismissed

SANJEEV SACHDEVA, J.

1. These petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') are objections to two separate but identical arbitral awards both dated 04.10.2013. Since the awards are identical and the facts are similar the objects are being disposed of by a common judgment.

2. The disputes relate to two separate tenanted premises taken on rent by the Respondent. The terms and conditions of letting are identical, identical pleas were raised and evidence led by the parties and both petitions were argued together.

3. The two tenanted premises being shop/space No.G-03 (in OMP No.132/2014) & shop/space No.G-02 (in OMP No.133/2014) situated in Parsavnath Arcadia Complex, 1, Gurgaon Mehrauli Road, near Sector 14 Gurgaon were taken on lease on 16.02.2007 by the Respondent from M/s. Parsavnath Developers Ltd. for a period of 12 years.

4. Lease Agreements dated 16.02.2007 were executed between M/s. Parsavnath Developers Ltd. and the Respondent. The said lease agreements stipulated that the term of the lease to be 12 years and initial monthly rent to be Rs.1,24,000/-. The lease agreements were executed on a Rs. 100/- Stamp paper each and were unregistered.

5. Subsequent to the creation of the tenancy of the Respondent, the respective spaces were sold to the Petitioners/objectors by M/s. Parsavnath Developers Ltd. Subsequent to the purchase of the said spaces by the Petitioners, the Respondent attorned their tenancy in favour of the Petitioners.

6. As per the Petitioners, the lease agreements also stipulated that there would be a 36 month lock-in-period w.e.f. 16.04.2007 to 15.04.2010 in which neither of the parties could terminate the lease. As per the Petitioners, the Respondent in violation of the terms and conditions of the lease agreement, by letter dated 20.01.2009, terminated the lease agreement, paid rent only upto 31.01.2009 and abandoned the shops on 30.03.2009. The Petitioners demanded the rent from the Respondent for the month of February and March, 2009 and also for the unexpired period of the lock-in-period. The Petitioners further contended that the Respondent had never handed over physical possession of the shops to the Petitioners and had failed to remove the fittings and fixtures affixed therein.

7. The Petitioners filed a suit for recovery against the Respondent in the Court of Additional District Judge, Saket on 01.08.2011. The said suit was disposed of with a direction to the parties to settle the dispute through arbitration. The present Arbitral Tribunal was constituted by this Court under Section 11 of the Act. The Arbitral Tribunal has published the Awards dated 04.10.2013 that are impugned herein.

8. The Petitioners before the Arbitral Tribunal claimed the rent for the month of February 2009 and March 2009 and further rent from 01.04.2009 to 15.04.2010 being the rent for the balance of the lock-in-period.

9. The Respondent contested the claim of the Petitioners on the ground that the premises were vacated by the Respondent on 30.03.2009 after two months notice to the Petitioners and as such, their liability to pay rent after they vacated the premises ceased. Further, with respect to the lock-in-period, the Respondent set up a defence that the lease agreements were neither duly stamped nor registered and as such, no term of the lease agreement could be enforced. The Respondent further took a plea that as the lease agreements were not registered, the tenancy was a month to month tenancy terminable by 15 days' notice and no clause of the lease agreements could be relied upon or enforced. The Respondent further claimed adjustment of the security deposited that was

admittedly being held by the Petitioners.

10. The following issues were framed by the Arbitral Tribunal:

"(1) Whether the claimant has no locus standi to file the present claim petition? OPR.

(2) Whether the claim petition is time barred as alleged in Para 2 of the preliminary objections of the reply to the statement of claim? OPR.

(3) Whether the claim petition is hit by section 17(1)(d) r/w section 49 of Indian Registration Act and also hit by section 35 of the Indian Stamps Act. If so, its effect? OPR.

This issue No.3 was amended with the consent of parties on 15-07-2013 as under:

Whether the lease deed dated 16-02-2007 is hit by section 17(1)(d) r/w section 49 of Indian Registration Act and also hit by section 35 of Indian Stamps Act. If so, its effect? OPR.

(4) Whether the claimant is owner of the suit premises? OPC.

(5) To what amount, if any, is the claimant entitled to recover from the Respondent? OPC.

(6) To what rate of interest, if any, is the claimant entitled and if so, for what period and on which amount? OPC.

(7) Relief."

11. The Arbitral Tribunal after considering the evidence and the submissions of the parties on issues No. 1 & 4 returned a finding that the Petitioners were the owners and landlord of the suit premises and, as such, were entitled to maintain the claim petition. This finding has not been assailed by the Respondent. On issue No.2 pertaining to limitation, the Arbitral Tribunal has returned a finding that as the premises was vacated on 01.04.2009, the suit for recovery, in which the parties were referred to arbitration, was filed on 15.04.2010 well within limitation. This finding has not been impugned by the Respondent. The Respondent has not impugned the awards.

12. With regard to issue No.3 i.e. issue pertaining to the objection of the Respondent that the claim of the petitioner for payment for the

unexpired lock– in period was hit by the provisions of the Indian Stamp Act and the Indian Registration Act, the Arbitral Tribunal has held that the Lease Deed was insufficiently stamped and it compulsorily required registration and as it was unregistered, it was inadmissible in evidence and the clause of lock– in period could not be enforced.

13. The Supreme Court in the case of **K.B. SAHA AND SONS PVT. LTD. VERSUS. DEVELOPMENT CONSULTANT LTD.** 2008 (8) SCC 564 has laid down as under:

> "21. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that:
>
> 1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.
> 2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.
> 3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
> 4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in Immovable property of the value of one hundred rupees and upwards.
> 5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

14. A document that is compulsorily required to be registered and is not registered is inadmissible in evidence. A document compulsorily required to be registered but not being so registered cannot be used as evidence except for any collateral purpose. A collateral transaction must be independent of and divisible from the transaction to effect which the law requires registration. A collateral transaction must be a transaction

not itself required to be effected by a registered transaction. Some examples of collateral transaction in transactions pertaining to landlord- tenant would be the relationship between the parties, nature of premises, purpose of letting, rate of rent. An unregistered lease deed can be looked into for the purposes of ascertaining any of the above collateral purposes but not for enforcing a term of the lease.

15. A clause in a lease deed fixing or stipulating a term of the lease or a fixed term of lock-in-period is not a collateral purpose. The said clause would be one of the main clauses of the lease which in the absence of registration would be inadmissible in evidence and unenforceable in law. The Arbitral Tribunal has rightly held that the clause vis-a-vis the lock-in-period cannot be called a collateral purpose and the tenancy between the parties was not a fixed term tenancy but a month to month tenancy terminable by a notice on either side.

16. The Arbitral Tribunal has further rightly held that the document was insufficiently stamped and as such, inadmissible in evidence. If the document is found to be not duly stamped, Section 35 of Stamp Act bars the said document being acted upon. (**SMS TEA ESTATES PVT. LTD. VERSUS CHANDMARI TEA COMPANY PVT. LTD.** 2011 (14) SCC 66).

17. The finding of the Arbitral Tribunal, that the Lease agreement compulsorily required registration and in the absence of registration and being insufficiently stamped was inadmissible in evidence and unenforceable and further that the clause stipulating a lock–in period was one of the main clauses of the lease and in the absence of registration could neither be relied upon nor enforced, cannot be faulted with.

18. The Arbitral Tribunal has, on the appraisal of the evidence of the parties, returned a finding of fact that the tenancy was terminated by the Respondent by the legal notice dated 20.01.2009, which notice also intimated the intention of the Respondent to vacate the premises w.e.f 01.04.2009. The Arbitral Tribunal has further returned a finding of fact that the premises were vacated w.e.f 01.04.2009. The Arbitral Tribunal has held the Respondent liable to pay rent for the months of February and March 2009 at the agreed rate of Rs.1,24,000/- besides service tax and maintenance charges.

19. The Arbitral Tribunal has held that the Respondent is entitled to

the balance of the security deposit after adjustment of the amount held to be payable by the Petitioners alongwith interest @ 18% per annum.

20. The Petitioners have impugned the findings of fact by the Arbitral Tribunal.

21. A perusal of the claim petition filed by the Petitioners shows that the Petitioners had claimed rent under two heads, rent for the month of February and March, 2009 and rent from 01.04.2009 to 15.04.2009 as rent from the lock-in-period separately. This segregation by the Petitioners is an indication of the fact that the Petitioners were themselves treating the two periods as distinct. The rental for the said two periods was same and thus the only purpose for showing the said two periods separately appears to be the fact that the Petitioners were aware that the premises had been vacated on 01.04.2009. Further in the legal notice dated 27.04.2009 (Ex.CW1/10) issued on behalf of the Petitioners, the Petitioners have themselves admitted that the Respondent had vacated the premises on 30.03.2009. However, have disputed, the handing over of physical possession. The finding by the Arbitral Tribunal is that the Respondent had vacated the premises w.e.f 01.04.2009. This finding is purely factual.

22. The powers exercised by the Court while deciding objections under Section 34 of the Act are not appellate powers. The Court does not sit as a Court of appeal. If the Arbitral Tribunal has taken a plausible view, the Court while dealing with objections under Section 34 would not substitute its view for the view of the Arbitral Tribunal even in a case where the Court were to come to a conclusion that a different view is possible from the view taken by the Arbitral Tribunal, provided the view taken by the Arbitral Tribunal was a plausible view. The Court entertaining objections under Section 34 is not to appreciate or re-appreciate the evidence for the purposes of returning a finding of fact. The findings of fact returned by the Arbitral Tribunal are not to be interfered with unless they are perverse or erroneous on the face of the record. No such perversity or error apparent has been pointed out in the present case. The findings of the Arbitral Tribunal that the agreement being unregistered and insufficiently stamped and thus inadmissible in evidence and further that no clause of the said agreement can be enforced, are the findings in accordance with the settled judicial principles.

23. The Supreme Court of India in the case of **MCDERMOTT INTERNATIONAL INC. VERSUS BURN STANDARD CO. LTD. :**

2006 (11) SCC 181 has laid down as under:

> "35. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

24. The Supreme Court of India in the case of **ONGC LTD. VERSUS SAW PIPES LTD.,** (2003) 5 SCC 705 has laid down as under:

> **"54.** It is true that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the court would have no jurisdiction to interfere with the award. But this would depend upon reference made to the arbitrator: (a) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the court could interfere; (b) it is also settled law that in a case of reasoned award, the court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; and (c) if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit its being set aside, unless the court is satisfied that the arbitrator had proceeded illegally."

25. The Supreme Court of India in the case of **MAHARASHTRA SEB V. STERILITE INDUSTRIES (INDIA)** 2001 (8) SCC 482 has laid down as under:

> "9. The position in law has been noticed by this Court in **Union of India v. A.L. Rallia Ram** [AIR 1963 SC 1685 : (1964) 3 SCR 164] and **Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd.** [AIR 1967 SC 1030 : (1967) 1 SCR 105] to the effect that the arbitrator's award both on facts and law is final; that there is no appeal from his verdict; that the court cannot

review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In understanding what would be an error of law on the face of the award, the following observations in **Champsey Bhara & Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd.** [(1922-23) 50 IA 324 : AIR 1923 PC 66] , a decision of the Privy Council, are relevant (IA p. 331)

> 'An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.'
>
> 10. In **Arosan Enterprises Ltd. v. Union of India** [(1999) 9 SCC 449] this Court again examined this matter and stated that where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference in the award based on an erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator."

26. The Arbitral Tribunal has returned a finding and rightly so, that as the Lease Agreement was unregistered and insufficiently stamped, the clause stipulating a lock-in-period could not be enforced. The Petitioners were rightly held not entitled to seek any amount for the unexpired lock-in-period. As regards the finding by the Arbitral Tribunal that the premises were vacated w.e.f. 01.04.2009, the findings are factual and not an error apparent on the face of the record. The same are not perverse and cannot be interfered with.

27. In view of the above, I find no merit in the petitions. The petitions are accordingly dismissed. No costs.

ILR (2014) III DELHI 2200
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TRANS INDIA LOGISTICS .....PETITIONER

VERSUS

UNION OF INDIA & ORS. .....RESPONDENTS

(HIMA KOHLI, J.)

W.P.(C) NO. : 1643/2014 & CM APPL. : 3425 - 3426/2014 **DATE OF DECISION: 13.03.2014**

A. Constitution of India, 1950—Article 226—Petition seeking quashing of an order passed by Respondent 4 informing that the tenure of the lease of the period for the two lease contracts had expired and it was not possible to consider its request for extension of the contract. Held—Petitioner has remained completely silent about the letter issued by the respondents rejecting the extension of the subject contract. It is settled law that when a party approaches the High Court and seeks invocation of its jurisdiction u/a 226, it must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary jurisdiction u/a 226 the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case of deliberate concealment or suppression of material facts on the part of the petitioner or if it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is well entitled to entertain the petition and dismiss it without entering into the merits of the matter. Petition dismissed.

It is a settled law that when a party approaches the High Court and seeks the invocation of its jurisdiction under Article 226 of the Constitution of India, it must place on

record all the relevant facts before the Court without any reservation. In exercising its discretionary powers and extraordinary jurisdiction under Article 226 of the Constitution of India, the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case there is a deliberate concealment or suppression of material facts on the part of the petitioner or it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is entitled to refuse to entertain the petition and dismiss it without entering into the merits of the matter [Refer: **Prestige Lights Ltd. vs. State Bank of India** (2007) 8 SCC 449]. **(Para 7)**

In the case at hand, on a perusal of the petition including the list of dates and events and annexures, this Court finds that the petitioner has remained completely silent about the letter dated 6.12.2010 issued by the respondents rejecting the extension of the subject contract that was duly received by him. Moreover, the petitioner has concealed the fact that he had accepted the extension for the contract of leasing of 4 tonnes RSLR space in train no. 2626 on the conditions imposed by the respondents vide letter dated 21.01.2011 which were on the same lines as contained in the letter dated 06.12.2010. **(Para 8)**

The aforesaid conduct of the petitioner amounts to deliberate concealment of material facts from the Court, which itself is considered a sufficient ground for the Court to dismiss the present petition. The petitioner cannot expect equity to flow in his favour when he elects to approach the Court with unclean hands and states half truths and makes selective disclosures. **(Para 9)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Sukumar Pattjoshi, Sr. Advocate with Mr. Swetank Shantanu, Mr. Pratap Shankar and Mr. Pratap Shankar and Mr. S.K. Dubey, Advocates.

FOR THE RESPONDENTS : Mr. Jagjit Singh, Advocate with Ms. Sampa Sengupta and Mr. Tarak Khanna, Advocates.

CASE REFERRED TO:

1. *Prestige Lights Ltd.* vs. *State Bank of India* (2007) 8 SCC 449].

RESULT: Petition dismissed.

HIMA KOHLI, J. (ORAL)

1. The present petition has been filed by the petitioner praying inter alia for quashing of an order dated 18.02.2014 passed by the respondent No.4 informing it that the tenure of the lease period for the two lease contracts granted to it in respect of FSLR II and RSLR in train No.2626 had expired in one case, on 18.09.2010 and in the other case, on 19.01.2011 and therefore, it was not possible to consider its request for extension of the lease contract in terms of clause 18 of the agreement dated 05.03.2008 executed by the parties.

2. Mr. Pattjoshi, learned Senior Advocate appearing for the petitioner states that it was during the currency of the subject lease agreement that the petitioner had addressed a representation dated 15.03.2010 to the respondents seeking extension of the lease. However, the respondents had failed to reply to the said request made by the petitioner till as late as on 28.09.2010, when they had addressed a letter informing him that the competent authority had decided to extend the petitioner's lease but with certain conditions as mentioned in Annexure P-4. It is submitted that as the conditions imposed in the said letter were contrary to the terms and conditions of the agreement governing the parties and the directions issued in the Circular No.12/2006, the petitioner had written a letter dated 30.09.2010 to the respondents stating inter alia that he was entitled to extension of the contract in terms of the conditions stipulated in the original agreement. It is submitted by learned counsel that thereafter, a series of representations were made by the petitioner to the respondents on the same lines seeking extension of the contract but the respondents did not give any reply till as recently as on 18.02.2014, when the impugned letter was issued declining the petitioner's request.

3. Mr. Jagjit Singh, counsel for the respondents, who appears on advance copy, disputes the aforesaid submissions made by the other side and states on instructions that the petitioner has deliberately withheld a letter dated 06.12.2010 addressed by the respondents to him on the issue of extension of the contract, wherein he was informed that since he had not accepted the conditions that were mentioned in the earlier letter dated 28.09.2010, the competent authority had decided not to extend the contract. He hands over a copy of the letter dated 06.12.2010 issued by the respondents that is taken on record.

4. Mr. Sowmen Bhowmik, the proprietor of the petitioner is present in Court. Learned counsel for the petitioner has been asked to obtain instructions from his client as to why the aforesaid letter has not been placed on record. The briefing counsel confirms the fact that his client had duly received the aforesaid letter dated 06.12.2010 but states that he had not revealed the same to him at the time of drafting the present petition.

5. Further, counsel for the respondents states that the petitioner has failed to point out that out of the two lease agreements executed with the petitioner, the lease in respect of RSLR in train No.2626 was duly extended by the respondents for a period of two years as the petitioner had duly complied with the conditions imposed by the respondents on him in its letter. In support of the said submission, learned counsel hands over a copy of the letter dated 20.01.2011 addressed by the respondents to the petitioner granting him extension of lease of 04 tons RSLR space in train No.2626 for a period of two years or till finalization of fresh tender, which was duly accepted by him. Curiously, even the aforesaid facts have not been mentioned in the writ petition. Though the petitioner had accepted similar terms and conditions imposed by the respondents in the letter dated 20.01.2011, there is not a whisper in the writ petition as to the fact that the petitioner had accepted the said extension on the conditions imposed by the respondents, except for making a passing reference to the letter dated 21.01.2011 in sub para (V)(k) of the writ petition.

6. Lastly, learned counsel for the respondents states that upon the expiry of the lease in respect of the subject train on 22.02.2011, a fresh contract was granted to a third party that was valid till 21.02.2014, and during the currency of the said contract, steps have been initiated by the respondents to float a fresh tender for inviting bids for executing a fresh

lease in respect of the subject train and therefore, the petitioner is not entitled to any relief in the present petition.

7. It is a settled law that when a party approaches the High Court and seeks the invocation of its jurisdiction under Article 226 of the Constitution of India, it must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary powers and extraordinary jurisdiction under Article 226 of the Constitution of India, the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case there is a deliberate concealment or suppression of material facts on the part of the petitioner or it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is entitled to refuse to entertain the petition and dismiss it without entering into the merits of the matter [Refer: **Prestige Lights Ltd. vs. State Bank of India** (2007) 8 SCC 449].

8. In the case at hand, on a perusal of the petition including the list of dates and events and annexures, this Court finds that the petitioner has remained completely silent about the letter dated 6.12.2010 issued by the respondents rejecting the extension of the subject contract that was duly received by him. Moreover, the petitioner has concealed the fact that he had accepted the extension for the contract of leasing of 4 tonnes RSLR space in train no. 2626 on the conditions imposed by the respondents vide letter dated 21.01.2011 which were on the same lines as contained in the letter dated 06.12.2010.

9. The aforesaid conduct of the petitioner amounts to deliberate concealment of material facts from the Court, which itself is considered a sufficient ground for the Court to dismiss the present petition. The petitioner cannot expect equity to flow in his favour when he elects to approach the Court with unclean hands and states half truths and makes selective disclosures.

10. In view of the aforesaid facts and circumstances, while refraining from imposing substantial costs on the petitioner for intentionally failing to reveal all the necessary and material facts to the Court and deliberately failing to place on record the relevant documents, the present petition is dismissed with costs of Rs.10,000/- to be deposited with the Delhi High Court Mediation and Conciliation Centre within two weeks from today and proof of deposit, placed on record within the same time. In case the

costs are not deposited and proof of payment not placed on record, then the Registry shall place the matter before the court.

11. The petition is dismissed, alongwith the pending applications.

ILR (2014) III DELHI 2205
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R.L. VARMA & SONS (HUF) .....PETITIONER

VERSUS

KOTAK MAHINDRA BANK LTD. .....RESPONDENT

(HIMA KOHLI, J.)

W.P. (C) NO. : 1711/2014 & CMS NO. : 3584-85/2014 **DATE OF DECISION: 14.03.2014**

Constitution of India, 1950—Article 226: Petitioner praying for staying hands of the respondent/bank from selling/auctioning the properties. Held - Petitioner maintained complete silence on the previous litigations with the bank in respect of the subject properties and orders passed by the Division Bench in earlier WP. It is settled law that the when a party approaches the High Court and seeks invocation of its jurisdiction u/a 226, it must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary jurisdiction u/a 226 the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case of deliberated concealment or suppression of material facts on the part of the petitioner or if it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is well entitled to refuse to entertain the petition and dismiss it without entering into the merits of the matter. Petition dismissed with cost of Rs. 20,000/-

It is settled law that when a party approaches the High Court and seeks the invocation of its jurisdiction under Article 226 of the Constitution of India, it must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary powers and extraordinary jurisdiction under Article 226 of the Constitution of India, the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case of a deliberate concealment or suppression of material facts on the part of the petitioner or if it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is well entitled to refuse to entertain the petition and dismiss it without entering into the merits of the matter. [Refer: **Prestige Lights Ltd. vs. State Bank of India & K.D. Sharma Vs. SAIL** (2007) 8 SCC 449 & (2008) 12 SCC 481]. **(Para 14)**

In the case in hand, the petitioner has maintained complete silence on the previous litigations with the bank in respect of the subject properties and the orders passed by the Division Bench in WP(C)No.7653/2011. In the writ petition, reference has only been made to the proceedings initiated by the respondent/Bank before the DRT and not to the petition filed by Smt. Vinanti Seth D/o Smt. Aruna Verma wherein comprehensive orders have been passed by the Division Bench reflecting the conduct of the petitioner herein and the family members of the HUF. **(Para 15)**

In view of the aforesaid conduct of the petitioner in deliberately concealing the relevant orders passed in other proceedings from the Court and withholding material information which has a direct bearing on the relief prayed for in the present proceedings, this Court declines to entertain the present petition, which is accordingly dismissed, along with the pending applications, with costs of Rs. 20,000/-

imposed on the petitioner. The costs shall be paid to the respondent Bank through counsel within two weeks with a copy of the receipt placed on record within one week thereafter. **(Para 16)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr.A.K. Gupta, Advocate with Mrs. Aruna Verma.

FOR THE RESPONDENT : Mr. Suresh Dutt Dobhal, Advocate.

CASES REFERRED TO:

1. *'Smt. Vinanti Seth* vs. *Kotak Mahindra Bank Ltd. & Ors.',* WP(C)No.7653/2011.
2. *K.D. Sharma vs. SAIL* (2007) 8 SCC 449 & (2008) 12 SCC 481].
3. *Prestige Lights Ltd.* vs. *State Bank of India* (2007) 8 SCC 449.

RESULT: Petition dismissed.

HIMA KOHLI, J. (ORAL)

1. The present petition has been filed by the petitioner praying inter alia for staying the hands of the respondent/Bank from selling/auctioning the two properties, i.e., a residential premises bearing House No.A-123, New Friends Colony, New Delhi and a commercial property measuring 8160 sq. ft. situated on the 4th floor of Gopal Dass Bhawan, Barakhamba Road, New Delhi.

2. Counsel for the petitioner states that the present petition had to be filed as the respondent/Bank has issued an auction notice dated 15.2.2014 in respect of the subject properties and the auction thereof is fixed for tomorrow, i.e., on 15.3.2014 at 10.30 AM. It is the contention of the learned counsel for the petitioner that the reserved price of the subject properties fixed in the auction notice is far below the prevailing circle rates published by the government and therefore, the said auction ought to be stayed and the properties should be directed to be sold at the prevalent market rates.

3. A pointed query has been posed to the counsel for the petitioner as to why has the present petition been filed at the eleventh hour when the public notice in question was issued on 15.2.2014, but there is no satisfactory explanation offered by him.

4. Learned counsel for the respondent/Bank, who appears on advance copy, submits that the present writ petition is yet another attempt on the part of the petitioners to somehow or the other scuttle the auction proceedings that are fixed for tomorrow and even earlier such attempts had been made by them. He states that in any case, the present petition filed by Smt. Aruna Verma, mother of Sh.Dhruv Verma, the authorized representative of the HUF, is not maintainable as she does not have any authority to file such a petition.

5. Counsel for the petitioner informs the court that no doubt Shri Dhruv Verma is the authorized representative of the HUF, but he is presently in judicial custody in a criminal case and is therefore unavailable and due to urgency in the matter, Smt. Aruna Verma had to file an affidavit in support of the present writ petition.

6. Counsel for the respondent/Bank hands over a set of documents, including the orders passed by the Division Bench in WP(C)No.7653/2011 entitled **'Smt. Vinanti Seth vs. Kotak Mahindra Bank Ltd. & Ors.',** wherein the petitioner HUF was impleaded as respondent No.2 and Smt. Aruna Verma was impleaded as respondent No.6 and all the parties were duly represented in the aforesaid proceedings. He points out that the relief sought in the aforesaid writ petition is identical to the relief being sought in the present writ petition and after the Division Bench had heard the parties at length, the aforesaid writ petition was disposed of, vide order dated 21.10.2011, on agreed terms whereunder the petitioner and her family members had agreed to make payments to the respondent/Bank in terms of the consent decree dated 3.2.2011 (Annexure P-6) passed by the Presiding Officer, DRT. But, they had grossly defaulted in abiding by the obligations undertaken by them and later on, the respondent/Bank had proceeded to take steps to dispose of the subject properties to adjust the moneys received towards the outstanding loan amount payable by the petitioners.

7. Counsel for the respondent/Bank states that in WP(C)No.7653/2011 the petitioner herein and the family members had agreed to make arrangement for payment of the defaulted installments along with overdue

interest thereon by selling portions of the commercial space at Gopal Dass Bhawan and when the respondent/Bank agreed to the aforesaid proposal, the Division Bench had directed that the sale proceeds would be routed through the respondent/Bank directly and the remaining portion of the commercial space at Gopal Dass Bhawan would continue to remain mortgaged with respondent/Bank, apart from the residential property situated at New Friends Colony.

8. It is stated that the respondents No.2 to 6 therein had agreed to make the payments to the respondent/Bank within 60 days reckoned from 21.10.2011 and it was clarified that in case of any default on their part, the respondent/Bank would be entitled to process the auction sale of both, the commercial space and the residential property, under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. In view of the settlement arrived at between the parties and the undertakings given by the respondents therein, the writ petition was dismissed as withdrawn. At the same time, the Division Bench had observed that the parties were made fully aware of the consequences of any breach of the statements.

9. Counsel for the respondent/Bank states that the petitioner and the family members had grossly defaulted in abiding by the undertakings given by them to the Division Bench and on 20.12.2011, they had filed an application in WP(C)No.7653/2011, registered as CM No.19848/2011, for extension of time. In the course of hearing of the aforesaid application, the Division Bench had observed that the petitioner herein and the family members had concealed material facts from the Court and they had not informed the Court that portions of the mortgaged property had been agreed to be sold by them to third parties, after the mortgage was created. 10. Vide order dated 10.2.2012, the Division Bench had deprecated the conduct of the petitioner herein (respondent No.2 in the aforesaid writ petition) and the respondents No.3 to 6, and observed that there was non-disclosure of rights created by them in the mortgaged properties at the stage of creation of mortgage and the same was not even brought to the notice of the Court. Shri Dhruv Verma, the authorized representative of the petitioner herein, was directed to file an affidavit giving the correct factual position, a perusal whereof had compelled the Division Bench to observe that the respondents therein had not only cheated and misled the respondent/Bank, but had tried to overreach the Court by failing to disclose the creation of third party interest in respect of various portions of the

commercial space at Gopal Dass Bhawan. As a result, the aforesaid application for extension of time filed in WP(C)No.7653/2011, was dismissed, while imposing costs of Rs. 1.00 lac on the applicant. Further, it was made clear that the respondents No.2 to 6 therein as also the petitioner would allow the auction to proceed without any obstruction and physical possession of the residential premises would be handed over to the respondent/Bank on 15.2.2012.

11. Learned counsel for the respondent/Bank states that the costs imposed on the applicant were not paid but pursuant to the order dated 10.2.2012 passed by the Division Bench, physical possession of the residential premises was taken over by the respondent/Bank and now that the respondent/Bank has fixed a date for conducting the auction sale of the subject property, the petitioner has filed the present misconceived petition, yet again trying to stall the said auction proceedings.

12. Copies of the documents handed over by the counsel for the respondent/Bank, including the orders passed in various proceedings and the list of dates and events, are taken on record.

13. A pointed query has been posed to the learned counsel for the petitioner as to whether all the aforesaid orders passed in respect of the subject properties find mention in the writ petition and if not, have the copies thereof been placed on record. Counsel for the petitioner responds by stating that his client had given him limited instructions and he was not informed about the earlier orders passed in WP(C) No.7653/2011.

14. It is settled law that when a party approaches the High Court and seeks the invocation of its jurisdiction under Article 226 of the Constitution of India, it must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary powers and extraordinary jurisdiction under Article 226 of the Constitution of India, the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case of a deliberate concealment or suppression of material facts on the part of the petitioner or if it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is well entitled to refuse to entertain the petition and dismiss it without entering into the merits of the matter. [Refer: **Prestige Lights Ltd. vs. State Bank of India & K.D.Sharma Vs. SAIL** (2007) 8 SCC 449 & (2008) 12 SCC 481].

15. In the case in hand, the petitioner has maintained complete silence on the previous litigations with the bank in respect of the subject properties and the orders passed by the Division Bench in WP(C)No.7653/2011. In the writ petition, reference has only been made to the proceedings initiated by the respondent/Bank before the DRT and not to the petition filed by Smt. Vinanti Seth D/o Smt. Aruna Verma wherein comprehensive orders have been passed by the Division Bench reflecting the conduct of the petitioner herein and the family members of the HUF.

16. In view of the aforesaid conduct of the petitioner in deliberately concealing the relevant orders passed in other proceedings from the Court and withholding material information which has a direct bearing on the relief prayed for in the present proceedings, this Court declines to entertain the present petition, which is accordingly dismissed, along with the pending applications, with costs of Rs. 20,000/- imposed on the petitioner. The costs shall be paid to the respondent Bank through counsel within two weeks with a copy of the receipt placed on record within one week thereafter.

ILR (2014) III DELHI 2211
CRL.A

ARUN & ORS. .....APPELLANTS

VERSUS

STATE .....RESPONDENT

(SANJEEV KHANNA & G.P. MITTAL, JJ.)

CRL.A. : 773/2011 & CRL.M.(B). : 2332/2013, CRL. A. : 646/2011, 1094/2011 **DATE OF DECISION 18.03.2014**

Indian Penal Code, 1860—Sec. 302, 34 read with Section 120B—Case of the prosecution is that Satdev Rathi was working Manager in the factory named K.N. Inter Plast Pvt. Ltd. Owned by one Kuldeep Singh Dalal. The

five appellants were employed in the earlier said factory—Appellant Arun Kumar and Rani were in love with each other—Rani and Tarun started a quarrel in the factory in loud voice—It is also alleged that the deceased once found appellants Arun Kumar and Rani in objectionable condition in a vacant room inside the factory—Thereafter appellant Arun Kumar stopped coming to the factory as he was under the impression that his service had been terminated—Grievance of these two sets of appellants is alleged to have given them the motive to eliminate the deceased—As per plan Rani met the deceased at Tikri border in the evening and took him to a Tur field—Thereafter, appellants inflicted knife blows on the deceased and after killing him made good their escape—The appellants examined four witnesses in their defence—On appreciation of evidence, the Trial Court opined that the circumstantial evidence adduced by the prosecution was sufficient to draw an inference of guilt against the appellants for the offence of entering into a conspiracy and committing murder of the deceased—The prosecution relied on the circumstance of "last seen together" and the motive of committing the crime in support of their case—Since this case rests on circumstantial evidence and the circumstantial of "last seen together" is one of the most important circumstance relied on by the prosecution his evidence assumes significance to determine the time of death and o test the veracity and credibility of the witnesses PW-3 and PW-13 on "last seen together"—PW-13 deposed that the deceased was working as a Manager in his factory M/s.K.N.Inter Plast Pvt. Ltd. for about last ten years. On 17.10.2008, he was going to Bahadurgarh via Kanjhawla-Nizampur Road. At about 7:00 p.m., while going towards Rohtak Road from village Nizampur, he noticed the deceased going towards Nizampur road along with appellant Rani. He also noticed the remaining four appellants, namely,

Arun Kumar, Ram Prakash @ Guddu, Krishna Kumar @ Krishna and Prithvi Raj following them from a distance of about 50 mts. He testified that appellants, Arun, Ram Prakash @ Guddu, Krishna Kumar @ Krishna and Prithvi Raj were ex- employees. They had been expelled from the job due to their bad behaviour—He also testified that appellants Arun and Rani were seen in objectionable condition by the deceased. The deceased informed him about this act—It is well settled that where that prosecution case rests purely on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must, in the first instance be fully established; the circumstances should be of conclusive nature; the circumstances taken together must unerringly point to the guilt of the accused; the circumstances proved on record must be incompatible with the innocence of the accused and from the complete chain of circumstances and it must be proved that in all probabilities, the offence was committed by the accused—The prosecution in order to connect the appellants with the commission of the offence and to exclude any other hypothesis except that the deceased's murder was committed by the appellants, relied on the following circumstantial evidence:(i) Evidence of last seen together;(ii) Recovery of some bloodstained clothes at the instance of appellants and recovery of there knives/ dagger at the instance of appellants Arun, Kumar @ Krishna and Ram Prakash @ Guddu; and (iii) Motive for commission of the offence—The 'last seen together" theory assumes importance only when the time of death of the deceased is sufficiently established and it is proved that the deceased was last seen alive in the company of the accused and there was no possibility of any other person coming in between the time when the deceased and the accused were seen together and the time of his death. In the instant case, the exact time or even approximate time of death has not

been crystallised—A perusal of the post mortem report (Ex.PW-8/A) shows that the post mortem on the dead body of the deceased was conducted on 18.10.2008 at 1:00 p.m. and the time since death was given as 41 hours. It would make the deceased's death on 16.10.2008 at about 6:00 a.m. However, the deceased was admittedly alive till the evening of 17.10.2008. For unexplained reasons, PW-8 changed duration since death from 41 hours to 22 hours in his court deposition. If that is accepted, the time of death would be about 3:00 p.m. On 17.10.2008. That is also not acceptable as the deceased was allegedly seen alive on 17.10.2008 at around 07:00-07:30 p.m. by PW-13. IT seems that Dr. V.K. Jha (PW-8) had performed his duties in a totally perfunctory manner as he appears to have given the time since death in the post-mortem report only on the basis of brief facts forwarded to him as also on the basis of rukka where initially the time of incident was mentioned between 05:00 p.m. on 16.10.2008 to 07:00 a.m. On 17.10.2008. The Court not inclined to rely much on the post mortem report (Ex.PW8/A) as also on the testimony of PW-8 regarding the time of the deceased's death.—The prosecution version as also he "last seen together" theory falls flat for other reasons also. It is difficult to comprehened that when a lady was luring a person who was her superior (Manager) in the same factory, that person would allow the lady to talk some other person so many times. Moreover, as per prosecution version, all the appellants were together after 7:30 p.m. Thus there could not have been any occasion for them to talk on mobile phone—There is another serious lapse in the investigation. As per the prosecution version, the deceased possessed a mobile phone. The deceased's wife spoke to him at 6:00 p.m on 17.10.2008 and thereafter, his son also tried to speak to him. The deceased is started to have informed his wife that he would be back home in half an hour and thereafter his

mobile phone got switched off. However, for unexplained reasons, the call details of the deceased's telephone were not obtained by the investigation officer. Since evidence of "last seen together" has been held to be otherwise unbelievable, this lapse on the part of the investigating officer further gives a dent to the prosecution version—In addition to the evidence of "last seen together", the prosecution also relies on the recovery of bloodstained knives Ex. P-1, P-2 and P-3 at the instance of the appellants Arun Kumar, Krishna Kumar @ Krishna and Ram Prakash @ Guddu respectively at the time of their arrest. Also, according to the prosecution appellant Arun Kumar was found to be wearing a black bloodstained pyjama—Similarly, the abovesaid three appellants also told the I.O. that they were wearing the same clothes that they were wearing now at the time of commission of the offence. In addition, they allegedly got recovered some bloodstained clothes from the room of one Phool Singh and one Om Prakash Sharma. It is not understandable that if they had opportunity to wash the bloodstains off some of their clothes, why would they not wash the remaining ones and would conceal the same simply to get them recovered later on to the police—The prosecution has led some evidence with regard to the motive. In their statements under Section 313 Cr.P.C., appellants Ram Prakash, Krishna Kumar @ Krishna and Prithvi Raj have denied that they ever misbehaved with the deceased after consuming liquor in the factory or that they were expelled from the services. They gave different dates for leaving the employment with M/s. K.N. Inter Plast Pvt. Ltd—The prosecution version is that appellant Ram Prakash, Krishan Kumar @ Krishna and Prithvi Raj had been expelled from the factory because of their misbehaviour with the deceased after consuming liquor. Similarly, as per prosecution version appellants Rani and Arun Kumar were Counselled by the deceased

for their objectionable behaviour in the factory and appellant Arun Kumar stopped reporting for work considering that he had been expelled, yet, employment records of the five appellants were not seized by the I.O. during the course of investigation. As per the prosecution case set up in the charge sheet which is reflected from the statements of the witnesses recorded under Section 161 Cr.P.C., the incident of the three appellants misbehaving with the deceased took place two to three years before the occurrence. However, in Court, evidence was led to the effect that the incident took place merely two-three months before the occurrence. The witness were also duly confronted with their statements under Section 161 Cr.P.C. In view of the prosecution version, seizure of the entire employment record to pin point the period of employment of the appellants was extremely important which was not done by the I.O. for the reasons best known to him. It is well settle that an accused is not expected to prove his defence beyond shadow of reasonable doubt. The absence of appellant Ram Prakash's name in the salary sheet for the month of June, 2008 makes his defence plausible which again creates doubt in the prosecution version—In view of the prosecution version, the employment records if seized would have provided some credence as to how and when the appellant's service were terminated or any of them stopped reporting for work—There could not be a motive strong enough for appellants Arun Kumar and Rani to have entered into any conspiracy to commit the gruesome crime as alleged. Otherwise also, it is very well settled that motive, however, strong is not enough to base conviction of the accused—In this view of matter, even if it is assumed that the possibly some grievance existed, the same is not sufficient to base appellants' conviction—Non-seizure of the employment records, non-obtaining of the call details of the deceased's

mobile phone, non-recording of the statement of PW-13 at the time of recovery of dead body, discrepancy in the post mortem report and PW-8's testimony, though not significant individually, when read together with the gaping holes create serious doubt about the motive theory—It is true that direct evidence of hatching a conspiracy is seldom available, yet at the same time, it is the bounden duty of the prosecution to prove the conspiracy by indirect or circumstantial evidence which must be clear, cogent and believable—Allowed. The judgment and the order on sentence are accordingly set aside. The appellants are acquitted of the charges framed against them.

Important Issue Involved: The appellants are alleged to have entered into a criminal conspiracy to commit the deceased's murder. It is true that direct evidence of hatching a conspiracy is seldom available, yet at the same time, it is the bounden duty of the prosecution to prove the conspiracy by indirect or circumstantial evidence which must be clear, cogent and believable. That having not been done, it cannot be said that the appellants had entered into any criminal conspiracy to commit the murder.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANTS : Mr. S.S. Ahluwalia, Advocate for Appellant No.1 Ms. Nandita Rao, Advocate for Appellants No.2 & 3., Siddharth Aggarwal with Mr. Gautam Khazanchi, Advocates, Mr. K. Singhal, Advocate.

FOR THE RESPONDENTS : Ms. Rajdipa Behura App.

CASES REFERRED TO:

1. *Sampath Kumar* vs. *Inspector of Police, Krishnagiri,* (2012) 4 SCC 124.

2. *Sunil Rai* vs. *UT, Chandigarh,* (2011) 12 SCC 258.
3. *Rukia Begum* vs. *State of Karnataka,* (2011) 4 SCC 779.
4. *Santosh Kumar Singh* vs. *State,* (2010) 9 SCC 747.
5. *Mani* vs. *State of Tamil Nadu,* 2009 (17) SCC 273.
6. *N.J. Suraj* vs. *State,* (2004) 11 SCC 346.
7. *Santosh Kumar Singh* vs. *State,* (2010) 9 SCC 747.
8. *N.J. Suraj* vs. *State,* (2004) 11 SCC 346.
9. *Deva* vs. *State of Rajasthan,* 1999 SCC (Cri) 41.
10. *Surjit Singh & Anr.* vs. *State of Punjab,* AIR 1994 SC 110.
11. *Sharad Birdhichand Sarda* vs. *State of Maharashtra,* (1984)4 SCC 116).
12. *Narsinbhai Haribhai Prajapati etc.* vs. *Chhatrasinh & Ors,* AIR 1977 SC 1753.
13. *Prabhoo* vs. *State of U.P.,* AIR 1963 SC 1113.
14. *Hanumant Govind Nargundkar & Anr.* vs. *State of Madhya Pradesh,* AIR 1952 SC 343.

RESULT: Allowed

G.P. MITTAL, J.

1. Appellants Arun Kumar, Ram Parkash @ Guddu, Krishan Kumar @ Krishna, Prithvi Raj and Rani impugn the judgment dated 26.02.2011 and the order on sentence dated 15.03.2011 passed by the Additional Sessions Judge (ASJ), West 02, Delhi whereby the appellants were convicted for the offence punishable under Section 302/ 34 read with Section 120B of the Indian Penal Code, 1860 (IPC) and were sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- each. In default of payment of fine, each of the appellant was sentenced to undergo simple imprisonment for six months.

2. Succinctly stated, case of the prosecution is that Satdev Rathi (the deceased) was working as a Manager in a factory named K.N. Inter Plast Pvt. Ltd. owned by one Kuldeep Singh Dalal (PW-13). The five appellants were employed in the earlier said factory. It is case of the prosecution that 2-3 months before the incident, appellants Ram Parkash

@ Guddu, Krishan Kumar @ Krishna and Prithvi Raj had consumed liquor in the factory while they were on duty and had then misbehaved with the deceased. On account of this misbehaviour, they were expelled from service.

3. It is further alleged that appellant Arun Kumar and Rani were in love with each other. One day, Rani and Tarun (brother of Arun) started a quarrel in the factory in a loud voice. They were called in the office and were advised to have patience. It is also alleged that the deceased once found appellants Arun Kumar and Rani in objectionable condition in a vacant room inside the factory. It is also alleged that thereafter appellant Arun Kumar stopped coming to the factory as he was under the impression that his services had been terminated. Thus, grievance of these two sets of appellants is alleged to have given them the motive to eliminate the deceased.

4. Hence, all the appellants allegedly entered into a conspiracy. The appellants decided that appellant Rani would lure the deceased to open fields where the remaining four appellants would finish him. In pursuance of the conspiracy, on 17.10.2008, appellant Rani asked the deceased to celebrate karvachauth and persuaded him to meet her (Rani) at Tikri border in the evening. As per the plan, Rani met the deceased at Tikri border and took him to a Tur (Arhar) field. The remaining four appellants followed the two, keeping safe distance. Rani made the deceased undress himself and thereafter the appellants Arun Kumar, Krishan Kumar @ Krishna and Ram Parkash captured him while appellant Prithvi Raj kept a watch on the road. Thereafter, appellants Arun Kumar, Krishan Kumar @ Krishna and Ram Parkash inflicted knife blows on the deceased and after killing him made good their escape.

5. It is alleged that on 17.10.2008, it was karvachauth and PW-1's mother (Mrs. Sushila) had called up his father (the deceased) on his mobile number 9416052814 at about 6:00 p.m. to inquire about his return. His father told his mother that he would return in half an hour. Thereafter PW-1 went out to play. He returned at about 7:30-7:45 p.m. and his mother informed him of his father (the deceased) not reaching home. PW-1 tried to contact the deceased on his mobile phone but the same was found to be switched off. PW-1 also went in the night to the factory where the deceased worked but he could not get any clue of his father as he was informed by the guard that all the employees had left

the office at closing time. Thus, PW-1 along with his other relations including PW-2 searched for his father the whole night but in vain.

6. On 18.10.2008 at about 7:15 a.m., PW-1 again started his search and ultimately at about 8:15 a.m., he reached Police Post Tikri. The police informed PW-1 that one dead body had been found at Nizampur road. While PW-1 and PW-2 were leaving from the Police Post, Kuldeep Singh Dalal (PW-13), owner of K.N. Inter Plast Pvt. Ltd. also reached the Police Post. They proceeded to the spot where the dead body was allegedly lying. On seeing the dead body, PW-1 identified it to be of his father. He made a statement Ex.PW-19/ A to the police on which an endorsement Ex.PW-24/A was made by S.I. Om Prakash (PW-24) and the same was transmitted to the Police Station for registration of an FIR.

7. On appellants' pleading not guilty to the charge for the offence punishable under Section 302/ 34 IPC and Section 302/ 120B IPC, the prosecution examined 24 witnesses. In their examination under Section 313 of the Code of Criminal Procedure, 1973, the appellants while denying the incriminating evidence produced by the prosecution against them, stated that they have been falsely implicated in the case.

8. Appellants Krishan Kumar @ Krishna, Ram Parkash and Prithvi Raj admitted that they were employed at M/s. K.N. Inter Plast Pvt. Ltd. They however, denied that they had ever consumed any liquor in the factory or that they were expelled from service. Appellant Ram Parkash while denying that he was ever expelled from the factory by the deceased stated that he had left the job on his own in the month of April, 2008. Similarly, appellants Prithvi Raj and Krishan Kumar @ Krishna also stated that they were never expelled from the service and that they had left the service with M/s. K.N. Inter Plast Pvt. Ltd. on their own in the month of June-July, 2008. At the same time, appellants Arun Kumar and Rani denied that they were ever seen in any obscene condition by the deceased or that they ever had any grievance against the deceased.

9. The appellants examined four witnesses in their defence. Shyam Lal (DW-1) was examined to prove that on the night of 19.10.2008, some police officials came in village Tikri Kalan and apprehended the appellants Ram Parkash and Prithvi Raj from their house and thus, DW-1 tried to falsify the prosecution version regarding these 2 appellants' arrest on 20.10.2008 from village Tikri Kalan. Kamlesh (DW-2) is appellant Arun Kumar's mother. She deposed that her son Arun Kumar was lifted

by the police from their residence on 18.10.2008 at 6:30-7:30 p.m. She stated that she had given one mobile phone to appellant Rani as she used to work with her son Arun. In cross-examination, she denied that Arun was arrested on 20.10.2008 from Tikri Border. Vijay Kumar (DW-3) also corroborated DW-2 and deposed about apprehension of appellant Arun Kumar on 18.10.2008. Mukesh (DW-4), appellant Rani's brother testified that on 19.10.2008 at about 8:00 a.m., he was having breakfast with his sister Rani. Appellant Arun Kumar made a phone call on the mobile phone of his sister and told her that he wanted to meet her for five minutes at Baba Haridass Mandir. When they reached there, they were apprehended by the police; after 3-4 hours, the police officers released him but his sister Rani was falsely implicated in this case.

10. On appreciation of evidence, the Trial Court opined that the circumstantial evidence adduced by the prosecution was sufficient to draw an inference of guilt against the appellants for the offence of entering into a conspiracy and committing murder of the deceased. The appellants were thus, convicted and sentenced as stated earlier. Apart from recovery of the knives (Ex. P-1 to P-3) at the instance of appellants Arun Kumar, Krishan Kumar @ Krishna and Ram Parkash @ Guddu and some bloodstained clothes from appellant Arun Kumar, Krishan Kumar @ Krishna and Ram Parkash, the prosecution relied on the circumstance of last seen together and the motive of committing the crime in support of their case.

11. Before we dwell and analyse the circumstances pressed by the prosecution, we would like to refer to the evidence of some important witnesses examined by the prosecution.

12. Ajit Singh (PW-3) and Kuldeep Singh Dalal (PW-13) are the most crucial witnesses examined by the prosecution to prove that the deceased was seen alive last in the appellants' company on 17.10.2008 at about 7:30 p.m. They also tried to prove the motive for commission of the offence. Amit Rathi (PW-1) and Yudhvir Singh (PW-2) deposed about the search of the deceased the whole night of 17.10.2008 and discovery of the dead body on the morning of 18.10.2008. Dr. V.K. Jha (PW-8) had conducted post-mortem examination on the dead body of the deceased. Since this case rests on circumstantial evidence and the circumstance of *'last seen together'* is one of the most important circumstance relied on by the prosecution, his evidence assumes

significance to determine the time of death and to test the veracity and credibility of the witnesses PW-3 and PW-13 on .last seen together..

13. PW-13 deposed that the deceased was working as a Manager in his factory M/s. K.N. Inter Plast Pvt. Ltd. for about last ten years. On 17.10.2008, he was going to Bahadurgarh via Kanjhawla-Nizampur Road. At about 7:00 p.m., while going towards Rohtak road from village Nizampur, he noticed the deceased going towards Nizampur road along with appellant Rani. He also noticed the remaining four appellants, namely, Arun Kumar, Ram Parkash @ Guddu, Krishan Kumar @ Krishna and Prithvi Raj following them from a distance of about 50 mts. He testified that appellants Arun, Ram Parkash @ Guddu, Krishan Kumar @ Krishna and Prithvi Raj were his ex-employees. They had been expelled from the job due to their bad behaviour. He testified that Ram Parkash @ Guddu, Krishan Kumar @ Krishna and Prithvi Raj were expelled because they came to the factory under the influence of liquor and then misbehaved with the factory's Manager (the deceased). The deceased informed him about the incident and therefore he took the step of expelling them from the services in the end of June or beginning of July, 2008. He also testified that appellants Arun and Rani were seen in objectionable condition by the deceased. The deceased informed him about this act. Both (Arun and Rani) were warned (about their conduct) and appellant Arun himself stopped coming to work as he was under the impression that he had been removed from service.

14. Similarly, Ajit Singh (PW-3) on the appellants' misconduct testified that about 2-3 months before the incident, appellants Ram Parkash @ Guddu, Krishan Kumar @ Krishna and Prithvi Raj consumed liquor in duty hours and misbehaved with the Manager (the deceased). Because of their misbehaviour, they were expelled from the services. He further stated that there was a love affair between appellants Arun and Rani. One day Rani and Tarun (brother of Arun) started a quarrel in the factory in a loud voice. They were called in the office and both were asked to behave themselves. Tarun and Rani were warned not to quarrel in the factory on account of their family matters. He added that the deceased had informed him that once he had seen appellants Arun and Rani in objectionable condition in a vacant room. Thereafter Arun was expelled from the services due to dereliction of duty and disobeying orders. On 17.10.2008, he had dropped the deceased at around 05:20 p.m. 05:30 p.m. at Old Bank near MIE on his motorcycle.

15. On the aspect of recovery of the dead body of the deceased, PW-1 deposed that on 17.10.2008, it was karvachauth and his mother (Mrs. Sushila) had called up his father (the deceased) on his mobile number 9416052814 at about 6:00 p.m. to inquire about his return. His father had told his mother that he would return in half an hour. (Mrs. Sushila never appeared and deposed as a witness in the Court). Thereafter PW-1 went out to play. He returned at about 7:30-7:45 p.m. and he was informed by his mother that his father had still not returned from work. He tried to contact his father on his mobile phone but the same was found to be switched off. After 30-45 minutes, he went to his father's factory to inquire about him and the guard informed him that all the employees including his father had left at the closing hour of the factory. He stated that thereafter he searched for his father at his maternal grandfather's house at village Tikri and his cousin (his mother's sister's son), PW-2 also joined him in the search. They searched for his father in certain hospitals and also went to Police Post Bahadurgarh, Police Post MIE and Police Post Tikri. However, they could not get any information. They returned at mid-night. He further testified that on 18.10.2008 at about 7:15 a.m., he along with his cousin again went to various places in search of his father. He reached Police Post Tikri at about 8:15 p.m. and the police informed him that information had been received that a dead body was found at Nizampur road. While he was in the Police Post, Kuldeep Singh Dalal (PW-13) also reached there. They all went in PW-13's car to the place where the dead body was found lying. When they reached the fields, they found a dead body lying in one of the field which was identified by him to be that of his father. To the same effect is the testimony of Yudhvir Singh (PW-2), who is PW-1's cousin.

16. Although Dr. V.K. Jha (PW-8) was examined to prove homicidal death of the deceased as also the time of his death to connect the appellants with the offence, yet the post-mortem report (Ex.PW-8/E) has created more confusion than fixing the time of death. The homicidal death of the deceased is not in dispute. However, in the post-mortem report, PW-8 opined the time since death to be 41 hours whereas in his testimony recorded in the Court, he gave the time of death as 22 hours before conducting of the post-mortem examination. He did not give any explanation as to why he changed the approximate time of death in the post-mortem report and in his deposition in the Court except that no precise time could be given.

17. It is well settled that where the prosecution case rests purely on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must, in the first instance be fully established; the circumstances should be of conclusive nature; the circumstances taken together must unerringly point to the guilt of the accused; the circumstances proved on record must be incompatible with the innocence of the accused and form the complete chain of circumstances and it must be proved that in all probabilities, the offence was committed by the accused. (**Hanumant Govind Nargundkar & Anr. v. State of Madhya Pradesh,** AIR 1952 SC 343 and **Sharad Birdhichand Sarda v. State of Maharashtra,** (1984)4 SCC 116).

18. The prosecution in order to connect the appellants with the commission of the offence and to exclude any other hypothesis except that the deceased's murder was committed by the appellants, relied on the following circumstantial evidence:

(i) Evidence of last seen together;

(ii) Recovery of some bloodstained clothes at the instance of appellants and recovery of three knives/ dagger at the instance of appellants Arun, Krishan Kumar @ Krishna and Ram Parkash @ Guddu; and

(iii) Motive for commission of the offence.

LAST SEEN TOGETHER

19. We have already extracted above the relevant portion of the examination-in-chief of PW-13 who has projected himself to be a witness of seeing the deceased alive last in the appellants' company. As per Ajit Singh (PW-3), who was working as a Supervisor in M/s. K.N. Inter Plast Pvt. Ltd., Bahadurgarh, on 17.10.2008, he had dropped the deceased at Old Bank near MIE at about 05:20-05:30 p.m. He stated that the deceased had informed him that he had some work at Tikri. As stated earlier, PW-13 deposed that while he was returning to Bahadurgarh via Nizampur road at 7:00 p.m., he noticed the deceased going towards Nizampur road along with appellant Rani. He also noticed the remaining four appellants following them from a distance of around 50 mts. This witness was cross examined as to how he happened to be travelling in his car at Nizampur road leading to Bahadurgarh. As stated earlier, in his examination-in-chief PW-13 deposed as under:-

"....At about 7.00 p.m. I was going towards Rohtak Road from Nizampur village. Before Rohtak Road, I saw Satdev Rathi who was going towards Nizampur Road along with a lady namely Rani (Rani was also working in my factory at that time). The four persons namely Arun, Ram Parkash @ Guddu, Krishan @ Krishna and Prithvi Raj were also behind Satdev Rathi and Rani. (Distance between Satdev Rathi . Rani and Arun, Ram Parkash @ Guddu, Krishan @ Krishna and Prithvi Raj about 50 metres)."

20. In his cross-examination, he deposed that he did not go to the factory on 17.10.2008. He contacted the deceased on his telephone 3-4 times on 17.10.2008. He went on to add that his last talk with the deceased took place at about 01:00-01:30 p.m. He gave his telephone number as 9811508854 and that of Late Satdev Rathi as 9416052814. He added that he had stored Late Satdev Rathi's mobile number in his telephone which he had brought even on the day of recording of his cross examination i.e. on 01.07.2009. In his further cross examination recorded on 14.04.2009, PW-13 was questioned as to the cause of his presence on Nizampur road where he allegedly saw the deceased and the appellants. He stated that he did not go to his factory on 17.10.2008 as he had some foreign guests staying with him to whom he was attending to. He deposed that he had taken his guests for shopping to Connaught Place and they were there in the market till about 5:30 p.m whereafter, he was returning to his residence via Nizampur Road. He added that he had gone to that road several times before also where that day he saw the appellants with the deceased.

21. We have to test the veracity of PW-13's testimony. First of all, there are several good roads from Connaught Place to Bahadurgarh. The Court can take judicial notice of the fact that PW-13 could have straightway proceeded to his residence on Delhi-Rohtak Road which is a highway instead of straying to some smaller routes, that too in the evening hours. Even if it is assumed that for unexplained reasons, PW-13 did adopt the alleged route to his residence as stated by him, yet he was very well aware that the three appellants Ram Parkash, Krishan Kumar @ Krishna and Prithvi Raj had been expelled from the factory because of their misbehaviour with the deceased. Similarly, PW-13 was also aware that appellant Arun was also not reporting for work, after Rani and Arun Kumar were embarrassed. PW-13 is not a rustic villager. He owns a

number of factories including one in Bahadurgarh and another in Noida. Had he really found the appellant Rani in the deceased's company followed by the remaining four appellants, it would have naturally aroused a great suspicion in his mind. The natural human conduct would have been to inquire from the deceased as to how he was going in the company of appellant Rani all alone and to warn him that the other four appellants, three of whom had been expelled from service for misbehaving with the deceased, were following him. Further, PW-13 was in the company of some foreign guests as claimed by him. His wife was also sitting in the car. Even if PW-13 did not consider it appropriate or was in a hurry (though not claimed by him), what was least expected of him was to have called up the deceased and ask about his presence at the earlier said place at odd hours. PW-13 would have warned or atleast advised the deceased that he was being followed by four objectionable persons. It may also be noticed that PW-13 claimed that he remembers the deceased's mobile number by heart and that he had also saved the same in his mobile phone which was still there in his mobile on the date of recording of his cross examination. Thus, the conduct of PW-13 defies natural human behaviour.

22. Not only this, as per the prosecution version, PW-1, the deceased's son, met him (PW-13) in Police Post Tikri on 18.10.2008 at 8:15 p.m. PW-1 and PW-13 say that they together alongwith PW-2 proceeded to the place where the dead body was lying, and PW-1 and PW-13 admit that on seeing the dead body, the same was identified by PW-1 to be that of his father. PW-13 stated in his examination-in-chief that on 18.10.2008 when he reached his factory at about 8:00 a.m., the guard at the factory informed him of deceased Satdev Rathi not reaching home the previous night. He stated that it immediately struck him that he saw Rani and four other appellants with the deceased the previous evening. He thus, immediately proceeded to Police Post Tikri. Hence, on reaching Police Post Tikri it would have been natural for PW-13 to have disclosed this important fact to the police. Even if this was not done by him at that time, when he along with the deceased's son (PW-1) and nephew (PW-2) reached the spot and found the deceased's dead body, he would have immediately disclosed to PW-1 as also to the police officers that he had seen the deceased in the company of five appellants the previous evening. So much so that if this information had been given by PW-13 either to PW-1 or to the police, the case would have been registered on the

statement of PW-13 and not on the statement of PW-1 wherein the names of the five appellants would have been mentioned as suspects. There is another aspect of doubt in the prosecution version. According to PW-13, he saw the deceased and appellant Rani walking on foot and at the same time he saw the four appellants at a distance of about 50 mts. following the deceased and appellant Rani. It is highly improbable and unbelievable that if five appellants had entered into any conspiracy, the four appellants would be following the deceased and appellant Rani just at a distance of 50 mts. Obviously, the deceased himself could also have seen the other four just by turning back. Thus, the testimony of PW-13 defies human logic. Therefore, his statement that on 17.10.2008 at about 7:00 p.m., he saw appellant Rani along with deceased followed by the remaining four appellants is unbelievable and unacceptable.

23. The *'last seen together'* theory assumes importance only when the time of death of the deceased is sufficiently established and it is proved that the deceased was last seen alive in the company of the accused and there was no possibility of any other person coming in between the time when the deceased and the accused were seen together and the time of his death. In the instant case, the exact time or even approximate time of death has not been crystallised. A perusal of the post mortem report (Ex. PW-8/ A) shows that the post mortem on the dead body of the deceased was conducted on 18.10.2008 at 1:00 p.m. and the time since death was given as 41 hours. It would make the time of deceased's death on 16.10.2008 at about 6:00 a.m. However, the deceased was admittedly alive till the evening of 17.10.2008. For unexplained reasons, PW-8 changed duration since death from 41 hours to 22 hours in his court deposition. If that is accepted, the time of death would be about 3:00 p.m. on 17.10.2008. That is also not acceptable as the deceased was allegedly seen alive on 17.10.2008 at around 07:00-07:30 p.m. by PW-13. It seems that Dr. V.K. Jha (PW-8) had performed his duties in a totally perfunctory manner as he appears to have given the time since death in the post-mortem report only on the basis of brief facts forwarded to him as also on the basis of rukka where initially the time of incident was mentioned between 05:00 p.m. on 16.10.2008 to 07:00 a.m. on 17.10.2008. Thus, we are not inclined to rely much on the post mortem report (Ex. PW-8/ A) as also on the testimony of PW-8 regarding the time of the deceased's death.

24. The prosecution version as also the *'last seen together'* theory

falls flat for other reasons also. The prosecution has placed on record call records of phone number 9355732140 belonging to appellant Arun and the mobile number 9355733307 belonging to appellant Rani. The call record clearly shows that they were talking time and again with each other on 17.10.2008 from 5:00 a.m. till 9:05 p.m. PW-13 claims to have seen Rani in deceased's company at 7:00 p.m on 17.10.2008. There are calls between appellants Rani and Arun at 7:08 p.m., 7:09 p.m., 7:15 p.m., 7:19 p.m., 7:20 p.m., 7:29 p.m., 7:34 p.m., 7:50 p.m., 7:54 p.m. 8:03 p.m. and 9:05 p.m. on 17.10.2008. It is difficult to comprehend that when a lady was luring a person who was her superior (Manager) in the same factory, that person would allow the lady to talk to some other person so many times. Moreover, as per prosecution version, all the appellants were together after 7:30 p.m. Thus, there could not have been any occasion for them to talk on mobile phone.

25. There is another serious lapse in the investigation. As per the prosecution version, the deceased possessed a mobile phone. The deceased's wife spoke to him at 6:00 p.m on 17.10.2008 and thereafter, his son also tried to speak to him. The deceased is stated to have informed his wife that he would be back home in half an hour and thereafter his mobile phone got switched off. However, for unexplained reasons, the call details of the deceased's telephone were not obtained by the investigating officer. Since evidence of 'last seen together' has been held to be otherwise unbelievable, this lapse on the part of the investigating officer further gives a dent to the prosecution version.

RECOVERY OF INCRIMINATING ARTICLES

26. In addition to the evidence of *'last seen together',* the prosecution also relies on the recovery of bloodstained knives Ex. P-1, P-2 and P-3 at the instance of appellants Arun Kumar, Krishan Kumar @ Krishna and Ram Parkash @ Guddu respectively at the time of their arrest. Also, according to the prosecution, appellant Arun Kumar was found to be wearing a black bloodstained pyjama.

27. Admittedly, no independent/public witness was present at the time of alleged recoveries. Knife Ex. P-1 was allegedly got recovered by appellant Arun Kumar in pursuance of his Disclosure Statement Ex. PW-16/ 7 hidden in the bushes at South West Corner of the field where dead body of Satdev Rathi was found lying at Nizampur road. Similarly, knives Ex. P-2 and P-3 were allegedly got recovered by appellants Krishan

Kumar @ Krishna and Ram Prakash respectively in pursuance of their Disclosure Statements Ex. PW-16/ 8 and Ex. PW-16/ 9 after digging up the place in the field of one Jai Singh. Knives Ex.P-1 to P-3 were ordinary knives and they were not any valuable property. There was no reason for the appellants to have hidden these knives and that too in the open fields near the place of incident. Similarly, the abovesaid three appellants also told the I.O. that they were wearing the same clothes that they were wearing now at the time of commission of the offence. In addition, they allegedly got recovered some bloodstained clothes from the room of one Phool Singh and one Om Prakash Sharma. It is not understandable that if they had opportunity to wash the bloodstains off some of their clothes, why would they not wash the remaining ones and would conceal the same simply to get them recovered later on to the police.

28. In **Prabhoo v. State of U.P.,** AIR 1963 SC 1113, recovery of a bloodstained shirt and a dhoti as also an axe on which human blood was detected was held to be extremely weak evidence to base conviction of the accused. In **Narsinbhai Haribhai Prajapati etc. v. Chhatrasinh & Ors,** AIR 1977 SC 1753, recovery of a bloodstained shirt and a dhoti as also the weapon of offence, a dhariya were held to be weak evidence. In **Surjit Singh & Anr. v. State of Punjab,** AIR 1994 SC 110, recovery of a watch stated to be that of a deceased and the dagger stained with blood of the same group as that of the deceased were held to be weak evidence. Similar view was taken by the Supreme Court in **Deva v. State of Rajasthan,** 1999 SCC (Cri) 41 and **Mani v. State of Tamil Nadu,** 2009 (17) SCC 273.

29. In view of the law laid down in *Prabhoo, Narsinbhai Haribhai Prajapati, Surjit Singh* and *Mani,* we are not inclined to attach much importance to the alleged recoveries effected at the instance of appellants Arun Kumar, Ram Parkash and Krishan Kumar @ Krishna.

MOTIVE

30. The prosecution has led some evidence with regard to the motive. In their statements under Section 313 Cr.P.C., appellants Ram Parkash, Krishan Kumar @ Krishna and Prithvi Raj have denied that they ever misbehaved with the deceased after consuming liquor in the factory or that they were expelled from the services. They gave different dates for leaving the employment with M/s. K.N. Inter Plast Pvt. Ltd.

31. The prosecution version is that appellants Ram Parkash, Krishan Kumar @ Krishna and Prithvi Raj had been expelled from the factory because of their misbehaviour with the deceased after consuming liquor. Similarly, as per prosecution version appellants Rani and Arun Kumar were counselled by the deceased for their objectionable behaviour in the factory and appellant Arun Kumar stopped reporting for work considering that he had been expelled, yet, employment records of the five appellants were not seized by the I.O. during the course of investigation. As per the prosecution case set up in the charge sheet which is reflected from the statements of the witnesses recorded under Section 161 Cr.P.C., the incident of the three appellants misbehaving with the deceased took place two to three years before the occurrence. However, in Court, evidence was led to the effect that the incident took place merely two-three months before the occurrence. The witnesses were also duly confronted with their statements under Section 161 Cr.P.C. Thus, in view of the prosecution version, seizure of the entire employment record to pin point the period of employment of the appellants was extremely important which was not done by the I.O. for the reasons best known to him. So much so that PW-13 had stated that on 24.10.2008, the police wanted to seize the record but he declined to part with the same on the ground that the same would be produced in the Court only, when required. If really there had been any record, the same would have been seized by the I.O. during the course of investigation.

32. Further, some computer generated salary sheets of the employees were also sought to be proved as Ex. PW-13/ A to Ex. PW-13/ D. The same reveal that appellant Rani received some salary for the month of October, 2008 whereas names of other appellants were not there. In the salary sheet for the month of June, 2008, names of Krishan Kumar @ Krishna, Arun Kumar and Prithvi Raj were there but name of appellant Ram Prakash was conspicuously absent. If these salary sheets are to be believed, they lend credence to appellant Ram Prakash's version that there was no incident of misbehaviour by him and others with the deceased and that he had left the services with M/s. K.N. Inter Plast Pvt. Ltd. in April, 2008 itself. It is well settled that an accused is not expected to prove his defence beyond shadow of reasonable doubt. Thus, the absence of appellant Ram Prakash's name in the salary sheet for the month of June, 2008 makes his defence plausible which again creates doubt in the prosecution version.

33. In view of the prosecution version, the employment records if seized would have provided some credence as to how and when the appellants' services were terminated or any of them stopped reporting for work.

34. In the absence of seizure of the employment record, the same could not be verified. Whatever record/ computer generated salary sheets were produced, the same do not support the prosecution version. Similarly, as per the prosecution version, appellant Arun Kumar himself stopped coming to work whereas appellant Rani was still serving. Thus, there could not be a motive strong enough for appellants Arun Kumar and Rani to have entered into any conspiracy to commit the gruesome crime as alleged. Otherwise also, it is very well settled that motive, however, strong is not enough to base conviction of the accused. In **Sampath Kumar v. Inspector of Police, Krishnagiri,** (2012) 4 SCC 124 while referring to **N.J. Suraj v. State,** (2004) 11 SCC 346, **Santosh Kumar Singh v. State,** (2010) 9 SCC 747 and **Rukia Begum v. State of Karnataka,** (2011) 4 SCC 779, the Supreme Court observed that motive alone can hardly be a ground for conviction. In paras 29 and 30, the Supreme Court held as under:-

> *"29. In **N.J. Suraj v. State,** (2004) 11 SCC 346, the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected the motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused.*
>
> *30. To the same effect is the decision of this Court in **Santosh Kumar Singh v. State,** (2010) 9 SCC 747 and **Rukia Begum v. State of Karnataka,** (2011) 4 SCC 779, where this Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision of this Court in **Sunil Rai v. UT, Chandigarh,** (2011) 12 SCC 258. This Court explained the legal position as follows: (Sunil Rai case, SCC p. 266, paras 31-32)*

> *"31. In any event, motive alone can hardly be a ground for conviction. 32. On the materials on record, there may be some suspicion against the accused, but as is often said, suspicion, howsoever strong, cannot take the place of proof."*

35. In this view of matter, even if it is assumed that the possibly some grievance existed, the same is not sufficient to base appellants' conviction.

36. Non-seizure of the employment records, non-obtaining of the call details of the deceased's mobile phone, non-recording of the statement of PW-13 at the time of recovery of dead body, discrepancy in the post mortem report and PW-8's testimony, though not significant individually, when read together with the gaping holes create serious doubt about the motive theory.

37. The appellants are alleged to have entered into a criminal conspiracy to commit the deceased's murder. It is true that direct evidence of hatching a conspiracy is seldom available, yet at the same time, it is the bounden duty of the prosecution to prove the conspiracy by indirect or circumstantial evidence which must be clear, cogent and believable. That having not been done, it cannot be said that the appellants had entered into any criminal conspiracy to commit the murder of Late Satdev Rathi. As noticed above, the Trial Court has invoked both Sections 34 and 120B IPC and convicted the appellants. As per the charge sheet, all of them were present at the place of occurrence. However, for the reasons stated above, we have held that the prosecution has not been able to establish the said charges beyond reasonable doubt.

38. For the foregoing reasons, the appeals are bound to succeed; the same are accordingly allowed. The judgment and the order on sentence are accordingly set aside. The appellants are acquitted of the charges framed against them.

39. The appeals are allowed in above terms.

40. Pending applications also stand disposed of.

41. A copy of the order be transmitted to the Trial Court for information.

ILR (2014) III DELHI 2233
WP (C)

BHULE BISRE KALAKAR CO-OPERATIVE INDUSTRIAL PRODUCTION SOCIETY LTD. & ORS. .....PETITIONERS

VERSUS

UNION OF INDIA & ORS ....RESPONDENTS

(HIMA KOHLI, J.)

W.P.(C) NO. 1290/2014 & CM APPL. NO. 3834/2014 DATE OF DECISION:20.03.2014

A. Constitution of India, 1950—Article 226: Petition praying that DDA be restrained from dispossessing them or enabling the Developer from engaging in any building project in the Kathputli Colony—Held—As the contention of the Petitioners that the layout plan approved by the DUAC does not meet the norms stipulated in the Delhi Master Plan 2021 and the said grievance has not been taken up with the DDA till date, except referring to the same for the first time in the present petition, it is deemed appropriate to grant two weeks time to the petitioners to point out to DDA such of the norms laid down in the Delhi Master Plan 2021 and not complied with while finalizing the layout plan of the area. The said representation would be considered by DDA and response thereto conveyed to the Petitioner. Held—The anxiety expressed by the Petitioners with regard to the lack of facilities provided in the transit camp set up by the Developer at the instance of DDA can be easily assuaged by directing five representatives who are permanent residents in the settlement colony, to visit the transit camp and if there are any further facilities required to be provided or deficiencies pointed out, DDA and the Developer

shall examine the suggestions made and try and provide the same to that stay of the relocated households at the transit camp can be made as comfortable as possible. Petition disposed of.

As it is the contention of the counsel for the petitioners that the layout plan approved by the DUAC does not meet the norms stipulated in the Delhi Master Plan 2021 and the said grievance has not been taken up with the respondent No.2/DDA till date, except for referring to the same for the first time in the present petition, it is deemed appropriate to grant two weeks' time to the petitioners to point out to the respondent No.2/DDA such of the norms laid down in the Delhi Master Plan 2021 and not complied with while finalizing the layout plan of the area. The said representation shall be considered by the DDA and a response thereto, conveyed to the petitioners, through counsel within four weeks therefrom. **(Para 11)**

The last anxiety expressed by the counsel for the petitioners is with regard to lack of facilities provided in the Transit Camp set up by the respondent No.3/Developer at Anand Parbat at the instance of the respondent No.2/DDA, in terms of the Development Agreement. The said anxiety can be easily assuaged by directing five representatives, who are permanent residents in the settlement colony, to visit the Transit Camp at Anand Parbat alongwith Mr. S.K. Jain, Nodal Officer of the respondent No.2/DDA on 22.03.2014 at 11 AM. If there are any further facilities required to be provided or deficiencies pointed out, the respondent No.2/DDA and the respondent No.3/Developer shall examine the suggestions made and as far as possible, try to provide the same, so that the stay of the relocated households at the Transit Camp can be made as comfortable as is possible. **(Para 12)**

In view of the submission made by the counsel for the petitioners in the course of the arguments that every possible effort shall be made by the petitioners who claim to represent

the different communities residing at the Kathputli Colony as also the members of the petitioner No.1/Society to play a constructive role in persuading all the other residents of the colony to co-operate with the respondents and shift to the Transit Camp after its inspection is conducted as directed above, it is hoped and expected that not only shall the petitioners abide by the aforesaid assurance, they shall also desist from dissuading the other residents or obstructing them in any manner from shifting to the Transit Camp. **(Para 13)**

At the same time, learned counsel for the respondent No.2/DDA states on instructions from his officer, that till date, no coercive measures have been taken by the authorities to remove any of the residents of the settlement colony for relocating them to the Transit Camp and every effort shall be made by the respondent No.2/DDA to play a positive and supportive role in persuading the residents of the colony to voluntarily relocate to Anand Parbat as soon as possible, since a lot of investment has been made by the respondent No.3/Developer in setting up the Transit Camp and any further delay in vacating the settlement colony shall result in bringing the entire project to a grinding halt. He however clarifies that the aforesaid assurance given by DDA that it shall play a supportive role to enable the residents of the colony to shift to the Transit Camp should not be interpreted to mean that DDA is permanently precluded from taking appropriate steps available to it in law for relocating the residents in the settlement colony to the Transit Camp, if faced with continuing resistance. **(Para 14)**

It goes without saying that if the respondent No.2/DDA takes any step to relocate the residents of the settlement colony to the Transit Camp, the same shall be strictly in accordance with the law. It is further clarified that those residents of the settlement colony, who have voluntarily taken a decision to shift to the transit camp, shall proceed to do so unhindered by any third party and the directions issued in this order shall not preclude the other residents of the colony from

shifting to the Transit Camp at the earliest. **(Para 15)**

[An Ba]

APPEARANCES:

FOR THE PETITIONERS	**:**	Ms. Nitya Ramkrishnan, Advocate with Mr.Sarim Naved and Ms.Ria Singh, Advocates.
FOR THE RESPONDENTS	**:**	Mr. Neeraj Chaudhari, CGSC with Mr. Raujyot Singh Advocate for R-1/UOI. Mr. Rajiv Bansal, Advocate for R-2/DDA Mr. Neeraj Kishan Kaul, Senior Advocate with Mr. Shalabh Singhal, Advocate for R-3.

RESULT: Petition disposed of.

HIMA KOHLI, J. (ORAL)

1. The present petition has been filed by twenty eight petitioners, including the petitioner No.1/Society praying inter alia that the respondent No.2/DDA be restrained from dispossessing them or enabling the respondent No.3/Developer from engaging in any building project in the area known as Kathputli Colony opposite Shadipur, Delhi, and further for issuing directions to the respondent No.2/DDA to consider the proposal put forth by them(Annexure P-18 to P-20 enclosed with CM APPL.3834/2014).

2. Ms. Nitya Ramakrishnan, learned counsel for the petitioners states that the petitioners are craftsman, artists and artisans who have been residing in Kathputli Colony for the past several decades. The petitioners are aggrieved by the In-situ slum development project undertaken by the respondent No.2/DDA in the year 2008 on a parcel of land measuring 5.22 hectares in Kathputli Colony for constructing 2800 residential units under the EWS category on a part thereof upon entering into a Project Development Agreement with the respondent No.3 on 04.09.2009, whereunder it was granted a timeline of two years from the date of notice of commencement of work, for undertaking construction on the subject land.

3. It is submitted by the learned counsel for the petitioners that

after executing the aforesaid Agreement, the respondent No.2/DDA had undertaken a survey of the area for identifying the number of households in the colony but the final list drawn up by it was neither placed on their website, nor was it displayed on any public notice board and the basis of conducting the said survey was also not explained. As a result, there are some genuine households, whose names have been left out from the final list and if they are removed from the present settlement, they and their families would be rendered homeless.

4. The second grievance raised by the counsel for the petitioners is that while finalising the layout plan for the purpose of mixed use development at the Kathputli Colony, the respondent No.2/DDA and the respondent No.3/Developer did not take into consideration the needs of the residents of the area, who have peculiar requirements in view of the nature of vocations practiced by them that include puppeteering, practicing music, weaving and other performing arts etc., which require special skills and unusual equipments and gadgets. She states that representations on the aforesaid lines were submitted by the petitioners to the respondent No.2/DDA but they have not been taken into consideration. To substantiate the aforesaid submission, learned counsel draws the attention of the Court to pages 92 and 93 of the documents enclosed with CM APPL. 3834/2014.

5. It is next stated by learned counsel for the petitioners that the petitioners do not intend to obstruct the development project in any manner, but they only want an assurance that the project is executed in such a manner that sufficient space is made available for them to undertake the unique character of their vocation and display their skills for earning a livelihood. She states that if the petitioners are given an opportunity to submit their suggestions in respect of the proposed development of the area in question in the context of the common facilities, multipurpose hall, auditorium and other utilities, it will go a long way in improving the quality of their lives and those of the other residents of the area, on the condition that the proposed layout plan(a copy whereof has been handed over by the counsel for the respondent No.2/DDA to the counsel for the petitioners) abides by the development norms that have been stipulated in the Delhi Master Plan 2021. However, on enquiry, learned counsel concedes that prior to filing the present petition, the petitioners have not made any such representation to the competent authority complaining inter alia that the respondents No.2/DDA and respondent No.3/Developer have not

adhered to the development norms stipulated in the Delhi Master Plan 2021 or the guidelines laid down therein pertaining to the layout plan of the area. She states that the petitioners may be permitted to make a representation on the aforesaid lines and the respondent No.2/DDA be directed to consider the same in accordance with the law.

6. Lastly, it is stated by learned counsel for the petitioners that pursuant to the survey conducted by them, the respondent No.2/DDA has very recently displayed the names of the identified households on their website, who have been found eligible for In-situ rehabilitation after the development work in the colony is concluded and as a tide over, then they would be entitled to shift to a Transit Camp set up by the respondent No.3/Developer at Anand Parbat. She submits that those genuine households whose names have been left out from the list and have a genuine grievance in that regard, ought to be permitted to make a representation to the respondent No.2/DDA for their names to be included in the Final List drawn by the DDA, if found to be eligible.

7. At the outset, Mr.Rajiv Bansal, learned counsel for the respondent No.2/DDA and Mr.N.K.Kaul, learned Senior Advocate appearing for the respondent No.3/Developer challenge the very maintainability of the present petition and state that the names of all the persons arrayed as petitioners at Sr.No.2 to 28 of the memo of parties have already been included in the list of eligible households drawn up by the respondent No.2/DDA and therefore, they cannot have any grievance that their names have been excluded from the Final list. They contend that in reality there are certain vested interests that the present petitioners seek to represent under the garb of the present petition which is nothing but an attempt to dissuade the other residents from shifting to the Transit Camp, which assertion is vehemently disputed by the counsel for the petitioners.

8. Learned counsel for the respondent No.2/DDA states that as far as the issue raised with regard to the names of genuine households being left out, the DDA is open to receiving representations from such aggrieved persons so that their grievance can be redressed in accordance with law. He states that DDA is willing to display a public notice in the area and on its website, wherein the requisite documents required to be submitted by such applicants and the timeline for submitting such representations, shall be stated so that their cases can be considered and disposed of in accordance with law. He states that DDA is willing to walk an extra mile

so as to iron out any difficulty that may be faced by the residents in submitting their representations at its headquarters and to save time, a Nodal Officer of the rank of a Director, whose temporary office has already been established at the site, shall display the public notice on a notice board in the colony and receive their representations there itself for being processed and decided by the competent authority in accordance with law.

9. Learned counsel for the respondent No.2/DDA denies the assertion made by the other side that the residents of the colony are plagued with the fear of being left homeless once they leave the colony and there is no certainty of their returning. He hands over a set of documents including a copy of an agreement executed with such of the eligible householders for shifting them to the Transit Camp and for allotment of a dwelling unit at the reconstructed Kathputli Colony and states that all eligible persons shall execute a Tripartite Agreement with the respondent No.2/DDA and the respondent No.3/Developer for the said purpose and this being the first In-situ slum development project undertaken by DDA on the basis of a public/private partnership, every care shall be taken to have it implemented smoothly and expeditiously. Copies of the documents handed over by the learned counsel are taken on record.

10. It is next stated by the counsel for the respondent No.2/DDA that now that a copy of the layout plan for the purpose of mixed use development of the area has been furnished to the counsel for the petitioners, the petitioners are at liberty to examine the same and submit their suggestions for making the common facilities and common areas more compatible to their needs, but within the scope of the plans as approved by the DUAC.

11. As it is the contention of the counsel for the petitioners that the layout plan approved by the DUAC does not meet the norms stipulated in the Delhi Master Plan 2021 and the said grievance has not been taken up with the respondent No.2/DDA till date, except for referring to the same for the first time in the present petition, it is deemed appropriate to grant two weeks' time to the petitioners to point out to the respondent No.2/DDA such of the norms laid down in the Delhi Master Plan 2021 and not complied with while finalizing the layout plan of the area. The said representation shall be considered by the DDA and a response thereto, conveyed to the petitioners, through counsel within four weeks therefrom.

12. The last anxiety expressed by the counsel for the petitioners is with regard to lack of facilities provided in the Transit Camp set up by the respondent No.3/Developer at Anand Parbat at the instance of the respondent No.2/DDA, in terms of the Development Agreement. The said anxiety can be easily assuaged by directing five representatives, who are permanent residents in the settlement colony, to visit the Transit Camp at Anand Parbat alongwith Mr. S.K. Jain, Nodal Officer of the respondent No.2/DDA on 22.03.2014 at 11 AM. If there are any further facilities required to be provided or deficiencies pointed out, the respondent No.2/DDA and the respondent No.3/Developer shall examine the suggestions made and as far as possible, try to provide the same, so that the stay of the relocated households at the Transit Camp can be made as comfortable as is possible.

13. In view of the submission made by the counsel for the petitioners in the course of the arguments that every possible effort shall be made by the petitioners who claim to represent the different communities residing at the Kathputli Colony as also the members of the petitioner No.1/ Society to play a constructive role in persuading all the other residents of the colony to co-operate with the respondents and shift to the Transit Camp after its inspection is conducted as directed above, it is hoped and expected that not only shall the petitioners abide by the aforesaid assurance, they shall also desist from dissuading the other residents or obstructing them in any manner from shifting to the Transit Camp.

14. At the same time, learned counsel for the respondent No.2/DDA states on instructions from his officer, that till date, no coercive measures have been taken by the authorities to remove any of the residents of the settlement colony for relocating them to the Transit Camp and every effort shall be made by the respondent No.2/DDA to play a positive and supportive role in persuading the residents of the colony to voluntarily relocate to Anand Parbat as soon as possible, since a lot of investment has been made by the respondent No.3/Developer in setting up the Transit Camp and any further delay in vacating the settlement colony shall result in bringing the entire project to a grinding halt. He however clarifies that the aforesaid assurance given by DDA that it shall play a supportive role to enable the residents of the colony to shift to the Transit Camp should not be interpreted to mean that DDA is permanently precluded from taking appropriate steps available to it in law for relocating the residents

in the settlement colony to the Transit Camp, if faced with continuing resistance.

15. It goes without saying that if the respondent No.2/DDA takes any step to relocate the residents of the settlement colony to the Transit Camp, the same shall be strictly in accordance with the law. It is further clarified that those residents of the settlement colony, who have voluntarily taken a decision to shift to the transit camp, shall proceed to do so unhindered by any third party and the directions issued in this order shall not preclude the other residents of the colony from shifting to the Transit Camp at the earliest.

16. The petition is disposed of alongwith the pending application.

DASTI to the parties.

ILR (2014) IV DELHI 2241
RC REV.

RAJENDER PRASAD GUPTA ….PETITIONER

VERSUS

RAJEEV GAGERNA ….RESPONDENT

(NAJMI WAZIRI, J.)

RC REV. 66/11 & CM NO. 4635/2013 **DATE OF DECISION: 20.03.2014**

Delhi Rent Control Act, 1958—Section 14(1)(e)—Petition against rejection of leave to defend application of the tenant and eviction orders. Held-Simply because the daughter is of a marriageable age and allegedly likely to marry would not necessarily cut her ties from her maternal family nor would the requirement for her accommodation in her father's house be lessened. Daughter being a qualified professional the need is all

the more acute and bona fide. Reasons and conclusions of the Trial Court correct. Petition Dismissed.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Asit Tewari, Advocate.

FOR THE RESPONDENT : Mr. N.K. Goyal with Ms. Varsha Ahluwalia, Advs.

RESULT: Petition dismissed.

NAJMI WAZIRI (Open Court)

This is a tenant's petition challenging an order dated 29.11.2010 passed by the Additional Rent Controller, North District, Delhi, whereby an order of eviction has been passed in respect of one shop and one godown at property No.1028, Gali Teliyan, Tilak Bazar, Behind Novelty Cinema, Delhi-110006. The respondent-landlord's petition under Section 14(1)(e) of the Delhi Rent Control Act, 1958 (hereinafter referred to as the 'said Act') was allowed. The petitioner-tenant was denied leave to defend, which he sought on the following grounds:

i. That there was no bona fide need.

ii. That the eviction petitioner was not absolute owner and landlord of the property; Smt. Shanti Devi was the owner of the premises and prior to her Smt. Bela Devi was the owner thereof.

iii. That she had executed a will in favour of her nephews, i.e. sons of Mr. Anandi Lal.

Therefore, the eviction petitioner had no locus standi to file the petition. He has further argued that in any case, the petition was bad for non-joinder of necessary parties; that there were other co-tenants in the property and furthermore the petition was liable to be dismissed as the tenancy was never terminated during the lifetime of the original tenant.

The leave to defend further contended that the eviction-petitioner had one shop vacant on the ground floor of property No.1028, Gali Teliyan, Tilak Bazar, Behind Novelty Cinema, Delhi and one property at F-19/18, Krishna Nagar, Delhi-110051, which comprised of three

bedrooms, one drawing-cum-dining room, two latrines, two bathrooms, two kitchens and the daughter of the petitioner was of marriageable age and, therefore, the need for her would not sustain. Thus, the eviction-petitioner would have sufficient accommodation hence, no bona fide need was made out under Section 14(1)(e) of the said Act. However, the Trial Court after considering contentions and the facts & circumstances of the case, concluded as under:

> "a. The next ground taken is that petitioner has not disclosed the details of his family members and their age but said ground appears to have been taken for the sake of the defence as if in the entire leave to defend application number of family members have not been denied and so far as age of daughter is concerned when it is alleged that the daughter is practicing Advocate but said factum has not been denied in the entire leave to defend application and so far as age of son is concerned, it is nowhere stated in the leave to defend application that he is infant and thus, it cannot be said that petition lacks of material particulars.
>
> b. The other ground taken is availability of other suitable accommodation at property No.F-19/18, Krishna Nagar and one vacant shop on the ground floor in property No.1028, Gali Teliyan, Tilak Bazar as well as entire first floor of the said property and petitioner has denied the availability of the same. The Site Plan of the property at Krishna Nagar and of Tilak Bazar have been filed along with the reply to leave to defend application and in the Site Plan it is disclosed that the remaining portion of the property at Krishna Nagar is in possession of the brother of the petitioner, i.e. Mr. Sanjeev Gagerna which is shown in Green colour and the other shop at Ground floor of the property at Tilak Bazar is in possession of tenant Mr. Rajesh Kumar Gupta, one room attached with the kitchen on first floor is in possession of Mr. Sanjeev Gagerna in terms of the Will executed by Smt. Shanti Devi and the other room on the first floor is in possession of Mr. Rajesh Kumar Gupta and the room at second floor is in possession of one Lalita Prasad and no counter Site Plan has been filed on behalf of the respondent rebutting the claim of the petitioner and in absence of any counter Site Plan, the Site Plan filed by the petitioner are deemed to be correct and from the averment in the petition, petitioner is having three rooms in his possession and

> petitioner's family consists of petitioner, his wife, son and daughter and no where in the entire leave to defend application it has been denied that the petitioner's daughter is not practicing as an Advocate and requirement is shown of her for the purpose of her professional office and in all three rooms are available and as per requirement shown two rooms are required by petitioner and his wife, one room as Pooja room, one room as guest room, one as bed room for the daughter and one as study room for the son and thus, requirement of the petitioner is shown of more accommodation for residential purpose and said requirement as well as other requirement for office of daughter and keeping in mind the requirement of the daughter for the purposes of professional office it is clear that there is no space available for running the office and thus, it is established from the record available that need of the petitioner is genuine and bonafide for the purposes of running professional office for the daughter.
>
> c. The next ground taken is that petitioner wants to convert the property in question into the market to get pecuniary benefits but said ground appears to have been taken for the sake of defence without having any substance as there is protection provided under Section 19 of the DRC Act to the tenant.
>
> d. The next ground taken is that there is no notification of any enactment amending the provision under Section 14(1)(e) of DRC Act and there is only suggestion of the Hon'ble Supreme Court and therefore, petition is not maintainable as the property in dispute is commercial in nature. It appears that said ground is taken for the sake of defence without having any substance as in Satyawati Case; Hon'ble Supreme Court has held that the provision under Section 14(1)(e) of the DRC Act has no application to the premises which are let out for commercial purposes if same is required for bonafide requirements of the landlord/owner or for his dependent and that is the law of land.¡±

The memorandum of appeal reiterates the same grounds taken in the leave to defend and counsel for the petitioner submits that the Trial Court fell into an error on each of the grounds listed in the memorandum of appeal. He submits that the respondent was not the owner of the premises and in any case there was no bona fide need.

Having considered the arguments of learned counsel for the parties, this Court is of the view that the Trial Court has taken into consideration each of the contentions raised in the leave to defend and found them to be not triable issues. The reasons for and conclusion arrived at cannot be faulted. Furthermore, simply because the daughter of a marriageable age and allegedly likely to marry would not necessary cut her ties from her maternal family nor would the requirement for her accommodation in her father's house be lessened. Indeed, in the present times a daughter who is married-out, may like to retain her accommodation in her father's house which forms an emotional anchor and a place for refuge for all times. In times of an unfortunate marital discord such need becomes more acute should there be such a need. Conversely her family also would want to retain a room so as to re-assure her of a continued place of residence in her paternal home. A married daughter's ties with her paternal family do not end upon her marriage. For a married daughter her parents. home is always a refuge; an abode of reassurance and an abiding source of emotional strength and happiness. In the present case the daughter is a practicing advocate, i.e. a qualified professional, the need is all the more acute and bona fide. This Court finds, as did the Trial Court did, that no triable issues were raised in the leave to defend. Therefore, there was no need to grant leave or set the matter for trial. The reasons and the conclusion arrived at in the impugned order are correct and call for no interference.

The petition and the application are accordingly dismissed as being without any merit.

ILR (2014) IV DELHI 2246
C.R.P

SANJAY ....PETITIONER

VERSUS

AJIT SINGH BAJAJ ....RESPONDENT

(NAJMI WAZIRI, J.)

C.RL.P. 23, 24, 25, 26, 27/2013 DATE OF DECISION : 20.03.2014

Code of Civil Procedure, 1908—Order 7 Rule 11 and Section 115—Delhi Land Reforms Act, 1954—Section 33 and 42—Indian Contract Act, 1872—Section 23—Limitation Act, 1908—Article 24,27,47 and 55 of Schedule—Trial Court dismissed petitioner's application for rejection of plaint—Order challenged before High Court — Plea taken, impugned order suffers from material irregularity : suit was barred by Section 33 and 42 of DLR Act, 1954 therefore Court lacked jurisdiction and case is barred by limitation—Held— Trial Court has considered both objections in impugned order — It has clearly reasoned that both these objections are mixed question of facts, which could be decided after a trial—It is not indeed it cannot be - contention of petitioner herein that issues are pure questions of law de hors facts of case—It cannot by any stretch of imagination be held that question of : (i) whether a document—which is basic of suit—is illegal in view of Delhi Land Reforms Act, and (ii) whether suit was filed on 01.08.2011 or on 02.08.2011 are only question of law—Latter question is ex facie issue of fact—Given same, impugned order, which rejects application under Order VII Rule 11 and relegates party to trial on issues raised in application, is not one that warrants interference under Section

115 of Code—This Court finds no reason to interfere with impugned order—Petition is without merit and is accordingly dismissed.

Important Issue Involved: Courts under Section 115 of the Code of Civil Procedure have limited jurisdiction, which provides only 3 ground for interference by the High Court namely, (a) where the subordinate court has appears to have exercised jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity

[Ar Bh]

APPEARANCES :

FOR THE PETITIONER : Mr. Lohit Ganguly & Mr. Ajay Kumar, Advs.

FOR THE RESPONDENT : Mr. Santosh Kumar with Mr. S.B Saran, Advs.

CASES REFERRED TO:

1. *Gunjan Khanna & Anr. (Ms.)* vs. *Mr. Arunabha Maitra* 2010 IV AD (Delhi) 258.
2. *Ashok Malik* vs. *Ramesh Malik* 155 (2008) DLT 6930.
3. *C. Natarajan* vs. *Ashim Bai & Anr.* (2007) (4) CCC 721 (SC).
4. *Ramesh B. Desai & Ors.* vs. *Bipin Vadilal Mehta & Ors.,* [(2006) 5 SCC 638].
5. *Balsaria Construction (P) Ltd.* vs. *Hanuman Seva Trust & Ors.,* [(2006) 5 SCC 658].
6. *Mayar (H.K.) Ltd.* vs. *Owners & Parties, Vessel, M.V. Fortune Express (2006) 3 SCC 100.*
7. *Popat and Kotecha Property* Vs. *State Bank of India Staff Assam* (2005) 7 SCC 510.
8. *Sopan Sukhdeo* vs. *Asstt. Charity Commissioner & Ors. (2004) 3 SCC 137.*
9. *Salim Bhai* vs. *State of Maharashtra* (2003) 1 SCC 557.
10. *M.V."Sea Success I"* vs. *L & LSP & Indemnity Association Ltd.* AIR 2002 Bombay 151.
11. *Susila Dei & Ors.* vs. *Sridhar Rautray & Ors.* AIR 1970 Orissa 89.
12. *Panchoo* vs. *Ram Sunder* AIR 1943 Allahabad 294.
13. *D.Ramachandran* vs. *R.V. Janakiraman,* (1999) 3 SCC 267.

RESULT : Dismissed.

NAJMI WAZIRI (Open Court)

1. This order shall dispose off the 8 petitions under section 115 of the Code of Civil Procedure, 1908 ("Code"), which arises from an order dated 27.11.2012 whereby the petitioner's application under Order 7 Rule 11 of the CPC was dismissed. The ground for dismissal of the application was twofold:

Firstly, the impugned order held that at the time of ascertaining the plaint assailed under Order VII rule 11, the Court is not to consider whether the plaint is based on a cause of action, but is required to consider whether the averments of the plaint discloses a cause of action. It observed that once the plaint discloses a cause of action, the veracity whether the averment is correct or incorrect is an issue which would be decided after going into trial. It held under Order 7 Rule 11 CPC results in non suiting the plaintiff it cannot be lightly ordered and the Court ought to exercise due caution in this regard.

Secondly, the impugned order concluded the objection taken by the application as to the suit being barred by limitation was a mixed question of fact and law and ought to rightly be considered after trial. The objection taken in the application was that the claim of the plaintiff that the suit was filed on 1.8.2011 but was inadvertently marked on the plaint by the Filing Section as having been filed on 2.8.2011 was baseless. In arriving at its conclusion that the issue raises a mixed question of fact and law, the trial court considered the defendant's arguments and the precedents they wished to rely upon as under:-

"5. Counsel for the defendant has relied upon the following judgment:

(i) **Salim Bhai Vs. State of Maharashtra** (2003) 1 SCC 557

(ii) **Sopan Sukhdeo Vs. Asstt. Charity Commissioner & Ors.** (2004) 3 SCC 137

(iii) **Popat and Kotecha Property Vs. State Bank of India Staff Assam** (2005) 7 SCC 510

(iv) **C. Natarajan Vs. Ashim Bai & Anr.** (2007) (4) CCC 721 (SC)

(v) **Ashok Malik Vs. Ramesh Malik** 155 (2008) DLT 693

(vi) **Panchoo Vs. Ram Sunder** AIR 1943 Allahabad 294

(vii) **Susila Dei & Ors. Vs. Sridhar Rautray & Ors.** AIR 1970 Orissa 89.

2. The plaintiff had relied upon a case titled **Gunjan Khanna & Anr. (Ms.) v. Mr. Arunabha Maitra** 2010 IV AD (Delhi) 258 to contend that where there are mixed questions of fact and law, it cannot be decided without leading evidence. The Trial Court also relied upon the dictum in **M.V."Sea Success I" v. L & LSP & Indemnity Association Ltd.** AIR 2002 Bombay 151 in support of its conclusion that the correctness and the averments in the plaint is not to be seen at the time of adjudication of an application under Order 7 Rule 11 of the Code. The Trial Court further relied upon on **D.Ramachandran v. R.V. Janakiraman,** (1999) 3 SCC 267 which held that where triable issues have arisen, the Court cannot dissect the pleadings into several parts and consider whether each of them disclose a cause of action, instead the entire plaint ought to be considered in its entirety. The impugned order thus concluded, that what is to be considered at the time of disposing off an application under Order 7 Rule 11 Code is merely the averments in the plaint irrespective of the contents of the written statement. The Trial Court also relied upon the judgment of the Supreme Court in **Mayar (H.K.) Ltd. Vs. Owners & Parties, Vessel, M.V. Fortune Express** (2006) 3 SCC 100.

3. The learned counsel for the petitioner has argued that the impugned order suffers from material irregularity: the suit was barred by section 33 and 42 of the Delhi Land Reforms Act, 1954, therefore the court lacked jurisdiction. Since the objective of the agreement dated 3.5.2008 was the

unlawful illegal sale and transfer such agreement would be void ab initio under section 23 of the Indian Contract Act. He contends that the case is barred by limitation under section 24 of the Schedule to the Limitation Act; it was also hit by the limitation prescribed under Articles 27, 47 and 55 of the said Act. Therefore, it was not maintainable and ought to have been rejected; that by not rejecting it, the Court has exercised jurisdiction not vested in it.

4. Counsel also relied upon the same judgments as have been mentioned herein above.

5. This Court is of the view that the above arguments of counsel for the parties will have to be appreciated in the context of the limited jurisdiction of this Court under section 115 of the Code of Civil Procedure, which provides only 3 grounds for interference by the High Court namely, (a) where the subordinate court has appears to have exercised jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

6. The petitioner contends that the impugned order suffers from material irregularity and patent illegality since it could be ascertained from the Court's own record that the suit was barred by limitation, and further, on a bare perusal of Sections 33, 42 of Delhi Reforms Act, it is apparent that the suit ought to have been rejected on the ground of lack of jurisdiction.

7. The Trial Court has considered both objections in the impugned order. It has clearly reasoned that both these objections are mixed questions of facts, which could be decided after a trial. It is not – indeed it cannot be – the contention of the petitioner herein that the issues are pure questions of law de hors the facts of the case. It cannot by any stretch of imagination be held that the question of: (i) whether a document – which is the basis of the suit – is illegal in view of the Delhi Land Reforms Act, and (ii) whether the suit was filed on 01.08.2011 or on 02.08.2011 are only questions of law. The latter question is ex facie an issue of fact.

8. Given the same, the impugned order, which rejects the application under Order VII Rule 11 and relegates the party to trial on the issues raised in the application, is not one that warrants interference under

section 115 of the Code. The Supreme Court, in **Ramesh B. Desai & Ors. V Bipin Vadilal Mehta & Ors.,** [(2006) 5 SCC 638] held that the Code of Civil Procedure, 1908, does not confer jurisdiction upon a Court to try a mixed question of fact and law as a preliminary issue. It further held, relying on **Balsaria Construction (P) Ltd. v Hanuman Seva Trust & Ors.,** [(2006) 5 SCC 658] that unless it is apparent from a reading of the plaint that the Suit will be barred by limitation, the plaint cannot be rejected under Order VII rule 11.

9. This Court finds no reason to interfere with the impugned order. The petition is without merit and is accordingly dismissed.

ILR (2014) IV DELHI 2251
CRL.A

RAJESH GUPTA **....APPELLANT**

VERSUS

STATE THOUGH CENTRAL BUREAU OF INVESTIGATION **....RESPONDENT**

(S. MURALIDHAR, J.)

CRL.A. 89/2009 **DATE OF DECISION : 25.03.2014**

Prevention of Corruption Act, 1988—Section 7/13(1)(d) - Appellant, Assistance Commissioner of Income Tax convicted for having demanded and accepted money from the complaint whose Income Tax Returns were pending with him - As per the case of the Prosecution, on the complaint PW3 lodging a complaint with the CBI that the appellant had demanded a bribe from her, she was made to telephonically speak to the appellant and the conversation was recorded in an audio cassette which revealed the demand of bribe by the appellant and subsequently a trap was laid down

and the appellant was caught alongwith the bribe amount - Contention of appellant that the audio cassette is inadmissible in evidence and that even otherwise the conversation in the same does not prove the demand of a bribe and further that the acceptance of bribe has also not been proved beyond reasonable doubt for the hand washes of the appellant did not turn pink - Impugned judgment also challenged on the grounds that the sanction order did not mention the correct provision of the P.C Act and that the accused was not put all the incriminating evidence u/s 313 Cr. PC. Held : Evidence of PW3 the complainant is both cogent and reliable and can be safely accepted as proving the fact of demand and the fact of acceptance of the bribe amount by the appellant. PW3 was familiar with the appellant's voice having met him earlier and therefore her identification of the voice of the appellant in the tape recorded conversation can be relied upon. Appellant is precluded from challenging the admissibility of the transcript of the conversation once during trial the said transcript was accepted by the defence as an admissible piece of evidence and the prosecution witness were confronted with the same. Further the version of PW3 that she asked to place Rs. 15,000/- in a torn sheet of paper without the appellant touching it is in fact consistent with his hand washes not turning pink when taken at the spot. The failure to put to the appellant u/s 313 Cr. PC certain aspects of the evidence of PW3 cannot be said to have caused any prejudice to him. As regards the non mentioning of the correct provisions of the PC Act in the sanction order, the settled law is that mere failure to mention correct provision cannot lead to invalidity of the order. Appeal dismissed.

On reading of the entire evidence of PW-3 it appears that there are two stages of the demand as spoken to by her. PW-3 states that when met the Appellant on 7th March 2000 in respect of the scrutiny of her income tax returns, the

Appellant had demanded Rs.75,000 for a favourable scrutiny and that after negotiations the amount was settled at Rs.50,000. While it is true that in her complaint she did not mention about the role of the CA and Mr. Krishan Kumar the essential fact of Appellant demanding Rs.75,000 and reducing it later to Rs.50,000 has been mentioned by her in the complaint. **(Para 33)**

In her examination-in-chief, PW-3 stated that when the conversation contained in the cassette Ex. P 2 was played in her presence it "was very much clear and audible and I identified my voice as well as the voice of Rajesh Gupta". Although Ex P-2 when played in Court was not clear, PW-3 identified from the transcript that the conversation at points A to A, B to B and C to C in her voice and that of the Appellant. **(Para 35)**

The above submission is to no avail since Ex. PW-11/DB was used by learned counsel for the Appellant confronting both PWs-11 and 12. They were asked whether the transcript was accurate and they answered in the affirmative. When PW-3 stated that Ex. P 2 was audible and clear when it was played in the office of CBI but when played in Court the voice of the Appellant was low, her attention was drawn to the transcript and she identified portions of the transcript. The first three pages of the transcript referred to Ex. P 2 containing the conversation recorded on 7th March 2000. There is merit in the contention of the learned SPP that having accepted the said transcript as admissible piece of evidence and confronting PWs 11 and 12 with it would preclude the Appellant from challenging the admissibility of the said transcript at this stage. **(Para 43)**

In the present case the voice of the Appellant could be identified either by the maker of the record or by others who recognised his voice. The voices of both the PW-3 and the Appellant have been duly identified by PW-3. She was familiar with the Appellant's voice having met him earlier. Next as regards the accuracy of the tape recorded

conversation, when Ex. P 2 was played in the office of the CBI it was clear and audible. PW-3 was unable to be shaken in her cross-examination on that aspect. Although the tape was inaudible when played in the Court, PW-3 was able to identify the conversation from the transcript. In response to a specific suggestion put to both PWs 11 and 12 in cross-examination, both denied that Ex P 2 had been tampered. **(Para 48)**

While it is true that the hand washes of the Appellant did not turn pink, the CFSL Report Chemical Division does indicate that the TLC Test showed the presence of phenolphthalein in the sodium carbonate solution. There are several unanswered questions as regards the cotton piece not containing any sodium carbonate although it was supposed to have been dipped into it. These discrepancies do not by themselves shake the credibility of the prosecution case. The version of PW-3 that she was asked to place Rs.15,000 in a torn sheet of paper without the Appellant touching it is in fact consistent with his hand washes not turning pink when taken at the spot. This is spoken to by not only PW-3 but also PWs-4, 5 and 12. **(Para 54)**

As already noticed even if the above statements of PW-3 are not taken into account, the fact is that on 9th March 2000 during the telephonic conversation, the offer by PW-3 to bring a reduced bribe amount being accepted by the Appellant has been satisfactorily proved by the prosecution. Therefore, the failure to put to the Appellant the above aspects of the evidence of PW-3 cannot be said to have caused any prejudice whatsoever to the Appellant. The case appearing against the Appellant and in particular the circumstances concerning the telephonic conversation of 9th March 2000 have been put to him. It is another matter that he has denied the said conversation. **(Para 60)**

It is true that PW-1 in his evidence admits that most of the language of the sanction order was in terms of the proforma sanction order given by the Vigilance Department. However,

that by itself cannot lead to the inference that there was non-application of mind by PW-1. The words "red-handed" was perhaps in the context of the fact that a trap was laid as a result of which the Appellant was apprehended and arrested. As regards the non-mentioning of the correct provisions of PC Act, the settled law is that mere failure to mention correct provisions cannot lead to invalidity of the order (**C.S. Krishnamurthy v. State of Karnataka** (2005) 4 SCC 81). In any event, Section 19 (3)(a) read with 19(4) of PC Act states that no finding of guilt would be reversed only on the ground of any error or irregularity in the sanction order unless the Court is of the view that there was a failure of justice. The Court is not persuaded to hold that the mention of Section 19 (1) (c) PC Act in the sanction order instead of Section 19 (1) (a) has resulted in any failure of justice qua the Appellant. **(Para 62)**

Important Issue Involved : Having accepted a piece of evidence as admissible during trial, an accused is precluded from challenged the admissibility of the same at the appellate stage.

[An Gr]

APPEARANCES :

FOR THE APPELLANT : Mr. Arvind K. Nigam, Senior Advocate with Mr. Subhiksh Vasudev, Mr. Abhishek Singh, Mr. Atul T.N., Advocates.

FOR THE RESPONDENT : Mr. Narender Mann. Special Public Prosecutor with Mr. Manoj Pant and Ms. Utkarsha Kohli, Advocate.

CASES REFERRED TO:

1. *Niranjan Singh* vs. *CBI* (2013) 203 DLT 635.
2. *Nilesh Dinkar Paradkar* vs. *State of Maharashtra* (2011) 4 SCC 143.

3. *Sujit Biswas* vs. *State of Assam* (2013) 3 JCC 1887.
4. *(C.S. Krishnamurthy* vs. *State of Karnataka* (2005) 4 SCC 81).
5. *M. Narsinga Rao* vs. *State of Andhra Pradesh* (2001) SCC 691.
6. *Sohan* vs. *State of Haryana* (2001) 3 SCC 620.
7. *Gura Singh* vs. *State of Rajasthan* 2001 Cri. LJ 487.
8. *State of UP* vs. *Zakaullah 1*998 SCC (Crl.) 456.
9. *State of UP* vs. *M.K. Anthony* (1995) 1 SCC 505.
10. *Ram Singh* vs. *Col. Ram Singh* 1985 Supp. SCC 611.
11. *Sharad Birdhichand Sarda* vs. *State of Maharashtra* (1984) 4 SCC 116.
12. *State of UP* vs. *Dr. G.K. Ghosh* (1984) 1 SCC 254.
13. *Mahabir Prasad Verma* vs. *Dr. Surinder Kaur* (1982) 2 SCC 258.
14. *Parkash Chand* vs. *State* 1979 (3) SCC 90.
15. *Rabindra Kumar Dey* vs. *State of Orissa* 1977 CriLJ 173.
16. *Bhagwan Singh* vs. *State of Haryana* 1976 Cri LJ 203.
17. *Narain* vs. *State of Punjab* AIR 1959 SC 484..

RESULT: Appeal dismissed.

S. MURALIDHAR, J.

1. This appeal is directed against the judgment dated 24th January 2009 passed by the Special Judge, Central District-02, Delhi in CC No. 195/01 convicting the Appellant for the offences under Sections 7 and 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 ('PC Act.') and the order on sentence dated 27th January 2009 whereby for the offence under Section 7 of the PC Act, the Appellant was sentenced to two years rigorous imprisonment ("RI") with a fine of Rs. 15,000 and in default of payment of fine, further simple imprisonment ("SI") for 30 days and for the offence under Section 13 (2) read with Section 13 (1) (d) of the PC Act, to RI for 2½ years and fine of Rs.15,000 and in default to undergo SI for 30 days. Both sentences were

directed to run concurrently. By an order dated 4th February 2009 while admitting the appeal, the sentence awarded to the Appellant was suspended.

The case of the prosecution

2. The case of the prosecution is that Mrs. Madhu Bala, the Complainant (PW-3) was running a business of packing, shipping and a travel agency under the name and style of M/s. Duro Pack at C-4/67, SDA, New Delhi and was filing her income tax returns ("ITRs") regularly. The ITR filed by her for the assessment year 1997-98 was under scrutiny with the Appellant who was the Assistant Commissioner of Income Tax ("ACIT"), Circle 20 (1). The office of the Appellant was at Room No. 163, C.R. Building, ITO Delhi. On 7th March 2000, PW-3 met the Appellant for ascertaining whether any further information was required for the ITR filed by her. According to PW-3, the Appellant demanded a bribe of Rs.75,000 from her to clear her case. On her repeated request, the bribe amount was reduced to Rs.50,000 and the Appellant informed her that he would let her know finally in a day or two. PW-3 is then supposed to have sought some time to make payment as it was a large sum. However, PW-3 did not want to pay any bribe and thus lodged a complaint with the Central Bureau of Investigation („CBI.), Anti Corruption Branch ("ACB") on 9th March 2000.

3. The further case of the prosecution is that at around 10.30 am, PW-3 gave an oral complaint to the Superintendent of Police ("SP"), CBI, ACB about the alleged demand of a bribe by the Appellant. The SP directed Inspector Azad Singh (PW-12) to verify the genuineness of the complaint. After arranging an audio cassette and ensuring that it was blank PW-12 in the presence of two independent witnesses i.e. Mr. V.S. Chauhan, Eviction Inspector (PW-5) and Mr. Virendra Prasad, Superintendent (PW-4) both from the Directorate of Estates, New Delhi recorded a conversation made by PW-3 to the Appellant on telephone No. 3316392 (of the ITO) from telephone No. 4362460. According to the prosecution, the conversation revealed that PW-3 had repeatedly requested the Appellant to reduce the bribe amount and the Appellant had asked her to come at around 4 pm to pay whatever amount she had collected by that time. The original cassette was sealed. A memo (Ex.PW-3/A) of the telephone conversation was prepared. The conversation is stated to have commenced at 11:30 am and concluded at 11:45 am.

4. It was thereafter decided to lay a trap for the Appellant. PW-3 then submitted a written complaint (Ex.PW-3/B) on the basis of which a case was registered by the CBI and entrusted to PW-12 for laying a trap. A trap team of CBI officers along with PW-3 and PWs-4 and 5 was constituted. PW-3 produced Rs.15,000 in the form of a hundred government currency („GC.) notes of Rs.100 each and a hundred GC notes of Rs.50 each. The serial numbers of the notes were noted down in an annexure to the handing over memo (Ex. PW-3/C and 3/C-1). The GC notes were treated with phenolphthalein powder by PW-12 and a practical demonstration through PW-4 was given.

5. The tainted GC notes were kept in the hand bag of PW-3. The instructions to PW-3 were that she had to hand over the tainted GC notes to the Appellant only on specific demand; she had to take PW-5 along with her so that PW-5 could see and overhear the conversation between PW-3 and the Appellant while the bribe transaction was being completed. She was further instructed to switch on the micro cassette recorder (MCR) before entering the room of the Appellant. PWs-3 and 5 were directed to give a signal to the trap team by scratching their heads when the transaction was completed. This apart, an automatic transmitter-cum-recorder (TCR) was given to PW-5 to record the conversation which was likely to be held between Appellant and PW-3. Thereafter the trap team left for the spot.

6. On reaching the spot, PW-3 sent a chit to the Appellant through his peon Mr. Biharilal (PW-13). However, the Appellant permitted only PW-3 to enter the office. As a result, PW-5 remained waiting at the door. At around 4:40 pm, PW-3 came out of the room of the Appellant and gave the pre-appointed signal to the trap team. Thereupon PW-12 with the other team members including PW-4, PW-5 and PW-3 rushed into the Appellant's room. They found two other persons besides the Appellant. Their identities were disclosed as Mr. T. Kipgen, ACIT (PW-10) and Mr. N.C. Swain, DCIT (PW-6). The Appellant's room was separated by a wooden partition which ended with the visitors chairs. PW-12 challenged the Appellant to disclose whether he had demanded and accepted a bribe of Rs.15,000 from PW-3. The Appellant denied it. Meanwhile, Mr. Vivek Dhir, Inspector and PW-12 caught hold of the right and left wrist of the Appellant.

7. PW-3 informed PW-12 that during discussions she informed the

Appellant that she could arrange only Rs.15,000 of the bribe amount. Thereupon, according to PW-3, the Appellant tore a note sheet paper from a pad lying on his incliner and kept the same on the left side of the incliner in front of PW-3 on her right side. The Appellant is stated to have directed PW-3 by gesture through his eyes and by nodding his head to place the bribe amount on the torn note sheet paper. Acting according to the said directions, PW-3 is stated to have taken out the bribe amount from her bag and kept it on the note sheet. Thereupon the Appellant immediately folded the torn note sheet and covered it by the blue coloured dak folder with both his hands. PW-3 further disclosed that the Appellant had directed her to pay the balance amount as early as possible either by herself or through someone else.

8. The trap team apparently could not locate the bribe amount stated to have been paid by PW-3 to the Appellant. PW-3 pointed out where the bribe amount was kept i.e. on the table under the dak folder. Acting on the directions of PW-12, PW-5 is stated to have lifted the dak folder and the treated GC notes were seen in the partially folded note sheet. A request for the finger print expert and photographer from CFSL was made from the spot after securing the scene of the crime.

9. A colourless solution of sodium carbonate was prepared in a neat and clean glass tumbler. The Appellant washed his left hand fingers in the colourless solution but the colour of the solution remained unchanged. The wash was transferred to a clean glass tumbler and sealed and marked as LHW. It was signed by both PWs-4 and 5. Likewise, the right hand wash (RHW) was also obtained. This wash also did not turn pink. The TCR provided to PW-4 was taken back. The cassette which contained the alleged conversation between Appellant and PW-3 was rewound and heard. The cassette was then sealed with a seal of the CBI.

10. At around 6 pm, Mr. S.K. Chadha, SSO-II, finger print expert and Mr. Rajesh Bist, SSA, Photograph Division of CFSL, reached the spot. Mr. S.K. Chadha is stated to have picked up the tainted GC notes and handed them over to PW-5. PWs-4 and 5 then compared the numbers of the said GC notes with the numbers mentioned in the handing over memo (Ex.PW-3/C) and found them to be tallying. The note sheet paper in which the GC notes were wrapped was washed in a sodium carbonate solution which then turned pink and was sealed and marked as NSPW. Similarly, with the help of a piece of cotton the wash of the dak pad was

also obtained. The sodium carbonate solution remained unchanged. The wash was transferred to another glass tumbler, sealed and marked as FW. The cotton piece used for washing was sealed in an envelope. The torn piece of paper used for wrapping the tainted money along with the note sheet and dark pad was kept in an envelope and sealed.

11. The search of the office of the Appellant, the file pertaining to the ITR of PW-3 was recovered from the office cupboard. A rough site plan of the scene of the crime was prepared. The CBI seal used for sealing was handed over to PW-4 and all case properties were taken into possession. 12. There were three test reports of the CFSL. The report of the chemical division (Ex. PW-2/A) dated 2nd May 2000 certified that the right hand wash, the left hand wash, the finger wash („FW.) and the note sheet paper wash gave a positive test for Phenolphthalein and sodium carbonate. The wash of the piece of cotton ('PC') gave a positive test only for Phenolphthalein. The detailed work sheet of the chemical report of the CFSL enclosed the analysis of all four washes.

13. The report of the physical division of the CFSL (EX.PW-8/A) was regarding the finger prints on the torn piece of white note sheet paper (Ex. 1/A) and whether it matched with the remaining sheet of paper (Ex.1/B). The report confirmed that it did and that both parts were parts of "one and the same paper". The CFSL expert Mr. C.K. Jain (PW-8) in his report dated 25th May 2000 opined that the note sheet, with one corner in torn condition, physically matched with the other part of the paper.

14. The report of the finger print division of the CFSL (Ex.PW-11/DA) had prints marked as Q-1 to Q-12 containing two prints Q-1 and Q-2 of the torn note sheet containing the bribe amount. The report was that the prints marked as Q-2 was different from the specimen finger prints of the Appellant which were marked S-1 to S-5. However a third note sheet lying on the table incliner was found to contain the finger prints of the Appellant.

15. The Under Secretary in the Department of Revenue passed an order dated 24th September 2001 (Ex. PW-1/A) according sanction under Section 19 (1) (c) of the PC Act for prosecuting the Appellant for the offences under Section 7 and 13 (2) read with Section 13 (1) (d) of the PC Act. The charge sheet was accordingly filed. The order framing

charges was passed on 2nd January 2003 and the trial commenced.

The statement of the Appellant under Section 313 Cr PC

16. The prosecution examined 13 witnesses. In his statement under Section 313 Cr PC, the Appellant admitted that while working as ACIT during March 2000, the scrutiny of the income tax assessment case of PW-3 was pending with him. He also did not deny that on 9th March 2000 PW-3 had sent a chit to him through one peon by writing her name on that chit and that he called her inside his chamber. He accepted as correct that when PW-3 entered his office, she found another person sitting on the other side of the partition from where he was sitting. He further stated that while he was not aware about PW-3 giving any signal, two-three persons came inside the chamber and disclosed that they were CBI officers. He also admitted that Inspector A.K. Singh and Vivek Dhir caught hold of him and that the TLO Azad Singh (PW-12) challenged the Appellant as having demanded and accepted Rs.15,000 from PW-3. He, however, denied that the independent shadow witness V.S. Chauhan (PW-5) had on the directions of PW-12 removed the dak pad and found two bundles of GC notes of Rs.100 and Rs.50 denomination wrapped in a note sheet. He agreed that the hand washes were taken but stated that he did not know what happened thereafter as the transfer of washes and sealing was not done in his presence.

17. The Appellant denied that he had refused to give his specimen voice but stated that since the written matter which was given to him to read was objectionable and could be manipulated against him, he had only requested the learned MM that if a changed matter could have been given to him he would have given a specimen voice. He claimed that the case was false and motivated. He denied demanding or accepting any money from PW-3. When asked why the PWs had deposed against him, the Appellant stated as under:

> "The Complainant is an accomplice in the eyes of law. The two panch witnesses have deposed out of fear of departmental action, moreover one of them Sh. V.S. Chauhan is a stock witness and a witness of choice of CBI. The CFSL report of the hand washes is biased and is not admissible in law. The other witnesses are either CBI's own persons or they are formal in nature."

The judgment of the trial Court

18. On the issue of the validity of the sanction order (Ex.PW-1/A), the trial Court held that merely because PW-1 took help from the draft sanction order, did not ipso facto make it illegal. It was apparent that PW-1 had applied his mind to the materials produced before him.

19. The trial Court analysed the pre-trap proceedings as spoken of by PW-3 the Complainant, PW-5 the shadow witness, PW-4 the recovery witness and PW-12 the trap laying officer. The trial Court concluded that in the complaint, PW-3 did mention about the demand of a bribe by the Appellant from her on 7th March 2000 as well as on 9th March 2000 when the call was made by her from the office of the CBI. It was held that PW-3 was not required to mention all the minute details in the complaint. PW-3 had proved the pre-trial proceedings, i.e., lodging of the oral complaint, verification thereof, lodging of the written complaint, production of Rs.15,000 in the CBI office, the treating of the GC notes with phenolphthalein powder as recorded in the handing over memo EX. PW-3/C. This was corroborated by PW-5. He had also proved the telephonic conversation memo Ex.PW-3/A as well as the treating of the GC notes. PW-4 confirmed that PW-3 had come to the CBI office with a complaint about demand and bribe by the Appellant, her using the GC notes in denominations of Rs.100 and Rs.50 for the sum of Rs.15,000; the notes being treated with phenolphthalein; the practical demonstration being given; PW-3 being made to contact Appellant on telephone from the CBI Office and fixing of the time of meeting at 3 or 4 pm. The trap proceedings were also corroborated by PW-12.

20. As regards the demand, acceptance and recovery of the bribe amount, the trial Court analysed the evidence of PW-3. It was PW-3 who had suggested that the lady Constable Babita Kapoor and panch witnesses should not accompany her inside the room of the Appellant. PW-3 stated that the MCR she was carrying could not be operated by her. However, since TCR was on, the conversation could be recorded outside but this was not audible. PW-3 confirmed that the treated notes were not recovered from the person of the Appellant but from the table on her pointing out the spot. She denied the suggestion that she had cleverly concealed the treated notes beneath the file and that the Appellant had neither demanded nor accepted the bribe. She also denied the suggestion that she had falsely implicated the Appellant through her acquaintance in

the CBI to get rid of the penal provisions of the Income Tax Act in her scrutiny case.

21. PW-5 confirmed that PW-3 gave her visiting card to the peon outside the room of the Appellant. Before PW-5 could have entered, the peon stopped him and he along with one CBI official sat on the chair outside the office of the Appellant. After PW-3 came out after some time and gave a signal, all members of the trap team gathered at one place and rushed inside the room. He confirmed that on the pointing out of the PW-3 the treated notes were recovered from underneath a dak pad in a note sheet. PW-5 confirmed that the notes were the same as recorded in the pre-raid proceedings. He confirmed that the hands of the Appellant were washed in the separate solution but the colour did not change and the solutions were transferred in the bottles and labelled. He confirmed the drawing up of the recovery memo (Ex.PW-3/E) on the spot with his signatures thereon.

22. PW-4 more or less corroborated all of the above statements. He too was not able to be shaken in the cross-examination. The evidence of PW-12 fully corroborated the raid proceedings as spoken to by PWs-3, 4 and 5. In his cross-examination he maintained that the scene of occurrence was not disturbed for the purposes of recovery till the CFSL experts arrived.

23. As regards the argument of the defence counsel that since the right hand wash of the Appellant did not turn pink at the spot it could not, on a chemical analysis show the presence of phenolphthalein, the trial Court referred to the Thin Layer Chromatography ("TLC") Test which was reliable when chemicals are used in small amounts. The trial Court concluded that the TLC Test corroborated the case of the prosecution that the Appellant had come into contact with the treated GC notes while accepting them from PW-3 in the manner stated by her. It was concluded that it was unlikely that PW-3 could have kept the money on a note sheet paper on the Appellant's table without being asked by the Appellant to do so. There was no reason for PW-3 to implicate the Appellant falsely in such a serious matter.

24. In the facts and circumstances, the trial Court by the impugned judgment dated 24th January 2009 concluded that the deposition of PW-3 on the demand and acceptance of bribe by the Appellant was truthful

and inspired confidence and proved the guilt of the Appellant beyond all reasonable doubt. A separate order on sentence was passed by the trial Court on 27th January 2009 sentencing the Appellant and imposing fines as noticed in the first para of this judgment.

Submissions of counsel

25. Mr. Arvind Nigam, learned Senior counsel for the Appellant, submitted that there were several inconsistencies in the testimonies of the PWs. Referring to the charge, he pointed out that it was alleged that on 7th March 2000, the Appellant demanded as Rs.75,000 as illegal gratification for clearing the income tax returns of PW-3. The said amount was then reduced to Rs.50,000 and finally on 9th March 2000, the Appellant demanded and accepted Rs.15,000 from PW-3. In her cross-examination PW-3 disclosed that she had visited the Appellant's office in February 2000 along with a Chartered Accountant (CA) Mr. Rajesh Jain and again visited him on 7th March 2000 with her employee Mr. Krishan Kumar. The CA purportedly told PW-3 that since she had met the Appellant by herself, she would have to pay Rs.1 lakh. Mr. Nigam submitted that apart from the fact that all the above facts were not disclosed in the complaint, the CA and Mr. Krishan Kumar were not examined as witnesses. Therefore, according to him, the entire chain of foundational facts was not proved.

26. Further elaborating on the lack of evidence regarding demand of bribe by the Appellant, Mr. Nigam submitted that both PWs 4 and 5 stated that during the telephonic conversation between the PW-3 and the Appellant on 9th March 2000 there was no demand of bribe by the Appellant. PW- 3 too admitted that the Appellant had not uttered any word about any sum of money. On each occasion during their telephonic conversation it was PW-3 who mentioned different amounts. This was also corroborated by PW-12. Mr. Nigam relied on the decisions in **Sohan v. State of Haryana** (2001) 3 SCC 620 and **Narain v. State of Punjab** AIR 1959 SC 484.

27. As regards the tape recording, Mr. Nigam submitted that since it was not played in the Court, the transcript of the telephonic conversation between PW-3 and Appellant recorded on 9th March 2000 could not be relied upon. The MCR containing voice of PWs-4 and 5 (Ex.PW-3/D) as seen from the tape recording memo Ex. PW-3/D was found blank when it was played in the trial Court. The second device, the TCR along with

a hearing cord which was with PW-4 during pre-raid proceedings was not in fact with PW-4 or PW-5. Further although there were two audio cassettes mentioned in the list of articles supplied with the charge sheet, it appeared that there were six audio cassettes prepared by the prosecution. Three of the said cassettes were never produced.

28. Mr. Nigam doubted the safe custody of the case property. He submitted that there was no link evidence to show such safe custody. He pointed out that the chain of safe custody has not been established by the prosecution. Referring to the decisions in **Niranjan Singh v. CBI** (2013) 203 DLT 635 and **Nilesh Dinkar Paradkar v. State of Maharashtra** (2011) 4 SCC 143, Mr. Nigam submitted that the said tape recorded conversation was, therefore, not reliable at all.

29. Mr. Narender Mann, learned Special Public Prosecutor ("SPP") for the CBI on the other hand submitted that the evidence of PW-3 sufficiently proved the pre-raid telephonic conversation. He referred to the deposition of PW-3 in which she submitted that after entering the room she informed the Appellant that he should take whatever she had brought and thereupon the Appellant tore a sheet of paper lying with him and by way of gesture directed her to keep the amount in it. He submitted that the evidence of PW-3 was corroborated by the police witnesses and other independent evidence and that it was not necessary that every detail of her statement required to be corroborated. Mr. Mann, relied on the decisions in **State of UP v. Zakaullah** 1998 SCC (Crl.) 456, **State of UP v. Dr. G.K. Ghosh** (1984) 1 SCC 254 and **Parkash Chand v. State** 1979 (3) SCC 90. He also submitted that while appreciating the evidence of witnesses, it must be seen whether it had a ring of truth. Reliance was placed on the decision of **State of UP v. M.K. Anthony** (1995) 1 SCC 505.

30. Mr. Mann, submitted that the cassette containing the recording of the telephonic conversation of 9th March 2000 (Ex. P 2) was played in the Court and PW-3 proved the same by pointing out the portions A to A, B to B and C to C therein. This was not objected to by the Appellant and, therefore, was admissible under Section 142 of the Evidence Act, 1872 (,,EA.). According to Mr. Mann, Ex. P-2 was clear and audible and PW-3 in fact stated during her examination-in-chief that "the tape recorded conversation which was done previously was very clear...".

31. Mr. Mann further submitted that the Appellant himself used the

transcript Ex.PW-11/DB to cross-examine PWs-3, 11 and 12. He also referred to the cross-examination of PW-11 where he confirmed that the transcript bears his signature at points A and C. This transcript was prepared on 11th June 2001 after procuring the cassette from the malkhana. He also referred to the cross-examination of PW-12 during which learned counsel for the Appellant asked whether PW-12 had seen the transcript. According to Mr. Mann, by the aforementioned question the Appellant had not only admitted the correctness of the transcript but also admitted his voice in the cassette. He submitted that transcripts so admitted and proved were relevant and admissible under Sections 157, 159 and 160 of EA.

32. Mr. Mann clarified that the recording at the spot on the TCR was in the cassette Ex. P-1 and the one in the MCR was Ex.P-3. Therefore only three cassettes were seized. Copies of Ex. P-2 and Ex. P-1 were kept for the purposes of investigation and this was reflected in both the seizure memos. All the original cassettes i.e. Ex. P-1, P-2 and P-3, were produced before the Court. The remaining three cassettes were only for the purposes of investigation.

Demand of bribe

33. On reading of the entire evidence of PW-3 it appears that there are two stages of the demand as spoken to by her. PW-3 states that when met the Appellant on 7th March 2000 in respect of the scrutiny of her income tax returns, the Appellant had demanded Rs.75,000 for a favourable scrutiny and that after negotiations the amount was settled at Rs.50,000. While it is true that in her complaint she did not mention about the role of the CA and Mr. Krishan Kumar the essential fact of Appellant demanding Rs.75,000 and reducing it later to Rs.50,000 has been mentioned by her in the complaint.

34. As regards the second stage of the demand i.e. on 9th March 2000, the conversation between PW-3 and Appellant on telephone which was recorded in the cassette marked as Ex. P-2. In her examination-in-chief she confirmed the pre-raid proceedings and the handing over memo (Ex. PW-3/C). She also confirmed the annexures to the handing over memo (Ex. PW-3/C-1) containing the numbers of the GC notes. She proved Ex. PW-3/A, the telephone conversation-cum- recording memo. PW-3 also identified her signatures thereon. A perusal of this memo shows that it contains the signatures of PWs-4 and 5 and Inspector

Vivek Dhir. It records that specimen voices of both PWs-4 and 5 were recorded with the help of a credit card type transmitter. A bug was installed in the telephone line of telephone no. 4362460 and PW-3 was directed to contact the Appellant on telephone no. 3316392. The TCR was handed over to PW-5 for the purposes of overhearing the conversation with the help of the cord. The memo records that PW-3 dialled the number given to her and talked to the Appellant. The conversation was simultaneously recorded in the presence of PW-5 and the other signatories to the memo. After the conclusion of the conversation, the cassette was rewound and replayed and the conversation confirmed the demand of bribe by the Appellant from PW3. It recorded that PW-3 identified the voice of the Appellant. PW-5 also confirmed the conversation which he had heard simultaneously recorded in the device. The cassette Ex. P 2 was then taken out of the recorder and both witnesses signed on the paper slip pasted on the cassette. A copy of the cassette was prepared and the original was kept in its cover and sealed with the CBI seal and seal was handed over to PW-4 for safe custody. The proceedings are said to have commenced at 11:30 am and concluded at 11:45 am.

35. In her examination-in-chief, PW-3 stated that when the conversation contained in the cassette Ex. P 2 was played in her presence it "was very much clear and audible and I identified my voice as well as the voice of Rajesh Gupta". Although Ex P-2 when played in Court was not clear, PW-3 identified from the transcript that the conversation at points A to A, B to B and C to C in her voice and that of the Appellant.

36. As regards Ex. P 1, the cassette containing the recording of the TCR, PW-3 stated that "...now she recollect the names of independent witnesses Mr. Chauhan and Mr. Prasad. After hearing the conversation, the witness states that this cassette Ex. P1 is the same which was recorded at the spot and she states that she is talking with Rajesh Gupta but is unable to tell what conversation is going on between her and Rajesh Gupta because there is noise and Rajesh Gupta is speaking very low tone and as such, the conversation is not audible."

37. When PW-4 was examined he resiled from his statement that on hearing the telephonic conversation it was confirmed that the demand of bribe of Rs.75,000 was reduced to Rs.50,000 by the accused. He also denied that the Appellant had called PW-3 to his office with the bribe amount which had been arranged by her as revealed in the conversation

recorded in the cassette. However, he admitted that the voices himself (PW-4) and PW-5 were recorded both in the MCR as well as the in the regular cassette. In his cross-examination by the learned counsel for the accused, PW-4 stated that a telephonic conversation took place in the CBI office by attaching the instrument with the telephone. He did not know the Appellant at that that time so he could not identify his voice.

38. PW-5 confirmed that telephonic conversation memo Ex. PW-3/A was prepared in the CBI Office and contained his signatures at point C. He too confirmed the handing over memo Ex. PW-3/C. He stated that "when complainant was talking with the accused in CBI office before trap, she was talking about one CA Rajeev Jain. During the telephonic conversation between complainant and the accused I also heard about the talk of Rs.50,000/- by the complainant but there was no positive response showing demand from the other side who was saying "Aa Jayiye, Dekh Lenge".

39. At that stage, the SPP requested to examine the witness as he was resiling from his earlier statement. PW-5 confirmed that his previous statement Ex. PW-5/A at portions A to A was correctly recorded. The said portion reads "Tape recorded conversation confirmed the demand of bribe of Rs.75,000 and thereafter reduced to Rs.50,000 by Sh. Rajesh Gupta, Assistant Commissioner from Smt. Madhu Bala". In other words, it was clarified from this witness that the demand was reduced to Rs.50,000. In his cross-examination he stated that "from the conversation with the Complainant it was revealed that the money was being demanded by the suspect from Mr. Rajiv Jain, CA." He then stated "From the telephonic conversation which I heard with earphone I can state that there was no demand of money from the other side i.e. accused Rajesh Gupta".

40. PW-11 was Inspector Surinder Malik. In his cross-examination he was asked about Ex. PW-11/DB and gave the following answers:

> "I do not recollect if I had sent the cassette to CFSL for preparing transcript. I do not want to look into the case diary to refresh my memory. It is wrong to suggest that I am deliberately avoiding to answer this question. It is wrong to suggest that the cassette, on play, was not audible. The transcription was got typed while playing the cassette intermittently as per version of complainant and

witness. **The transcription Ex. PW-11/DB does not bear the signature either of the complainant or of any witness but it bears my signature at point-A on the last page. The transcription was prepared on 11.6.2001 after procuring the cassette from the Malkhana.** The permission for desealing the cassette was obtained from the Court on 26.9.2000. At the time of opening of the cassette and during proceedings, both the panch witnesses were present. **It is wrong to suggest that the cassette in question was tampered with during investigation."** (emphasis supplied)

41. PW-12 also spoke of the telephonic conversation and Ex.PW-3/A being drawn up. In his cross-examination, he was asked about the transcript Ex.PW-11/DB. His specific answers were as under:

> "I have seen the transcript Ex. PW-11/DB. There are no specific words uttered by Rajesh mentioning the amount of Rs.50,000, Rs.75,0000, Rs.1 lacs or Rs.1.5 lac. Vol. This inference can be drawn from portion X to X1 of the transcript. Specimen voice of the complainant was not recorded by me. **It is wrong to suggest that the cassette allegedly containing conversations were distorted and fabricated."** (emphasis supplied)

42. A perusal of the transcript Ex. PW-11/DB shows that it was prepared on 11th June 2001. It was submitted by Mr. Nigam that when an application was made before the trial Court by the Appellant, subsequent to the above date, seeking a copy of the cassette, the prosecution took the stand that as on that date no transcript had been prepared and, therefore, the copy could not be provided. Mr. Nigam submitted that it was inexplicable how the fact of the transcript having already been prepared on 11th June 2001 was not disclosed to the trial Court.

43. The above submission is to no avail since Ex. PW-11/DB was used by learned counsel for the Appellant confronting both PWs-11 and 12. They were asked whether the transcript was accurate and they answered in the affirmative. When PW-3 stated that Ex. P 2 was audible and clear when it was played in the office of CBI but when played in Court the voice of the Appellant was low, her attention was drawn to the transcript and she identified portions of the transcript. The first three pages of the transcript referred to Ex. P 2 containing the conversation

recorded on 7th March 2000. There is merit in the contention of the learned SPP that having accepted the said transcript as admissible piece of evidence and confronting PWs 11 and 12 with it would preclude the Appellant from challenging the admissibility of the said transcript at this stage.

44. Although PWs-4 and 5 appear to be vacillating on whether they heard Appellant making any demand, it is clear from the identified portions of the transcript that when PW-3 stated "Sir To Ab Pachas To Ho Jayenge Na Sir Pachas, Sir Please Sir Wo To Mai Phir Le Ke Aa Sakti Hu" the Appellant answered "Chaliye Aap Aaiye". She then asked him when she should come to which he says she should come around 3 pm. When she asked whether she could come by 4 pm, the Appellant agreed. Although the Appellant may himself have not specified the amount and it was the PW-3 who was suggesting the amount, it is clear that the Appellant was referring to the demand already made and was implicitly agreeing to a reduction of the amount to Rs.50,000.

The tape recording of the conversation

45. As regards the evidentiary value of the tape recording of the conversation on 9th March 2000, in **Nilesh Dinkar Paradkar v. State of Maharashtra** (2011) 4 SCC 143, the Supreme Court referred to its earlier decision in **Ram Singh v. Col. Ram Singh** 1985 Supp. SCC 611 where it was held as under:

> "(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.
>
> (2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence-direct or circumstantial.
>
> (3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of the Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

46. Reference was also made by the Supreme Court in the above case to Chapter 14 of **Archbold Criminal Pleadings, Evidence and Practice** (2010 Edn.) as regards the factors to be considered for voice identification:

"(a) the quality of the recording of the disputed voice,

(b) the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;

(c) the ability of the individual to identify voices in general (research showing that this varies from person to person),

(d) the nature and duration of the speech which is sought to be identified, and

(e) the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a way listener may nevertheless be wrong."

47. A tape recorded conversation can only be corroborative and not substantive evidence. In **Mahabir Prasad Verma v. Dr. Surinder Kaur** (1982) 2 SCC 258 it was explained by the Supreme Court:

"22. ...Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon."

48. In the present case the voice of the Appellant could be identified either by the maker of the record or by others who recognised his voice. The voices of both the PW-3 and the Appellant have been duly identified by PW-3. She was familiar with the Appellant's voice having met him earlier. Next as regards the accuracy of the tape recorded conversation,

when Ex. P 2 was played in the office of the CBI it was clear and audible. PW-3 was unable to be shaken in her cross-examination on that aspect. Although the tape was inaudible when played in the Court, PW-3 was able to identify the conversation from the transcript. In response to a specific suggestion put to both PWs 11 and 12 in cross-examination, both denied that Ex P 2 had been tampered.

49. Even if PW-4 turned hostile, it is clear from the examination of PW-5 on the point of Ex.PW-3/A that he did confirm about the demand amount being reduced from Rs.75,000 to Rs.50,0000. Consequently, the statements in the cross-examination of PWs-4 and 5 when reconciled with the statements in their respective examinations-in-chief lead to the conclusion that there is corroboration of the portion of their depositions which fully supports the case of the prosecution.

50. In **Gura Singh v. State of Rajasthan** 2001 Cri. LJ 487 it was held:

"11. There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in **Bhagwan Singh v. State of Haryana** 1976 Cri LJ 203 held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness.

In **Rabindra Kumar Dey v. State of Orissa** 1977 CriLJ 173 it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness

stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy."

51. The Court is, therefore, not persuaded by the submission of the Appellant that it was not proved beyond reasonable doubt by the prosecution that there was a demand by the Appellant of illegal gratification from PW-3 and that the demand was reduced from Rs.75,000 to Rs.50,000. The fact that the prosecution may not have examined the CA or Mr. Krishan Kumar loses significance in light of the actual tape recorded conversation of 9th March 2000 being reduced to a transcript which has been used by the accused to confront PWs-11 and 12.

Acceptance of bribe

52. Once the demand of bribe stands proved it was incumbent on the prosecution to prove the acceptance of Rs.15,000 by the Appellant. Here again the evidence of PW-3 is significant. When she entered his room PW-3 informed the Appellant that she had brought Rs.15,000 upon which he tore out a sheet of paper and by way of gesture asked her to place the notes in it. As regards the conversation that took place between the two, the cassette Ex P 1 played in the Court was inaudible. The prosecution's case, therefore, hinged on the other evidence.

53. The main thrust of the argument of the Appellant has been that the chain of custody of the case property, viz., the cassettes and hand washes have not been established as there is no link evidence. As regards the safe custody of Ex P 2 containing the telephonic conversation of 9th March 2000 both PWs 11 and 12 denied that it was tampered. As regards the MCR which was suggested to be used at the time of the meeting between the Appellant and PW-3, it was clear that PW-3 forgot to activate it. As regards the automatic TCR, the conversation was admittedly inaudible with there being too much noise.

54. While it is true that the hand washes of the Appellant did not turn pink, the CFSL Report Chemical Division does indicate that the TLC Test showed the presence of phenolphthalein in the sodium carbonate solution. There are several unanswered questions as regards the cotton piece not containing any sodium carbonate although it was supposed to have been dipped into it. These discrepancies do not by themselves shake

the credibility of the prosecution case. The version of PW-3 that she was asked to place Rs.15,000 in a torn sheet of paper without the Appellant touching it is in fact consistent with his hand washes not turning pink when taken at the spot. This is spoken to by not only PW-3 but also PWs-4, 5 and 12.

55. There was no need for PW-3 to take Rs.15,000 with her to falsely implicate the Appellant. The truthfulness of the deposition of PW-3 is also evidenced from the fact that when the trap team entered the room it was she who pointed out where the treated notes were. Her version appears to be both natural and probable and does have the ring of truth. As explained in **State of UP v. M.K. Anthony** (1995) 1 SCC 505:

> "While appreciating the evidence of witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigation officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole..."

56. Consequently, notwithstanding that the CFSL reports, the hand washes and the finger prints may not appear to support the case of the prosecution, the evidence of PW-3 is both cogent and reliable and can be safely accepted as proving the fact of acceptance of the bribe amount by the Appellant. Presumption under Section 20 PC Act 57. Once the demand and acceptance of bribe is proved then the prosecution under Section 20 PC Act would be attracted. Section 20 PC Act has been elaborately discussed by the Supreme Court in **M. Narsinga Rao v. State of Andhra Pradesh** (2001) SCC 691 and in that context it has been observed as under:

> "17. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in Law of Evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled."

58. It was of course open to the Appellant to rebut the presumption on a preponderance of probabilities. In the considered view of the Court, the Appellant has been unable to rebut the statutory presumption under Section 20 PC Act. The ingredients of Section 20 stand satisfied that in the present case. There has been a demand and an acceptance of the bribe amount by the Appellant.

Questions to the Appellant under Section 313 Cr PC

59. While on this aspect the Court is required to deal with one more submission regarding the Appellant not being put all the incriminating evidence against him when being examined under Section 313 Cr PC. Reliance in this regard was placed on the decisions in **Sujit Biswas v. State of Assam** (2013) 3 JCC 1887 and **Sharad Birdhichand Sarda v. State of Maharashtra** (1984) 4 SCC 116. It was submitted by Mr. Nigam that the fact that the CA of PW-3 met the Appellant or the fact of her coming with her employee Mr. Krishan Kumar to meet the Appellant were not put to him under Section 313 Cr PC and, therefore, the entire evidence of PW-3 has to be excluded.

60. As already noticed even if the above statements of PW-3 are not taken into account, the fact is that on 9th March 2000 during the telephonic conversation, the offer by PW-3 to bring a reduced bribe amount being accepted by the Appellant has been satisfactorily proved by the prosecution. Therefore, the failure to put to the Appellant the above aspects of the evidence of PW-3 cannot be said to have caused any prejudice whatsoever to the Appellant. The case appearing against the Appellant and in particular the circumstances concerning the telephonic conversation of 9th March 2000 have been put to him. It is another

matter that he has denied the said conversation.

Validity of the sanction order

61. Lastly on the aspect of granting sanction it was argued that mentioning of Section 19 (1) (c) of PC Act instead of Section 19 (1) (a) PC Act in the order granting sanction showed the non-application of mind by the sanctioning authority. Further according to the sanctioning authority, the Appellant was caught red-handed which was not even the case of the prosecution. Lastly, it was submitted that the draft sanction order was prepared by the Vigilance Department and merely copied by the sanctioning authority.

62. It is true that PW-1 in his evidence admits that most of the language of the sanction order was in terms of the proforma sanction order given by the Vigilance Department. However, that by itself cannot lead to the inference that there was non-application of mind by PW-1. The words "red-handed" was perhaps in the context of the fact that a trap was laid as a result of which the Appellant was apprehended and arrested. As regards the non-mentioning of the correct provisions of PC Act, the settled law is that mere failure to mention correct provisions cannot lead to invalidity of the order (**C.S. Krishnamurthy v. State of Karnataka** (2005) 4 SCC 81). In any event, Section 19 (3)(a) read with 19(4) of PC Act states that no finding of guilt would be reversed only on the ground of any error or irregularity in the sanction order unless the Court is of the view that there was a failure of justice. The Court is not persuaded to hold that the mention of Section 19 (1) (c) PC Act in the sanction order instead of Section 19 (1) (a) has resulted in any failure of justice qua the Appellant.

63. The Court is unable to find any legal infirmity either in the impugned judgment or in the order on sentence passed by the trial Court. The appeal is accordingly dismissed. The Appellant will now surrender forthwith to serve out the remainder sentence.

ILR (2014) III DELHI 2277
MAT.APP

RAJENDER KUMAR .....PETITIONER

VERSUS

MANJU ....RESPONDENT

(NAJMI WAZIRI, J.)

MAT. APP. : 53/2008, DATE OF DECISION: 26.03.2014
CM NO. : 7643/2005

Hindu Marriage Act, 1955—Section 13(i)(i-a)—Husband preferred petition seeking divorce on the ground of cruelty which was dismissed by the Ld. Trial Court—Appeal—Held, Burden of proving the allegation of cruelty lies upon the party alleging it—Petitioner failed to show or substantiate specific instance of cruelty—Mere allegations and bald averments insufficient—Though in a divorce sought on ground of cruelty or desertion the facts are not to be proved beyond reasonable doubt, and it would be sufficient if such facts are proved by preponderance of probabilities, but petitioner failed to bring any evidence at all to show that there were incidents of cruelty by the respondent.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Nemo.

FOR THE RESPONDENT : Respondent in person

CASES REFERRED TO:

1. *Renu Bala* vs. *Jagdeep Chiller* (2010)171 DLT 314.
2. *G.V.N. Kameshwara Rao* vs. *G. Jabbili* (2002) 2 SCC 296.

3. *Dastane* vs. *Dastane* AIR 1975 SC 1534.

RESULT: Appeal Dismissed.

NAJMI WAZIRI, J. (Oral)

1. The present appeal assails the judgment dated 30.03.2005 in HMA No. 140 of 1998 whereby the learned ADJ, Karkardooma Courts, Delhi rejected the appellant/husband's petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 (the 'Act').

2. The parties were married as per Hindu rites on 05.05.1992. A girl Surbhi was born to them. The husband alleged that the wife's behaviour towards him and his family was not cordial and that she made demands which were beyond his financial means; that she and her family abused and also threatened him with physical violence; that she insisted on living separately from the parents of the husband; and she further threatened to implicate him and his family in false dowry demand cases. The petition narrates various dates and instances of acts of cruelty. Hence the husband/petitioner prayed for dissolution of their marriage on the ground of cruelty.

3. The wife, in her Written Statement (WS), denied all the allegations. She submitted that, it was in fact, the husband and his family who were cruel to her; that she never abandoned her husband; that in fact she was subjected to physical brutality, even their minor daughter was not spared from the husband's act of violence and of his family members; that the extent of physical violence was so severe that the wife gave birth to a stillborn child, and even during this emotional trauma and physical tragedy, neither the husband nor his family members visited her in the hospital nor reached out to commiserate her; that the husband did not pay for any of the expenses incurred for the delivery, neither did he offer to reimburse the expenses to the family of the wife. It was submitted that the husband and his family made several demands for dowry on the wife and her failure to bring the amount demanded, only lead to more violence towards her. The family of the wife had to struggle to gather such large amounts in order to save her from being harassed any further. It was unequivocally denied that the wife ever asked the husband to live separately from his family or that he had complied with such a demand. It was submitted that the complaint made to CAW Cell was compromised with an assurance that the husband and his family members shall not make any more

demands for dowry and instead would take care of the wife and their minor daughter in the matrimonial home. However none of the assurances were met.

4. The Trail Court framed the following issues:

I. Whether the respondent has treated the petitioner with cruelty as alleged? OPP

II Relief.

The Trial Court noted that the statements made by the husband on Oath stood successfully rebutted by the wife. As a result it was held that there was no cruelty towards the husband and his family. Instead, it was the husband who was cruel towards the wife. The Trial Court concluded that a demand for dowry of Rs.50,000/- was made by the husband and his family. That the wife could collect only Rs.30,000/- was found to be true. The record of bank transactions showed that the wife's father had withdrawn a sum of Rs.30,000/- and otherwise tried his best to pay the entire dowry amount demanded.

5. On finding that the husband had been unable to prove any of the allegations made against the wife and in view of the fact that the wife has discharged the burden of proving there was cruelty towards her, the Trial Court dismissed the petition.

6. This Court notices that this appeal has been pending since the year 2005 and this is its twenty-eighth listing. The appellant has not appeared before this Court since 27.11.2012. Consistently for the last six hearings and for earlier seven hearings too the appellant has not appeared. It is noted that over more than 65% of the time when the case was listed, the appellant has not appeared in the Court. This really shows a lackadaisical approach of the appellant towards the matter and the non-seriousness in pursuing it. The appellant is proceeded ex parte. However, the written synopsis of the appellant being on record is taken into account for adjudication of the appeal on merits.

7. The appellant has relied on the Supreme Court dicta in **Dastane v. Dastane** AIR 1975 SC 1534 to contend that acts of cruelty are not restricted to life, limb or health alone but to reputation also. The appellant had averred that the wife was required to prove before the Court that she faced reasonable apprehension of danger to her physical and mental

wellbeing while cohabiting with the husband; that solitary incidents or occasional outbursts towards the other spouse cannot be the sole basis of deciding if there were incidents of cruelty, but that such incidents should be regarded in light of the overall behaviour towards the spouse. To strengthen this argument, the appellant has relied upon the judgment in **G.V.N. Kameshwara Rao v. G. Jabbili** (2002) 2 SCC 296. It was also the husband's his case that the wife often indulged in picking up quarrels with him and his family members; that he was often under the apprehension of being implicated in false cases by the wife, if he failed to fulfil her demands. He had listed acts of cruelties by the wife towards him which, it is averred, the Trial Court failed to take note of.

8. In the written submissions it is further contended that the Trial Court failed to take into consideration the various documents placed by the husband but took into account only the testimony of the wife and her father, while dismissing the petition. Reliance is placed on complaints to the police to show that there were threats of her committing suicide; and a legal notice sent to the wife requiring her to join the company of the husband, apropos a compromise having been made between them on 28.04.1997.

9. This Court is of the view that the appellant/husband has not been able to show or substantiate specific instances of cruelty. The burden of proving the allegation of cruelty lies upon the party alleging it. The appellant was thereby required to bring all such documents and witnesses which would prove the allegations of cruelty. Mere allegations and bald averments are insufficient to make out a case of cruelty. This Court notices that as far as the documents brought before the Court were concerned, the learned Trial Court has indeed taken due note of them. Indeed, the impugned order diligently records that the legal notice requiring the wife to join the company of her husband and her reply to it to the effect that the promise of harmonious marital life was breached by the husband's dowry demands and threats; hence she chose not to join the company of the husband to avoid the threats. This Court is of the view that the Trial Court has taken into record all documents and the complete circumstances before dismissing the petition.

10. The written synopsis further alleges that the Trial Court has not taken into consideration the various instances of cruelty towards the husband thereby failing to arrive at logical conclusion. This Court, however,

is of the view that the impugned order has systematically taken into record all the evidence produced by the both parties. Admittedly, the husband had filed for divorce petition on grounds of cruelty. The burden to prove cruelty lay on him. He failed to prove it. Therefore his petition was dismissed. This **Court in Renu Bala v. Jagdeep Chiller** (2010)171 DLT 314 held that in a divorce sought on grounds of cruelty or desertion the facts are not to be proved beyond reasonable doubt, and like in civil proceedings it would be sufficient if such facts are proved by preponderance of probabilities. The said judgment observed that in matrimonial cases and civil proceedings Courts have to arrive at an intelligible deduction keeping in mind the normal human conduct and the prevailing fact-situation, even though the same may not be specifically pleaded or proved by the parties. Such being the settled the position, the husband was not required to adduce all such evidence which would establish beyond reasonable doubt that he was being treated with cruelty by the wife. However, this Court notices that the husband has failed to bring any evidence at all to show that there were incidents of cruelty in the first place. The various letters, documents placed by the respondent only go to show that it was the wife who was being treated with cruelty by the husband.

11. The bank transactions showing withdrawal of the amount paid as dowry, the correspondence by the wife in response to the husband's legal notice and the letter written by the father of the wife to the husband, expressing his trepidation for his daughter's safety in the matrimonial home, only go to prove the veracity of the submissions made by the wife.

12. This Court finds no error in the impugned order. The petition is without any merit, and is accordingly dismissed.

ILR (2014) III DELHI 2282
CRL.A.

MOHD. SHAHID ..... APPELLANT

VERSUS

STATE ..... RESPONDENT

(KAILASH GAMBHIR & SUNITA GUPTA, JJ.)

CRL.A.433, 456/1999 DATE OF DECISION: 1.04. 2014

Indian Penal Code, 1860—Section 302/34—Prosecution based its case on circumstantial evidence and the circumstances which accounted for the conviction of the appellants were namely that they had a motive to kill the deceased as they had a quarrel with him a few days before the body of the deceased was discovered by the police and they were also last seen with him and it was in pursuance of their disclosures and pointing out that the weapons of offence namely a dagger and a knife and the blood stained clothes of one of the appellants was recovered. Held: Only one tea vendor and a Constable assertedly had seen the appellants having a quarrel with the deceased and the accused persons were not known to both of them from before. In such circumstances it was incumbent upon the IO to have arranged the Test Identification Parade of the accused persons. The said failure alongwith the fact that the depositions of the tea vendor and the Constable were not consistent and completely reliable makes their identification of the accused persons in the court of not much value. Even otherwise the motive for the alleged murder appears to be very weak and illogical for the quarrel between the accused persons and the deceased was on such a trivial issue that the same cannot furnish a motive to do away with the deceased. Absence of strong motive

in the present case, which is based completely on circumstantial evidence, is very relevant. Further the witness who assertedly informed the police that he had last seen the deceased and the accused together, denied having made any such statement and as such even the last seen theory is not substantiated. As regards the recovery of a knife at the instance of one of the appellants, in the absence of detection of blood on it, it cannot be stated that it was used in crime, more so when it was never shown to the concerned doctor to seek his opinion whether the injury on the person of deceased could have been inflicted by it. Similarly the recovery of blood stained clothes and a dagger from the house of the other appellant is to be held to be very weak evidence for the prosecution has not led any evidence to show that the said clothes were worn by the said appellant at the time when the crime was committed. Suspicion howsoever strong against the appellants is not enough to justify their conviction for murder.

The object of conducting a Test Identification Parade is two-fold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who are seen by them in connection with the commission of the crime. Second is to satisfy the Investigating Authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of the witness. It is accordingly considered a safe rule of prudence to generally look for corroboration of sworn testimony of the witness in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. **(Para 22)**

The recoveries of blood-stained clothes and weapon of offence at the instance of the appellant, however, has to be viewed in light of various decisions of the Supreme Court where such kind of recoveries have been held to be very weak evidence. **(Para 45)**

In the decision reported as AIR 1963 SC 1113, **Prabhoo v. State of U.P.** recovery of a blood-stained shirt and a dhoti as also an axe on which human blood was detected was held to be extremely weak evidence. Similarly, in the decision reported as (1977) 4 SCC 600 (1) **Narsinbhai Prajapati v. Chhatrasinh Kanji,** the recovery of a blood-stained shirt and a dhoti as also the weapon of offence a dhariya were held to be weak evidence. In the decision reported as AIR 1994 SC 110 **Surjit Singh v. State of Punjab** the recovery of a watch stated to be that of deceased and a dagger stained with blood of the same group as that of the deceased were held to be weak evidence. As late as in the decision reported as (2009) 17 SCC 273 **Mani v. State of T.N.** recoveries of blood stained clothes and weapon of offence stained with blood were held to be weak recoveries. Following these judgments in **Raj Kumar @ Raju v. State,** ILR (2010) Supp (1) Delhi 389, the recovery was held to be very weak type of evidence. **(Para 46)**

Adverting to the case in hand, the part of the disclosure statement of the accused that the clothes which he was wearing at the time when he committed the crime got stained with blood of the deceased and his getting the clothes recovered attracts Section 27 of the Evidence Act, limited to the extent that the accused got recovered blood stained clothes. However, independent evidence has to be led to prove that the said clothes were being worn by the accused at the time when the crime was committed and said fact cannot be proved through his disclosure statement. No such evidence has been led by the prosecution. **(Para 47)**

Important Issue Involved: It is a safe rule of prudence to generally look for corroboration of sworn testimony of the witness in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Mukesh Kalia, Ms. Arun Srivastava, Advocate

FOR THE RESPONDENT : Ms. Richa Kapoor, APP.

CASES REFERRED TO:

1. *Rishipal* vs. *State of Uttarakhand,* 2013 II AD (SC) 103.
2. *Sunil Clifford Daniel (DV)* vs. *State of Punjab,* (2012) 8 SCALE 670.
3. *Munish Mubar* vs. *State of Haryana,* (2012) 10 SCC 464.
4. *Aftab Ahmad Ansari* vs. *State of Uttaranchal,* (2010) 2 SCC 583.
5. *Raj Kumar @ Raju* vs. *State,* ILR (2010) Supp (1) Delhi 389.
6. *Pannayar* vs. *State of Tamilnadu by Inspector of Police,* (2009) 9 SCC 152.
7. *Mani* vs. *State of T.N.* (2009) 17 SCC 273.
8. *Surjit Singh* vs. *State of Punjab* (2009) 17 SCC 273.
9. *Sukhram* vs. *State of Maharashtra,* (2007) 3 SCC 502.
10. *Ramreddy Rajesh Khanna Reddy* vs. *State of A.P.,* (2006) 10 JCC 172.
11. *Tarseem Kumar* vs. *Delhi Admn.,* AIR 1994 SC 2585.
12. *Suresh Chandra Bahri* vs. *State of Bihar*, 1994 Crl. LJ 3271.
13. *Sharad Birdhichand Sarda* vs. *State of Maharashtra,* (1984) 4 SCC 116.
14. *Narsinbhai Prajapati* vs. *Chhatrasinh Kanji,* (1977) 4 SCC 600 (1).
15. *Sk. Hasib* vs. *State of Bihar,* 1972 CriLJ 233.
16. *Rameshwar Singh* vs. *State of J & K,* 1972 Cri LJ 15.
17. *Sarwan Singh Rattan Singh* vs. *State of Punjab,* AIR 1957 SC 637.

RESULT: Appeal allowed.

SUNITA GUPTA, J.

1. Appellant Mohd. Shahid and Mukhtiyar Ahmed have filed separate appeals bearing No.Crl.A.433/1999 and Crl.A.456/1999 challenging the common judgment and order on sentence dated 2nd August, 1999 and 4th August, 1999 respectively passed by the learned Additional Sessions Judge, Delhi in Sessions Case No. 124/97 arising out of FIR No.288/97, PS Kamla Market whereby the appellants were convicted under Section 302/34 IPC as well as under Section 27 and 25 of Arms Act and were sentenced to undergo life imprisonment and fine of Rs.1,000/- each, in default, to undergo six months rigorous imprisonment under Section 302/34 IPC and to undergo rigorous imprisonment for 6 months and fine of Rs.200/- each, in default, one month rigorous imprisonment under Section 25 of Arms Act and further sentence to undergo RI for two years and to pay a fine of Rs.500/- each, in default, three months RI under Section 27 of Arms Act. Substantive sentences of imprisonment were to run concurrently. The appellants were granted benefit of Section 428 of the Code of Criminal Procedure, 1973.

2. Prosecution case, succinctly stated, is as follows.

3. On 9th October, 1997 Constable Satish Kumar (PW14) was at Picket Police Booth, Zakir Hussain College from 9:00 AM to 9:00 PM along with Constable Udai Veer Singh. At about 7:30 PM, Constable Udai Veer Singh went to police station. Constable Satish saw one boy aged about 20 years with his hand on his abdomen. The injured informed Constable Satish Kumar that a quarrel had taken place between him and some boys of G.B. Road few days back and they stabbed him and escaped. The injured further informed him that his cycle and thaila were lying across the road and after saying so, he became unconscious. Constable Satish took him to JPN Hospital in a rickshaw and was immediately taken to operation theatre. Intimation regarding admission of injured in JPN Hospital was sent by Constable Mitender Kumar (PW15) posted as the duty constable to the police station Kamla Market. On receipt of this information, Head Constable Mahipal Singh (PW3) recorded DD No.18A Ex.PW3/A and handed over the same to SI Sanjay Singh (PW20) who went to the hospital. Thereafter, Inspector Hanuman Singh (PW23) also reached the hospital where he met SI Sanjay Singh and Constable Satish Kumar who informed him that injured had died in operation theatre. Since there was no eye witness in the hospital Insp.

Hanuman Singh along with Constable Rajesh and Constable Satish Kumar reached at JLN Marg, Zakir Hussain College where also no eye witness was available. One cycle with thaila and blood nearby that cycle was found lying adjacent to Ramlila Ground, Gate No. 3. He recorded statement of Constable Satish Kumar Ex.PW3/C on the basis of which FIR No. 288/97 Ex.PW3/D was registered. Inspector Hanuman Singh got the place of incident photographed, prepared the site plan Ex.PW23/A, seized cycle, blood and blood stained earth along with thaila. Clothes of the deceased were handed over by SI Sanjay Singh which was seized vide memo Ex.PW14/C.

4. It is further the case of prosecution that on the next day, accused Mukhtiyar Ahmed was arrested from railway godown in the presence of public witness Abdul Nadeem. He made a disclosure statement Ex.PW18/B and got recovered dagger and his blood stained pant and shirt which he was wearing at the time of incident lying under the malba. The same were taken into possession vide memo Ex.PW18/C.

5. On 31st July, 1997 accused Mohd. Shahid was apprehended from railway godown. He was arrested. A disclosure statement Ex. PW11/A was made by him pursuant to which he got recovered one knife. During the course of investigation, the exhibits were sent to FSL. After completing investigation, charge sheet was submitted against the appellants.

6. In order to substantiate its case, prosecution has examined 24 witnesses. All the incriminating evidence was put to the accused persons while recording their statement under Section 313 Cr.P.C. wherein they have pleaded their innocence and alleged false implication in this case. Accused Mukhtiyar Ahmed examined DW1 Zahur Ali who has deposed that accused was picked up from his house on 10th July, 1997. Appreciation of evidence thus assembled at the trial led the trial court to the conclusion that the appellants had committed offences punishable under the provisions with which they stood charged and accordingly convicted and sentenced as mentioned above.

7. Aggrieved by the judgment and order passed by the trial court, the appellants have preferred separate appeals.

8. We have heard Mr. Arun Srivastava, learned counsel for the appellant Mukhtiyar Ahmed and Mr. Mukesh Kalia, Advocate for appellant

Mohd. Shahid and Ms. Richa Kapoor, learned Additional Public Prosecutor for the State.

9. Admittedly, there is no eye-witness to the incident and the case of prosecution rests on circumstantial evidence. The tests applicable to cases based on circumstantial evidence are fairly well-known. The decisions of Hon'ble Supreme Court recognising and applying those tests to varied fact situation are a legion. Reference to only some of the said decisions should, however, suffice.

10. In **Sharad Birdhichand Sarda v. State of Maharashtra,** (1984) 4 SCC 116, Hon'ble Supreme Court declared that a case based on circumstantial evidence must satisfy, the following tests:

> *"(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*
>
> *(3) The circumstances should be of a conclusive nature and tendency.*
>
> *(4) They should exclude every possible hypothesis except the one to be proved, and*
>
> *(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

11. In **Aftab Ahmad Ansari v. State of Uttaranchal,** (2010) 2 SCC 583, it was observed:

> *"13. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing*

the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/ themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be."

12. What, therefore, needs to be seen is whether the prosecution has established the incriminating circumstances upon which it places reliance and whether those circumstances constitute a chain so complete as not to leave any reasonable ground for the Appellant to be found innocent.

13. The circumstances relied upon by the prosecution primarily are:

(i) Motive

(ii) Recovery of knife at the instance of appellant Mohd. Shahid.

(iii) Recovery of dagger and blood stained clothes of appellant Mukhtiyar Ahmad at his instance.

14. We shall take each of the circumstances relied upon by the prosecution in seriatum:-

Motive

15. It is the case of prosecution that on 2nd July, 1997, the cycle of deceased Sudhir @ Sonu hit against both the accused who were going on foot as a result of which a quarrel took place. The matter was, however, pacified with the intervention of Constable Pawan Kumar who separated both the parties. The incident was witnessed by Ravinder Singh and Raju.

16. In order to substantiate the incident of 2nd July, 1997, prosecution has examined PW1 Suresh Kumar Tiwari, PW8 Ravinder Singh, PW19 Raju and PW21 Constable Pawan Kumar.

17. PW1 Suresh Kumar Tiwari is the brother of the deceased, who identified the dead body of his brother in LNJP hospital. Besides that he deposed that on 2nd July, 1997 his brother Sonu informed him that he

had a quarrel with two boys, namely, Shahid and Mukhtiyar on account of hitting cycle against Mukhtiyar when he was going somewhere.

18. PW8 Ravinder Singh is the employer of the deceased. According to him, the deceased was working in his office for serving water and cleaning work three months prior to the incident. However, no incident took place previously with the deceased and nothing had happened with the deceased as per his knowledge. Since the witness did not support the case of prosecution, he was cross-examined by learned Public Prosecutor for the State and he denied having made any statement before the police.

19. PW19 Raju was running a tea shop. This witness has deposed that Sonu was working in a shop near his shop. On 2nd July, 1997, cycle of Sonu hit against both the accused who were going on foot. They quarrelled with Sonu. Constable Pawan Kumar came and separated both the parties after slapping them. Later on, he came to know that Sonu was killed by both the accused.

20. PW21 Constable Pawan Kumar has testified that on 2nd July, 1997, his duty was at PP Sahaganj, GB Road. He was standing outside police booth at GB Road when he heard noise in front of shop No. 53, GB Road and several persons gathered there. He went there and saw accused Shahid and Mukhtiyar quarrelling with Sudhir @ Sonu. He pacified and separated them. PWs Ravinder and Raju were also present there at that time.

21. It is not disputed that the accused persons were not known to any of the witnesses from before. Under the circumstances, it was incumbent upon the Investigating Officer of the case to have arranged Test Identification Parade of the accused persons after their arrest.

22. The object of conducting a Test Identification Parade is two-fold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who are seen by them in connection with the commission of the crime. Second is to satisfy the Investigating Authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of the witness. It is accordingly considered a safe rule of prudence to generally look for corroboration of sworn testimony of the witness in Court as to the identity of the accused who are strangers to them, in the

form of earlier identification proceedings.

23. In **Sk. Hasib v. State of Bihar,** 1972 CriLJ 233 Hon'ble Supreme Court observed:

> "...The purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding..."

24. In **Rameshwar Singh v. State of J & K,** 1972 Cri LJ 15, it was observed:

> *"... It may be remembered that the substantive evidence of a witness is his evidence in court, but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial."*

25. In **Suresh Chandra Bahri v. State of Bihar,** 1994 Crl. LJ 3271, Hon'ble Supreme Court observed:

> *"It is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned also who was a stranger to the accused because in that event the chances of his memory fading away are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of TIP."*

26. No such Test Identification Parade of the accused persons were got conducted by the Investigating Officer of the case. None of the witnesses were known to the accused persons from before. Although the substantive evidence of the witnesses is their evidence in the Court if that evidence is found to be reliable then absence of corroboration by test identification would not be fatal. That being so, it is to be seen whether the evidence of the witnesses are reliable or not.

27. So far as the testimony of PW1 Suresh Kumar Tiwari is concerned, his testimony is hearsay as according to him, he was informed by the deceased on 2nd July, 1997 regarding quarrel with Shahid and Mukhtiyar on account of hitting the cycle against Mukhtiyar when he was going somewhere. He is otherwise not an eye witness to the incident. His testimony being hearsay is inadmissible in evidence.

28. So far as PW8 Ravinder Singh is concerned, this witness has absolutely not supported the case of prosecution and even his cross examination by learned Public Prosecutor could not elicit anything to substantiate the case of prosecution.

29. PW19 Raju claims to be an eye-witness of the incident and according to him, due to hitting of the cycle of Sonu, quarrel took place between him and accused persons which was sorted out by Constable Pawan Kumar. The witness, however, did not support the case of prosecution in all material particulars, therefore, he was cross-examined by learned Public Prosecutor for the State. In cross-examination by the learned Public Prosecutor, he deposed that both the accused persons were not known to him from before nor he made any such statement to the police. He also denied that accused Mukhtiyar Ahmed used to come to his shop to have tea. Despite the fact that his attention was drawn by the learned Public Prosecutor for the State towards the accused Mukhtiyar, the witness could not identify him and went on stating that the accused

persons were not known to him from before. In cross-examination by learned counsel for the accused, he denied that no incident took place on 2nd July, 1997 or that he cannot identify the accused. Under the circumstances, the testimony of this witness is not consistent and is very shaky, therefore, no implicit reliance can be placed on the same.

30. PW21 Constable Pawan Kumar has, however, deposed that the accused persons were quarrelling with Sudhir @ Sonu. He pacified and separated them. As such, at the most, the testimony of this witness revealed that on 2nd July, 1997, when the deceased was going on his cycle, he hit against the accused Mukhtiyar. Thereupon a quarrel took place which was, however, pacified then and there by Constable Pawan Kumar. This incident was on such a trivial issue that it cannot furnish the motive for commission of murder of the deceased. Moreover, if the testimony of PW1 Sudhir Kumar Misra is believed then on the date of incident itself, the deceased was aware of the names of the accused persons. However, as per the rukka Ex. PW3/B which was recorded on the statement of Constable Satish Kumar, the deceased came with injury on his abdomen and on inquiry, he only revealed that boys of GB Road with whom a quarrel had taken place few days back, gave knife blow and escaped. There was no mention of the names of the boys with whom the quarrel had taken place earlier and who stabbed him. For the same reasons, MLC Ex.PW17/A prepared by Dr. Vikas Rampal (PW17) only records the history as given by Constable Satish Kumar that the patient had come in front of him while he was on beat duty, muttered something and collapsed.

31. Under the circumstances, although as per statement of Costable Pawan Kumar, a quarrel has taken place between deceased and two boys on 2.7.1997 but it is not established beyond reasonable doubt that quarrel was between the deceased and the accused persons. Even if it is taken that such a quarrel had taken place on 2nd July 1997, between accused persons and deceased, it was on such a trivial issue that the same cannot furnish a motive to do away with deceased. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence.

32. In **Tarseem Kumar v. Delhi Admn.,** AIR 1994 SC 2585,

Hon'ble Supreme Court pointed out that where the case of prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the Court the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. In **Munish Mubar v. State of Haryana,** (2012) 10 SCC 464, it was reiterated that in a case of circumstantial evidence, motive assumes great significance and importance, for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof.

33. Similar view was taken in **Sukhram v. State of Maharashtra,** (2007) 3 SCC 502, **Sunil Clifford Daniel (DV) v. State of Punjab,** (2012) 8 SCALE 670, **Pannayar v. State of Tamilnadu by Inspector of Police,** (2009) 9 SCC 152, **Rishipal v. State of Uttarakhand,** 2013 II AD (SC) 103. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.

34. Last seen evidence was sought to be proved through the testimony of PW19 Raju for proving that both the accused came to his shop on 10th July, 1997 at about 7:30 PM and stood separately; when Sudhir @ Sonu went to GB Road on a cycle towards Ajmeri Gate then they followed him and at about 7:40 PM, they came to his shop and informed, that they had taken revenge of the incident dated 2nd July, 1997 by stabbing Sonu with knife in Ramlila Ground and had taught him a lesson. However, the witness denied having made any such supplementary statement on 22nd August, 1997 to the police. As such, even the ¡°last seen theory¡± is not substantiated.

Recovery of knife at the instance of accused Mohd. Shahid.

35. It is the case of prosecution that on 31st July, 1997, accused Mohd. Shahid was apprehended from railway godown who was already known to the police officials as he was Bad Character of Police Station Kamla Market. He made a disclosure statement Ex.PW11/A regarding concealment of the weapon of offence, i.e., knife in a box in his house and that he can get the same recovered. Thereupon, he led the police officials to his house and pointed out the place where he concealed the knife and got recovered the same. Sketch of the knife Ex.PW11/B was prepared and it was taken into possession vide memo Ex.PW11/C.

36. Recovery of this knife has been challenged by the learned counsel for the appellant on the ground that the accused was apprehended from a public place, i.e., railway godown, however, no independent witness was joined either at the time of apprehension of accused or at the time of recovery of weapon of offence. Moreover, there was no blood on the knife. As such, it was submitted that the recovery of knife at the instance of the accused is not proved. Even otherwise, the same does not connect him with the commission of the crime. It was further submitted that even if it is not proved that knife which was allegedly recovered from accused was the same which was sent to the doctor as the sketch of the knife prepared by the Investigating Officer does not show any embroidery on its handle and the measurement was 24 cms, however, the Doctor prepared the sketch of knife Ex.PW23/K which shows various patterns of flowers at the handle and measurement is 24.1 cms.

37. The submissions made by learned counsel for the appellant has substantial force, inasmuch as there is no independent witness to the recovery of knife alleged to have been effected at the instance of accused. There was no dearth of independent witnesses, inasmuch as, the accused was apprehended from near railway godown. Admittedly, no effort was made to join any independent witness either at the time of apprehension of the accused or at the time of recovery. No effort was made to call any neighbour to join the investigation as contemplated under Section 100 of the Code of Criminal Procedure, 1973. Even the father of the accused who was present in the house was not asked to join the proceedings and the recovery memo Ex.PW11/C does not bear either the signatures of the father of accused or accused himself. Even if it is taken that the omission to show embroidery on the handle of knife and difference in the measurement is trivial in nature, even then, no blood was found on the knife. The knife was sent to the doctor who conducted post-mortem examination, however, the concerned doctor has not been examined. The opinion has merely been exhibited in the statement of Investigating Officer of the case. Even the weapon of offence was not shown to Dr. P.C. Dixit (PW24) who had come to depose in place of Dr. A.P. Singh to prove the post-mortem report Ex.PW23/H to ascertain as to whether the injuries on the person of the deceased were possible by the knife which was allegedly recovered at the instance of the accused.

38. Under the circumstances, first the recovery of knife at the

instance of the accused Mohd. Shahid is not proved beyond reasonable doubt, even otherwise, it is not established that the knife which was recovered at the instance of accused Mohd. Shahid was the weapon of offence which was used in the commission of crime.

Recovery of weapon of offence and blood stained clothes at the instance of accused Mukhtiyar Ahmad

39. It is the case of prosecution that on 11th July, 1997, accused Mukhtiyar Ahmed was arrested on the pointing out of Constable Pawan Kumar from Railway godown area in the presence of a public witness Abdul Nadeem. He was interrogated and he made a disclosure statement Ex.PW18/B and got recovered a dagger Ex.P1 and his blood stained pant and shirt lying under the malba. Sketch of the dagger Ex.PW18/D was prepared and the dagger as well as the blood stained clothes were seized vide recovery memo Ex.PW18/C.

40. This recovery is alleged to have been effected in the presence of PW18 Abdul Nadeem, PW21 Constable Pawan Kumar and PW23 Inspector Hanuman Singh. Testimony of PW18 Abdul Nadeem was challenged by learned counsel for the appellant on the ground that this witness has not fully supported the case of prosecution. This witness is at the mercy of the police officials in running the hotel, as such, he has been set up as a witness by the prosecution. Credibility of the witness was also challenged on the ground that he is facing criminal trial in other cases and, as such, no reliance can be placed on the testimony of such a witness. The remaining two witnesses are police officials who are interested in the success of the case and, therefore, bound to depose in favour of prosecution. It was submitted that it was a blind murder case and in order to solve the same, the accused has been falsely implicated in the case.

41. Learned Public Prosecutor for the State, however, submitted that the recovery of blood stained clothes of the accused and the dagger recovered at the instance of accused is duly proved. Moreover, the same were sent to FSL along with the clothes of the deceased, seat of bicycle, sample earth taken from the spot and blood stained gauze and as per the report Ex. PW23/G, the blood was found to be of human origin and the weapon of offence recovered at the instance of Mukhtiyar Ahmed and his blood stained clothes bore the same blood group as that of the

deceased and, therefore, it was submitted that this is a strong incriminating piece of circumstance against the accused to connect him with the crime.

42. PW18 Abdul Nadim has deposed that he was coming from Farash Khana and was going to Ajmeri Gate, GB Road. Constable Pawan Kumar and SHO Hanuman Singh met him on GB Road and told him that Mukhtiyar is to be arrested. Thereafter, he deposed that he does not know anything else about the case. He was cross-examined by learned Public Prosecutor for the State and in cross-examination, he admitted that accused Mukhtiyar was arrested in his presence by the police at the instance of Constable Pawan Kumar inside railway godown in the area of PS Kamla Market on the basis of secret information. He denied that any disclosure statement Ex.PW18/B was made by the accused that he can get dagger and clothes smeared with blood recovered lying inside the railway godown concealed in a malba. However, he admitted that disclosure statement Ex. PW18/B bears his signatures. He further went on deposing that the dagger and clothes were in the hands of the constable. Later on, he deposed that dagger Ex.P1 and clothes Ex.P2 and Ex.P3 were got recovered by Mukhtiyar from inside railway godown kept concealed under malba. In cross-examination by learned counsel for the appellant, he admitted that at the time of incident, he was a clerk and now he is running a hotel at Ajmeri Gate which comes within the jurisdiction of PS Kamla Market. This hotel was got opened with the help of Constable Jaspal of PS Kamla Market. He admitted that he is not in possession of any licence to run the hotel nor is paying tehbazari of the said hotel. According to him, after recovery of dagger and clothes, the same were sealed in a parcel with a rubber seal and seal after use was handed over to him which he returned after two days to the SHO. He admitted that he was facing criminal case with the tenant and two other cases against the tenant and relatives. Although, he denied the suggestion that he has been utilized by police for the purpose of witness in different cases but admitted that police does not harass him to run the khokha. A perusal of testimony of this witness goes to show that the witness is running his hotel at the mercy of police officials without any licence or paying any tehbazari. Besides that, he has been changing his stand time and again. He was not totally relied upon by the prosecution. As such, testimony of this witness requires to be scrutinized with circumspection.

43. The police officials, however, have deposed regarding the

recovery at the behest of accused. It is, therefore, to be seen whether the same are sufficient to connect him with crime.

44. The weapon of offence and blood stained clothes along with other articles were sent to FSL and as per report Ex.PW23/G given by Dr. Rajender Kumar, Senior Scientific Officer, human blood of 'AB' group was found on the same which matched with the blood group of deceased.

45. The recoveries of blood-stained clothes and weapon of offence at the instance of the appellant, however, has to be viewed in light of various decisions of the Supreme Court where such kind of recoveries have been held to be very weak evidence.

46. In the decision reported as AIR 1963 SC 1113, **Prabhoo v. State of U.P.** recovery of a blood-stained shirt and a dhoti as also an axe on which human blood was detected was held to be extremely weak evidence. Similarly, in the decision reported as (1977) 4 SCC 600 (1) **Narsinbhai Prajapati v. Chhatrasinh Kanji,** the recovery of a blood-stained shirt and a dhoti as also the weapon of offence a dhariya were held to be weak evidence. In the decision reported as AIR 1994 SC 110 **Surjit Singh v. State of Punjab** the recovery of a watch stated to be that of deceased and a dagger stained with blood of the same group as that of the deceased were held to be weak evidence. As late as in the decision reported as (2009) 17 SCC 273 **Mani v. State of T.N.** recoveries of blood stained clothes and weapon of offence stained with blood were held to be weak recoveries. Following these judgments in **Raj Kumar @ Raju v. State,** ILR (2010) Supp (1) Delhi 389, the recovery was held to be very weak type of evidence.

47. Adverting to the case in hand, the part of the disclosure statement of the accused that the clothes which he was wearing at the time when he committed the crime got stained with blood of the deceased and his getting the clothes recovered attracts Section 27 of the Evidence Act, limited to the extent that the accused got recovered blood stained clothes. However, independent evidence has to be led to prove that the said clothes were being worn by the accused at the time when the crime was committed and said fact cannot be proved through his disclosure statement. No such evidence has been led by the prosecution.

48. It is true that the tell-tale circumstances proved on the basis of the evidence on record gives rise to a suspicion against the appellants but suspicion howsoever strong is not enough to justify conviction of the appellants for murder. The trial court has, in our opinion, proceeded more on the basis that the appellants may have murdered the deceased Sudhir @ Sonu. In doing so, the trial court overlooked the fact that there is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in the instant case. The legal position on the subject is well settled.

49. In **Ramreddy Rajesh Khanna Reddy v. State of A.P.,** (2006) 10 JCC 172, it was observed:

> *"It is now well-settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well-settled that suspicion, however grave may be, cannot be a substitute for a proof and the Courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence."*

50. As far back as in the year 1957, Hon'ble Supreme Court in **Sarwan Singh Rattan Singh v. State of Punjab,** AIR 1957 SC 637 observed that there may be an element of truth in the version of prosecution against accused and considering as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence before the accused can be convicted. It was further observed that degree of agony and frustration may be caused to the families of the victim by the fact that heinous crime may go unpunished but then the law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubts on the basis of acceptable evidence and in case of doubt, accused is entitled to get benefit of the same.

51. Even if we take the most charitable liberal view in favour of the prosecution, all that we get is a suspicion against the appellants which cannot take the place of proof, therefore, appellants are entitled to get benefit of the same.

52. Accordingly, both the appeals are allowed.

53. The impugned judgment and order on sentence dated 2nd August, 1999 and 4th August, 1999 respectively convicting the appellants are set aside. The appellants are acquitted of the charges framed against them. Their bail bonds are discharged. Copy of the judgment be sent to the concerned Jail Superintendent.

Trial Court record be returned forthwith.

ILR (2014) (IV) DELHI 2300
RC REV.

ASHOK KUMAR & ANR. ....PETITIONERS

VERSUS

SUNIL KUMAR & ORS. ....RESPONDENTS

(NAJMI WAZIRI, J.)

RC REV. : 07, 10/14 & CM NO. : 123, 188/2014 **DATE OF DECISION: 02.04.2014**

Delhi Rent Control Act, 1958—Section 14(1)(e), 25B-Petition against rejection of leave to defend application of the tenant and eviction order. Tenant challenged the landlord tenant relationship between the Petitioner and the Respondent herein. Held- if the tenant had any objection regarding the rent receipts showing any other person as a landlord then protest could have been raised. No objection was raised. The tenant had

by silence acquiesced to the Respondent also as landlord. Landlord tenant relationship stood established in favour of respondent. Held—Age has no bearing on the requirement of commercial accommodation of a person. The need to start a new business cannot be doubted solely because such need is of a senior citizen. No irregularity with the Trial Court order.

Apropos the dispute sought to be raised with respect of Shri Anil Kumar, the tenants had not placed any material on record or a copy of the Will which could be said to grant or confer any right, title or interest in favour of Shri Anil Kumar nor had any document been produced to show that the dispute had indeed been raised by said Shri Anil Kumar with respect to the suit premises. The veracity of the registered sale deed dated 29.7.1992 in favour of Smt. Kusum Lata had not been challenged by the tenants. The Trial Court found that the rent receipts showed Smt. Kusum Lata and Shri Sunil Kumar as the landlords whereas the tenants accepted the tenancy only with respect to Kusum Lata. **(Para 4)**

The Trial Court found that the old electricity bills as well as rent receipts of 1984-85 in favour of tenants Rajinder Kumar and Devender Kumar had been issued by Smt. Urmila Devi. With respect to property No.1436/2, Gali Arya Samaj, Delhi-110006 the Trial Court concluded that Ms. Seema Aggarwal was the tenant in the said property which was owned by one Shri Rajiv Dawar and the rent receipts ranging from the year 2008, 2010 and 2012 were shown. Therefore, in the absence of any document being filed by the tenant, their bald assertions that these rent receipts were forged and fabricated, were of no consequence. The Trial Court found that with respect to four properties, i.e. Shop No.491, Bazar Sita Ram, Delhi-110006; Property No.4273, Gali Shahtara, Ajmeri Gate, Delhi-110006; Shop No.1436/2, Gali Arya Samaj, Bazar Sita Ram, Delhi-110006; and Property No.1303, Bagichi Tansukh Rai, Ajmeri Gate, Delhi, the eviction-

petitioners had sufficiently show that they were not the owners thereof or that the same were not available to them as an alternate accommodation. The Trial Court found the need of the eviction-petitioner No.2 as bona fide and no triable issue was raised which could be shown to prevent the grant of an eviction order as sought in the petition for bona fide need. **(Para 5)**

The selective acceptance of the one landlord only was contrary to the rent receipts which showed that Mr. Sunil Kumar also as the landlord. This Court is of the view that if the tenants had any objection regarding the rent receipts showing Mr. Sunil Kumar too as a landlord, then protest could have been raised. Admittedly, no objection was raised. The tenant had, by their silence acquiesced to Mr. Sunil Kumar also as their landlord during the lifetime of Smt. Kusum Lata herself. Hence, the landlord-tenant relationship stood established in favour of Shri Sunil Kumar, eviction-petitioner No.1. **(Para 6)**

This Court finds that insofar as the eviction-petitioners had shown that they had no suitable alternate accommodation whereas the bona fide need was established, the eviction order necessarily had to follow. Age has no bearing on the requirement of commercial accommodation of a person. The need to start a new business cannot be doubted solely because such need is of a person who is a senior citizen. The impugned order is based upon the records. There is no material irregularity. The reasoning for and the conclusion arrived at are based on the record. The petition is without merit and is accordingly dismissed. **(Para 7)**

[An Ba]

APPEARANCES:

FOR THE PETITIONERS	**:**	Mr. S. K. Gupta & Mr. Manish Gupta, Advocates.
FOR THE RESPONDENTS	**:**	Ms. Savita Rustogi, Adv.

RESULT: Petition Dismissed

NAJMI WAZIRI, J. (Oral)

1. This petition impugns order dated 3.10.2013 passed by the learned ARC-1/Central Delhi in eviction petition Nos.E-77/12 & E-78/12 whereby the petitioner's application under Section 25B of the Delhi Rent Control Act, 1958 (hereinafter referred to as .the Act.) was dismissed and an eviction order was passed under Section 14(1)(e) of the Act with respect to property No.2987, Kucha Mai Dass, Bazar Sita Ram, Ajmeri Gate, Delhi-110006. The respondents/eviction petitioner had sought the said premises for the bona fide need for respondent/landlord No.2 who is a senior citizen. Earlier the respondent No.2/eviction-petitioner had stopped his business of kirana store pursuant to the demise of his wife and started assisting his son, eviction-petitioner No.1, in the latter's business of cosmetics. With the passage of time the widower came to terms with his loss and with a view to carry on with life wanted to set up his own retail business in cosmetics. The eviction-petitioners had averred that they had no other suitable alternate commercial accommodation.

2. The tenant had sought leave to contest the eviction petition on the ground that they had been inducted into the tenanted premises in the year 1994 by Smt. Kusum Lata for commercial purposes only and were paying rent to her. After her demise in the year 2001, the claim for the suit property became disputed as one Shri Anil Kumar claimed exclusive ownership of the entire ground floor; that the said Anil Kumar had not been impleaded; that a wrong site plan regarding the ground floor had been filed by the eviction-petitioners, hence the tenant had filed a ¡°correct¡± site plan of the entire ground floor and the first floor; the eviction-petitioner Nos.1 & 2 were in occupation and possession of the commercial ground floor portion of the property bearing No.2987, Kucha Mai Das, Bazar Sita Ram, Delhi-110006; that they were both engaged in the business of ladies garments and cosmetics. Furthermore it was contended that the eviction-petitioner No.2 had started his independent business from shop No.1054, Bazar Sita Ram, Delhi-110006 from where he ran his business under the name & style of 'Shingar Sadan' with eviction-petitioner No.2 as its sole proprietor. Therefore, both petitioner Nos.1 & 2 had surplus commercial accommodation available with them. It was also contended that the petitioners owned shop No.491, Bazar Sita Ram, Delhi-110006, which had been let out to Ranjit Water Supply; that

they had also built up another commercial property bearing No.4273, Gali Shahtara, Ajmeri Gate, Delhi-110006; while petitioner No.2 was carrying on the business of perfumery, soaps, and toiletry items from shop No.1436/2, Gali Arya Samaj, Bazar Sita Ram, Delhi-110006. In addition, eviction-petitioner No.4 had the ownership of property No.1303, Bagichi Tansukh Rai, Ajmeri Gate, Delhi, which consisted of commercial ground floor apart from first and second floor and lastly, that the shop on the ground floor of the said property was lying vacant.

3. The eviction-petitioners, however, refuted the ownership of any of the aforesaid properties. To prove their ownership of the tenanted premises they relied upon the registered Sale Deed in favour of Late Smt. Kusum Lata. The Trial Court was of the view that the mention of telephone No.23219405 on the cash memo of eviction-petitioner No.4.s business card was incorrectly printed, because the said telephone number was found to be installed in property No.4273. The correct telephone number was 23219406 with respect to eviction- petitioner No.4.s premises No.1436/2, Ajmeri Gate, Delhi. This was proven by the eviction-petitioners bringing on record copies of telephone No.23219406 for the years 2002, 2003, 2007, 2008, 2012 & 2013. With respect to property No.1303, Bagichi Tansukh Rai, the eviction-petitioners had brought on record a copy of the sale deed dated 27.8.1984 in favour of Smt. Urmila Devi. Upon perusal of copy of the registered sale deed in favour of Smt. Urmila Devi, mother-in-law of eviction-petitioner No.4, the Trial Court rested the argument raised by the tenant. With respect to property No.1436/2, the Trial Court found it to be tenanted premises on the basis of rent receipts issued by the owner/landlord thereof. The Trial Court went on to hold that the eviction-petitioners were seeking the ownership on the basis of a Will executed in favour of eviction-petitioner No.1 by his mother, late Smt. Kusum Lata.

4. Apropos the dispute sought to be raised with respect of Shri Anil Kumar, the tenants had not placed any material on record or a copy of the Will which could be said to grant or confer any right, title or interest in favour of Shri Anil Kumar nor had any document been produced to show that the dispute had indeed been raised by said Shri Anil Kumar with respect to the suit premises. The veracity of the registered sale deed dated 29.7.1992 in favour of Smt. Kusum Lata had not been challenged by the tenants. The Trial Court found that the rent receipts showed Smt.

Kusum Lata and Shri Sunil Kumar as the landlords whereas the tenants accepted the tenancy only with respect to Kusum Lata.

5. The Trial Court found that the old electricity bills as well as rent receipts of 1984-85 in favour of tenants Rajinder Kumar and Devender Kumar had been issued by Smt. Urmila Devi. With respect to property No.1436/2, Gali Arya Samaj, Delhi-110006 the Trial Court concluded that Ms. Seema Aggarwal was the tenant in the said property which was owned by one Shri Rajiv Dawar and the rent receipts ranging from the year 2008, 2010 and 2012 were shown. Therefore, in the absence of any document being filed by the tenant, their bald assertions that these rent receipts were forged and fabricated, were of no consequence. The Trial Court found that with respect to four properties, i.e. Shop No.491, Bazar Sita Ram, Delhi-110006; Property No.4273, Gali Shahtara, Ajmeri Gate, Delhi-110006; Shop No.1436/2, Gali Arya Samaj, Bazar Sita Ram, Delhi-110006; and Property No.1303, Bagichi Tansukh Rai, Ajmeri Gate, Delhi, the eviction- petitioners had sufficiently show that they were not the owners thereof or that the same were not available to them as an alternate accommodation. The Trial Court found the need of the eviction-petitioner No.2 as bona fide and no triable issue was raised which could be shown to prevent the grant of an eviction order as sought in the petition for bona fide need.

6. The selective acceptance of the one landlord only was contrary to the rent receipts which showed that Mr. Sunil Kumar also as the landlord. This Court is of the view that if the tenants had any objection regarding the rent receipts showing Mr. Sunil Kumar too as a landlord, then protest could have been raised. Admittedly, no objection was raised. The tenant had, by their silence acquiesced to Mr. Sunil Kumar also as their landlord during the lifetime of Smt. Kusum Lata herself. Hence, the landlord-tenant relationship stood established in favour of Shri Sunil Kumar, eviction-petitioner No.1.

7. This Court finds that insofar as the eviction-petitioners had shown that they had no suitable alternate accommodation whereas the bona fide need was established, the eviction order necessarily had to follow. Age has no bearing on the requirement of commercial accommodation of a person. The need to start a new business cannot be doubted solely because such need is of a person who is a senior citizen. The impugned order is based upon the records. There is no material irregularity. The

reasoning for and the conclusion arrived at are based on the record. The petition is without merit and is accordingly dismissed.

ILR (2014) III DELHI 2306
CRL.A.

SAHIL **....APPELLANT**

VERSUS

STATE **.....RESPONDENT**

(S.P. GARG, J.)

CRL.A. 1356/2012 **DATE OF DECISION: 02.04.2014**

Indian Penal Code, 1860—Sec. 393, 394 and 398—Arms Act, 1959—Sec. 27—Allegations against the appellant-Sahil, as revealed in the charge-sheet, were that on 05.06.2010 at about 09.30.p.m. opposite house No.3266, Ranjeet Nagar, he and his associates (not arrested) attempted to rob complainant-Ajay Kumar of laptop at pistol point. In the process of committing robbery, he voluntarily caused hurt to complaint's son-Amit—The prosecution examined 13 witnesses to substantiate the charges and to establish the guilt of the appellant. In 313 statement, the appellant pleaded false implication and denied complicity in the crime. The trial resulted in his conviction as aforesaid. It is relevant to note that the appellant was acquitted of the charges under Section 25 Arms Act in the absence of sanction under Section 39 Arms Act and the State did not challenge the said acquittal—Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of

interested witnesses without independent corroboration. She forcefully argued that it was a case of mere quarrel and the appellant was falsely implicated in this case. Learned APP urged that the impugned judgment is based upon the cogent and reliable testimonies of the complainant and his son who had no prior animosity to falsely implicate—The witness deposed that he had seen the pistol at the spot and also at the police Station. He denied the suggestion that the accused was not present at the spot or was falsely implicated in the case—The appellant did not give any specific reasons to remain present near his house without any particular purpose—The appellant did not give plausible explanation to the incriminating circumstances in 313 statement—The appellant, did not examine any witness to prove the defence taken by him for the first time in his statement under Section 313—The prosecution has proved on record FSL report (Ex.PW-13/D) which showed that the pistol recovered from the accused was in working order. It is true that subsequently when the pistol was unloaded, it was found empty. It has come on record that the appellant was not at the time of commission of the crime and his associates succeeded to flee the spot. They were also allegedly armed with various weapons. Simply because the pistol (Ex.P-1) recovered from the accused was empty at the relevant time, it cannot be said that it was not a 'deadly' one particularly when Sahil was convicted under Section 27 of the Arms Act for using a weapon unauthorisedly without licence in violation of provision of Arms Act—Minor discrepancies and improvements highlighted by the appellant's counsel do not affect the basic structure of the prosecution case. The victims were not aware that the 'deadly' weapon with which the appellant was armed was loaded or not. 'Butt' of this weapon was used to cause hurt to the victim-Amit. For the purposes of Section 398 IPC, mere possession of the 'deadly' weapon is

sufficient. This Court find no substance in the plea that Section 398 IPC is not attracted and proved—disposed of.

Important Issue Involved: For attracting Section 398 IPC it is sufficient that appellant was armed with a deadly weapon and victim could see it even though it is loaded or empty.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Anita Abraham Adv.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

RESULT: Disposed of.

S.P. GARG, J.

1. Sahil (the appellant) questions the legality and correctness of a judgment dated 01.08.2012 of learned Additional Sessions Judge-FTC (Central) in Sessions Case No.48/10 arising out of FIR No.107/10 registered at Police Station Ranjeet Nagar by which he was convicted under Sections 393/394/398 IPC and 27 Arms Act. By an order on sentence dated 08.08.2012, he was awarded RI for seven years with fine Rs. 2,500/- under Section 393 IPC; RI for seven years with fine Rs. 2,500/- under Section 394 IPC; RI for seven years under Section 398 IPC and RI for three years with fine Rs.1,000/- under Section 27 Arms Act. All the sentences were to operate concurrently.

2. Allegations against the appellant-Sahil, as revealed in the charge-sheet, were that on 05.06.2010 at about 09.30 p.m. opposite house No.3266, Ranjeet Nagar, he and his associates (not arrested) attempted to rob complainant-Ajay Kumar of laptop at pistol point. In the process of committing robbery, he voluntarily caused hurt to complainant's son-Amit. The police machinery came into motion when information about the occurrence was conveyed and recorded by a Daily Diary (DD) No.28A (Ex.PW-12/A) at 09.45 p.m. at police station Ranjit Nagar. The investigation was assigned to HC Gyan Parkash who with Ct.Virender and Ct.Rakesh went to the spot. Subsequently, ASI Rajender Singh also joined them. Ajay handed over the custody of the appellant, who was

lying unconscious at the spot, to the Investigating Officer along with the pistol recovered from him. The victims and the appellant were sent for medical examination. After recording complainant's statement (Ex.PW-1/A), the Investigating Officer lodged First Information Report. Statements of witnesses conversant with the facts were recorded. The exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was filed against the appellant in the court; he was duly charged and brought to trial. The prosecution examined 13 witnesses to substantiate the charges and to establish the guilt of the appellant. In 313 statement, the appellant pleaded false implication and denied complicity in the crime. The trial resulted in his conviction as aforesaid. It is relevant to note that the appellant was acquitted of the charges under Section 25 Arms Act in the absence of sanction under Section 39 Arms Act and the State did not challenge the said acquittal.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of interested witnesses without independent corroboration. No public person present at the spot, who had allegedly given beatings to the appellant, was associated in the investigation. She emphasized that Section 398 IPC was not attracted and proved as the 'pistol' allegedly recovered from the appellant's possession was empty and did not have any cartridge. It was not 'used' by him to commit robbery. The prosecution witnesses have made vital improvements in their deposition regarding the exact number of assailants and the motor-cycles on which they had arrived at the spot. She forcefully argued that it was a case of mere quarrel and the appellant was falsely implicated in this case. Learned APP urged that the impugned judgment Crl.A.no.1356/2012 Page 4 of 9 is based upon the cogent and reliable testimonies of the complainant and his son who had no prior animosity to falsely implicate.

4. The occurrence took place at around 09.30 p.m. Daily Dairy (DD No.28/A) was recorded at Police Station Ranjit Nagar at 09.45 p.m. regarding the incident. It was informed that an individual having a gun was quarrelling at House No.3266, Ranjeet Nagar. Both the victims-Amit and appellant were taken to Dr. Ram Manohar Lohia hospital for medical examination. Sahil's MLC (Ex.PW-11/A) records the arrival time at the hospital as 10.45 p.m. It confirms his presence at the spot. PW-1 (Ajay Kumar) and PW-2 (Amit) were taken to Dr.Ram Manohar Lohia hospital

and their MLCs (Ex.PW-6/B and Ex.PW-6/A respectively) record the arrival time at 11.55 p.m. After recording complainant's statement (Ex.PW-1/A), the investigating officer lodged First Information Report at about 01.40 A.M. by endorsement/rukka (Ex.PW-13/A). Apparently, there was no inordinate delay in lodging the First Information Report. In the complaint, Ajay Kumar gave detailed account of the occurrence and disclosed as to how and under what circumstances the appellant and his associates attempted to rob them of their laptop lying on the rear seat of the car when they had arrived near their House No.3266, Ranjeet Nagar. He also informed that in the process, the assailant with the butt of the pistol caused hurt to his son. The associates of the appellant succeeded to flee the spot. In his court statement as PW-1, Ajay Kumar proved the version given to the police at the first instance without major variations. He identified Sahil as one of the assailants who had arrived on a motorcycle and had pointed a pistol at him. Due to fear, PW-1 (Ajay Kumar) went to his house. The appellant attempted to pick up the bag containing laptop, documents and some cash kept on the rear seat of the car. He also caused hurt to Amit with the butt of the pistol. PW-1 caught hold of the appellant when he had put his neck inside the car to pick the laptop. He was given beatings by the public. His associates with the help of weapons like knife and pistols threatened the public and succeeded to flee the spot. On arrival of the police, the pistol (Ex.P-1) was handed over along with the custody of the appellant. In the cross-examination, the witness admitted that all the accused persons were wearing full mask helmets. Injuries were caused to his son on forehead. He was first taken to a private hospital i.e. Kailash Nursing Home and thereafter he was taken to Dr.Ram Manohar Lohia hospital for medical examination. Someone from the public had informed the police at 100. The witness deposed that he had seen the pistol at the spot and also at the police station. He denied the suggestion that the accused was not present at the spot or was falsely implicated in the case. Scanning the testimony of this witness, reveals that despite lengthy and searching cross-examination, no material discrepancies could be elicited to discard the version narrated by him. No ulterior motive was assigned to him to falsely rope in an innocent. Presence of the witness was not denied in the cross-examination. No suggestion was put to the witness as to how and under what circumstances, the appellant who had sustained injuries on his body was apprehended outside his house. The appellant did not give any specific reasons to remain present near his house without any particular purpose. PW-2 (Amit-the

victim) fully corroborated PW-1 on all material facts and identified the appellant-Sahil as one of the assailants who had attempted to commit robbery and in the process caused hurt on his forehead with the butt of the pistol. In the cross-examination, he was confronted with certain facts with his statement (Ex.PW2/DA) under Section 161 Cr.P.C. He reasserted that he had seen the pistol at the place of occurrence as well as in the police station. He also denied the suggestion that the accused was no present at the place of occurrence. Again, no infirmity has emerged in the cross-examination to discard his statement. Ocular testimony is in consonance with the medical evidence. MLCs (Ex.PW-6/A and Ex.PW-6/B) reveal that both Amit and Ajay were medically examined on 05.06.2010 by PW-6 (Dr.Shekhar Yadav). The appellant was also taken to RML hospital and was examined by PW-11 (Dr.Ranjit Singh) by MLC (Ex.PW-11/A). The appellant did not give plausible explanation to the incriminating circumstances in 313 statement. He took inconsistent and conflicting defence and alleged that on that day, he was going on his motor-cycle which struck the car of the complainant and a quarrel ensued between him and the complainants-Ajay and Amit. He sustained injuries on his hand, forehead and behind his ear in the said quarrel. The appellant, however, did not examine any witness to prove the defence taken by him for the first time in his statement under Section 313. No such suggestion was put to PW-1 and PW-2 in the cross-examination. Rather the suggestion put to them was that the accused was not present at the spot and was falsely implicated. The accused did not disclose the number of motor-cycle which had allegedly struck against the car of the complainant. No such motor-cycle was recovered from the spot. The defence was out-rightly rejected for valid reasons by the trial court.

5. Non-examination of independent public witness is inconsequential as PW-1 and PW-2 have categorically identified and proved the specific role played by the accused in the incident. It is not the prosecution case that the incident was witnessed by any such public persons who subsequently gathered at the spot on hearing the commotion. The prosecution has proved on record FSL report (Ex.PW-13/D) which showed that the pistol recovered from the accused was in working order. It is true that subsequently when the pistol was unloaded, it was found empty. It has come on record that the appellant was not alone at the time of commission of the crime and his associates succeeded to flee the spot. They were also allegedly armed with various weapons. Simply

because the pistol (Ex.P-1) recovered from the accused was empty at the relevant time, it cannot be said that it was not a 'deadly' one particularly when Sahil was convicted under Section 27 of the Arms Act for using a weapon unauthorisedly without licence in violation of provisions of Arms Act. It was a US made pistol. Minor discrepancies and improvements highlighted by the appellant's counsel do not affect the basic structure of the prosecution case. The victims were not aware that the 'deadly' weapon with which the appellant was armed was loaded or not. 'Butt' of this weapon was used to cause hurt to the victim-Amit. For the purposes of Section 398 IPC, mere possession of the 'deadly' weapon is sufficient. I find no substance in the plea that Section 398 IPC is not attracted and proved. Minimum sentence prescribed under Section 398 IPC cannot be modified or altered. Nominal roll dated 06.11.2012 reveals involvement of the appellant in four other such cases. The sentence order is left undisturbed except that default sentence for non-payment of fine under Section 393/394 IPC will be fifteen days (15 days) and ten days (10 days) under Section 27 Arms Act.

6. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith along with a copy of this order.

ILR (2014) III DELHI 2312
CRL.A.

ROHIT **..... APPELLANT**

VERSUS

STATE **..... RESPONDENT**

(S.P.GARG, J.)

CRL.A.843/2012 **DATE OF DECISION: 03.04.2014**

Indian Penal Code, 1860—Sec 304 (ii),—Bihari Lal-appellant's father was found dead inside his house No.16/1644 E, Bapa Nagar, Karol Bagh, Delhi on

14.02.2011. Daily Diary (DD) NO.36A was recorded at 10.06 p.m. at Police Station Prasad Nagar on getting information from PCR that an individual who used to consume liquor had died inside his house.—During investigation, it revealed that a quarrel had taken place between the deceased and the appellant on 14.02.2011. The Investigation Officer lodged First Information Report under Section 302 IPC on 18.02.2011. Statements of witness conversant with the facts were recorded—The prosecution examined 12 witnesses to establish the guilt—The trial resulted in his conviction under Section 304 (II) IPC—Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective—The circumstances do not point unerringly to the guilt of the appellant. They may at the most raise some suspicion, but suspicion, however, strong cannot take the place of proof—Post-mortem examination report reveals that the victims suffered 13 injuries on various body organs/ parts Some injuries were inflicted by a sharp weapon and others were caused with blunt object. The death was a result of manual strangulation. All injuries were ante-mortem in nature, fresh in duration and were sufficient to cause death in the ordinary course of nature.—Apparently, the appellant was the only individual who was last seen with the victim inside the house. Only for fifteen minutes, the appellant was not inside the house and had gone to his sister-Rekha residing at 16/882 E, Bapa Nagar, Padam Singh Road, Karol Bagh. There is nothing on record to show if during these fifteen minutes any other individual had entered inside the house. The offence had taken place inside the privacy of a house where the appellant had all the opportunity to commit it. It is on record that after the quarrel, the appellant had gone after closing the door of the house and it was opened by him when he returned to the house with his sister-Rekha and the dead body was found—All these circumstances

were within the special knowledge of the appellant and he under Section 106 Evidence Act was under legal obligation to explain. However, he did not give plausible explanation and failed to divulge his whereabouts during these fifteen minutes. Initially, his plea was that he was not present at the spot. He did not put any suggestion to PW-1 that he had left along with Rahul at about 05.30 p.m. PW-4 (Rahul) in his deposition merely stated that after appellant's father had started hurling abuses, he left the house of the accused at around 05.30 p.m. He did not state that at that time, Rohit had also left the house along with him.—The appellant did not discharge the burden which had shifted to him under Section 106 Evidence Act. This silence forms an additional link the chain of circumstances. For the absence of an explanation from the side of the appellant, there was every justification for drawing an inference that the appellant was the author of injuries including strangulation—DD No.36A records that the victim had died a natural death inside the house as he was a habitual drunked. Apparently, the police was mislead. It was not a case of natural death as in post-mortem examination report, the cause of death was ascertained as 'asphyxia as a result of manual strangulation—The trial court has dealt with the mismatch in the probable time of death given in the post-mortem examination and for good reasons preference was given to ocular evidence over medical evidence which was advisory in nature—Certain description and contradictions highlighted by the appellant's counsel are inconsequential. Non-recovery of crime weapon i.e. lag of wooden stool, and recovery of blood-stained clothes which the appellant was wearing at the time of occurrence are not material. In the instance case, the prosecution relies on the 'last seen' theory. Here, there is practically no time lag between the time when PW-1 saw the deceased the accused/appellant together and the time

the death was discovered. The time lag was about fifteen minutes only. Unnatural conduct; motive of the appellant to inflict injuries to the victims; and false explanation given in 313 statement to the incriminating circumstances are other strong circumstances taken cumulatively from a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and none else.—The alternative plea to modify the sentence order as the appellant has undergone substantial period of substantive awarded to him, it reveals that the sentences awarded to the appellant is RI for seven years, which cannot be termed unreasonable or excessive—Dismissed.

Important Issue Involved: All the circumstances which are within the special knowledge of the appellant, he is under legal obligation to explain under section 106 Evidence Act. For the absence of an explanation from the side of the appellant, there was every justification for drawing an inference against him.

When the prosecution relied on the Last Seen Theory, it is be seen that there is practically no time lag between the time when witness last saw the deceased and the accused/ appellant together and the time when the death was discovered.

Unnatural conduct; motive of the appellant to inflict injuries to the victom; and false explanation given in 313 statement are other strong circumstances taken cumulatively from a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and none else.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. S.B. Dandapani, Advocate.

FOR THE RESPONDENT : M.N. Dudeja, APP for the State.

RESULT: Dismissed.

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 02.05.2012 in Sessions Case No.33/11 arising out of FIR No.38/11 registered at PS Prasad Nagar by which the appellant-Rohit was held guilty for committing offence under Section 304 (II) IPC. By an order dated 07.05.2012, he was awarded RI for seven years.

2. Bihari Lal-appellant's father was found dead inside his house No.16/1644 E, Bapa Nagar, Karol Bagh, Delhi on 14.02.2011. Daily Diary (DD) No.36A was recorded at 10.06 p.m. at Police Station Prasad Nagar on getting information from PCR that an individual who used to consume liquor had died inside his house. The investigation was assigned to SI Manish who with Ct.Bhur Singh went to the spot. He spotted the dead body of Bihari Lal with numerous injuries on left arm and legs lying on the ground. Lot of blood had scattered at the spot. The crime team took the photographs of the crime scene and the dead body was sent for post-mortem examination to LNJP hospital. PW-2 (Dr.Jatin Bodwal) conducted post-mortem examination of the body and opined the cause of death as 'asphyxia as a result of manual strangulation'. The dead body was handed over to the relatives of the deceased. During investigation, it revealed that a quarrel had taken place between the deceased and the appellant on 14.02.2011. The Investigating Officer lodged First Information Report under Section 302 IPC on 18.02.2011. Statements of witnesses conversant with the facts were recorded. On 19.02.2011, Rohit was arrested and some recoveries were effected at his instance. After completion of investigation, a charge-sheet was filed against him under Section 302 IPC; he was duly charged; and brought to trial. The prosecution examined 12 witnesses to establish the guilt. In 313 statement, the appellant denied his involvement in the crime and took the plea that at about 05-05.30 p.m. when he came along with his friend Rahul to take shoes in the house, his father who was under the influence of liquor started hurling abuses to him and his friend. He left the house along with his friend-Rahul. When he returned at about 0830-9.00 p.m., he saw a

crowd in front of his house. His sister-Rekha was also present there. When the door was opened, he saw his father lying in injured condition near the main door and he was bleeding from his leg. He called Dr.Jafar Alam, who on examination pronounced him dead. When he lifted the dead body to take his father to the hospital, the clothes which he was wearing at the time got blood-stained. He, however, did not examine any witness in defence. The trial resulted in his conviction under Section 304 (II) IPC.

3. I have heard the learned counsel for the parties and have examined the record. Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective. He submitted that the prosecution case was based on circumstantial evidence. However, the circumstances do not point unerringly to the guilt of the appellant. They may at the most raise some suspicion, but suspicion, however, strong cannot take the place of proof. The appellant had no motive to inflict injuries to his father and cause his death. He was not present at the spot at the relevant time. Post-mortem examination report (Ex.PW-2/A) reveals that the probable time of death of the deceased was 02.20 a.m. The appellant had informed all the relatives and had summoned the doctor. He had performed last rites of the deceased and was not a suspect till his arrest on 19.02.2011. The trial court did not believe recovery of the crime weapon or the blood-stained clothes. Learned APP urged that the evidence adduced by the prosecution leaves no scope for doubt about the appellant's involvement in the crime in question. Counsel submitted that the appeal be, therefore, dismissed.

4. There is no dispute that Bihari Lal met a homicidal death. Medical evidence is clear on this point. Crucial testimony in this regard is that of PW-2 (Dr.Jatin Bodwal) who conducted post-mortem examination on the body of the deceased vide report (Ex.PW-2/A). In his opinion, the cause of death was 'asphyxia as a result of manual strangulation via injuries on the neck i.e. injury No.1 to 6. These injuries were sufficient to cause death in the ordinary course of nature and the manner of death was homicidal. Opinion given by the expert witness was not challenged in the cross-examination. Post-mortem examination report reveals that the victim suffered 13 injuries on various body organs/parts. Some injuries were inflicted by a sharp weapon and others were caused with blunt object. The death was a result of manual strangulation. All injuries were ante-mortem in nature, fresh in duration and were sufficient to cause

death in the ordinary course of nature. About 15 minutes prior to the death, PW-1 (Rakesh Kumar Singhania) had seen the victim hale and hearty. Apparently, it was a case of culpable homicide.

5. At the outset, it may be mentioned that the prosecution case is based upon circumstantial evidence. PW-1 (Rakesh Kumar Singhania) deposed that on 14.02.2011, in the evening, when he was going in the gali, he saw Rohit and friend Rahul consuming liquor in Rohit's house. In the meantime, Bihari Lal who was under the influence of liquor arrived there. He stared hurling filthy abuses to the accused and asked Rahul to leave the house. On that, Rahul left the house and the accused Rohit caught hold of his collar (of his father) and dragged him inside the room. Thereafter, he heard the noises of quarrel between both of them. After about 15 minutes, saw the accused coming along with his sister there. They opened the door in his presence and saw Bhagwat @ Bihari lying dead on the floor. The police arrived at the spot and recorded his statement. In the cross-examination by learned APP, after Court's permission, he admitted that after some time of the quarrel, the noises of quarrel coming from the house of the accused had stopped and the accused left the house after closing the door. He admitted that after some time, Rohit returned with his sister-Rekha. In the cross-examination, he disclosed that he was a plumber by profession and used to perform work on daily bases till 05.00 p.m. Bihar Lal was known to him being his neighbour and he treated him like his brother. On 14.02.2011, he was strolling in the gali between 8-9 p.m. after dinner when the deceased started abusing the accused. He came to know about Bihari Lal's death when the accused along with his sister came there. He explained that he did not intervene in the quarrel because it was a daily routine for the victim and the appellant to quarrel frequently and this fact was known to everyone. The deceased even used to quarrel with him on many occasions.

6. Presence of this witness at the spot, being neighbour residing at a very short distance from the residence of the victim was quite natural and probable. He did not nurture any grudge or animosity either with the appellant or the victim to make a false statement. He was fair enough to admit that he did not see the accused giving beatings to the victim. His testimony is in consonance with the appellant's plea/defence in 313 statement that on the day of incident, a quarrel had taken place with the victim when he had come in a drunken condition and hurled abuses to him and his friend Rahul. There are no sound reasons to discard the

cogent and natural testimony of the independent witness. PW-4 (Rahul) also deposed that on 14.02.2011, he met Rohit in the street and went along with him to his house. At about 05.30 p.m. his father arrived there under the influence of liquor and started throwing his beddings inside the house. He also hurled abuses to both of them. He immediately left the house of the accused due to the said quarrel. From the testimonies of PW-1 and PW-4, it stands established that on the day of incident, a quarrel had taken place between the appellant and the victim and the deceased had hurled abuses to him and his friend Rahul. It further stands established from the testimony of PW-1 that the occurrence took place at about 09.00 p.m. when the victim was dragged after the quarrel inside the house and thereafter he heard noises of quarrel from there. After about 15 minutes of the said occurrence, the appellant along with his sister-Rekha returned to the house and Bihari Lal was found dead inside the house. Apparently, the appellant was the only individual who was last seen with the victim inside the house. Only for fifteen minutes, the appellant was not inside the house and had gone to his sister-Rekha residing at 16/882 E, Bapa Nagar, Padam Singh Road, Karol Bagh. There is nothing on record to show if during these fifteen minutes any other individual had entered inside the house. The offence had taken place inside the privacy of a house where the appellant had all the opportunity to commit it. It is on record that after the quarrel, the appellant had gone after closing the door of the house and it was opened by him when he returned to the house with his sister-Rekha and the dead body was found. Apparently, nobody else had access to the house during the time the appellant had left the house and had returned thereafter within fifteen minutes. The appellant did not explain as to why he had gone outside the house after closing its door leaving his father in an injured condition. He did not elaborate as to where Rekha met him and what was the reason to bring her to the house. Rekha was not examined in defence to show as to when the appellant had gone to her. All these circumstances were within the special knowledge of the appellant and he under Section 106 Evidence Act was under legal obligation to explain. However, he did not give plausible explanation and failed to divulge his whereabouts during these fifteen minutes. Initially, his plea was that he was not present at the spot. He did not put any suggestion to PW-1 that he had left along with Rahul at about 05.30 p.m. PW-4 (Rahul) in his deposition merely stated that after appellant's father had started hurling abuses, he left the house of the accused at around 05.30 p.m. He did not state that at that

time, Rohit had also left the house along with him. Only in 313 statement, the appellant made the plea that he had left at about 05.00-5.30 p.m. along with his friend Rahul and returned at about 08.30-09.00 p.m. He did not explain as to where and for what purpose, he remained outside the house during this period. The appellant did not discharge the burden which had shifted to him under Section 106 Evidence Act. This silence forms an additional link in the chain of circumstances. For the absence of an explanation from the side of the appellant, there was every justification for drawing an inference that the appellant was the author of injuries including strangulation.

7. Appellant's conduct in leaving his father in a critical condition is unreasonable and unnatural. He had dragged the victim inside the house and noises of quarrel were heard thereafter. None else was there inside the house at that time. Obviously, the injuries found on the body of the victim were inflicted by him. The appellant did not take the victim for medical assistance from the spot. He even did not lodge report with the police. After infliction of injuries, he went to his sister-Rekha and brought her to the house after about fifteen minutes. Even thereafter, neither he nor Rekha informed the police and took the victim to hospital. It is unclear as to at what time PW-5 (Dr.Jafar Alam) running a private clinic in the name and style of 'Bihar Clinic' at 16/1575 E Bapa Nagar, Arya Samaj road, Delhi was called. When he arrived at the spot, he found the victim dead. He did not elaborate as to at what time, the appellant had visited him and at what time he had arrived at the spot. PCR form (Ex.PW-12/E) vide which the information regarding the incident was received was recorded at 22:03:18. The informant-Prem Raj residing at House No.16/1661 E, Bapa Nagar, Arya Samaj Road, Karol Bagh, New Delhi, was not examined as a witness. DD No.36A records that the victim had died a natural death inside the house as he was a habitual drunkard. Apparently, the police was mislead. It was not a case of natural death as in post-mortem examination report, the cause of death was ascertained as 'asphyxia as a result of manual strangulation'. Even after recording PCR form (Ex.PW-12/E) and DD No.36-A, the appellant was not considered as a suspect and no FIR was lodged on 14.02.2011. It shows lapses on the part of the investigating agency. When apparently the victim had sustained multiple injuries on various organs, there was no question to consider it a case of natural death even on 14.02.2011. Only after getting post-mortem report on 18.02.2011, the FIR under Section

302 IPC was lodged.

8. It is true that in the post-mortem examination report (Ex.PW- 2/A), the probable time of death has been given as 02.20 a.m. on the night intervening 14/15.02.2011. PW-1 (Rakesh Kumar Singhania) clearly deposed that when the accused returned after fifteen minutes with his sister-Rekha, Bihari Lal was found lying dead at about 09.00 p.m. The factum of death of the victim in DD No.36A was recorded around 10.06 p.m. The trial court has dealt with the mismatch in the probable time of death given in the post-mortem examination and for good reasons preference was given to ocular evidence over medical evidence which was advisory in nature.

9. The appellant had clear motive to inflict injuries to the victim as he had hurled abuses to him and his friend for consuming liquor inside the house. Rahul had left the house due to abuses hurled by the victim. The appellant did not like it and it prompted him to drag the victim, who was under the influence of liquor, and to inflict multiple injuries to him.

10. Certain discrepancies and contradictions highlighted by the appellant's counsel are inconsequential. Non-recovery of crime weapon i.e. lag of wooden stool, and recovery of blood-stained cloths which the appellant was wearing at the time of occurrence are not material. In the instance case, the prosecution relies on the 'last seen' theory. Here, there is practically no time lag between the time when PW-1 saw the deceased and the accused/appellant together and the time the death was discovered. The time lag was about fifteen minutes only. Unnatural conduct; motive of the appellant to inflict injuries to the victim; and false explanation given in 313 statement to the incriminating circumstances are other strong circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and none else. The impugned judgment is based upon fair appraisal of evidence and the findings that the appellant alone was the author of the crime needs no interference.

11. Turning to the alternative plea to modify the sentence order as the appellant has undergone substantial period of substantive sentence awarded to him, it reveals that the sentence awarded to the appellant is RI for seven years, which cannot be termed unreasonable or excessive. The appellant who was expected to take care of his aged father, brutally inflicted multiple injuries by blunt/sharp object and also caused his death

by manual strangulation. The only fault of the victim was that he had objected to the consumption of liquor by him and his friend-Rahul inside the house. The appellant deserves no leniency.

12. In the light of the above discussion, the appeal is dismissed as unmerited. Conviction and sentence awarded by the trial court are sustained. Trial court record be sent back along with a copy of this order.

ILR (2014) III DELHI 2322
CRL.A.

ENFORCEMENT DIRECTORATE ....APPELLANT

VERSUS

M/S. MORGAN INDUSTRIES LTD. ....RESPONDENT

(S.P.GARG, J.)

CRL.A. 1503/2011 DATE OF DECISION: 3.04.2014

Foreign Exchange Regulation Act, 1973—Sec. 54—The Appellant Tribunal allowed appeal of the respondent and quashed the adjudication order dated 28.10.2003—The application has been moved for condonation of delay of 775 days in filing the appeal—Learned counsel for the appellant (Enforcement Directorate) urged that the Appellate Tribunal's order dated 21.08.2009 was communicated to the office of the Enforcement Directorate on 17.09.2009. The decision to file appeal was taken at various levels which consumed valuable time. There was no intentional delay on the part of the appellant—The court has considered the submissions of the appellant and have examined the record. Apparently, the present appeal has been filed after an inordinate delay of 775 of days. Section 35 of FEMA

permits the appeal to be filed within 60 days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order. The proviso authorises High Courts to extend the Appeal to be filed within next 60 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal. Since the impugned order was passed by the Appellate Tribunal constituted under FEMA, in my view, the provisions of Section 35 of the FEMA are attracted and the period of limitation for filing the appeal cannot be extended beyond 120 days—Undoubtedly, Section 54 FERA permits an appeal to be filed to the High Court within 60 days. The proviso clearly prescribes that the High Court shall not entertain any appeal under Section 54 if it is filed after the expiry of 60 days of the date of communication of the decision or order of Appellate Tribunal unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. Even if provisions of Section 54 are taken into consideration, there is no sufficient ground made out by the appeal to file the appeal after an inordinate delay of 775 days. The delay has not been explained. The reasons given by the appellant for delay in filing the appeal do not constitute 'sufficient cause' Rather it reveals that there was inaction and negligence on the part of the various officers. Nothing has been explained in the application as to at what specific level the delay to take decision occurred and what was its duration. Each day's delay has not been explained. There was slackness on the part of the appellant to take remedial steps. Delay cannot be condoned as a matter of routine as vested right accrues in favour of the opposite party and benefit of such right cannot be disturbed lightly.—In 'Directorate of Enforcement vs. Renu Vij', decided on 30.09.2011 and 'Directorate of Enforcement vs. Harmit Singh & Anr'. (Crl.A.No. 276/2012) decided on February 28, 2013,

this Court in similar circumstances declined to condone the delay of 507 days & 832 days, respectively, in filing the appeals from the date of final order.—No merit in the application of the appellant seeking condonation of delay in filing the appeal. Accordingly, the application for condonation of delay is dismissed.

CRL.A. No. 1503/2011

In View of the Order passed in Crl.M.A. 18825/2011, the appeals is dismissed.

Important Issue Involved: To prove "Sufficient cause" there shall be an explanation in the application as to at what specific level the delay to take decision occurred and what was its duration. Each day's delay has to be explained. And when there was slackness on the part of the appellant to take remedial steps. Delay cannot be condoned as a matter of routine as vested right accrues in favour of the opposite party and benefit of such right cannot be disturbed lightly.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mrs. Rajdipa Behura, Advocate.

FOR THE RESPONDENT : Muneesh Malhotra, Advocate with Mr. Vikram V. Minhas, Advocate.

CASES REFERRED TO:

1. *Directorate of Enforcement vs. Harmit Singh & Anr.',* (Crl.A.No. 276/2012) decided on February 28, 2013.
2. *'Directorate of Enforcement vs. Renu Vij',* (Crl.A.No.1231/2011) decided on 30.09.2011.
3. *'Union of India vs. Ashok J.Ramsinghani',* 2011 (4) ALLMR 45.
4. *'Thirumalai Chemicals Limited vs. Union of India (UOI) & ors.',* 2011 (6) SCC 739.

5. *Shyam Sundar and Ors. vs. Ram Kumar and Anr.* (2001) 8 SCC 24.

6. *Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar and Ors.* (1999) 8 SCC 16.

7. *Hitendra Vishnu Thakur and Ors. vs. State of Maharashtra and Ors.* (1994) 4 SCC 602.

8. *New India Insurance Company Limited vs. Smt. Shanti Mishra* (1975) 2 SCC 840.

9. *Veeraya vs. N. Subbiah Choudhry and Ors.* AIR 1957 SC 540.

RESULT: Dismissed.

S.P.GARG, J.

1. Crl.A.1503/2011 has been preferred under Section 54 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA') against the final order dated 21.08.2009 of Appellate Tribunal for Foreign Exchange, New Delhi in Appeal No. 610/2003. The Appellate Tribunal allowed appeal of the respondent and quashed the adjudication order dated 28.10.2003.

2. The application has been moved for condonation of delay of 775 days in filing the appeal.

3. Learned counsel for the appellant (Enforcement Directorate) urged that the Appellate Tribunal's order dated 21.08.2009 was communicated to the office of the Enforcement Directorate on 17.09.2009. The decision to file appeal was taken at various levels which consumed valuable time. There was no intentional delay on the part of the appellant.

4. I have considered the submissions of the appellant and have examined the record. Apparently, the present appeal has been filed after an inordinate delay of 775 days. Section 35 of FEMA permits the appeal to be filed within 60 days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order. The proviso authorises High Courts to extend the appeal to be filed within next 60 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal. Since the impugned order was passed by the Appellate Tribunal constituted under FEMA, in

my view, the provisions of Section 35 of the FEMA are attracted and the period of limitation for filing the appeal cannot be extended beyond 120 days.

5. In '**Thirumalai Chemicals Limited vs. Union of India (UOI) & ors.',** 2011 (6) SCC 739, the Supreme Court held :

> *"14. Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute prospective unless it is expressly or by necessary implication made to have retrospective operation. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.*

15. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to few of those decisions. This Court in Garikapati **Veeraya v. N. Subbiah Choudhry and Ors.** AIR 1957 SC 540, **New India Insurance Company Limited v. Smt. Shanti Mishra** (1975) 2 SCC 840, **Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.** (1994) 4 SCC 602; **Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and Ors.** (1999) 8 SCC 16; **Shyam Sundar and Ors. v. Ram Kumar and Anr.** (2001) 8 SCC 24, has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive

in nature.

17. Right of appeal conferred under Section 19(1) of FEMA is therefore a substantive right. The procedure for filing an appeal under Sub-section (2) of Section 19 as also the proviso to Sub-section (2) of Section 19 conferring power on the Tribunal to condone delay in filing the appeal if sufficient cause is shown, are procedural rights."

6. It further held :

"19. Law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. On expiry of the period of limitation, the right to sue comes to an end and if a particular right of action had become time barred under the earlier statute of limitation the right is not revived by the provision of the latest statute. Statutes of limitation are thus retrospective insofar as they apply to all legal proceedings brought after their operation for enforcing cause of action accrued earlier, but they are prospective in the sense that neither have the effect of reviving the right of action which is already barred on the date of their coming into operation, nor do they have effect of extinguishing a right of action subsisting on that date. Bennion on Statutory Interpretation 5th Edn.(2008) Page 321 while dealing with retrospective operation of procedural provisions has stated that provisions laying down limitation periods fall into a special category and opined that although prima facie procedural, they are capable of effectively depriving persons of accrued rights and therefore they need be approached with caution.

25. The appellate Board under FERA, it may be noted stood dissolved and ceased to function when FEMA was enacted. Therefore, any appeal against the order of the adjudicating officer made under FERA, after FEMA came into force, had to be filed before the Appellate Tribunal constituted under FEMA and not to the Appellate Board under FERA. Section 52 of FERA stipulates the limitation for an appeal against the orders of the adjudicating officer to the Appellate Board. It provides the period

of limitation as 45 days but the Board may entertain an appeal after the expiry of 45 days but not beyond 90 days. Under FEMA, an appeal lies to the Crl.A. 1503/2011 Page 5 of 9 appellate tribunal constituted under that Act and Section 19(2) provides that every appeal shall be filed within 45 days from the date on which a copy of the order of the adjudicating authority is received. The appellate is however empowered to entertain appeals filed after the expiry of 45 days if it is satisfied that there was sufficient cause for the delay in filing the appeal. Though both Section 52(2) of FERA and Section 19(2) of FEMA provide a limitation of 45 days and also give the discretion to the appellate authority to entertain an appeal after the expiry of 45 days, if the Appellant was prevented by sufficient cause from filing an appeal in time, the appellate authority under FERA could not condone the delay beyond 45 days whereas under FEMA, if the sufficient cause is made out, the delay can be condoned without any limit. The question we have already pointed out is whether Section 52(2) of FERA or Section 19(2) of FEMA will govern the appeal. As noticed above, any provision relating to limitation is always regarded as procedural and in the absence of any provision to the contrary, the law in force on the date of the institution of the appeal, irrespective of the date of accrual of the cause of action for the original order, will govern the period of limitation.

26. Section 52(2) can apply only to an appeal to the appellate Board and not to any appellate tribunal. Therefore, irrespective of the fact that the adjudicating officer had passed the orders with reference to the violation of the provisions of FERA, as the appeal against such order was to the appellate tribunal constituted under FEMA, necessarily Section 19(2) of FEMA alone will apply and it is not possible to import the provisions of Section 52(2) of FERA. As we are not concerned with the appeals to Appellate Board, but appeals to the Appellate Tribunal, limitation being a matter of procedure, only that law that is applicable at the time of filing the appeal, would apply. Therefore, Section 19(2) of FEMA and not Section 52(2) of FERA will apply. As noticed above, under Section 19(2) , there is no ceiling in regard to the period of delay that could Crl.A. 1503/2011 Page 6 of 9

be condoned by the appellate tribunal. If sufficient cause is made out, delay beyond 45 days can also be condoned. The tribunal and the High Court misdirected themselves in assuming that the period of limitation was governed by Section 52(2) of FERA.

27. We have already indicated that Clause (b) of Subsection (5) of Section 49 refers to appeal preferred and pending before the Appellate Board under FERA at the time of repeal. The said clause does not specifically refer to appeals preferred against adjudication orders passed under FEMA with reference to causes of action which arose under FERA. We have already noticed the right of appeal under FEMA has already been saved in respect of cause of action which arose under FERA however subject to the proviso to Sub-section (2) of Section 19 , in the case of belated appeals.

28. Above discussion will clearly demonstrate that Section 49 of FEMA does not seek to withdraw or take away the vested right of appeal in cases where proceedings were initiated prior to repeal of FERA on 01.06.2000 or after. On a combined reading of Section 49 of FEMA and Section 6 of General Clauses Act, it is clear that the procedure prescribed by FEMA only would be applicable in respect of an appeal filed under FEMA though cause of action arose under FERA. In fact, the time limit prescribed under FERA was taken away under the proviso to Sub-section (2) of Section 19 and the Tribunal has been conferred with wide powers to condone delay if the appeal is not filed within forty-five days prescribed, provided sufficient cause is shown. Therefore, the findings rendered by the Tribunal as well as the High Court that the Tribunal does not have jurisdiction to condone the delay beyond the date prescribed under FERA is not a correct understanding of the law on the subject."

7. In **'Union of India vs. Ashok J.Ramsinghani',** 2011 (4) ALLMR 45, the Bombay High Court held :

"16. We find it difficult to accept the above contentions. The legislature while repealing FERA and replacing it with FEMA has expressly dissolved the first appellate authority, namely the Appellate Board. Thus, on commencement of FEMA, the first

appellate forum prescribed under FERA namely, the Appellate Board is expressly abolished. As a result, after commencement of FEMA, appeals against adjudication orders passed under FERA had to be filed before the appellate authorities under FEMA, namely Special Director (Appeals) / Appellate Tribunal, as the case may be. The legislature further provides under Section 49(5)(b) of FEMA that appeals pending before the Appellate Board on the date of commencement of FEMA shall be transferred to the Appellate Tribunal constituted under FEMA. Thus, on commencement of FEMA, appeal against the adjudication order passed under FERA would be maintainable before the appellate authorities constituted under FEMA within the period of limitation prescribed under FEMA. In other words, appeals against adjudication orders passed under FERA or FEMA after the commencement of FEMA, have to be filed before the appellate authorities constituted under FEMA within the period of limitation prescribed for filing appeals before the appellate authorities constituted under FEMA."

8. Undoubtedly, Section 54 FERA permits an appeal to be filed to the High Court within 60 days. The proviso clearly prescribes that the High Court shall not entertain any appeal under Section 54 if it is filed after the expiry of 60 days of the date of communication of the decision or order of Appellate Tribunal unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. Even if provisions of Section 54 are taken into consideration, there is no sufficient ground made out by the appellant to file the appeal after an inordinate delay of 775 days. The delay has not been explained. The reasons given by the appellant for delay in filing the appeal do not constitute 'sufficient cause'. Rather it reveals that there was inaction and negligence on the part of the various officers. Nothing has been explained in the application as to at what specific level the delay to take decision occurred and what was its duration. Each day's delay has not been explained. There was slackness on the part of the appellant to take remedial steps. Delay cannot be condoned as a matter of routine as vested right accrues in favour of the opposite party and benefit of such right cannot be disturbed lightly.

9. In **'Directorate of Enforcement vs. Renu Vij',** (Crl.A.No.1231/2011) decided on 30.09.2011 and **'Directorate of Enforcement vs.**

Harmit Singh & Anr.', (Crl.A.No. 276/2012) decided on February 28, 2013, this Court in similar circumstances declined to condone the delay of 507 days & 832 days, respectively, in filing the appeals from the date of final order.

10. In view of the aforestated reasons, I find no merit in the application of the appellant seeking condonation of delay in filing the appeal. Accordingly, the application for condonation of delay is dismissed.

CRL.A. 1503/2011

12. In view of the order passed in Crl.M.A.18825/2011, the appeal is dismissed.

ILR (2014) IV DELHI 2331
CLR.A.

ASHISH KUMAR DUBEY ....APPELLANT

VERSUS

STATE THR. CBI: ....RESPONDENT

(S. MURALIDHAR, J.)

CRL.A.124/2008 DATE OF DECISION: 04.04.2014

Prevention of Corruption Act, 1988 – Section 7/13(1)(d) – Appellant, Divisional Head of PS Shalimar Bagh convicted for having demanded and accepted a bribe from the complainant for not involving and arresting him in a case regarding kidnapping of his maid servant—Prosecution, in addition to the trap proceedings, relied upon two tape recorded conversations in which the appellant assertedly made the demand of bribe from the complainant – Contention of the appellant that he was never entrusted with the missing report of the maid of the complainant and that

the complainant had falsely implicated him because he himself was indulging in flesh trade and had even offered his services to the appellant to oblige him, which the appellant had refused. Held: Daily diary of PS Shalimar Bagh produced by the prosecution itself proves that the complainant had given a statement at the PS on 19.06.2002 that his maid had returned and that he does not wish to pursue the missing complaint any further. In such circumstances there was no motive for the appellant to have demanded a bribe from the complainant, two months later in August, 2002 for not registering a case of kidnapping against him and therefore the version of the complainant in this regard appears to be completely illogical. Further none of the two tape recorded conversations can be relied upon as corroborative evidence for the prosecution failed to get the device used for recording the said conversations, examined by an expert for ruling out the possibility of tampering. It is also to be taken note of that from the transcripts of neither of the two conversations, is it clear that the appellant had demanded a bribe. As regards the trap proceedings both the panch witnesses did not support the case of the prosecution with respect to the demand of the bribe by the appellant and its acceptance thereof. Sole testimony of the complainant not sufficiently credible and reliable to return a finding of guilt against the appellant.

Important Issue Involved: The possibility of tampering with a tape recorded statement cannot be ruled out without getting the device used for recording the statement, examined by an expert.

[An Gr]

APPEARANCE:

FOR THE APPELLANT : Mr. Dayan Krishnan, Senior

Advocate with Mr. Pramod Kumar Dubey, Ms. Smriti Sinha, Mohd. Faraz, Ms. Swati Goswami, Mr. Shiv Pande, Ms. Vasundhara Nagrath and Mr. Nishank Mattoo, Advocates

FOR THE RESPONDENT : Mr. Manoj Ohri, Special Public Prosecutor

APPEARANCES:

CASES REFERRED TO:

1. *Nilesh Dinkar Paradkar* vs. *State of Maharashtra* (2011) 4 SCC 143.
2. *Ram Singh* vs. *Col. Ram Singh* 1985 Supp SCC 611.
3. *State of U.P.* vs. *Dr. G.K. Ghosh* 1984 (1) SCC 254.
4. *Hazari Lal* vs. *State* (1980) 2 SCC 390.
5. *R.* vs. *Robson* (1972) 2 All ER 699.

RESULT: Appeal allowed

S. MURALIDHAR, J.

1. This appeal is directed against the judgment dated 25th January 2008 passed by the learned Special Judge (CBI) in CC No. 07/03 convicting the Appellant under Section 7 and 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 („PC Act.) and the order on sentence dated 28th January 2008 sentencing him to two years rigorous imprisonment („RI.) with a fine of Rs. 10,000, and in default, to undergo simple imprisonment for fifteen days for the offence under Section 7 of the PC Act and RI for two and a half years with a fine of Rs. 15,000, and in default, to undergo SI for fifteen days for the offence under Section 13(2) read with 13 (1) (d) of the PC Act. Both the sentences were directed to run concurrently.

2. By an order dated 26th February 2008, this Court suspended the sentence awarded to the Appellant during the pendency of the appeal, subject to terms.

The case of the prosecution

3. The case of the prosecution was that one Ms. Sabina, the maid servant of Mr. Qayum Qureshi (PW5) and his wife Smt. Zeenat Qureshi (PW6) went missing on 18th March 2002. A report to that effect was lodged by Smt. Khushnudh Begum, the mother-in-law of PW5. Daily Diary („DD.) Entry 29A was made in that regard. Assistant Sub-Inspector ("ASI") Ram Darsh, Police Station ("PS") Shalimar Bagh, Delhi was directed to inquire into the matter. On 18th June 2002, the Appellant SI A.K. Dubey joined duty as Divisional Head of PS Shalimar Bagh, Delhi. He was briefed about all the pending matters, including the missing report of Ms. Sabina by ASI Ram Darsh.

4. According to prosecution, on 19th June 2002, the Appellant along with ASI Ram Darsh and some constables conducted a search at the residence of PW5 and brought him to the PS, where he was threatened by the Appellant. According to PW5, when he was brought to the PS, Ms. Sabina was already there and he was forced to sign on DD. He alleged that neither was Ms. Sabina sent along with him nor was he allowed to talk to her.

5. However, there is a DD 35/B (Ex.PW7/C) dated 19th June 2002, which records the statement of PW5 that Sabina, on her own, came back to his house and that he had no further complaint about her going missing and does not wish to initiate any legal proceedings in that regard. It further records that he wishes to take her back with him. The DD entry records that the girl has been sent back to the custody of PW5. 6. It may be noted at this stage that Inspector B.R. Mann (PW7), who was posted at the relevant time as Station House Officer („SHO.) in PS Shalimar Bagh, had confirmed both the DD entries 29A and 35B. He stated that the Appellant was the Divisional Officer and in-charge of the area, from where the missing report was received and "at no point of time, he was entrusted with investigation of the above DDs." PW7 further stated that "the missing girl was handed over to the Complainant, i.e., Qayoom Qureshi on the same day, i.e., 19.6.2002 and an entry to this effect was made in the DD by the duty officer."

7. According to PW5, the Appellant asked him to come to the PS and demanded a bribe of Rs. 8,000 and threatened him that if the bribe amount was not paid, the Appellant would register a case of kidnapping against PW5. PW5 also alleged that he was slapped by the Appellant. PW5 stated that he then returned home and disclosed to his wife Zeenat

Quereshi (PW6) that the Appellant had demanded a bribe, PW6 is then stated to have said that they should not pay the bribe. PW5 left for his work, and in his absence, the Appellant made a telephone call to his house, which was attended by PW6. The Appellant is stated to have spoken to PW6 regarding the bribe amount.

8. In his cross-examination, PW5 stated that he had a micro cassette recorder ("MCR") at his residence and also had an ID caller installed at his residential telephone. According to PW5, PW6 recorded the telephonic conversation between herself and the Appellant using the said MCR. In her examination-in-chief, PW6 stated that the cassette containing the telephonic conversation between herself and the Appellant was handed over to the Central Bureau of Investigation ("CBI") along with the complaint (Ex. PW5/A). This cassette was marked as Q3 in the trial. When the cassette was played in the Court, PW6 identified her voice and the voice of the Appellant. She also identified the points in the transcript (Ex. PW6/A). In her cross-examination, PW-6 confirmed that she had recorded the telephonic conversation on 19th August 2002 in the evening, by which time only she and her infant child were present. She stated that the cassette was also lying at her house.

Pre-raid proceedings

9. According to PW5, on the next day, i.e. 20th August 2002, he and PW6 went to the CBI office and lodged their complaint (Ex. PW5/A) and also handed over the cassette containing the conversation between PW 6 and the Appellant that took place the previous evening to the CBI officer S. Balasubramony (PW11). PW-11 stated that the complaint was marked to him by the then Superintendent of Police ("SP"), Mr. Kamal Pant. PW11 verified the contents of the complaint, and on that basis, first information report ("FIR") [PW11/A] was registered. According to PW11, the cassette containing the conversation between the Appellant and PW6 revealed that the Appellant was demanding bribe amount of Rs. 8,000. The cassette was taken into possession under seizure memo (Ex. PW1/H).

10. PW11 stated that PW5 produced 16 government currency („GC.) notes of Rs. 500 denomination each and their numbers were noted down in the handing over memo (Ex.PW1/F). Thereafter, phenolphthalein powder was applied to the GC notes and a practical demonstration was given by Inspector A.K. Singh. On this aspect, it must be noted that in his cross-

examination PW5 stated that "I borrowed money from Kailash Kumar for giving to the accused."

11. At this stage, it requires to be noticed that, according to PW11, one Mr. Kailash Kumar (PW4) from the Ministry of Health („MOH.) was directed to act as shadow witness. One other person, Mr. Hub Lal (PW1), was the other independent witness from the MOH who formed part of the trap team.

12. In the handing over memo of the tape recorder, which was drawn up in the office of the CBI, it was recorded that in the presence of the signatories to the memo including PWs 1 and 4, PW 5 was handed over a Kinetic Cassette Recorder ("KCR")-360 with transmitter, a Sanyo MCR and two sealed TDK D-60 blank cassettes. The voice of both PWs 1 and 4 were recorded on one cassette after ensuring that the cassette was blank by playing it on both the sides in the presence of the said witnesses. The transmitter of the KCR and the Sanyo MCR were handed over to PW5 with the direction to switch on the same while making contact with the accused for the purpose of recording of the conversation that might take place between the Appellant and PW5.

13. In the handing over memo of the tainted GC notes (Ex. PW1/F), it was recorded that PW5 produced a sum of Rs. 8,000 in the form of 500 GC notes and their numbers were noted down in the said memo. PW4 was directed to act as shadow witness and remain as close as possible to PW5 to hear the conversation that might take place between the Appellant and the PW5 and also to see the passing of the bribe amount. PW4 was directed to give a signal after completion of the transaction by scratching his head with both his hands.

The trap proceedings

14. In the detailed recovery-cum-seizure memo (Ex.PW1/A), drawn-up by PW11 and signed by PW5, PW1, Inspector A.K. Singh, Inspector Surender Malik and SI Prem Nath, it is recorded that PW4 went to the house of PW5 and the rest of the team positioned themselves around the house of PW5. A telephone call was made from the residence of PW5 to PS: Shalimar Bagh, Delhi when it was found that the Appellant had left for Court work. At around 5:30 pm., a telephone call made by the Appellant from PS: Shalimar Bagh, Delhi to PW5 and the call was identified through the caller ID installed at the residential telephone of PW5. The

Appellant directed PW5 to come to the ICICI Bank ATM, Everbake market, Shalimar Bagh, Delhi within ten minutes. The said conversation between the Appellant and the PW5 was recorded in the MCR and the same was rewound and listened. It is stated that PW5 identified his voice as well as the voice of the Appellant. The cassette was not sealed as it was to be used for further proceedings.

15. The recovery-cum-seizure memo (Ex.PW1/A) stated that at around 5:40 pm, the trap team reached the spot and at about 6 pm the Appellant reached the spot. The Appellant along with PWs 4 and 5 went to the ATM of HDFC Bank situated near the ICICI Bank. After about ten minutes, PW4 came out of the ATM and flashed the pre-arranged signal to the trap team members. In the meanwhile, the Appellant, followed by PW5, came out of the ATM counter of HDFC Bank. At the same time, PW11 along with trap team, including the witnesses rushed towards the Appellant. On seeing the team members rushing towards him, the Appellant took out the bunch of currency notes from the left pocket of his shirt and threw it on the ground and tried to escape. After chasing him for a few yards, the Appellant was caught by PW11 and Inspector Surender Malik by the left and right wrist respectively. Inspector A.K. Singh and PW1 guarded the money thrown out by the Appellant on the ground. PW11 disclosed his identity as well as the identity of the other team members to the Appellant. In the meanwhile, the crowd which had gathered was told the purpose of the operation and they were invited to be witnesses to the proceedings. However, they declined and left the spot. The Appellant denied having accepted any bribe amount from PW5. PW1 was then directed to recover the GC notes thrown by the Appellant on the ground. After counting the GC notes, PW1 reported that these were 16 notes. Since all this took place in an open place, the remaining proceedings were carried out in the office of Mr. Dharampal, proprietor of Keshav Properties, adjacent to the HDFC Bank ATM counter, after taking due permission of Mr. Dharampal "on the condition that he will not be a witness to the proceedings."

16. PW4, on being asked, informed PW11 that the Appellant had some formal talk and PW4 informed the Appellant that he would give him some valuable information. Thereafter, the Appellant, by making gesture with his right hand, demanded the bribe amount from PW5. Thereafter, PW5 took out the treated GC notes from his left pocket with his right

hand which was accepted by the Appellant by extending his right hand and kept it in the left side shirt pocket by touching the notes with his left hand. PW11 stated in the recovery-cum-seizure memo (PW1/A) that "The whole proceedings was visible from the outside as there was a glass door in the HDFC ATM counter." The colourless solution of sodium carbonate was prepared in a neat and clean glass tumbler. The Appellant was directed to dip his right hand first. On his doing so, the colourless solution turned pink. This was collected in a neat and clean glass bottle, then sealed and labelled. The same was done with the left hand, the wash of which also turned pink. The samples were sealed in a neat and clean bottle and labelled. A third sample of the pocket of the shirt of the Appellant, when dipped in the sodium carbonate solution, also turned pink. This was also collected in a bottle and labelled. It is stated that the shirt was given back to the Appellant till the alternative arrangements were made, keeping in view the decency of the Appellant.

17. The recovery memo stated that the MCR was taken back from PW5 and was listened to. The KCR was also listened to. Both the recorders established the conversation of PWs 4 and 5. The MCR was marked as "Q1" and the audio cassette recorder was marked as "Q2". The Appellant was arrested at 7:45 pm. 18. A rough site plan of the place showing where the trap transactions took place was drawn-up (Ex.PW1/B). The personal search arrest memo (PW1/C) of the Appellant was also taken. During investigation, the subsequent voice of the Appellant was taken (PW1/D) on 21st August 2002.

The CFSL reports

19. On 3rd October 2002, the Central Forensic Science Laboratory ("CFSL") gave its report concerning the right hand wash, left hand wash and the left shirt pocket wash of the Appellant and confirmed that all the three gave positive tests for sodium carbonate and phenolphthalein powder.

20. As regards the tape recorded conversation, the CFSL gave its report dated 31st December 2002. The report referred to three parcels Q1, Q2 and Q3. Q1 was the parcel containing the MCR of make Sony MC 60 which had a total duration of recorded conversation of 2 minutes and 31 seconds. This was the conversation between PW5 and the Appellant when the Appellant called PW5 at his residence in the evening of 20th August 2004.

21. Q2 was the parcel containing the audio cassette of make TDK D 60 having a total recorded conversation of three minutes and 36 seconds. This was the conversation recorded at the spot.

22. Q3 was stated to be containing a "normal audio cassette of make TDK D60", purportedly of a total duration of 1 minute and 32 seconds which was of the conversation of PW6 and the Appellant on 19th August 2002. It stated that the common sentences with respect to the specimen voice of the Appellant (S1) had been selected from Q3 for voice spectrographic analysis.

23. Parcel S1 was described as containing a normal audio cassette of make T-series HF90 containing the specimen voice of the Appellant.

24. The result of the examination was that the specimen voice, marked S1 (A), was similar to the male voice in Q1 (A) and Q2 (A) in respect of linguistic and phonetic features. Further, no common sentences could be detected in Q1 (A) and Q2 (A) and, therefore, the questioned voice in Q1 (A) and Q2 (A) could not be compared with the specimen questioned voice S1 A1. However, the auditioning and voice spectrographic examination of the voice samples in Q3 was similar to the specimen voice sample in S1. It was accordingly concluded that "the voice marked exhibit Q3 (A) is the voice of the same person whose specimen voice marked exhibit S1 (A) [Shri Ashish Kumar] beyond reasonable doubt." The report was signed by Dr. Rajinder Singh (PW-3), Senior Scientific Officer, Grade-I. The transcripts of the conversations recorded in the KCR (Q2) were marked as Exhibit PW5/B. The transcripts of the conversation recorded in the MCR at the house and the spot was marked as Exhibit PW5/C. The transcripts of the conversation between PW6 and the Appellant recorded on 19th August 2002 were exhibited as Ex. PW6/A.

25. A chargesheet was filed on 30th January 2003. Charges were framed against the Appellant on 15th January 2004 for the offences under Section 7 and 13 (2) read with Section 13 (1) (d) of the PC Act.

The Appellant's statement under S. 313 Cr PC

26. The prosecution examined 12 witnesses. In his statement under Section 313 Cr PC, the Appellant stated that he was made a Divisional Officer in PS Shalimar Bagh, Delhi on 18th June 2002 and the girl Ms.

Sabina was recovered on 19th June 2002 and he was never entrusted with the missing report. He denied having ever gone to the house of PW5 or demanding a bribe from him and that the entire story had been concocted by PW5 with a view to falsely implicate him and to put pressure on him and the local police as PW5 was indulging in the flesh trade. As regards the conversation which purportedly took place between him and PW6, he stated that he was made to read over the transcript of the said conversation in the office of the CBI.

27. The Appellant denied that he had directed PW5 to come to Everbake market, Shalimar Bagh, Delhi. He denied demanding a bribe at the spot in the ATM. He stated that "the complainant tried to catch hold of me from behind and thrust the money forcibly into my pocket. When I resisted, there was a scuffle and no money was recovered from me." The Appellant denied having been challenged by PW11 for accepting the bribe. He, however, did not deny that his right and left hand as well as left side pocket wash, when dipped in sodium carbonate, turned pink. As regards the audio cassette, the translation of which was exhibit PW5/B, he stated that it could not be played in the Court on 24th and 25th November 2004 or 24th March 2005 and 6th April 2005.

28. When the Appellant was asked whether he had anything else to state, he stated as under:

> "Since the complainant was indulging in flash trade, he offered his services, since he initially wanted to oblige me and when I refused he implicated me by way of introducing one informer having information in respect of some robbers and prostitution racket and the shadow witness was introduced to me as an informer and for the said services I even offered him financial assistance. Thus, I have been falsely implicated in the present case."

The finding of the trial Court

29. Before the trial Court, the validity of the Sanction Order was questioned. That point was decided against the Appellant. The said finding has not been challenged in this Court during the course of arguments by learned counsel for the Appellant.

30. On the merits of the case, the learned trial Court held that voice spectrographic analysis, which confirmed that the questioned voice of

Q3 was that of the Appellant, was admissible in evidence and that the transcript Ex.PW6/A "clearly shows that accused was demanding 8,000 from the complainant (PW5)." As regards the plea of learned counsel for the Plaintiff that the scientific expert (PW3) had not given any opinion on whether the cassette had been tampered or edited in terms of the legal requirements spelt out by the Supreme Court in **Ram Singh v. Col. Ram Singh** 1985 Supp SCC 611, the learned trial Court referred to the fact that the cassette was sealed as per the production-cum-seizure memo (Ex.PW1/H) with CBI seal and was sent to the CFSL where the parcel was found to be sealed with the seal of CBI and the seal was tallied with the specimen seal and found intact. The report of CFSL (Ex.PW3/A) was sent with the said cassette, resealed with their seal which was opened in the Court during the cross-examination of PW1. Accordingly, the learned trial Court concluded that "there was no question of tampering with the contents of conversation recorded in the cassette."

Demand of bribe

31. The case of the prosecution was that there was a demand for a bribe already made by the Appellant from PW5 by calling him over to the PS and that the above conversation with PW6 was simply a follow-up on that issue. It is stated that it is in the above context that the transcript of the conversation between PW6 and the Appellant has to be understood.

32. In the first place, it must be noticed that in Ex.PW5/A, the complaint dated 20th August 2002, it was stated that the Appellant was „harassing. PWs 5 and 6 regarding the case of their maid servant going missing. He is alleged to have demanded Rs. 8,000 for not implicating from them in the said case. The learned trial Court appears to have overlooked one important aspect here. The maid servant in question was shown in DD 35/B (Ex.PW7/C) to have already returned. The statement to that effect was recorded on 19th June 2002. This was confirmed by PW7, Inspector Mann, who was SHO PS Shalimar Bagh at the relevant point in time. Mr. Mann was never cross-examined by the learned APP that the said statement was wrong or that the official record was false. DD entry 35B was marked as an exhibit through the said witness as an official record. This falsified the plea of PW5 that he was forced to sign DD 35B and that Ms. Sabina was never sent back with him.

33. The learned trial Court has gone by the fact that since PW5

was "just 5th class pass", he "does not know the legal implications" and the Appellant "must be well qualified and intelligent." The above conclusions of the learned trial Court are based on surmises. It is difficult to believe that PW5 did not understand the implications of DD 35B which clearly stated that Ms. Sabina had already returned on her own on 19th June 2002 itself. There was no motive for the Appellant, two months later, to demand a bribe for not registering a case against PWs 5 and 6 alleging that they had kidnapped Ms. Sabina. The so-called demand of bribe was for not registering a case which in any event did not survive as on the date of the demand of a bribe. The prosecution story in this regard appears not logical at all.

34. Interestingly, in his examination-in-chief, PW5 is vague about when the Appellant actually demanded the bribe. His statement reads as under:

> "One day A.K. Dubey, accused came to my house and conducted search of my house and took me to the police station and demanded bribe from me threatening that if the bribe was not paid, he would register a case of kidnapping against me. He demanded Rs. 8000 from me. He also slapped me."

35. It will be seen, therefore, that no date or time is mentioned about the search conducted by the Appellant. The prosecution has also not produced any log book or diary entries to show that the Appellant had left PS Shalimar Bagh, Delhi to conduct a raid in the house of PW5. If indeed he came to conduct a search with other police officials, there is no evidence by any of the police witnesses which spoke of raid conducted by the Appellant in the house of PW5.

36. Another important aspect is the recording of the conversation that allegedly took place between PW6 and the Appellant, which was done by PW6 with the help of an MCR which PW5 had apparently given to her. If indeed it was a micro cassette, then it was for the prosecution to explain how the parcel Q3 given to the CFSL contained a regular TDK D-60 cassette and not a micro cassette. It is not clear when the contents of the micro cassette were transferred to a larger cassette for being given to the CFSL. Also, it appears that the MCR given by PW5 to PW6 on 19th August 2002 was different from the MCR given to him by PW11 during the pre-raid proceedings for which the handing over memo Ex. PW1/G was drawn up.

The conversation on 19th August 2002

37. The next aspect of the matter as regards the conversation between PW6 and the Appellant which purportedly took place on 19th August 2002 is that the device by which the conversation was recorded was not itself examined. This was important since a specific question was put to the scientific expert (PW3) whether the device was tampered or not. In his cross-examination, PW3 stated: "As I was not asked to give opinion whether the cassette was tampered or edited, I have not expressed any opinion on this aspect."

38. At this stage, it is important to recall the requirements of law, as spelt out in **Ram Singh v. Col. Ram Singh** which read as under:

> "(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.
>
> (2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence – direct or circumstantial.
>
> (3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
>
> (4) The statement must be relevant according to the rules of the Evidence Act.
>
> (5) The recorded cassette must be carefully sealed and kept in safe or official custody.
>
> (6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

39. The above statement of PW3 was in the context of the third test which required ruling out "every possibility of tampering with or erasure of a part of a tape recorded statement." What the learned trial

Court in the instant case has done is examined the 5th requirement that "the recorded cassette must be carefully sealed and kept in safe or official custody." The learned trial Court has failed to notice that the third requirement spelt out in ***Ram Singh v. Col. Ram Singh*** was not satisfied in view of the above answer of PW3. The official safety of the parcel contained in the cassette is not the same thing as ruling out the possibility of tampering with a tape recorded statement.

40. In **Nilesh Dinkar Paradkar v. State of Maharashtra** (2011) 4 SCC 143, the Supreme Court referred to the judgment in **R. V. Robson** (1972) 2 All ER 699 where it was observed as under:

> "....The determination of the question is rendered the more difficult because tape recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts."

41. Both in *Ram Singh v. Col. Ram Singh and Nilesh Dinkar Paradkar v. State of Maharashtra* reference was made to Archbold Criminal Pleading, Evidence and Practice (Chapter 14) which lays down that the factors that would be relevant for the purpose of correct identification of voice. One of this is "quality of the recording of the disputed voice." Reference was also made to American Jurisprudence 2d (Vol.29) according to which for admissibility of a sound recording it had to be shown inter alia that "the recording device was capable to taking and testimony"; that the recording was authentic and correct and "the manner of the preservations of the recording" was also shown. This is apart from the fact that tape recorded evidence can only be used as a corroboration evidence.

42. The MCR used in the present case by PW6 to record the conversation was not submitted to CFSL. Without the device being examined and without the cassette itself being examined for ruling out the possibility of tampering, one of the important requirements spelt out in *Ram Singh v. Col. Ram Singh* was not satisfied in the present case. This rendered the Q3 cassette an inadmissible piece of evidence.

43. In the present case as already noticed although the voice may have been identified by PW-6 to be that of Appellant, the third test in Ram Singh's case that the tape recorded conversation must be shown to

be not tampered or capable of being tampered, has not been satisfied.

44. PW6 herself was not a witness to the demand by the Appellant or bribe from PW5. She had only purportedly heard of the demand of bribe from PW5. The only time she could have heard of the demand was during her conversation with the Appellant on 19th August 2002. The Court finds that the transcript of the conversation between her and the Appellant does not clearly spell out the demand by the Appellant of the bribe amount of Rs. 8,000. The transcript of the conversation, and in particular, the relevant portions have been marked 'A-A' to 'E-E' and have been set out in detail in the judgment of the learned trial Court. In appreciating the above conversation, it must be remembered that the shadow witness (PW 4) was pretending to be an informer and PW5 was supposed to introduce PW4 in that capacity to the Appellant. He was perhaps to be paid for passing on information. One portion of the transcript contains a reference to the sum of eight thousand. However, when the entire transcript is read as a whole it is not clear whether it refers to the demand of bribe by the Appellant.

The two 'independent' witnesses

45. The prosecution case is that when PW5 and PW6 went to the CBI office in the morning of 20th August 2002 and filed a written complaint (PW5/A) about the demand of bribe by the Appellant, the two independent witnesses were already present. Interestingly, four days earlier a letter dated 16th August 2002, which forms part of the trial Court record, was purportedly written by the Additional Director, Central Government Health Scheme ('CGHS'), Nirman Bhawan, Delhi to the Anti Corruption Branch of CBI as under:

> "Sub: Nomination for confidential duties – regarding of.
>
> Sir,
>
> Kindly refer to your letter No. NIL dated 16.8.2002 on the subject mentioned above. The following Lower Division Clerks are nominated and directed to report to you on 19.8.2002 at 10:00 A.M.
>
> 1. Sh. Hube Lal LDC
>
> 12. Sh. Kailash Kumar LDC"

46. The letter was signed with the date of 16th August 2002. Clearly, the CBI had written a letter on that very date to the CGHS asking them to nominate two officers for "confidential duties" It is inexplicable that this could have been in anticipation of a complaint which was to be made to the ACB, CBI four days later. It is not clear what was written by the CBI in its letter to the CGHS since that letter has not been produced before the Court. However, what is clear is that PWs 1 and 4, the two witnesses, seem to have already been assigned for duties with the CBI on 16th August 2002 itself, at least four days prior to the complaint filed by PWs 5 and 6.

47. Strangely, the learned trial Court appears to have brushed aside this unexplained discrepancy in the prosecution case by observing in para 42 as under:

> "It is a fact that CBI is a very big Investigation Agency of the country and is heavily burdened with thousands of cases. It requires services of independent witnesses not only in trap cases but also in various searches, preparation of memos, transcriptions, specimen's voice, specimen's signatures and handwriting on many a week days. These witnesses have produced the copy of letter Ext. PW1/E issued by Head of their Departments addressed to SP, CBI Ext. PW1/E dated 16.8.02 to the effect that PW-1 Sh. Hub Lal and PW-4 Sh. Kailash Kumar have been nominated to report in their office on 19.8.02 and obviously the name of the case is not mentioned in the letter for maintaining secrecy."

48. The above observations of the learned trial Court would seem to imply that there are "stock independent witnesses" who are at the service of the CBI. This seriously undermines the so-called independence of these witnesses. This was too serious a matter for the learned trial Court to be basing its views on surmises and conjectures as to how these two witnesses could already be present in the office of the CBI even before the Complainant reached there with his written complaint.

49. PWs 1 and 4 stated that they visited the office of the CBI on 19th August 2002 itself and again were asked to come on 20th August 2002. This again is overlooked by the learned trial Court when it stated as under:

> "These witnesses might have visited the office of CBI on 19.8.02

but not in the present case as the complaint was lodged on 20.8.02 and these witnesses might have been asked to come to CBI office next day on 20th August 2002 when their services were utilized by the CBI officer in the present case."

50. There can be no doubt that again the learned trial Court is basing its opinion on surmises that the witnesses did not come to the office of the CBI on 19th August 2002 when clearly these witnesses say so. It was impermissible for the learned trial Court to substitute its own opinion on facts overlooking the evidence on record.

51. It is a matter of fact that neither PW1 nor PW4 has supported the case of the prosecution as regards what transpired during the pre-raid proceedings and the trap proceedings. The learned trial Court simply held that both these witnesses were won over by the accused. There was no basis for the said conclusion either.

Demand during the trap proceedings

52. The case of the prosecution is that prior to the raid there were two instances of demand of bribe purportedly made by the Appellant. The first, as noted in the charge framed against the Appellant, was that "while you were posted as Sub-Inspector at the PS Shalimar Bagh demanded Rs. 8,000/- on 19.8.2002 from the Complainant Mohd. Qayuum Qureshi for a motive or reward of not involving and arresting him in a case regarding kidnapping of his maid servant Sabina." The second was during the conversation with PW 6. As far as the above charge is concerned, for the reasons discussed, the Court is of the view that the prosecution has not been able to prove it beyond reasonable doubt.

53. The further case of the prosecution is that the Appellant made a further demand which is indicated in the second part of the charge which reads thus: "and in furtherance of your demand you demanded and accepted the bribe of Rs. 8,000 from the complainant on 20.8.2002 near ICICI Bank, Everbake market, Shalimar Bagh, Delhi and thereby you committed an offence punishable u/s 7 of the P.C. Act and within the cognizance of this Court."

54. As regards the demand allegedly made by the Appellant from PW-5 on 20th August 2002 at the ATM near ICICI Bank, Mr. Manoj Ohri, learned Special Public Prosecutor (SPP) has relied on the evidence of PW-5 as corroborated by PW-11. The case of the prosecution is that

the Appellant telephoned PW-5 at his residence for fixing of the spot and for introduction of PW-4, the supposed informer. The transcript of this conversation as recorded in the audio tape was also read out in the court. All this does is to confirm that the purpose of the meeting between the Appellant and PW-5 for introduction of PW-4 as informer. There is no reference to any bribe in this conversation.

55. PW-5 in his examination-in-chief has stated that the Appellant demanded the bribe money by a hand gesture and when it was taken out by PW-5 and handed over to the Appellant, it was accepted by the Appellant with his right hand. The only other person present at that time was PW-4 and he has not supported the prosecution on this aspect. In his cross-examination by the Senior Public Prosecutor for the CBI, PW-4 agreed that he and PW-5 went to the ATM. However, he denied the suggestion that the Appellant demanded Rs. 8,000 from PW-5 by gesture and that PW-5 gave the treated GC notes to the Appellant which the Appellant accepted with his right hand.

56. The parameters for testing the authenticity of the taped conversations on the tapes Q 1 and Q 2 would be the same as was applied to test the conversation recorded on Q 3. Neither Q 1 nor Q 2 was tested for tampering by PW-3. Notwithstanding this, the transcript of the conversation between PW-5 and the Appellant at the house prior to the trap team leaving to the site does not per se establish any demand of bribe by the Appellant for not registering a case concerning the Ms. Sabina going missing. The conversation is about the introduction of the informer to the Appellant. Admittedly, even the recording of the conversation at the spot on the KCR does not reveal any demand of bribe which is perhaps why it is sought to be stated by PW-5 that the demand was made by gesture.

Evidence of PW-5

57. Given the conduct of PW-5 in the present case, he does not appear to be a trustworthy witness. He is the only person speaking of the demand of a bribe by the Appellant at the police station, for which there is no evidence, and later at the spot which again is not corroborated by PW-4. It would be unsafe only to rely on the evidence of PW-5 to conclude that there was a demand of bribe of Rs. 8,000 either prior to the trap proceedings or at the spot.

58. In the impugned judgment of the trial Court, the discussion has turned essentially on the hand washes turning pink. It was concluded that this one aspect was sufficient by itself to prove that there was demand and acceptance by the Appellant of the bribe amount. The Court is unable to draw any such conclusion in the absence of other reliable evidence.

Acceptance of bribe

59. On the question of acceptance of the bribe, the prosecution has relied on the fact that PW-5 as well as PW-11 have spoken of the Appellant throwing the treated GC notes on the ground from his shirt pocket and of both his left and right hands turning pink. It must be recalled that the defence of the Appellant as stated in his answer under Section 313 CrPC is that he was caught from behind and that there was a scuffle and that the money was thrust into his pocket.

60. Neither PW-1 nor PW-4 supported the prosecution in this regard. PW-1 states that when he received the signal and went towards the ATM, he found the treated GC notes scattered on the ground and in a mutilated condition. PW-1 was directed by PW-11 to pick up the treated GC notes. He, however, does say that the right and left hand wash as well as the wash of the shirt pocket of the Appellant turned pink. Since he was not supporting the prosecution, PW-1 was examined by the SPP. He resiled from his statement that he had seen the Appellant throwing the money on seeing the raiding party. PW-4, the other independent witness, also did not support the prosecution. He denied the suggestion that he had flashed the pre-arranged signal after the alleged transaction of bribe was completed and that the trap team thereupon rushed towards the spot and the Appellant on seeing the trap team took out the treated GC notes and threw them on the ground. PW-4 agreed that the recovered GC notes tallied with those notes noted down in the handing over memo.

61. In the above circumstances, the mere fact that the hand washes turned pink cannot be said to conclusively prove that the Appellant had accepted the bribe money. In the first place, it is not clear whether the accused in fact accepted the money with his right hand as spoken of by PW-5 since that was not supported by any of the independent witnesses. Nothing in their examination-in-chief can be said to support PW-5 on this aspect. As far as PW-11 is concerned, he entered the scene only after the pre-arranged signal was given by PW-4. PW-11 did not actually see the Appellant accepting the bribe money with his right hand as alleged by

PW-5. PW-11 only says that the accused threw the money on the ground.

62. If as stated by the Appellant that he was caught from behind and there was a scuffle, then it is possible that in the struggle, the treated GC notes were flung on the ground. Interestingly PW-4 in his examination-in-chief states as under:

> "We left for the market from the residence of Qureshi. At about 7.30 p.m. the Inspector came along with two constables in the market and he was on the other side of the road. Qureshi called the Inspector by gesture. Both of them shook their hands and Qureshi took him to ATM Booth. I was standing outside the ATM booth. They talked about 2/3 minutes and thereafter Qureshi called me by gesticulating inside the ATM. I was introduced to the Inspector as informer. Inspector asked me about the information and I told him that in Shalimar Bagh some prostitution racket was operating by four girls and four boys. Inspector insisted me to reveal the information then and there. I told the Inspector to come at Real Juice at 8 p.m. Qureshi made me to go outside the booth. Thereafter, I heard a noise of quarrel. When I saw by turning myself towards the Booth I saw Qureshi holding the Inspector from his back and they were grappling with each other. I saw the currency notes lying on the ground. The said currency notes were picked up by CBI officials and caught the said Inspector. That Inspector is the accused present in court (correctly identified)."

63. It was at the above stage that the SPP sought to cross-examine PW-4. What PW-4 stated in his examination-in-chief probablises the defence of the Appellant regarding the grappling. The Court is, therefore, unable to agree with the conclusion reached by the trial Court that the prosecution has been able to prove beyond reasonable doubt that there was an acceptance of the treated GC notes by the Appellant and that while accepting that he knew it to be illegal gratification.

64. There is also a discrepancy in the version of PW-5 on this critical aspect. In his examination-in-chief, he stated that the Appellant tried to run away from the spot "after dropping the money when the CBI people rushed towards the spot". In his cross-examination, he stated out that a chowkidar was sitting outside the ATM. Incidentally this chowkidar was not examined. PW-5 then stated that "the money did not fell down

as after accepting the money and counting the same, the accused kept the same in his pocket. The accused while coming out was apprehended by CBI and on that he took out the money from his pocket and was in the process of throwing down when caught hold by CBI."

65. It appears that PW-5 was unclear from where the money was recovered. He was, therefore, again examined by the SPP. He now stated:

> "It is correct that when the accused was about to be apprehended, he threw the money on the ground".
>
> Therefore, even PW-5 cannot be said to be a reliable witness on what exactly transpired at the spot and during the trial proceedings.

66. Mr. Ohri explained the failure to examine the property dealer in whose office the proceedings were completed by pointing out that the seizure memo itself states that the property dealer permitted the prosecution to use his office on the condition that he would not be examined as a witness. Nevertheless even according to PW-5 there was a chowkidar sitting outside the ATM. There is no reasonable explanation as to why the prosecution failed to examine the chowkidar. PW-5 being an unreliable witness cannot be said to have supported the case of the prosecution as regards the acceptance of the bribe amount by the Appellant.

67. As regards the wash of the shirt pocket turning pink, it has been rightly pointed out that after the initial wash, the shirt was in fact handed back to the Appellant. Therefore, the sanctity of the shirt being preserved for forensic examination was compromised. In that view of the matter, the court does not consider it necessary to examine the question that has been elaborately examined by the trial Court regarding the two different dates on the signatures on the shirt. The Court is of the view that if the Appellant was caught from behind as he alleges by PW-5 and in any event touched the tainted GC notes at that time, the mere fact that the shirt pocket wash turned pink, may itself not be sufficient to hold that the Appellant consciously accepted the bribe amount and kept it in his left shirt pocket. Consequently, the fact that the shirt pocket turned pink does not by itself help the prosecution in the present case.

68. With the prosecution failing to prove the demand or acceptance of the bribe by the Appellant, the question of applicability of the presumption Section 20 of the PC Act does not arise.

Evidence of PW-11

69. Mr. Ohri sought to place reliance on the decisions in **Hazari Lal v. State** (1980) 2 SCC 390 and **State of U.P. v. Zakaullah** (1998) 1 SCC 557 and **State of U.P. v. Dr. G.K. Ghosh** 1984 (1) SCC 254 to urge that even if the independent witnesses turned hostile, the evidence of the official witnesses can be relied upon even without corroboration.

70. Had the complainant (PW-5) fully supported the case of prosecution on the aspect of the demand of a bribe by the Appellant, it would still be possible to consider whether the evidence of PW-11 could be held to be sufficient proof of the acceptance of the bribe amount by the Appellant as regards what transpired at the spot. However, as already noticed, PW-5 was an unreliable witness. Interestingly, some of the members of the pre-trap proceedings, Inspector AK Singh and Inspector Surender Malik, do not appear to have been examined. We have only evidence of PW-11 who arrived at the spot after the pre-arranged signal of PW-4. PW-11 was himself not a witness to the acceptance of the bribe amount by the Appellant. If there was a struggle as spoken of by PW-4, then the mere fact that the GC notes were flung on the ground by itself would not prove the acceptance of the bribe amount by the Appellant. On the critical aspects of the case therefore, the uncorroborated evidence of PW-11 cannot help prove the case of the prosecution beyond reasonable doubt.

Conclusion

71. The Court is thus of the view that the evidence brought on record by the prosecution was insufficient to return a finding of guilt against the Appellant beyond all reasonable doubt. The offence under Section 13(2) read with Section 13(1) (d) of the PC Act is not made out against the Appellant.

72. For the aforementioned reasons, the impugned judgment 25th January 2008 and the order on sentence dated 28th January 2008 passed by the trial Court are set aside and the Appellant is acquitted of the offences with which he has been charged.

73. The appeal is allowed in the above terms but, in the circumstances, with no order as to costs. The trial Court record be sent back forthwith.

ILR (2014) III DELHI 2353
CRL.A.

MUNIR @ CHOTA ....APPELLANT

VERSUS

STATE (GOVT. OF NCT OF DELHI) .....RESPONDENT

(S.P. GARG, J.)

CRL.A.NO. 555, 556, 557/2012 & CRL. M.B. NO. 435/2014 **DATE OF DECISION 4.04.2014**

Indian Penal Code, 1860—Section 395—The prosecution case as revealed in the charge-sheet was that on 23.05.2009 at about 01.50 a.m. at House No. A-181, Gali No.6, Mandoli Extension, the appellans and their associates Aftab @ Daboo and Yamin @ Kalia committed dacoity. Daily Diary (DD) No. 7B was recorded at PS Mehrauli on getting information about the occurrence from PCR—Further case of the prosecution is that on 25.05.2009, Sakir, Mohd. Rahim, Mohd Harun (A-3), Mohd. Munir Bada, Dulal (A-2), Munir Chota (A-1) and Kamal were arrested by the police of Special Staff, South District, in case FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli. Various weapons were recovered from them. Their involvement in the instant case emerged in the disclosure statements made by them—The prosecution examined twenty-one witnesses to substantiate the charges against them. In 313 statements, the accused persons denied their complicity in the crimes and pleaded false implication. After considering the rival contentions of the parties and appreciating the evidence and other materials, the Trial Court, by the impugned judgment, held A-1 to A-3 guilty under Section 395 IPC. Aftab and Yamin @ Kalia were acquitted of the charges. State did not

prefer any appeal against their acquittal. Being aggrieved and dissatisfied A-1 to A-3 have preferred the appeals—The appellants were arrested along with their associates in FIR No. 267/2009 under Section 399/402 IPC and 25 Arms Act, PS Mehrauli, by the police of Special Staff, South District on 25.05.2009—It is trite to say that the substantive evidence is the evidence of identification in the Court. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. Neither of the appellants claimed their presence at any other particular place on the relevant time and date. They did not examine any of their family members or employers to prove their presence in their respective houses or places of work. The appellants had no reason to be present inside the victim's house at odd hours—Minor contradictions, discrepancies and improvements highlighted by the appellants' counsel do not stake the basic structure of the prosecution case due to clear identification by the complainant who had direct confrontation with the assailants for about ten minutes inside the house and had clear and reasonable opportunity to note their broad features—Exact number of assailants who were involved in the incident could not be ascertained during investigation—Minimum number of assailants required for conviction under Section 395 IPC is five which the prosecution failed to prove beyond doubt. Conviction under Section 395

IPC was not permissible. Since the victim was injured in committing the robbery by the assailants, the offence proved against A-1 to A-3 would be under Section 394 IPC. The conviction is accordingly altered to Section 394 IPC—None of them has any previous conviction though they are involved in some other criminal cases. Taking into consideration all the facts and circumstances, the sentence order is modified and substantive sentence of the appellants is reduced to eight years with fine Rs. 10,000/- each and failing to pay the fine to undergo SI for three months, each under Section 394—disposed of.

Important Issue Involved: The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of Identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. Minor contradictions, discrepancies and improvements do not stake the basic structure of the prosecution case due to clear identification by the complainant who had direct confrontation with the assailants and had clear and reasonable opportunity to not their broad features.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr.S.S. Ahluwalia, Advocate, Mr. Saurabh Kansal, Advocate with Ms. Pallavi Kansal, Adv.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

CASE REFERRED TO

1. *('Amitsingh Bhikamsing Thakur* vs. *State of Maharashtra',*

AIR 2007 SC 676).

RESULT: Appeals stand disposed of.

S.P. GARG, J.

1. Munir @ Chota (A-1), Dulal (A-2) and Harun (A-3) challenge the legality and correctness of a judgment dated 19.12.2011 of learned Addl. Sessions Judge in Sessions Case No. 37/10 arising out of FIR No. 91/09 PS Harsh Vihar by which they were held perpetrators of the crime under Section 395 IPC. By an order dated 24.12.2011, they were sentenced to undergo RI for ten years with fine Rs. 20,000/-, each.

2. The prosecution case as revealed in the charge-sheet was that on 23.05.2009 at about 01.50 a.m. at House No.A-181, Gali No.6, Mandoli Extension, the appellants and their associates Aftab @ Daboo and Yamin @ Kalia committed dacoity. Daily Diary (DD) No. 7B was recorded at PS Mehrauli on getting information about the occurrence from PCR. The investigation was assigned to ASI Rakesh Tyagi who with HC Rishi Raj went to the spot. He lodged First Information Report after recording complainant – Satender Kumar's statement (Ex.PW-3/A) under Sections 394/34 IPC. Injured – Satender Kumar was taken to GTB hospital where he was medically examined. The complainant disclosed that three / four individuals who had entered inside the house by jumping over the wall robbed Rs. 19,500/-, gold ring and purse containing his school I-card. The intruders were armed with weapons and on his resistance, he was caused injuries. Efforts were made to find out the culprits but in vain. Further case of the prosecution is that on 25.05.2009, Sakir, Mohd.Rahim, Mohd.Harun (A-3), Mohd.Munir Bada, Dulal (A-2), Munir Chota (A-1) and Kamal were arrested by the police of Special Staff, South District, in case FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli. Various weapons were recovered from them. Their involvement in the instant case emerged in the disclosure statements made by them. Intimation was given to the Investigating Officer of this case and DD no. 2B was recorded. PW-21 (SI Rakesh Tyagi) arrested Rahim, Sakir, Bada Munir, Chota Munir, Kamal, Yamin @ Kalia, Aftab, Harun and Dulal as suspects. After Court's permission, their disclosure statements Ex.PW-21/I [of A-3 (Harun)], Ex.PW-21/J [of A-1 (Chota Munir)], Ex.PW-21/K [of A-2 (Dulal)], Ex.PW-21/L (of Yamin @ Kalia) and Ex.PW-21/M (of Aftab) were recorded. In Test Identification

Proceedings, complainant – Satender identified A-1 and A-3. Yamin @ Kalia declined to participate in the TIP. On 09.06.2009 during police remand, Rahim, Bada Munir, Sakir and Aftab led the police party to the place of occurrence and pointing out memos (Ex.PW-13A to Ex.PW-13/D) were prepared. Aftab pursuant to the disclosure statement, recovered school I-card of the complainant which was seized vide seizure memo Ex.PW-13/E. Statements of the witnesses conversant with the facts were recorded. The exhibits were sent to Forensic Science Laboratory. Rahim, Sakir, Bada Munir and Kamal were got discharged. After completion of investigation, a charge-sheet was filed against A-1 to A-3, and Yamin @ Kalia and Aftab; they were duly charged and brought to trial. The prosecution examined twenty-one witnesses to substantiate the charges against them. In 313 statements, the accused persons denied their complicity in the crime and pleaded false implication. After considering the rival contentions of the parties and appreciating the evidence and other materials, the Trial Court, by the impugned judgment, held A-1 to A-3 guilty under Section 395 IPC. Aftab and Yamin @ Kalia were acquitted of the charges. State did not prefer any appeal against their acquittal. Being aggrieved and dissatisfied, A-1 to A-3 have preferred the appeals.

3. I have heard the learned counsel for the parties and have examined the record. The incident in which complainant – Satender Kumar was robbed of Rs. 19,500/- and other valuable articles on the night intervening 22/23.05.2009 at House No.A-181, Gali No.6, Mandoli Extension is not under challenge. Only plea of the appellants is that they were not the perpetrators of the crime and were falsely implicated in this case. The complainant had no extraneous consideration to fake or concoct the incident of robbery at night time at his residence. He was not only deprived of cash and other valuable articles but was also injured while committing robbery by the assailants. He was taken to GTB hospital and was medically examined. He suffered injuries 'simple' in nature. The occurrence took place at around 01.50 A.M. The First Information Report was lodged at 03.50 A.M. in promptitude after recording complainant's statement (Ex.PW-3/A). The complainant at the first available opportunity disclosed to the police as to how and under what circumstances, three / four boys had entered inside the house and had committed robbery. On raising an alarm, many neighbourers including PW-1 (Naresh Kumar) gathered at the spot and pelted stones at the intruders. To scare them, the assailants fired in retaliation and managed to escape. PW-3 (Satender

Kumar), PW-4 (Vimlesh), PW-5 (Rekha) and PW-6 (Rinki) have all given consistent version about the incident of robbery. 4. The appellants were arrested along with their associates in FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli, by the police of Special Staff, South District on 25.05.2009. Their involvement emerged in the instant case on their disclosure statements recorded therein. The Investigating Officer of this case moved applications for holding Test Identification Proceedings. PW-16 (Ms.Suchi Laler), learned Metropolitan Magistrate, conducted Test Identification Proceedings at Tihar Jail in which the complainant identified A-1 and A-3 correctly. Yamin @ Kalia refused to participate in the Test Identification Proceedings. While appearing as PW-3, in Court statement, Satender Kumar identified A-1 and A-3 without hesitation and specifically deposed that they were among the assailants who had entered inside the house and committed robbery. He denied that both these assailants were shown to him in the police station prior to the Test Identification Proceedings. This submission of the appellants is devoid of merit. They have not given any specific date as to when and where they were shown to the complainant. They had voluntarily agreed to join the Test Identification Proceedings. At that time, no such complaint was lodged with the learned Metropolitan Magistrate conducting TIP. They cannot be permitted to challenge their identification by the complainant in TIP simply because he was able to recognise them as the assailants. PW-3 (Satender Kumar) was fair enough not to recognise and identify Aftab and Yamin @ Kalia in his Court statement stating that they had covered their faces and primarily it resulted in their acquittal.

5. The complainant identified A-2 in his Court statement and pointed towards him stating that he was also the assailant involved in the occurrence. In the cross-examination, he denied the suggestion that A-2 was present outside the house at the time of incident. He volunteered to add that A-2 was inside the house in the room where the robbery was committed. It is true that the Investigating Officer did not move application for conducting TIP for A-2 during investigation. For that lapse of the Investigating Officer, otherwise cogent and reliable testimony of the complainant who had no prior animosity with A-2 cannot be discredited. It is trite to say that the substantive evidence is the evidence of identification in the Court. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating

agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (**'Amitsingh Bhikamsing Thakur vs. State of Maharashtra',** AIR 2007 SC 676). In the instant case, the Trial Court observed that the cartridges recovered from the spot were connected with the pistol recovered from the accused in the proceedings in FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli. Neither of the appellants claimed their presence at any other particular place on the relevant time and date. They did not examine any of their family members or employers to prove their presence in their respective houses or places of work. The appellants had no reason to be present inside the victim's house at odd hours. Non-recovery of the robbed articles is of no consequence. PW-3 (Satender Kumar), PW-4 (Vimlesh), PW-5 (Rekha) and PW-6 (Rinki) have all deposed about the robbery of the valuable articles from the house. PW-4 (Vimlesh), PW-5 (Rekha) and PW-6 (Rinki) were unable to identify the assailants as they could not see their faces due to fear. Minor contradictions, discrepancies and improvements highlighted by the appellants' counsel do not stake the basic structure of the prosecution case due to clear identification by the complainant who had direct confrontation with the assailants for about ten minutes inside the house and had clear and reasonable opportunity to note their broad features.

6. Initially in the statement (Ex.PW-3/A), complainant – Satender Kumar had not given the exact number of intruders and described that they were three or four. In his Court statement also, he disclosed their number as three / four. PW-1 (Naresh Kumar), a neighbourer, gave the number of the assailants as five or six but he was unable to identify any of the assailants. PW-4 (Vimlesh) did not state the number of the assailants in her examination-in-chief. Only, in the crossexamination, she disclosed that the intruders were six or seven. She was not able to identify any of the culprits. PW-5 (Rekha) merely stated that her brother was caught hold by three / four individuals. PW-6 (Rinki) gave the number of the assailants four / five. It reveals that exact number of assailants who were involved in the incident could not be ascertained during investigation. Nine individuals were arrested during investigation and four of them were

discharged for lack of evidence. The Trial Court did not find cogent evidence against Aftab and Yamin @ Kalia and acquitted them of the charges. Minimum number of assailants required for conviction under Section 395 IPC is five which the prosecution failed to prove beyond doubt. Conviction under Section 395 IPC was not permissible. Since the victim was injured in committing the robbery by the assailants, the offence proved against A-1 to A-3 would be under Section 394 IPC. The conviction is accordingly altered to Section 394 IPC.

7. Nominal roll dated 17.07.2012 reveals that A-1 and A-2 have suffered custody for three years, one month and seven days besides remission for three months as on 17.07.2012. A-3's nominal roll dated 10.02.2014 reveals that he has suffered custody for four years, eight months and eight days besides remission for eleven months as on 10.02.2014. None of them has any previous conviction though they are involved in some other criminal cases. Taking into consideration all the facts and circumstances, the sentence order is modified and substantive sentence of the appellants is reduced to eight years with fine Rs. 10,000/-, each and failing to pay the fine to undergo SI for three months, each under Section 394 IPC.

8. Appeals stand disposed of in the above terms. Pending application also stands disposed of. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to Superintendent Jail for information.

ILR (2014) III DELHI 2361

WP

UOI AND ORS. .....PETITIONERS

VERSUS

RAJNESH JAIN .....RESPONDENT

(GITA MITTAL AND DEEPA SHARMA, JJ.)

W.P. (C) NO. 5883/2013 & CM NO. 12958/2013 & 1053/2014 DATE OF DECISION: 16.04.2014

A. Constitution of India, 1950—Article 226: Petition against judgment of the CAT accepting the Respondent`s challenge to the OM`s whereby the representations relating to adverse remarks and grading in her SCR were rejected. HELD-Respondent was not afforded favourable consideration by DPC only on the ground that her ACR did not meet benchmark. Tribunal has held the ACR for the relevant year to be treated as non est. No reason to interfere. 6 weeks time given to Petitioner to comply with the judgment of Tribunal and contempt petition filed by Respondent to be kept in abeyance. Petition dismissed.

By way of the instant writ petition, the petitioner has assailed the order dated 7th February, 2013 passed in OA No.1362/2012 whereby the Tribunal has accepted the present respondent's challenge to the OMs dated 18th October, 2010 and 17th January, 2012 whereby the representations relating to adverse remarks and grading in her Annual Confidential Report (ACR) for the year 2005-06 were rejected. The Tribunal accepted the respondent's challenge by its judgment dated 7th February, 2013 which is assailed before us. **(Para 1)**

Before us, the petitioners are unable to dispute the factual narration which was placed before the Tribunal or the above findings on any legally tenable ground.

We see no reason to disagree with the view taken by the Tribunal and find no merit in this writ petition which is hereby dismissed. **(Para 8)**

It is to be noted that the respondent was not afforded favourable consideration by the DPC only on the ground that because her ACR for the year 2005-06 did not meet the benchmark. This was the only ground pleaded by the petitioners before the Central Administrative Tribunal. The Tribunal has held that the ACR for the year 2005-06 shall be treated as non-est. The same could not have been considered by the DPC while evaluating the respondent's fitness for the purposes of promotion when her batch mates or juniors were so considered.

It is submitted by the respondent that while denying the promotion to her several juniors have also been promoted. Given the fact that the respondent has been deprived the benefit of fair consideration by the DPC, in case she is found fit for promotion by the DPC which is to be convened now, the respondent deserves to be granted consequential benefits as well. **(Para 9)**

The petitioners are given six weeks time to comply with the directions made in the order dated 7th February, 2013 of the Tribunal. As a result, the proceedings in the contempt petition shall be kept in abeyance till 30th May, 2014. **(Para 11)**

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. M. K. Bhardwaj, Adv.

FOR THE RESPONDENT : Respondent in person

RESULT : Writ Petition dismissed

GITA MITTAL, J (Oral)

1. By way of the instant writ petition, the petitioner has assailed the order dated 7th February, 2013 passed in OA No.1362/2012 whereby the Tribunal has accepted the present respondent's challenge to the OMs dated 18th October, 2010 and 17th January, 2012 whereby the representations relating to adverse remarks and grading in her Annual Confidential Report (ACR) for the year 2005-06 were rejected. The Tribunal accepted the respondent's challenge by its judgment dated 7th February, 2013 which is assailed before us.

2. The factual matrix in the instant case is undisputed. The respondent was working as Joint Director in the Social Statistics Division

of the petitioner during the year 2005-06. A DPC was held in July, 2009 to consider the applicant and others for promotion to the Senior Administrative Grade (`SAG' hereinafter). However, the respondent was not promoted and on seeking information under the Right to Information Act, 2005, she learnt that she had not been promoted as her ACR for the year 2005-06 was below benchmark. It is undisputed that such remarks were not communicated to the petitioner till the year 2010 when she sought the information from the present petitioner.

3. It is the admitted position before us that the respondent had been consistently graded `very good' since 2001 to 2004-05 as well as after 2005-06. There was a sudden drop in her grading to `average' for the year 2005-06. The reporting officer also made certain adverse remarks in various columns of her Annual Confidential Report for this particular year.

4. The respondent submitted a representation dated 25th May, 2010 seeking upgradation of her ACR. This representation was rejected by the Secretary, Ministry of Statistics and Programme Implementation vide OM dated 18th October, 2010. Aggrieved thereby, the petitioner filed the petition before the Central Administrative Tribunal being OA No.3288 of 2011, seeking quashing of the same as well a direction to the present petitioner to consider her claim for promotion to the SAG grade.

5. This application was disposed of by the Central Administrative Tribunal by an order dated 13th September, 2011 issuing directions to the present petitioners to deal with the several issues raised by the respondent afresh. The present respondent was given liberty to seek adjudication afresh if she was aggrieved by the fresh order which is passed.

6. It appears that after consideration afresh, the decision on the representation of the petitioner was conveyed to her through an office memorandum dated 17th January, 2012 which was assailed by her by way of OA No.1362 of 2012. The present petitioners contested the respondent's challenge and filed a counter affidavit defending the action taken. The respondent, inter alia, challenged the authority of the reporting officer to record her Annual Confidential Report for the reason that he was in the same grade as her. By the order dated 7th February, 2013, this ground of challenge stands rejected by the Tribunal. Inasmuch as there is no challenge by the respondent to the findings of the Tribunal, we are not required to dwell on this aspect of the matter any further.

7. We find that the respondent challenged the comments of the reporting and reviewing officer in her ACR for the period 2005-2006 on the ground of mala fide as well. The Tribunal has carefully considered

the challenge by the respondent. Paras 9 & 10 of the order dated 7th February, 2013 assailed before us, usefully deserves to be extracted and read as follows:-

> "9. Having heard the learned counsel for the parties and carefully perused the records, we are of the view that there is no lacuna in the respondent no.2 recording the ACR of the applicant for the period 2005-06 as the Reporting Officer. Respondent no.1 has addressed this issue adequately while deciding the matter as per the directions of this Tribunal contained in order dated 13.09.2011 passed in OA No.3288/2011. Perusal of the decision in Sukhdeos case (supra) relied upon by the applicant, we find that the said case is not pertinent to the matter in hand as the facts in both these cases are distinguishable. However, from the record it is also clear that although the ACR of the applicant for 2005-06 was recorded in October/November, 2006, the applicant was not apprised of the contents of the ACR and did not have any opportunity to represent against the same. The entries made by the Reporting Officer against the Items, Quality of Output, Attitude to Work, Inter-personal Relations, and General Assessment are decidedly adverse and cannot be ignored just because the Reviewing Officer has observed that these are not correct while recording his views on the assessment of the officer given by the reporting officer. Moreover, in Column-I of Part-III of the ACR relating to comments on Part-II as filled out by the officer the reporting officer has recorded Yes, I agree, with reference to content of Column-5 of Part-II of the ACR, which gives details of targets achieved during April 2005 to March, 2006. It appears to be malafide to hold that the performance of the applicant is Average while agreeing with the material placed on record relating to physical/financial targets/ objectives and achievements against each target as the officer reported upon has also claimed that there are no shortfalls. The applicant was only able to file her representation against the adverse remarks and grading of the ACR of 2005-06 in 2010 much after the ACR was recorded and when she learnt that the DPC had not recommended her for promotion to SAG. Even at the stage when the Competent Authority considered the representation of the applicant against the adverse remarks, the only instance of shortfall in performance that was cited by the Reporting/Reviewing officers in their comments related to the remarks of the Additional Secretary dated 12.11.2005. Perusal of the ACR dossiers of the officer shows that her claim that she

has consistently been graded as Very Good from the years 2000-01 to 2004-05 and after 2005-06 is valid and the sudden drop in performance in 2005-06 to the level of Average/Good would seem to be not possible. Here, the decision in M.A. Rajsekhars case (supra) and numerous other rulings appear relevant as the officer recording ACRs must do so in a fair and objective manner.

10. In view of the facts and circumstances of the case, we are of the view that the remarks of the Reporting Officer smack of bias. Also, the applicant did not have timely opportunity to represent against the adverse remarks. Since the applicant has been compelled to approach this Tribunal twice over for no fault of hers, we accept this OA to the extent that the impugned order dated 18.10.2010 is set aside and the ACR for 2005-06 is directed to be treated as non est. Consequential relief, if any, will be for consideration with respondent no.1. There shall be no order as to costs."

8. Before us, the petitioners are unable to dispute the factual narration which was placed before the Tribunal or the above findings on any legally tenable ground.

We see no reason to disagree with the view taken by the Tribunal and find no merit in this writ petition which is hereby dismissed.

9. It is to be noted that the respondent was not afforded favourable consideration by the DPC only on the ground that because her ACR for the year 2005-06 did not meet the benchmark. This was the only ground pleaded by the petitioners before the Central Administrative Tribunal. The Tribunal has held that the ACR for the year 2005-06 shall be treated as non-est. The same could not have been considered by the DPC while evaluating the respondent's fitness for the purposes of promotion when her batch mates or juniors were so considered.

It is submitted by the respondent that while denying the promotion to her several juniors have also been promoted. Given the fact that the respondent has been deprived the benefit of fair consideration by the DPC, in case she is found fit for promotion by the DPC which is to be convened now, the respondent deserves to be granted consequential benefits as well.

10. We are informed that the respondent has filed a petition seeking initiation of action under the Contempt of Courts Act against the petitioners.

11. The petitioners are given six weeks time to comply with the directions made in the order dated 7th February, 2013 of the Tribunal. As a result, the proceedings in the contempt petition shall be kept in

abeyance till 30th May, 2014.

The petitioner shall place a compliance report before the Tribunal on or before the expiry before the contempt court.

CM Nos.12958/2013 & 1053/2014

12. In view of the orders passed in the writ petition, these applications do not survive for adjudication and are dismissed.

Copy of this order be given dasti to parties.

ILR (2014) III DELHI 2366

WP

GLOBAL INFRASTRUCTURE TECHNOLOGIES LTD. ....PETITIONER

VERSUS

KOTAK MAHINDRA BANK LTD. & ORS. ...RESPONDENTS

(S. RAVINDRA BHAT AND R.V. EASWAR, JJ.)

W.P.(C) NO. 4862/2013 DATE OF DECISION; 16.04.2014

A. Sick Industrial Companies (Special Provision) Act, 1985, Section 15(1); Securitisation of Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 13(4), 13(9): KMBL filed an application for abatement of reference filed by Petitioner u/s 15(1) of SICA on the ground that KMBL held more than 3/4th in value of the outstanding secured debts of the petitioner and had also taken action u/s 14(4) of SARFAESI. BIFR allowed KMBL's application, Appeal to AIFR rejected. Hence the present petition. Interplay between section 13(9) of SARFAESI act and the third proviso of Section 15(1) of SICA. Petitioner's contention is that S. 13(9) of SARFAESI Act, when it refers to amount outstanding in respect of "financing of a financial asset" can only refer to three-fourth of the amount oustanding in relation to the financing of a financial asset whereas the third proviso to S. 15(1) of SICA when it refers to three fourth in value of the

amount outstanding, mandates the calculation to be based on the "financial assistance disbursed to the borrower of such creditor". HELD-Satisfaction by a secured creditor of the condition laid down in S. 13(9) of the SARFAESI Act cannot automatically be taken as satisfaction of the condition prescribed in the 3rd Proviso to S. 15(1) of SICA for the simple reason that both conditions prescribe different thresholds. While section 13(9) of the SARAFAESI Act speaks of financing of "a financial asset", the 3rd proviso to section 15(1) of the SICA speaks of "financial assistance disbursed to the borrower of such secured creditors". The reference can only be to the total amount borrowed by the petitioner from all the secured creditors which is outstanding and therefore the enquiry should be to find if KMBL also satisfies the condition that it shall represent in value not less than 3/4th of the total amounts borrowed by the petitioner from all secured creditors. It is only then that it can fall within the 3rd proviso and apply to the BIFR for abatement of the reference of the petitioner's reference. Writ petition allowed. Order of BIFR and AIFR set aside, matter restored to BIFR.

The brief facts are that the petitioner filed a reference before the BIFR on 11.05.2002 under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"). The company was declared as a sick company. An application had been filed before the BIFR by the Kotak Mahindra Bank Ltd., hereinafter referred to as KMBL, seeking abatement of the reference made by the petitioner under the third proviso to Section 15(1) of SICA. The application had been filed on the ground that KMBL held more than 3/4ths in value of the outstanding secured debts of the petitioner and had also taken action under Section 13(4) of the Securitisation of Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"). The application filed by KMBL was allowed by the BIFR and the reference stood abated. **(Para 2)**

The contention of the learned counsel for the petitioner is that Section 13(9) of the SARFAESI Act, when it refers to amount outstanding in respect of *"financing of a financial asset"* can only refer to three-fourth of the amount outstanding in relation to the financing of a financial asset whereas the third proviso to Section 15(1) of SICA, when it refers to three-fourth in value of the amount outstanding, mandates the calculation to be based on the *"financial assistance disbursed to the borrower of such creditors".* According to her there is a sea of difference between the two provisions and what is required to be fulfilled by KMBL, in order to successfully seek abatement of the reference is to show that it represents three-fourth in value of the amount outstanding against financial assistance disbursed to the petitioner as a whole and not merely with reference to the financing of a financial asset. This contention is articulated in ground "J" in the writ petition. It is further contended that KMBL has taken the measure listed in Section 13(4) of the SARFAESI Act in respect of a plot of land belonging to the petitioner and no measure has been taken against the entire unit of the petitioner which is intact. **(Para 8)**

Thus, sub-sections (4) and (9) of section 13 of the SARAFAESI Act, read conjointly show that their object is to lay down what measures can be taken by the secured creditors to recover the amount advanced to finance a financial asset acquired by the borrower and the conditions subject to which such measures can be taken. The computation of 3/4ths of the amount outstanding has to therefore be based only with reference to that amount and not with reference to the entire outstanding debts of the borrower. **(Para 10)**

Section 15 of the SICA has an entirely different purpose to serve. It provides for a reference of a sick industrial company (as a whole) to the BIFR on a resolution being passed by the board of directors of the company within a particular time-frame from the finalisation of the audited accounts. Originally it had only one proviso, but two more provisos were added in the year 2002 by the SARAFAESI Act. We are concerned with the 3rd proviso so inserted. It provides for abatement of a reference to the BIFR, where secured creditors representing not less than 3/4ths in value "of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of the Act" (the reference is to the

SARAFAESI Act). If this condition for abatement is applied to the present case, it seems to us that KMBL can successfully claim abatement of the reference of the petitioner's case pending before the BIFR only if it represents (as a secured creditor) at least 3/4ths (in value) of the amount outstanding against financial assistance disbursed to the petitioner and has also taken any of the measures outlined in section 13(4) of the SARAFAESI Act. KMBL has taken such action by taking possession of a plot of land belonging to the petitioner. But it is further necessary to examine whether KMBL also represents 3/4ths in value of the amount outstanding against the financial assistance disbursed to the petitioner by the secured creditors, as required by the 3rd proviso to section 15(1) of SICA and not merely to examine whether KMBL has satisfied the condition prescribed by section 13(9) of the SARAFAESI Act. Both the BIFR and the AIFR do not appear to have examined this aspect. **(Para 11)**

While section 13(9) of the SARAFAESI Act speaks of financing of *"a financial asset",* the 3rd proviso to section 15(1) of the SICA speaks of *"financial assistance disbursed to the borrower of such secured creditors".* The reference can only be to the total amount borrowed by the petitioner from all the secured creditors which is outstanding and therefore the enquiry should be to find out if KMBL also satisfies the condition that it shall represent in value not less than 3/4ths of the total amounts borrowed by the petitioner from all secured creditors. It is only then that it can fall within the 3rd proviso and apply to the BIFR for abatement of the reference of the petitioner's reference. Satisfaction by a secured creditor of the condition laid down in section 13(9) of the SARAFAESI Act cannot automatically be taken as satisfaction of the condition prescribed in the 3rd proviso to section 15(1) of the SICA for the simple reason that both conditions prescribe different thresholds. **(Para 12)**

Section 35 of the SARAFAESI Act provides for over-riding effect of that Act over other laws which are inconsistent therewith. It cannot certainly be said (nor was it so suggested before us) that the SICA as a whole is inconsistent with the SARAFAESI Act. It was not also the contention of the respondent that the 3rd proviso to section 15(1) is inconsistent with the SARAFAESI Act. Even otherwise, it is

difficult to imagine that a provision which was inserted into the SICA in the year 2002 by the SARAFAESI Act itself would be inconsistent with that Act; we cannot attribute to the legislature an act that is violative of section 35 of the SARAFAESI which already existed in that Act since inception. That leads to the conclusion that section 13(9) of the SARAFAESI Act and the 3rd proviso to section 15(1) of the SICA operate on distinct fields without overlap. **(Para 13)**

The question whether the threshold limits/conditions set by the 3rd proviso to section 15(1) of SICA are satisfied is necessarily to be based on data reflected by the accounts of the petitioner and any other relevant material. That is an exercise which can only be embarked upon by the BIFR. While therefore setting aside the orders of the BIFR and the AIFR, we restore the matter to the BIFR for a decision, to be taken after giving a fair and reasonable opportunity to the parties to put forth their respective cases and place on record the accounts and all other relevant material. It shall be open to both sides to raise all other contentions and arguments (on the merits of which we express no opinion) which shall be considered and decided by the BIFR. It would be expedient that the decision is rendered by the BIFR within four months from today. **(Para 17)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Maneesha Dhir with Ms. Geeta Sharma, Vinita Sasidharan and Ms. Mithu Jain, Advocates.

FOR THE RESPONDENTS : Mr. T.K. Ganju, Sr Advocates with Mr. Sanjay Bhatt and Mr. Abhishek, Advocates R-1.

CASES REFERRED TO:

1. *Chemstar Organics India Limited* vs. *Bank of Baroda & ors.* (W.P.(C) No. 1487/2011 decided on 17-9-2012.
2. *Alpine Industries Ltd.* vs. *Appellate Authority for Industrial & Financial Reconstruction and ors.* (2011) 162 Comp. Cas. 563 (Del.).
3. *Asset Reconstruction Co. India P. Ltd.* vs. *Shamkeen Spinners Ltd.* (AIR 2011 Del. 17).

RESULT: Writ Petition allowed.

R.V. EASWAR, J.

1. In this writ petition, the petitioner impugns the order passed by the Appellate Authority for Industrial and Financial Reconstruction, New Delhi (hereinafter referred to as "AIFR") passed on 12.06.2013 as also the order passed by the Board of Industrial and Financial Reconstruction (hereinafter referred to as "BIFR") passed on 04.10.2010. The order passed by the AIFR is in an appeal preferred by the petitioner against the order passed by the BIFR.

2. The brief facts are that the petitioner filed a reference before the BIFR on 11.05.2002 under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"). The company was declared as a sick company. An application had been filed before the BIFR by the Kotak Mahindra Bank Ltd., hereinafter referred to as KMBL, seeking abatement of the reference made by the petitioner under the third proviso to Section 15(1) of SICA. The application had been filed on the ground that KMBL held more than 3/4ths in value of the outstanding secured debts of the petitioner and had also taken action under Section 13(4) of the Securitisation of Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"). The application filed by KMBL was allowed by the BIFR and the reference stood abated.

3. The petitioner challenged the order passed by the BIFR before the AIFR and contended:

> (a) that KMBL is not a secured creditor as the assignment of the debt to it by the State Bank of India was invalid and, therefore, KMBL cannot be called a secured creditor;
>
> (b) that KMBL does not hold 3/4th or more of the total secured debts of the petitioner (as required by the 3rd proviso to section 15(1) of the SARFAESI Act and, therefore, even if some action had been taken against the petitioner under Section 13(4) of the SARFAESI Act, the reference cannot abate; and
>
> (c) that the BIFR having passed an order on 19.08.2008 that the reference cannot be abated, could not have changed its view by holding to the contrary in its order passed on 04.10.2010.

These arguments having been rejected by the AIFR, the petitioner has approached this Court with a writ petition.

4. The learned counsel for the petitioner confined her argument,

without giving up the other contentions, to the question whether KMBL fell within the third proviso to Section 15(1) of SICA, by fulfilling the criterion required by the said proviso i.e. that it should represent not less than three-fourths in value of the amount outstanding against financial assistance disbursed to the petitioner. There is no dispute that KMBL had taken action under Section 13(4) of the SARFAESI Act. It had taken possession of the assets of the petitioner situated at Survey No.111, Plot 1-197, Vishrantwadi, Taluka Haweli, Pune on 07.03.2008; in its order passed on 19.08.2008 on the application filed by KMBL seeking abatement of the reference, the BIFR noted that the bank had taken over only a plot of land and not the factory premises, accepting the submission of the petitioner that the factory located at another location i.e. Wagholi, Pune, which was lying closed for the past three years, was still in the possession of the petitioner and that KMBL had taken possession of only a piece of land which was charged to SBI Home Finance Ltd. which had assigned the debt to SBI, which in turn had assigned the debt to KMBL. In this view of the matter the request for abatement of the reference was rejected by the BIFR.

5. The primary question for consideration is the nature of the interplay between Section 13(9) of the SARFAESI Act and the third proviso to Section 15(1) of the SICA.

6. A brief reference to the statutory provisions may be made. The SARFAESI Act came into force in the year 2002. Chapter III provided for "enforcement of security interest". Section 13(1) permitted the enforcement of any security interest created in favour of a secured creditor (including banks) without the intervention of the Court or the Tribunal. Such enforcement has to be in accordance with the provisions of the SARFAESI Act. Sub-section (4) of Section 13 provides for certain measures which can be taken by the secured creditor to recover the secured debt in case the borrower fails to discharge his liability in full within the specified period. Briefly, the secured creditor can take possession of the secured assets or take over the management of the business of the borrower or appoint any other person to manage the secured assets or require any person who has acquired the secured assets from the borrower and some money is due or outstanding to the borrower on this count, to pay such money to the secured creditor sufficient to discharge the debt. Section 13(9) is in the following terms: -

> *"Section 13(9) – In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed*

upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors."

7. Section 15 of the SICA provides for reference of a sick industrial company to BIFR on the passing of a resolution to that effect by the Board of Directors of the company. The second proviso prohibits any reference being made to the BIFR after the introduction of the SARFAESI Act in the year 2002. The third proviso (with which we are concerned) is as under: -

"Provided also that on or after the commencement* of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of that Act.]"

8. The contention of the learned counsel for the petitioner is that Section 13(9) of the SARFAESI Act, when it refers to amount outstanding in respect of *"financing of a financial asset"* can only refer to three-fourth of the amount outstanding in relation to the financing of a financial asset whereas the third proviso to Section 15(1) of SICA, when it refers to three-fourth in value of the amount outstanding, mandates the calculation to be based on the *"financial assistance disbursed to the borrower of such creditors"*. According to her there is a sea of difference between the two provisions and what is required to be fulfilled by KMBL, in order to successfully seek abatement of the reference is to show that it represents three-fourth in value of the amount outstanding against financial assistance disbursed to the petitioner as a whole and not merely with reference to the financing of a financial asset. This contention is articulated in ground "J" in the writ petition. It is further contended that KMBL has taken the measure listed in Section 13(4) of the SARFAESI Act in respect of a plot of land belonging to the petitioner and no measure has been taken against the entire unit of the petitioner which is intact.

9. A first look at both section 13(9) of the SARFAESI and the 3rd proviso to section 15(1) of the SICA shows that they operate in different situations. Section 13(4) of the SARFAESI Act, which permits the secured creditor to take any of the measures specified therein, applies subject to two conditions and these are prescribed in section 13(9). The first condition

is that "a financial asset" must have been financed by the secured creditor either singly or jointly with other secured creditors. In case it is financed by a single creditor, there would be no difficulty – he can take any of the measures permitted by section 13(4) without reference to any other person. In a case where the financial asset is financed by more than one secured creditor or where the financial asset is jointly financed by several secured creditors, there is the further condition that action can be taken under section 13(4) only if the exercise of such action is agreed upon by secured creditors representing not less than 3/4ths in value of the amount outstanding. For instance, if a borrower has acquired a machinery under financing by a bank which has lent Rs. 50 lakhs for the acquisition, and no other bank or financial institution has advanced any monies for the acquisition, that bank can take action under section 13(4) independently because it has financed the financial asset to the extent of 100%. But supposing two banks have advanced Rs. 25 lakhs each to the borrower to enable him to acquire the asset, then none of the two banks can take independent action because none of them has advanced 3/4ths of amount outstanding; they have to join together to take such action. To continue the same example, if Bank "A" has advanced Rs. 10 lakhs, Bank "B" has advanced Rs. 25 lakhs and Bank "C" has advanced the balance of Rs. 15 lakhs, action under section 13(4) can be taken only if at least Bank "B" and Bank "C" agree or all the three Banks agree; in that case, they would represent more than 3/4ths of the value of the amount outstanding. The series of actions permitted to be taken by the secured creditors is subject to this basic condition being fulfilled. A look at the various "measures" contemplated by section 13(4) reveals that they all speak of the "secured assets". Subject to fulfilment of the condition prescribed in section 13(9), the secured creditors can take possession of "the secured assets" or appoint a manager to manage "the secured assets the possession of which has been taken over" or call upon any person who has acquired any of "the secured assets" from the borrower to pay over the monies to them. The taking over of the management of the business, if such a step is taken by the secured creditors who satisfy the condition laid down in section 13(9), can only be to the extent relatable to the security of the debt, provided the business is severable.

10. Thus, sub-sections (4) and (9) of section 13 of the SARAFAESI Act, read conjointly show that their object is to lay down what measures can be taken by the secured creditors to recover the amount advanced to finance a financial asset acquired by the borrower and the conditions subject to which such measures can be taken. The computation of 3/4ths of the amount outstanding has to therefore be based only with reference to that amount and not with reference to the entire outstanding debts of the borrower.

11. Section 15 of the SICA has an entirely different purpose to serve. It provides for a reference of a sick industrial company (as a whole) to the BIFR on a resolution being passed by the board of directors of the company within a particular time-frame from the finalisation of the audited accounts. Originally it had only one proviso, but two more provisos were added in the year 2002 by the SARAFAESI Act. We are concerned with the 3rd proviso so inserted. It provides for abatement of a reference to the BIFR, where secured creditors representing not less than 3/4ths in value "of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of the Act" (the reference is to the SARAFAESI Act). If this condition for abatement is applied to the present case, it seems to us that KMBL can successfully claim abatement of the reference of the petitioner's case pending before the BIFR only if it represents (as a secured creditor) at least 3/4ths (in value) of the amount outstanding against financial assistance disbursed to the petitioner and has also taken any of the measures outlined in section 13(4) of the SARAFAESI Act. KMBL has taken such action by taking possession of a plot of land belonging to the petitioner. But it is further necessary to examine whether KMBL also represents 3/4ths in value of the amount outstanding against the financial assistance disbursed to the petitioner by the secured creditors, as required by the 3rd proviso to section 15(1) of SICA and not merely to examine whether KMBL has satisfied the condition prescribed by section 13(9) of the SARAFAESI Act. Both the BIFR and the AIFR do not appear to have examined this aspect.

12. While section 13(9) of the SARAFAESI Act speaks of financing of *"a financial asset"*, the 3rd proviso to section 15(1) of the SICA speaks of *"financial assistance disbursed to the borrower of such secured creditors"*. The reference can only be to the total amount borrowed by the petitioner from all the secured creditors which is outstanding and therefore the enquiry should be to find out if KMBL also satisfies the condition that it shall represent in value not less than 3/4ths of the total amounts borrowed by the petitioner from all secured creditors. It is only then that it can fall within the 3rd proviso and apply to the BIFR for abatement of the reference of the petitioner's reference. Satisfaction by a secured creditor of the condition laid down in section 13(9) of the SARAFAESI Act cannot automatically be taken as satisfaction of the condition prescribed in the 3rd proviso to section 15(1) of the SICA for the simple reason that both conditions prescribe different thresholds.

13. Section 35 of the SARAFAESI Act provides for over-riding effect of that Act over other laws which are inconsistent therewith. It

cannot certainly be said (nor was it so suggested before us) that the SICA as a whole is inconsistent with the SARAFAESI Act. It was not also the contention of the respondent that the 3rd proviso to section 15(1) is inconsistent with the SARAFAESI Act. Even otherwise, it is difficult to imagine that a provision which was inserted into the SICA in the year 2002 by the SARAFAESI Act itself would be inconsistent with that Act; we cannot attribute to the legislature an act that is violative of section 35 of the SARAFAESI which already existed in that Act since inception. That leads to the conclusion that section 13(9) of the SARAFAESI Act and the 3rd proviso to section 15(1) of the SICA operate on distinct fields without overlap.

14. There is also another aspect. SARAFAESI Act is concerned mainly with the recovery of the debt by banks and financial institutions without recourse to any court or tribunal. It permits securitisation of the debt and aims at minimising the non-performing assets. The SICA, a pre-existing legislation, provides for timely detection of sick and potentially sick companies owning industrial undertakings and the speedy determination by the BIFR of remedial and ameliorative measures and enforcement of such measures. We have to keep in mind the different purposes of the two Acts while examining the inter-play between the provisions of the two and eschew, if permissible, a readiness to hold that their provisions overlap or tread over each other.

15. We will now turn to some of the authorities cited before us. In none of them does the precise question appear to have come up for consideration. In **Asset Reconstruction Co. India P. Ltd. vs Shamkeen Spinners Ltd.** (AIR 2011 Del. 17), cited on behalf of the petitioner as supporting it, a Division Bench of this court did examine the third proviso to section 15(1) of the SICA but that was in a different context: whether, in the absence of any specific provision in the 2nd proviso, the limit of 3/4ths of the value of the secured debt set by the 3rd proviso should be read into the 2nd proviso. This court held that if such a limit is not read into the 2nd proviso, it will result in this position, namely, that a purchaser of a miniscule of the debt of the sick company will be able to frustrate the revival of a sick company though he may not be able to pursue its remedy under the SARAFAESI Act because he would not have the cut-off percentage of 75% prescribed by Section 13(9) of that Act. That is a different question, though it does appear that the decision would indirectly support the submission made on behalf of the petitioner, because it (the decision) is based on the assumption that abatement of a reference pending before the BIFR requires a larger threshold compared to that necessary to take any of the measures permitted by section 13(4) of the SARFAESI Act to be taken by a secured creditor. But that is as far as it can go. In

Chemstar Organics India Limited vs. Bank of Baroda & ors. (W.P.(C) No. 1487/2011 decided on 17-9-2012) another Division Bench of this court examined the relevant provisions but again in a different context; the interplay between the provisions of the two Acts with which we are concerned was not the subject-matter of consideration there. The judgement of the Division Bench of this court in **Alpine Industries Ltd. vs. Appellate Authority for Industrial & Financial Reconstruction and ors.** (2011) 162 Comp. Cas. 563 (Del.) cited on behalf of the respondent would at first blush appear to support him, but on a closer reading shows that it does not. The underlying assumption of the decision is that the requirement of 3/4th of the secured creditors taking measures for the abatement of a reference under the 3rd proviso to section 15(1) of the SICA is not independent of the measures taken by 3/4ths of the secured creditors under section 13(9) of the SARFAESI Act; consequently, it was held that once the measure taken by the secured creditor is not disputed by the borrower, and no appeal was taken to the Debt Recovery Tribunal under section 17 of the SARFAESI Act questioning the measure taken by the secured creditor on the ground that the secured creditor did not represent 3/4ths in value of the amount outstanding, the matter ended there and cannot be independently examined by the BIFR. This decision is not authority for the proposition as to whether the threshold limits set by the 3rd proviso to section 15(1) of the SICA and section 13(9) of the SARFAESI Act are identical. That question appears to have passed sub silentio. It is that question which is urged before us on behalf of the petitioner, in which we find merit. Once it is held that the threshold limits are drastically different in the two sets of provisions, then there is no difficulty in reaching the logical conclusion that it would be open to the BIFR/AIFR to examine if the requirements of the 3rd proviso to section 15(1) of the SICA are satisfied. Those authorities would be deciding an issue which properly falls within their jurisdiction.

16. Apart from authority, it seems to us that it would be incongruous to hold that a secured creditor or group of secured creditors who represent 3/4ths in value of the financial assistance in respect of *"a financial asset"* and thus are entitled to recover the debt from the borrower without recourse to any tribunal or court and by taking any of the measures to recover the debt contemplated by section 13(4) of the SARFAESI Act can also scuttle the revival of a sick industrial company by asking for abatement of the reference pending before the BIFR without satisfying the more stringent requirement of the 3rd proviso to section 15(1) of SICA. To continue the example given earlier, if the total debts due by the borrower to the secured creditors is Rs. 100 crores, and if the contention of the respondent is right, then Bank "B" and Bank "C" which together have advanced Rs. 40 lakhs against the machinery can not only take

steps to recover the debts under the SARAFAESI Act but also successfully ask for abatement of the reference pending before the BIFR, though they woefully fall short of the threshold limit of Rs. 75 crores set by the 3rd proviso to section 15(1) of the SICA. One fails to understand what purpose would be served if such an interpretation canvassed on behalf of the respondent is accepted.

17. The question whether the threshold limits/conditions set by the 3rd proviso to section 15(1) of SICA are satisfied is necessarily to be based on data reflected by the accounts of the petitioner and any other relevant material. That is an exercise which can only be embarked upon by the BIFR. While therefore setting aside the orders of the BIFR and the AIFR, we restore the matter to the BIFR for a decision, to be taken after giving a fair and reasonable opportunity to the parties to put forth their respective cases and place on record the accounts and all other relevant material. It shall be open to both sides to raise all other contentions and arguments (on the merits of which we express no opinion) which shall be considered and decided by the BIFR. It would be expedient that the decision is rendered by the BIFR within four months from today.

18. The writ petition is allowed in the above terms with no order as to costs.

ILR (2014) IV DELHI 2378

CO.PET.

DEUTSCHE TRUSTEE COMPANY LTD. ....PETITIONER

VERSUS

TULIP TELECOM LTD. ....RESPONDENT

(R.V. EASWAR, J.)

CO.PET. NO. 329/2013 DATE OF DECISION: 16.04.2010
CO. APPL. NO. 1529/2013 & 1688/2013

Companies Act, 1956—Winding up of the Company—Application for stay of CDR Scheme—Winding up petition is yet to come up for admission—Whether there is any justification for staying the CDR Scheme—Scheme is an attempt by a majority of the secured

creditor to revive the company—Scheme has the support and backing of the RBI—Held—Staying of the scheme will not be the interest of the company or the various stake holder—It is the duty of the Company Court to welcome revival rather than father than affirm the death of the company—Staying the CDR Scheme would be practicably amount to winding up of the company which step has to be taken only as last resort—No stay of the CDR Scheme—Application disposed off.

Important Issue Involved: The company Court should welcome measures to revive the company rather than winding up the company because the liquidation of the company is likely to affect prejudicially the stakeholders.

[As Ma]

APPEARANCES :

FOR THE PETITIONER : Mr. Rajiv Nayar, Sr. Advocate with Mr. L.K. Bhushan and Mr. Anirudh Arun Kumar, Advocates.

FOR THE RESPONDENT : Mr. C.A. Sundaram, Sr. Adv. with Ms. Diya Kapur, Mr. Arjun Singh Puri with Tejaswi Shetty and Ms. Himani Katoch Adv. Mr. Sandeep Sethi, Sr. Adv. With Mr. Devmani Bansal, Adv. for ICICI Bank.

Mr. Darpan Namboodiry, Advocates for workmen

RESULT: Application disposed off.

R. V. EASWAR, J.:

1. M/s Tulip Telecom Ltd. (hereinafter referred to as "TTL" or the "respondent-company") is a company incorporated in India. It issued an offering circular for foreign currency convertible bonds (FCCBs) for USD 150 million, to be redeemed on maturity at 144.56% of the principal amount. A trust deed was entered into between TTL and M/s Deutsche Trustee Company Ltd., the petitioner herein, under which the petitioner was appointed the trustee for the bondholders. The bonds were to be redeemed on 26th July, 2012. They had been partly redeemed and the principal value of the unredeemed bonds on the date of maturity was USD 97 million. After aggregating the premium payable on maturity, the

amount payable by TTL as on the above date on the bonds came to USD 140 million. It is common ground that when the maturity date arrived, the unredeemed bonds were not redeemed by TTL. Assurances were given to the Bombay Stock Exchange and the National Stock Exchange that the bonds would be redeemed by 10th September, 2012. The trustee for the bondholders i.e. the petitioner in these proceedings, sent a fax message to the respondent on 28th August, 2012 informing the latter that the bonds were not redeemed on the date of maturity. Action was contemplated by the petitioner and this was also intimated to TTL. In October, 2012 there was an announcement to the bondholders about the development. On 19.3.2013 the petitioner sent the statutory demand notice contemplated by section 434(1)(a) of the Companies Act, 1956 which was followed up by reminders sent in the month of April, 2013. No amount was forthcoming from TTL despite the statutory demand notice and reminders.

2. On 8th May, 2013, TTL obtained a letter of approval for a Corporate Debt Restructuring Scheme, a copy of which is placed as annexure C to CA 1688/2013. The petitioner on coming to know of the CDR scheme, filed a winding up petition before this Court on 31st May, 2013 under section 433(e) of the Companies Act seeking winding up of TTL on the ground of inability to pay its debts. CA 1529/2013 is an application filed by the petitioner to restrain TTL from modifying in any manner any security interest granted by TTL to the CDR lenders in the past. CA 1688/2013 is an application filed by ICICI Bank Ltd., which is the lead bank in the consortium of banks, seeking impleadment in the present proceedings.

3. When the company petition No.329/2013 was listed for hearing, on 16th September, 2013, the learned senior counsel appearing for TTL undertook before the Company Judge that the CDR scheme will not be given effect to till the disposal of the interim applications. When the matter was listed for arguments on 7th October, 2013, there was initially some dispute raised on behalf of the respondent as to whether any such undertaking was given to this Court, but after some time the learned senior counsel appearing for the respondent-company made a statement that if any such undertaking had been given earlier by the senior counsel who appeared before this Court on the earlier date, the same would be honoured. Thereafter CA 1529/2013, which is an application for stay of the CDR scheme was taken up for consideration. Even here initially there was some objection raised on behalf of the respondent as to whether CA 1529/2013 was in fact an application for stay of the CDR scheme. However, the learned senior counsel for the petitioner pointed out that a prayer for stay of the CDR scheme had been made in para 15 of the

company petition. After this statement was made, the parties addressed arguments as to whether the CDR scheme should be stayed, pending admission of the company petition. The position therefore is that this Court has not passed any order as to whether the company petition No.329/2013 should be admitted or not; arguments were heard at length only on the question whether the CDR scheme which was approved by letter dated 8th May, 2013 and was followed up by a Master Restructuring Agreement (MRA) dated 17th July, 2013 should continue or should be stayed till further orders.

4. Mr Rajiv Nayar, the learned senior counsel appearing for the petitioner put forth the following submissions in support of the application for stay of the CDR scheme :

(i) There is an undisputed debt which TTL is unable to pay. There is also acknowledgement of the debt several times. No reply was sent by TTL to the statutory demand notice, nor was any payment made in redemption of the bonds. There is thus a prima facie case for admission of the company petition. If so, there is also a strong case for granting stay of the CDR scheme.

(ii) The CDR scheme is heavily loaded in favour of the secured creditors giving rise to the apprehension in the minds of the petitioner that if the said scheme is implemented, there will be no assets left which can be liquated for meeting the liability of TTL to the bondholders.

(iii) Between 31st May, 2013 and 10th July, 2013, the respondent did not inform the petitioner about the proposed CDR scheme, even though by that time the default had occurred and the petitioner had also sent the statutory notice followed up by reminders.

(iv) After the judgment of the Supreme Court in Jitendra Nath Singh v. Official Liquidator (2013) 1 SCC 462, the very basis of any CDR scheme has come under a cloud or question because of the provision for pooling of securities and for inducting further securities into the CDR scheme. The CDR scheme in the present case makes provision for both pooling of securities and for inducting further securities to the prejudice of the interests of the petitioner.

(v) The CDR scheme is not a statutory scheme; in any case, the petitioner is neither bound by the scheme nor can he be compelled to join the scheme or await the outcome of the scheme.

5. Mr Nayar sought to elaborate the main objection to the CDR scheme, i.e. the provision for pooling of the securities and the provision for the induction of further security in the form of shares of a company by name Tulip Data Centre Pvt. Ltd. a wholly-owned subsidiary of TTL. He clarified that there is no objection to the security itself, but the

objection is to the pooling of the security amongst the secured creditors who are participating in the CDR scheme, which may deprive the petitioner of its legitimate rights to have the proceeds of the assets, even if not charged in favour of the petitioner, applied to the discharge of the FCCBs. He strongly relied on the observations of the Supreme Court in para 10 and 11 of the judgment in the case of **Jitendra Nath Singh** (supra) to the effect that a secured creditor of an insolvent company which is being wound up has only a right over the particular property or asset of the company offered to the secured creditor as a security and the unsecured creditors have rights over all other properties or assets of the insolvent company. He also invited my attention to para 8(a) of CA 1529/2013 in which there is a specific challenge to the pooling of the securities. The other strong objection to the CDR scheme is that it provides for further induction of security in the form of shares of Tulip Data Centre Pvt. Ltd., the argument being that but for such induction of the shares into the CDR package, they would have been available for being applied towards the discharge of the liability to the bondholders and thus the induction of those shares into the CDR package was detrimental to the interests of the petitioner.

6. The subsidiary objections of Mr Nayar, the learned senior counsel for the petitioner, are firstly that the CDR scheme cannot fix the redemption value of the FCCBs since the CDR lenders or those who participate in the CDR scheme are in no way concerned with the unsecured creditors such as the bondholders. It is pointed out that as per the CDR scheme, a cap of Rs.243 cores has been placed on the liability in respect of the FCCBs which is completely without the sanction of law and is a unilateral, unauthorised step taken by the CDR lenders. According to Mr Nayar, TTL has given only two options to the petitioner – either to accept the amount of Rs.243 cores in full settlement of the liability now or to accept fresh bonds of 10 years maturity for a total redemption value of USD 144.71 million, neither of which is acceptable to the petitioner.

7. Mr. Nayar criticised a few aspects of the CDR scheme which according to him were detrimental to the interests of the petitioner. He pointed that the MRA provided for certain sacrifices by the secured creditors participating in the CDR scheme, according to which the secured creditors sacrificed only the interest of Rs.238 cores on the loans advanced by them without any sacrifice of the principal amount, whereas the expectation of the CDR scheme is that the petitioner should sacrifice a sum of Rs.650 cores. He submitted that these terms are heavily loaded in favour of the respondent-company and the secured creditors participating in the CDR scheme. He placed strong reliance on the judgments of the Bombay High Court in Sublime Agro Ltd. V. Indage Vinters Ltd. (dated 19.3.2010, S.J. Kathwalla, J.) and **BNY Corporate**

Trustee Services Ltd. V. Wockhardt Ltd. (dated 11.3.2011, S.C. Dharmadhikari, J.), and the judgment of this Court in Citibank N.A. vs. Moser Baer (dated 17th July, 2013).

8. In support of the aforesaid submissions, Mr Nayar made elaborate references to the CDR scheme and the MRA.

9. The stay application was vehemently opposed on behalf of the respondent company. Mr. Sundaram, the learned senior counsel appearing for TTL pointed out that the winding up petition has not even been admitted and therefore utmost caution has to be exercised in passing any order on the application which seeks to stay the implementation of the CDR scheme. He pointed out that the usual parameters for stay, such as the existence of a prima facie case on merits, the balance of convenience and the irreparable loss or injury that could be caused to the parties ought to be taken note of in the present case also, with the additional aspect being factored in, namely, that the winding up petition itself is yet to be admitted. With this preface he contended that there was a marked difference between the judgment of this Court in the case of **Citibank N.A., vs. Moser Baer** (supra), relied upon by the petitioner, and the present case in the sense that Moser Baer relied upon earlier judgment of this Court in **Bipla Chemical Industries V. Shree Keshariya Investment Ltd.** (1977) 47 Com.Cas 211, which was a case which was not decided on the existence of debts. He submitted that a company court is a court of equitable jurisdiction and therefore while deciding on the stay application, it has to weigh all factors which would affect the justness and the equitable nature of the issue. He heavily relied on the judgment of the Supreme Court in **Hind Overseas Private Ltd. V. Raghunath Prasad Jhunjhunwalla & Anr.** (1976) 3SCC 259 and the judgment of this Court in **Laguna Holdings Pvt. Ltd. & Ors. V. Eden Park Hotels Pvt. Ltd. & Ors.** (2013) 176 Comp. Cas. 118. Mr. Sundaram submitted that both Bipla Chemical Industries and Moser Baer (Supra) were cases on the question whether the winding up petition should be admitted or not. The defence in those cases was that since there was already a CDR Scheme or a revival scheme in place, the winding up petition should not be admitted. This Court found no merit in the defence which, according to Mr.Sundaram, was the right view to take since at the stage of admission of the winding up petition the company court has to merely examine whether there was an admitted debt which the company is unable to pay. If these basic conditions are satisfied, it is the discretion of the court to admit the petition or not and in the two decisions of this Court cited above, the Court thought it fit to hold that the existence of a CDR scheme cannot be an impediment to the admission of the winding up petition, given that there was an admitted debt and an inability to pay

the same. According to Mr. Sundaram, the present proceedings are different, in the sense that we are not concerned with the question whether the winding up petition should be admitted or not; the petitioner seeks stay even before the petition is admitted, a situation which according to Mr. Sundaram calls for extreme caution and sensitiveness. Moreover, according to him, the bondholders are only speculators, having bought the bonds in the market at a discount and expecting to gain if the company goes into liquidation, and not genuine investors. He further contended that it is even doubtful whether the bonds can be said to represent a "debt" for the purposes of Section 433/434 of the Act.

10. Mr. Sundaram reminded me of the well-settled principle laid down in **Madhusudan Gordhandas V. Madhu Woollen Ind.** (1971) 3SCC 632 that the decision whether to wind-up a company or not should be taken by the company court after taking into consideration the wishes and views of all the stakeholders including the contributories, the secured creditors, the workmen as well as the customers. The company court is also bound to keep in view the economy of the country and the public interest that is likely to suffer if an order of winding up is made. According to the learned senior counsel, a majority of the creditors (almost 3-4th) in the present case desire that the company should revive. The CDR scheme is a step for the revival of the company. Irrespective of the question whether it is statutory or not, there can be no gainsaying that the scheme has the blessing of the Reserve Bank of India which has laid down certain broad principles and contours for the framing of the CDR Scheme. The scheme was initiated after a study conducted by Ernst and Young, who have made some general observations in their technical evaluation report indicating a positive outlook for TTL.

11. Mr. Sundaram further submitted that if the stay application is allowed and the CDR scheme is stayed, this Court would have reached a conclusion that there was a case for winding-up even before the winding-up petition is admitted, a course which would be a reversal of the proceedings and the normal procedure that the stay application would come up for consideration only if the winding up petition is admitted or at least notice is issued to the respondent. He therefore reminded this court several times, gently but firmly, that this Court should exercise extra caution and should have very strong and exceptional reasons as to why the CDR scheme should be stayed even before the winding up petition is admitted.

12. Mr. Sundaram has also pointed out several provisions in the CDR scheme and the MRA which are aimed at lightening of the debt burden of the respondent-company and the increase of its working capital, which would go a long way in reviving the liquidity of TTL.

13. The workmen numbering about 121 out of 3500 odd workers of TTL have filed CA No.1796/2013 for impleading. Mr. Wadhwa, the learned counsel appearing for the workmen strongly relied on the judgment of the Supreme Court in **National Textiles Workers'Union V. P.R.Ramakrishnanand & Ors.** (1983) 1SCC 228 and submitted that the workers have a right to be heard both before the winding up petition is admitted and thereafter before any winding up order is passed. He contended that the CDR scheme will ease the liquidity crunch faced by TTL. Pointing out that there is nothing in the CDR scheme which provides for retrenchment of workmen and arguing for a case for continuance of the scheme, Mr.Wadhwa submitted that the company court is a court of equitable jurisdiction and is not bound to order winding up of a company even if the conditions of Section 433 of the Act are satisfied. The power of the court to admit a winding up petition is discretionary. Mr. Wadhwa says that if that is so, the position would be a fortiori in the case of stay application, that too where the winding up petition is yet to be taken up for admission; the balance of convenience and the irretrievable loss or injury are loaded in favour of the continuance of the CDR scheme. He submitted that the petitioner is an unsecured creditor and all unsecured creditors have an inherent risk and the petitioner is no exception. The concerns of the workmen should be protected by the company court. He therefore pleaded that the implementation of the CDR scheme should not be stayed.

14. Mr. Sandeep Sethi, learned senior counsel appearing for the ICICI Bank Ltd. in CA No.1688/2013, which is the lead bank in the CDR scheme pointed out that there are 13 banks and financial institutions representing more than 2/3rd of the debt owed by TTL participating in the scheme and an amount in excess of Rs.2000 crores is due to them, the amount due to ICICI Bank Ltd. being Rs.670 crores. He read out and relied upon the salient features of the revival scheme, particularly the provisions relating to restructuring of debts. According to Mr. Sethi, the CDR scheme does address the concerns of the FCCB holders also and thus a holistic and macro view has been taken. He pointed out that the CDR scheme does not envisage any payment to any creditor to the prejudice of the other creditors and a moratorium on such payment has been imposed till March, 2015 and therefore at least till that time, no prejudice would be caused to the petitioner. He drew my attention to the impressive customer profile of TTL and submitted that once the CDR scheme is implemented and considerable progress is made, the effect thereof shall be felt in increased liquidity and possibility of sparing of funds enabling repayment of the FCCBs. With reference to the argument of the petitioner that the pooling of the securities would be detrimental to the interests of the bondholders, Mr. Sethi strongly denied that it

would be so. He argued that the implication of pooling of securities is only that the secured creditors would inter se make adjustments to their respective securities without in any way affecting the prospects of the unsecured creditors and therefore there is no room for the apprehension expressed on behalf of the petitioner that the pooling of the securities would diminish the prospects of the unsecured creditors getting any payment in respect of the bonds. He pointed out that in any case, even before the CDR scheme, all the creditors, in addition to the charge or security of a specific asset, had a pari passu charge on the other fixed or moveable assets and the pooling of securities did not make any effective change to the same.

15. In his rejoinder to the arguments of the learned senior counsel for the respondent-company and the ICICI Bank Ltd. as well as to the arguments of the learned counsel for the workmen, Mr. Rajiv Nayar summed up his arguments as follows: -

(i) The induction of the shares of Tulip Data Centre Pvt. Ltd. into the fold of the CDR scheme is wholly detrimental and prejudicial to the interests of the petitioner and should not be permitted. The sale of these shares is in the immediate contemplation of the CDR lenders and there is no provision in the MRA prohibiting the sale. The only provision is that the payment to the CDR lenders will be deferred till June, 2015 but the sale of shares can take place at any time;

(ii) The pooling of the securities contemplated by the CDR scheme deprives the right of the petitioner by reducing the asset-base of the respondent-company and creates a new class of creditors, which is impermissible;

(iii) The CDR scheme will negate the rights of the unsecured creditors in the case of the liquidation. The CDR scheme does not take care of the unsecured creditors of which the petitioner is one;

(iv) If the sale of shares takes place, against which there is no provision, it cannot be reversed by the Company Court; any fresh charges created upon the aforesaid shares cannot be undone by the Company Court; even a pledge of shares cannot be undone. In truth and reality, the CDR scheme is thus only a process of sale of the assets of the company for the benefit of the secured creditors; it is not a step towards revival of the company;

(v) The petitioner is not a speculator, as alleged by the

respondent, who has acquired the bonds at a discounted price and is hoping to derive huge gains if any payment is made by the TTL. On the contrary, even as per the offer circular, the fluctuation in the market price of the shares are bound to affect the bonds, but once the maturity date is crossed, without redemption, the risk factor cannot operate thereafter;

(vi) As per the circular issued by the Reserve Bank of India on 01.07.2013, even a bond is a debt instrument and, therefore, the argument advanced on behalf of the respondent-company that the bonds do not represent a debt qua Sections 433 and 434 of the Companies Act is without any merit;

(vii) The circulars issued by the Reserve Bank of India on 23.08.2001, 05.02.2013 and 10.11.2005 on the subject of CDR schemes have no statutory basis. Only the secured creditors who are parties to the CDR scheme are bound by the circulars;

(viii) The existence of a CDR scheme is not an impediment to the winding-up proceedings being admitted by the Company Court as held by the **Bombay High Court in Sublime Agro Ltd.** (supra) and **Wockhardt Ltd.** (supra) **The judgment of this Court in Citibank N.A. vs. Moser Baer** (supra) and in the **Hongkong and Shanghai Banking Corporation Ltd. V. M/s Surya Vinayak Ind. Ltd.** Dated 12.2.2014 (Bakhru, J.) are also to the same effect;

(ix) The projected profit and loss account shows a dismal picture of the respondent-company. TTL is a sinking ship. The technical evaluation and viability report submitted by Ernst & Young on which reliance was placed by the respondent and the ICICI Bank Ltd. has no credibility. The Directors' report does not inspire any confidence;

(x) The conduct of ICICI Bank Ltd., the lead banker, has not been bona fide in as much as it did not inform the Court about the existence of the CDR scheme even on 10.07.2013 though the winding-up petition was filed by the petitioner on 31.05.2013. The bank had a motive to conceal the fact from this Court because the MRA was pending approval on that date and the Court, if it had been informed, could have put the same on hold; and

(xi) The respondent-company has also not informed this Court about the oral undertaking given by its senior counsel to this Court on 16.09.2013 that it will not proceed with the CDR scheme. It was only the petitioner which brought it to the notice of this Court on 23.10.2013 and 24.10.2013; the respondent has thus not acted bona fide.

16. The parties have filed written submissions which have been taken into consideration.

17. At this stage, when the winding-up petition is yet to come up for admission, the only concern is whether there is any justification for staying the CDR Scheme, which is yet to be given effect to pursuant to the undertaking given to this court on behalf of TTL on 16-9-2013. There can be no dispute that the company court is not bound to order winding-up even if the conditions of sections 433 and 434 are satisfied, if it is found that winding-up will not be in the interests of all the stakeholders of the company, such as the creditors, customers, workmen, contributories etc. It is also open to the court to ascertain the wishes of the creditors under section 557 of the Act. The company court should welcome measures to revive the company rather than wind-up the company because the liquidation of the company is likely to affect prejudicially the stakeholders. The question whether the CDR scheme should be stayed is closely linked to this broad and general rule; a CDR scheme is aimed at reviving the company which has fallen into difficulties. Even assuming for the sake of argument that the CDR Scheme is not statutory in nature despite the backing and support extended by the RBI, and its implementation is purely voluntary or contractual and in its very nature cannot include the unsecured creditors, confined as it is to secured creditors, still one cannot overlook that it is an attempt by a majority of the secured creditors to revive the company and help it turn round and overcome the financial crisis. It must also be appreciated – as I do – that a CDR scheme has to perforce be based on an optimistic approach, provided the company continues to be viable with its substratum intact. The technical evaluation and viability report has to be accorded some credibility in this context and its authors accredited with some sense of responsibility, even making allowance for the fact that its highlights could possibly tend to be somewhat exaggerated. The report has therefore to be viewed as a document which provides the platform for implementation of further financial strategies and as affording merely a starting point of a series of optimistic measures to be put in place aimed at revival. The report is no doubt not a magical talisman, a wand that can make the past disappear. But it gives the impetus for everyone to take efforts jointly to make the past of the company disappear.

18. The predominant concerns of the petitioner, articulated with precision by Mr. Rajiv Nayar appearing for the petitioner, are: (i) the pooling of the securities and (ii) the induction of further security in the form of shares of TDCPL which would have been otherwise available for the unsecured creditors, including the petitioner. The answer to (i) given on behalf of the respondent-company is that even before the pooling of the securities the CDR lenders had, in addition to the asset secured to them, a first pari passu charge on all the other fixed assets of the company and a second pari passu charge on the moveable assets; the working capital lenders had a first pari passu charge over the moveable asset and second pari passu charge over the fixed assets. It is thus contended by the respondent that the assets available to the unsecured creditors cannot be said to be reduced because of the CDR scheme. With regard to the point No.(ii) above, the respondent contends that the petitioner's estimate that the shares of TDCPL would fetch around Rs.3,000 to Rs.4,000 crores is "outrageously exaggerated". My attention was drawn to the financial statements for the six months period ended 31.03.2013 in which the investment in the said shares is shown at Rs.214.01 crores. It is also submitted that TDCPL has a total secured debt of about Rs.350 crores including the debt of Rs.150 crores extended by ICICI Bank, against which 30% of the shares have been pledged. In addition another 30% of the shares are pledged to Edelweiss and Religare. According to the respondent, the realisable value of the shares in a distress sale would be much below the book value and will not be sufficient to clear the dues to the bondholders. The argument is that the induction of the TDCPL shares will not prejudice the interests of the bondholders, considering their low market value. Excpet the book value of Rs.214 crores, the other figures – given by the petitioner as the estimated market price of the shares – and the claim of the respondent that the shares would fetch a price much below the book value are not immediately capable of verification in the absence of any acceptable report by a competent person estimating the market value of the shares on a realistic basis.

19. I am unable to reject the apprehension of the petitioner as baseless, so far as these two points are concerned. Even if the respondent is correct in stating that the pooling arrangement does not cause any fresh prejudice to the interests of the bondholders, the fresh induction of TDCPL shares is a cause for concern. A robust commonsense approach would indicate that the CDR lenders apparently had some basis for the opinion that the shares are of considerable value; otherwise it is difficult to justify the decision to induct them into the CDR package scheme. When this move was made, I am fairly certain that the lender – banks would have taken pains to assess the real worth of shares and after

embarking upon such an exercise, they must have had enough justification in support of the move, in terms of the market value of the shares. I am unable to hazard a guess as to what precisely is the market value of the shares but at the same time I am fairly certain that their real worth must have been such as to justify the decision of the lender banks to induct them into the CDR scheme.

20. The question now is whether the mere existence of these two thorny issues should persuade the Company Court to injunct the respondent from proceeding further with the CDR scheme. That consequence seems to me to be somewhat unfair and disproportionate to the apprehensions of the petitioner. The respondent-company is a network infrastructure company providing network connectivity to 2000 cities and supporting crucial networks for the government, public sector banks and various private enterprises. It is one of the largest information technology infrastructure companies and provides core infrastructure and essential services. Its customer profile is an impressive array of electricity boards of several States, leading private sector and public sector banks, many airlines to which it provides connectivity, police departments of Jammu & Kashmir, Delhi, etc., National Informatics Centre (NIC) the States of Haryana, Assam, Madhya Pradesh, Maharashtra and Gujarat, who avail of the "State wide area network" provided by the respondent and so on and so forth. The respondent-company, like many other infrastructure companies, has not been able to match the cash flows with the requirements of the business or with its liabilities towards repayment of loans including the bonds on account of the fact that in all such companies which are capital intensive the revenues start flowing in only after a long gestation period. Between the time when the infrastructure is put in place (by which time heavy capital outlay would have taken place) and the time when the revenues start trickling in, every such company faces a cash crunch during which period there is high probability of defaults in loan repayments. Apparently, TTL being such an infrastructure company providing core and essential services in the IT sector has been caught in this period. The optimism generated by the technical evaluation and viability report has factored in this element; it is only a matter of time, according to the report, that the company would start earning revenues which would generate adequate cash inflows. The CDR package scheme enables the company to tide over this crucial period by providing for funding of interest liability, fresh infusion of working capital, moratorium on repayment of debt and a slew of other measures outlined in the CDR scheme and the MRA. In my opinion, it would be useless beyond a particular point to enter into the nitty-gritty of the figures mentioned in the CDR scheme and the MRA since one can adopt a selective approach and cull out figures which suit what one wants to say.

21. One of the contentions of the petitioner was that the CDR scheme is not viable, that its object is not to revive the company but to merely realize the assets of the company for the benefit of the secured creditors. I do not think that such a sweeping charge can be countenanced. As already pointed out, the CDR scheme has the support and backing of the RBI, which has issued several guidelines through various circulars and though it is doubtful whether the CDR scheme can be called statutory, yet it has a basic sanctity and reflects an attempt by the secured creditors to revive the company. The basic object of any CDR scheme is to restructure the debts of the company and to provide the company with the much needed time to equalise its revenues with its repayment obligations. Any company may at any time of its existence go through phases of financial crunch. In many cases it may be temporary and may be due to mismatch of the revenue and payment streams. The CDR mechanism certainly is not a guarantee that the company will overcome the financial crisis. It is an attempt, bona fide made, to assist the company get back on to rails. It attempts to infuse a sense of financial discipline and resilience into the company. However, the success of the CDR scheme depends on several factors, not the least of them being a sense of commitment on the part of the company to adhere to the terms of the scheme. The company cannot by any means be said to ignore the unsecured creditors and prefer the secured creditors by entering into a CDR scheme. Despite sincere efforts, it may happen that during the implementation of the scheme, it may not be able to adhere to certain projected parameters/figures. But one cannot doubt the sincerity on the part of the company merely because it has not been able to achieve the targeted or projected figures during the implementation of the scheme. The rationale is that the company must be given a fair chance to acquit itself well, survive the financial crisis and move forward to honouring its commitments.

22. Mr. Nayar also took objection to the effect that the CDR lenders have made a sacrifice of only Rs.238 crores by giving up the interest on the loans temporarily while at the same time they expect the bond holders to make a sacrifice of the entire amounts due on the bonds. The CDR scheme is confined to the secured creditors. They can only speak for themselves which is what they did when they announced a sacrifice of Rs.238 crores. By placing a cap of Rs.243 cores I do not think that the intention is that the balance of around Rs. 650 cores due to the bond holders should be sacrificed by them. The cap of Rs.243 crores has been placed in the CDR scheme as one of the bases for calculating the cash flows of the company. The CDR lenders certainly have no right to say that the balance of the amount should be sacrificed by the bond holders. While working out the possible cash flows of the

company certain assumptions have to be made both in respect of the revenues and the payments. One such assumption is a cap of Rs.243 crores on the liability to bond holders and the cash flows available to the company are worked out on that basis. It can hardly be said to imply that the bond holders should give up their claim to the extent of Rs.650 cores. In any case, it is only an option offered at best, and it is open to the petitioner to reject it.

23. Taking an overall view of the conspectus of the case it seems to me that the implementation of the CDR scheme cannot be stayed. That will not be in the interests of the company or the various stake holders; nor would it be in the interest of the bondholders. Mr. Nayar, strongly contended that the argument that the success of the CDR scheme would be beneficial to the petitioner and therefore the petitioner should not try to block it is unacceptable because the CDR scheme, even if it is implemented, appears to be only for the benefit of the secured creditors. But what this contention overlooks is that the bondholders are unsecured creditors, whereas the CDR lenders are all secured creditors. I must hasten to clarify that I do not mean to convey the idea that an unsecured creditor need not be paid back his dues. But having lent monies without any security, an unsecured creditor would appear to have taken a greater risk, as pointed out by Mr. Wadhwa, the learned counsel appearing for the workmen of the company, and therefore cannot complain when the secured creditors join together and take steps to revive the company. The revival, if successful, would benefit not only the secured creditors but also the bondholders who may expect to be paid their dues once the company revives. The bondholders, in my humble opinion will not be justified in claiming that the company should be willy-nilly wound up just because their dues have not been paid, even when steps for revival of the company are afoot. It is in this context necessary to recapitulate that it is the duty of the Company Court to welcome revival rather than affirm the death of the company. The respondent-company is an IT infrastructure company providing core infrastructure and essential services. It employs about 3500 workmen on whom some 20,000 lives are dependent. Staying the CDR scheme at this juncture would practicably amount to winding up of the company which step has to be taken only as a last resort. The legislative thinking on this aspect can also be gleaned from the provisions of the Companies Act, 2013 which is yet to come in force fully, though many of its provisions have been notified. Section 253 of that Act provides that the Company or 50% in value of its secured creditors may file an application before the Company Law Tribunal for a determination that the company be declared sick and for stay of the winding up proceedings to facilitate revival. Section 256 provides for appointment of an interim administrator to consider whether it is possible to revive and rehabilitate

a sick company on the basis of the draft scheme, if any, filed along with the application for revival and rehabilitation filed under section 254(1) by a secured creditor or the company itself. Thus the legislative thinking also appears to be to revive and rehabilitate the company if possible and save it from liquidation. This is legislative recognition of the judicial decisions.

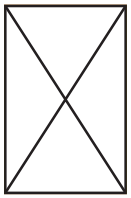
24. Before I conclude, it is necessary for me to explain my decision in Citibank, N.A. vs. Moser Baer rendered on 17th July, 2013, on which reliance was placed by Mr. Rajiv Nayar, the learned senior counsel for the petitioner. In the subsequent decision rendered by me on 3.4.2014 in the same case in CA No.2091/2013 I had dealt with my earlier decision in Moser Baer (supra) and distinguished it as follows:-

> *"21. The context in which the observations were made by me in paragraphs 16 to 18 of my order dated 17th July, 2013 needs to be appreciated. That was the admission stage of the company petition. The contention of the petitioner was that the discretion should not be exercised in favour of the respondent's company by refusing to admit the company petition merely because of the existence of a CDR scheme and the infusion of the funds by the consortiums of banks. For the purpose of admitting a winding up petition it is only necessary for the petitioner to make out a prima facie case for winding up. The petition was under Section 433(e) of the Companies Act. Under this provision the Court may wind up a company if the company is unable to pay its debts. It is a discretion given to the Company court to admit the winding up petition when it is shown that the company is unable to pay its debts. I had, while dealing with the company petition at the admission stage referred to the judgment of T.P.S. Chawla, J (as he then was) of this Court in Bipla Chemical Industries vs. Shree Keshariya Investment Ltd. (1977) 47 Company Cases 211. This judgment of the learned single judge relates to the admission stage and the governing principle was held to be that as soon as a prima facie case for winding up was made out, the petition ought to be admitted. It was in this context held by me that all the arguments advanced by the respondent-company that no winding up order should be made in view of the steps for revival initiated by the CDR scheme, would be relevant at a later stage when the court is faced with the question whether the winding up order should be passed or not. It was in this context observed by me that the merits of the CDR scheme cannot be gone into at the stage of admission of the winding up petition. I did advert to the fact that there was no manageable or objective yard stick by*

> *which to judge the efficacy of the CDR level scheme. But that was only in deference to the argument that the existence of the CDR scheme is sufficient to preclude the admission of the winding up petition. It was in that context observed by me, taking care to clarify that it was only a prima facie observation, that the quantum of funds to be infused by the company into the CDR scheme (Rs.150 crores) does not compare well with the outstanding liability of around Rs.863 crores due to the petitioner as trustee for the bond-holders. I further proceeded to make a distinction between cases where the company has substantial defences and cases where the argument is only that there are attempts at reviving the company. To explain further- as it is my duty to do so- at the stage of admission one has to examine whether the company has substantial defence and not whether the company would in future be able to pay the debts because of the CDR scheme or similar revival attempts. The case of the respondent-company did not measure up to any substantial defence at the admission stage, which was considered by me to be sufficient and relevant to admit the petition. The existence of the CDR scheme was considered by me to be not relevant at the admission stage. I referred to two judgments of the Bombay High Court (supra) wherein it was held that the existence of a CDR scheme was held not to be an impediment to the admission of a winding-up petition. Hence I admitted the petition."*

25. The result is that there will be no stay of the CDR scheme and the company is at liberty to implement the same forthwith. The undertaking given to this Court on 16.09.2013 stands discharged. However, I direct that though there can be a pooling of the securities, any sale of a pooled security shall be subject to the orders passed by this Court and prior approval of such sale shall be taken from this Court. In respect of the shares of TDCPL, though they can be inducted into the CDR scheme, any sale of the said shares or any charge, pledge or security interest created upon them shall be subject to the orders of this Court and before creating any such charge etc. or disposing of the shares, the company shall take the prior permission of this Court. This shall constitute sufficient protection of the interests of the bondholders.

26. CA No.1529/2013 is disposed of subject to the aforesaid terms. CA No.1688/2013 is allowed. The company petition (CP No.329/2013) and other connected applications are directed to be listed before the roster bench for directions on 5.5.2014.



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— Section 11 and 34—Indian Registration Act, 1908—Section 17(1)(d) and 49—Indian Stamps Act, 1899—Section 35—Two premises were taken on lease by Respondent— Lease agreements were executed on a Rs.100/- stamp paper each and were unregistered—Lease agreements stipulated that term of lease shall be 12 years—As per Petitioners, lease agreements also stipulated that there would be a 36 months lock-in-Period w.e.f. 16.04.2007 to 15.04.2010 in which neither of parties could terminate lease—As per Petitioners, Respondent in violation of terms and conditions of lease agreement, by letter dated 20.01.2009, terminated lease agreement, paid rent only upto 31.01.2009 and abandoned shops on 30.03.2009—Petitioners before Arbitral Tribunal claimed rent for month of February and March, 2009 and also for unexpired period of lock-in-period—Arbitral Tribunal held that Respondent liable to pay rent for months of February and March, 2009 at agreed rate of Rs.1,24,000/- besides service tax and maintenance charges—With regard to issue pertaining to objection of Respondent that claim of Petitioner for payment for unexpired lock-in-period was hit by provisions of Indian Stamp Act and Indian Registration Act, it held that lease deed was insufficiently stamped and it compulsory required registration

and as it was unregistered, it was inadmissible in evidence and clause of lock-in period could not be enforced—Award challenged before High Court—Held—A document compulsorily required to be registered but not being So registered cannot be used as evidence except for any collateral purpose—A clause in a lease deed fixing or stipulating a term of lease or a fixed term of lock-in period is not a collateral purpose—Said clause would be one of main clauses of lease which in absence of registration would be inadmissible in evidence and unenforceable in law—Arbitral Tribunal has rightly held that clause vis-a-vis lock-in period cannot be called a collateral purpose and tenancy between parties was not fixed term tenancy but a month to month tenancy terminable by a notice on either side—Finding by Arbitral Tribunal that Respondent had vacated premises w.e.f. 01.04.2009 is purely factual—Powers exercised by Court while deciding objections under Section 34 of Act are not appellate powers—Court does not sit as a Court of appeal—Findings of Arbitral Tribunal are findings in a according with settled judicial principles and cannot be interfered with.

Bharat Lal Maurya v. Godrej & Boyce Mfg. Co. Ltd *2188*

ARMS ACT, 1959—Sec. 27—Allegations against the appellant-Sahil, as revealed in the charge-sheet, were that on 05.06.2010 at about 09.30.p.m. opposite house No.3266, Ranjeet Nagar, he and his associates (not arrested) attempted to rob complainant-Ajay Kumar of laptop at pistol point. In the process of committing robbery, he voluntarily caused hurt to complaint's son-Amit—The prosecution examined 13 witnesses to substantiate the charges and to establish the guilt of the appellant. In 313 statement, the appellant pleaded false implication and denied complicity in the crime. The trial resulted in his conviction as aforesaid. It is relevant to note that the appellant was acquitted of the charges under Section 25 Arms Act in the absence of sanction under Section 39

Arms Act and the State did not challenge the said acquittal—Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of interested witnesses without independent corroboration. She forcefully argued that it was a case of mere quarrel and the appellant was falsely implicated in this case. Learned APP urged that the impugned judgment is based upon the cogent and reliable testimonies of the complainant and his son who had no prior animosity to falsely implicate—The witness deposed that he had seen the pistol at the spot and also at the police Station. He denied the suggestion that the accused was not present at the spot or was falsely implicated in the case—The appellant did not give any specific reasons to remain present near his house without any particular purpose—The appellant did not give plausible explanation to the incriminating circumstances in 313 statement—The appellant, did not examine any witness to prove the defence taken by him for the first time in his statement under Section 313—The prosecution has proved on record FSL report (Ex.PW-13/D) which showed that the pistol recovered from the accused was in working order. It is true that subsequently when the pistol was unloaded, it was found empty. It has come on record that the appellant was not at the time of commission of the crime and his associates succeeded to flee the spot. They were also allegedly armed with various weapons. Simply because the pistol (Ex.P-1) recovered from the accused was empty at the relevant time, it cannot be said that it was not a 'deadly' one particularly when Sahil was convicted under Section 27 of the Arms Act for using a weapon unauthorisedly without licence in violation of provision of Arms Act—Minor discrepancies and improvements highlighted by the appellant's counsel do not affect the basic structure of the prosecution case. The victims were not aware that the 'deadly' weapon with which the appellant was armed was loaded or not. 'Butt' of this weapon was used to cause hurt to the victim-Amit. For the purposes of Section 398 IPC, mere possession of the 'deadly' weapon

is sufficient. This Court find no substance in the plea that Section 398 IPC is not attracted and proved—disposed of.

Sahil v. State *2306*

— S.25 (1B)—IPC—S.307/452—Accused acquitted under IPC but convicted U/s.25 of Arms Act—in appeal arguments confined to the quantum of sentence. Held, where the complainant failed to identify the accused as assailant and accused has been acquitted of graver offences under IPC, and is not a previous convict, lenient view is taken and accused sentenced to period already undergone.

Santosh Kumar v. State of Delhi *1668*

— S. 25—Appeal against conviction—Accused apprehended at a short distance from the spot and found in possession of country made pistol with live cartridges—FIR lodges promptly—No animosity between complaint and accused—Accused not even a resident of Delhi Minor contradictions and small improvement in the testimony of the witnesses do not effect the basic structure of the prosecution case—Since the accused apprehended after the incident at a short distance there was no requirement of TIP. Acquittal of co-accused—Does not necessitate acquittal of appellant where there are specific and cogent evidence of his involvement—It is always open to Court to differentiate the accused who is convicted from those who are acquitted. S. 397 IPC—Describes minimum sentence for improvement and does not prescribe fine, therefore, imposition of fine U/s. 397 IPC is not permissible.

Rizwan @ Bhura v. State of Delhi *1942*

CCS (CCS) RULES, 1965—Rule 10 (1), (6) and (7) and Rule 14—Respondent in present case was placed under suspension vide orders dated 14th March, 2010 with immediate effect—Respondent's suspension was reviewed on 8th June, 2012 whereby his suspension was extended for a period of another three months—Next review in accordance with law was on

7th September, 2012—Admittedly, petitioner failed to review suspension of respondent and undertook this exercise only on 22nd November, 2012 and vide order dated 23rd November, 2012 respondent's suspension was extended for a further period of six months—Respondent challenged action of respondent in not permitting him to join duty and prayed that period beyond 12th September, 2012 be considered as duty for all purposes—Central Administrative Tribunal allowed prayer of respondent challenging extension of period for which he was suspended when disciplinary proceedings were contemplated against him—Writ petitioner assailed order of Tribunal before High Court—Held—Review of respondent's suspension on 8th June, 2012 was within period prescribed under Rule 10 (6) of CCS (CCA) Rules, 1965 and petitioner possibly cannot make any grievance with regard to extension of suspension till 8th September, 2012—However, second review effected on 22nd November, 2012 was way beyond period prescribed under Rule 10 (6) and (7) of CCS (CCS) Rules, 1965 and therefore was illegal and not sustainable—While considering matter, Tribunal has overlooked fact that respondent's suspension was actually reviewed on 8th June, 2012 within period prescribed by law—To extent that impugned order grants relief qua suspension upto 7th September, 2012 as well, there is error in impugned order—Order of Tribunal modified and substituted—Petitioner directed to commute amounts payable to appellant in terms of present order and inform respondent about same within for weeks.

National Council of Education v. Ved Prakash *1750*

COURT FEES ACT, 1870—Section 7(x)—Specific Relief Act, 1963—Section 19 (1)(b)—Suit for specific performance of Agreement to Sell along with cancellation of five sale deeds which have been executed after the agreement to sell. Application seeking rejection of plaint on the ground that the plaintiff has not correctly valued the suit for the purposes of

Court fee and jurisdiction. As per the applicant the Plaintiff had sought cancellation of sale deeds which are registered at different values and since Plaintiff is not in possession of the property., the suit should have been valued on the consideration mentioned in the respective sale deeds. Plaintiff states that Plaintiff had to value the suit for substantive relief of specific performance and the consequential reliefs of cancellation are covered in the main relief. Held—The relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of subsequent transferees is only an ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant in favour of the Plaintiff. Consequently there will be no question of payment of ad valorem Court fees in respect of said relief. The said relief claimed would be superficial and unnecessary. Application dismissed.

Jafar Imam v. Devender Chauhan & Others 1917

CODE OF CIVIL PROCEDURE, 1908—Suit for the permanent injunction restraining infringement of trade marks and Copyrights, seeking damages and rendition of accounts—Defendants despite service failed to appear—Ex-Parte evidence led on behalf of the plaintiffs to Show that they are the subsidiares of the Walt Disney Company and have established themselve as creators and distributors of highly creative and entertaining animated motion pictures and television programes and whose unique characters namely Mickey Mouse, Minnie Mouse, Donald Duck, Daisy Duck, Goofy Pluto, Winnie the Pooh, Tigger, Hannah Montana, etc. stand registered as the trademarks of the plaintiffs across many countries including India—Allegation of the plaintiff that the defendants have infringed the copyrights and trademarks of the plaintiff by selling, trading and distributing a variety of bags with the plaintiff's trademarks and copyrights protected characters

affixed on them—Report of the Local Commissioner appointed by the court confirmed that on inspection of the premises of the defendants, 40 school bags bearing the plaintiff's trademark were found—Held: Affidavit by way of evidence filed on record alongwith documents remains unrebutted. Report of the Local Commissioner supports the case put forward by the plaintiffs. Hence plaintiff is entitled to the injunction sought. As regards the damages to be awarded, since the defendants has deliberately stayed away from the present proceeding an inquiry into the accounts of the defendants for determination of damages cannot take place. However plaintiff still entitled to the punitive damages to the tune of Rs. 2 Lacs for a defendant who choose to stay away from the proceedings of the court, should not be permitted to enjoy the benefits of evasion of court proceeding.

Disney Enterprise, inc & Anr. v.Dhiraj & Anr. 2150

— Order Vll Rule 11, Order XXXIX Rules 1 & 2, Order XLI Rule 22, Order XLIII Rule 1, Section 151—Delhi High Court Act, 1966—Section 10—Trade Marks Act, 1999—Section 10 & 134(2)—Respondents filed a suit seeking a decree of permanent injunction to restrain defendants/appellants from manufacturing, selling etc. alcoholic beverages or any other allied goods under impugned trade mark composing of 'Real' logo and label or any other trade mark/lable deceptively similar to plaintiff's trade mark comprising 'RICARD' logo and label which amounts to infringement of Registered trademark of respondents/plaintiffs and other connected reliefs-During pendency of appeal, defendants/appellants showed a new lable to Court and learned Single Judge concluded that old lable which was used by appellants was prime facie identical to label of respondents and restrained appellants from using old label which was subject matter of present suit during pendency of said suit—Regarding New label produced in Court, it was held that it still contains some essential features similar to respondents' label and in order to avoid any confusion or deception, appellants were allowed to use New lable subject

to condition of Change of Navy Blue Colour—Order challenged in appeal before DB—Plea taken, second part of injunction order permitting appellants to use New label subject to condition of change of Navy Blue colour strips is materially erroneous and needs to be set aside—Respondents registered Trademark does not have any colour and hence to that extent, impugned order is misplaced as it has injuncted appellants from using colour Navy Blue—Held—A look at mark/lable in question would show that it cannot be said that New lable which is presently being used by appellants is identical to mark/ lable of respondents—Essential features of two marks are different —Apart from blue bands used at top and bottom of lable, there is no other similarity in two marks—Essential feature of brand of respondent is circle shaded in red with number '45' Which is fused with a set of swirling scrolls/ arms on either side—None of these features are reproduced in New brand/mark being used by appellants—Product of respondent is anise aperitif which is priced at more than Rs. 2, 000/- per bottle—Class of customers purchasing same would be entirely different from class who would purchase IMFL whisky of appellant which is priced around Rs. 60/- per bottle—New brand uses mark/trade logo of appellant's 'Real' very distinctively and clearly—Prime facie, it is not possible to stay that New label which was for first time filed in court by appellants on 16.12.2008 infringers trademark of respondents—Order of learned single judge modifies permitting appellants use New mark/lable as filed by appellants in court on 16.12.2008 using Navy Blue colour.

Real House Distillery Pvt Ltd. & Anr. v. Pernod Ricard S.A. & Anr *2169*

— Section 20—Territorial jurisdiction—Principal office of defendant situated at Delhi —Entire cause of action arose at Udaipur where branch / subordinate office of the defendant situated —No part of cause of action arose at Delhi.

Swastik Polytek Pvt. Ltd. v. Oriental Insurance Company *2181*

— Order 7 Rule 11 and Section 115—Delhi Land Reforms Act, 1954—Section 33 and 42—Contract Act, 1872—Section 23—Limitation Act, 1908—Article 24,27,47 and 55 of Schedule—Trial Court dismissed petitioner's application for rejection of plaint—Order challenged before High Court — Plea taken, impugned order suffers from material irregularity : suit was barred by Section 33 and 42 of DLR Act, 1954 therefore Court lacked jurisdiction and case is barred by limitation—Held—Trial Court has considered both objections in impugned order — It has clearly reasoned that both these objections are mixed question of facts, which could be decided after a trial—It is not indeed it cannot be - contention of petitioner herein that issues are pure questions of law de hors facts of case—It cannot by any stretch of imagination be held that question of : (i) whether a document—which is basic of suit—is illegal in view of Delhi Land Reforms Act, and (ii) whether suit was filed on 01.08.2011 or on 02.08.2011 are only question of law—Latter question is ex facie issue of fact—Given same, impugned order, which rejects application under Order Vll Rule 11 and relegates party to trial on issues raised in application, is not one that warrants interference under Section 115 of Code—This Court finds no reason to interfere with impugned order—Petition is without merit and is accordingly dismissed.

Sanjay v. Ajit Singh Bajaj *2246*

— Suit for partition and permanent injunction between brothers and sisters. Parents died intestate. Preliminary decree passed defining share of the parties as 1/5th each. Since suit property only 100 sq. yards, parties unable to divide the same by metes and bounds. Held—Final decree passed defining share of all the parties as 1/5th each. Parties to endevourro sell the suit property within 3 months and in case they are unable to parties will have the right to execute the decree.

Munishwar Kumar v. Rakesh Kumar & Ors. *2081*

— Order 1 Rule 10—Society which was the transferor/seller filed application for impleadment—Whether seller/transferor of the

property is a necessary party in a suit by transferee to enforce its rights under a transfer deed against third parties—Held—Under normal circumstance transferor/seller is not a necessary party, however present case is peculiar. The entire case of the plaintiff revolves around the various resolutions passed by the Society with regard to the acquisition of land, preparation of the layout plan. The dispute pertains to the land allotted to the society, its demarcations, the plots originally sanctioned and allotted. Dispute also pertains to location and area sold to the Plaintiffs by the Society. These questions cannot be completely and effectively adjudicated upon in the absence of the Society. The present of Society and its role at various stages would have to be examined at the time of adjudication of the various disputes that are arising in the present suit. Discretion to add a party can be exercised by a Court either suomotu or on an application of a party to the suit or a person who is a party. Society's application for impleadment allowed.

D.V. Singh and Another v. Municipal Corporation of Delhi & Another *1601*

— Order XXXIX Rule 1 and 2, Order XXXIX Rule 4: Suit for permanent and mandatory injunction. As per the family settlement Defendant no. 1 had right to reside on the ground floor and enjoy rental income from the second floor. Plaintiff no. 2 was to be absolute and exclusive owner of ground floor. Plaintiff no. 1 was to be absolute and exclusive owner of second floor. Defendant no. 2 was to be absolute and exclusive owner of first floor. Plaintiff 1 and 2 are not residing in the suit property. Defendant no. 2 claims that drive way, roof terrace, servant quarter and any other common area or space was to be in joint ownership of residents of the property, i.e. Defendant no. 1 and 2. Plaintiffs had given power of attorney in favour of Defendant no. 2. Plaintiffs contend that the Defendant no. 2 by misusing the power of attorney, obtained sanction to build third floor and had started construction. Plaintiffs further contend that the Defendant no. 2 had no right,

title or interest on the terrace, as per the family settlement. Application seeking ad interim injunction against construction—Held: For grant of interim injunction the Plaintiff has to satisfy three requirements. Prima facie case, balance of convenience and irreparable injury. The balance of convenience tilts substantially in favour of Defendant. Construction being raised is lawful construction. Defendants are raising construction after sanction of the addition/alteration plan. Plaintiffs executed a registered power of attorney giving amongst other, the power to represent the Plaintiffs and defendant no. 1 before the statutory authorities and also with the right to make additions/alterations to get the building plan sanctioned from MCD or concerned authority. Defendants have submitted that they are not claiming any amount nor would claim any amount for raising the construction from the Plaintiffs in case Plaintiffs were to succeed in their claim. Defendants are agreeable to depositing fair rental in Court. The stage of construction is such that the property cannot be left as it is. In case the Defendant is directed to remove the construction raised there would be complete wastage of the amount spent on the construction by Defendant no. 2. Balance of convenience tilts substantially in favour of the Defendants. Defendant no. 2 permitted to complete construction and occupy the floor after construction. Defendant no. 2 shall not create any third party right. From the date of completion the Defendant no. 2 shall deposit a sum of Rs. 50, 000/- in Court. In case the Plaintiffs succeed apart from being entitled to the rental the Plaintiffs shall be entitled to payment of fair cost of construction. Defendant no. 2 shall not claim any equities. Interim order modified.

Meera Jain & Another v. Sundari Devi Garg & Ors. *1608*

— Order VIII Rule 1—Order VIII Rule 10—Appeal against order of Joint Registrar condoning delay of 129 days in filing WS despite a finding of neglect and despite the WS being

defective. Held—The application seeking condonation of delay was neither signed by the Defendant No. 1 nor supported by an affidavit of the Defendant No. 1. If there were any facts or circumstances leading to the delay in filing of the Written Statement, which were within the personal knowledge of the advocate, the advocate could have filed the application with a supporting affidavit. However, in the present case, the facts pleaded for condonation of delay are attributable to the Defendant No. 1 and within the personal knowledge of the Defendant No. 1. So the application seeking condonation of delay could not have been signed alone by the advocate without signatures of the Defendant No. 1 and could not have been supported by an affidavit only of the advocate for the Defendant No. 1. This application is no application in the eyes of law and, accordingly, the same could not have been taken cognizance of by the Joint Registrar. Held Further—The Written Statement filed on behalf of the Defendant No. 1 cannot be said to be a validity signed and executed Written Statement. The Written Statement is dated 30.10.2012. It is not signed by the Defendant and does not contain any verification. It is supported by an affidavit of the Defendant No. 1 dated 30.09.2012, which was prior to the date of Written Statement. The affidavit in support of the Written Statement has to confirm the contents of the Written Statement. If the affidavit is executed and attested prior to the preparation of the Written Statement, the affidavit cannot be taken as an affidavit in support of the Written Statement. The purpose of verification is to fix responsibility on the party or person verifying and to prevent false pleadings from being recklessly filed or false allegations being recklessly made. Since the Written Statement filed on behalf of the Defendant No. 1 is without her signatures and any verification, it is clearly defective. However, the defect of signatures and verification in pleadings is an irregularity which can be remedied. It is not fatal but is a curable defect. If defects in regard to the signature, verification or presentation of plaint are cured on

a day subsequent to the date of filing the suit, the date of institution of the plaint is not changed to the subsequent date. Held—The Written Statement filed on behalf of the Defendant No. 1 is defective and the application is not application in the eyes of law. Accordingly, the chamber appeal of the Plaintiff is allowed. The order dated 06.09.2013 of the Joint Registrar is set aside and the application seeking condonation of delay being is dismissed as defective. Held—The ends of justice would be served in case an opportunity is granted to the Defendant No. 1 to cure the defects in the Written Statement and to file a proper Written Statement duly signed, verified and supported by her affidavit and further and opportunity is also granted to file a proper application seeking condonation of delay giving proper details, duly signed and supported by her affidavit.

— Indian Easement Act, 1882—Section 52—Indian Evidence Act, 1872—Section 116—Suit for possession, damages and mense profit. Defendants claim that Plaintiff have no title to the suit property as documents produced by them are merely general power of attorney, agreement to sell etc. Further contend that property purchased benami by father of Plaintiff in name of minor children being Plaintiff and his brother. Defendants contention is that Defendants were residing with the father in joint possession of the property with the permission of the father and to the exclusion of the plaintiffs and that defendants are entitled to claim adverse possession Held—As admittedly the defendants came into possession with permission granted by the father of the plaintiffs who permitted them to enter/ use the premises for a limited period, the defendants were using the premise as Licensee. As the father has died, the License has been terminated. Defendant cannot challenge the title of the licensor now at this stage after 14 years. The written statement fails to bring out any title or right in the defendants

to continue to retain possession. Defendant taking frivolous and vexatious defense for the purpose of prolonging their illegal possession of the suit property. Suit decreed in favour of Plaintiff.

Laxman Singh & Ors. v. Urmila Devi & Ors. 1649

— Order XXXIX Rules 1 and 2 CPC—Application seeking injunction to restrain the defendants etc. from manufacturing or offering for sale medicinal or pharmaceutical preparations under the trademark 'AMAFORTEN' or any other mark deceptively similar to the plaintiff's registered trademark 'ANAFORTAN'—Contention of the defendants that the trademark of the plaintiff is neither registered nor properly stamped and therefore is liable to be impounded u/s 33 of the Stamp Act and that even otherwise the relief sought is barred u/s 28(3) r/w section 30(2)(e) of the Trademark Act in as much as the defendant is the registered proprietor of the impugned mark 'AMAFORTEN' and is also protected u/s 33 and 34 of the Trademarks Act and further the defendants being situated outside New Delhi and no material brought on record to show that even the plaintiff had its office in Delhi, the Court has no territorial jurisdiction. Held: In view of the specific averments in the plaint that the plaintiff is carrying on business in New Delhi and has a sales office in Delhi, this Court had territorial jurisdiction to entertain the suit. As regards the deficient stamp fees, no cogent submissions made by the defendant and hence not possible to decide the issue at this stage. Further well settled law that sections 28(3) and 30(2)(e) do not bar a suit for injunction even where two trademarks are registered. Even otherwise an action for passing off would be maintainable. The trademark of the plaintiff registered in 1988 and it is a much prior user in point of time in the said trademark than the defendant whose trademark is registered in the year 2009 only. The trademark of the defendant is also phonetically, visually and structurally similar to that of the plaintiff and prima facie it appears that the defendant had

dishonestly sought to take advantage of the name and reputation of the plaintiff's trademark and hence, the interim injunction sought for granted.

Abbott Healthcare Pvt. Ltd. v. Raj Kumar Prasad & Ors. 1734

— Order VI Rule 17—Order XLI Rule 5—Section 11, 13, 114 and 151—Plea taken, issue of tenant being put to terms was already considered and decided by Appellate Court—Appellate Court cannot reopen issue. Whether on its own motion or on application of a party—This is in view of fact that Order XLI Rule 5 is for purpose of protecting interest of parties, not to further interest of one party to detriment of other—Per contra plea taken, tenant who continues in property after order of eviction stays at sufferance of landlord and ought not to be allowed to enjoy premises at contractual rate of interest—Held—Principle of Res-judicata by its very nature, is intended to provide finality to judicial orders, ought to not lightly be applied to interim arrangements/orders—That not all interlocutory orders ought to not be subject to rigours of res judicata is a principle not merely of convenience in administration of justice, but also of a long standing, well established and judicially as well as a legislatively recognised rule of law—Order of Appellate Court directing deposit of amount per mensem cannot be subject to principle of res judicata, being not final and being amenable to further modification—These orders would doubtless not be modified without sufficient cause for such modification by Court either on its own motion or upon application by party—When initial condition of deposit was to be of reasonable user charges commensurate with market rate, it cannot, by any stretch of imagination, be said that interest of landlord remains protected when quantum of deposit remains unchanged for over twenty years—Order under Order XLI Rule 5 imposing a condition of deposit/payment of reasonable user charges for continued user of premises from date of order of eviction is not final

and may be altered at a later stage in proceedings—This may be done by Appellate Court on its own motion or on application of either of parties—Alteration may be either to increase or decrease amount earlier set and will depend upon facts and circumstances of case—No straitjacket formula can be laid down as to how often or to what extent quantum ought to be modified; same shall be at discretion of Appellate Court to be decided based on specific circumstances attendant to each case—However, no such application could be entertained unless party seeking modification is able to show changed circumstances as would warrant modification.

Federal Motors Pvt. Ltd. v. *Atma Ram Properties Pvt. Ltd.* *1810*

— Order XLI Rule 5—Plea taken, first order of Appellate Court imposing condition merged with order of Supreme Court, condition of deposit imposed earlier may be modified only by Supreme Court—Held—Nothing will bar either party from reapplying to Court seized of appeal seeking that grant of stay, condition to be imposed therefor, and/or quantum of deposit be reconsidered- even if same were approved, modified or set aside in appeal or revision prior to such second and/or further application—Where such new and fresh facts are indeed shown—Doubtless facts that did not exist or could not be ascertained despite exercise of due diligence at time when original order was made—Court seized of appeal would be bound to consider new facts and pass a fresh order as to either grant of stay, condition to be imposed therefor, and/or quantum of deposit, as may be prayed for.

Federal Motors Pvt. Ltd. v. *Atma Ram Properties Pvt. Ltd.* *1810*

— Order VIII Rule 5 and Order XII Rule 6—Appellant challenged judgment and order of Family Court whereby his marriage with respondent—Contracted as per Muslim Personal law was decreed to have been dissolved due to latter's subsequent

apostasy—Plea taken, impugned order is invalid and contrary to express provisions of both Muslim personal law as well as Act—Act makes it amply clear that adjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslin personal law—Held—Neither could it be said that apostasy per se does not dissolve a marriage governed by Muslim personal law nor could it be said that Act makes any change to this general law—Plain meaning of Section 4 of Act would be to effect that even if prior to passing of Act apostasy would have operated to dissolve marriage *ipso facto* subsequent to coming into force of Section 4 marriage is not ipso facto dissolved—All that Section 4 had done is to introduce intervening mechanism, but to reach same conclusion, i.e. that apostasy would not be itself dissolve marriage and some further substantive act would be required to be done in this regard; substantive act being filing of a suit seeking declaration as to dissolution under Section 2(ix) of Act—A woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under Section 2(ix) seeking dissolution of marriage—Respondent was initially professing Hinduism and had embraced Islam prior to marriage, and then reconverted to Hinduism—Thus, she falls within exemption under second proviso to Section 4; in a way, she walks out of constraints of Section 4—Thus, in present matter, marriage stands dissolved from date on which respondent apostatized from Islam—Respondent made such public declaration that she had re-embraced Hinduism and produced a certificate from organization which facilitated it—She reiterated this factum in plaint and then deposed so in affidavit in petition—No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy—First substantive defence of appellant that petition was filed contrary to terms of Section 4 of Act is unambiguous admission as to factum of reconversion—Marriage of respondent who was originally a Hindu is regulated not by rule enunciated in Section 4 of Act by rather pre-existing Muslim personal law which dissolves

marriage upon apostasy ipso facto—This Court finds no merit in appeal.

Munavvar-UL-Islam v. Rishu Arora & Rukhsar *1886*

— Order VII rule 11—Appellant had filed suit seeking perpetual injunction against dispossession from suit property and declaration that restoration allotment of same by Lt. Governor was illegal—Learned Single Judge dismissed suit on ground that plaintiff (Appellant herein) had no title to suit property—Order challenged in appeal before DB—Plea taken, application u/O VII rule 11 ought to be decided based on averments in plaint alone—Learned Single Judge had incorrectly proceeded upon assumption that possession of suit premises were taken pursuant to acquisition without giving opportunity to appellant to prove his case—Per contra plea taken, it is ex facie evident from documents filed with plaint that suit property was given to Society pursuant to acquisition and under lease agreements—It is a logical sequitur therefrom that Society would be bound by terms thereof including prohibition from selling—In circumstances, no title could have flown from Society to appellant—Where plaint itself discloses no cause of action suit ought to be dismissed and there is no infirmity in action of learned Single Judge in doing so—Held—Case of appellant is that possession of suit property was never taken pursuant to agreement and Society had acquired title, possession and/or interest therein from the original owners pursuant to settlement and not acquisition—It is this that appellant seeks to set his title up—This cannot be set to be a case of clever or artful drafting to create illusory cause of action that ought to be nipped in bud under O VII rule 11—Duty of Court under O VII rule 11 is to consider whether averments in plaint taken as a whole, along with documents filed therewith, if taken to be true, would warrant a decree in favour of plaintiff—This Court is of view that in instant case, averments and documents would so do—De hors a patent

contradiction, i.e., one ascertainable ex facie from record, without involving any lengthy or complicated argument or a long drawn out process of reasoning, between averments and documents, Court considering application under O VII rule 11 ought to not lightly ignore averment in plaint—Conclusion of learned Single Judge that Society acquired title/interest in suit property under lease agreements is unwarranted at stage of considering application under O VII rule 11—Plaint does disclose a cause of action which ought to be considered in trial—Impugned order is set aside.

Pankaj Bajaj v. Meenakshi Sharma & Ors. *1905*

— Order VII Rule 11—Court Fees Act, 1870—Section 7(x)—Specific Relief Act, 1963—Section 19 (1)(b)—Suit for specific performance of Agreement to Sell along with cancellation of five sale deeds which have been executed after the agreement to sell. Application seeking rejection of plaint on the ground that the plaintiff has not correctly valued the suit for the purposes of Court fee and jurisdiction. As per the applicant the Plaintiff had sought cancellation of sale deeds which are registered at different values and since Plaintiff is not in possession of the property., the suit should have been valued on the consideration mentioned in the respective sale deeds. Plaintiff states that Plaintiff had to value the suit for substantive relief of specific performance and the consequential reliefs of cancellation are covered in the main relief. Held—The relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of subsequent transferees is only an ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant in favour of the Plaintiff. Consequently there will be no question of payment of ad valorem Court fees in respect of said relief. The said relief claimed would be superficial and unnecessary.

Application dismissed.

Jafar Imam v. Devender Chauhan & Others 1917

— Specific Relief Act, 1963—Section 14, Indian Contract Act, 1872—Section 24, 73—Suit for declaration and damages that termination of his services is illegal, arbitrary and in violation of the terms of employment and principles of natural justice. Plaintiff joined at the post of General Manager and continued to work till 02.01.2009. On 02.01.2009 when Plaintiff joined after a leave the was orally asked to resign without assigning any reason and was asked to leave the office abruptly/Plaintiff could not even take his original papers lying in the office containing important documents. The Plaintiff returned the laptop and the company car provided to the plaintiff was also taken away forcibly. Plaintiff contends that part of salary not paid and cash incentive not paid in full, medical bills and medical insurance not paid, statutory benefits of provident fund have also not been deducted. Defendant states that Plaintiff was not discharging his duties well and was having a highly unprofessional attitude. Oral notice of termination of three months was given to the Plaintiff. Held—No evidence on record to show that oral notice of termination was given to the plaintiff. Termination of the Plaintiff is illegal as no notice of three months was given. Salary for three months granted to Plaintiff. However, relief of reinstatement cannot be granted in view of Section 14 of the SRA as the present contract provides for a termination clause. Claim of Plaintiff for cash incentive is rejected being hit by s. 24 of the contract act. Claim of maintenance of company car, driver's salary, Petrol expenses, provident fund, medical reimbursement and medical insurance allowed. Damages of Rs. 25 lacs rejected as no cogent evidence has been places on record on the basis of which claim can be adjudicated. Compensation of any remote or any indirect loss or damage sustained by the party complaining of a breach cannot be granted. Suit decreed.

Dinesh Chadha v. Hotel Queen Road Pvt. Ltd. 1954

CODE OF CRIMINAL PROCEDURE, 1973—Section 125—Code of Civil Procedure, 1908—Order VIII Rule 5 and Order XII Rule 6—Appellant challenged judgment and order of Family Court whereby his marriage with respondent—Contracted as per Muslim Personal law was decreed to have been dissolved due to latter's subsequent apostasy—Plea taken, impugned order is invalid and contrary to express provisions of both Muslim personal law as well as Act—Act makes it amply clear that adjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslin personal law—Held—Neither could it be said that apostasy per se does not dissolve a marriage governed by Muslim personal law nor could it be said that Act makes any change to this general law—Plain meaning of Section 4 of Act would be to effect that even if prior to passing of Act apostasy would have operated to dissolve marriage *ipso facto* subsequent to coming into force of Section 4 marriage is not ipso facto dissolved—All that Section 4 had done is to introduce intervening mechanism, but to reach same conclusion, i.e. that apostasy would not be itself dissolve marriage and some further substantive act would be required to be done in this regard; substantive act being filing of a suit seeking declaration as to dissolution under Section 2(ix) of Act—A woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under Section 2(ix) seeking dissolution of marriage—Respondent was initially professing Hinduism and had embraced Islam prior to marriage, and then reconverted to Hinduism—Thus, she falls within exemption under second proviso to Section 4; in a way, she walks out of constraints of Section 4—Thus, in present matter, marriage stands dissolved from date on which respondent apostatized from Islam—Respondent made such public declaration that she had re-embraced Hinduism and produced a certificate from organization which facilitated it—She reiterated this factum in plaint and then deposed so in affidavit in petition—No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy—First substantive defence of appellant that petition

was filed contrary to terms of Section 4 of Act is unambiguous admission as to factum of reconversion—Marriage of respondent who was originally a Hindu is regulated not by rule enunciated in Section 4 of Act by rather pre-existing Muslim personal law which dissolves marriage upon apostasy ipso facto—This Court finds no merit in appeal.

Munavvar-UL-Islam v. Rishu Arora & Rukhsar *1886*

CONSTITUTION OF INDIA, 1950—Article 226; Income Tax Act, 1961, Section 245A To 245M: Petition challenging the majority decision of ITSC granting immunity to Respondent no.2 from imposition of penalty and prosecution on the ground that it is contrary to parameters laid down in S. 245H(1) and the ITSC has taken a perverse view of the facts and the evidence brought on record and therefore, it was permissible for this Court in writ proceedings to upstage the majority opinion of ITSC. HELD—It is important to note that the twin conditions for grant of immunity are (1) the applicant has cooperated with the Settlement Commission in the proceedings before it and (2) has made a full and true disclosure of his income and the manner in which such income was derived. Immunity can be granted only within the parameters of Section 245H(1) which requires full and true disclosure of income and co-operation from the assessee in the proceedings before the ITSC. Co-operation implies an act of volition on the part of the assessee; the present assessee "co-operated" in the proceedings before the ITSC only when faced with the reports submitted by the CIT. The ITSC, in our opinion was therefore not justified in taking a somewhat charitable view towards the assessee when it observed that it was at its "advice." made in a "spirit of settlement" that the assessee offered the entire bogus purchases of Rs. 117.98 crores as its income. Majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and

prosecution was ritualistic, once the assessee disclose the entire concealed income, ignoring the vital requirement that it is stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced. Petition allowed and majority view taken by ITSC quashed.

Commissioner of Income Tax (Central)-II v. Income Tax Settlement Commission & Anr. *2054*

— Article 226; Income Tax Act, 1961, Section 142(2A): Scope of interference—Held-the question whether the accounts and the related documents and records available with the A.O. present complexity is essentially to be decided by the A.O. and in this area the power of the court to intrude should necessarily be used sparingly. It he finds that the accounts are complex, the court normally will not interfere u/a 226. The power of the court to control the discretion to refer the accounts for special audit was exercised objectively, as far as the accounts, records, documents and other material present before the A.O. would permit.

At & T Communication Services India (P) Ltd. v. Commissioner of income Tax-I & Anr. *2127*

— Article 226—Petition seeking quashing of an order passed by Respondent 4 informing that the tenure of the lease of the period for the two lease contracts had expired and it was not possible to consider its request for extension of the contract. Held—Petitioner has remained completely silent about the letter

issued by the respondents rejecting the extension of the subject contract. It is settled law that when a party approaches the High Court and seeks invocation of its jurisdiction u/a 226, it must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary jurisdiction u/a 226 the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case of deliberate concealment or suppression of material facts on the part of the petitioner or if it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is well entitled to entertain the petition and dismiss it without entering into the merits of the matter. Petition dismissed.

Trans India Logistics v. Union of India & Ors..... 2200

—Article 226: Petitioner praying for staying hands of the respondent/bank from selling/auctioning the properties. Held - Petitioner maintained complete silence on the previous litigations with the bank in respect of the subject properties and orders passed by the Division Bench in earlier WP. It is settled law that the when a party approaches the High Court and seeks invocation of its jurisdiction u/a 226, it must place on record all the relevant facts before the Court without any reservation. In exercising its discretionary jurisdiction u/a 226 the High Court not only acts as a court of law, but also as a court of equity. Therefore, in case of deliberated concealment or suppression of material facts on the part of the petitioner or if it transpires that the facts have been so twisted and placed before the Court, so as to amount to concealment, the writ court is well entitled to refuse to entertain the petition and dismiss it without entering into the merits of the matter. Petition dismissed with cost of Rs. 20,000/-

R.L. Varma & Sons (HUF) v. Kotak Mahindra Bank Ltd. 2205

— Article 226: Petition praying that DDA be restrained from dispossessing them or enabling the Developer from engaging

in any building project in the Kathputli Colony—Held—As the contention of the Petitioners that the layout plan approved by the DUAC does not meet the norms stipulated in the Delhi Master Plan 2021 and the said grievance has not been taken up with the DDA till date, except referring to the same for the first time in the present petition, it is deemed appropriate to grant two weeks time to the petitioners to point out to DDA such of the norms laid down in the Delhi Master Plan 2021 and not complied with while finalizing the layout plan of the area. The said representation would be considered by DDA and response thereto conveyed to the Petitioner. Held—The anxiety expressed by the Petitioners with regard to the lack of facilities provided in the transit camp set up by the Developer at the instance of DDA can be easily assuaged by directing five representatives who are permanent residents in the settlement colony, to visit the transit camp and if there are any further facilities required to be provided or deficiencies pointed out, DDA and the Developer shall examine the suggestions made and try and provide the same to that stay of the relocated households at the transit camp can be made as comfortable as possible. Petition disposed of.

Bhule Bisre Kalakar Co-Operative Industrial Production Society Ltd. & Ors. v. Union of India & Ors 2233

— Article 226: Petition against judgment of the CAT accepting the Respondent`s challenge to the OM`s whereby the representations relating to adverse remarks and grading in her SCR were rejected. HELD-Respondent was not afforded favourable consideration by DPC only on the ground that her ACR did not meet benchmark. Tribunal has held the ACR for the relevant year to be treated as non est. No reason to interfere. 6 weeks time given to Petitioner to comply with the judgment of Tribunal and contempt petition filed by Respondent to be kept in abeyance. Petition dismissed.

UOI and Ors. v. Rajnesh Jain 2361

—Article, 136, 141 and 227—Plea taken, application was filed to delay proceedings at a juncture when appeal was fixed for final hearing—Prior to passing impugned order, no trial was conducted, nor was any evidence permitted to be led by parties in respect of value that could have been fetched by premises—Fixation of quantum of deposit at Rs. 1,60,000/- (Rupees One lakh sixty thousand only) per mensem towards user charges for leased premises is wholly onerous—Appellate Court has not given any reasons for fixing quantum at figure it has and has proceeded almost entirely on surmises and conjectures and impugned order ought to be set aside—Held—Order passed in exercise of a power vested in authority, directing parties to furnish documents to enable authority to appropriately exercise power can hardly be regarded as illegal or contrary to material on record—Merely because Appellate Court has proceeded to ascertain quantum based on affidavits and documents filed by parties, same cannot be considered as error so gross and patent as to warrant interference under Article 227; this Court is of view that this is not error, but appropriate course to have been followed—Where both parties have been given equal and sufficient opportunity to make their case as to quantum to be fixed, and where Court considers all material available on record and comes to a conclusion on basis thereof, same cannot be regarded as being patently illegal and warranting interference—Appellate Court has given due consideration to all material available on record and facts and attendant circumstances relevant to issue to arrive at its conclusion as found in second impugned order—Tenant is, in effect, praying that this Court reconsider material to arrive at its own conclusion; this Court sees no justification to so apply itself—This Court, in exercise of its supervisory jurisdiction, will not convert itself into a Court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

Federal Motors Pvt. Ltd. v. *Atma Ram Properties Pvt. Ltd.* *1810*

COMPANIES ACT, 1956—Winding up of the Company—Application for stay of CDR Scheme—Winding up petition is yet to come up for admission—Whether there is any justification for staying the CDR Scheme—Scheme is an attempt by a majority of the secured creditor to revive the company—Scheme has the support and backing of the RBI—Held—Staying of the scheme will not be the interest of the company or the various stake holder—It is the duty of the Company Court to welcome revival rather than father than affirm the death of the company—Staying the CDR Scheme would be practicably amount to winding up of the company which step has to be taken only as last resort—No stay of the CDR Scheme—Application disposed off.

Deutsche Trustee Company Ltd. v. Tulip Telecom Ltd. *2378*

DELHI HIGH COURT ACT, 1966—Section 10—Trade Marks Act, 1999—Section 10 & 134(2)—Respondents filed a suit seeking a decree of permanent injunction to restrain defendants/appellants from manufacturing, selling etc. alcoholic beverages or any other allied goods under impugned trade mark composing of 'Real' logo and label or any other trade mark/lable deceptively similar to plaintiff's trade mark comprising 'RICARD' logo and label which amounts to infringement of Registered trademark of respondents/plaintiffs and other connected reliefs-During pendency of appeal, defendants/appellants showed a new lable to Court and learned Single Judge concluded that old lable which was used by appellants was prime facie identical to label of respondents and restrained appellants from using old label which was subject matter of present suit during pendency of said suit—Regarding New label produced in Court, it was held that it still contains some essential features similar to respondents' label and in order to avoid any confusion or deception, appellants were allowed to use New lable subject to condition of Change of Navy Blue Colour—Order challenged in appeal before DB—Plea taken, second part of injunction order

permitting appellants to use New label subject to condition of change of Navy Blue colour strips is materially erroneous and needs to be set aside—Respondents registered Trademark does not have any colour and hence to that extent, impugned order is misplaced as it has injuncted appellants from using colour Navy Blue—Held—A look at mark/lable in question would show that it cannot be said that New lable which is presently being used by appellants is identical to mark/lable of respondents—Essential features of two marks are different —Apart from blue bands used at top and bottom of lable, there is no other similarity in two marks—Essential feature of brand of respondent is circle shaded in red with number '45' Which is fused with a set of swirling scrolls/arms on either side—None of these features are reproduced in New brand/mark being used by appellants—Product of respondent is anise aperitif which is priced at more than Rs. 2, 000/- per bottle—Class of customers purchasing same would be entirely different from class who would purchase IMFL whisky of appellant which is priced around Rs. 60/- per bottle—New brand uses mark/trade logo of appellant's 'Real' very distinctively and clearly—Prime facie, it is not possible to stay that New label which was for first time filed in court by appellants on 16.12.2008 infringers trademark of respondents—Order of learned single judge modifies permitting appellants use New mark/lable as filed by appellants in court on 16.12.2008 using Navy Blue colour.

Real House Distillery Pvt Ltd & Anr. v. Pernod Ricard S.A. & Anr *2169*

DELHI LAND REFORMS ACT, 1954—Section 33 and 42—Indian Contract Act, 1872—Section 23—Limitation Act, 1908—Article 24,27,47 and 55 of Schedule—Trial Court dismissed petitioner's application for rejection of plaint—Order challenged before High Court — Plea taken, impugned order suffers from material irregularity : suit was barred by Section 33 and 42 of DLR Act, 1954 therefore Court lacked jurisdiction and case is barred by limitation—Held— Trial

Court has considered both objections in impugned order — It has clearly reasoned that both these objections are mixed question of facts, which could be decided after a trial—It is not indeed it cannot be - contention of petitioner herein that issues are pure questions of law de hors facts of case—It cannot by any stretch of imagination be held that question of : (i) whether a document—which is basic of suit—is illegal in view of Delhi Land Reforms Act, and (ii) whether suit was filed on 01.08.2011 or on 02.08.2011 are only question of law—Latter question is ex facie issue of fact—Given same, impugned order, which rejects application under Order Vll Rule 11 and relegates party to trial on issues raised in application, is not one that warrants interference under Section 115 of Code—This Court finds no reason to interfere with impugned order—Petition is without merit and is accordingly dismissed.

Sanjay v. Ajit Singh Bajaj *2246*

DELHI RENT CONTROL ACT, 1958—Evicting—Petitioner filed revision against order of ARC directing eviction of petitioner from property in question—Plea taken, respondent/landlord is using adjacent shop which was earlier allegedly being used by his to run his own business—Subsequent development would show that petitioner was actually in possession and use of said adjacent property—Hence, petitioner has no bonafide need of any additional space or of tenanted premises for carrying out his business as proposed in eviction petition—Held—Photographs which have now been sought to be accused in these proceedings pertain to a situation which existed when application for leave to defend was filed—Therefore, proposed " additional evidence" has to be and is cautiously rejected—Landlord has two married daughters who although settled in their respective matrimonial homes, continue to visit their father every fortnight or so, hence they would need space/accommodation for themselves—To contend that simply because daughters have married need to have additional rooms or retain accommodation for them is not essential, is not acceptable—In these circumstances, it cannot be said that

landlord's bonafide need is not proven—Petition is without merit and is frivolous.

Mishra Lal v. *Shri Ramesh Chander* *2163*

— Section 14(1)(e) and 25B(8)—Leave to defend application filed by tenant dismissed by SCJ-cum-RC—Order challenged before High Court- Plea taken, site plan filed by landlords is incorrect—Landlords have two additional properties which are lying vacant and landlords are not putting them to use and are harassing tenant by filing eviction petition—Landlord did not need accommodation as claimed as they had sufficient space available with them- There was no tenant—landlord relationship between parties therefore tenant cannot be evicted from premises—Sale deed vesting ownership on landlord was illegal and void—Landlords have sufficient alternative accommodation and as such there is no bona fide requirement—Held—Tenant is required to file a site plan of his own which would aid this Court in understanding lacunae in site plan filed by landlords—In eviction petition, landlord need not disclose alternative properties available to him if he is of view that alternate properties are unsuitable for them—Landlord's discretion and prerogative in this regard cannot be questioned, except insofar as it is not whimsical, ex facie or shockingly unreasonable—Tenant is not one to dictate to judiciary as to how it can use property—Such liberty is not vested with either Court or tenant—When tenant himself admits to have been residing in premises for 100 years and also paying rent regularly, his argument that there was no tenant—landlord relationship is self defeating—In matters of landlord—Tenant relationship, question whether landlord has title to property pales into insignificance when tenant shows that he has been paying rent to eviction—Petitioner-In eviction petition, a Court proceeds on assumption that need of premises is genuine—Mere bald averments by tenant would not suffice, he would need to show ex facie reasons which would disentitle landlord from grant of eviction order—There is not material

irregularity in impugned order warranting interference of this Court.

Babu Lal v. Atul Kumar & Anr. *2047*

— Section 14(1)(e)—Petition against rejection of leave to defend application of the tenant and eviction orders. Held-Simply because the daughter is of a marriageable age and allegedly likely to marry would not necessarily cut her ties from her maternal family nor would the requirement for her accommodation in her father's house be lessened. Daughter being a qualified professional the need is all the more acute and bona fide. Reasons and conclusions of the Trial Court correct. Petition Dismissed.

Rajender Prasad Gupta v. Rajeev Gagerna *2241*

— Section 14(1)(e), 25B — Petition against rejection of leave to defend application of the tenant and eviction order. Tenant challenged the landlord tenant relationship between the Petitioner and the Respondent herein. Held- if the tenant had any objection regarding the rent receipts showing any other person as a landlord then protest could have been raised. No objection was raised. The tenant had by silence acquiesced to the Respondent also as landlord. Landlord tenant relationship stood established in favour of respondent. Held—Age has no bearing on the requirement of commercial accommodation of a person. The need to start a new business cannot be doubted solely because such need is of a senior citizen. No irregularity with the Trial Court order.

Ashok Kumar & Anr. v. Sunil Kumar & Ors. *2300*

—Eviction Petition U/s. 14(1)(e). Once bonafide requirement of landlord is established, neither the tenant nor the Court can determine or suggest as to which accommodation would be most suitable for the landlord's need—It is landlord's exclusive prerogative to determine the suitability of property for his need.

Naveen Arora and Ors. v. Suresh Chand *1641*

— Eviction Petition Under Section 14(1)(e)—Leave to defend granted by ARC—Challenged. Held, Property which is not owned by the landlord and not in possession of the landlord cannot be deemed to be alternative suitable accommodation to be taken into consideration as a defence by the tenant opposing his eviction. A landlord cannot be made to lean upon his relatives to provide accommodation. It is not for a tenant to dictate how else the landlord could adjust himself so as to obviate the need of the tenant's eviction. Revision allowed.

Kedari Lal Gupta v. CB Singh Raja .....*...1797*

— Section 6, 6A, 14(1)(b) and 38—Order of Appellate Court directing petitioner/tenant to deposit amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) per mensem towards user charges of suit property challenged before High Court—Plea taken, application by landlord is nothing short of a unilateral attempt by landlord to increase rent payable qua leased premises, exercise prohibited by law—Provisions of Act, specifically Sections and 6-A thereof specifically disentitles landlord from unilaterally increasing rent payable qua premises—Onerous condition cannot be imposed on tenant, which is exercising its statutory right of appeal—Principles laid down for increase of rent under Section 6A have been given a complete go by in impugned order—Held—Tenancy comes to end upon order of eviction being passed and none of provisions of Delhi Rent Control Act would apply to govern relationship between parties—Provisions of Section 6 and 6A of Act would have no applicability in determination of charges to be deposited by tenant as use and occupation charges during pendency of appeal—Present contention on behalf of tenant hardly inspires any confidence in mind of Court.

Federal Motors Pvt. Ltd. v. *Atma Ram Properties Pvt. Ltd.* *1810*

DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939—Section 2(ii), 2 (viii) (a), 2 (ix) and 4—Code of Criminal

Procedure, 1973—Section 125—Code of Civil Procedure, 1908—Order VIII Rule 5 and Order XII Rule 6—Appellant challenged judgment and order of Family Court whereby his marriage with respondent—Contracted as per Muslim Personal law was decreed to have been dissolved due to latter's subsequent apostasy—Plea taken, impugned order is invalid and contrary to express provisions of both Muslim personal law as well as Act—Act makes it amply clear that adjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslin personal law—Held—Neither could it be said that apostasy per se does not dissolve a marriage governed by Muslim personal law nor could it be said that Act makes any change to this general law—Plain meaning of Section 4 of Act would be to effect that even if prior to passing of Act apostasy would have operated to dissolve marriage *ipso facto* subsequent to coming into force of Section 4 marriage is not ipso facto dissolved—All that Section 4 had done is to introduce intervening mechanism, but to reach same conclusion, i.e. that apostasy would not be itself dissolve marriage and some further substantive act would be required to be done in this regard; substantive act being filing of a suit seeking declaration as to dissolution under Section 2(ix) of Act—A woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under Section 2(ix) seeking dissolution of marriage—Respondent was initially professing Hinduism and had embraced Islam prior to marriage, and then reconverted to Hinduism—Thus, she falls within exemption under second proviso to Section 4; in a way, she walks out of constraints of Section 4—Thus, in present matter, marriage stands dissolved from date on which respondent apostatized from Islam—Respondent made such public declaration that she had re-embraced Hinduism and produced a certificate from organization which facilitated it—She reiterated this factum in plaint and then deposed so in affidavit in petition—No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy—First substantive defence of appellant that petition

was filed contrary to terms of Section 4 of Act is unambiguous admission as to factum of reconversion—Marriage of respondent who was originally a Hindu is regulated not by rule enunciated in Section 4 of Act by rather pre-existing Muslim personal law which dissolves marriage upon apostasy ipso facto—This Court finds no merit in appeal.

Munavvar-UL-Islam v. Rishu Arora & Rukhsar *1886*

HINDU MARRIAGE ACT, 1955—Section 13(i)(i-a)—Husband preferred petition seeking divorce on the ground of cruelty which was dismissed by the Ld. Trial Court—Appeal—Held, Burden of proving the allegation of cruelty lies upon the party alleging it—Petitioner failed to show or substantiate specific instance of cruety—Mere allegations and bald averments insufficient—Though in a divorce sought on ground of cruelty or desertion the facts are not to be proved beyond reasonable doubt, and it would be sufficient if such facts are proved by preponderance of probabilites, but petitioner failed to bring any evidence at all to show that there were incidents of cruelty by the respondent.

Rajender Kumar v. Manju *2277*

INCOME TAX ACT, 1961—Section 245A To 245M: Petition challenging the majority decision of ITSC granting immunity to Respondent no.2 from imposition of penalty and prosecution on the ground that it is contrary to parameters laid down in S. 245H(1) and the ITSC has taken a perverse view of the facts and the evidence brought on record and therefore, it was permissible for this Court in writ proceedings to upstage the majority opinion of ITSC. HELD—It is important to note that the twin conditions for grant of immunity are (1) the applicant has cooperated with the Settlement Commission in the proceedings before it and (2) has made a full and true disclosure of his income and the manner in which such income was derived. Immunity can be granted only within the parameters of Section 245H(1) which requires full and true

disclosure of income and co-operation from the assessee in the proceedings before the ITSC. Co-operation implies an act of volition on the part of the assessee; the present assessee "co-operated" in the proceedings before the ITSC only when faced with the reports submitted by the CIT. The ITSC, in our opinion was therefore not justified in taking a somewhat charitable view towards the assessee when it observed that it was at its "advice." made in a "spirit of settlement" that the assessee offered the entire bogus purchases of Rs. 117.98 crores as its income. Majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and prosecution was ritualistic, once the assessee disclose the entire concealed income, ignoring the vital requirement that it is stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced. Petition allowed and majority view taken by ITSC quashed.

Commissioner of Income Tax (Central)-II v. Income Tax Settlement Commission & Anr. *2054*

— Section 142(2A): Petition challenging the order of Assistant CIT directing special audit of Petitioners accounts u/s 142(2A) on three grounds; (i) the books of accounts were not called for or examined by the Assessing Officer and no special audit can be ordered without examining the books of accounts of the assessee (ii) no show cause notice was issued before ordering a special audit and thus there was a breach of rules

of Natural justice (iii) there was complete non application of mind by the first respondent while according approval to the proposal for special audit in the petitioner's case. Held— Respondent no. 2 did require the Petitioner to show cause as to why special audit should not be directed, the show cause notice was replied to by the Petitioner, this contention of the Petitioner that no show cause notice was issued therefore fails. Held- S. 142(2A) does not require "books of accounts" to be examined by the A.O. It empowers the A.O with the previous approval of the Chief Commissioner or Commissioner of Income Tax, to direct the assessee to get the accounts audited if he is of the opinion that it is necessary to do so "having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue." Account used in the section does not refer merely to "books of account" of the assessee, it could include the books of accounts, balance sheets and all other records which are available to the A.O during assessment of proceedings. It is not possible to accept the contention that A.O. cannot direct a special audit under he examines the books of accounts. Held—there is no requirement that the approving authority has to record elaborate reasons for approval. Of course approval cannot be mechanical. Cannot be said that the CIT did not apply his mind to the proposal of special audit.

At & T Communication Services India (P) Ltd. v. Commissioner of income Tax-I & Anr. 2127

— Section 142(2A): Scope of interference—Held-the question whether the accounts and the related documents and records available with the A.O. present complexity is essentially to be decided by the A.O. and in this area the power of the court to intrude should necessarily be used sparingly. It he finds that the accounts are complex, the court normally will not interfere u/a 226. The power of the court to control the discretion to refer the accounts for special audit was exercised objectively, as far as the accounts, records, documents and

other material present before the A.O. would permit.

At & T Communication Services India (P) Ltd. v. Commissioner of income Tax-I & Anr. 2127

— Section 37(1)—Expenditure charageable under profit and gains of business or profession—Burden of showing expenditure would be wholly and exclusively for the purpose of business is upon the assessee—Personal expenditure cannot be claimed as business expenditure—No intent seen in the Statute which prescribes that only expenditure strictly for business can be considered for deduction—Decision to deduct necessarily to be case dependent.

Kostub Investment Ltd. v. Commissioner of Income Tax 2143

— Section 37(1)—Expenditure chargeable under profit and gains of business or profession—Expenditure of Rs.23,16,942/- under the head "Education and Training Expenses"—Incurred on higher education (MBA course in U.K.) of son of Directors—Whether qualified for deduction under Section 37(1)—Decision to deduct necessarily to be case dependent—Beneficiary worked in the company for one year before opting higher education, bonded himself to work for a further five years after finishing MBA and higher education linked to assessee's business—Held: Yes Chosen subject of study would aid and assist the company and is aimed at adding value to its business—Assessee entitled to deduction under Section 37(1).

Kostub Investment Ltd. v. Commissioner of Income Tax 2143

INDIAN CONTRACT ACT, 1872—Section 23—Limitation Act, 1908—Article 24,27,47 and 55 of Schedule—Trial Court dismissed petitioner's application for rejection of plaint—Order challenged before High Court — Plea taken, impugned order suffers from material irregularity : suit was barred by Section 33 and 42 of DLR Act, 1954 therefore Court lacked jurisdiction and case is barred by limitation—Held— Trial

Court has considered both objections in impugned order — It has clearly reasoned that both these objections are mixed question of facts, which could be decided after a trial—It is not indeed it cannot be - contention of petitioner herein that issues are pure questions of law de hors facts of case—It cannot by any stretch of imagination be held that question of : (i) whether a document—which is basic of suit—is illegal in view of Delhi Land Reforms Act, and (ii) whether suit was filed on 01.08.2011 or on 02.08.2011 are only question of law—Latter question is ex facie issue of fact—Given same, impugned order, which rejects application under Order Vll Rule 11 and relegates party to trial on issues raised in application, is not one that warrants interference under Section 115 of Code—This Court finds no reason to interfere with impugned order—Petition is without merit and is accordingly dismissed.

Sanjay v. Ajit Singh Bajaj..... *2246*

—Section 24, 73—Suit for declaration and damages that termination of his services is illegal, arbitrary and in violation of the terms of employment and principles of natural justice. Plaintiff joined at the post of General Manager and continued to work till 02.01.2009. On 02.01.2009 when Plaintiff joined after a leave the was orally asked to resign without assigning any reason and was asked to leave the office abruptly/Plaintiff could not even take his original papers lying in the office containing important documents. The Plaintiff returned the laptop and the company car provided to the plaintiff was also taken away forcibly. Plaintiff contends that part of salary not paid and cash incentive not paid in full, medical bills and medical insurance not paid, statutory benefits of provident fund have also not been deducted. Defendant states that Plaintiff was not discharging his duties well and was having a highly unprofessional attitude. Oral notice of termination of three months was given to the Plaintiff. Held—No evidence on record to show that oral notice of termination was given to the plaintiff. Termination of the Plaintiff is illegal as no

notice of three months was given. Salary for three months granted to Plaintiff. However, relief of reinstatement cannot be granted in view of Section 14 of the SRA as the present contract provides for a termination clause. Claim of Plaintiff for cash incentive is rejected being hit by s. 24 of the contract act. Claim of maintenance of company car, driver's salary, Petrol expenses, provident fund, medical reimbursement and medical insurance allowed. Damages of Rs. 25 lacs rejected as no cogent evidence has been places on record on the basis of which claim can be adjudicated. Compensation of any remote or any indirect loss or damage sustained by the party complaining of a breach cannot be granted. Suit decreed.

Dinesh Chadha v. Hotel Queen Road Pvt. Ltd. *1954*

INDIAN EVIDENCE ACT, 1872—Section 8 Appellant challenged his conviction U/s 302 of Code for murdering his wife—Prosecution case squarely rested on circumstantial evidence which according to appellant not proved beyond reasonable doubt—One of the circumstances relied upon by prosecution was information given by the accused himself regarding committing murder of his wife.

Held:- The earliest information given by the accused himself is admissible against him as evidence of his conduct u/s 8 of the Evidence Act.

Krishan Ram v. State of The Nct of Delhi..... *2089*

—Section 116—Suit for possession, damages and mense profit. Defendants claim that Plaintiff have no title to the suit property as documents produced by them are merely general power of attorney, agreement to sell etc. Further contend that property purchased benami by father of Plaintiff in name of minor children being Plaintiff and his brother. Defendants contention is that Defendants were residing with the father in joint possession of the property with the permission of the

father and to the exclusion of the plaintiffs and that defendants are entitled to claim adverse possession Held—As admittedly the defendants came into possession with permission granted by the father of the plaintiffs who permitted them to enter/ use the premises for a limited period, the defendants were using the premise as Licensee. As the father has died, the License has been terminated. Defendant cannot challenge the title of the licensor now at this stage after 14 years. The written statement fails to bring out any title or right in the defendants to continue to retain possession. Defendant taking frivolous and vexatious defense for the purpose of prolonging their illegal possession of the suit property. Suit decreed in favour of Plaintiff.

Laxman Singh & Ors. v. Urmila Devi & Ors. 1649

— Section 108—Respondent stopped attending duties and he was issued a charge memo proposing to conduct disciplinary proceedings against him on charge of absenting himself from duty unauthorisedly—One of his relatives lodges a police complaint with regard to his being missing—Charge-sheet sent to respondent by registered post was returned undelivered with remark that "person who has to receive it remains out without intimation. No hope that he will return, hence returned"—Notice on inquiry proceedings issued by Inquiry Officer (IO) was also returned with same remark as before—Report of IO holding that charges framed against respondent were proved correct was sent to respondents permanent address and was returned undelivered with was remark as before—Disciplinary Authority (DA) accepted recommendations of IO and imposed penality of removal from service with immediate effect—Respondent was finally traced in a condition as that of a mad person in Ayodhya-Application filed by respondent before Administrative Tribunal was allowed holding that IO & DA arbitrarily concluded that applicant's absence was unauthorized—Order challenged before High Court—Held—Petitioners had before them evidence of police report as well as confirmation by police

that respondent was not traceable—Tribunal had found decision of DA to initiate disciplinary action against respondent on charge of unauthorized absence from duties as arbitrary and hasty—Inquiry proceedings conducted by IO has been held to be a formality inasmuch as telegram and registered letters were being sent to a person who was missing and was admittedly not available at address to which they were sent—Nothing has been pointed out to us which would enable us to take a view which is contrary to view taken by Tribunal—Petitioners would be entitled to subject respondent to a medical examination.

Union of India & Ors. v. Jatashankar 1770

INDIAN PENAL CODE, 1860—Section 302—Indian Evidence Act—1872—Section 8 Appellant challenged his conviction U/ s 302 of Code for murdering his wife—Prosecution case squarely rested on circumstantial evidence which according to appellant not proved beyond reasonable doubt—One of the circumstances relied upon by prosecution was information given by the accused himself regarding committing murder of his wife.

Held:- The earliest information given by the accused himself is admissible against him as evidence of his conduct u/s 8 of the Evidence Act.

Krishan Ram v. State of The Nct of Delhi..... 2089

— Sec. 302, 34 read with Section 120B—Case of the prosecution is that Satdev Rathi was working Manager in the factory named K.N. Inter Plast Pvt. Ltd. Owned by one Kuldeep Singh Dalal. The five appellants were employed in the earlier said factory—Appellant Arun Kumar and Rani were in love with each other—Rani and Tarun started a quarrel in the factory in loud voice—It is also alleged that the deceased once found appellants Arun Kumar and Rani in objectionable condition in a vacant room inside the factory—Thereafter appellant Arun

Kumar stopped coming to the factory as he was under the impression that his service had been terminated—Grievance of these two sets of appellants is alleged to have given them the motive to eliminate the deceased—As per plan Rani met the deceased at Tikri border in the evening and took him to a Tur field—Thereafter, appellants inflicted knife blows on the deceased and after killing him made good their escape—The appellants examined four witnesses in their defence—On appreciation of evidence, the Trial Court opined that the circumstantial evidence adduced by the prosecution was sufficient to draw an inference of guilt against the appellants for the offence of entering into a conspiracy and committing murder of the deceased—The prosecution relied on the circumstance of "last seen together" and the motive of committing the crime in support of their case—Since this case rests on circumstantial evidence and the circumstantial of "last seen together" is one of the most important circumstance relied on by the prosecution his evidence assumes significance to determine the time of death and o test the veracity and credibility of the witnesses PW-3 and PW-13 on "last seen together"—PW-13 deposed that the deceased was working as a Manager in his factory M/s.K.N.Inter Plast Pvt. Ltd. for about last ten years. On 17.10.2008, he was going to Bahadurgarh via Kanjhawla-Nizampur Road. At about 7:00 p.m., while going towards Rohtak Road from village Nizampur, he noticed the deceased going towards Nizampur road along with appellant Rani. He also noticed the remaining four appellants, namely, Arun Kumar, Ram Prakash @ Guddu, Krishna Kumar @ Krishna and Prithvi Raj following them from a distance of about 50 mts. He testified that appellants, Arun, Ram Prakash @ Guddu, Krishna Kumar @ Krishna and Prithvi Raj were ex- employees. They had been expelled from the job due to their bad behaviour—He also testified that appellants Arun and Rani were seen in objectionable condition by the deceased. The deceased informed him about this act—It is well settled that where that prosecution case rests purely on

circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must, in the first instance be fully established; the circumstances should be of conclusive nature; the circumstances taken to-gether must unerringly point to the guilt of the accused; the circumstances proved on record must be incompatible with the innocence of the accused and from the complete chain of circumstances and it must be proved that in all probabilities, the offence was committed by the accused—The prosecution in order to connect the appellants with the commission of the offence and to exclude any other hypothesis except that the deceased's murder was committed by the appellants, relied on the following circumstantial evidence:(i) Evidence of last seen together;(ii) Recovery of some bloodstained clothes at the instance of appellants and recovery of there knives/ dagger at the instance of appellants Arun, Kumar @ Krishna and Ram Prakash @ Guddu; and (iii) Motive for commission of the offence—The 'last seen together" theory assumes importance only when the time of death of the deceased is sufficiently established and it is proved that the deceased was last seen alive in the company of the accused and there was no possibility of any other person coming in between the time when the deceased and the accused were seen together and the time of his death. In the instant case, the exact time or even approximate time of death has not been crystallised—A perusal of the post mortem report (Ex.PW-8/A) shows that the post mortem on the dead body of the deceased was conducted on 18.10.2008 at 1:00 p.m. and the time since death was given as 41 hours. It would make the deceased's death on 16.10.2008 at about 6:00 a.m. However, the deceased was admittedly alive till the evening of 17.10.2008. For unexplained reasons, PW-8 changed duration since death from 41 hours to 22 hours in his court deposition. If that is accepted, the time of death would be about 3:00 p.m. On 17.10.2008. That is also not acceptable as the deceased was allegedly seen alive on 17.10.2008 at around 07:00-07:30 p.m. by PW-13. IT

seems that Dr. V.K. Jha (PW-8) had performed his duties in a totally perfunctory manner as he appears to have given the time since death in the post-mortem report only on the basis of brief facts forwarded to him as also on the basis of rukka where initially the time of incident was mentioned between 05:00 p.m. on 16.10.2008 to 07:00 a.m. On 17.10.2008. The Court not inclined to rely much on the post mortem report (Ex.PW8/A) as also on the testimony of PW-8 regarding the time of the deceased's death.—The prosecution version as also he "last seen together" theory falls flat for other reasons also. It is difficult to comprehened that when a lady was luring a person who was her superior (Manager) in the same factory, that person would allow the lady to talk some other person so many times. Moreover, as per prosecution version, all the appellants were together after 7:30 p.m. Thus there could not have been any occasion for them to talk on mobile phone—There is another serious lapse in the investigation. As per the prosecution version, the deceased possessed a mobile phone. The deceased's wife spoke to him at 6:00 p.m on 17.10.2008 and thereafter, his son also tried to speak to him. The deceased is started to have informed his wife that he would be back home in half an hour and thereafter his mobile phone got switched off. However, for unexplained reasons, the call details of the deceased's telephone were not obtained by the investigation officer. Since evidence of "last seen together" has been held to be otherwise unbelievable, this lapse on the part of the investigating officer further gives a dent to the prosecution version—In addition to the evidence of "last seen together", the prosecution also relies on the recovery of bloodstained knives Ex. P-1, P-2 and P-3 at the instance of the appellants Arun Kumar, Krishna Kumar @ Krishna and Ram Prakash @ Guddu respectively at the time of their arrest. Also, according to the prosecution appellant Arun Kumar was found to be wearing a black bloodstained pyjama—Similarly, the abovesaid three appellants also told the I.O. that they were wearing the same clothes that they were wearing now at the

time of commission of the offence. In addition, they allegedly got recovered some bloodstained clothes from the room of one Phool Singh and one Om Prakash Sharma. It is not understandable that if they had opportunity to wash the bloodstains off some of their clothes, why would they not wash the remaining ones and would conceal the same simply to get them recovered later on to the police—The prosecution has led some evidence with regard to the motive. In their statements under Section 313 Cr.P.C., appellants Ram Prakash, Krishna Kumar @ Krishna and Prithvi Raj have denied that they ever misbehaved with the deceased after consuming liquor in the factory or that they were expelled from the services. They gave different dates for leaving the employment with M/s. K.N. Inter Plast Pvt. Ltd—The prosecution version is that appellant Ram Prakash, Krishan Kumar @ Krishna and Prithvi Raj had been expelled from the factory because of their misbehaviour with the deceased after consuming liquor. Similarly, as per prosecution version appellants Rani and Arun Kumar were Counselled by the deceased for their objectionable behaviour in the factory and appellant Arun Kumar stopped reporting for work considering that he had been expelled, yet, employment records of the five appellants were not seized by the I.O. during the course of investigation. As per the prosecution case set up in the charge sheet which is reflected from the statements of the witnesses recorded under Section 161 Cr.P.C., the incident of the three appellants misbehaving with the deceased took place two to three years before the occurrence. However, in Court, evidence was led to the effect that the incident took place merely two-three months before the occurrence. The witness were also duly confronted with their statements under Section 161 Cr.P.C. In view of the prosecution version, seizure of the entire employment record to pin point the period of employment of the appellants was extremely important which was not done by the I.O. for the reasons best known to him. It is well settle that an accused is not expected to prove his defence beyond shadow of

reasonable doubt. The absence of appellant Ram Prakash's name in the salary sheet for the month of June, 2008 makes his defence plausible which again creates doubt in the prosecution version—In view of the prosecution version, the employment records if seized would have provided some credence as to how and when the appellant's service were terminated or any of them stopped reporting for work—There could not be a motive strong enough for appellants Arun Kumar and Rani to have entered into any conspiracy to commit the gruesome crime as alleged. Otherwise also, it is very well settled that motive, however, strong is not enough to base conviction of the accused—In this view of matter, even if it is assumed that the possibly some grievance existed, the same is not sufficient to base appellants' conviction—Non-seizure of the employment records, non-obtaining of the call details of the deceased's mobile phone, non-recording of the statement of PW-13 at the time of recovery of dead body, discrepancy in the post mortem report and PW-8's testimony, though not significant individually, when read together with the gaping holes create serious dobut about the motive theory—It is true that direct evidence of hatching a conspiracy is seldom available, yet at the same time, it is the bounden duty of the prosecution to prove the conspiracy by indirect or circumstantial evidence which must be clear, cogent and believable—Allowed. The judgment and the order on sentence are accordingly set aside. The appellants are acquitted of the charges framed against them.

Arun & Ors. v. State *2211*

— Section 302/34—Prosecution based its case on circumstantial evidence and the circumstances which accounted for the conviction of the appellants were namely that they had a motive to kill the deceased as they had a quarrel with him a few days before the body of the deceased was discovered by the police and they were also last seen with him and it was in pursuance of their disclosures and pointing out that the weapons of

offence namely a dagger and a knife and the blood stained clothes of one of the appellants was recovered. Held: Only one tea vendor and a Constable assertedly had seen the appellants having a quarrel with the deceased and the accused persons were not known to both of them from before. In such circumstances it was incumbent upon the IO to have arranged the Test Identification Parade of the accused persons. The said failure alongwith the fact that the depositions of the tea vendor and the Constable were not consistent and completely reliable makes their identification of the accused persons in the court of not much value. Even otherwise the motive for the alleged murder appears to be very weak and illogical for the quarrel between the accused persons and the deceased was on such a trivial issue that the same cannot furnish a motive to do away with the deceased. Absence of strong motive in the present case, which is based completely on circumstantial evidence, is very relevant. Further the witness who assertedly informed the police that he had last seen the deceased and the accused together, denied having made any such statement and as such even the last seen theory is not substantiated. As regards the recovery of a knife at the instance of one of the appellants, in the absence of detection of blood on it, it cannot be stated that it was used in crime, more so when it was never shown to the concerned doctor to seek his opinion whether the injury on the person of deceased could have been inflicted by it. Similarly the recovery of blood stained clothes and a dagger from the house of the other appellant is to be held to be very weak evidence for the prosecution has not led any evidence to show that the said clothes were worn by the said appellant at the time when the crime was committed. Suspicion howsoever strong against the appellants is not enough to justify their conviction for murder.

Mohd. Shahid v. State *2282*

— Sec. 393, 394 and 398— Arms Act, 1959—Sec. 27—Allegations against the appellant-Sahil, as revealed in the

charge-sheet, were that on 05.06.2010 at about 09.30.p.m. opposite house No.3266, Ranjeet Nagar, he and his associates (not arrested) attempted to rob complainant-Ajay Kumar of laptop at pistol point. In the process of committing robbery, he voluntarily caused hurt to complaint's son-Amit—The prosecution examined 13 witnesses to substantiate the charges and to establish the guilt of the appellant. In 313 statement, the appellant pleaded false implication and denied complicity in the crime. The trial resulted in his conviction as aforesaid. It is relevant to note that the appellant was acquitted of the charges under Section 25 Arms Act in the absence of sanction under Section 39 Arms Act and the State did not challenge the said acquittal—Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of interested witnesses without independent corroboration. She forcefully argued that it was a case of mere quarrel and the appellant was falsely implicated in this case. Learned APP urged that the impugned judgment is based upon the cogent and reliable testimonies of the complainant and his son who had no prior animosity to falsely implicate—The witness deposed that he had seen the pistol at the spot and also at the police Station. He denied the suggestion that the accused was not present at the spot or was falsely implicated in the case—The appellant did not give any specific reasons to remain present near his house without any particular purpose—The appellant did not give plausible explanation to the incriminating circumstances in 313 statement—The appellant, did not examine any witness to prove the defence taken by him for the first time in his statement under Section 313—The prosecution has proved on record FSL report (Ex.PW-13/D) which showed that the pistol recovered from the accused was in working order. It is true that subsequently when the pistol was unloaded, it was found empty. It has come on record that the appellant was not at the time of commission of the crime and his associates succeeded to flee

the spot. They were also allegedly armed with various weapons. Simply because the pistol (Ex.P-1) recovered from the accused was empty at the relevant time, it cannot be said that it was not a 'deadly' one particularly when Sahil was convicted under Section 27 of the Arms Act for using a weapon unauthorisedly without licence in violation of provision of Arms Act—Minor discrepancies and improvements highlighted by the appellant's counsel do not affect the basic structure of the prosecution case. The victims were not aware that the 'deadly' weapon with which the appellant was armed was loaded or not. 'Butt' of this weapon was used to cause hurt to the victim-Amit. For the purposes of Section 398 IPC, mere possession of the 'deadly' weapon is sufficient. This Court find no substance in the plea that Section 398 IPC is not attracted and proved—disposed of.

Sahil v. State..... *2306*

— Sec 304 (ii),—Bihari Lal-appellant's father was found dead inside his house No.16/1644 E, Bapa Nagar, Karol Bagh, Delhi on 14.02.2011. Daily Diary (DD) NO.36A was recorded at 10.06 p.m.at Police Station Prasad Nagar on getting information from PCR that an individual who used to consume liquor had died inside his house.—During investigation, it revealed that a quarrel had taken place between the deceased and the appellant on 14.02.2011. The Investigation Officer lodged First Information Report under Section 302 IPC on 18.02.2011. Statements of witness conversant with the facts were recorded—The prosecution examined 12 witnesses to establish the guilt—The trial resulted in his conviction under Section 304 (II) IPC—Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective—The circumstances do not point unerringly to the guilt of the appellant. They may at the most raise some suspicion, but suspicion, however, strong cannot take the place of proof—Post-mortem examination report reveals that the victims suffered 13 injuries on various body organs/parts Some

injuries were inflicted by a sharp weapon and others were caused with blunt object. The death was a result of manual strangulation. All injuries were ante-mortem in nature, fresh in duration and were sufficient to cause death in the ordinary course of nature.—Apparently, the appellant was the only individual who was last seen with the victim inside the house. Only for fifteen minutes, the appellant was not inside the house and had gone to his sister-Rekha residing at 16/882 E, Bapa Nagar, Padam Singh Road, Karol Bagh. There is nothing on record to show if during these fifteen minutes any other individual had entered inside the house. The offence had taken place inside the privacy of a house where the appellant had all the opportunity to commit it. It is on record that after the quarrel, the appellant had gone after closing the door of the house and it was opened by him when he returned to the house with his sister-Rekha and the dead body was found—All these circumstances were within the special knowledge of the appellant and he under Section 106 Evidence Act was under legal obligation to explain. However, he did not give plausible explanation and failed to divulge his whereabouts during these fifteen minutes. Initially, his plea was that he was not present at the spot. He did not put any suggestion to PW-1 that he had left along with Rahul at about 05.30 p.m. PW-4 (Rahul) in his deposition merely stated that after appellant's father had started hurling abuses, he left the house of the accused at around 05.30 p.m. He did not state that at that time, Rohit had also left the house along with him.—The appellant did not discharge the burden which had shifted to him under Section 106 Evidence Act. This silence forms an additional link the chain of circumstances. For the absence of an explanation from the side of the appellant, there was every justification for drawing an inference that the appellant was the author of injuries including strangulation—DD No.36A records that the victim had died a natural death inside the house as he was a habitual drunked. Apparently, the police was mislead. It was not a case of natural death as in post-mortem examination

report, the cause of death was ascertained as 'asphyxia as a result of manual strangulation—The trial court has dealt with the mismatch in the probable time of death given in the post-mortem examination and for good reasons preference was given to ocular evidence over medical evidence which was advisory in nature—Certain description and contradictions highlighted by the appellant's counsel are inconsequential. Non-recovery of crime weapon i.e. lag of wooden stool, and recovery of blood-stained clothes which the appellant was wearing at the time of occurrence are not material. In the instance case, the prosecution relies on the 'last seen' theory. Here, there is practically no time lag between the time when PW-1 saw the deceased the accused/appellant together and the time the death was discovered. The time lag was about fifteen minutes only. Unnatural conduct; motive of the appellant to inflict injuries to the victims; and false explanation given in 313 statement to the incriminating circumstances are other strong circumstances taken cumulatively from a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and none else.—The alternative plea to modify the sentence order as the appellant has undergone substantial period of substantive awarded to him, it reveals that the sentences awarded to the appellant is RI for seven years, which cannot be termed unreasonable or excessive—Dismissed.

Rohit v. State *2312*

— Section 395—The prosecution case as revealed in the charge-sheet was that on 23.05.2009 at about 01.50 a.m. at House No. A-181, Gali No.6, Mandoli Extension, the appellans and their associates Aftab @ Daboo and Yamin @ Kalia committed dacoity. Daily Diary (DD) No. 7B was recorded at PS Mehrauli on getting information about the occurrence from PCR—Further case of the prosecution is that on 25.05.2009, Sakir, Mohd. Rahim, Mohd Harun (A-3), Mohd. Munir Bada, Dulal

(A-2), Munir Chota (A-1) and Kamal were arrested by the police of Special Staff, South District, in case FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli. Various weapons were recovered from them. Their involvement in the instant case emerged in the disclosure statements made by them—The prosecution examined twenty-one witnesses to substantiate the charges against them. In 313 statements, the accused persons denied their complicity in the crimes and pleaded false implication. After considering the rival contentions of the parties and appreciating the evidence and other materials, the Trial Court, by the impugned judgment, held A-1 to A-3 guilty under Section 395 IPC. Aftab and Yamin @ Kalia were acquitted of the charges. State did not prefer any appeal against their acquittal. Being aggrieved and dissatisfied A-1 to A-3 have preferred the appeals—The appellants were arrested along with their associates in FIR No. 267/2009 under Section 399/402 IPC and 25 Arms Act, PS Mehrauli, by the police of Special Staff, South District on 25.05.2009—It is trite to say that the substantive evidence is the evidence of identification in the Court. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. Neither of the appellants claimed their presence at any other particular place on the relevant time and date. They did not examine any of their family members or employers to prove their presence in their respective houses or places of work. The appellants had no reason to be present inside the victim's house at odd hours—Minor contradictions, discrepancies and improvements highlighted by the appellants' counsel do not stake the basic structure of the prosecution

case due to clear identification by the complainant who had direct confrontation with the assailants for about ten minutes inside the house and had clear and reasonable opportunity to note their broad features—Exact number of assailants who were involved in the incident could not be ascertained during investigation—Minimum number of assailants required for conviction under Section 395 IPC is five which the prosecution failed to prove beyond doubt. Conviction under Section 395 IPC was not permissible. Since the victim was injured in committing the robbery by the assailants, the offence proved against A-1 to A-3 would be under Section 394 IPC. The conviction is accordingly altered to Section 394 IPC—None of them has any previous conviction though they are involved in some other criminal cases. Taking into consideration all the facts and circumstances, the sentence order is modified and substantive sentence of the appellants is reduced to eight years with fine Rs. 10,000/- each and failing to pay the fine to undergo SI for three months, each under Section 394—disposed of.

Munir @ Chota v. State (Govt. of NCT of Delhi) *2353*

—S.307/326—Grave and sudden provocations—Accused charged U/s.307 IPC but convicted U/s.326 IPC only—Acquittal U/s.307 IPC not challenged by prosecution—In statement accused admitted that acid was thrown by him due to grave provocation for being injured by a Lathi on his head—Burden on accused to establish beyond doubt that the injuries were inflicted whilst deprived of the power of self-control by grave and sudden provocation—He did not adduce any evidence to substantiate defence—He did not name specific individual who inflicted injuries on him—No Lathi recovered—No complaint lodged by the accused—Accused took conflicting and inconsistent pleas—Ocular testimony in consonance with the medical evidence—Appeal dismissed.

Suraj v. NCT of Delhi *1664*

— Section 304 part 1 Section 34—Culpable homicide not amounting to murder—information as to a person mercilessly beaten—DD No. 23B recorded at PS Prashant Vihar—Victim removed to hospital—Spot of occurrence within the jurisdiction of PP Rohini—Intimation given to the concerned police officers—DD No.13 recorded—MLC of injured collected—Injured unfit for statement—on regaining consciousness statement of injured recorded—FIR No.516/07 u/s. 308/341/506/34 registered at PS Prashant Vihar named appellant as one of the assailants—Appellant arrested the same day—one co-accused also arrested at his instance—Baseball bat recovered from the bushes—Victim scummed to injuries—DD No.94 recorded—post mortem examination conducted—Section 302 IPC added charge-sheet filed against appellant and his associate Charge framed prosecution examined 28 witnesses—Claimed false implication in statement u/s. 313 Cr. P.C.—No witness examined in defence appellant held guilty and convicted co-accused acquitted—Appellant preferred appeal—Contended evidence not appreciated in its true and proper perspective—Informant did not support the prosecution—Dying declaration recorded by the IO highly suspect and doubtful—Victim never regained consciousness—No permission from doctor before recording dying declaration—Victim got discharged against medical advice and shifted to another hospital—Family members of victim lodged complaint against IO for not recording the statement of victim properly—Inordinate delay in recording the statement of witnesses—Case of mistaken indentity appellant had no motive to inflict injuries to the victim—Additional PP contended judgment based on fair appraisal of evidence—IO had no ulterior motive to fabricate or manipulate—Held: MLC contains endorsement of fit for statement at 12.30 PM victim gave detailed account of the incident—Identified appellant and gave sufficient description to fix his indentity—Identity never questioned in cross examination—Plea of mistaken identity has no force—Testimony of witness as regards recording of dying

declaration of victim remained unchallenged in cross examination—Genuineness and authenticity of the statement not questioned—Injuries opined to be ante mortem caused by hand blunt force impacts can be caused by baseball bat or similar type of bat—Version corroborated by in entirety by other witness no reason to infer that victim did not make that statement no material to suspect the animus of the IO—Nothing to show the statement to be a result of tutoring or prompting—Statement made without exterior influence or ulterior motive guilt of appellant established by cogent evidence—Judgment needs no interference—Appeal dismissed.

Naresh Kumar v. State *1704*

— S.307/308/34—Accused acquitted U/s.307 but convicted U/s.308/34 of the IPC. TIP of one of the accused not conducted despite the occurrence taking place at night and despite the accused not acquainted with victim prior to the occurrence—Identification of said accused for the first time in the Court not enough to prove his involvement specially when no crime weapon was recovered and other recoveries were disbelieved by trial court. In the initial information, victim did not give exact number of assailants—Names of assailants not disclosed to the police and to the doctors initially despite acquainted with three accused prior to the incident-Inordinate delay in recording statement of witness which remained unexplained—Apparently the prosecution witnesses presented untrue facts and improved their versions from time to time—All accused acquitted.

Shivender Pandey @ Pandit & Ors. v. State.....*...1763*

— S.308/326/324/34—Prompt lodging of FIR—Since of FIR was lodges without any delay, there was least possibility of the complainant to fabricate or concoct a false story in such a short interval. Contradictions in evidence—Held, such minor contradictions are bound where a group of persons had attacked three persons. In such a situation, it would not be

reasonable to expect that every witness should describe with mathematical accuracy about each and every injury sustained by all the injured persons giving minor details. The totality of the evidence of a witness has to be taken into consideration for fixing the probative value. The totality of the evidence of a witness has to be taken into consideration for fixing the probative value. Plea of alibi—Held, when a plea of alibi is raised by an accused, it is for him to establish the said plea by positive evidence. The burden is on the accused to show that he was somewhere else other than the place of occurrence at the time of incident. The burden on the accused is undoubtedly heavy. This flows from Section 103 of Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. Plea of 'alibi' must be proved with absolute certainty so as to completely exclude the possibility of accused's presence at the time and place where the incident took place.

Kanchan Singh v. State *1970*

— Injured witness—Held, testimony of injured witness is accorded a special status in law. Injury to a witness is an inbuilt guarantee of his presence at the scene of crime. Injured witness will not want to let the actual assailant go unpunished merely to falsely involve a third party.

Plea of alibi—Plea of alibi must be proved by an accused by cogent and satisfactory evidence completely excluding the possibility of accused persons at the scene of occurrence at the relevant time, where presence of accused at the scene of occurrence has been established satisfactorily by the prosecution.

Necessary ingredients of S. 308 IPC—No injuries inflicted on vital organs of the victim—Fractures on right femur, right Tibia and metacarpal bones—Though injuries were 'grievous' in nature, they were not sufficient in ordinary course of nature to cause death—Prosecution could not establish any evidence

to infer that the injuries were caused with the object and knowledge to cause victim's death—Incident took place suddenly without pre-plan—Accused not armed with any weapon—No past history of animosity—From these circumstances, it cannot be inferred that accused had intention or knowledge attracting S. 308 IPC—Conviction U/s.325/34 affirmed.

Prabhu Dayal Sharma v. The State of NCT of Delhi *1979*

— Arms Act, 1959—S. 25—Appeal against conviction—Accused apprehended at a short distance from the spot and found in possession of country made pistol with live cartridges—FIR lodges promptly—No animosity between complaint and accused—Accused not even a resident of Delhi Minor contradictions and small improvement in the testimony of the witnesses do not effect the basic structure of the prosecution case—Since the accused apprehended after the incident at a short distance there was no requirement of TIP. Acquittal of co-accused—Does not necessitate acquittal of appellant where there are specific and cogent evidence of his involvement—It is always open to Court to differentiate the accused who is convicted from those who are acquitted. S. 397 IPC—Describes minimum sentence for improvement and does not prescribe fine, therefore, imposition of fine U/s. 397 IPC is not permissible.

Rizwan @ Bhura v. State of Delhi *1944*

— S.302/34—Related witnesses—Held, relationship itself is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal culprit and make allegations against an innocent person. Evidence of related witnesses can be relied upon if it has a ring of truth to it and is cogent, credible and trustworthy. Such evidence however needs to be carefully scrutinised and appreciated before any conclusion is made to rest upon it. Evidence cannot be disbelieved merely on the ground that the witnesses are related.

Once it is established that their depositions are cogent, inspires confidence, do not suffer from any material contradictions, the Court would be justified in relying upon such valuable piece of evidence.

Ravi Kumar & Ors. v. *State* *1990*

INDIAN EASEMENT ACT, 1882—Section 52—Indian Evidence Act, 1872—Section 116—Suit for possession, damages and mense profit. Defendants claim that Plaintiff have no title to the suit property as documents produced by them are merely general power of attorney, agreement to sell etc. Further contend that property purchased benami by father of Plaintiff in name of minor children being Plaintiff and his brother. Defendants contention is that Defendants were residing with the father in joint possession of the property with the permission of the father and to the exclusion of the plaintiffs and that defendants are entitled to claim adverse possession Held—As admittedly the defendants came into possession with permission granted by the father of the plaintiffs who permitted them to enter/use the premises for a limited period, the defendants were using the premise as Licensee. As the father has died, the License has been terminated. Defendant cannot challenge the title of the licensor now at this stage after 14 years. The written statement fails to bring out any title or right in the defendants to continue to retain possession. Defendant taking frivolous and vexatious defense for the purpose of prolonging their illegal possession of the suit property. Suit decreed in favour of Plaintiff.

Laxman Singh & Ors. v. Urmila Devi & Ors. *1649*

INDIAN REGISTRATION ACT, 1908—Section 17(1)(d) and 49—Indian Stamps Act, 1899—Section 35—Two premises were taken on lease by Respondent— Lease agreements were executed on a Rs.100/- stamp paper each and were unregistered—Lease agreements stipulated that term of lease shall be 12 years—As per Petitioners, lease agreements also stipulated that there would be a 36 months lock-in-Period

w.e.f. 16.04.2007 to 15.04.2010 in which neither of parties could terminate lease—As per Petitioners, Respondent in violation of terms and conditions of lease agreement, by letter dated 20.01.2009, terminated lease agreement, paid rent only upto 31.01.2009 and abandoned shops on 30.03.2009—Petitioners before Arbitral Tribunal claimed rent for month of February and March, 2009 and also for unexpired period of lock-in-period—Arbitral Tribunal held that Respondent liable to pay rent for months of February and March, 2009 at agreed rate of Rs.1,24,000/- besides service tax and maintenance charges—With regard to issue pertaining to objection of Respondent that claim of Petitioner for payment for unexpired lock-in-period was hit by provisions of Indian Stamp Act and Indian Registration Act, it held that lease deed was insufficiently stamped and it compulsory required registration and as it was unregistered, it was inadmissible in evidence and clause of lock-in period could not be enforced— Award challenged before High Court—Held—A document compulsorily required to be registered but not being So registered cannot be used as evidence except for any collateral purpose—A clause in a lease deed fixing or stipulating a term of lease or a fixed term of lock-in period is not a collateral purpose—Said clause would be one of main clauses of lease which in absence of registration would be inadmissible in evidence and unenforceable in law—Arbitral Tribunal has rightly held that clause vis-a-vis lock-in period cannot be called a collateral purpose and tenancy between parties was not fixed term tenancy but a month to month tenancy terminable by a notice on either side—Finding by Arbitral Tribunal that Respondent had vacated premises w.e.f. 01.04.2009 is purely factual—Powers exercised by Court while deciding objections under Section 34 of Act are not appellate powers—Court does not sit as a Court of appeal—Findings of Arbitral Tribunal are findings in a according with settled judicial principles and cannot be interfered with.

Bharat Lal Maurya v. Godrej & Boyce Mfg. Co. Ltd *2188*

INDIAN STAMPS ACT, 1899—Section 35—Two premises were taken on lease by Respondent— Lease agreements were executed on a Rs.100/- stamp paper each and were unregistered—Lease agreements stipulated that term of lease shall be 12 years—As per Petitioners, lease agreements also stipulated that there would be a 36 months lock-in-Period w.e.f. 16.04.2007 to 15.04.2010 in which neither of parties could terminate lease—As per Petitioners, Respondent in violation of terms and conditions of lease agreement, by letter dated 20.01.2009, terminated lease agreement, paid rent only upto 31.01.2009 and abandoned shops on 30.03.2009—Petitioners before Arbitral Tribunal claimed rent for month of February and March, 2009 and also for unexpired period of lock-in-period—Arbitral Tribunal held that Respondent liable to pay rent for months of February and March, 2009 at agreed rate of Rs.1,24,000/- besides service tax and maintenance charges—With regard to issue pertaining to objection of Respondent that claim of Petitioner for payment for unexpired lock-in-period was hit by provisions of Indian Stamp Act and Indian Registration Act, it held that lease deed was insufficiently stamped and it compulsory required registration and as it was unregistered, it was inadmissible in evidence and clause of lock-in period could not be enforced— Award challenged before High Court—Held—A document compulsorily required to be registered but not being So registered cannot be used as evidence except for any collateral purpose—A clause in a lease deed fixing or stipulating a term of lease or a fixed term of lock-in period is not a collateral purpose—Said clause would be one of main clauses of lease which in absence of registration would be inadmissible in evidence and unenforceable in law—Arbitral Tribunal has rightly held that clause vis-a-vis lock-in period cannot be called a collateral purpose and tenancy between parties was not fixed term tenancy but a month to month tenancy terminable by a notice on either side—Finding by Arbitral Tribunal that Respondent had vacated premises w.e.f. 01.04.2009 is purely factual—Powers exercised by Court while deciding objections under Section 34 of Act are not appellate powers—Court does not sit as a Court of appeal—Findings of Arbitral Tribunal are findings in a according with settled judicial principles and cannot be interfered with.

INDUSTRIAL COMPANIES (SPECIAL PROVISION) ACT, 1985—Section 15(1); Securitisation of Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 13(4), 13(9): KMBL filed an application for abatement of reference filed by Petitioner u/s 15(1) of SICA on the ground that KMBL held more than 3/4th in value of the outstanding secured debts of the petitioner and had also taken action u/s 14(4) of SARFAESI. BIFR allowed KMBL's application, Appeal to AIFR rejected. Hence the present petition. Interplay between section 13(9) of SARFAESI act and the third proviso of Section 15(1) of SICA. Petitioner's contention is that S. 13(9) of SARFAESI Act, when it refers to amount outstanding in respect of "financing of a financial asset" can only refer to three-fourth of the amount oustanding in relation to the financing of a financial asset whereas the third proviso to S. 15(1) of SICA when it refers to three fourth in value of the amount outstanding, mandates the calculation to be based on the "financial assistance disbursed to the borrower of such creditor". HELD-Satisfaction by a secured creditor of the condition laid down in S. 13(9) of the SARFAESI Act cannot automatically be taken as satisfaction of the condition prescribed in the 3rd Proviso to S. 15(1) of SICA for the simple reason that both conditions prescribe different thresholds. While section 13(9) of the SARAFAESI Act speaks of financing of "a financial asset", the 3rd proviso to section 15(1) of the SICA speaks of "financial assistance disbursed to the borrower of such secured creditors". The reference can only be to the total amount borrowed by the

petitioner from all the secured creditors which is outstanding and therefore the enquiry should be to find if KMBL also satisfies the condition that it shall represent in value not less than 3/4th of the total amounts borrowed by the petitioner from all secured creditors. It is only then that it can fall within the 3rd proviso and apply to the BIFR for abatement of the reference of the petitioner's reference. Writ petition allowed. Order of BIFR and AIFR set aside, matter restored to BIFR.

Global Infrastructure Technologies Ltd. v. Kotak Mahindra Bank Ltd. & Ors. 2366

INDUSTRIAL DISPUTES ACT, 1947—Section 25F—Petitioner challenged before High Court award Passed by Labour Court holding that respondents no. 1 and 2 have been in continuous service for 5 and 4 years respectively and their services were terminated without complying with mandatory conditions specified in Section 25F of Act—Plea taken, finding recorded by Labour Court that Petitioner is industry is erroneous—Onus to Prove that workman had worked for 240 days is on respondent workman—All India Institute of Medical Sciences is industry—Held—A Division Bench of this Court has already held that petitioner is industry within meaning of Industrial Disputes Act, 1947—There is no reason to take a different view here—Reply filed by petitioner to statement of claim is utterly vague and bereft of details—A specific averment is made by workmen about date of their employment, date of their termination and that they have worked for 240 days in each completed year of service—Written statement of Petitioner simply accepts that they were employed in AIIMS but failed to give period of employment—Labour Court cannot be faulted in making adverse inference against petitioner—There is also no merit in contention of learned counsel for petitioner that respondents failed to discharge onus on them to prove that they have worked for 240 days is on respondents—In view of pleadings and evidence placed on record by respondents workmen, there is no merit in

submission of petitioner.

A.I.I.M.S. New Delhi v. Uddal & Ors. 1714

— Section 33(2)(b)—Order passed by Industrial Tribunal dismissing Petition of petitioner seeking approval of its directions for removal of respondent from service, challenged before High Court—Plea taken, evidence of a ticketless passenger is not necessary for petitioner to prove type of charges that were leveled against respondent—per contra plea taken, in present case there was evidence on record before Enquiry Officer to show that one of two passengers on basis of whose statement Checking Team had made a report, had sent a written communication pointing out that Conductor was not at fault and passenger had asked him for a ticket which was given to him by Conductor—This fact clearly falsifies statement of Checking Team and there is no basis to disregard findings recorded by impugned order—Held—Considering two conflicting statements, impugned order records a finding disbelieving version of petitioner and hence holds that petitioner has not been able to establish charges against respondent—There is no perversity in said conclusion drawn by impugned order—Appreciation of evidence is within domain of Tribunal—Findings of fact recorded by fact finding authority duly constituted for said purpose cannot be disturbed for reason of having been based on materials or evidence not said to be sufficient by Writ Court as long as findings are based on some materials on record which are relevant for said purpose—Merely because another view was possible would not be a ground to set aside said findings—petitioner failed to show as to why finding recorded by Tribunal is liable to be set aside—it is true that in this case there is evidence of inspecting staff which carried out checking to show that two of passengers had been given tickets of less denomination—Yet in present case one of passengers has written a communication to petitioner clearly pointing out that he had been issued a ticked which he had requested for and conductor

did nothing wrong—This evidence of passenger has gone unrebutted—There is nothing on record to show that statement of passenger was obtained under any influence—In light of this evidence, statement of Inspecting staff cannot be unequivocally accepted—Petition is without merit and is dismissed—Order of Tribunal is upheld—However, in case petition implements order of Tribunal dated 18.03.2002 within three months from today, namely, that he will be satisfied in case 50% of back wages plus relief of re-instatement is given to him.

D.T.C. v. Amarjeet Singh & Anr. *1724*

INTELLECTUAL PROPERTY RIGHTS—Trade Mark—Present Injuncting—Plaintiffs field the present suit for permanent injunction, restraining infringement and passing off of trade dress rights, copyright, delivery up against the defendants—An exparte injunction was granted in favour of the plaintiff—As despite service none appeared on behalf of defendants, defendants no.1 to 4 were proceeded ex parte on 28.1.2014 and on 4.9.2013 defendant no.5 was deleted from the array of parties—In view of the fact that the plaints is duly supported by the affidavit of the authorized representative of the plaintiffs, it is not necessary to direct the plaintiffs to lead evidence in the matter and the plaint shall be treated as an affidavit—The plaintiff No. 1 has many sales and distribution office throughout the world. It is also pleaded in the plaint that in India, the plaintiff No. 1 operates through its subsidiary, Perfetti Van Melle India Pvt. Ltd., which is the plaintiff No. 2 herein. The plaintiff No. 2 has diversified and expanded its products portfolio to ready-business to-eat, packaged salty snacks—It is also started in the plaint that the plaintiff no. 1 owns and operates several websites including its primary website, www.perfettivanmelle.it, which provides detailed information about the company and its range of products available in different countries and is accessible by Internet users all over the World, including India, both within and outside the jurisdiction of this court—Counsel submitted

that the 'Animal Kids ' packaging, the pack layout and overall design used by the defendants is identical to the plaintiffs' "STOP NOT" pack. It is further submitted that the defendants have lifted the entire artwork, layout, colour scheme, design and the individual features therein, in toto, from the plaintiffs' prior adopted and launched "STOP NOT" pack—On the basis of the averments made in the plaint duly supported by an affidavit, which has remained unrebutted, the plaintiffs have been able to establish that they are registered proprietor of the trade-mark "STOP NOT" in class 30 of the Trademark Act and prior user of the "STOP NOT" trade dress. A comparison chart, illustrating the product images of plaintiff and defendants, exhibited as EX. p-3, evidence that the defendants have lifted the entire artwork, layout, colour scheme as well as design from the plaintiffs "STOP NOT" trade dress. Although the reports filed by both local commissioner reflect that no packets were found at the given addresses of the defendants which bore a similarity to the plaintiffs trade dress, however, the plaintiffs have placed on record "STOP NOT" look alike product packs. The Court is of the view, the use of the Animal Kid's packing by the defendants, which is a substantial reproduction of the plaintiffs "STOP NOT" trade dress, is likely to dillure the distinctive character of the plaintiff's packaging and the same is likely to erode the goodwill and reputation of the plaintiff—Suit decreed.

Perfetti Van Melles.P.A & Anr. v. Anil Bajaj & Ors. *2083*

LAND ACQUISITION ACT, 1894—Section 4, 6, 9 & 10—Code of Civil Procedure, 1908—O VII rule 11—Appellant had filed suit seeking perpetual injunction against dispossession from suit property and declaration that restoration allotment of same by Lt. Governor was illegal—Learned Single Judge dismissed suit on ground that plaintiff (Appellant herein) had no title to suit property—Order challenged in appeal before DB—Plea taken, application u/O VII rule 11 ought to be decided based

on averments in plaint alone—Learned Single Judge had incorrectly proceeded upon assumption that possession of suit premises were taken pursuant to acquisition without giving opportunity to appellant to prove his case—Per contra plea taken, it is ex facie evident from documents filed with plaint that suit property was given to Society pursuant to acquisition and under lease agreements—It is a logical sequitur therefrom that Society would be bound by terms thereof including prohibition from selling—In circumstances, no title could have flown from Society to appellant—Where plaint itself discloses no cause of action suit ought to be dismissed and there is no infirmity in action of learned Single Judge in doing so—Held—Case of appellant is that possession of suit property was never taken pursuant to agreement and Society had acquired title, possession and/or interest therein from the original owners pursuant to settlement and not acquisition—It is this that appellant seeks to set his title up—This cannot be set to be a case of clever or artful drafting to create illusory cause of action that ought to be nipped in bud under O VII rule 11—Duty of Court under O VII rule 11 is to consider whether averments in plaint taken as a whole, along with documents filed therewith, if taken to be true, would warrant a decree in favour of plaintiff—This Court is of view that in instant case, averments and documents would so do—De hors a patent contradiction, i.e., one ascertainable ex facie from record, without involving any lengthy or complicated argument or a long drawn out process of reasoning, between averments and documents, Court considering application under O VII rule 11 ought to not lightly ignore averment in plaint—Conclusion of learned Single Judge that Society acquired title/interest in suit property under lease agreements is unwarranted at stage of considering application under O VII rule 11—Plaint does disclose a cause of action which ought to be considered in trial—Impugned order is set aside.

Pankaj Bajaj v. Meenakshi Sharma & Ors...... *1905*

LIMITATION ACT, 1908—Article 24,27,47 and 55 of Schedule—Trial Court dismissed petitioner's application for rejection of plaint—Order challenged before High Court — Plea taken, impugned order suffers from material irregularity : suit was barred by Section 33 and 42 of DLR Act, 1954 therefore Court lacked jurisdiction and case is barred by limitation—Held— Trial Court has considered both objections in impugned order — It has clearly reasoned that both these objections are mixed question of facts, which could be decided after a trial—It is not indeed it cannot be - contention of petitioner herein that issues are pure questions of law de hors facts of case—It cannot by any stretch of imagination be held that question of : (i) whether a document—which is basic of suit—is illegal in view of Delhi Land Reforms Act, and (ii) whether suit was filed on 01.08.2011 or on 02.08.2011 are only question of law—Latter question is ex facie issue of fact—Given same, impugned order, which rejects application under Order Vll Rule 11 and relegates party to trial on issues raised in application, is not one that warrants interference under Section 115 of Code—This Court finds no reason to interfere with impugned order—Petition is without merit and is accordingly dismissed.

Sanjay v. Ajit Singh Bajaj..... *2246*

— Section 18—Preliminary issue of limitation—Whether the fresh period of limitation would commence from the date of execution of the document acknowledging the debt or from the expiry of the period stipulated in the acknowledgment for payment. Held—IF a person had promised to do a particular act within a stipulated period, then the cause of action to sue for breach of the promise would accrue either on the specific refusal of the promisor to perform the said promise or on the expiry of the period stipulated for the performance. The cause of action to sue for recovery accrues to a party only on the failure of the other party to pay within stipulated period for payment. In the facts of the present case, the cause of action to sue on written acknowledgment of 14.04.2006 would

accrue to the plaintiff only on the failure of the defendant to pay on the expiry of six months of 14.04.2006. i.e., on 13.10.2006. Thus, the acknowledg-ment dated 10.06.2009 is a written acknowledgment in terms of Section 18 of the Act and executed within the period of limitation of the acknowledgment dated 14.04.2006 as it was coupled with a payment of Rs. 30,000/- and an undertaking to pay the balance amount within six months. The suit of the Plaintiff is prima facie held to be within time.

Manoj Kumar Goyal v. Jagdish Kumar Modi 1595

MOTOR VEHICLES ACT, 1988—Challenge to award of compensation on the ground that Tribunal wrongly calculated income of deceased as GPF, Gratuity and other benefits which the deceased was getting not added and loss of consortium and love and affection not included. Held—Settled law that while calculating the income of the deceased for the purpose of calculation of loss of dependency, the income includes all the perks and benefits which were beneficial to the family of the deceased. Tribunal erred in not adding this amount while calculating income. Held—From the principles laid down by the Hon'ble Supreme Court in Rajesh and others v. Rajbir Singh & Ors. Appellants and wife and minor children of the deceased are entitled to Rs. 1,00,000/- towards loss of consortium and Rs. 1,00,000/- towards loss of love and affection. Compensation re-assessed from the date of filing of petition.

Neena Devi & Ors. v. Ashok Yadav & Ors. 1802

— Compensation In the proceedings under Motor Vehicles Act, learned Motor Accident Claims Tribunal awarded compensation but at the same time, reached the conclusion that there was a breach in terms of the insurance policy since the driver of the offending vehicle was not holding a valid driving licence, as such the Tribunal granted recovery to the insurance company—Appellant challenged the order of the

Tribunal arguing only to the effect that the liability to pay the claimant ought to have been fixed directly on the driver and owner of the offending vehicle instead of the appellant being directed to first pay the claimant and then recover the same from the owner and driver of the offending vehicle—Held, in view of settled legal position that the liabilty to pay compensation under Motor Vehicles Act is joint and several, coupled with the legal position that liability to pay the third person under the policy is that of the insurance company, the insurance company can only be given a right to recover the awarded compensation from violators of terms and conditions of the insurance policy, so order of the learned Tribunal did not suffer any infirmity.

New India Assurance Company Ltd. v. Ashwani Kumar & Ors. 1863

— Challenged to award of the Tribunal on the ground that income calculated in the absence of documentary evidence as the documents on record were manipulated and fabricated. Held—After going through he evidence produced before the Tribunal it is apparent that the Appellant's stand has no merit and income correctly calculated. Contention of the Appellant that because the signature of the deceased differs on each and every voucher, the vouchers are not genuine has no force. The insurance company had the opportunity for getting the disputed signatures of deceased on vouchers examined by the handwriting expert. The Court at this stage cannot presume that the vouchers do not bear the signatures of the deceased. Appeal dismissed.

National Insurance Co. Ltd. v. Sukriti Devi & Ors. 1849

— Sections 2 (44), 2 (21), 166 & 140—Award passed by Motor Accident Claims Tribunal on petition filed by respondents fixing liability on insurance company to pay compensation and rejected its claim for recovery rights—Aggrieved insurance

company preferred appeal claiming there was violation of insurance policy as driver was not holding valid and effective driving licence to drive tractor—He was holding driving licence valid for motorcycle and LMV (Non-Transport). Held: Tractor is motor vehicle coming within the definition of section 2 (44) of Motor Vehicle Act and is also a light motor vehicle within the meaning of section 2 (21) of motor Vehicle Act. The tractor not being used for any commercial purpose and is also not a non-transport vehicle.

New India Assurance Co. Ltd. v. Sanjay Singh & Ors. 1857

— Appeal for enhancement of compensation by LR's of deceased properly. The deceased was a contractor and income ought to have been Rs. 30,000/- to 40,000/-. Denial of future prospects is against the principles laid down in Sarla Verma's case. Held—Appellant had failed to prove that the deceased was a marble contractor. His income has been assessed on the basis of minimum wage. He thus is taken as a salaried person instead of a self employed person. Held—From the directions in Sarla Verma's case it is apparent that only two categories of persons are not entitled to future prospects, one, where the deceased was self employed and secondly where the deceased was working on a fixed salary (without prospect of annual increment). The government revises the minimum wages twice annually. The deceased who has been assessed as daily wager does not fall into the exempted category in Sarla Verma's case. Since age of the deceased is below 40, he was entitled to 50% of his salary towards future prospect. Appeal disposed of.

Rajender Sah & Ors. v. Santosh Kumar & Ors. 1875

— Appellant met with an accieent and thereby suffered Permanent disablement of 80% in respect of lower limbs—The Tribunal assessed the whole body disability at 40% and calculated loss

of future earning after taking into account his age as well as three income tax returns—Challenged—Petitioner argued before the High Court that the Tribunal ought not to have taken into consideration the income shown in the assessment year 2009-2010 since during financial year 2008-2009 the petitioner remained indisposed due to his injuries and was not in service, which is the reason for reduction in the earnings of that year otherwise the income tax returns showed that there was yearwise increase in his income—Held, as reflected from record that due to the accident on 21.9.2009, appellant was not able to perform duties with his employer for 5-6 months and therefore, his earnings for the assessment year 2009-2010 are less than the earnings of the previous years, so the Tribunal ought not to have taken into consideration the same—Also held that towards future prospects, keeping in mind age of the appellant as 26 years, the Tribunal ought to have applied 50% of his salary towards future prospects and the Tribunal wrongly applied 30% towards future prospects—Accordingly, the High Court recomputed the compensation payable to the appellant.

Raj Kumar v. Jeet Singh & Ors. 1868

— Section 166 & 140—Award passed by Motor Accident Claims Tribunal challenged by insurance company on ground of incorrect multiplier as per age of deceased applied to calculate compensation in death case of a bachelor aged 21 years. Held:- Multiplier has to be taken as per the age of bachelor deceased or the survivor, whichever is higher.

Royal Sundram Alliance Insurance Co. Ltd. v. Vimla Devi & Ors. 1946

— Section 166 & 140—Award passed by Motor Accident Claims Tribunal challenged by insurance company on ground that legal heirs of deceased not entitled to future prospects. Held:- Only two categories i.e. where the deceased was self employed or where he was working on a fixed salary with no provision of

annual increment etc. are excluded while calculating the future prospects.

Royal Sundram Alliance Insurance Co. Ltd. v. Vimla Devi & Ors. *1946*

NDPS ACT, 1985—Section 21 (b)—Appeal against conviction. Held, delay in sending of the sample in FSL, without any evidence of tampering with the samples, is of no adverse consequence to the prosecution. Also, Held, merely because prosecution witnesses are police officials, they do not cease to be competent witnesses and their testimony cannot be doubted merely because they were police officials. Non-joining of public persons especially when the reason has been explained, is not fatal to the prosecution's case and conviction can be based on the testimony of police officials which is corroborated by ocular as well as documentary evidence. Also, held, minor omissions in the testimonies of police officials not fatal especially when the police officials witness many such criminal cases in discharge of their official duties.

Ashif Khan @ Kallu v. State ..... *...1754*

PREVENTION OF CORRUPTION ACT, 1988—Section 7/ 13(1)(d) – Appellant, Divisional Head of PS Shalimar Bagh convicted for having demanded and accepted a bribe from the complainant for not involving and arresting him in a case regarding kidnapping of his maid servant—Prosecution, in addition to the trap proceedings, relied upon two tape recorded conversations in which the appellant assertedly made the demand of bribe from the complainant – Contention of the appellant that he was never entrusted with the missing report of the maid of the complainant and that the complainant had falsely implicated him because he himself was indulging in flesh trade and had even offered his services to the appellant to oblige him, which the appellant had refused. Held: Daily diary of PS Shalimar Bagh produced by the prosecution itself proves that the complainant had given a statement at the PS

on 19.06.2002 that his maid had returned and that he does not wish to pursue the missing complaint any further. In such circumstances there was no motive for the appellant to have demanded a bribe from the complainant, two months later in August, 2002 for not registering a case of kidnapping against him and therefore the version of the complainant in this regard appears to be completely illogical. Further none of the two tape recorded conversations can be relied upon as corroborative evidence for the prosecution failed to get the device used for recording the said conversations, examined by an expert for ruling out the possibility of tampering. It is also to be taken note of that from the transcripts of neither of the two conversations, is it clear that the appellant had demanded a bribe. As regards the trap proceedings both the panch witnesses did not support the case of the prosecution with respect to the demand of the bribe by the appellant and its acceptance thereof. Sole testimony of the complainant not sufficiently credible and reliable to return a finding of guilt against the appellant.

Ashish Kumar Dubey v. State Thr. CBI: *2331*

— S. 7, 13 (1)(d) r/w S. 13(2)—Conviction—Challenged—Accused caught with treated government currency notes in left pocket of his shirt—Hands as well as pocket of the shirt turned pink on handwash—Accused admitted his presence at the spot but claimed that his shirt was lying on the bench nearby which was found to be having currency notes when he was apprehended by the raid officer—Explanation appears to be afterthought and weak defence—Evidence was unimpeachable—Conviction upheld—Appeal dismissed.

— S. 7, 13(1)(d) r/w S. 13(2)—Conviction—Appeal against—Complainant PW3 in his examination in chief confirmed the demand made by accused and acceptance of the bribe and the fact that after accepting the bribe amount accused had kept it in the right side pocket of his pant—However in his cross-

examination, after one month, PW3 resiled and claimed that he had purchased a scooter from accused and owed Rs. 5000/ - as balance consideration to the accused—PW3 admitted in his chief that a trap was laid and that accused was arrested after his right hand and right side pocket of pant turned pink on wash—Accused also claimed that he took money as balance consideration of sale of scooter from PW3, which explanation was not offered soon after his apprehension—Accused did not deny that his hand and pant turned pink on wash—Defence of accused is an afterthought—Shadow witness and recovery witness supported prosecution—Relying on the case of *Khujji v. State of M.P.:* AIR 1991 SC 1953 contrary statement of PW3 in cross-examination discarded—Appeal dismissed.

Dinesh v. State 1777

— S. 7, 13(1)(d) r/w S. 13(2)—Conviction—Appeal against—Complainant PW3 in his examination in chief confirmed the demand made by accused and acceptance of the bribe and the fact that after accepting the bribe amount accused had kept it in the right side pocket of his pant—However in his cross-examination, after one month, PW3 resiled and claimed that he had purchased a scooter from accused and owed Rs. 5000/- as balance consideration to the accused—PW3 admitted in his chief that a trap was laid and that accused was arrested after his right hand and right side pocket of pant turned pink on wash—Accused also claimed that he took money as balance consideration of sale of scooter from PW3, which explanation was not offered soon after his apprehension—Accused did not deny that his hand and pant turned pink on wash—Defence of accused is an afterthought—Shadow witness and recovery witness supported prosecution—Relying on the case of *Khujji v. State of M.P.:* AIR 1991 SC 1953 contrary statement of PW3 in cross-examination discarded—Appeal dismissed.

Babu Ram v. *Central Bureau of Investigation* *1783*

PROMOTION—Non-Grant of actual benefits—Brief Facts—Shri Mahesh Kumar was working as a lecturer in Mathematics in the Lucknow University, which job he gave up to join the UP Provincial Forest Service in the year 1952 as a direct recuit as an Assistant Conservator of Forests—In the year 1960, he was duly promoted to the post of Deputy conservator of Forests—He was promoted to the post of Deputy Conservator of Forest and when the All India Forest Services (IFS) was constituted—Shri Mahesh Kumar being the senior most Deputy Conservator of Forests, Grade-II with effect from 11th May, 1978—He was granted the selection grade with effect from 12th July, 1977 but for some reasons, the benefit thereof was not extended to him—Unfortunately with effect from 10th May, 1978, one day prior to his formal promotion to the post of Conservators of Forests, he was compulsorily retired—Shri Mahesh Kumar challenged his compulsory retirement in the Delhi High Court by way of a writ petition which came to be dismissed—The decision of the learned Single Judge was reversed by the Division Bench in LPA No. 71/1978. By its order dated 22nd May, 1979 the order of compulsory retirement dated 10th May, 1978 was also set aside—Petitioners challenged the judgment of the Division Bench by way of Civil Appeal No. 2759-6/1979 before the Supreme Court of India—This appeal was dismissed by the Supreme Court by an order dated 6th August, 1986—Shri Mahesh Kumar was still not granted any relief by the present petitioners and he was compelled to seek relief by way of W.P. Nos. 997/1999 and 998/2006 which were transferred to the Central Administrative Tribunal—Tribunal has set aside and quashed the DPC minutes dated 1st November, 1995 and allotted the T.A. No.3/2007 directing the respondents to extend the benefit of the selection grade and promotions within the period of five months from the date of receipt of the order—Hence, the present petition. Held: Tribunal had noted that it was not the case of the respondents that the merit of Shri Mahesh Kumar suddenly and drastically deteriorated after 12th July, 1977 so

as to deprive him of the promotion in question—Tribunal has also noted the letter dated 17th November, 1992 written by the Conservator of Forests to the Principal Chief Conservator of Forests, Lucknow, U.P. on the above lines and stating that the order of the Court would be complied with and the matter would be solved—Approval of this action was sought—Tribunal had considered the manner in which the present petitioners were proceeding and also that they had wrongly done the fixation and that their actions were erroneous and contrary to the prior orders of the tribunal dated 8th November, 2008 and 31st January, 2012 and that of the High Court dated 7th September, 2010—After seeking justice for a period of 26 years from 1978, Shri Mahesh Kumar expired in the year 2004—Thereafter, his legal heirs have been pursuing the litigation—Despite passage of almost 36 years from the date when cause of action arose in favour of late Shri Mahesh Kumar, justice still eludes the present respondents who are the legal heirs of the deceased—In view of the above discussion, this writ petition and application are dismissed being devoid of merits.

State of U.P. v. Shri Mahesh Kumar & Anr. 1632

RAILWAY SERVANTS (DISCIPLINARY & APPEAL) RULES, 1968—Rule 18 and 25—Indian Evidence Act, 1872—Section 108—Respondent stopped attending duties and he was issued a charge memo proposing to conduct disciplinary proceedings against him on charge of absenting himself from duty unauthorisedly—One of his relatives lodges a police complaint with regard to his being missing—Charge-sheet sent to respondent by registered post was returned undelivered with remark that "person who has to receive it remains out without intimation. No hope that he will return, hence returned"—Notice on inquiry proceedings issued by Inquiry Officer (IO) was also returned with same remark as before—Report of IO holding that charges framed against respondent were proved correct was sent to respondents

permanent address and was returned undelivered with was remark as before—Disciplinary Authority (DA) accepted recommendations of IO and imposed penality of removal from service with immediate effect—Respondent was finally traced in a condition as that of a mad person in Ayodhya-Application filed by respondent before Administrative Tribunal was allowed holding that IO & DA arbitrarily concluded that applicant's absence was unauthorized—Order challenged before High Court—Held—Petitioners had before them evidence of police report as well as confirmation by police that respondent was not traceable—Tribunal had found decision of DA to initiate disciplinary action against respondent on charge of unauthorized absence from duties as arbitrary and hasty—Inquiry proceedings conducted by IO has been held to be a formality inasmuch as telegram and registered letters were being sent to a person who was missing and was admittedly not available at address to which they were sent—Nothing has been pointed out to us which would enable us to take a view which is contrary to view taken by Tribunal—Petitioners would be entitled to subject respondent to a medical examination.

Union of India & Ors. v. Jatashankar 1770

SERVICE LAW—Respondents notified vacancies of 14 posts of Instructor/Mathematics in the Department of respondent No.1, out of which 12 posts were in the category of unreserved and 2 were in the category of schedule caste Petitioner submitted an application as scheduled caste candidate and successfully cleared the written examination and was provisionally selected as one of the two scheduled caste candidates for the post—Respondent No.2 forwarded dosier of the petitioner alongwith the other selected candidates to respondent for issuing after of appointment after due verification—Respondents found on verification that the letter of experience submitted by the petitioner was not genuine, so his candidature was rejected—Tribunal also held that the experience certificate submitted by petitioner was not genuine, so respondents rightly denied

appointment to the petitioner—Challenged in writ petition—Held, the confusion occurred since the company issuing the experience certificate had been using spelling of its name as Tondon Diesels and had also been spelling its name as Tondon Diesel as well as Tandon Diesel—Held, the doubt as regards genuineness of the experience certificate was without any basis, so order of Tribunal set aside and directions issued to the respondents to proceed in the matter of appointment of petitioner.

Khem Chand v. Govt of NCT of Delhi & Anr. 1931

SPECIFIC RELIEF ACT, 1963—Section 19 (1)(b)—Suit for specific performance of Agreement to Sell along with cancellation of five sale deeds which have been executed after the agreement to sell. Application seeking rejection of plaint on the ground that the plaintiff has not correctly valued the suit for the purposes of Court fee and jurisdiction. As per the applicant the Plaintiff had sought cancellation of sale deeds which are registered at different values and since Plaintiff is not in possession of the property., the suit should have been valued on the consideration mentioned in the respective sale deeds. Plaintiff states that Plaintiff had to value the suit for substantive relief of specific performance and the consequential reliefs of cancellation are covered in the main relief. Held—The relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of subsequent transferees is only an ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant in favour of the Plaintiff. Consequently there will be no question of payment of ad valorem Court fees in respect of said relief. The said relief claimed would be superficial and unnecessary. Application dismissed.

Jafar Imam v. Devender Chauhan & Others 1917

— Section 14, Indian Contract Act, 1872—Section 24, 73—Suit for declaration and damages that termination of his services is illegal, arbitrary and in violation of the terms of employment and principles of natural justice. Plaintiff joined at the post of General Manager and continued to work till 02.01.2009. On 02.01.2009 when Plaintiff joined after a leave the was orally asked to resign without assigning any reason and was asked to leave the office abruptly/Plaintiff could not even take his original papers lying in the office containing important documents. The Plaintiff returned the laptop and the company car provided to the plaintiff was also taken away forcibly. Plaintiff contends that part of salary not paid and cash incentive not paid in full, medical bills and medical insurance not paid, statutory benefits of provident fund have also not been deducted. Defendant states that Plaintiff was not discharging his duties well and was having a highly unprofessional attitude. Oral notice of termination of three months was given to the Plaintiff. Held—No evidence on record to show that oral notice of termination was given to the plaintiff. Termination of the Plaintiff is illegal as no notice of three months was given. Salary for three months granted to Plaintiff. However, relief of reinstatement cannot be granted in view of Section 14 of the SRA as the present contract provides for a termination clause. Claim of Plaintiff for cash incentive is rejected being hit by s. 24 of the contract act. Claim of maintenance of company car, driver's salary, Petrol expenses, provident fund, medical reimbursement and medical insurance allowed. Damages of Rs. 25 lacs rejected as no cogent evidence has been places on record on the basis of which claim can be adjudicated. Compensation of any remote or any indirect loss or damage sustained by the party complaining of a breach cannot be granted. Suit decreed.

Dinesh Chadha v. Hotel Queen Road Pvt. Ltd. 1954

SUIT FOR SPECIFIC PERFORMANCE, DECLARATION AND PERMANENT INJUNCTION: BRIEF FACTS—Appellant and Respondent No. 1 entered into an agreement to sell on 9.2.2005 for land owned by the appellant company for a total consideration of 7,35,00,000/- Respondent No. 1 Paid an advance of 1,10,000,00/- and the balance 6,25,000,00/- was payable at the time of completion of the sale formalities by April 30, 2005—Appellant was to Provide the No Objection Certificate/Permission from the competent authority (NOC) for transfer of the suit property—Company applied for NOC on March 24, 2005 Respondent No. 1 was surprised to receive a letter dated April 30, 2005 on May 05, 2005 by which the appellant company sought to cancel the agreement on the pretext that its Board did not approve the Agreement—A draft of 1,10,000,00/- was also sent with the said communication—Respondent No. 1 did not accept the cancellation of the agreement by the appellant company and vide his letter dated May 19, 2005 reiterated the some to the appellant stressing also that respondent No. 1 was not accepting the said bank draft for 1,10,00,000/- Appellant had received the NOC on May 02, 2005—In the second week of June 2005, Attorney holder of the appellant informed respondent No. 1 that the Board of Directors of the appellant had approved the Agreement to Sell dated February 09, 2005 and the General Body of the shareholders of the appellant company had also accorded its approval on June 08, 2005—Appellant is also stated to have applied for a fresh NOC on June 13,2005 as the earlier NOC had expired on June 01, 2005—On July 08, 2005 a communication was received from the appellant stating that sale formalities would be completed within 15 days of receipt of NOC—In the meantime, it is stated that a circular was issued on June 01, 2005 by the Government of NCT of Delhi that NOCs would not be issued in respect of Agricultural lands less than 8 acres—Delhi High Court on December 20, 2005 allowed the writ petition inasmuch as Government of NCT Delhi agreed

to issue the NOC.—Thereafter, there was no information from the appellant and they kept evading the respondents—Hence, the respondent No. 1 filed the present Suit seeking the relief of specific performance, declaration and permanent injunction on February 14, 2006 -Judgment and decree dated 21.12.2012 Passed whereby the suit of the respondents seeking specific performance of the Agreement to Sell dated February 09,2005 was decreed in favour of the respondents with a direction to the respondent to pay to the appellant the balance sale consideration of 6.25 crores (Rupees six crore and twenty five lacs only) with interest @ 6% Per annum from the date of filing of the suit till date of payment—Hence, the Present Appeal—Cross objections filed by the respondents challenging the direction in the impugned order directing the respondents to pay interest @ 6% Per annum on the balance sale consideration. Held: There are no reasons to differ with the view taken in the impugned order on the said issues—Though no serious arguments were raised as to whether time was the essence of the Agreement to Sell, impugned order has rightly held relying on Section 55 of The Contract Act that there are no facts on record to show that it was the intention of the parties that time should be the essence of the Contract—Original contract dated February 09, 2005 Provided that the sale formalities would be completed by April 30. 2005—Appellant received that the NOC on May 02, 2005 but did not take steps to communicate the same to respondent No. 1 or have the transaction completed—Accordingly, the said NOC lapsed—in the meantime, respondent No. 1 purported to cancel the agreement on April 30, 2005 (Ex. P-12) claiming that the shareholders of the company did not approve the Agreement to Sell—Thereafter on June 08, 2005 it claimed that the shareholders of respondent No. 1 company approved the sale transaction and accordingly a fresh application for NOC was made and a supplementary agreement was entered into on July 08, 2005 (Ex. P-13)—it was the supplementary agreement which provided that balance payment would be made within

15 days of receipt of the NOC from the competent authority-A finding has already been recorded that NOC was received on December 23, 2005, but a copy was never provided to respondent No. 1—No copy of the fresh Power of Attorney was supplied to respondent No. 1 nor was respondent No. 1 intimated about the same. In the light of the above facts and the conduct of the appellant it is not possible to conclude that time was the essence of the contract—Appellant could not cancel the Contract in the manner sought to be done.

R.K.B. Fiscal Services Pvt. v. Ishwar Dayal Kansal and Anr. *1671*

TRADE MARKS ACT, 1999—Section 10 & 134(2)—Respondents filed a suit seeking a decree of permanent injunction to restrain defendants/appellants from manufacturing, selling etc. alcoholic beverages or any other allied goods under impugned trade mark composing of 'Real' logo and label or any other trade mark/lable deceptively similar to plaintiff's trade mark comprising 'RICARD' logo and label which amounts to infringement of Registered trademark of respondents/plaintiffs and other connected reliefs-During pendency of appeal, defendants/appellants showed a new lable to Court and learned Single Judge concluded that old lable which was used by appellants was prime facie identical to label of respondents and restrained appellants from using old label which was subject matter of present suit during pendency of said suit—Regarding New label produced in Court, it was held that it still contains some essential features similar to respondents' label and in order to avoid any confusion or deception, appellants were allowed to use New lable subject to condition of Change of Navy Blue Colour—Order challenged in appeal before DB—Plea taken, second part of injunction order permitting appellants to use New label subject to condition of change of Navy Blue colour strips is materially erroneous and needs to be set aside—Respondents registered Trademark does not have any colour and hence to that extent, impugned order is misplaced as it has injuncted appellants from

using colour Navy Blue—Held—A look at mark/lable in question would show that it cannot be said that New lable which is presently being used by appellants is identical to mark/lable of respondents—Essential features of two marks are different —Apart from blue bands used at top and bottom of lable, there is no other similarity in two marks—Essential feature of brand of respondent is circle shaded in red with number '45' Which is fused with a set of swirling scrolls/arms on either side—None of these features are reproduced in New brand/mark being used by appellants—Product of respondent is anise aperitif which is priced at more than Rs. 2, 000/- per bottle—Class of customers purchasing same would be entirely different from class who would purchase IMFL whisky of appellant which is priced around Rs. 60/- per bottle—New brand uses mark/trade logo of appellant's 'Real' very distinctively and clearly—Prime facie, it is not possible to stay that New label which was for first time filed in court by appellants on 16.12.2008 infringers trademark of respondents—Order of learned single judge modifies permitting appellants use New mark/lable as filed by appellants in court on 16.12.2008 using Navy Blue colour.

Real House Distillery Pvt. Ltd. & Anr. v. Pernod Ricard S.A. & Anr. *2169*