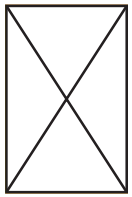

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CONTENTS
VOLUME-1, PART-II
FEBRUARY, 2014

Pages

1. Comparative Table ..... (i)

2. Nominal Index ..... (v)

3. Subject Index ..... (vii)

4. Case Law 443

COMPARATIVE TABLE
ILR (DS) 2014 (I) = OTHER JOURNAL
FEBRAURY, PART-II

Page No.	Journal Page No.
601	No Equivalent
595	2014 (1) JCC 727
484	No Equivalent
539	2014 (140) DRJ 174
506	No Equivalent
628	No Equivalent
721	2014 (207) DLT 689
721	2014 (141) DRJ 570
695	No Equivalent
637	2014 (141) DRJ 585
637	2014 (208) DLT 223
617	No Equivalent
773	No Equivalent
668	2014 (2) JCC 933
620	No Equivalent
584	2014 (1) JCC 206
584	2014 (1) Crimes 464 (1) (SN)
675	No Equivalent
471	No Equivalent
758	No Equivalent
763	No Equivalent
658	2014 (207) DLT 766
658	2014 (141) DRJ 623
743	2014 (207) DLT 777
743	2014 (5) AD (D) 220
684	No Equivalent

612	No Equivalent
768	2014 (2) JCC 927
791	No Equivalent
781	2014 (1) JCC 700
700	No Equivalent
589	No Equivalent
608	No Equivalent
443	2013 (298) ELT 335
752	No Equivalent
569	No Equivalent
652	No Equivalent

COMPARATIVE TABLE

OTHER JOURNAL = ILR (DS) 2014 (I)

FEBRAURY, PART-II

Journal Name Page No.	=	ILR (DS) 2014 (I) Page No.
2014 (5) AD (D) 220	=	ILR (DS) 2014 (I) 743
2014 (1) Crimes 464 (1) (SN)	=	ILR (DS) 2014 (I) 584
2014 (1) JCC 727	=	ILR (DS) 2014 (I) 595
2014 (207) DLT 689	=	ILR (DS) 2014 (I) 721
2014 (208) DLT 223	=	ILR (DS) 2014 (I) 637
2014 (207) DLT 766	=	ILR (DS) 2014 (I) 658
2014 (207) DLT 777	=	ILR (DS) 2014 (I) 743
2014 (140) DRJ 174	=	ILR (DS) 2014 (I) 539
2014 (141) DRJ 570	=	ILR (DS) 2014 (I) 721
2014 (141) DRJ 585	=	ILR (DS) 2014 (I) 637
2014 (141) DRJ 623	=	ILR (DS) 2014 (I) 658
2013 (298) ELT 335	=	ILR (DS) 2014 (I) 443
2014 (2) JCC 933	=	ILR (DS) 2014 (I) 668
2014 (1) JCC 206	=	ILR (DS) 2014 (I) 584
2014 (2) JCC 927	=	ILR (DS) 2014 (I) 768
2014 (1) JCC 700	=	ILR (DS) 2014 (I) 781

NOMINAL-INDEX
VOLUME-1, PART-II
FEBRUARY, 2014

Pages

A. Nagrajan *v.* State 601

Ahmed Sayeed *v.* State 595

Air India Ltd. *v.* Tej Shoe Exporters P. Ltd. & Anr. 484

Association for Development and Anr. *v.* Union of India and Ors. 539

East India Hotel Ltd. and Anr. *v.* Union of India and Anr. 506

Gulshan Sharma & Ors. *v.* State of NCT of Delhi 628

Ishpinder Kochhar *v.* Deluxe Dentelles (P) Ltd. & Anr. 721

Jagbir @ Jaggi *v.* State & Anr. 695

Janak Datwani *v.* C.N.A. Exports Pvt. Ltd. & Ors. 637

Jauddin @ Pappu *v.* The State (NCT of Delhi) 617

Liyakat Ali *v.* State 773

Madan Lal *v.* The State (Govt. of NCT of Delhi) 668

Max Hospital Pitampura *v.* Medical Council of India 620

Naresh Kumar Etc. *v.* State 584

National Technical Research Organization *v.* P. Kulshrestha & Ors. 675

Om Prakash *v.* Union of India & Ors. 471

Preeti Arora *v.* Aniket Subash Kore 758

Prince Garg *v.* Govt. of NCT & Ors. 763

Raj Rani & Anr. *v.* Sumitra Parashar & Anr. 658

Rakesh Kumar & Anr. *v.* Saroj Marwah & Anr. 743

Rashid *v.* State 684

Ravinder Kumar *v.* The State 612

Sehzad @ Nadeem *v.* State 768

Sri Narain and Anr. *v.* State (Govt. of NCT of Delhi) 781

State *v.* Rampal Singh and Anr. 700

UOI & Ors. *v.* J.P. Singh 589

Umesh Dutt Sharma *v.* Union of India & Ors. 608

Union of India & Anr. *v.* Hari Singh 443

Union of India & Anr. *v.* Saikat Roy 752

Union of India *v.* Synbiotics Limited and Anr. 569

Vishal *v.* The State of NCT of Delhi 652

SUBJECT-INDEX
VOLUME-1, PART-II
FEBRUARY, 2014

ARMS ACT, 1959—R. 27—The complainant did not offer any explanation as to why the accused apprehended at the spot with a crime weapon, was not handed over to PCR officials who allegedly arrived at the spot after about 20 minutes of the occurrence—Despite police remand, the IO was unable to ascertain the identity of the appellant's associates and apprehend them. The robbed cash could not be recovered—The exact location where occurrence took place could not be ascertained—In his Court statement, the complainant did not attribute any specific role to the each assailants and in vague terms disclosed that the 'four individuals' pushed him and asked him to keep hands up on the pretext of rush in the bus. He vaguely stated that they 'forcibly' took out Rs. 16,500/- from the inner pocket of his wearing pant. He did not describe as to what force was used and in what manner the currency lying in his inner pocket were taken out by any specific individual. No specific and definite role was attributed to the appellant in depriving him of cash from his pocket. The appellant was not apprehended while taking out the currency notes from the pocket of the complainant. It is unclear as to when and at what place the bus stopped and the four assailants alighted from—The bus. Driver and conductor or any other passenger in the bus was not associated at the time of conducting search of the accused. After his apprehension, no instrument to pick-pocket was recovered from his possession.

— The appellant who was allegedly armed with a deadly weapon, did not use it to avoid his apprehension. No injuries with knife were inflicted to the complainant or the public giving beating to him—Possibility of mistaken identity cannot be ruled out. Sole testimony of the complainant is not safe to convict the appellant in the absence of any corroboration in the light of

various discrepancies and infirmities in the prosecution case—Delay in lodging the FIR has not been explained.

— None of the offenders used any deadly weapon to overawe or scare the complainant. The appellant was not found in possession of any robbed/stolen article and did not use knife (a) in order to the committing of the theft; or (b) in committing the theft; or (c) in carrying away or attempting to carry away property obtained by theft, to attract Section 390 IPC when theft becomes robbery under above noted circumstances. The knife was allegedly taken out by the appellant when he was being chased to avoid his apprehension—Appeal allowed—Conviction and sentence set aside.

Vishal v. *The State of NCT of Delhi* *652*

CCS (CCA) RULES, 1965—Rule 14: Order of the CAT holding that there was unexplained delay in initiating disciplinary proceedings against Respondent, challenged in the present proceedings. Held—The Tribunal has noted that the Petitioner have not been able to adequately explain the inordinate delay in initiation of the charge sheet which would cause prejudice to the defence of the Respondent. The Petitioners have not been able to place explanation for the delay which has ensued before us as well. Reliance placed on UOI v. Hari Singh, wherein same issues were raised, held that Petitioners have not been able to place any explanation for delay—Other circumstances including the fact that Respondent was promoted, the order quashing penalty were accepted by the Petitioner as well as the fact the CBI found no culpability if the Respondent also lend substance to the case of Respondent. No merit in the challenge to the order of the CAT—Costs of Rs. 25,000. Petition Dismissed.

UOI & Ors. v. *J.P. Singh* *589*

CARRIAGE BY AIR ACT, 1972—Ist Schedule—R. 22—Tej shoes (respondent herein) had sued air India (appellant herein) for value of loss of its goods, wrongfully released to the

consignee- Respondents hired the services of appellant for transporting a consignment worth DM (Deutsche mark) 1,50,152 by Airway Bill No 09857645545 dated 21.08.09-named consignee under the airway bill was a bank - appellant-no declaration of the amount if consignment for the carrier in the said airway bill-appellant entrusted the goods to Lufthansa Airways second respondent) at Frankfurt-30.08.1990, ultimate consignee-genuine mistake and agreed to compensate appellant in terms of the maximum limited liability, i.e. US $ 20per kg- second respondent authorized appellant to settle the claims of respondent- in accordance with the terms of the contract of carriage, i.e. US $ 20 per kg—Not satisfied with the compensation- respondent filed a complaint under section 21 read with section 12 of the Consumer Protection Act, 1986 before the national Consumer Dispute Redressal Commission ("commission")- the Commission ordered appellant to pay respondent the equivalent of US $20 per kg-Respondent filed a special leave petition against that order of the Commission- later dismissed as withdrawn- on 02.11.1993, respondent-after gap of more than three years from the cause of action filed a suit for recovery-appellant contending that the claim was barred by limitation- stipulated by the 1972 Act-paid its liability @ US $ 20 per kg-vide order of the commission- LD. Single judge vide order dated 19.10.2006-decreed a sum of Rs 20,81,372 in favors of respondent-with 10% per suit, pendent lite and future interest, per annum-Hence, the present appeal. Held: under Rule 22 of the first schedule and second schedule of the Act incorporating the Hague protocol and earlier Warsaw Convention-restricts the liability of the carrier to a maximum of US $ 20 per kg- limits of liability prescribed in the Convention are absolute-Respondent wanted appellant to assume liability for an amount exceeding US $ 20-declare such amount for carriage and pay the applicable valuation charge—Interpretation which allows the consignor or consignee to recover more than the prescribed limits, on a gateway for unlimited liability under diverse and unforeseen conditions rendering unviable the business of air carriage- Had parliament intended that courts

can exceed the liability limits imposed by statute for loss of goods, the structure of clause 22 would have been entirely different—The period of limitation prescribed under Articles 29 (of the first schedule) and 30 (of the second schedule) of the Act are contrary stipulation- which amount to period of limitation different from the period under the Limitation Act (section 29(2))- stipulations under the 1972 Act are under a special statute and are absolute in terms- prevail over the general provisions of the Limitation Act.

Air India Ltd. v. *Tej Shoe Exporters P. Ltd. & Anr.* *484*

CODE OF CIVIL PROCEDURE, 1908—Order 6 Rule 17—Plaintiff filed suit seeking relief of declaration—He also moved an application U/o 6 Rule 17 CPC to amend the plaint by seeking to delete paragraph 20—Defendants objected to amendment and urged plaintiff, by way of application, was trying to withdraw admission made in plaint, thus, application not maintainable.

Held:- An admission cannot be resiled from but in a given case it may be explained or clarified.

Janak Datwani v. *C.N.A. Exports Pvt. Ltd. & Ors.* *637*

— Plaintiff filed suit seeking relief of possession, recovery of damages mesne profits, permanent and mandatory injunction—After filing evidence of PW1 by way of affidavit, plaintiff moved application to seek amendment and to add relief praying for declaration—Defendant challenged application and urged application was barred as trial had commenced.

Held:- Commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments.

Raj Rani & Anr. v. *Sumitra Parashar & Anr.* *658*

— Delhi Rent Control Act, 1958—Section 6A and 8—Plaintiff filed suit seeking decree of possession and other consequential reliefs—He also moved application U/o 12 Rule 6 of Code praying for judgment on admissions—According to defendants, suit not maintainable as they are protected tenants under Delhi Rent Control Act and alleged notice sent by plaintiff, does not terminate tenancy—As per plaintiff, Section 6 of Act not applicable as defendants paid the increased rent according to agreement to lease executed between parties.

Held:- Statutory provisions do not contain any prohibition prohibiting an agreement between landlord and tenant whereby they have agreed to increase the rent after periodic intervals on their own. Enhancement of rent by consent not barred U/s 6A and 8 of the Delhi Rent control Act.

Ishpinder Kochhar v. *Deluxe Dentelles (P) Ltd. & Anr.* *721*

— Order VII Rule 14—Indian Evidence Act, 1872—Section 65B—Petitioner challenged impugned order disallowing petitioner's application to bring on record print outs of certain e-mails allegedly exchanged between parties—Plea taken, proceedings pending before Trial Court are in context of a socially beneficial legislation concerning marital relationship between parties—Courts would always take a view which would advance cause of justice and a strict interpretation which would cause irreparable loss and disadvantage to wife ought not to be taken—Per contra plea taken, law requires that documents relied upon are required to be filed at appropriate stage i.e. along with written statement which means that they have to be filed before replication is filed or otherwise with permission of Court at time of framing of issues but definitely before evidence starts—Held—Apart from reason that application for bringing on record print outs of e-mails had been occasioned only on account of change of counsel, no other reason has been provided—In opinion of this Court, that itself would not be sufficient reason in any case—To seek

indulgence of a Court to accept additional documents under Order VIII Rule 14, party seeking to produce documents must satisfy Court that said documents were earlier not within part's knowledge or could not be produced at appropriate time in spite of due diligence—These documents are not new and were evidently in knowledge of petitioner wife prior to filing of divorce petition—Permitting same to be brought on record now would have its own cascading effect in form of amendment of written statement/reply, a rejoinder thereto issues have framed fresh evidence to be led, etc.—This would unnecessarily delay proceedings that CPC spells out for equitable framework and schedule with which parties have to comply and Courts ought to conduct proceedings before it—For aforesaid reasons, this Court is not persuaded to interfere with impugned order.

Preeti Arora v. *Aniket Subash Kore* *758*

COMMISSION FOR PROTECTION OF CHILD RIGHTS ACT, 2005—Section 3—petitioners challenged appointment of second and third respondent as members of National Commission for Protection of child Right—plea taken, selection procedure was not transparent or fair but was arbitrary—Those with qualifications and experience better than private respondents were kept out of consideration—UOI never adopted any fair method of inviting application—per contra plea taken, court should not substitute its opinion for that of UOI which took into consideration all relevant materials objectively, fairly and in a bona fide manner while selecting private respondents as members of NCPCR—In absence of clear violation of statutory provisions and regulations laying down procedure for appointment, High Court has no jurisdiction even to issue a writ of quo warranto—Court should be circumspect in conducting a "merit" review which would result in court substituting its opinion for wisdom of statutory designated authority i.e. central government—Held—This court is to be guided by decision passed in earlier writ petition filed by petitioners and confine its enquiry as to whether appointments challenged are contrary to statute

insofar as private respondents do not possess any qualification or do not fulfill any eligibility condition; procedurally illegal or irregular; not in bona fide exercise of power—Previous litigation was initiated at behest of first petitioner association and there being no dispute that second petitioner is association concerned and involved with child right issues with field experience for 13 years, court is of opinion that present petition is maintaintable as a public interest litigation—Mere circumstance that president of first petitioner was a candidate who had applied for appointment, would not bar scrutiny by court, especially in view of fact that second petitioner is a party to present proceeding—UoI did not publicly make known vacancy position in Commission—use of terms like "ability" "standing" "experience" and "eminence" highlights parliamentary intention that those of proven merit and track record, and singularly distinguished only should be chosen to man NCPCR—This court refrains from rendering any adverse finding with respect to Mr. Tikoo's candidature for reason that though materials regarding his ability, standing and eminence are scanty, there is something to indicate his eligibility vis-à-vis qualification—selection process nowhere discusses, even in the barest minimum manner, strengths and weaknesses of short listed candidates, particularly where more than one applicant is listed under same head—What ultimately persuaded Committee to drop certain names, and accept names of those finally appointed, does not appear from record made available to court—Not is there any light shed in affidavit filed by UOI to indicate of relative qualification and experience of at least short listed candidates was considered, and whether some kind of ranking, marking or evaluating system was adopted—Having short listed many candidates, some whom were retained, there are complete lack of reasons for dropping names of other—Insistence for reasons is not to probe merits of decision to drop candidate's names, but as to what really struck Committee at stage and persuaded them to drop their candidature- Court is wary of commenting on choice of Committee selecting third respondent- At least he possesses educational qualifications, relevant to field (sociology and

social work) and has placed on record some certificate in this regard—But in case of Dr. Dube, conspicuous inconsistencies in respect of his claim regarding educational qualifications were glossed over; his CV does not pin point specifically any relevant experience in relevant discipline or field- his final selection and appointment can be justified due to "absence of intellectual objectivity"- selection and appointment of second respondent being contrary to mandate of section 3(2)(b) of Act, is quashed.

Association for Development and Anr. v. *Union of India and Ors.* *539*

CONSTITUTION OF INDIA, 1950—Article 226—Petition against the order of Central Administrative Tribunal (CAT) quashing the disciplinary proceedings initiated by the petitioner, against the respondent. Respondent joined the customs department in 1976- posted as inspector at the export shed, ICD in 1998 wherein he conducted inspections of consignment presented for export from the said port. Directorate of intelligence review (DRI) initiated an inquiry into availment of duty drawback on export of UPFC pipes between 1998-1999 by M/S. Aravali (India) Ltd.- show cause notice was issued to the exporter (but not to the respondent) in 2000 by the DRI and the matter stood concluded in 2001 without anything incriminating the respondent- In August, 2003, the DRI in a letter to the Chief Commissioner of central excise recommended action against 23 mentioned officials who had attended to the above export case- yet no action was initiated. In 2004, the respondent was summoned and interrogated by the vigilance department, thereafter which no action was taken against him under the Customs' Act or Customs Conduct Rules (CCS)- in the background of the absence of copies of the shipping bills of the relevant period, another inquiry officer was appointed in 2010, and chargesheet was issue vide office memo dated 25th February, 2011. Aggrieved, respondent approached the CAT—Initially the explanation given by the petitioner for delay being non availability of shipping bills was accepted by CAT, however on review, CAT noted that

relevant documents were available with the petitioner and there was an excessive delay in issuance of charge sheet-on merits, the Tribunal recalled its earlier order and office memo dated 25th Feb, 2011 was quashed and set aside. Aggrieved, the present writ petition was field contending that delay on part of the petitioner was bona fide. Held: plea of the petitioner baseless—Rightly rejected by the CAT—The action of the petitioner is grossly belated—Delay in initiating disciplinary proceedings would constitute denial of reasonable opportunity to defend the charges and therefore, amounts to violation of Principles of atural justice—Writ dismissed- cost awarded.

Union of India & Anr. v. *Hari Singh* *443*

— Article 226; Air Force Rules, 24, 45, 48—Petitioner implicated for unauthorized selling liquor, Charges framed—Initially court martial found petitioner not guilty of 1st , 2nd and 3rd charge but found him guilty of 4th charge. Confirming Authority passed order for revision of findings on 1st , 2nd and 3rd charge. Court martial reassemble, no fresh finding was recorded, petitioner was heard and thereafter found guilty of 1st, 2nd and 3rd charged and awarded sentence of dismissal from service. Confirming Authority reduced sentence to reduction in Rank. Appeal against the said order was dismissed by Chief of air staff. Writ petitioner filed—Was transferred to the Armed Forces Tribunal which was rejected by the impugned order. Petitioner has assailed the proceedings of the court martial on the ground that the same are in violation of Rule, 45 and 48. Held- contention rejected relying on *Lt. Col. Prithipal Singh Bedi v. Union of India,* (1982) 3 scc 140.

Om Prakash v. *Union of India & Ors.* *471*

Petitioner assailed the impugned order on the ground that there is no evidence- held- it's not a case of no evidence—The deposition of the witnesses unequivocally implicated the petitioner—No legally tenable grounds raised; petition dismissed.

Om Prakash v. *Union of India & Ors.* *471*

— Article 226; Government of India (Transaction of business) Rules, 1961; Indian Contract Act, 1872- Section 199: appeal against order of Ld. Single judge dismissing the petition praying for quashing cancellation notification for grant of land to the petitioner- whether the appellants have a remedy under public law- appellant contends that allotment made by the respondent was a concluded contract, wherein amounts were paid towards consideration- Accordingly, respondent estopped from contending that such manner of allotment was flawed, since decision to allot plot to appellant was based on due consideration of facts by all authorities.

Respondent contends that the allotment letter dated 27.06.1995 had no authority, since no approval was obtained from the Ministry of Finance—The allotment was made without following proper procedure—Further, the allotment letter indicated that there would be a license agreement executed in favour of the appellant- No such license agreement was executed—Therefore, appellant had no enforceable right. Appellant only entitled to round along with interest.

Held: validity of a competitive bidding process is beyond question—Thus, decision to cancel allotment letter cannot be termed arbitrary- from the relevant records it is clear that there is on approval from the Finance Ministry, which compelled and Union Cabinet to decide that such allotment could not be sustained- Transaction of business rules which mandate prior consultation with the finance ministry before land is dealt with, were not observed. Central government is within its rights to say it would not proceed ahead with the lease agreement- no arbitrary conduct on part of the respondents—Public interest would be served through a fresh bidding process—Finally, no legitimate expectation is created or promissory estoppel operates against the government in matters of public law, where reasoned decisions taken in public interest will take precedence.

East India Hotel Ltd. and Anr. v. *Union of India and Anr.* *506*

— Article 226—Commission for Protection of Child Rights Act, 2005—Section 3—petitioners challenged appointment of second and third respondent as members of National Commission for Protection of child Right—plea taken, selection procedure was not transparent or fair but was arbitrary—Those with qualifications and experience better than private respondents were kept out of consideration—UOI never adopted any fair method of inviting application—per contra plea taken, court should not substitute its opinion for that of UOI which took into consideration all relevant materials objectively, fairly and in a bona fide manner while selecting private respondents as members of NCPCR—In absence of clear violation of statutory provisions and regulations laying down procedure for appointment, High Court has no jurisdiction even to issue a writ of quo warranto—Court should be circumspect in conducting a "merit" review which would result in court substituting its opinion for wisdom of statutory designated authority i.e. central government—Held—This court is to be guided by decision passed in earlier writ petition filed by petitioners and confine its enquiry as to whether appointments challenged are contrary to statute insofar as private respondents do not possess any qualification or do not fulfill any eligibility condition; procedurally illegal or irregular; not in bona fide exercise of power—Previous litigation was initiated at behest of first petitioner association and there being no dispute that second petitioner is association concerned and involved with child right issues with field experience for 13 years, court is of opinion that present petition is maintaintable as a public interest litigation—Mere circumstance that president of first petitioner was a candidate who had applied for appointment, would not bar scrutiny by court, especially in view of fact that second petitioner is a party to present proceeding—UoI did not publicly make known vacancy position in Commission—use of terms like "ability" "standing" "experience" and "eminence" highlights parliamentary intention that those of proven merit and track record, and singularly distinguished only should be chosen to man NCPCR—This court refrains from rendering any adverse

finding with respect to Mr. Tikoo's candidature for reason that though materials regarding his ability, standing and eminence are scanty, there is something to indicate his eligibility vis-à-vis qualification—selection process nowhere discusses, even in the barest minimum manner, strengths and weaknesses of short listed candidates, particularly where more than one applicant is listed under same head—What ultimately persuaded Committee to drop certain names, and accept names of those finally appointed, does not appear from record made available to court—Not is there any light shed in affidavit filed by UOI to indicate of relative qualification and experience of at least short listed candidates was considered, and whether some kind of ranking, marking or evaluating system was adopted—Having short listed many candidates, some whom were retained, there are complete lack of reasons for dropping names of other—Insistence for reasons is not to probe merits of decision to drop candidate's names, but as to what really struck Committee at stage and persuaded them to drop their candidature- Court is wary of commenting on choice of Committee selecting third respondent- At least he possesses educational qualifications, relevant to field (sociology and social work) and has placed on record some certificate in this regard—But in case of Dr. Dube, conspicuous inconsistencies in respect of his claim regarding educational qualifications were glossed over; his CV does not pin point specifically any relevant experience in relevant discipline or field- his final selection and appointment can be justified due to "absence of intellectual objectivity"- selection and appointment of second respondent being contrary to mandate of section 3(2)(b) of Act, is quashed.

Association for Development and Anr. v. *Union of India and Ors.* *539*

— Article 226; Drugs (prices control order), 1979—clauses 7(2). 17; Essential Commodities Act, 1955: Appeal against the order of single judge whereby respondent's challenge to a demand made in terms of DPCO, was allowed—Respondent, a bulk drug manufacturer, firstly contended compulsion to sell

respondent's products at pooled price, as per DPCO, and not for a lower price—Secondly, Respondent as manufacturer of a bulk drug, could not be compelled to deposit the difference in the pooled price and retention price in the Drug price Equalization Account, especially since the amount is not realized if manufacturer sell the bulk drug at retention price.

Appellant contends that purpose of mechanism under DPCO was to avoid monopoly in essential products—"pooled price" is that which manufacturer can realize or the rate at which drug could be sold in the market, whereas "Retention price" is the price at which bulk drugs for manufacturing the formulation can be retailed—Purpose of Drug price equalization Account under clause 17 was to credit the difference between the two prices by the manufacturer if pooled price was higher, and to reimburse manufacturer from the fund in case the inverse happened- the system was one of benefits and compensation to small manufacturers, and a disincentive to large manufacturers to secure a monopoly.

Respondent contends that interpretation to the effect that irrespective of actual sale, the bulk drug manufacturer such as the Respondent, is to be made liable and not the formulator, is without merit—A plain reading of clause 7(2) of the DPCO clarifies that the difference between the pooled price and Retention price is to be borne by the formulator and not the bulk drug manufacturer—Question of bulk drug manufacturer being made to bear the burden once over defies logic, amounts to levying a penalty and import not authorized under the Essential commodities Act, 1955.

Held: The language of clause 7(2) of DPCO casts the obligation on the formulator to make good the difference between the pooled price and the at which drug is procured from the bulk manufacturer to be deposited into the drug price equalization account—clause 17 of the DPCO does not independently create a liability—Further, there is no primary duty on the bulk drug manufacturer to pay into the fund—Therefore, court

rejected appellant's argument on clause 17—Once the formulator's obligation under clause7(2) if fulfilled, the Central Government cannot seek to penalize a penalize a manufacturer for being able to sell bulk drugs at retention price. Appeal dismissed.

Union of India v. *Synbiotics Limited and Anr.*..... *569*

— Article 226; CCS (CCA) Rules 1965-Rule 14: Order of the CAT holding that there was unexplained delay in initiating disciplinary proceedings against Respondent, challenged in the present proceedings. Held—The Tribunal has noted that the Petitioner have not been able to adequately explain the inordinate delay in initiation of the charge sheet which would cause prejudice to the defence of the Respondent. The Petitioners have not been able to place explanation for the delay which has ensued before us as well. Reliance placed on UOI v. Hari Singh, wherein same issues were raised, held that Petitioners have not been able to place any explanation for delay—Other circumstances including the fact that Respondent was promoted, the order quashing penalty were accepted by the Petitioner as well as the fact the CBI found no culpability if the Respondent also lend substance to the case of Respondent. No merit in the challenge to the order of the CAT—Costs of Rs. 25,000. Petition Dismissed.

UOI & Ors. v. *J.P. Singh* *589*

— Article 226: Petitioner herein has assailed order of the CAT, whereby Petitioner’s challenge to his non-selection for the post of JE-II was rejected, as well as the order rejecting Petitioner’s review application.

Present with petition filed challenging final selection list for the post of JE-II (25% LDCE Quota) wherein Petitioner’s name was not included—Sole ground of challenge was claim of the Petitioner that he was entitled to 20 additional marks, under the “Personality Address, Leadership and Academic/ Technical Qualifications” in terms of circular RBE No. 55/ 86.

Respondents countered Petitioner's claimon the ground of revised classification—Pursuant to Railway Board's directive on 22nd March, 2006, heading of "Personality Address, Leadership and Academic/Technical Qualifications" stood deleted—Respondents conducted selection as per rules modified in notification dated 7th January, 2010.

Held: In view of the above directions, Petitioner not entitled to any additional benefit—No other ground was pressed before the Tribunal—Therefore, the actions of the Respondents or the orders impugned herein cannot be faulted—Further, the factum of an earlier writ petition on the same ground concealed by the Petitioner—No merit in the writ petition.

Umesh Dutt Sharma v. *Union of India & Ors.* *608*

— Article 226 and 227—Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002—Indian Medical Council Act, 1956—Section 20-A and Section 33 (m)—Delhi Nursing Homes Registration Act, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in treating patient (Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of hospitals and secondly, that Ethics Committee of MCI acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by

Ethics Committee of MCI about state of affairs in Petitioner hospital and same did not harm any legal right or interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against Petitioner hospital highlighted above.

Max Hospital Pitampura v. *Medical Council of India* *620*

— Art. 226—Service Law—Promotion Respondents claiming they were beneficiaries of Flexible Complementing Scheme (FCS), filed application before Central Administrative Tribunal seeking a direction for promotions from date of completion of eligible service in promotional post wherein they were given in situ promotion on subsequent dates—Orders of Tribunal allowing application, challenged before High Court—Plea taken, directions made by Tribunal in impugned judgment tantamount to granting pay to respondents for work which they have not done—Held—It is admitted position that petitioner has only effected in situ promotions to respondents—There is no distinction in work which was being discharged by respondents prior to their promotion or thereafter—Only variation is in financial benefit which would accrue to respondents after their promotions—Principle of 'no work no pay' has no application to instant case—From very expression in situ, it is apparent that there is no change in either place or position in which respondents are working—Therefore, it cannot be contended that respondents are being paid any amount for work they have not discharged—We find

no merit in these petitions and applications which are dismissed with costs which are quantified at Rs. 2,000/- per respondent.

National Technical Research Organization v. *P. Kulshrestha & Ors.* *675*

— Art. 226—Service Law—Representation of petitioner requesting for merger of pollution level test inspector and motor vehicle inspector cadres, rejected by respondents—Petitioner relieved from his posting with directions for duties in Taxi Unit, Burari-—Application of petitioner challenging both orders dismissed by Administrative Tribunal—Order of Tribunal challenged before HC- plea taken, posting in taxi unit, burari amounts to change of cadre- Transfer outside cadre in a different wing is bad in law being violative of conditions of service—In eventuality of refusal to merge two cadres independent to each other, petitioner be not transferred out of pollution control branch as it would amount to serving under junior officers of MVI bench- Held- lssues raised by petitioner are whether rejection of representation to merge PLTI and MVI cadres into one is unjustified and whether his transfer to taxi unit. Burari amounts to forcing him to work under his juniors- petitioner had challenged impugned orders before learned Tribunal and raised same contentions, as have been raised before us—Tribunal has carefully considered both submissions of petitioner and given sound reasons for rejection- Impugned order of Central Administrative Tribunal does not suffer with any infirmity—There are no grounds to interfere with findings of learned Tribunal- writ petition dismissed.

Prince Garg v. *Govt. of NCT & Ors.* *763*

— Art. 226—Service Law—Respondent participated in examination conducted by UPSC for selection to post of Junior Geologist Group 'A' in Geological Survey of India—Having qualified said examination respondent was directed by petitioner to appear before Central Standing Medical Board at

Safdarjung Hospital for medical examination—Medical Board, after examining respondent declared him 'unfit' on ground of his having undergone Lasik Surgery—Respondent successfully challenged order of petitioner before Administrative Tribunal before High Court—Held—There is no prescription in recruitment rules to effect that a person who had undergone Lasik Surgery to correct vision, would be disqualified for consideration for appointment—Medical Board which has examined respondent has not found his vision criterion—Only ground for rejecting him was fact that he had undergone corrective Lasik Surgery—In absence of any prescription in rule or regulation, mere fact that person has undergone corrective surgery ipso facto cannot tantamount to his being medically unfit and result in rejection of a candidate.

Union of India & Anr. v. *Saikat Roy* *752*

DELHI NURSING HOMES REGISTRATION ACT, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in treating patient (Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of hospitals and secondly, that Ethics Committee of MCI acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by Ethics Committee of MCI about state of affairs

in Petitioner hospital and same did not harm any legal right or interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against Petitioner hospital highlighted above.

Max Hospital Pitampura v. *Medical Council of India* *620*

DELHI RENT CONTROL ACT, 1958—Section 6A and 8—Plaintiff filed suit seeking decree of possession and other consequential reliefs—He also moved application U/o 12 Rule 6 of Code praying for judgment on admissions—According to defendants, suit not maintainable as they are protected tenants under Delhi Rent Control Act and alleged notice sent by plaintiff, does not terminate tenancy—As per plaintiff, Section 6 of Act not applicable as defendants paid the increased rent according to agreement to lease executed between parties.

Held:- Statutory provisions do not contain any prohibition prohibiting an agreement between landlord and tenant whereby they have agreed to increase the rent after periodic intervals on their own. Enhancement of rent by consent not barred U/s 6A and 8 of the Delhi Rent control Act.

Ishpinder Kochhar v. *Deluxe Dentelles (P) Ltd. & Anr.* *721*

ESSENTIAL COMMODITIES ACT, 1955—Appeal against the order of single judge whereby respondent's challenge to a

demand made in terms of DPCO, was allowed—Respondent, a bulk drug manufacturer, firstly contended compulsion to sell respondent's products at pooled price, as per DPCO, and not for a lower price—Secondly, Respondent as manufacturer of a bulk drug, could not be compelled to deposit the difference in the pooled price and retention price in the Drug price Equalization Account, especially since the amount is not realized if manufacturer sell the bulk drug at retention price.

Appellant contends that purpose of mechanism under DPCO was to avoid monopoly in essential products—"pooled price" is that which manufacturer can realize or the rate at which drug could be sold in the market, whereas "Retention price" is the price at which bulk drugs for manufacturing the formulation can be retailed—Purpose of Drug price equalization Account under clause 17 was to credit the difference between the two prices by the manufacturer if pooled price was higher, and to reimburse manufacturer from the fund in case the inverse happened- the system was one of benefits and compensation to small manufacturers, and a disincentive to large manufacturers to secure a monopoly.

Respondent contends that interpretation to the effect that irrespective of actual sale, the bulk drug manufacturer such as the Respondent, is to be made liable and not the formulator, is without merit—A plain reading of clause 7(2) of the DPCO clarifies that the difference between the pooled price and Retention price is to be borne by the formulator and not the bulk drug manufacturer—Question of bulk drug manufacturer being made to bear the burden once over defies logic, amounts to levying a penalty and import not authorized under the Essential commodities Act, 1955.

Held: The language of clause 7(2) of DPCO casts the obligation on the formulator to make good the difference between the pooled price and the at which drug is procured from the bulk manufacturer to be deposited into the drug price equalization

account—clause 17 of the DPCO does not independently create a liability—Further, there is no primary duty on the bulk drug manufacturer to pay into the fund—Therefore, court rejected appellant's argument on clause 17—Once the formulator's obligation under clause7(2) if fulfilled, the Central Government cannot seek to penalize a penalize a manufacturer for being able to sell bulk drugs at retention price. Appeal dismissed.

Union of India v. *Synbiotics Limited and Anr.*..... *569*

INDIAN CONTRACT ACT, 1872—Section 199: appeal against order of Ld. Single judge dismissing the petition praying for quashing cancellation notification for grant of land to the petitioner- whether the appellants have a remedy under public law- appellant contends that allotment made by the respondent was a concluded contract, wherein amounts were paid towards consideration- Accordingly, respondent estopped from contending that such manner of allotment was flawed, since decision to allot plot to appellant was based on due consideration of facts by all authorities.

Respondent contends that the allotment letter dated 27.06.1995 had no authority, since no approval was obtained from the Ministry of Finance—The allotment was made without following proper procedure—Further, the allotment letter indicated that there would be a license agreement executed in favour of the appellant- No such license agreement was executed—Therefore, appellant had no enforceable right. Appellant only entitled to round along with interest.

Held: validity of a competitive bidding process is beyond question—Thus, decision to cancel allotment letter cannot be termed arbitrary- from the relevant records it is clear that there is on approval from the Finance Ministry, which compelled and Union Cabinet to decide that such allotment could not be sustained- Transaction of business rules which mandate prior consultation with the finance ministry before land is dealt with, were not observed. Central government is within its rights to

say it would not proceed ahead with the lease agreement- no arbitrary conduct on part of the respondents—Public interest would be served through a fresh bidding process—Finally, no legitimate expectation is created or promissory estoppel operates against the government in matters of public law, where reasoned decisions taken in public interest will take precedence.

East India Hotel Ltd. and Anr. v. *Union of India and Anr.* *506*

— Section 25, 26 and 27—Appellant State challenged acquittal of respondents U/s 302/392/382 r/w section 120B of Code—According to appellant, prosecution case rested purely on circumstantial evidence and all the circumstances including discovery and establishment of fact of use of motorcycle in commission of offences proved beyond iota of doubt by it.

Held:- Section 27 of the Act which is in the form of an exception to Sections 25 and 26 of the Act admits only so much of the information given by an accused which distinctly relates to the facts discovered in pursuance of the information. The recovery of the object has to be distinguished from the fact thereby discovered. If in pursuance of the information provided, any fact is discovered which connects the accused with the commission of the crime, then only the fact discovered becomes relevant.

State v. *Rampal Singh and Anr.* *700*

INDIAN EVIDENCE ACT, 1872—Section 106—The facts which are within the special knowledge of the person, he is bound to explain those facts under section 106 Evidence Act—It is well settled that even if an accused does not plead self-defence during trial, it is open to the court to consider such a plea if the same arises from the material on record. The burden of proving the existence of circumstances bringing a case within any exception is upon the accused—Of course that burden can be discharged by showing probabilities in

favour of that plea. Under Section 105 of the Indian Evidence Act, the onus rests on the accused to establish his plea of self-defence. Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself by adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution—Right of private defence is primarily a defensive right and is available only to one who is suddenly confronted with the necessity of averting an impending danger.

There is no rule of law that if the court acquits certain accused on the evidence of a witness finding it to be open to some doubt with regard to them for definite reasons, other accused against whom there is positive evidence must be acquitted. The court has a duty in such cases to separate the grain from the chaff.

Liyakat Ali v. *State* *773*

— Under Section 32 it is not the requirement of law that the person making the statement, must be under expectation of death.

Common intention—S.34 of IPC—It is true that the common intention could arise at the spur of moment and be formed suddenly even at the spot—However, there has to be positive evidence of the same. Particularly, where a fatal blow is given by one person and the others who are present at the spot are unarmed, there has to be some positive evidence to draw an inference of common intention—Since it is difficult to get direct evidence of the fact that any act done by the accused persons at the spot is in furtherance of the common intention of all or of some of them present at the scene of crime, the inference of common intention has necessarily to be drawn from the circumstances established by the prosecution.

Statement completely silent that appellants had exhorted to kill or to stab the deceased—Statement does not even show

that the appellants were aware of co-accused carrying a knife with him—When the deceased was held by appellant SN he was given slaps and fist flows by appellant S. It was at this point of time that co accused suddenly took out a knife and stabbed in the deceased's abdomen.

Held, no material to show that the appellants shared the common intention to inflict the knife injury by co-accused. It is not even stated that while the injuries were being inflicted, appellant S N continued to hold the deceased. Thus, the appellants' conviction under Section 302 read with Section 34 IPC cannot be sustained—Convicted for the offence punishable under section 323 read with Section 34 IPC.

Sri Narain and Anr. v. *State (Govt. of NCT of Delhi)* *781*

— Section 65B—Petitioner challenged impugned order disallowing petitioner's application to bring on record print outs of certain e-mails allegedly exchanged between parties—Plea taken, proceedings pending before Trial Court are in context of a socially beneficial legislation concerning marital relationship between parties—Courts would always take a view which would advance cause of justice and a strict interpretation which would cause irreparable loss and disadvantage to wife ought not to be taken—Per contra plea taken, law requires that documents relied upon are required to be filed at appropriate stage i.e. along with written statement which means that they have to be filed before replication is filed or otherwise with permission of Court at time of framing of issues but definitely before evidence starts—Held—Apart from reason that application for bringing on record print outs of e-mails had been occasioned only on account of change of counsel, no other reason has been provided—In opinion of this Court, that itself would not be sufficient reason in any case—To seek indulgence of a Court to accept additional documents under Order VIII Rule 14, party seeking to produce documents must satisfy Court that said documents were earlier not within part's

knowledge or could not be produced at appropriate time in spite of due diligence—These documents are not new and were evidently in knowledge of petitioner wife prior to filing of divorce petition—Permitting same to be brought on record now would have its own cascading effect in form of amendment of written statement/reply, a rejoinder thereto issues have framed fresh evidence to be led, etc.—This would unnecessarily delay proceedings that CPC spells out for equitable framework and schedule with which parties have to comply and Courts ought to conduct proceedings before it—For aforesaid reasons, this Court is not persuaded to interfere with impugned order.

Preeti Arora v. *Aniket Subash Kore* *758*

INDIAN MEDICAL COUNCIL ACT, 1956—Section 20-A and Section 33 (m)—Delhi Nursing Homes Registration Act, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in treating patient (Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of hospitals and secondly, that Ethics Committee of MCI acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by Ethics Committee of MCI about state of affairs in Petitioner hospital and same did not harm any legal right or

interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against Petitioner hospital highlighted above.

Max Hospital Pitampura v. *Medical Council of India* *620*

INDIAN PENAL CODE, 1860—Section 307—The prosecution has to prove that the accused while inflicting injuries to the victim, had an intention to cause his death or he had the knowledge that the act done by him may result in the death of the victim and, there is an intention or knowledge coupled with some overt act in the execution thereof. Initially appellant did not give any injury—When the victim pushed him out of the house, the appellant stuck a single blow on his chest with a sharp object—He did not harm his wife and son standing nearby—He did not inflict repeated blows with the sharp object in his possession. There was no previous history of animosity—The weapon was an ordinary scissor or some sharp object whose nature could not be ascertained. Nature of injuries—Doctor was not examined during trial. In the MLC depth of the injury was not indicated—Since the particular opinion has not been proved through the doctor who gave it and it is unclear on what basis he formed that opinion, it is not safe to hold that the injuries inflicted by the accused were 'grievous'. The patient was conscious and oriented when taken to hospital for medical examination—The appellant was under the influence of liquor and injury was caused in a scuffle. In

these circumstances, it cannot be inferred that the single blow inflicted was with the avowed object or intention to cause death. The conviction under Section 307 IPC, thus, cannot be sustained and is altered to Section 324 IPC.

Ravinder Kumar v. *The State* *612*

— Sec. 458, 392 and 397—Arms Act,, 1959—Sec. 27—Appellant Convicted Under Section 458/392 read with Section 397 IPC and 27 Arms Act—Awarded minimum sentence under section 397 IPC i.e. seven years—The peculiar circumstances and interest of justice compelled the Court to reduce the sentence—Appellant had already undergone actual imprisonment of about four years and four months and had earned a remission of over five months—The original record was not traceable. Attempts were made to reconstruct the original record to appreciate the appeal on merits. However, the Trial Court was unable to reconstruct the original record to scrutinize the testimonies of the material prosecution witnesses on merits. The documents on record are not at all sufficient to finally decide the appeal on merits—Considering the peculiar and special circumstances where the original record is not available and taking into consideration all the facts and circumstances for special and adequate reasons, the order on sentence modified and the appellant sentenced to undergo the sentence for the period already suffered in custody by him.

Jauddin @ Pappu v. *The State (NCT of Delhi)* *617*

— Section 308—Attempt to commit culpable homicide—Section 34—Common —intention—Appellants inflicted injuries to two persons—FIR No. 122/96 under Section 308/34 IPC registered at P.S.J.P. Kalan—Charge sheet filed—Charges for offences u/s. 308/325/34 IPC framed—Prosecution examined twelve witnesses—Statement of the accused persons recorded—Pleaded false implication—Examined one witness in defence—Appellants released on probation and directed to pay compensation to victims—Two accused persons acquitted—Acquittal not challenged by the State—Appellant no. 1 convicted for offence under section 325 IPC and other two

appellants convicted for offence under Section 323 IPC—Appellants released on probation and directed to pay compensation to the victims—Being aggrieved appellants preferred appeal—During pendency of appeal appellant no. 1 expired—His legal heir substituted—Appellants opted not to challenge the findings on conviction—Prayed for direction to employer of appellant No.1 to release pension—Conviction affirmed—Court not aware of nature of disciplinary action against the appellant no.1—In absence of any cogent-material direction as prayed cannot be given—Appeal dismissed.

Naresh Kumar Etc. v. *State* *584*

— Section 498A/304B—Appellant convicted by ASJ—Trial Court itself was not sure if soon before death deceased was subjected to cruelty—Deceased's younger sister was married to accused's younger brother—She was never subjected to cruelty and living happily in matrimonial home—She was not examined by the prosecution to ascertain conduct and attitude of the accused—Allegations regarding demand of dowry vague, unspecific and uncertain—No specific date mentioned as to when any specified dowry articles demanded—IO failed to investigate as to whether accused had illicit relations as alleged and whether that was provocation for the deceased to take the extreme step—Parents of deceased leveled allegation only after the suicide and no prior complaint—Deceased used to live at Hapur before shifting to Delhi about 1½ months prior to occurrence, whereas, accused was working in Delhi. Held, prosecution thus failed to establish beyond reasonable doubt that there was direct nexus between the cruelty and suicide. The prosecution is required to prove the very case it lodges and the Court cannot substitute its own opinion and make out a new case. The investigating officer did not collect surrounding circumstances which permitted to commit suicide. The accused was sleeping on the roof at the time of occurrence. Nothing came in evidence that he instigated deceased to commit suicide at that moment—Accused acquitted.

Ahmed Sayeed v. *State* *595*

— Section 498-A/306—Deceased committed suicide by hanging—Ornaments given to the deceased at the time of marriage, were pledged—No investigation as to the purpose of pledging of ornaments—Employer of deceased where she was working, did not depose that the deceased was subjected to cruelty or harassment by in-laws on account of dowry—By no stretch of imagination it can be inferred that pledging of ornaments had any direct nexus with the suicide—Sufficient time elapsed between the pledging and death—IO did not investigate surrounding circumstances which prompted the deceased to commit suicide or the presence of accused at the time of occurrence—No neighbour examined to prove that deceased was subjected to cruelty—Allegations emerged after suicide and no complaint prior to it was ever lodged—Deceased never taken for medical examination regarding beatings inflicted to her—Divergent and conflicting version given by the prosecution witnesses about demand of dowry—Witnesses made vital improvements—Allegations vague and uncertain and without specific dates—Parents of deceased used to live at a short distance from matrimonial home, but they never confronted the accused and his family members for the cruelty meted out to the deceased—Simply because the accused was obsessed with drinking and used to waste money, not enough to infer that he was instrumental of death of deceased, without a positive act of instigation or aid in commission of suicide. Held, The cruelty established has to be of such a gravity as is likely to drive a woman to commit suicide. The mere fact that Meena committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband. The Court is required to look into all other circumstances of the case. One of the circumstances which has to be considered by the Court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. A reasonable nexus has to be established between the cruelty and the suicide in order to

make good the offence of cruelty which is lacking in the instant case.

A. Nagrajan v. *State* *601*

— Sections 34, 307—Appellants impugning order of the Addl. Sessions Court convicting them u/s 307/34 IPC. Prosecution contended that accused inflicted injuries and stabbed the victim (PW-1) with a knife, being resentful of the victim demanding money owed to him from the accused—FIR was registered and during the course of investigation accused persons were arrested, weapon of crime recovered—Charge sheet filed u/s 307/201/34 IPC—Accused persons pleaded false implication—Addl. Sessions Court convicted all the accused u/s 307/34 IPC—Hence, present appeal filed—No appeal filed against acquittal u/s 201 IPC. Appellants contended that Addl. Sessions Court fell into grave error by relying upon interested witnesses with no corroboration—Improvements in statements of prosecution witnesses ignored—Ingredients of s. 307 not attracted—MLC does not record nature of injuries. Held:

- Material facts proved by complainant remain unchallenged in cross examination—No reason to disbelieve eye witnesses—No previous enmity with accused persons to falsely implicate them in present incident—Therefore, no sound reason to disbelieve their ocular testimony which is duly corroborated by medical evidence.

- Appellants 2 and 3 cannot be held vicariously liable for knife injuries inflicted by Appellant 1—They are only liable for the individual role played by them in beating by fists and blows at the first instance. Common intention must precede the act constituting the offence—In the absence of proof of a pre-arranged plan, mere fact of all three appellants being present at the scene of the crime, is not sufficient to make A-2 and A-3 liable for the crime of A-1.

- Period already undergone by A-2 and A-3 to be treated as substantive sentence—No further sentence is required to be

awarded—However, from facts and circumstances, A-1 liable for his individual act u/s 307 IPC.

Gulshan Sharma & Ors. v. *State of NCT of Delhi* *628*

— Sec. 458, 392 and 397—Arms Act,, 1959—Sec. 27—Appellant Convicted Under Section 458/392 read with Section 397 IPC and 27 Arms Act—Awarded minimum sentence under section 397 IPC i.e. seven years—The peculiar circumstances and interest of justice compelled the Court to reduce the sentence—Appellant had already undergone actual imprisonment of about four years and four months and had earned a remission of over five months—The original record was not traceable. Attempts were made to reconstruct the original record to appreciate the appeal on merits. However, the Trial Court was unable to reconstruct the original record to scrutinize the testimonies of the material prosecution witnesses on merits. The documents on record are not at all sufficient to finally decide the appeal on merits—Considering the peculiar and special circumstances where the original record is not available and taking into consideration all the facts and circumstances for special and adequate reasons, the order on sentence modified and the appellant sentenced to undergo the sentence for the period already suffered in custody by him.

Jauddin @ Pappu v. *The State (NCT of Delhi)* *617*

— Section 307—Non-recovery of weapon of offence is not fatal as injuries were inflicted with a 'sharp weapon'.

Minor discrepancies, contradictions and improvements are insignificant and do not affect the core of the prosecution case regarding infliction of injury with a sharp object on the abdomen of the victim.

There was no animosity between the appellant and the victim. Only when confrontation took place, in a fit of rage, on the spur of the moment the appellant whipped out a knife; inflicted

a solitary knife blow on the abdomen and fled the spot. He did not cause any harm to PW-11 of PW-8— No repeated blows with sharp weapon were caused to the victim. The crime weapon could not be recovered to ascertain its dimensions. The parties had cordial relations prior to 27.04.1985 and participated in the functions.

Held, no inference can be drawn that injury inflicted was with the avowed object or intention to cause death. The determinative question is intention or knowledge, as the case may be, and not nature of injury.

The appellant voluntarily inflicted 'dangerous' injuries with a sharp weapon on the vital organ and was liable for conviction under Section 326 IPC. The conviction is accordingly, altered from Section 307 IPC to Section 326 IPC.

Madan Lal v. *The State (Govt. of NCT of Delhi)* *668*

— Sec. 392, 397—Under Section 392 read with Section 397 IPC and Arms Act, 1959—R. 27—The complainant did not offer any explanation as to why the accused apprehended at the spot with a crime weapon, was not handed over to PCR officials who allegedly arrived at the spot after about 20 minutes of the occurrence—Despite police remand, the IO was unable to ascertain the identity of the appellant's associates and apprehend them. The robbed cash could not be recovered—The exact location where occurrence took place could not be ascertained—In his Court statement, the complainant did not attribute any specific role to the each assailants and in vague terms disclosed that the 'four individuals' pushed him and asked him to keep hands up on the pretext of rush in the bus. He vaguely stated that they 'forcibly' took out Rs. 16,500/- from the inner pocket of his wearing pant. He did not describe as to what force was used and in what manner the currency lying in his inner pocket were taken out by any specific individual. No specific and definite role was attributed to the appellant in depriving him of cash from his pocket. The

appellant was not apprehended while taking out the currency notes from the pocket of the complainant. It is unclear as to when and at what place the bus stopped and the four assailants alighted from—The bus. Driver and conductor or any other passenger in the bus was not associated at the time of conducting search of the accused. After his apprehension, no instrument to pick-pocket was recovered from his possession.

— The appellant who was allegedly armed with a deadly weapon, did not use it to avoid his apprehension. No injuries with knife were inflicted to the complainant or the public giving beating to him—Possibility of mistaken identity cannot be ruled out. Sole testimony of the complainant is not safe to convict the appellant in the absence of any corroboration in the light of various discrepancies and infirmities in the prosecution case—Delay in lodging the FIR has not been explained.

— None of the offenders used any deadly weapon to overawe or scare the complainant. The appellant was not found in possession of any robbed/stolen article and did not use knife (a) in order to the committing of the theft; or (b) in committing the theft; or (c) in carrying away or attempting to carry away property obtained by theft, to attract Section 390 IPC when theft becomes robbery under above noted circumstances. The knife was allegedly taken out by the appellant when he was being chased to avoid his apprehension—Appeal allowed—Conviction and sentence set aside.

Vishal v. *The State of NCT of Delhi* *652*

— Sections 304/324: Appellant is challenging conviction by the Trial Court u/s 304/324 IPC. Appellant contends that victims wanted to withdraw water out of turn due to a wedding in the family, due to which a dispute arose- During the dispute, one life was lost, two other victims sustained grave injuries- Appellant denies being author of the injuries, pleads false implication- further contends to having received injuries himself at the hands of the complainants- Trial Court convicted

Appellant u/s 304/324 IPC- Hence, present appeal. Appellant contended that TC erred in relying upon interested witnesses, without independent corroboration- Testimony of eye witnesses not corroborated by medical evidence- Highly improbable for injured witnesses to testify to the injuries of the deceased, when they were attacked simultaneously. Held:

- Defence taken by Appellant is conflicting- Version of Appellant entirely contradicted by Defence witnesses- Nothing on record to show that Appellant sustained injuries as claimed.

- Prompt and vivid reporting of the incident gives assurance regarding its true version.

- Testimony of an injured witness is accorded a special status in law- His statement is generally considered reliable- Unlikely that injured witness would spare the actual witness in order to falsely implicate someone else. Convincing evidence is required to discredit an injured witness. Victim was father and grandfather of PW2 and PW1. They were not expected to let the real culprit go scot free to falsely rope in an innocent.

- Trite law that minor variations between medical evidence and oral evidence do not take away the primacy of the latter= Minor contradictions and discrepancies are inconsequential- Do not affect core of the prosecution case.

- PW-2 suffered injuries ‘simple’ in nature- Conviction u/s 324 IPC altered to s. 323 IPC.

- Impugned judgement based on fair appraisal of the evidence and all the relevant contentions of the appellant have been considered. No reason to interfere with the findings. Appellant has suffered ordeal of trial/appeal for 15 years- Clean antecedents- No history of enmity- Substantive sentence is modified to 5 years.

Rashid v. *State* *684*

— Section 392, 186—In the Court, the complainant did not subscribe to the version given to the police at the first instance, though he stood by the story of snatching of Rs. 40,000/- from his possession when he was keeping it in the dickey of the scooter. He did not identify Appellant to be the assailant who had snatched the envelope containing cash and from whom the stolen cash was recovered. He was declared hostile and was cross-examined by learned Additional Public Prosecutor in which also, nothing material could be elicited to establish the identity of the appellant—He rather gave a conflicting statement that after the envelope containing cash was snatched, he went to Mr. S.L. Banga, from whom he had taken the cash, to inform him about the incident, thereafter he saw a crowd of people standing across his house, the police informed him that they had recovered the cash from the individual who was in their custody. He was not even aware if any knife was recovered from the appellant's possession—Statements of PWs full of contradictions and no implicit reliance can be placed to establish the guilt of the appellant beyond reasonable doubt.

Medical examination after an inordinate delay at 12:15 A.M. —Constable who allegedly sustained injuries at the hands of the appellant in an attempt to apprehend him was taken to hospital at 01:35 A.M. in the night intervening 3/4-07-1999. Again no explanation has been given as to why Constable was taken for medical examined belatedly—Constables who allegedly apprehended the appellant and recovered the bag containing the envelope having cash, are not witnesses to the seizure memo or sketch of he knife or seizure memo of knife or on personal search memo—Conviction and sentence of the appellant cannot be sustained.

Jagbir @ Jaggi v. *State & Anr.* *695*

— Sec. 394 and 398—Hostile witness—Evidentiary value. It is settled law that the evidence of a hostile witness can be relied upon at least to the extent it supported the case of the prosecution— The ocular testimony of the complainant is in consonance with medical evidence—Minor discrepancies, contradictions or improvement are not very material to affect the core of the prosecution case. The complainant's testimony inspires confidence and implicates the appellant without any doubt. The accused did not give plausible explanation to the incriminating circumstances proved against him. DW-1 did not lodge any complaint against any police officials for falsely implicating him in the case.

Sehzad @ Nadeem v. *State* *768*

— Sections 302, 392, 382 and 120B—Indian Evidence Act, 1872—Section 25, 26 and 27—Appellant State challenged acquittal of respondents U/s 302/392/382 r/w section 120B of Code—According to appellant, prosecution case rested purely on circumstantial evidence and all the circumstances including discovery and establishment of fact of use of motorcycle in commission of offences proved beyond iota of doubt by it.

Held:- Section 27 of the Act which is in the form of an exception to Sections 25 and 26 of the Act admits only so much of the information given by an accused which distinctly relates to the facts discovered in pursuance of the information. The recovery of the object has to be distinguished from the fact thereby discovered. If in pursuance of the information provided, any fact is discovered which connects the accused with the commission of the crime, then only the fact discovered becomes relevant.

State v. *Rampal Singh and Anr.* *700*

MEDICAL COUNCIL OF INDIA (PROFESSIONAL CONDUCT, ETIQUETTE AND ETHICS) REGULATIONS, 2002—Indian Medical Council Act, 1956—Section 20-A and Section 33 (m)—Delhi Nursing Homes Registration Act, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in

treating patient (Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of hospitals and secondly, that Ethics Committee of MCI acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by Ethics Committee of MCI about state of affairs in Petitioner hospital and same did not harm any legal right or interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against Petitioner hospital highlighted above.

Max Hospital Pitampura v. *Medical Council of India* *620*

RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTION ACT, 1993—Sections 17 & 18—Plaintiffs

filed suit seeking decree for declaration and mandatory injunction to be declared as lawful and absolute owners of suit property—According to defendant no. 2, suit was a collusive suit between plaintiffs and defendant no. 1 and was barred U/s 34 of SRFAESI Act and Section 17 & 18 of DRT Act.

—Held:- DRT Act is not a bar for a civil court to apply the relief such as Section 56 of the Transfer of Property Act inasmuch as it was held that no prejudice is caused to the Bank inasmuch as it only directs that other properties be sold first to satisfy the mortgaged debt.

Rakesh Kumar & Anr. v. *Saroj Marwah & Anr.* *743*

SECURITISATION & RECONSTRUCTION OF FINANCIAL ASSETS & ENFORCEMENT OF SECURITY INTEREST ACT, 2002—Section 34—Recovery of Debts Due to Banks and Financial Institution Act, 1993—Sections 17 & 18—Plaintiffs filed suit seeking decree for declaration and mandatory injunction to be declared as lawful and absolute owners of suit property—According to defendant no. 2, suit was a collusive suit between plaintiffs and defendant no. 1 and was barred U/s 34 of SRFAESI Act and Section 17 & 18 of DRT Act.

Held:- DRT Act is not a bar for a civil court to apply the relief such as Section 56 of the Transfer of Property Act inasmuch as it was held that no prejudice is caused to the Bank inasmuch as it only directs that other properties be sold first to satisfy the mortgaged debt.

Rakesh Kumar & Anr. v. *Saroj Marwah & Anr.* *743*

SERVICE LAW—Promotion Respondents claiming they were beneficiaries of Flexible Complementing Scheme (FCS), filed application before Central Administrative Tribunal seeking a direction for promotions from date of completion of eligible service in promotional post wherein they were given in situ

promotion on subsequent dates—Orders of Tribunal allowing application, challenged before High Court—Plea taken, directions made by Tribunal in impugned judgment tantamount to granting pay to respondents for work which they have not done—Held—It is admitted position that petitioner has only effected in situ promotions to respondents—There is no distinction in work which was being discharged by respondents prior to their promotion or thereafter—Only variation is in financial benefit which would accrue to respondents after their promotions—Principle of 'no work no pay' has no application to instant case—From very expression in situ, it is apparent that there is no change in either place or position in which respondents are working—Therefore, it cannot be contended that respondents are being paid any amount for work they have not discharged—We find no merit in these petitions and applications which are dismissed with costs which are quantified at Rs. 2,000/- per respondent.

National Technical Research Organization v. *P. Kulshrestha & Ors.* *675*

— Respondent participated in examination conducted by UPSC for selection to post of Junior Geologist Group 'A' in Geological Survey of India—Having qualified said examination respondent was directed by petitioner to appear before Central Standing Medical Board at Safdarjung Hospital for medical examination—Medical Board, after examining respondent declared him 'unfit' on ground of his having undergone Lasik Surgery—Respondent successfully challenged order of petitioner before Administrative Tribunal before High Court—Held—There is no prescription in recruitment rules to effect that a person who had undergone Lasik Surgery to correct vision, would be disqualified for consideration for appointment—Medical Board which has examined respondent has not found his vision criterion—Only ground for rejecting him was fact that he had undergone corrective Lasik Surgery—In absence of any prescription in rule or regulation, mere fact that person has undergone corrective surgery ipso

facto cannot tantamount to his being medically unfit and result in rejection of a candidate.

Union of India & Anr. v. *Saikat Roy* *752*

— Representation of petitioner requesting for merger of pollution level test inspector and motor vehicle inspector cadres, rejected by respondents—Petitioner relieved from his posting with directions for duties in Taxi Unit, Burari-—Application of petitioner challenging both orders dismissed by Administrative Tribunal—Order of Tribunal challenged before HC- plea taken, posting in taxi unit, burari amounts to change of cadre-Transfer outside cadre in a different wing is bad in law being violative of conditions of service—In eventuality of refusal to merge two cadres independent to each other, petitioner be not transferred out of pollution control branch as it would amount to serving under junior officers of MVI bench- Held-lssues raised by petitioner are whether rejection of representation to merge PLTI and MVI cadres into one is unjustified and whether his transfer to taxi unit. Burari amounts to forcing him to work under his juniors- petitioner had challenged impugned orders before learned Tribunal and raised same contentions, as have been raised before us—Tribunal has carefully considered both submissions of petitioner and given sound reasons for rejection- Impugned order of Central Administrative Tribunal does not suffer with any infirmity—There are no grounds to interfere with findings of learned Tribunal- writ petition dismissed.

Prince Garg v. *Govt. of NCT & Ors.* *763*

ILR (2014) I DELHI 443
W.P.

UNION OF INDIA & ANR. ...PETITIONER

VERSUS

HARI SINGH ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. NO. : 4245/2013 & CM NO. : 9885/2013 **DATE OF DECISION: 10.09.2013**

Constitution of India, 1950—Article 226—Petition against the order of Central Administrative Tribunal (CAT) quashing the disciplinary proceedings initiated by the petitioner, against the respondent. Respondent joined the customs department in 1976- posted as inspector at the export shed, ICD in 1998 wherein he conducted inspections of consignment presented for export from the said port. Directorate of intelligence review (DRI) initiated an inquiry into availment of duty drawback on export of UPFC pipes between 1998-1999 by M/S. Aravali (India) Ltd.- show cause notice was issued to the exporter (but not to the respondent) in 2000 by the DRI and the matter stood concluded in 2001 without anything incriminating the respondent- In August, 2003, the DRI in a letter to the Chief Commissioner of central excise recommended action against 23 mentioned officials who had attended to the above export case- yet no action was initiated. In 2004, the respondent was summoned and interrogated by the vigilance department, thereafter which no action was taken against him under the Customs' Act or Customs Conduct Rules (CCS)- in the background of the absence of copies of the shipping bills of the relevant period, another inquiry officer was appointed in 2010, and chargesheet was issue vide office memo

dated 25th February, 2011. Aggrieved, respondent approached the CAT—Initially the explanation given by the petitioner for delay being non availability of shipping bills was accepted by CAT, however on review, CAT noted that relevant documents were available with the petitioner and there was an excessive delay in issuance of charge sheet-on merits, the Tribunal recalled its earlier order and office memo dated 25th Feb, 2011 was quashed and set aside. Aggrieved, the present writ petition was field contending that delay on part of the petitioner was bona fide. Held: plea of the petitioner baseless—Rightly rejected by the CAT—The action of the petitioner is grossly belated—Delay in initiating disciplinary proceedings would constitute denial of reasonable opportunity to defend the charges and therefore, amounts to violation of Principles of atural justice—Writ dismissed- cost awarded.

Aggrieved by the issuance of the said memorandum and proposed inquiry, the respondent challenged the same by way of O.A.No.1844/2011 before the Central Administrative Tribunal (Principal Bench), Delhi. The learned Tribunal accepted the above explanation tendered by the respondent for the delay and, therefore, was of the view that the case was a fit case if the proceedings were allowed to proceed and came to a conclusion that the responsibility of the respondent was to be fixed. In view thereof, an order dated 19th December, 2011 was passed by the Tribunal whereby the challenge by the respondent was rejected. **(Para 10)**

The Tribunal noted in the Review Application the factual narration made by the present petitioner and concluded that the relevant documents were actually available with the present petitioner; that there was excessive delay in issuance of the chargesheet and that the instant case was a case of inordinate and unexplained delay in commencement of the disciplinary proceedings. **(Para 16)**

The available record was considered sufficient by the

Commissioner Custom to pass a final adjucation order dated 2nd November, 2001. This order makes a detailed reference to the shipping bills and other documents. However, when it comes to initiation of disciplinary proceedings against the respondent, the petitioners want this court to accept that the available record was insufficient. **(Para 53)**

The commission reiterated its prior instructions dated 3rd March, 1999 which prescribed the following time limits to be adhered by the Ministry/Departments of Government of India, autonomous organisations and other Cooperative Societies, in respect of their employees for expeditious disposal of the cases :

It would be most inappropriate to accept the only justification tendered by the respondents of merely having written a few communications to the DRI for the documents. In any case, if the petitioner was serious about initiating disciplinary action in the above noted circumstances, it could have done so. We have noted above that the petitioner had available with them the necessary record and there was really no reason or occasion for delaying the proceedings for want of original documents. The final adjudication order as well as all inquiry reports was based on the records of the petitioners. Even after obtaining the inquiry report, the respondents delayed the matter not by one or two years but by several years as set out above. **(Para 58)**

So far as the prejudice is concerned, the long period which has lapsed between the alleged transaction and issuance of charge sheet would by itself have caused memory to have blurred and records to have been lost by the delinquent. Therefore, the respondent would be hard put to trace out his defence. The prejudice to the respondent is writ large on the face of the record. The principles laid down by the Supreme Court as well as by this court in the judgments cited by the respondent and noted above squarely apply to the instant case. **(Para 60)**

The plea of the petitioners that they did not have the original documents or certified copies thereof is baseless and rightly rejected by the Tribunal in the impugned order. As noted above, the petitioners were in possession of photocopy of original shipping bills which photocopy had been prepared by them and were available throughout. Even if the plea that the original documents or certified copy were necessary for initiating the disciplinary proceedings were to be accepted, the action of the respondents was grossly belated and certainly the long period which has lapsed was not necessary for procuring the same. **(Para 67)**

We have noted the judicial pronouncements laying down the applicable consideration in some detail hereinabove only to point out that the law on the subject is well settled. The petitioners were fully aware of the position in law as well as of the necessary facts to adjudicate upon the issue. In our view, the present writ petition was wholly inappropriate and not called for. **(Para 69)**

For all these reasons, the judgment of the Tribunal cannot be faulted on any legally tenable grounds.

The writ petition and application are devoid of legal merits and are hereby dismissed.

The respondent shall be entitled to costs of litigation which is are quantified at Rs.20,000/- . **(Para 70)**

Important Issue Involved: Gross delay in initiating disciplinary proceedings leads to constitute denial of reasonable opportunity to defend the charges thereby violating Principles of natural justice.

[An Ba]

APPEARANCES

FOR THE PETITIONER : Mr. R.V. Sinha, Adv.

FOR THE RESPONDENTS : Mr. Sachin Chauhan, Adv.

CASES REFERRED TO:

1. *Union of India* vs. *B.A. Dhayalan* MANU/DE/2911/2013.
2. *Secretary Ministry of Defence* vs. *Prabhash Chandra Mirdha* 2012 (11) SCC 565.
3. *Chairman, LIC of India & Ors.* vs. *A. Masilamani* JT 2012 (11) SC 533.
4. *Union of India and Another* vs. *M.S. Bhatia* WP(C)No.750/2010.
5. *UOI & Ors.* vs. *M.S. Bhatia* WP(C) No.750/2010.
6. *UOI* vs. *Irfan Ahmed;* SLP Civil CC 1918/2010.
7. *Joseph Kouk* vs. *Union of India & Another* O.A.No.2727/2010.
8. *M.S. Bhatia* vs. *UOI & Ors.* O.A.No.1087/2009.
9. *The Government of Andhra Pradesh and Others* vs. *Appala Swamy* 2007 (3) Scale 1.
10. *Union of India* vs. *V.K. Sareen* WP(C)No.4757/2007.
11. *UOI* vs. *Irfan Ahmed;* W.P.No.2079/2007.
12. *P.V. Mahadevan* vs. *M.D. Tamil Nadu Housing Board* JT 2005 (7) SC 417.
13. *Irfan Ahmed* vs. *UOI & Ors.;* O.A.No.689/2005.
14. *Inderjit Singh & Ors.* vs. *Food Corporation of India & Ors.*; 2002 (4) SLR 233.
15. *Meera Rawther* vs. *State of Kerala* 2001 (1) SLR 518.
16. *Rajbir Singh Gill* vs. *State of Punjab;* 1999 (7) SLR 422.
17. *State of Andhra Pradesh* vs. *N. Radhakishan,* 1998 (4) SCC 154.
18. *State of Punjab* vs. *Chaman Lal Goyal* 1995 (1) ILJ 679 (SC).
19. *State of Madhya Pradesh* vs. *Bani Singh & Another* 1990 (Supp) SCC 738.

20. *Mohanbhai Dungarbhai Parmar* vs. *Y.B. Zala and Others,* 1980 (1) SLR 324.
21. *UOI & Ors.* vs. *V.J. Ahmed;* 1979 SCR (3) 504.
22. *B.J. Shelat* vs. *State of Gujarat & Ors.;* 1978 Lab. I.C. 824.

RESULT: Writ Petition Dismissed.

GITA MITTAL, J.

1. By way of the present writ petition, the petitioners have challenged the judgment dated 8th January, 2013 in R.A.No.27/2012 in O.A.No.1844/2011 passed by the Central Administrative Tribunal, Principal Bench at New Delhi holding that there was inordinate and unexplained delay in commencement of the disciplinary proceedings against the respondents before the Tribunal and directing that the same would stand quashed.

2. The respondent before us, joined service with the Customs Department in the year 1976. At the time of filing of his Original Application before the Tribunal, he had put in 35 years of meritorious service. On the 4th of October, 1998, the respondent was posted as Inspector at the Export Shed, Inland Container Deport (ICD), Tughlakabad, New Delhi where he was inter alia assigned the duty of inspection/examination of consignment presented for export from the said port. It appears that the Directorate of Revenue Intelligence (DRI) initiated an inquiry in availment of duty drawback on export of chief quality junk UPFC pipes between 1998 and 1999 by M/s. Aravali (India) Limited, Hissar which culminated in issuance of a notice to show cause dated 21st December, 2000 to the exporter. In this notice, reliance was placed on the shipping bills of said firm with regard to the subject transaction. This show cause notice was not addressed to the respondent. It is noteworthy that nothing adverse against the respondent was mentioned therein.

3. The exporter appears to have submitted a reply. After consideration of the matter, upon adjudication by the Commissioner of Customs, an order dated 2nd November, 2001 was passed. There was still nothing incriminating against the respondent. Therefore, from the Custom's point of view, investigation in the case stood completed.

4. On the 6th of August, 2003, the DRI addressed a letter to the Chief Commissioner of Central Excise, (Delhi Zone) with regard to an

alleged export fraud of M/s. Aravali (India) Limited, Hissar. This communication was in response to the Chief Commissioner's letter dated 18th June, 2003 and referred to findings of the DRI. Specific reference was made to the shipping bills presented by the company on which the goods had been exported. In para 8 of this letter dated 6th August, 2003, the DRI had stated that scrutiny of the shipping bills revealed that 20 officers of the Custom had examined the consignment covered by the bills. In para 12, the DRI had made following recommendations:

> "12. Considering that a large number of Customs and Central Excise Officers had attended to the export consignment of M/s Aravali India Ltd. over a period of time, it may be a little far fetched to infer that each of the officers had colluded and/or connived with the exporter in the latter fraudulent activities. On the other hand, a charge of gross negligence or dereliction of duty against the concerned officials would appear more appropriate and sustainable as well. Thus, it is recommended that departmental action for dereliction of duty may be initiated against the above mentioned 23 officers. This office is shortly issuing a show cause notice invoking penal provisions against only the exporter/firm and its Managing Director."

Despite the DRI pointing out the above, no action was initiated for dereliction of duty against the 23 custom officers at the ICD.

5. In the meantime, on the 27th of October, 2004, the respondent was summoned by the his Vigilance Department and interrogated about the above exports. The respondent has submitted that he had tendered his explanation to the best of his knowledge, memory, and referred to the incident as well as contemporaneous documents relating to the said export. According to the respondent, the vigilance officials were satisfied with his explanation. Therefore, no action was taken against him, either under the Customs' Act or under the CCS (Conduct) Rules.

6. The petitioner submits that a preliminary enquiry report dated 3rd October, 2005 was submitted by Shri B.D. Singhal, Assistant Commissioner (Customs) ICD, TKD, New Delhi. Vide the letter dated 24th November, 2006, this enquiry report was forwarded to Central Excise Delhi – I. However, the Cadre Controlling Authority – (being the Additional Commissioner (P&V), Central Excise Delhi – I) sent a letter

dated 14th December, 2006 as he found the enquiry report incomplete and noted that the report did not suggest a specific role of each officer in the fraudulent availment of duty drawback to enable initiation of regular departmental enquiry after obtaining first stage advice from DGOV. In view of the above, another enquiry report dated 9th August, 2007 was submitted by Shri S.N.B. Sharma, Assistant Commissioner, Export (Shed) ICD, TKD, New Delhi which was forwarded to the Central Excise (Delhi) on the 20th of August, 2007.

7. To explain as to why no disciplinary proceedings were initiated against the respondent, the petitioner has further submitted that the DRI had not provided the original or their attested copies of 219 shipping bills relating to the transaction despite several reminders between 26th October, 2004 to 30th December, 2009 which were necessary to initiate disciplinary proceeding.

8. The Directorate General of Vigilance was requested vide a letter dated 11th February, 2010 for first stage advice. The Directorate General of Vigilance, vide letter dated 23rd April, 2010, had informed that the proposal seeking first stage advice was incomplete in the absence of original or certified copy of shipping bills. As per the petitioner, these bills were received only on the 29th of June, 2010 and 17th August, 2010. In this background, Mohd. Abu Sama, Deputy Commissioner was appointed as Inquiry Officer on 8th July, 2010 who submitted his report 8th October, 2010. The first stage advice was thereafter sought vide letter dated 19th October, 2010 enclosing the draft Chargesheet dated 25th February, 2011.

9. The respondent was aggrieved by the issuance of the memorandum dated 25th February, 2011 for the reason that it was issued after a lapse of 13 years of a transaction which had already been the subject matter of the aforesaid show cause notice and adjudication order. The respondent had sent a letter dated 9th March, 2011 requesting for relied upon documents to the impugned memorandum and sought extension of time for filing of reply thereto. This was of no avail. Without acceding to the respondent's request, the petitioner appointed Shri C.P. Sukhramani, Superintendent as the Presenting Officer vide letter dated 26th April, 2011.

10. Aggrieved by the issuance of the said memorandum and proposed inquiry, the respondent challenged the same by way of O.A.No.1844/

2011 before the Central Administrative Tribunal (Principal Bench), Delhi. The learned Tribunal accepted the above explanation tendered by the respondent for the delay and, therefore, was of the view that the case was a fit case if the proceedings were allowed to proceed and came to a conclusion that the responsibility of the respondent was to be fixed. In view thereof, an order dated 19th December, 2011 was passed by the Tribunal whereby the challenge by the respondent was rejected.

11. In order to explain the delay in issuance of the chargesheet, the petitioners were primarily contending non-availability of the shipping bills with them for the reason that the same had been submitted with the DRI.

12. The respondent challenged the judgment of the Tribunal by way of WP(C)No.169/2012 before this court. The respondent had also come into possession of certain documents which had been requisitioned by his colleague Shri. Dharam Parkash Dahiya under the Right to Information Act. These documents included a letter written at the initial stages by the DRI on 24th August, 1999 to the Commissioner of Custom whereby the shipping bills and original documents had been firstly requisitioned by the DRI. In response thereto, on 25th September, 1999, while forwarding the original shipping bills, the Commissioner of Customs had clearly stated that the copies of the shipping bills had been retained by the Custom department. The DRI had addressed a letter dated 6th August, 2003 to the Chief Commissioner of Central Excise, (Delhi Zone) referring to the investigation of the respondent which shows that as back as in 2003, the particulars of the officers against whom misconduct was alleged in the transaction in question had been identified.

13. The respondent filed CM No.354/2012 in the above writ petition seeking permission of this court to bring on record these documents. The writ petition and the application were disposed of at that stage by the court vide an order passed on 11th January, 2012. Liberty was granted to the respondents to approach the Central Administrative Tribunal by way of a review for producing the additional documents in support thereof.

14. The respondent consequently filed Review Application No.27/2012 in O.A.No.1844/2011 relying upon the documents which had been received by the aforesaid Mr. Dahiya under the R.T.I. Act and sought review of the order dated 19th December, 2011. This review petition

was heard and allowed by the order dated 8th January, 2013 of the Central Administrative Tribunal.

15. Learned counsel for the respondent had urged that there was no satisfactory explanation for the delay of almost 8 years in issuance of charge memo dated 25th February, 2011. Reference was made to the several judicial pronouncements of the Supreme Court and orders of the Tribunals in similar matters including 1990 (Supp) SCC 733 **State of Madhya Pradesh v. Bani Singh & Another;** 1998 (4) SCC 154 **State of Andhra Pradesh v. N. Radhakishan;** JT 2005 (7) SC 417 **P.V. Mahadevan v. M.D. Tamil Nadu Housing Board;** (1995) 2 SCC 570 **State of Punjab & Ors. v. Chaman Lal Goyal;** 2002 (4) SLR 233 **Inderjit Singh & Ors. v. Food Corporation of India & Ors.;** 2001 (5) SLR 518 **Meera Rawther v. Stae of Kerala;** 1999 (7) SLR 422 **Rajbir Singh Gill v. State of Punjab;** O.A.No.689/2005 **Irfan Ahmed v. UOI & Ors.;** W.P.No.2079/2007 **UOI v. Irfan Ahmed;** SLP Civil CC 1918/2010 **UOI v. Irfan Ahmed;** 1978 Lab. I.C. 824 **B.J. Shelat v. State of Gujarat & Ors.;** 1979 SCR (3) 504 **UOI & Ors. v. V.J. Ahmed;** O.A.No.1087/2009 **M.S. Bhatia v. UOI & Ors.** and WP(C) No.750/2010 **UOI & Ors. v. M.S. Bhatia**. It was held in these judgments that if there was no satisfactory explanation for the inordinate delay in commencement of disciplinary proceedings, they were liable to be quashed.

16. The Tribunal noted the factual narration made by the present petitioner and concluded that the relevant documents were actually available with the present petitioner; that there was excessive delay in issuance of the chargesheet and that the instant case was a case of inordinate and unexplained delay in commencement of the disciplinary proceedings.

17. The Tribunal accepted the review petition and proceeded to hear the main petition on merits. The same was also allowed by the Central Administrative Tribunal holding that there was no satisfactory explanation for delay of almost 8 years in issuance of the charge sheet and the office memorandum dated 25th February, 2011 was quashed. The order of the Tribunal dated 19th December, 2011 was thus recalled and the impugned office memorandum dated 25th February, 2011 was set aside and quashed.

18. Aggrieved by the orders of the Central Administrative Tribunal, the petitioners have filed present writ petition contending that the explanation

given by the petitioner for the delay in issuing the memorandum dated 25th February, 2011 was bonafide, adequately explained and deserves to be accepted. It has also been contended that no finding has been returned with regard to any prejudice resulting to the applicant in contesting the disciplinary case on account of alleged delay. The submission is that the delay in issuance of the memorandum dated 25th February, 2011 had occurred in the circumstances which were completely beyond the control of the petitioner and that the judgment of the Central Administrative Tribunal was contrary to law laid down by the Supreme Court as well as by the Punjab and Haryana High Court. These questions arise for consideration by us in this writ petition.

19. The respondent entered appearance on advance notice and submitted that the impugned orders have to be tested on the basis of the records which were before the Central Administrative Tribunal when it passed the impugned order. In this background, we permitted the respondent to place such extracts of the record of the Tribunal as had not been placed before us by the petitioners and were necessary for adjudication of the case. The same was duly filed in the present proceedings and has been considered. The writ petition was admitted and taken up for hearing with the consent of both sides.

20. The question which arises for consideration in the present matter is whether the delay in issuance of the charge sheet stands adequately explained and what is the impact of the delay so far as the rights of the respondent are concerned.

21. It is an admitted position before this court that the transaction on which the disciplinary action is based related to the period of 1999. The petitioners do not dispute that they had full knowledge of the transactions. The communications received from the DRI are admitted before us. This correspondence manifests that proceedings had been initiated against the exporter on the documents which adequately informed the petitioners of the nature of the inquiry as well as the charges.

22. The disciplinary proceedings against the respondent were commenced by issuance of the charge memo dated 25th February, 2011.

23. We may first examine the principles of law which would govern the consideration of the issues raised herein. So far as delay in issuance of the charge sheet is concerned, we may usefully refer to the

pronouncement of the Supreme Court reported at 1990 (Supp) SCC 738, **State of Madhya Pradesh v. Bani Singh & Another.** Just as the case before us, in Bani Singh as well, the State had appealed against the order of the Tribunal on the ground that it ought not to have quashed the proceedings merely on the ground of delay and laches. The alleged irregularity had allegedly taken place in 1975-77 and the department was aware of them. The Supreme Court held that it is unreasonable to think that it would take more than 12 years to initiate the disciplinary proceedings. The contention was rejected by the court holding as follows:

> "4. The appeal against the order dated December 16, 1987 has been filed on the ground that the Tribunal should not have quashed the proceedings merely on the ground of delay and latches and should have allowed the enquiry to go on to decide the matter on merits. We are unable to agree with this contention of the learned counsel. The irregularities which were the subject matter of the enquiry is said to have taken place between the years 1975-77. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April, 1977 there was doubt about the involvement of the officer in the said irregularities and the investigation were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage. In any case there are no grounds to interfere with the Tribunal's orders and accordingly we dismiss this appeal."

24. Again in the judgment reported at 1998 (4) SCC 154 **State of Andhra Pradesh v. N. Radhakishan,** the Court considered the same issue and laid down the following principles:-

> "19. It is not possible to lay down any pre-determined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The

essence of the matter is that the court has to take into consideration all relevant factors and to balance and weight them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings **the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it.** It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. **Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings.** Ultimately, the court is to balance these two diverse considerations."

(Emphasis supplied)

25. It is therefore trite that delay which is unexplained and unreasonable would cause prejudice to the delinquent employee. Such delay clearly manifests the lack of seriousness on the part of the disciplinary authority in pursuing the charges against the employee. In the event of any employee deviating from path of honesty, efficiency and diligence, action should expeditiously be taken as per prescribed procedure. The Supreme Court has laid down the principles holding that unexplained and unreasonable delay per se results in prejudice to the charged officer except when the employer can show that the employee was responsible for delay or is otherwise able to explain the delay. While evaluating the

impact of the delay, the court must consider the nature of the charge, its complexity and for what reason the delay has occurred.

26. Learned counsel for the respondent has drawn our attention to the judgment dated 3rd July, 2009 passed in WP(C)No.4757/2007, **Union of India v. V.K. Sareen**. In this case, the petitioner had proposed to commence disciplinary action against the respondents for imposition of major penalty with regard to his functioning between 12th June, 1990 to 12th April, 1993. An Enquiry Officer was appointed on the 22nd of April, 2003 and the report of the inquiry was submitted on the 1st of July, 2005. The charge sheet and the proceedings were quashed by the Central Administrative Tribunal by an order passed on 20th of March, 2007 which order came to be questioned by way of the writ petition filed before this court. In the judgment dated 3rd July, 2009, this court had culled out the principles as follows:-

> "13. It is trite law that disciplinary proceedings should be conducted soon after the alleged misconduct or negligence on the part of the employee is discovered. Inordinate delay cannot be said to be fair to be Delinquent Officer and since it would also make the task of proving the charges difficult. It would also not be in interest of administration. If the delay is too long and remains unexplained, the court may interfere and quash the charges. However, how much delay is too long would depend upon the facts of each and every case and if such delay has prejudiced or is likely to prejudice the delinquent in defending the enquiry ought to be interdicted."

In the judgment in **Union of India v. V.K. Sareen** (Supra), the court also rejected the explanation for the delay in instituting the disciplinary proceedings as well as in taking final order on the enquiry report.

27. It has been repeatedly held by the Supreme Court that disciplinary proceedings are necessary in public interest as well. They are essential in inculcating a sense of discipline and efficiency. The proceedings should not be protracted. In this regard, our attention has been drawn to the pronouncement reported at JT 2005 (7) SC 417 **P.V. Mahadevan v. M.D. Tamil Nadu Housing Board**. In this case, a charge memo has been issued to the appellant on the 8th of January, 2000 pertaining to alleged irregularity in issuing a sale deed in the year 1990. There was no

explanation for the extraordinary delay of ten years in initiating the proceedings. The respondent had attempted to explain that the irregularities for which the disciplinary action had been initiated had come to light only in the second half of 1994-95, when the audit report was released. This explanation was not accepted by the Supreme Court. The court noted the unbearable mental agony and distress caused to the officer concerned and held as follows:-

> "The protracted disciplinary enquiry against a Government employee should, therefore, be avoided not only in the interests of the Government employee but in public interest and also in the interests of inspiring confidence in the minds of the Government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer."

28. The judgment of the Division Bench of this court dated 5th February, 2010 in WP(C)No.750/2010 **Union of India and Another v. M.S. Bhatia** is on a similar terms.

29. Mr. R.V. Sinha, learned counsel for the petitioner has urged that the Tribunal ought not to have interfered in the proceedings inasmuch as the respondent had approached it at the stage of issuance of charge sheet and that the matter had not proceeded to the stage of a final order. It is urged that the issuance of the charge sheet does not infringe the rights of a party and it is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action in his favour.

30. In this regard, reliance is also placed on the judgment reported at 2012 (11) SCC 565 **Secretary Ministry of Defence v. Prabhash Chandra Mirdha**. Perusal of this judgment would show that the charge memorandum dated 8th of January, 1992 was issued to the respondents on the alleged demand of bribe of Rs.37,000/ and its acceptance on 3rd August, 1991. The Supreme Court did not lay down any absolute proposition that a charge sheet cannot be ever challenged. In para 8 of

the judgment, the Supreme Court has specifically noted that the law does not permit quashing of the charge sheet in a 'routine manner'. The case considered by the Supreme Court also shows that a charge sheet in that case had been issued within one year of the alleged action by the employee. In para 9 of the judgment, the Supreme Court had noted that the delay in concluding the domestic enquiry is not always fatal and that it depends upon the facts and circumstances of each case. In para 10 of the judgment, the Supreme Court has noted that a writ application does not ordinarily lie against the charge sheet or show cause notice and that it should not ordinarily be quashed. In para 12, after considering the law on this aspect, the court reiterated the principles thus:-

> "Thus the law on the issue can be summarised to the effect that the charge-sheet cannot generally be a subject-matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the charge-sheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the ground that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor be to taken into consideration while quashing the proceedings."

31. The Supreme Court has, therefore, reiterated well settled principles that proceedings initiated at belated stage would be quashed if the delay creates prejudice to the delinquent employee.

32. We have noted above the pronouncements of the Supreme Court wherein the court has observed the manner in which the delay would result prejudice. In view thereof, this judicial precedent is of no assistance to the case of the petitioner in the present writ petition.

33. It is further contended that the respondent had failed to show as to how he has been prejudiced by the delay. Reliance is placed on the pronouncements of the Supreme Court reported at 2007 (3) Scale 1 **The Government of Andhra Pradesh and Others v. Appala Swamy and** JT 2012 (11) SC 533 **Chairman, LIC of India & Ors. v. A. Masilamani** in support of this submission.

34. We find that in **The Government of Andhra Pradesh and Others v. Appala Swamy** (Supra), the Supreme Court has again reiterated the well settled principles that no hard and fast rule can be laid on the effect of delay in concluding disciplinary proceedings or on the aspect of its impact on the delinquent. It was observed that the employee has to make out a case of prejudice. The court also noted that the question had to be considered in the facts and circumstances of the case keeping in view of the nature of the charges.

35. So far as the judgment in **Chairman, LIC of India & Ors. v. A. Masilamani** (Supra) is concerned, the Supreme Court in para 10.2 has held as follows:-

> "10.2 The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is de hors the limitation of judicial review. In the event that the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge-sheet or show cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by court. The same principle is applicable, in relation to there being a delay in conclusion of disciplinary proceedings. The facts and circumstances of the case in question, have to be examined, taking into consideration the gravity/magnitude of charges involved therein. The essence of the matter is that the court must take into consideration all relevant facts and to balance the weigh the same, so as to determine, if it is in fact in the interest of clean and honest administration, that the judicial proceedings are allowed to be terminated, only on the ground of delay in their conclusion."
>
> (Underlining by us)

The absolute proposition urged by Mr.R.V. Sinha, Advocate has not been laid down by the Supreme Court in this case.

36. The only explanation tendered by the petitioners to explain the delay is that it had forwarded the original shipping bills relating to the transactions to the DRI and, therefore, had to await receipts of these original shipping bills or certified copies from the DRI before commencing the action against its employees.

37. The respondent points out that as per the letter dated 24th August, 1999 of the DRI, it had requisitioned only "list of shipping bills and all shipping bills along with connected documents in original" which had been filed by M/s. Aravali (India) Limited, Hissar. The Commissioner of Custom, ICD, New Delhi forwarded the same under the cover letter dated 25th September, 1999 stating that it was enclosing list of 219 shipping bills along with all connected documents in original which had been filed by the said firm with the progress report. The Customs authority had also informed the DRI in this letter itself that Xerox copy of the original bills had been retained by it.

38. The respondent has placed before this court an extract of a noting of the Commissioner Central Excise dated 25th September, 1999 referring to the aforenoticed letter dated 24th August, 1999 of the DRI. It is noted therein that *"all shipping bills pertaining to the export made by DRI have been retrieved from the record room and xerox copies have been kept for records at the end. A draft forwarding letter is placed opposite alongwith a detailed report on the matter. If approved we may send the original documents along with the detailed report to DRI for further investigation submitted please"*.

39. It is manifest therefore, that even though the petitioner had forwarded original shipping bills, it had prepared and retained xerox copies with itself. Therefore, the explanation of the petitioners for the inordinate and unexplained delay in issuance of the chargesheet on the ground that the original bills or copies thereof were not available with it is wholly specious and devoid of merit. The xerox copies had been prepared by the custom department itself.

40. The respondent points out that the petitioners have taken the plea that they needed "certified" copies which were received only on 29th June, 2010 for the first time before the Central Administrative Tribunal.

For this reason as well, the reliance on the reminders to the DRI for the originals or attested copies of the shipping bills is of no avail inasmuch as the petitioner had in its possession all xerox copies which had been prepared by them from the original documents and they were at best required to certify the authenticity thereof. Therefore obtaining

the certified copies of the documents was really an idle formality and wholly unnecessary in the given case.

41. Certain other actions taken by the petitioner also support the respondent. On the 4th of January, 2000, the DRI initiated an inquiry. It issued the show cause notice dated 21st December, 2000 against the exports by M/s. Aravali (India) Limited, Hissar. It contained details which running into 20 typed sheets. The show cause notice was again addressed only to the exporter and was not addressed to the respondent. No Customs employees were implicated therein.

42. On culmination of its inquiry, a final order was passed by the Commissioner Customs which was based on the said shipping bills without implicating the respondent or commenting anything adverse to the petitioner. This final adjudication into the matter stood concluded. The Commissioner of Custom, ICD, New Delhi had passed the order dated 2nd November, 2001 against the exporter imposing penalty and directing confiscation of the goods as well as refund of the duty drawback which had been disbursed. It is noteworthy that this adjudication by the Commissioner Custom was again based on a detailed consideration of documents and makes reference to the shipping bills and other documents relating to the export. Even at this stage, the Commissioner Customs could not point out anything adverse against the respondent.

43. The DRI submitted a report dated 6th August, 2003 to the Chief Commissioner of Central Excise (Delhi Zone) referring to its investigation and recommended departmental action against 23 officers for dereliction of duties. As noted above, this report categorically stated that it was *"far fetched to infer that each of the officers had colluded and or connived with the exporters in the latter fraudulent activities"*.

44. On this report, we find a noting by the Department recommending that the statement of the remaining officers be finalized and the matter be referred to the Central Vigilance Commission for advice. Despite these directives of the DRI, the Custom authorities still did not move a step.

45. To the shock of the respondent, on the 27th of October, 2004, he was summoned by the Vigilance Section. When he reported, the respondent was interrogated and he had tendered his explanation to the interrogators. The petitioner has claimed that a preliminary report was submitted on 3rd October, 2005 which was found incomplete. A further

inquiry was commissioned which submitted another inquiry report dated 9th August, 2007.

According to the respondent, his explanation was accepted by the petitioners and, therefore, no action against him was taken.

46. The petitioners have attempted to take shelter under an inquiry report dated 9th August, 2007 received on the 20th of August, 2007, as another circumstance to explain the delay on their part. However, in our view nothing turns on this inquiry inasmuch as the petitioner had authoritatively adjudicated upon the subject matter on 2nd November, 2001 when final adjudication was effected against the exporter with regard to the transactions in questions.

47. In its communication dated 6th August, 2003, the DRI had named 23 persons including the respondent against whom departmental proceedings were suggested.

48. So far as inability to obtain copies is concerned, learned counsel for the respondent has urged that the DRI is located in the CGO complex at Lodhi Road, New Delhi and the Inland Container Deport (ICD) is located at Tughalkabad, New Delhi. The disciplinary authority of the petitioner was the Central Excise and Customs which has its office at the ITO. These premises are located within few kilometres of each other. It certainly did not have to take 13 years to reach one office from the other to obtain the certified copies, even if they could be held to be essential. We, of course, in the given circumstances, have held to the contrary.

49. Judicial precedent on the facts similar to the present case has been reported at MANU/DE/2911/2013 **Union of India v. B.A. Dhayalan**. The court has considered the factual narration and also referred to the relevant rule position with regard to requirement of original documents for conducting disciplinary proceedings. Para 34 of the judgment reads as follows:-

> "34. An examination of the order of the Tribunal impugned by the petitioners reveals that the aspect of delay has been carefully considered and recorded by the Tribunal. The Tribunal did not accept the plea of the petitioners that the delay in the present matter was on account of the fact that the original documents were in the custody of the Court and the police authorities, on

account of the criminal investigation pending before the Court against the respondent, on the FIR filed by the petitioners. In this regard, the Tribunal has observed and noted that the respondent had insisted that the authorities would proceed against him without producing the original documents, in 2003, which has not denied by the petitioners. The Tribunal, thus, held that there was no impediment for the authorities to have proceeded against the respondent with the copies of the documents as the respondent who could be prejudiced in absence of original documents had waived the presence of original documents. The Tribunals also relied on Rule 14 of the CCS(CCA) Rules, 1965 and observed that the rules does not mandates that the disciplinary authority has to show original documents to the delinquent even if the delinquent does not demand the original documents. The only requirement is to provide a list of documents to be supplied to the delinquent. As per the GI letter dated 19th June, 1987, in order to cut down delays in the disposal of the disciplinary cases, it has been recommended that among other measures to be adopted, the copies of all the documents relied upon and the statements of the witnesses cited on behalf of the disciplinary authority, ought to be supplied to the delinquent officer along with the charge sheet, wherever possible. Thus, the Tribunal held that there was no impediment in supplying the copies of the relevant documents to the respondent as the allegation of the petitioners was not that they did not have the copies of documents. In any case, the copies of documents could be easily obtained by making simple applications before the court, where the criminal prosecution initiated against the respondent was pending or from the investigation authorities. It was also noted that, in any case, the original documents could also have been inspected by the petitioners by requesting the same from the concerned Court."

The insistence of the writ petitioner before us on the requirement of the original documents or certified copies thereof is therefore, misconceived and the plea set up by the respondent has to be rejected by us.

50. The file notings stated 25th September, 1999 and 27th September, 1999 also militate against acceptance of the explanation given by the petitioners.

51. So far as the delay which the petitioner had to explain in issuance of charge memo dated 25th February, 2011 is concerned, this memo was thus initiated more than thirteen years after the transaction in question; more than eleven years after completion of the custom investigation and after completion of the adjudication by the Commissioner Custom on 2nd November, 2001; more than 8 years after the 6th August, 2003 when the DRI informed the petitioner about the recommendations for departmental action against 23 officials and 7 years after the petitioner had been called for and interrogated on the 27th of October, 2004.

52. In the impugned judgment dated 19th December, 2011, the Central Administrative Tribunal has held that inordinate and unexplained delay in issuance of the chargesheet is violative of the principles of natural justice.

53. The available record was considered sufficient by the Commissioner Custom to pass a final adjucation order dated 2nd November, 2001. This order makes a detailed reference to the shipping bills and other documents. However, when it comes to initiation of disciplinary proceedings against the respondent, the petitioners want this court to accept that the available record was insufficient.

54. On the question as to the manner in which disciplinary proceedings are required to be processed, learned counsel for the respondent has drawn our attention to the Office Memorandum No.000/VGL/18 dated 23rd May, 2000 issued by the Central Vigilance Commission, Government of India. By this memorandum, the Vigilance Commissioner had recommended a schedule of time limits in conducting investigation and departmental inquiries. It is observed that delay in disposal of disciplinary cases are a matter of serious concern to the commission and that such delay also effect the morale of the suspected charged employees and others in the organization.

55. The commission reiterated its prior instructions dated 3rd March, 1999 which prescribed the following time limits to be adhered by the Ministry/Departments of Government of India, autonomous organisations and other Cooperative Societies, in respect of their employees for expeditious disposal of the cases :

"S.No.	State of Investigation or Inquiry	Time Limit
1.	Decision as to whether the complaint involves a vigilance angle..	One month from receipt of the complaint
2.	Decision on complaint, whether to be filed or to be entrusted to CBI or to be taken up for investigation by departmental agency or to be sent to the concerned administrative authority for necessary action.	-do-
3.	Conducting investigation and submission of report.	Three months.
4.	Department's comments on the CBI reports in cases requiring Commission's advice	One month from the date ofreceipt of CBI's report by the CVO/Disciplin ary Authority.
5.	Referring departmental investigation reports to the Commission for advice.	One month from the date of receipt of investigation report.
6.	Reconsideration of the Commission's advice, if required.	One month from the date of receipt of Commission's advice.
7.	Issue of charge-sheet, if required.	(i) One month from the date of receipt of Commissioner's advice. (ii) Two months from the date of receipt of investigation report.

8.	Time for submission of defence statement.	Ordinarily ten days or as specified in CDA rules.
9.	Consideration of defence statement.	15 (Fifteen) days.
10.	Issue of final orders in minor penalty cases.	Two months from the receipt of defence statement.
11.	Appointment of IO/PO in major penalty cases.	Immediately after receipt and consideration of defence statement.
12.	Conducting departmental inquiry and submission of report.	Six months from the date of appointment of IO/PO.
13.	Sending a copy of the IO's report to the Charged Officer for his days of receipt representation.	i) Within 15 days of receipt of IO's report if any of the Articles of charge has been held as proved. ii) 15 days if all charges held as not proved. Reasons for disagreement with IO's findings to be communicated.
14.	Consideration of CO's representation and forwarding IO's report to the Commission for second stage advice.	One month from the date of receipt of representation.
15.	Issuance of orders on the Inquiry report.	i) One month from the date of Commission's advice. ii) Two months from the date of

receipt of IO's report if Commission's advice was not required."

The above time line has been hopelessly breached by the petitioners.

56. In the instant case, information with regard to adjudication was received vide the order dated 21st August, 1999 while the charge memorandum has been issued on 25th February, 2011. The charge memo was thirteen years after the transaction; eleven years after completion of the adjudication by the customs; 8 years after the DRI recommended the Departmental action against 23 officials and seven years after the petitioner was interdicted as on 27th of October, 2011 by the Vigilance Section of the petitioner. The petitioner has been given promotion in the meantime. Eight officers out of 23 named in the report dated 6th August, 2003 have retired. Certainly we have noted above the observations of the authority who had passed the order. The DRI in its communication dated 6th August, 2003 has taken a view that it was a little far fetched to infer that each of the officers had colluded and/or connived with the exporter in the latters fraudulent activities. The DRI has stated that a charge of gross negligence or dereliction of duty against the concerned officials would appear to be more appropriate and sustainable as well. Thus, no dishonesty was imputed to the respondent or any of the other persons named even by the DRI.

57. In the instant case, so far as delay is concerned, the petitioners do not remotely suggest that the respondent attributed to any delay. It is a hard fact that there is delay which is abnormal and extraordinary. The explanation of the petitioners is completely unacceptable for the reason that it is an after thought. In fact the petitioners had available with them the entire record which they claimed to have acquired belatedly.

58. It would be most inappropriate to accept the only justification tendered by the respondents of merely having written a few communications to the DRI for the documents. In any case, if the petitioner was serious about initiating disciplinary action in the above noted circumstances, it could have done so. We have noted above that the petitioner had available with them the necessary record and there was really no reason or occasion for delaying the proceedings for want of original documents. The final adjudication order as well as all inquiry reports was based on the records of the petitioners. Even after obtaining

the inquiry report, the respondents delayed the matter not by one or two years but by several years as set out above.

59. We find that the courts have even held that delay in initiating disciplinary proceedings could tantamount to denial of a reasonable opportunity to the charged official to defend himself and therefore be violative of the principles of natural justice. In this regard, reference may usefully be made to the pronouncement of the Kerala High Court reported at 2001 (1) SLR 518 **Meera Rawther Vs. State of Kerala** wherein it has been held as follows:

> "3. The court also held that wherever delay is put forward as a ground for quashing the charges, the Court has to weigh all the factors, both for and against the delinquent officer and come to a conclusion which is just and proper in the circumstances. In this connection we also refer to the decision of Gujarat High Court in **Mohanbhai Dungarbhai Parmar vs. Y.B. Zala and Others,** 1980 (1) SLR 324 wherein the Court held that delay in initiating proceedings must be held to constitute a denial of reasonable opportunity to defend himself for one cannot reasonably expect an employee to have a computer like memory or to maintain a day-today diary in which every small matter is meticulously recorded in anticipation of future eventualities of which he cannot have a provision. Nor can he be expected to adduce evidence to establish his innocence for after inordinate delay he would not recall the identity of the witness who could support him. Delay by itself therefore, will constitute denial of reasonable opportunity to show cause and that would amount to violation of the principles of natural justice."

60. So far as the prejudice is concerned, the long period which has lapsed between the alleged transaction and issuance of charge sheet would by itself have caused memory to have blurred and records to have been lost by the delinquent. Therefore, the respondent would be hard put to trace out his defence. The prejudice to the respondent is writ large on the face of the record. The principles laid down by the Supreme Court as well as by this court in the judgments cited by the respondent and noted above squarely apply to the instant case.

61. Certain intervening circumstances which are relevant and material for the purpose of the present consideration, deserve to be considered.

We note such circumstances hereafter.

62. On the 23rd of September, 2012 the petitioner was promoted to the post of Superintendent, after evaluation in selection by the Departmental Promotion Committee and due vigilance clearance.

63. Learned counsel for the petitioner has also drawn our attention to the pronouncement of the Tribunal in O.A.No.2727/2010 titled **Joseph Kouk v. Union of India & Another**. It is important to note that Joseph Kuok was implicated in the same incident as the present respondent. He also assailed the disciplinary proceedings similarly commenced against him by way of O.A.No.2777/2010. The Central Administrative Tribunal allowed Joseph Kouk's petition on the ground of inordinate and unexplained delay on the part of the respondent in issuing the charge memo. In the impugned order, the Central Administrative Tribunal has relied upon its adjudication in the **Joseph Kouk** matter.

64. We have been informed that eight officers out of the twenty three who were named in the report dated 6th August, 2003 have been permitted to retire. The petitioners permitted these eight officers to retire voluntarily from service. No disciplinary proceedings were initiated against them before they retired. It is trite that an employee against whom disciplinary proceedings were being contemplated would not be permitted to leave the organization or to voluntarily retire from service. It is apparent therefore, that the respondents themselves did not consider the matter as of any serious import affecting the discipline of the department.

65. In view of the above narration of facts, the delay in initiation of the proceedings certainly has lent room for allegations of bias, mala fide and misuse of powers against the respondent by the petitioners. In the judgment reported at 1995 (1) ILJ 679 (SC) **State of Punjab v. Chaman Lal Goyal** it has also been observed that when a plea of unexplained delay in initiation of disciplinary proceedings as well as prejudice to the delinquent officer is raised, the court has to weigh the facts appearing for and against the petitioners pleas and take a decision on the totality of circumstances. The court has to indulge in a process of balancing.

66. The alleged misconduct claimed to have been done by the respondent Hari Singh has also not been treated to be a major delinquency by the respondent in the light of the principles laid down in **Meera**

Rawther (Supra). It, therefore, has to be held that the delay in initiating disciplinary proceedings would constitute denial of reasonable opportunity to defend the charges in the case and therefore, amounts to violation of principles of natural justice.

67. The plea of the petitioners that they did not have the original documents or certified copies thereof is baseless and rightly rejected by the Tribunal in the impugned order. As noted above, the petitioners were in possession of photocopy of original shipping bills which photocopy had been prepared by them and were available throughout. Even if the plea that the original documents or certified copy were necessary for initiating the disciplinary proceedings were to be accepted, the action of the respondents was grossly belated and certainly the long period which has lapsed was not necessary for procuring the same.

68. The respondents have failed to provide a sufficient and reasonable explanation for the delay in initiating the disciplinary proceedings against the petitioner.

69. We have noted the judicial pronouncements laying down the applicable consideration in some detail hereinabove only to point out that the law on the subject is well settled. The petitioners were fully aware of the position in law as well as of the necessary facts to adjudicate upon the issue. In our view, the present writ petition was wholly inappropriate and not called for.

70. For all these reasons, the judgment of the Tribunal cannot be faulted on any legally tenable grounds.

The writ petition and application are devoid of legal merits and are hereby dismissed.

The respondent shall be entitled to costs of litigation which is are quantified at Rs.20,000/-.

ILR (2014) I DELHI 471
W.P

OM PRAKASH **....PETITIONER**

VERSUS

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

(GITA MITTAL & V. KAMESWAR RAO, JJ.)

CM NO. : 9960/2013 **DATE OF DECISION: 10.09.2013**
IN W.P. NO. : 4286/2013

(A) Constitution of India, 1950—Article 226; Air Force Rules, 24, 45, 48—Petitioner implicated for unauthorized selling liquor, Charges framed—Initially court martial found petitioner not guilty of 1st , 2nd and 3rd charge but found him guilty of 4th charge. Confirming Authority passed order for revision of findings on 1st , 2nd and 3rd charge. Court martial reassemble, no fresh finding was recorded, petitioner was heard and thereafter found guilty of 1st, 2nd and 3rd charged and awarded sentence of dismissal from service. Confirming Authority reduced sentence to reduction in Rank. Appeal against the said order was dismissed by Chief of air staff. Writ petitioner filed—Was transferred to the Armed Forces Tribunal which was rejected by the impugned order. Petitioner has assailed the proceedings of the court martial on the ground that the same are in violation of Rule, 45 and 48. Held- contention rejected relying on *Lt. Col. Prithipal Singh Bedi v. Union of India,* (1982) 3 scc 140.

In para 8 of it judgement, the Armed Forces Tribunal has placed reliance on the pronouncement of the Supreme Court reported at (1982) 3 SCC 140 **Lt. Col. Prithipal Singh Bedi v. Union of India** rendered in the context of Rule 40 of the Army Rules. Rule 40 of the Army Rules is

parimateria with Rule 48 of the Air Force Rules. It has been held by the Tribunal that the requirements of Rule 48 are not mandatory. It is in compliance with the provisions of natural justice that the court martial should not include "the persons from same unit" so that there will be objectivity and they will not have command influence. **(Para 18)**

(B) Petitioner assailed the impugned order on the ground that there is no evidence- held- it's not a case of no evidence—The deposition of the witnesses unequivocally implicated the petitioner—No legally tenable grounds raised; petition dismissed.

The above narration would show that the instant case was not a case of no evidence and that the deposition of the witnesses unequivocally implicated the petitioner.**(Para 29)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Narender Kaushik, Advocate.

FOR THE RESPONDENTS : Mr. Ankur Chhibber, Advocate.

CASE REFERRED TO:

1. *Lt. Col. Prithipal Singh Bedi* vs. *Union of India* (1982) 3 SCC 140.

RESULT: Writ Petition Dismissed.

GITA MITTAL, J.

1. By way of the present writ petition, the petitioner has assailed the order dated 27th April, 2012 passed by the Armed Forces Tribunal, Principal Bench, New Delhi rejecting the petitioner's challenge to the order dated 30th April, 2003 passed by the Chief of the Air Staff on the basis of general court martial revising its findings and the order dated 6th May, 2003 passed by the confirming authority and the order of rejection of the petitioner's appeal filed under Section 161(2) of the Air Force Act.

2. To the extent necessary, the relevant facts are noted hereafter. The petitioner was recruited as Airman in the Trade of Air Frame Fitter

in the year 1981. He stood promoted in 1986 to the rank of Corporal; in August, 1991 to the rank of Sergeant and on 1st December, 2012 as a Junior Warrant Officer. The petitioner claimed that he was so promoted after passing the requisite examinations and was also awarded three good conduct badges after four years of service.

3. On the 16th June, 2001, the petitioner was posted on the strength of 11 BRD, Air Force, Air Force Station, Ojhar, District Nashik. In January, 2002 he was given an additional appointment of Mess Caterer in the Senior Non-Commissioned Officer Mess for a period of one month. The petitioner was appointed as Barman of the mess as well. As part of his duties, he was required to purchase certain local items for the mess and was also required to provide the necessary articles for cooking when required by the Gallery. The petitioner submits that he had kept certain raw items in the cabin which was allotted to him in the mess as his family was staying at the quarter allotted to him in the Air Force Station, Palam, New Delhi.

4. The instant case arises out of an alleged incident of 5th February, 2002 in which one Naik J.D. Kale and AC Ambedkar were apprehended by Sergeant Kumar at 1740 hours in unauthorized possession of 21 bottles of liquor. On enquiry, Ex-Naik J.D. Kale revealed that he had purchased the same illegally from the petitioner. On 6th February, 2002, a warrant of search was issued by the competent authority and the items were seized. An inquiry was conducted into the matter by the Squadron Leader S. Baizel. The petitioner was chargesheeted on 1st October, 2002 as well as tried under Rule 24 of the Rules framed under Air Force Rule, 1969.

5. Thereafter a General Court Martial was convened against the petitioner on the following charges:-

"CHARGE SHEET

The accused, 669510 N Sgt. (Actg JWO paid) Om Prakash of 11 BRD, AF, an airman of the regular Air Force is charged with :

First Charge Section 65 AF Act, 1950

AN ACT PREJUDICIAL TO GOOD ORDER AND AIR FORCE DISCIPLINE

In that he,

At 11 BRD, AF, on 05 Feb. 02, improperly sold 21 bottles (15 bottles of McDowell Rum and 06 bottles of McDowell Whiskey) of liquor to the unauthorised person Ex-6468234 Nk JD Kale.

Second charge Section 52 (b) AF Act, 1950

COMMITTING DISHONEST MISAPPROPRIATION OF PROPERTY BELONGING TO THE SNOCS' MESS OF 11 BRD, AF

In that he,

At 11 BRD, AF being caterer of the SNCO's Mess for the month of Jan. 2002 dishonestly misappropriated the following service rations of SNCOS. Mess:

(i) Rice -337 Kgs.

(ii) Dal Urd Black -32.5 Kgs.

(iii) Masala -07 Kgs.

(iv) Condi -3.5 Kgs. ments

(v) Sugar -20 Kgs.

(vi) Chilly -3.5 Kgs.

(vii) Nutra -0.500 mul Kgs.

(viii) Jam -02 Kgs.

(ix) Coffee -0.400 Kgs.

(x) Tea -7.750 leaves Kgs.

(xi) Cheese -2.85 Kgs.

Third Charge Section 65 AF Act, 1950

AN ACT PREJUDICIAL TO GOOD ORDER AND AIR FORCE

(Alternative to the second Charge

DISCIPLINE

In that he, Act,

At 11 BRD, AF on 06 Feb. 2002 1950 during the search of room No.3 of the (Altern SNCO's Mess occupied by him was ative to found in improper possession of the the following service rations belonging to second the SNCOs. Mess:Charge

(i) Rice -337 Kgs.

(ii) Dal -32.5 Kgs.
Urd Black

(iii) Masala -07 Kgs.

(iv) Condi -3.5Kgs. ments

(v) Sugar -20 Kgs.

(vi) Chilly -3.5 Kgs.

(vii) Nutra -0.500mul Kgs.

(viii) Jam -02 Kgs.

(ix) Coffee -0.400 Kgs.

(x) Tea -7.750
leaves Kgs.

(xi) Cheese -2.85 Kgs.

Fourth Charge Section 65 AF Act, 1950 Charge Section 65 AF Act, 1950

AN ACT PREJUDICIAL TO GOOD ORDER AND AIR FORCE DISCIPLINE

In that he,

At 11 BRD, AF, on 06 Feb. 2002 during the search of Room No.3 of the SNCO's Mess occupied by him was found in improper possession of the following

unauthorized items:

a Rubber Stamps of

i) (BS Siwach) Air Cmde AOC 3 wing Air Force

ii) Round Stamp of Station Medicare Centre, AF, Stn. Palam.

iii) MO i/c Ml Room Army Hospital (R&R) Delhi Cantt Date.....

iv) Duty Medical Officer No.3 Wing, AF Air Force Station, Palam New Delhi-110010

v) (VS Kochak) Wg. Cdr. Stn. Adjt. 3 Wing AF

vi) (IP Vipin) Wg. Cdr. Commanding Officer 41 Squardron, AF

vii) (KS Multani) Flt Lt Medical Officer

viii) Round Stamp of 3 Wing. Af Stn. Palam

ix) Round stamp of QAS 21 C

x) Round Stamp of QAS 21 C

b Specimen signatures of :

i) Wg Cdr KK Pooniwala

ii) Wg Cdr MS chaudhary SMO

iii) Wg Cdr J Mukopadhyay

iv) 3 Wing AF – (OIC Core Group), STO (MT)

Documents:

i) Location list wef Dec.01- 09 sheets

ii) Trade/New TBM/ Present /Strength/Deficiency/Surplus dated 13 Jul. 01 One hand written sheet

iii) Letter from Min of HRD No.F21-35/85 – ES.5 dated 11 Oct. 01

iv) DG AQ AS, Inspection Note No.610/3/112/RCP 956 Set No.3 Copy No.8 dated 18 Sep 01 – two sheets.

v) Airports Authority of India, Reminder No.AAI/NOC/2001/ 67/342 dated 05 Nov. 01– two sheets.

vi) Citi Bank savings accounts deposit slip of A/C no.5306846223 Krishna Swamy Shogokar – Full booklet.

vii) Anonymous letter to AOC 3 Wing AF dated 10 Sep 01.10 Sep 01."

6. The Summary of Evidence was recorded in the matter in which Squadron Leader VRS Raju was one of the persons who remained present.

7. By an order dated 27th January, 2003, a General Court Martial was ordered to be convened against the petitioner. Squadron Leader VRS Raju was appointed as the prosecutor. The court martial included Wing Commander Upendra as a member.

8. Four witnesses were examined before the court martial while

additional one witness was examined as a court witness. The parties were also heard.

By an order dated 19th February, 2003, the court martial found the petitioner not guilty of the first, second and third charges but found him guilty of the fourth charge. The general court martial imposed the punishment of forfeiture of six months service for the purpose of pension, subject to its confirmation.

9. It appears that Confirming Authority passed an order dated 23rd April, 2003 for revision of the findings of the court martial on the charge no.1,2 and 3. As a result, the court martial was reassembled with effect from 29th April, 2003. No fresh finding was recorded. The petitioner was heard and he was thereafter found guilty also of charge no.1,2 and 3 and awarded sentence of dismissal from service subject to confirmation.

10. On consideration of the matter, the Confirming Authority reduced the sentence imposed upon the petitioner to reduction in rank. As a result, the petitioner was reduced to the lower rank of 'Leading Air Craftsman' from the rank of 'Junior Warrant Officer'.

11. The petitioner submitted an appeal against the above to the Chief of the Air Staff which was also rejected. The petitioner thereafter assailed the same by way of writ petition being WP(C)No.1907/2004 in this court. This writ petition was transferred for consideration to the Armed Forces Tribunal and registered as T.A.No.408/2010. After hearing, the petition was rejected by the Armed Forces Tribunal by an order dated 27th April, 2012 resulting in filing of the case in hand.

12. The petitioner has assailed the proceedings of the court martial primarily on the ground that the same were in violation of Rule 45 as well as Rule 48 of the Air Force Rules. It is contended that Squadron Leader VRS Raju was a witness to the proceedings conducted under Rule 24 proceedings and therefore, could not have been appointed as prosecutor.

13. Rule 45 of the Air Force Rules, 1969 provides the ineligibility and disqualification of officers for court martial. Sub-Rule (2) of Rule 45 which mandates disqualification reads as follows:-

"45. **Ineligibility and disqualification of officers for court-martial**

(1) xxx xxx xxx

(2) An officer is disqualified for serving on a general or district court-martial if he-

(a) is the officer who convened the court; or

(b) is the prosecutor, or a witness for the prosecution, or

(c) investigated the charges before trial, or took down the summary of evidence or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the flight, squadron, station, unit, or other commander who made preliminary inquiry into the case, or was a member of previous court-martial which tried the accused in respect of the same offence, or

(d) is the commanding officer of the accused or of the unit to which the accused is attached or belongs; or

(e) has a personal interest in the case."

14. It is noteworthy that Squadron Leader VRS Raju was neither cited as a prosecution witness nor was he examined as a witness in the court martial. Squadron Leader VRS Raju was not a witness even during the inquiry or in the summary of evidence.

15. It is not the petitioner's objection before us that Squadron Leader VRS Raju was arrayed as a witness in the prosecution or that he investigated the charges before trial or took down the summary of evidence. Squadron Leader VRS Raju was not a member of the court inquiry regarding the matter on which the charges against the petitioner were based. The objection that Squadron Leader VRS Raju could not be appointed as prosecutor has therefore, been rightly rejected by the Armed Forces Tribunal.

16. The second legal objection urged by the petitioner rests on Rule 48 of the Air Forces Rules and is premised on the appointment of Wing Commander Upendra as one member of the General Court Martial. So far as Rule 48 is concerned, the same provides as follows:-

"48. Unit of members of court-martial – A General or district court-martial shall not be composed exclusively of officers of the same unit, unless the convening officer states in the order

convening the court that in his opinion other officers are not (having due regard to the public service) available, and in no case shall it consist exclusively of officers belonging to the same unit as the accused."

17. The only prohibition therefore, is that members of the General Court Martial cannot be composed exclusively of officers of the same unit. It is evident from the reading of the above that the prohibition is restricted to appointment of all members of court martial from one unit. There is no prohibition if one or more (but less than five) out of the five officers constituting the General Court Martial are of the same unit. The petitioner contends that other officers of the court martial belong to the unit to which Wing Commander Upendra belonged.

18. In para 8 of it judgement, the Armed Forces Tribunal has placed reliance on the pronouncement of the Supreme Court reported at (1982) 3 SCC 140 **Lt. Col. Prithipal Singh Bedi v. Union of India** rendered in the context of Rule 40 of the Army Rules. Rule 40 of the Army Rules is parimateria with Rule 48 of the Air Force Rules. It has been held by the Tribunal that the requirements of Rule 48 are not mandatory. It is in compliance with the provisions of natural justice that the court martial should not include "the persons from same unit" so that there will be objectivity and they will not have command influence.

19. The present case arises under the Air Force Act in similar facts. In the given facts, we see no reason to take a different view.

20. The objection of the petitioner to Wing Commander Upendra having been included as a member of the General Court Martial is misconceived and hereby rejected. Mr. Narender Kaushik, learned counsel for the petitioner has made vehement objection that the petitioner was denied the benefit of a defending officer in the proceedings held by the General Court Martial in the revision proceedings which commenced on 29th April, 2003. In this regard, our attention is drawn to a letter dated 23rd April, 2003 written by the petitioner requesting for appointment of Wing Commander G. Chandra as the defending officer. In response thereto, by a letter dated 25th April, 2003, the Station Headquarters informed the petitioner that he had already declined to take defending officer from the service during the General Court Martial proceedings which were held between 4th February, 2003 to 19th February, 2003.

The petitioner had made an application dated 1st February, 2003 and had been permitted to engage a defence counsel from civil. The respondents had thus not acceded to the request for the defending officer but had permitted the petitioner to engage the same defence counsel who conducted his defence in the General Court Martial.

21. The petitioner does not say that the counsel was not available to him. The objection of the petitioner is therefore, devoid of legal merit.

22. The petitioner has lastly assailed the finding and sentence of the Court Martial as well as the findings and sentence on revision on the ground that there was no evidence to support the charges.

23. The respondents alleged that they had recovered 21 bottles of liquor from Ex-Naik J.D. Kale. The petitioner objects that neither the seizure memo was produced nor the recovered property was produced. The only evidence which the prosecution relied upon in support of this charge was that of Ex-Naik J.D. Kale to the effect that the recovered bottles had been received by him from the present petitioner.

24. It is noteworthy that this recovery was the subject matter of the first charge framed under Rule 65 of the Air Force Act, 1950 against the petitioner.

25. With reference to the record, we may note that the aforenoticed submission of the Naik J.D. Kale was the only witness in support of this charge is incorrect. In para 10 of the judgment, the Armed Forces Tribunal has recorded in detail the depositions of PW1 – Sergeant Kumar who had clearly stated that on 5th of February, 2002 at about 1730 hours he noticed one motorcyclist waiting near boundary wall near SNCOs mess. He waited at SMC to see as to what was happening there. After a few minutes, he had seen another person jumping over the boundary wall of the mess with two bags in his hands. In his deposition, Sergeant Kumar further deposed that he reached the spot and caught them red handed. On checking of the bags, it was found that it contained 21 bottles of liquor which was detailed by the witness. These two persons were taken to the guard room for further questioning during which they disclosed their identity as Ex.Naik J.D. Kale and second person as Ex. AC P.D. Ambedkar and further that they purchased the said liquor from the petitioner. Sergeant Kumar made contemporaneous entries in the guard register and informed the JWO In-charge police and also the

security officer. Sergeant Kumar prepared the panchanama at the guard room in the presence of Orderly Officer and the seizure panchanama was attached with the police investigation report. So far as identification of the bottles were concerned, Sergeant Kumar stated that he identified the seized liquor bottles from the label marked 'for defence services only'. After interrogation, these bottles were given to SNCO's Mess.

26. We may note that apart from the statement of Sergeant Kumar, the respondents adduced the evidence of Ex-Naik J.D. Kale as PW 2 who corroborated the above. Even though it could be urged that the Ex-Naik J.D. Kale's testimony could not have been relied upon by the respondents to find the petitioner guilty for the reason that he was party to the crime, the statement of PW-1 remained unchallenged and would support the conviction of the petitioner for the charge no.1 as has been held by the Armed Forces Tribunal.

27. So far as other charges are concerned, the other witnesses have deposed with regard thereto. Squadron Leader S. Baizel was examined as PW 3 who stated that on the 6th of February, 2002 he was working as Special Duty Officer and was required to carry out a search of the room which was occupied by the petitioner. The search was conducted in the presence of four other members which included the CMC, the duty officer and Orderly Officer no.1 and no.2 of the day. The Station Security Officer and two police personnel were also available besides the petitioner. During the course of search, the following search items were seized:

"1.	Rice	-351 Kgs.
2.	Dal (Urd Black)	-32.5 Kgs.
3.	Masala	-08 Kgs. (Imli, Haldi, Dhania)
4.	Hot Condiments	-3.5 Kgs.
5.	Sugar	-23 Kgs. (Gross wt with Bag)
6.	Chilly Dry	-3.5 Kgs (Red)
7.	Nutramal	-01 Pkt (500 g)
8.	Amul Butter	-4 Pkts (500 g)
9.	Britania Cheese	-07 tins (400 g)

10.	Mango Jam	-02 tins (1 Kg)
11.	Nescafe (200 g)	-02 Pkts
12.	Custard Powder (500 g)	-02 Pkts
13.	Amul Pure Ghee (01 kg)	-01 Pkts
14.	Noodles (200 g)	- -01 Pkts
15.	Amul Butter (100 g)	-02 Pkts
16.	Pickle	-02 Kgs (approx.)
17.	Papad (100 g)	-03 Pkts
18.	Tea leaves (01 kg)	-01 Pkts
19.	Tea leaves (500 g)	-07 Pkts
20.	Tea leaves (250 g)	`-07 Pkts
21.	Dal Channa and Urad White	-3.7 Kgs
22.	List of Rubber Stamps recovered	-List attached
23.	List of Documents Recovered	-List attached

28. These articles were then kept in the guard room. These articles were also produced during the proceedings of the court martial. The testimony of PW 3 is corroborated on all scores by the evidence of PW 4 Retd. M.A. Bhaskaran who was deputed as the Special Duty Officer, Security Staff on the relevant date and the search was carried out in his presence. He has also stated that rationed items retrieved from the room of the petitioner were taken into the custody of the Security Staff in his presence. These articles were brought on the charge of the mess on the 14th of March, 2002 which information was given to the Security Officer. This witness also verified the seized ration.

29. The above narration would show that the instant case was not a case of no evidence and that the deposition of the witnesses unequivocally implicated the petitioner.

30. We may note that the petitioner had filed a review petition seeking review of the order dated 28th April, 2012 of the Armed Forces Tribunal which came to be rejected by another reasoned order dated 16th

April, 2013. No other ground was raised or pressed before us.

31. In view thereof, we are of the view that no legally tenable grounds are made to support the challenge by the petitioner by way of the present petition therefore, required to be rejected.

This writ petition is therefore, dismissed.

ILR (2014) I DELHI 484
RFA (OS)

AIR INDIA LTD. ...APPELLANT

VERSUS

TEJ SHOE EXPORTS P. LTD. & ANR. RESPONDENTS

(S. RAVINDRA BHAT & R.V. EASWER JJ.)

RFA(OS) NO. : 18/2007 DATE OF DECISION: 19.09.2013

Carriage by Air Act, 1972—Ist Schedule—R. 22—Tej shoes (respondent herein) had sued air India (appellant herein) for value of loss of its goods, wrongfully released to the consignee- Respondents hired the services of appellant for transporting a consignment worth DM (Deutsche mark) 1,50,152 by Airway Bill No 09857645545 dated 21.08.09- named consignee under the airway bill was a bank - appellant-no declaration of the amount if consignment for the carrier in the said airway bill-appellant entrusted the goods to Lufthansa Airways second respondent) at Frankfurt- 30.08.1990, ultimate consignee-genuine mistake and agreed to compensate appellant in terms of the maximum limited liability, i.e. US $ 20per kg- second respondent authorized appellant to settle the claims of respondent- in accordance with the terms of the contract of

carriage, i.e. US $ 20 per kg—Not satisfied with the compensation- respondent filed a complaint under section 21 read with section 12 of the Consumer Protection Act, 1986 before the national Consumer Dispute Redressal Commission ("commission")- the Commission ordered appellant to pay respondent the equivalent of US $20 per kg- Respondent filed a special leave petition against that order of the Commission- later dismissed as withdrawn- on 02.11.1993, respondent-after gap of more than three years from the cause of action filed a suit for recovery- appellant contending that the claim was barred by limitation- stipulated by the 1972 Act- paid its liability @ US $ 20 per kg-vide order of the commission- LD. Single judge vide order dated 19.10.2006- decreed a sum of Rs 20,81,372 in favors of respondent-with 10% per suit, pendent lite and future interest, per annum- Hence, the present appeal. Held: under Rule 22 of the first schedule and second schedule of the Act incorporating the Hague protocol and earlier Warsaw Convention-restricts the liability of the carrier to a maximum of US $ 20 per kg- limits of liability prescribed in the Convention are absolute- Respondent wanted appellant to assume liability for an amount exceeding US $ 20-declare such amount for carriage and pay the applicable valuation charge—Interpretation which allows the consignor or consignee to recover more than the prescribed limits, on a gateway for unlimited liability under diverse and unforeseen conditions rendering unviable the business of air carriage- Had parliament intended that courts can exceed the liability limits imposed by statute for loss of goods, the structure of clause 22 would have been entirely different—The period of limitation prescribed under Articles 29 (of the first schedule) and 30 (of the second schedule) of the Act are contrary stipulation- which amount to period of limitation different from the period under the Limitation Act (section 29(2))-

stipulations under the 1972 Act are under a special statute and are absolute in terms- prevail over the general provisions of the Limitation Act.

Important Issue Involved: (A) Rule 22 of the first Schedule and Second Schedule of the earlier Warsaw Convention restricts the liability of the carrier to a maximum of US $ 20 per kg. The limits of liabilities prescribed in the Convention are absolute.

(B) The period of limitation prescribed under Articles 29 (of the first schedule) and 30 (of the second schedule) of the Act are contrary stipulations which amount to "period of limitation different from the period under the Limitation Act (Section 29(2)) which would exclude application of the Limitation Act itself.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Ms. Geeta Luthra, Sr. Adv. With Ms. Deeksha Shulka, Ms. Sangeeta bharti, Mr. Harish Malik & Mr. Gautam Bajaj, Advs.

FOR THE RESPONDENT : Ms. G.S. Raghav with Mr. A.K . Jain & Mr. Pankaj Kumar, Adv. For Resp-1.

CASES REFERRED TO:

1. *Trans Mediterranean Airways* vs. *M/S. Universal Exports & Anr.* (2011)10 SCC 316.
2. *Ethiopian Airways* vs. *Ganesh Narain Saboo* AIR 2011 SC 3494.
3. *Ethiopian Airways* vs. *Federal Chemical Works* AIR 2005 Del 258.
4. *Air India* vs. *Asia Tanning Co.* 2003 (1) LW622.

5. *Morris* vs. *KLM Dutch Airlines* [2002] 2 AC 628.
6. *Gulf Air Co.* vs. *Nahar Spinning Mills Ltd & Ors.* 2000 ILR (1) Pun & Har 238.
7. *Sailesh Textile Industries* vs. *British Airways and Anr.* 2003 (69) DRJ 683.
8. *Abnett* vs. *British Airways Plc.* 1997 (1) All.ER 193.
9. *Data Card Corp & Others* vs. *Air Express International* Corp 1983 (2) All ER 639.
10. *Vij Sales Corporation* vs. *Lufthansa Airlines,* ILR 1981 Del 749.
11. *Suthendran* vs. *Immigration Appeal Tribunal,* (1976) 3 All ER 611 (HL).
12. *American Export Isbrandtsen Lines Inc . and Anr. vs . Joe Lopez and Anr.,* AIR 1972 SC 1405.
13. *Jumma Masjid Kodimaniandra* AIR 1962 SC 847).
14. *East and West Steamship Co., Georgetown, Madra* vs. *S.K. Ramalingam Chettiar* [1960] 3 SCR 820.
15. *Sri Ram Ramnarain* vs. *State of Bombay* AIR 1959 SC 459.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. The defendant's appeal questions the judgment and order of a learned single judge of this Court, decreeing the suit preferred by Tej Shoes (the plaintiff, hereafter referred to by name), to the extent of Rs. 20,81,372/10 with interest @ 10% per annum. Tej Shoes had sued the defendant (appellant hereafter, called "Air India") for value of loss of its goods, wrongfully released to the consignee.

2. Air India is an international air carrier. In 1990, M/s Tej Shoe Exporters hired the services of Air India for transporting a consignment worth DM (Deutsche Mark) 1,50,152 by Airway Bill No 09857645545 dated 21.08.09. The named consignee under the airway bill was a bank, Sparkse Naila, Wester -18674 Nalia, West Germany. The consigned goods and the Airway bill were to be handed over to the consignee after receiving payment of the goods. Tej Shoes did not make any declaration

of the amount of consignment for the carrier in the said airway bill. In order to deliver the goods in Nuremberg, Air India entrusted the goods to Lufthansa Airways (the second respondent) at Frankfurt. This was done under terms and conditions printed on the reverse of the airway bill. On 30.08.1990, Lufthansa Airways, by mistake delivered the consignment to the ultimate consignee, Militzer Und Munch without obtaining the necessary bank release. Lufthansa Airways admitted that this was a genuine mistake and agreed to compensate Air India in terms of the maximum limited liability, i.e. US $ 20 per kg of the baggage lost (weight loss basis) provided under the Carriage by Air Act, 1972 ("the 1972 Act"). Lufthansa authorized Air India to settle the claims of Tej Shoes at US $ 39,780/- which was their maximum liability in accordance with the terms of the contract of carriage, i.e. US$ 20 per kg.

3. On 24.07.1990 Tej Shoes submitted its claim for DM 1,82,717 with 25% interest. Not satisfied with the compensation offered by Air India, Tej Shoes filed a complaint under Section 21 read with Section 12 of the Consumer Protection Act, 1986 before the National Consumer Dispute Redressal Commission claiming compensation @ Rs. 44,26,264/ 79 with pendent lite and future interest @ 21% p.a. The Commission, on 28.04.1993 after considering provisions of the 1972 Act ordered Air India to pay Tej Shoes the equivalent of US$ 39780. Not satisfied with this order, Tej Shoes filed a Special Leave Petition against that order of the Commission. The Special Leave Petition was later dismissed as withdrawn. On 02.11.1993, Tej Shoes, after a gap of more than three years from the cause of action, filed a suit for recovery of ' 48,86,784 before this Court (C.S No 2717 of 1993). Air India contested the suit by filing a written statement contending that the claim was barred by limitation as it was filed beyond the prescribed limitation period stipulated by the 1972 Act and that following the orders of National Commission it had paid its liability @ US$ 20 per kg.

4. By the impugned judgment and order of 19.10.2006, the learned Single Judge decreed a sum of Rs. 20,81,372 in favour of Tej Shoes, and against Air India, along with 10% per suit, *pendent lite* and future interest, per annum.

5. Air India urges that the learned Single Judge failed to appreciate that Tej Shoes' suit was time barred under the Carriage by Air Act 1972; the suit was also barred and not maintainable in terms of the contract

between the said parties, and the airway bill issued in this regard. It is argued that the single judge failed to appreciate that Air India could not be made liable for compensation which was beyond the maximum liability stipulated under the Carriage by Air Act, 1972.

6. To say that the suit was time barred, Air India relies on **Sailesh Textile Industries Vs. British Airways and Anr.** 2003 (69) DRJ 683 where, noticing the law declared by the Supreme Court in **East and West Steamship Co., Georgetown, Madra Vs S.K. Ramalingam Chettiar** [1960] 3 SCR 820, the Court held that Clause 18 of the Second Schedule to the Carriage by Air Act provides that the carrier can be liable for damage sustained if there is loss to the registered luggage or the cargo. The plaintiff's case fell under Clause 18 (1) of the 1972 Act. In terms of clauses 29 and 30, a suit filed beyond the period of two years is barred by limitation. Provisions of the Schedule to the 1972 Act are clear and unambiguous and provide for a period of limitation within which a suit is to be filed to claim damages for loss of goods, whether it be loss to the goods or whether loss to the owner. The suit, having been filed the beyond the period prescribed period of two years, is barred by limitation.

7. It is argued that the learned Single Judge erred by holding that in a case of wrongful delivery of consignment, limitation would not be governed by Rules 29 and 30 of the first and second Schedule to the 1972 Act but by the Limitation Act, 1963. It is submitted that Rules 29 and 30 clearly stipulate that the right of damages shall be extinguished if an action is not brought within two years from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. In the present case, the goods arrived at the destination on 30.08.1990. The suit is therefore clearly barred by limitation. Furthermore, submitted learned senior counsel Ms. Gita Luthra, the single judge overlooked that under the provisions of the 1972 Act, a carrier's liability is limited to a sum of 250 francs per kilo gram (equal to US $ 20 per kilo) unless the passenger or consignor had made a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so required. In the present case, submitted counsel, Tej Shoes did not declare the value of the goods for the carrier and therefore the carrier could not be compelled to pay anything more than the amount prescribed in the statute.

8. It was argued that the suit was time barred as even according to the conditions of the airway bill, it was incumbent on Tej Shoes to make a complaint in writing within 120 days from the date of the Airway Bill, in the event of non-delivery of the consignment to the consignee as named in the airway bill, failing which it shall be deemed to have waived its right to complain against the delivery or nondelivery of the consignment. Since no such complaint was made by Tej Shoes, within the stipulated period prescribed in the Airway Bills, the suit was barred by limitation.

9. Learned senior counsel relied on **Air India Vs Asia Tanning Co.** 2003 (1) LW622 where the Madras High Court held that the term 'damages' is not defined in the Rules and that some types of damages are referred to in some Rules in Chapter III. This did not ipso facto imply that the period of limitation prescribed in Rule 30 would not apply when the damages is claimed on the ground of delivery of cargo without insisting upon the production of the air waybill sent by the consignor to the consignee. In that case, the damage alleged was the delivery of the consignment to the consignee without insisting upon the original air waybill which, according to the plaintiff, has resulted in the consignee securing the possession of the goods without having first paid for the same. The rule of limitation provided in Rule 30 would clearly be attracted as the claim is in relation to the alleged wrongful delivery of goods without insisting upon the document of title even though the delivery was made to the person to whom it was intended to be delivered. She also relied on **American Export Isbrandtsen Lines Inc . and Anr . vs . Joe Lopez and Anr.,** AIR 1972 SC 1405 where it was held that:

> "Carrier and ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of goods or date when goods should have been delivered."

Similarly, the judgment of this court in Rajasthan Handicrafts Emporium, New Delhi v Pan American World Airways, AIR 1972 SC 396 with respect to the plea that the suit was time barred, was relied upon, by learned senior counsel for Air India. Counsel also relied on **Ethiopian Airways v Ganesh Narain Saboo** AIR 2011 SC 3494 and **Gulf Air Co v. Nahar Spinning Mills Ltd & Ors.** 2000 ILR (1) Pun & Har 238 for the submission that provisions of the 1972 Act being part of later special law, and providing to the contrary, would prevail over the earlier general law, embodied in the Limitation Act, 1963 (i.e. the doctrine of lex posterior

derogat priori).

10. Counsel lastly submitted that Rules 29 and 30 of the first and second Schedule to the Carriage By Air Act, 1972, stipulate that right to claim damages is extinguished if an action is not brought within two years from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. In the present case, the cause of action arose in 1990 but the suit was filed by Tej Shoe in 1993. The conditions of the contract printed on the reverse of the airway bill clearly stated that shipper's right to claim damages stands forfeited/ waived/extinguished after the expiry of two years from the date of arrival at the destination. Further, though the term 'damages' is not defined in the Rules and some types of damages are referred to in some of the Rules in Chapter III, this would not imply that the period of limitation prescribed in Rule 30 will not apply when the damages are claimed on the ground of delivery of cargo without insisting upon the production of the air waybill sent by the consignor to the consignee. Thus, the suit instituted by Tej Shoe is barred by law of limitation as per the Carriage by Air Act 1972 as well as the Contract between the shipper and the carrier.

11. Tej Shoes argued, in support of the findings rendered by the learned single judge, that Clause 18 of the First and second schedules to the 1972 Act enacted that a *"carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods.*." Counsel placed reliance on the decision of a learned single judge of this court in **Vij Sales Corporation v Lufthansa Airlines,** ILR 1981 Del 749, where it was held that the incorrect delivery of goods did not fall within Clause 18 as to attract the shorter period of limitation, or warrant applicability of statutorily limited damages:

> "On the face of it therefore the present case could not be treated as of destruction, loss or damage to the cargo, within the implication of these terms under rule 18. Instead the case as set up by the plaintiff is of unauthorised delivery to a wrong person. In other words it is contended that the case should be treated as one of non-delivery to the rightful person. Nondelivery has to be treated as non-delivery as per instructions or directions given. Where the instructions are not carried out, it does not matter to him whether the carrier had delivered the goods to X or Y other

> than the named consignee. In the circumstances it is urged that it follows that a case of misdelivery is well within the expression non-delivery."

It was submitted that the decision of the Supreme Court in East & West Steamship is of no assistance in limiting the carrier's liability, since the expression and phraseology used by the Carriage by Sea Act was entirely different from the expressions used in the 1972 Act. Learned counsel also relied on the decision in **Ethiopian Airways v Federal Chemical Works** AIR 2005 Del 258, where it was observed that:

> "13. The concept of loss or damage suffered by any account by the shipper or consignee, is not the same as the loss and damage referable to the goods. We are relying upon the judgment of **M/ s.Viz Sales Corporation Vs.Lufthansa, German Airlines's** case (supra) and approve the reasoning of the learned single Judge. In paragraph-18 of the **East and West Steamship Co. V/s.S K Ramalingam Chettiar's** case (supra) the Supreme Court took note that paragraph 8 spoke of loss or damage to or in connection with the goods but the legislature in 6th paragraph of the Article left the words 'loss or damage' unqualified. Had, therefore, words 'to or in connection with the goods' been incorporated in paragraph-6 as well as after the words 'loss or damage', the Supreme Court would not have treated the same as unqualified, which was so in their absence.."

12. It was argued that there can be no dispute about Tej Shoes' right to claim for damages for the non-delivery since that question was left open by the National Consumer Disputes Redressal Commission (NCDRC) in its order dated 28th April, 1993. At that stage, Air India did not express any reservations about Tej Shoes's right to claim such damages or compensation.

13. It was submitted that by virtue of Section 29 of the Limitation Act, the provisions of the Act would automatically apply to enactments and causes not specifically provided for, unless the special or local enactment provided to the contrary. The 1972 Act was silent as to causes of action in respect of non-delivery of goods. Consequently, the residual provision under the Limitation Act, i.e., Article 137 which provides a three year period, would apply; also, the silence in the 1972 Act meant that in respect of causes not provided for under Entry 18 of the first and

second schedule, compensation based on actual damage can be recovered.

The provisions

14. Before discussing the rival merits of the parties' cases, it would be necessary to notice the relevant provisions of law. The provisions of the 1972 Act, to the extent they are relevant, are reproduced hereafter. Section 2 (2) defines *"Convention"* as *"the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on the 12th day of October, 1929."* Section 2(1) defines "amended Convention" as "the Convention as amended by the Hague Protocol on the 28th day of September 1955". Section 3 (1) reads as follows:

> "3. Application of Convention to India – (1) The rules contained in the First Schedule, being the provisions of the Convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, shall, subject to the provisions of this Act, have the force of law in India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage...."

Section 4 (1), likewise, reads as under:

> "4. Application of amended Convention to India – (1) The rules contained in the Second Schedule, being the provisions of the amended Convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons shall, subject to the provisions of this Act, have the force of law in India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage...."

The relevant provisions of the First Schedule, read as follows:

> "18. (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.
>
> (2) The carriage by air within the meaning of sub-rule (1) comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome, in any

> place whatsoever.
>
> (3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If however, such a carriage takes place in the performance of a contract for carriage by air for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.
>
> 19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods. "

Article 22, (of the first schedule) which fixes the limits of liability, reads as follows:

> "22. (1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 1,25,000 francs. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability.
>
> (2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that sum is greater than the actual value to the consignor at delivery.
>
> (3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.
>
> (4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of sixty-five and a half milligrams gold of millesimal fineness nine hundred."

Rule 29 prescribes the period of limitation within which an action for damages can be instituted:

"29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."

Rules 18 and 19 of the second schedule are worded identically with corresponding rules in the First Schedule; Rule 22 reads as follows:

"22. (1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of 2,50,000 francs. Where in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed 2,50,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a high limit of liability.

(2) (a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the passengers or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

(b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The limits prescribed in this rule shall not prevent the Court

from awarding, in accordance with its own law, in addition, the whole or part of the Court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluded Court cost and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

(5) The sums mentioned in francs in this rule shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment."

Finally, the limitation period – Rule 30 in the second schedule – is in pari materia with Rule 29 in the First Schedule.

15. Section 29 of the Limitation Act reads as follows:

29. Savings. (1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 . (9 of 1872 .)

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Sections 25 and 26 and the definition of" easement" in section 2 shall not apply to cases arising in the territories to which the

Indian Easements Act, 1882 , (5 of 1882) may for the time being extend."

Analysis and Conclusions

16. It can be gathered from the above discussion that the question involved in this appeal is whether the carrier, Air India, is right when it contends that it is liable only to the extent of the limits of liability prescribed by Rule 22 (of the First and Second Schedule to the 1972 Act) and further, whether the suit was in any event barred by reason of it being presented or filed beyond the period prescribed under Rule 29 of the First Schedule and Rule 30 of the Second Schedule to the 1972 Act.

17. The preamble to the Act indicates that it was enacted to give effect to the Warsaw Convention (of 1929) for unification of rules relating to international carriage, to which India is signatory, and further to give effect to the Hague Protocol of 1955. The Protocol made certain amendments to the Warsaw Convention. The Warsaw Convention had previously been given effect to in India by enactment of the Indian Carriage by Air Act, 1934 (Act 20 of 1934) in regard to international carriage and the provisions of the Act were extended to the 'domestic carriage' as well, subject to certain exceptions, adaptations and modifications in terms of a notification issued in 1964. The Convention provided that, when an accident occurred during international carriage by Air, damage was caused to a passenger or the cargo, or there was loss or destruction of baggage or goods, there was a presumption of liability on the carriers (who, however could not be held liable, if they proved that they or their agents had taken all necessary measures to avoid damage or that it was impossible for them to take such measures). Striking a balance, the extent of liability on such presumption was fixed on the carrier, limiting the same to 1,25,000 Gold Francs in respect of death of each passenger; while there was no limitation of liability if the damage was caused by the willful misconduct of the Carrier. Limits of liability were also fixed in case of destruction of, or loss to goods.

18. A diplomatic conference was convened at the Hague in September 1955 at the instance of the International Civil Aviation Organization, as a result of which, the provisions of Warsaw Convention 1929 were amended and the extent of presumed liability imposed on the Carrier was enhanced from 1,25,000 Gold Francs per passenger to 2,50,000 Gold

Francs per passenger; besides the Protocol provided for simplification of the documents for carriage and also making the carrier liable where the damage was caused by an error in piloting or in handling the Air Craft or in navigation. Further to the steps taken by the Government of India to give effect to the Hague Protocol, as one of its signatories, Act 69 of 1972 (the 1972 Act) was brought into force w.e.f. 15.05.1973.

19. Coming to the judgment of the Supreme Court in **East and West Steamship** (supra), that was in the backdrop of a claim for loss (on account of non-delivery) of goods under the Carriage by Sea Act. Interpreting the relevant provisions of the schedule to the Act, the Court held:

> "It is worth noting in this connection that while paragraph 5 makes it clear that loss there means loss to the carrier and paragraph 6 speaks of loss or damage to or in connection with the goods, the Legislature has in the 6th paragraph of this Article left the words "loss or damage" unqualified. The object of the rule however being to give immunity to the carriers and the shippers from claims of compensation made by the owners of the goods in respect of loss sustained by them, it will be unreasonable to read the word " loss " in that paragraph as restricted to only loss of the goods ". When the object of this particular paragraph and the setting of this paragraph in the Article after the previous paragraphs are considered there remains no doubt whatsoever that the learned judges of the Bombay High Court were right in their conclusion that the loss or damage in this paragraph is a wide expression used by the Legislature to include any loss or damage caused to shipper or consignee in respect of which he makes a grievance and in respect ,of which he claims compensation from the shipping company. The argument that loss due to failure to deliver the goods is not covered by this clause is merely to be mentioned to deserve rejection. The very use of the words "the date on which the goods should have been delivered" clearly contemplates a case where the goods have not been delivered. The clause gives the owner of the goods one year's time to bring the suit the year to be calculated from the date of the delivery of the goods where the goods have been delivered and from the date when the goods should have been delivered where all or some of the goods have

not been delivered. The fact that the first clause of the 6th paragraph speaks of removal of the goods may be an argument for thinking as the Bombay High Court thought that clause has no application when goods are not delivered. It may be mentioned that some authorities (See Carver's Carriage of Goods by Sea, 10th Edition, p. 191) have suggested that the first clause of this paragraph appears to have little meaning. That is a matter which need not engage our attention. It is sufficient to mention that the fact that the rule of evidence provided in the first clause of the paragraph may have no application to cases of non-delivery is wholly irrelevant in deciding whether the third clause applies to cases of non-delivery. As we have already said the date when the goods should have been delivered necessarily contemplates a case where loss has arisen because goods have not been delivered."

In the earlier portion of the judgment, the Court had noticed the provisions:

"The fifth paragraph provides that the shipper shall be deemed to have guaranteed to the carrier the accuracy as regards the details of marks, number, 'quantity and weight as furnished by him. It provides further that the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from such inaccuracies. Then comes paragraph 6, the whole of which it is proper to set out :" Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading."

20. In the present case, the Carriage by Air Act provides for relief through Rule 18 (in both the First and Second Schedule). That is the only provision which prescribes or visualizes the kind of situations which Parliament had in contemplation while dealing with compensation. The expression is "damage sustained in the event of the destruction or loss of, or of damage to" the goods. In **East and West Steamship** (supra) the Supreme Court had to deal with a provision under the Carriage by

Sea Act, limiting liability in respect of "loss or damage" to the goods. The court decisively rejected that "loss or damage" contemplated was in respect of loss or damage to the goods and did not cover loss or damage of the goods:

"the loss or damage in this paragraph is a wide expression used by the Legislature to include any loss or damage caused to shipper or consignee in respect of which he makes a grievance and in respect ,of which he claims compensation from the shipping company. The argument that loss due to failure to deliver the goods is not covered by this clause is merely to be mentioned to deserve rejection. The very use of the words "the date on which the goods should have been delivered" clearly contemplates a case where the goods have not been delivered."

21. There is authority for the proposition that the task of the courts wherever the law uses a term in clear and unambiguous terms is to give such expressions their plain and ordinary meaning. Unless the context is otherwise, the amplitude of the expression cannot be cut down or curtailed by the interpretive process (ref **Sri Ram Ramnarain v. State of Bombay** AIR 1959 SC 459; **Jumma Masjid Kodimaniandra** AIR 1962 SC 847). The rule was explained crisply in **Suthendran v. Immigration Appeal Tribunal,** (1976) 3 All ER 611 (HL) as follows:

"PARLIAMENT is prima facie to be credited with meaning what is said in an Act of Parliament. The drafting of statutes, so important to a people who hope to live under the rule of law, will never be satisfactory unless courts seek whenever possible to apply 'the golden rule' of construction, that is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition..."

In the present case, there is nothing in the 1972 warranting a restrictive construction as to limit "loss" only to destruction of or loss to the goods, when the plain words clearly are "loss of" (emphasis supplied). Therefore, to hold that loss of goods as a result of their nondelivery falls outside of the enactment to justify an action for damages larger than what is provided by the Act would be unwarranted.

22. The public policy underlying uniform rules in the case of loss

caused to passenger baggage, personal injury to a passenger, and damage on account of loss of goods, or destruction or damage to goods and the presumptions which the Convention (as well as the Protocol) seek to raise – which are enacted as law -have been described by the Supreme Court in its recent decision in **Trans Mediterranean Airways vs M/S. Universal Exports & Anr.** (2011)10 SCC 316 as "balanc(ing) the imposition of a presumption of liability on the carrier by limiting his liability ..." The (former) House of Lords had, in **Abnett v. British Airways Plc.** 1997 (1) All.ER 193, similarly characterized identical terms of UK Law, which had given effect to the Warsaw Convention as amended by the Hague Protocol, as follows:

> "Article 22 however is important, because it limits the liability of the carrier. It does so in terms which enable the limitation of liability to be applied generally to all cases where the carrier is liable in the carriage of persons and of registered baggage and cargo. Article 22(1) begins simply with the words "In the carriage of persons." Article 22(2)(a) begins with the words "In the carriage of registered baggage and of cargo." The intention which emerges from these words is that, unless he agrees otherwise by special contract -for which provision is made elsewhere in the article -the carrier can be assured that his liability to each passenger and for each package will not exceed the sums stated in the article. This has obvious implications for insurance by the carrier and for the cost of his undertaking as a whole. Article 22(4) makes provision for the award, in addition, of the whole or part of the costs of the litigation. But this is subject to the ability of the carrier to limit his liability for costs by an offer in writing to the plaintiff. The effect of these rules would, I think, be severely distorted if they could not be applied generally to all cases in which a claim is made against the carrier.
>
> The counterpart of what was plainly a compromise is to be found in the following article, article 24. This Article provides that in the cases covered by articles 18 and 19 and by article 17 respectively -these cases are dealt with separately in two different paragraphs -"any action of damages, however founded, can only be brought subject to the conditions and limits set" by the Convention. It should be noted in passing that paragraph (2) of the article states that this rule is to apply to the cases covered

> by article 17 "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." As Professor Rene H Mankiewicz has pointed out in his article, "The Judicial Diversification of Uniform Private Law Conventions -The Warsaw Convention's Days in Court" (1972) 21 I.C.L.Q. 718, 741 no one could expect states to be prepared to amend their laws relating to these questions, which are basic to the laws of tort and contract and therefore of a wide reaching significance, for the sole purpose of unifying and accommodating all matters relating to the law of the air carrier's liability.
>
> The structure of these two provisions seems to me therefore to be this. On the one hand the carrier surrenders his freedom to exclude or to limit his liability. On the other hand the passenger or other party to the contract is restricted in the claims which he can bring in an action of damages by the conditions and limits set out in the Convention. The idea that an action of damages may be brought by a passenger against the carrier outside the Convention in the cases covered by article 17 which is the issue in the present case -seems to be entirely contrary to the system which these two articles were designed to create..."

23. The need for a uniform policy and a global approach was underlined again by the House of Lords in **Morris v. KLM Dutch Airlines** [2002] 2 AC 628:

> "81. In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them."

This point has been repeatedly emphasized, and applied in other decisions (see **Zicherman v. Korean Air Lines Co. Ltd 516 US 217, (1996),** "to foster uniformity in the law of international air travel"; also see, **El Al**

Israel Airlines Ltd. v. Tseng 525 U.S.155 (1999). In the latter decision, El Al Israel Airlines, a passenger claimed that she had sustained psychosomatic injuries as a result of an intrusive body search. It was accepted that there was no bodily injury within the meaning of that expression in the Convention but the passenger contended that she was not precluded from pursuing a separate action for damages under domestic law. The court said that:

> "To allow passengers to pursue claims under local law in circumstances when the Convention does not permit such recovery, could produce several anomalies. Carriers might be exposed to unlimited liability under diverse legal regimes but would be prevented in terms of the treaty from contracting out of such liability. Passengers injured physically in an emergency landing, might be subject to the liability caps of the Convention, while those merely traumatized in the same mishap would be free to sue outside of the Convention for potentially unlimited damages."

24. That the limits of liability prescribed in the Convention are absolute, and also apply to goods lost during, or by the carrier, has been confirmed in **Data Card Corp & others v Air Express International Corp** 1983 (2) All ER 639.

25. In the present case, the airway bill formed the contract between Air India and Tej Shoe. Tej Shoe had sought to urge that the airway bill relied on in this case by the Air India did not contain any stipulation limiting liability or requiring special declaration about value and payment of extra amounts. However, the copy of the airway bill produced by Tej Shoe itself (a point not disputed during the hearing by its counsel) shows that Condition No. 4 printed on the reverse of the airway bill limited the carrier's liability to US$ 20 kgs. The relevant stipulations, i.e. Clauses 3 and 4, read as follows:

> "3. The first Carrier's name may be abbreviated on the face hereof the full name and its abbreviation being set forth in such Carrier's tariffs, conditions of carriage, requisitions and timetables. The first carrier's address is the airport of departure shown on the face hereof. The agreed stopping places (which may be altered by the carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth on the face hereof or shown in the Carrier's timetables as scheduled stopping places for the route. Carriage to be performed hereunder by several successive carriers is regarded as a single operation.
>
> 4. Except as otherwise provided in Carrier's tariffs or conditions of carriage in carriage to which the Warsaw Convention does not apply and liability shall not exceed US $ 20.00 or the equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the shipper and supplementary charges paid."

The above stipulation, particularly Clause 4, gives effect to Rule 22 of the Schedule to the 1972 Act, to the extent that it limits liability for the loss of, or damage or destruction to goods:

> "the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires."

26. If the shipper, Tej Shoe, wanted Air India to assume liability for an amount exceeding US$ 20 or its equivalent, it had to declare such amount for carriage and pay the applicable valuation charge. Rule 22 of the Act of 1972 restricts the liability of the carrier to a maximum of US$ 20 per kg. The statute thus placed a limit on the liability of the carrier where compensation cannot be awarded in excess of US$ 20 per kg of the weight loss. For seeking a higher compensation, it was required that the consignor would make a special declaration of the value of the consignment for carriage and pay a supplementary charge. The court also notes that the plaintiff, Tej Shoe, did not declare the value of the goods in the airway bill, but rather, only the value for customs was declared (amounting to DM 150,152.90). Furthermore, no supplementary amount was paid to the appellant in accordance with the declaration of interest. An interpretation which allows the consignor or consignee to recover more than the prescribed limits, on an artificial construction of the expressions used by the statute, can be the gateway for unlimited liability under diverse and unforeseen conditions rendering unviable the business of air carriage. This court is also supported in the view it takes by Clause 22 (4) of the Second Schedule (supra) which permits Indian

courts to award sums over and above the limits set out in limited contingencies towards costs of litigation:

> "(4) The limits prescribed in this rule shall not prevent the Court from awarding, in accordance with its own law, in addition, the whole or part of the Court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluded Court cost and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later."

27. Had Parliament intended that courts can exceed the liability limits imposed by statute for loss of goods, the structure of Clause 22 would have been entirely different. Air India has already paid the maximum liability being of Rs. 12,51,877 as per the valuation of US $ 39,780 in terms of the order passed by the National Consumer Dispute Redressal Commission. This court does not discern anything in the order of the Commission enabling Tej Shoes to recover anything in excess of what is prescribed by statute; nor does that order record Air India's consent as to amount to estopping it from defending the higher claim of the said plaintiff. This court is therefore of the opinion that the single judge fell into error in placing the interpretation that regardless of whether the shipper/consignor declared a value higher than the limits imposed by Rule 22 (and Clause 4) and did not specify or pay any supplementary charge, it could recover damages in excess of the limits prescribed by the Convention and embodied in municipal law. Accordingly, the view in Vij Sales Corporation v Lufthansa Airlines ILR 1981 Del 749 (a decision rendered by a learned single judge) is hereby overruled. Likewise, the period of limitation prescribed under Articles 29 (of the first schedule) and 30 (of the second schedule) are contrary stipulations, which amount to "period of limitation different from the period" under the Limitation Act (Section 29(2)) which would exclude application of the Limitation Act itself. Those stipulations under the 1972 Act are under a special statute and are absolute in terms; they would prevail over the general provisions of the Limitation Act. Consequently, the suit filed by Tej Shoe is also time barred.

28. In view of the above discussion, the appeal has to succeed. The impugned judgment and decree of the learned single judge is hereby set aside. The appeal is allowed without any order on costs.

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EAST INDIA HOTEL LTD. AND ANR. ....APPELLANTS

VERSUS

UNION OF INDIA AND ANR. ....RESPONDENTS

(S. RAVINDRA BHAT & NAJMI WAZIRI, JJ.)

LPA NO. : 342/2008 & CM NO. : 127468/2008 **DATE OF DECISION: 10.10.2013**

Constitution of India, 1950—Article 226; Government of India (Transaction of business) Rules, 1961; Indian Contract Act, 1872—Section 199: appeal against order of Ld. Single judge dismissing the petition praying for quashing cancellation notification for grant of land to the petitioner- whether the appellants have a remedy under public law- appellant contends that allotment made by the respondent was a concluded contract, wherein amounts were paid towards consideration—Accordingly, respondent estopped from contending that such manner of allotment was flawed, since decision to allot plot to appellant was based on due consideration of facts by all authorities.

Respondent contends that the allotment letter dated 27.06.1995 had no authority, since no approval was obtained from the Ministry of Finance—The allotment was made without following proper procedure—Further,

the allotment letter indicated that there would be a license agreement executed in favour of the appellant- No such license agreement was executed—Therefore, appellant had no enforceable right. Appellant only entitled to round along with interest.

Held: validity of a competitive bidding process is beyond question—Thus, decision to cancel allotment letter cannot be termed arbitrary- from the relevant records it is clear that there is on approval from the Finance Ministry, which compelled and Union Cabinet to decide that such allotment could not be sustained- Transaction of business rules which mandate prior consultation with the finance ministry before land is dealt with, were not observed. Central government is within its rights to say it would not proceed ahead with the lease agreement- no arbitrary conduct on part of the respondents—Public interest would be served through a fresh bidding process—Finally, no legitimate expectation is created or promissory estoppel operates against the government in matters of public law, where reasoned decisions taken in public interest will take precedence.

As observed earlier, there can be no quarrel with the proposition that allocation of natural and public resources need not invariably be preceded by public auction. As long as the Court is satisfied that the method adopted by the State – even for allowing or disposing of the land or other valuable asset, is through a transparent and fair method, the public agency or the state's exercise of discretion would not be interfered with. In this case, however, what is in issue is not grant of land; it is the decision of the Government not to proceed ahead with its previous opinion, embodied in the allotment letter of 27.06.1995. The Central Government relies upon the Government of India (Transaction of Business) Rules, 1961 as well as some judgments of the Supreme Court. The judgments relied upon by the Central Government

– **Smt. Godavari Shamrao Parulekar** (supra); **State of Uttar Pradesh v. Om Prakash Gupta** (supra) and **Narmada Bachao Andolan** (supra) have held that the provisions in the Government of India (Transaction of Business) Rules should be complied with. In **Narmada Bachao Andolan** (supra), the Court relied upon later rulings, i.e. **MRF Limited v. Manohar Parrikar & Ors.** 2010 (11) SCC 374 to hold that substantial compliance with the rules can validate the action. In the present case, however, the Transaction of Business Rules, which unequivocally mandate prior consultation with the Finance Ministry before land is dealt with, were not observed. There is nothing on record to show that the file was ever referred to the Finance Ministry; rather, only Director level officials in the Ministry of Urban Affairs expressed their concurrence with the view that direct allotment could be made to the appellant after the previous arrangement with DTTDC was cancelled. **(Para 38)**

In these circumstances, the argument of the appellant at both levels that the decision, i.e. allotment of 27.06.1995 was legal and enforceable and also that in any event it was the highest bidder in 1992, leading to the allotment by DTTDC, cannot prevail. The Central Government's has unquestionable power to review its own decisions. The decision communicated to the appellant through the allotment letter was not complete or sustainable for the reasons that it was not concurred with the Finance Ministry. The Central Government, therefore, acted within its rights to say that it would not proceed ahead and enter into the lease arrangement which the appellant wanted. The power of administrative review is inherent with the executive agency and can be exercised having regard to the peculiar exigencies and circumstances. In this case, concededly, the Central Government was not exercising its statutory power while making the allotment. It was dealing with its own property held for and on behalf of the general public under the Constitution. Its decision not to go ahead and enter into a lease deed, therefore, was in exercise of such inherent administrative power and is, therefore, supportable in law,

taken to correct a flawed decision (ref. **R. R. Verma and Ors. v. Union of India (UOI) and Ors.,** 1980 (3) SCC 402 and **State of U.P. v. Maharaja Dharmander Prasad Singh,** (1989) 2 SCC 505). In R.R. Verma, the Court held that:

> "5. .....Surely, any Government must be free to alter policy or its decision in administrative matters. If they are to carry on their daily administration they cannot be hidebound by the rules and restrictions of judicial procedure though of course they are bound to obey all statutory requirements and also observe the principles of natural justice where rights of parties may be affected....."

In another decision, i.e. **M. Satyanandam v. Deputy Secretary to Govt. of A.P. and Anr.,** (1987) 3 SCC 574, it was observed that *"In the facts of this case as noted by the High Court, we are unable to entertain these contentions. We are unable to accept the contention that the Government cannot review its own order."* **(Para 39)**

As far as the argument with respect to the appellants being the highest bidders in the bidding process conducted by the DTTDC in 1992 is concerned, as discussed earlier, that process ended with the cancellation of allotment to DTTDC. The Central Government's objection to that process precisely was that a long time arrangement was sought to be entered into without its involvement, approval or concurrence. Once that allotment – to the DTTDC – became final, one of the steps leading upto the cancellation, i.e. the bidding process, cannot, in the opinion of this Court, be assaulted to uphold the appellant's contention. In other words, the entire decision of the DTTDC to allot the plot to the appellant, being a case for cancellation of the DTTDC's own allotment, the appellant cannot be permitted to rely upon the fact that it was the highest bidder in such process. The fact remains that the allotment made directly to the appellant on 27.06.1995 was not preceded by any fair or transparent procedure inviting

or involving other interested bidders – either through open tender bidding or by calling eligible parties for negotiations. Had such a process been resorted to, the appellant could have been justified in stating that the decision of the Central Government to review such allotment could not be allowed to stand on account of estoppel or other compelling principles. **(Para 40)**

The Appellants have also argued that under Section 199 of the Contract Act, the Central Government has by way of a subsequent decision to allot the plot in favour of the Appellant directly ratified the action of the DTTDC. While the effect of ratification is indeed what the Appellants claim to be – that of relating back to the date of the original contract (**Central National Bank Ltd. v. United Industrial Bank Ltd.,** AIR 1954 SC 181), in this case, the allotment to the Appellants was distinct, in the legal form, from the sub-license granted by the DTTDC – thus rendering this argument incorrect. In a case of ratification, the original action which is sought to be ratified comes into existence once again, whereas in this case, a fresh offer was made by the Government on 27.06.1995. Indeed, the admitted position of the Appellants is that the license agreement (the contractual agreement that may act as ratification) has not yet been concluded by the Land and Development Officer although, it is alleged, that the Government had mandated the Officer do so. In such a case, the argument that ratification fails as there is neither an express nor an implied ratification of the previous act "as its (the Government's) own", where in fact, the letter of cancellation of the allotment to DTTDC qualifies as a "clear repudiation" (**Kadiresan Chettiar v. Ramanathan Chetti and Another,** AIR 1927 Mad 478, para 23) **(Para 41)**

This brings us to the fourth question of any right vested created in the Appellants in equity, i.e. through the doctrines of promissory estoppel and legitimate expectation, which could injunct the Government. The Appellants note that over the passage of 13 years, equities had been created in its

favour, as also the fact that the representation made by the Land and Development Officer through the letter of allotment on 27th June, 1995, precludes the Government from back-tracking on that promise or assurance: "Accordingly, I am directed to convey the sanction of the President to the construction and commissioning of the Hotel by the East India Hotel Ltd.,/Centurion Hotels Ltd. on the aforesaid plot of land subject to compliance of the terms and conditions as enumerated in the license agreement dated 24.07.92 (copy enclosed) on usual terms and conditions which shall, inter alia, includes (sic) the following ..." For this, the Single Judge has rightly noted that the doctrine cannot create an expectation as against a public authority acting in public interest. The Supreme Court noted in **Hira Tikoo v. Union Territory, Chandigarh,** (2004) 6 SCC 765 that:

> "22. In public law in certain situations, relief to the parties aggrieved by action or promises of public authorities can be granted on the doctrine of legitimate expectation but when grant of such relief is likely to harm larger public interest, the doctrine cannot be allowed to be pressed into service....."

In this case, the larger public interest would no doubt be served through a fresh competitive bidding process today which will lead to greater accrual of revenue, as the Secretary, Urban Ministry has also alluded to. **(Para 42)**

Crucially, once the Central Government itself formed the opinion that disposal of its property by the allotment letter dated 27.06.1995 was not preceded by any fair or transparent procedure – which in the opinion of the Court is not a faulted conclusion – the argument of estoppel cannot prevail or apply. Estoppel as has been reiterated time and again is an equitable principle which would yield to substantive provisions. The State cannot, consistent with its mandate to follow the non-discriminatory principle underlying Article 14, be bound down by what essentially was an unsupportable bargain shrouded in secrecy as the allotment of 27.06.1995

unquestionably was. To direct the Central Government in the facts and circumstances to follow up the allotment letter dated 27.06.1995 by application of the principle of promissory estoppel would be, in the opinion of the Court, contrary to its obligations under the Constitution to dispose of public property through fair and transparent process. **(Para 43)**

Furthermore, the doctrines of promissory estoppel and legitimate expectations – doctrines of equity – translate into a specific performance of the promise made. Indeed, such remedies of specific performance – even, for example, under the Specific Relief Act, though it is not applicable here – are available when "injustice can be avoided only by enforcement of the promise"(**M/s. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.,** AIR 1979 SC 621). As observed in **Att. Gen. For New South Wales v. Quin** 1990 (64) Aus LJ.Rep 327 the doctrine of legitimate expectations ought not to "unlock the gate which shuts the court out of review on the merits," and that the Courts should not trespass "into the forbidden field of the merits." Thus, the argument of the cancellation (of allotment dated 27.06.1995) contravening the legitimate expectations of the appellant and the resultant arbitrariness is of no avail. In this case, the Single Judge has ordered a return of the investment made by the Appellant in the property by way of payment to the Government. Indeed, neither has the Appellant has referred in its pleadings to any independent damage that cannot be compensated but for the specific remedy it requests. **(Para 44)**

Finally, it is important to note that the present proceedings involve the writ jurisdiction of this Court, and are not an alternative to the ordinary jurisdiction of civil courts. Indeed, if the Appellants believe that a contractual or quasi-contractual right exists between them and the Government, or if any right under common law or equity is violated, in such opinion, the proper forum for such a dispute would be the civil courts, with the proceedings in the writ courts limited to a question of arbitrariness on the part of the State or

public agency's action. In this case, it is disputed between the parties whether a contract actually existed between them, in that the Land and Development Officer did not, in fact, conclude the license agreement on the terms of the DTTDC agreement as was the order of the Government through its letter dated 7th June, 1995. The question whether a contract was formed between the parties under the Indian Contract Act, and if a breach occurred as to justify either damages or specific performance, would engage the writ court in a matter properly reserved for the civil courts. A contrary conclusion would mean that any matter involving the State, a sovereign, in a plausible contractual relationship with a private entity would engage this Court's writ jurisdiction – a proposition contrary to well-settled law. **(Para 45)**

[An Ba]

APPEARANCES

FOR THE PETITIONER : Sh. Dushyant A. Dave, Sr. Advovate with Sh. R. Singh, Sh Ravi Sikri and Sh. Aniruddha Deshmukh, Advocates.

FOR THE RESPONDENTS : Sh. Rajeeve Mehra, Asg witih Sh. B.V. Niren, CGSC, Sh. Prasouk Jain, Sh. Kartikey Mahajan and Sh Aditya Malhotra, Advocates.

CASES REFERRED TO:

1. *Narmada Bachao Andolan* vs. *State of Madhya Pradesh* 2011 (12) SCR 84.
2. *MRF Limited* vs. *Manohar Parrikar & Ors.* 2010 (11) SCC 374.
3. *Vishal Properties Pvt. Ltd.* vs. *State of U.P. and Ors.,* 2007 (11) SCC 172.
4. *Sunil Pannalal Banthia and Ors.* vs. *City and Industrial Development Corporation of Maharashtra Ltd. and Anr.,* AIR 2007 SC 1529.

5. *State of Punjab* vs. *Nestle India Ltd. and Anr.* 2006 (4) SCC 465.
6. *Hira Tikkoo* vs. *Union Territory, Chandigarh and Ors.,* 2004 (6) SCC 765.
7. *Bejgam Veeranna Venkata Narasimloo and Ors.* vs. *State of A.P. and Ors.,* 1998 (1) SCC 563.
8. *Att. Gen. For New South Wales* vs. *Quin* 1990 (64) Aus LJ.Rep 327
9. *State of U.P.* vs. *Maharaja Dharmander Prasad Singh,* (1989) 2 SCC 505.
10. *Shri Sachidanand Pandey and Another* vs. *State of West Bengal and Ors.,* AIR 1987 SC 1109.
11. *M. Satyanandam* vs. *Deputy Secretary to Govt. of A.P. and Anr.,* (1987) 3 SCC 574.
12. *Kasturi Lal Lakshmi Reddy* vs. *State of J&K and Anr.,* 1980 (4) SCC 1.
13. *R.R. Verma and Ors.* vs. *Union of India (UOI) and Ors.,* 1980 (3) SCC 402.
14. *M/s. Motilal Padampat Sugar Mills Co. Ltd.* vs. *State of Uttar Pradesh and Ors.,* AIR 1979 SC 621).
15. *State of Uttar Pradesh* vs. *Om Prakash Gupta* AIR 1970 SC 679.
16. *Godavari Shamrao Parulkar* vs. *State of Maharastra & Ors.* AIR 1964 SC 1128.
17. *Central National Bank Ltd.* vs. *United Industrial Bank Ltd.,* AIR 1954 SC 181.
18. *Collector of Bombay* vs. *Municipal Corporation of City of Bombay,* AIR 1951 SC 469.
19. *Kadiresan Chettiar* vs. *Ramanathan Chetti and Another,* AIR 1927 Mad 478.

RESULT: Writ Appeal Dismissed.

S. RAVINDRA BHAT, J.

1. This is an unsuccessful writ petitioner's appeal against the

judgment and order dated 03.07.2008 of the learned learned Single Judge rejecting its claim.

2. The facts leading up to this dispute can be divided into three phases. The first starts in 1981, when the Land and Development Officer (L&DO) of the Ministry of Urban Affairs, Government of India, allotted 2.762 acres of land (the property in question in the present dispute and hereafter called "the plot") to the Appellant to build a 250 room hotel and other related facilities for the Asian Games in terms of a letter dated 21.02.1981. As the construction was to be completed in time for the Asian Games in 1982, the Appellant informed the L&DO that such a project was not feasible in that time span and thus, the allotment was cancelled. This cancellation is not disputed by either party in this case.

3. The second phase begins on 18th June, 1983, when the land was allotted by the Ministry of Urban Affairs, Government of India to the Delhi Tourism Development Corporation Ltd (DTTDC) to construct a budget hotel. Clause 8 of the said agreement is pertinent to this dispute. It reads:

> "8. The DTTDC shall not sub-lease the land in favour of any other party. They can, however, make such arrangement for constructing and running the hotel as will not involve sub leasing of the plot."

For eight years, no action was taken by DTTDC under this agreement to construct such a hotel. Ultimately, on 24th February, 1992, an advertisement was issued, inviting global tenders for the construction of the hotel. The present Appellant responded with a bid, along with 12 other bidders. The Appellant's bid was subsequently accepted (through the DTTDC's letter dated 8th May, 1992) for building and running, on its behalf, a three star hotel on license basis for a period of 33 years. A license agreement was then entered into between the Appellant and DTTDC on 24.07.1992. Before construction began, however, the Union Ministry of Urban Development informed the Managing Director, DTTDC, New Delhi by a letter (No. LIII/ 8/13(16)/83/392 dated 01.02.1993) that the allotment to it (the DTTDC) of the plot had been cancelled as a result of its failure to construct a budget hotel up until that time, and for violation of Clause 8 of the Agreement between the two parties by way of entering into a license agreement with the Appellant. This letter of cancellation, in its relevant part, reads as follows:

> "This land was allotted to you at highly concessional rates without recovery of premium for setting up a Budget Hotel charging low tariff. However, the Budget Hotel has not been constructed and commissioned. But it has come to the notice that you have entered into an agreement with M/s East India Hotels Ltd. to run the hotel which is against the terms and conditions of the allotment offered on 18.6.83."

Notice of this cancellation was also provided to the DTTDC by another letter dated 04.06.1993 [No. L.III/8/13(16)/83/107].

4. The Appellant made several representations, subsequent to cancellation of the allotment, to the concerned authorities, claiming to be aggrieved (by the letter of cancellation). Eventually a decision was taken by the Union Ministry of Urban Development to cancel the allotment to the DTTDC, but allot the land directly to the Appellant. This is clear from the Counter Affidavit of one Mr. LD Ganotra, Engineering Officer with L&DO, Union Ministry of Urban Affairs in W.P.(C) 3016/2000, where it was stated in paragraph 3 that:

> "Since the DTTDC had acted in clear breach of the terms and conditions of allotment, the allotment was cancelled by the L& DO on 1.2.1993. The DTTDC as well as the Delhi Government made representations to the Union of India against the said cancellation. The matter was discussed in a number of meetings in the various departments and finally on 19th October 1993 in a meeting presided by the Secretary, Union Ministry of Urban Development (in the meeting representatives of DTTDC were present), a decision was taken to allot the land to the Appellant. The minutes suggest that the decision was that the land would be allotted on the terms and conditions as those contained in the Agreement for License Agreement executed between the DTTDC and the Petitioner."

5. The Union Government later issued an order on 7th June, 1995 to the L&DO conveying its sanction in the following terms:

> "3. Sanction of the President is conveyed to the utilization of land by the East India Hotels Ltd. as per the terms and conditions enumerated in the license agreement dated 24.7.92 which shall be suitably modified / endorsed and executed for compliance by

the hotelier with the Land and Development Office on usual terms and conditions, which shall inter alia, include the following;

(i) The terms and conditions as enumerated in the License Agreement for construction / running of the hotel will be the same as contained in the enclosed Agreement and license -thereof will be in accordance with statement annexed in Schedule II thereto.

XXXXXX
XXXXXX
XXXXXX"

6. The third and operative phase of the dispute began after this. By an allotment letter/license deed (No. I. III/8/13(16)/82-187, dated 27.06.1995), the plot was allotted to the Appellant for the purposes of setting up a budget hotel. This letter indicated that an agreement on the lines of the earlier agreement between the Appellant and DTTDC was to be executed to give effect to the allotment letter. The L&DO, however, did not – for reasons which would be apparent hereafter – conclude any agreement with the Appellant. Consequently, the Appellant filed W.P.(C) 3016/2000, seeking a writ of mandamus against the Respondents to act pursuant to the allotment letter dated 27.06.1995. As a measure of interim relief, the Respondents were restrained from dispossessing the Appellant from the land in question. This Court also directed the Respondents to take a final decision on the allotment and the conclusion of the agreement by its order dated 24.01.2005.

7. Pursuant to this Court's order, the Appellant received a letter (No. L-III/8/13(16)/82/148, dated 11.04.2005) stating that after due consideration, a decision had been taken to cancel the earlier allotment to the Appellant. It is this action of the Respondents that is in question in the present proceedings.

8. The appellant instituted writ proceedings. In those writ proceedings, it was contended that the allotment made to the Appellant was a concluded contract and that amounts had been paid towards consideration. Accordingly, it was argued that the Union Government was estopped from contending that its decision to make the allotment was in any manner flawed or procedurally irregular, because the earlier allotment to the DTTDC was consciously cancelled and direct allotment

of the plot (to the appellant/Petitioner) was resorted to.

9. The Learned Single Judge considered the questions involved and held that whilst the Respondents were entitled to cancel the allotment of land – because of irregularities in the manner of allotment to the Appellant and the consequent arbitrariness that were discovered later – it (the Appellant) was entitled to the refund of the entire sum of '3.35 crores paid in instalments as regards the hotel construction project along with 18% interest per annum from the respective dates of payment till the time of refund. The Learned Single Judge also noted that the correct forum for decision on the question of facts which arose in the case would be the civil courts to enforce private law remedies available to the Appellant, rather than through public proceedings in a writ court.

10. Two issues arise from the present proceedings: first, whether the Appellant has any remedy under public law – i.e. whether the remedy that the Appellant is seeking for – that of specific performance of the allotment letter that came to be cancelled – can be and should be granted by this Court in the circumstances of this case, and secondly, as a corollary, whether the correct forum for such disputes are the civil courts with original jurisdiction.

11. The Appellants argue firstly, that the cancellation of the allotment to DTTDC for violation of the terms of the allotment on account of sub-licensing was incorrect. Learned senior counsel, Shri Dushyant Dave argued that the original allotment was made after following a publicly advertised global tender, followed by evaluation by a duly constituted committee which consisted representatives of the Union of India. That committee chose the Appellant's bid over the others, since it afforded the best terms for the plot. The acceptance was subject to signing the contract and furnishing a security deposit of '1 crore. Later a license deed was entered into for the specific purpose of constructing a hotel; the arrangement envisaged was to last for 33 years. The Union Government's concerns were adequately addressed because Clause 18 of the License Deed categorically stated that no interest in the land was passing to the licensee/Appellant. It is also argued that the license deed had calculated the fixed annual rental at Rs. 720.50 crores for a period of 30 years and further provides the percentage of gross turnover at 10% to 11% from the operating period of first year till the thirtieth year, three years being kept for planning and construction. On 28th July, 1992, the

Appellant was given possession of the plot. Learned counsel claims that despite this, and also the circumstance that the requisite amounts were paid, the Union Government cancelled allotment to DTTDC on 01.02.1993 for an utterly untenable reason, i.e. allotment had been made to the present Appellant contrary to terms of the allotment to DTTDC. It is argued that the Union Government was aware of the tendering process which preceded the allotment to the appellant; the advertisement was under its aegis and its officer was part of the tender evaluation process. Though the appellant's representation was initially rejected, the Union Government ultimately decided in its highest quarters to allot the land directly, on 19.10.1993, as evidenced by the affidavit of an officer of the L&DO in W.P.(C) 3016/2000.

12. Mr. Dave submitted that following the decision, the Government of India issued a letter conveying sanction of the President to allot the plot directly to the Appellant, sanctioning the utilization of the land by the terms and condition of the Agreement dated 24.07.1992 to be suitably modified to indicate that the arrangement is a license and would not be considered as a lease without a perpetual deed.

13. It was argued next that the decision to allot land directly to the Appellants was based on due consideration of the facts by all relevant authorities and is thus not arbitrary. Counsel stressed on the fact that a detailed note dated 17.07.1995 was prepared by the concerned Ministry which was then sent to the Office of the Prime Minister who having seen the same on 14.08.1995 had directed the matter to be referred to the Finance Ministry. The Ministry of Finance had accordingly examined the file dated 24.08.1995, which was discussed in the said Ministry in August 1995, and necessary approval was given by the said Ministry. Accordingly, on 03.02.1996, after the receipt of the file by the concerned Ministry from the Finance Ministry, necessary notings were made to the clearance by the Prime Minister and Finance Ministry to the effect that there were no deviations in the procedure followed by this Ministry and hence retracing our steps at that juncture was not recommended. Counsel stated that these were followed by notes by the Finance Ministry dated 06.03.1996, leading to a decision on 06.06.1996 in favour of allotment, culminating in the Union Urban Affairs Ministry's decision dated 11.06.1996 to execute the lease deed in favour of the appellant, especially when a competitive bidding process is not a mandated prerequisite in all cases. Counsel also laid emphasis on the allotment letter issued to the appellant

on 27.06.1995 and the amounts appropriated towards the first five years' license fee, by the Central Government. Reliance was placed on the decisions in **Shri Sachidanand Pandey and Another v. State of West Bengal and Ors.,** AIR 1987 SC 1109 and **Kasturi Lal Lakshmi Reddy v. State of J&K and Anr.,** 1980 (4) SCC 1 to justify the argument that there was no necessity for the Central Government to again re-advertise and seek bids and that in any case, the allotment to the Appellants was premised on the earlier joint global tender issued by DTTDC and the Ministry of Tourism. Counsel also relied on the Constitution Bench ruling of the Supreme Court, in its advisory jurisdiction under Article 143 of the Constitution (In re Special Reference No 1 of 2012 (2012 (3) SCR 147), where it was held that auction is not the invariable method for disposal of public property by the state:

> "...in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximization, and thus by auction, is based neither on law nor on logic. There is no constitutional imperative in the matter of economic policies-Article 14 does not pre-define any economic policy as a constitutional mandate. Even the mandate of 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term 'distribution', suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate."

14. The third submission made was that the internal functions and procedural requirements are not be known by citizens in their dealings with the Government, and that once dealings between the citizen and Government are transparent, it is not open to a Court, much less the Government which took the decision in the first place, to question the legality and propriety of the decision on grounds of procedural irregularity (reliance here is placed on the decisions in **Collector of Bombay v. Municipal Corporation of City of Bombay,** AIR 1951 SC 469 and **Bejgam Veeranna Venkata Narasimloo and Ors. v. State of A.P. and Ors.,** 1998 (1) SCC 563. Likewise, the Appellants rely on the judgment reported as **State of Punjab v Nestle India Ltd. and Anr.**

2006 (4) SCC 465 where it was held that:

> "44.....the Government cannot rely on a representation made without complying with the procedure prescribed by the relevant statute, but a citizen may and can compel the Government to do so if the factors necessary for founding a plea of promissory estoppel are established. Such a proposition would not "fall foul of our constitutional scheme and public interest....."

The Appellants contend that the representations made to it trigger a right in equity through the doctrines of legitimate expectation and promissory estoppel and that the Union Government cannot resile from its decisions. It is contended that apart from the license fee paid, it has expended considerable amounts for planning towards development of the property. Learned senior counsel also highlighted the fact that the Central Government's actions have resulted in the deprivation of a sum of over ' 700 crores to the public exchequer, which would have been earned if the period for which the license had been allowed to stand.

15. Mr. Dave urged that allotment to DTTDC on 18.06.1983 did not enable grant of any sub-lease. However Clause 8 enabled DTTDC to make arrangements for constructing and running the hotel as would not involve sub-lease of the plot. The advertisement issued on 24.02.1992 was relied on to say that it invited offers from hotel chains for setting up and running a new hotel. This was not contrary to Condition No.8. The licence agreement of 24.07.1992, was not a lease or a sub-lease but merely a licence. It did not confer any right or interest in the land, as apparent from Clauses 17 and 18 of which read as under:

> "17. The Licensee / Sub-Licensee shall not further underlet, sublet, encumber, assign, alienate or otherwise transfer their rights and interest or part with possession of the land and the building thereon or any part thereof or share therein to any person, directly or indirectly without the previous written consent of the Licensor except as provided in clause 24 & 25 (twenty four & twenty five) of this agreement.
>
> 18. The Licensee has been granted a licence only to enter upon the piece of land to be made available by the Licensor for the purpose of facilitating setting up of a 3 (Three) Star Hotel as specified hereinabove and granting of such a Licence shall in no case confer, create any right or interest or demise in the said land in favour of the Licensee or the Sub-licensee nor shall this Licence imply an exclusion of the possession title, legal or otherwise or interest of the Licensor in the land licenced for the purpose of facilitating and securing the construction of hotel and that this Licence is understood by the parties in all respects to be in conformity with the rights and powers of the party of the first part in the matter of the grant of this Licence."

16. It was urged that the licence agreement of 24.07.1992 was entered into between DTTDC and the Appellants after global offers were invited, bids were submitted by various parties and the appellant's bid was accepted after following a transparent process. It was contended that the argument and finding of the learned single judge that the license was granted without following a proper procedure was unsustainable.

17. The learned Additional Solicitor General, who appeared for the Union, argued that the DTTDC's allotment on 18.06.1983 was exclusively for the setting-up of a budget hotel. It was urged that the advertisement of 24.02.1992 was not issued by the Government but by DTTDC, which could not lease out the lands; clause 5 stipulated that DTTDC itself had to establish and manage a hotel. Clause 7 mandated that construction was to be completed within 24 months, before the grant of lease could be considered. Clause 8 of the allotment letter stipulated that DTTDC could not sub-let the land though it could make arrangements for constructing and running the hotel. The ASG stated that DTTDC was never a lessee. For over 10 years it did nothing. The allotment in favour of DTTDC being only a licence, (as evident from Clause 14) the invitation to invest in a new hotel contravened Clause 5 of the 1983 allotment letter. In terms, specific permission of the Union Government was necessary. The ASG argued that DTTDC had no authority to issue any such advertisement. Since DTTDC did not even have a lease in its favour, the acceptance of the offer by DTTDC on 08.05.1992, the grant a licence in favour of the Appellants to set up a three star hotel for a period of 33 years was untenable.

18. As regards the licence agreement between the first appellant and DTTDC and Oberoi Palaces & Resorts International Ltd. executed on 24.07.1992, it was urged that DTTDC was a licencee of the Union Government which unauthorizedly described itself as a licensor. The

first appellant was called a "licencee" and the Oberoi Palaces & Resorts Ltd was described as the "sub-licencee". The ASG relied upon the recitals which stated that the licence was for use of the plot by Novotel. Referring to various clauses of the agreement, he submitted that the same could not be entered into by DTTDC and was in complete violation of the allotment made by the Government of India in favour of DTTDC.

19. The learned ASG argued that in terms of the (Transaction of Business) Rules, 1961 of the Government of India, grant of land / lease / licence had to be approved by the Finance Ministry. It was submitted that no concurrence of the Finance Ministry was given to the arrangement. The ASG then argued that the property in question could not have been handed over to the first petitioner. Reliance was placed on the letter dated 01.02.1993 (under which the allotment in favour of DTTDC was cancelled). Referring next to the allotment letters of 07.06.1995 and 27.06.1995 issued by the Central Government, Ministry of Urban Affairs, Land & Development Office as well as the letter dated 01.07.1996 (issued by the Central Government, Ministry of Urban Affairs and Employment to the Land & Development Officer informing the latter that it may go ahead with the execution of the licence agreement with the first appellant after modifying the earlier licence agreement-executed between DTTDC and the said appellant) it was submitted that between 07.06.1995 and 27.06.1995, no approval from the Finance Ministry was obtained. Therefore, the allotment letter of 27.06.1995 was without any authority. Likewise, the clearance given by the letter of 01.07.1996 was not concurred with by the Finance Ministry. In this context, it was submitted that the Finance Ministry having not cleared the allotment, determinations or decisions of the Ministry of Urban Affairs and Employment could not prevail.

20. The Central Government next argues that the challenge to the letter dated 11.04.2005 by which the allotment of the plot to the appellant on 27.06.1995 was cancelled is misplaced as the said letter itself indicates that the reason for cancellation was that there were improprieties. The allotment was made without following the proper procedure and without resorting to a transparent and open procedure. He further submitted that the letter dated 07.06.1995 indicated that there would be a licence agreement executed in favour of the first appellant after suitably modifying the earlier licence agreement dated 24.07.1992. No such licence agreement

was executed. The appellant, therefore, could not claim any enforceable right.

21. It was contended in the appellant's counter-affidavit that on the issue of utilisation of the land, the Union Ministry of Finance advised that the plot should be disposed to a private party for a hotel etc., only after an open auction to ensure a free and fair transaction. The Ministry of Finance alternatively suggested that the plot could be used by the Central Government itself. Based on a request from DTTDC, the plot was offered for allotment to it for construction of a budget hotel, on specified terms and conditions in consultation with the Ministry of Finance. It was argued that the allotment was made at highly concessional rates which required an annual payment @ 6 +% of the notional premium calculated on the residential rates of '2,000/per sq. mtr; thus no premium was charged and only the licence fee at concessional rates was levied. The allotment was subject to the terms and conditions contained in the letter of allotment dated 18.06.1983. It was also pointed out that DTTDC failed, during the period 19841992, to set up the budget hotel as per the terms of the allotment and also failed to pay the licence fee. In 1992, DTTDC, without obtaining any permission from the Government of India, violating the conditions of allotment, invited tenders from private parties for setting up a 3-5 Star Hotel on the plot of land. The terms of allotment envisioned the setting up of a budget hotel by DTTDC alone. The Central Government asked DTTDC to immediately stop its violation of the allotment terms and also to pay arrears of licence fee. The ASG argued that there was no rationale for DTTDC to pass on the advantages of highly concessional licence fee to a third party or to sub-lease the land. Therefore, the allotment and agreement with the first was found to be in gross violation of the conditions of the allotment letter and the allotment in favour of DTTDC was cancelled by the said letter dated 01.02.1993.

22. The Central Government stated that DTTDC represented against the cancellation. In terms of the procedures of the Government, before taking any final decision in favour of a private party, in such a matter, the case should have been shown to the Ministry of Finance. Relying on the file notings, which were made available to the Court, and copies of which were also made available to the appellants' counsel, it was argued that during the earlier consultation, the Ministry of Finance had given its opinion that the plot of land should be disposed off by open auction to ensure a free and fair transaction. These procedures were not adhered

to while issuing the letter of allotment to the petitioner on 27.06.1995. The earlier licence agreement was adopted and the fee payable by the Appellants to the L&DO were kept at the same despite lapse of time. It was submitted that in spite of the allotment letter of 27.06.1995, no licence deed was drawn up nor was a formal contract entered into between the Government of India and the Appellants.

23. It was pointed out from the counter-affidavit, that in the course of the review of the case, the Union Urban Development Secretary was of opinion that the transaction would result in heavy financial losses. Besides, the Union Government would in effect have entered into a commercial deal with a private party, without following the normal procedure of competitive bidding and without consulting the Ministry of Law on the terms and conditions of such a contract. In the course of re-examination of the allotment, the case was referred to the Prime Minister's Office, which, in turn, advised that the opinion of the Attorney General be sought. The opinion of the Attorney General was received on 21.05.2000. But, before a final decision could be taken by the Central Government on the basis of the advice, the appellants had already filed the earlier writ petition and an order was made restraining the Government of India from dispossessing the appellants from the plot. This Court had directed the Government to take a final decision in the matter within six weeks. The Central Government reviewed the matter in the light of the Attorney General's opinion and had decided to cancel the allotment letter. This resulted in the impugned cancellation letter of 11.04.2005. The ASG relied on the decisions reported as **Godavari Shamrao Parulkar v State of Maharastra & Ors.** AIR 1964 SC 1128; **State of Uttar Pradesh v Om Prakash Gupta** AIR 1970 SC 679 and **Narmada Bachao Andolan v State of Madhya Pradesh** 2011 (12) SCR 84 and contended that the Rules of Business framed under the Constitution have to be adhered to for a decision to be considered as binding and enforceable upon the Government. It is not all decisions and determinations that are communicated to third parties, but only those which can be validly supported as binding decisions, that are enforceable. In the present case, the allotment made on 27.06.1995 could not be supported as communication of a valid decision, despite some of the later notings of various Central Government functionaries. The highest authorised decision makers, upon being made aware of the irregularities apparent, decided not go to ahead with the allotment, and later these culminated in the cancellation order of

2005 impugned in the writ petition. In these circumstances, argued the ASG, the impugned judgment and order did not require any interference.

24. On the first question of the cancellation of the allotment to the DTTDC based on a violation of the terms of the allotment through a sub-license, the Appellant argues that the agreement between itself and the DTTDC was only a sub-lease for the purposes of construction of the hotel under Clause 8 of the allotment letter and not a license contrary to the terms of allotment. This question, however, need not be decided by this Court as the Appellant's subsequent representations to the Government to allot the land afresh to it – with which these present proceedings are concerned – and silence on the illegality of that action for a period of almost 15 years forecloses its ability to agitate that question currently. Nevertheless, since considerable arguments were made on this aspect, the Court deems it appropriate to record its opinion on the issue.

25. The kingpin of the appellant's submission on this score is that the Central Government was privy to – as well as a party to – the entire decision making process which led to the previous allotment of 1992, because the advertisement issued in the public domain, inviting bids for running a hotel on the plot, *was that of DTTDC as well as the Central Government*. The only reason for this is the statement in the advertisement that it was issued by the "Delhi Tourism and Transportation Development Corporation, Government of India". Apart from this assertion, there is no support for the allegation that the Central Government was ever involved in the processing of the bids, or that it had at any stage approved the license arrangement between DTTDC and the appellants. The license deed of 24.07.1992 similarly did not involve the Central Government, or recite its approval to the arrangement. Rather, the two parties to the agreement were the DTTDC and the East India Hotels Ltd. No other party signed the document. The schedule to the document proposed the licensing fee – an arrangement which indicated that the property was given out on license for 33 years for a total fee of Rs. 720.50 crores. It was in these circumstances that the Central Government issued the cancellation letter dated 01.02.1993. That letter cited two reasons: non-payment of license fee by the DTTDC and its violation of the lease terms, since it entered into the license arrangement for 33 years, without Central Government approval. The Central Government went on to record that the action of DTTDC was unsupportable because it had been given the land *at highly concessional rates for constructing a budget hotel*, a

condition which stood violated by the terms of the license deed of 24th July, 1992. This Court fails to see how this cancellation can be termed either as unfair or arbitrary. The mere recital or nomenclature of an arrangement as a license is never determinative of its true nature. What has to be seen is the intent of the parties, emerging from an overall consideration. The grant of land for 33 years, with permission to put up constructions and at license fees decided without reference to the owner of the land, amount to creation of long term arrangements which can even be termed irrevocable. That is the reason why the Central Government cancelled the allotment to DTTDC. The appellant – by its own concession a mere license – could not possibly object to this action; it did not question the Central Government's action. In the circumstances, this court holds that it is too late in the day for the appellants to say that the cancellation of the DTTDC's allotment in 1993 was not legal. Crucially, the validity of that cancellation is independent of the present cancellation, the reasons for both being separate and distinct, and indeed, the cancellation of the first allotment being a necessary factual requisite for the present allotment to have been given. This Court, therefore, holds the appellants' arguments on this aspect to be insubstantial and meritless.

26. The second and third questions are whether the cancellation was justified in this case. The relevant question here – though the distinction may appear slight – is not whether the original allotment letter (of 27.06.1995) was arbitrary, but whether the cancellation made on 11.04.2005 is arbitrary. The Appellants contended that the Learned Single Judge erred in holding that the Central Government was entitled to cancel the allotment based on the reason that the earlier allotment suffered from procedural irregularities and the absence of a competitive bidding process. It is contended that after the cancellation of the land allotment to DTTDC, fresh representations were made by the Appellant to the Ministry of Urban Affairs, and the decision to allot the land to the Appellants was made only after a detailed consideration of this request, as displayed by the counter-affidavit of Shri L.D. Ganotra, Engineering Official, in the first W.P.(C) 3016/2000:

> "The matter was discussed in a number of meetings in the various departments and finally on 19th October 1993 in a meeting presided by the Secretary, Union Ministry of Urban Development (in the meeting representatives of DTTDC were present), a decision was taken to allot the land to the Appellant. The minutes

> suggest that the decision was that the land would be allotted on the terms and conditions as those contained in the Agreement for License Agreement executed between the DTTDC and the Petitioner."

27. Furthermore, on 7th June, 1995, the Government directed the Land and Development Officer in the following terms, indicating that the matter had indeed been considered in detail and the concurrence of the Finance Ministry had been taken:

> "In compliance of the above, the modified allotment letter should be issued by Land and Development Office and shown to Ministry before issue. In the process, if necessitated modified agreement with East India Hotels Ltd/CIF can even be executed.
>
> This (sic) issues with the concurrence of Finance Division vide their U.O. No. 757-F dated 6.6.1995.".

The Appellants rely on various communications within the Government between July 17, 1995 and June 11, 1996 considering the grant of the allotment letter to demonstrate that the decision was indeed taken after due consideration, concluding the following observation from the Government to the Land and Development Officer on July 1, 1996:

> "XXXXXX XXXXXX XXXXXX
>
> In continuation of this Ministry's letter of even number dated 7.6.95, this is to inform you that you may go ahead with the execution of the license agreement after suitably modifying the license agreement earlier executed between the DTDC and East India Hotels Ltd".

28. On the aspect of propriety of allotment without an action or competitive bidding process, it is clear that an auction or competitive bidding process is not necessary in all circumstances. In **Shri Sachidanand Pandey and Another v. The State of West Bengal,** AIR 1987 SC 1109, the Supreme Court noted that:

> "40. On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established. State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration.

> One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination....."

29. In that case, an arm's length negotiation between the Central Government and Taj Hotels was considered to be sufficient, and the Court did not insist upon an auction or a competitive bidding process to ensure conformity with Article 14. In the present case, the question before the Court is not whether the mere fact of the absence of a bidding process rendered the allotment arbitrary and thus subject to cancellation by the Court, but whether the absence of such a process entitled the Government itself to cancel its allotment based on the principle of public interest that is paramount in such decisions, and importantly, subject to the evaluation of the Union executive, which owns the property.

30. In this background, the Court must examine the discussions that precede the cancellation in the present case. Here, to note broadly, the file notings demonstrate that subsequent to the allotment to the Appellants, several dissident voices appeared within the Ministry's discussions: the Secretary (Urban Development), who felt that the transaction would result in heavy financial losses [Para 7 noting in Lands Division; Counter-Affidavit, pg. 206, para 7], and the Attorney General (whose opinion was requested by the Prime Minister's Office) on 21.05.2000. Indeed, the Principal Secretary to the Prime Minister recorded on 30.10.1998 – after the allotment of land – that the matter was

> "XXXXXX XXXXXX XXXXXX
>
> Discussed with PM. He is of the opinion that as a matter of abundant caution, Minister (UAE)'s decision may be referred to the Attorney General of India before it is implemented" (emphasis supplied).

Subsequently, the Urban Development Minister noted on 08.10.1999 that no competitive bids were issued and thus, Rs. 720.50 crores will accrue from Appellants as opposed to at least Rs. 1802 crores which could be

reasonably expected. The Minister also noted, significantly that the concurrence of the Finance Ministry had never been elicited, or obtained.

31. In this case, it is clear that the sub-license between the Appellant and the DTTDC of 24.07.1992 traced its existence to the license granted to DTTDC on 18.06.1983. Thus, once the latter was cancelled due to a violation of its terms, the former's existence was also vitiated. Subsequently, the Ministry of Urban Affairs, Government of India revived the arrangement in substance through the allotment of 27.06.1995 by substituting itself for the DTTDC and allotting land to the Appellants directly. Crucially, this allotment was not subject to any global tender. Indeed, the decision to cancel the allotment was based on the fact that it was made without a competitive bidding process in respect of this allotment. The reasoning of the Single Judge relies in the fact that after the cancellation of the license agreement between the DTTDC and Appellant, the global tender and its results stood vitiated ipso facto, thus unavailable to be the basis for any subsequent allotment. In this case, the decision to cancel the allotment was based on a subsequent assessment of the facts by various authorities, and not based on irrelevant considerations, as the file notings above clearly demonstrate, concluding that the absence of a competitive bidding process qua the second allotment mandated cancellation. The question, thus, is not whether the Government must have had a competitive bidding process when it allotted the land to the Appellant (as was the dispute in Kasturi Lal and Shri Sachidanand Pandey), but whether, it is open for the Government to have such a process now, and thus, cancel the allotment on that basis. Indeed, the validity of a competitive bidding process is beyond question and thus, the decision to cancel the allotment letter cannot be characterized as arbitrary. As to the Appellant's contention that the Government may not back-track on its decision based on procedural irregularities in its own functioning, the Appellants rely on various decisions of the Supreme Court (**Sunil Pannalal Banthia and Ors. v. City and Industrial Development Corporation of Maharashtra Ltd. and Anr.,** AIR 2007 SC 1529; **Collector of Bombay v. Municipal Corporation of The City of Bombay and Ors.,** AIR 1951 SC 469, and **Bejgam Veeranna Venkata Narasimloo and Ors. v. State of A.P. and Ors.,** 1998 (1) SCC 563 to argue that the cancellation letter was arbitrary and that Government may not rely on its own irregularities to defeat the rights of citizens. However, these decisions do not support such a blanket and broad legal principle. Not only has the

Supreme Court recognized in **Vishal Properties Pvt. Ltd. v. State of U.P. and Ors.,** 2007 (11) SCC 172 that *"we are not bound to direct any authority to repeat the wrong action done by it earlier"*, repeating a similar ratio in **Hira Tikkoo v. Union Territory, Chandigarh and Ors.,** 2004 (6) SCC 765 that:

> "19..... When a scheme of development of land and the allotments made thereunder are found to be in contravention of any law and contrary to general public interest, no claim based on so-called vested right can be countenanced....."

In Sunil Pannalal, the Court negated the argument that the decision of the City and Industrial Development Corporation of Maharashtra to allot land cannot be backtracked based on an assessment on facts that its original decision was not opposed to public policy on facts; in *Collector of Bombay*, the decision revolved around the limited question of the effects of a Government resolution within the meaning of Section 8 of the Bombay Act II of 1876; in Bejgam Veeranna, the Government's argument was that it was entitled to recoveries of excess payment to rice farmers based on a notification that it claimed was not notified was rejected. This, however, was because the Government itself collected rice compulsorily from the farmers based on that memorandum and thus could not claim that it had no legal effect. The question of whether sufficient reasons existed, as in this case, to revoke an earlier decision was never considered.

32. Traversing the discussions in this case between and within the relevant ministries, a clear picture emerges as to why the allotment was cancelled. To begin with, the official notings from the file of the Central Government no doubt show that on 11.06.1996, a view was expressed that having regard to the previous conspectus of circumstances, the request made by the appellants to allot the land directly, since it had participated in the previous auction of 1992 and was the highest bidder, was accepted. It was in these circumstances that it was issued. A similar note of the concerned Director (in the Ministry of Urban Development), i.e. Sh. B.R. Dhiman, who also made the note of 11.06.1996, was reiterated on 31.07.1996. When the official decision had to be taken, the Minister of State, UA&E on 31.07.1996 was of the view that a comprehensive note had to be prepared. The subsequent observations of the Joint Secretary (Urban Development) wondered why direct allotment

was proposed instead of an auction of the land, which was the normal method adopted by the Ministry on 23.09.1996. In these circumstances, a detailed note was prepared on 22.01.1998 by the Director (UD), Central Government. This noticed that before the allotment order was issued, the file was marked to the Finance Division of the Urban Development Ministry and that the Director was clearly of the opinion that:

> "legal opinion be taken in this case before any order is issued. However, JS (F) ruled that since the Minister has agreed to allocate the land to EIH on the same terms & conditions, the draft order may be agreed to. It is extremely important to note at this stage that the clear-cut instructions of the Government that before taking any official decision in favour of a private party in such a case, each case should be shown to the Ministry of Finance, were neither mentioned nor taken note of, even though these instructions were issued on 11.11.94 by the Lands Division ...".

The note went on to state that the appellants had sought for execution of lease and the matter was sent to the Legal Advisor who, in his opinion of 08.09.1996 expressed doubts and returned the file. It was highlighted more than once in this note that the absence of consultation with the Finance Ministry rendered the whole decision dubious.

33. In these circumstances, the Minister of UA&E, on 16.10.1998 noted that it was stated that since the appellant was in possession of land and had paid Rs. 4.61 crores, it would be illegal to avoid the contract. This note of 16.10.1998 appears to have received the concurrence of the Principal Secretary to the Prime Minister on 30.10.1998. It was in these circumstances that the Attorney General's opinion was sought. In the meanwhile, the Union Minister of UA&E, in another note of 08.10.1999, reviewed the entire matter and noticed that the allotment to the appellant after cancellation of DTTDC's allotment was not preceded by competent bids as required by the official rules and that the Ministry of Finance and Law Ministry were consulted.

34. The Minister noted that "[c]learly, there is a huge financial loss. If competitive bids had been invited by the Ministry, the amount of premium and ground rent would have been much higher. Even calculations made, on conservative assumptions, at the portion marked 'X' on page 335/N, show that Rs. 1802 crores would have accrued as against Rs.

720.50 crores which East India Hotels would pay under the present arrangements, in thirty-three years as license fee".

35. The Minister went on to state that his views could also be referred to the Attorney General. The Attorney General's written opinion of 17.05.2000 discussed the various nuances of the matter and stated that the decision of 27.06.1995 was questionable and was arrived at by following a procedure not sanctioned by the Business Rules. He also expressed the opinion that the said allotment should be cancelled. All these materials appear to have been taken into account by the Central Government which decided not to go ahead with the license arrangement and also later decided to issue the impugned letter of 2005.

36. As noticed previously, the decision impugned in this case is not the allotment of land itself but the Central Government's later opinion that the public interest would not lie in going ahead with the transaction. During the hearing, the petitioner's counsel had attempted to state that the decision of the Central Government was not only illegal but that it was based on fundamentally erroneous propositions and sought to rely upon calculations about the return of investments in such circumstances. In this Court's opinion, delving into that aspect would not be appropriate. What is at issue here is fundamentally whether the Central Government's communication of 27.06.1995, alienating the plot to the appellants resulted in an enforceable right. The Central Government heavily relies upon the Government of India (Transaction of Business Rules), 1961 as amended upto 1982 framed under Article 77 (3) of the Constitution of India. Rule 4 (which, deals with the inter-departmental communications), provides by sub-rule 2 that:

> (2) Unless the case is fully covered by powers to sanction expenditure or to appropriate or reappropriate funds, conferred by any general or special orders made by the Ministry of Finance, no department shall, without the previous concurrence of the Ministry of Finance, issue any orders which may
>
> (a) involve any abandonment of revenue or involve any expenditure for which no provision has been made in the appropriation act;
>
> (b) involve any grant of land or assignment of revenue or concession, grant, lease or license of mineral or forest rights or

> a right to water power or any easement or privilege in respect of such concession.
>
> (c) relate to the number or grade of posts, or to the strength of a service, or to the pay or allowances of Government servants or to any other conditions of their service having financial implications; or
>
> (d) otherwise have a financial bearing whether involving expenditure or not."

37. In the present case, the entire relevant records were shown to the Court. The only approval of the Minister on the record – the note of 06.03.1996 expressly stated that the concurrence was given for cancellation of allotment made earlier to DTTDC as it had defaulted on the terms and conditions of the lease agreement. However, there is no note or approval of the Finance Minister or the competent authority empowered to decide or approve the allotment of the plot, in the Finance Ministry. It was thus a glaring omission which compelled various officials in the Urban Affairs Ministry at middle and senior levels, the Minister of State and eventually the Union Cabinet Minister in 1999 to state that the allotment could not be sustained.

38. As observed earlier, there can be no quarrel with the proposition that allocation of natural and public resources need not invariably be preceded by public auction. As long as the Court is satisfied that the method adopted by the State – even for allowing or disposing of the land or other valuable asset, is through a transparent and fair method, the public agency or the state's exercise of discretion would not be interfered with. In this case, however, what is in issue is not grant of land; it is the decision of the Government not to proceed ahead with its previous opinion, embodied in the allotment letter of 27.06.1995. The Central Government relies upon the Government of India (Transaction of Business) Rules, 1961 as well as some judgments of the Supreme Court. The judgments relied upon by the Central Government – **Smt. Godavari Shamrao Parulekar** (supra); **State of Uttar Pradesh v. Om Prakash Gupta** (supra) and **Narmada Bachao Andolan** (supra) have held that the provisions in the Government of India (Transaction of Business) Rules should be complied with. In **Narmada Bachao Andolan** (supra), the Court relied upon later rulings, i.e. **MRF Limited v. Manohar Parrikar & Ors.** 2010 (11) SCC 374 to hold that substantial compliance with the

rules can validate the action. In the present case, however, the Transaction of Business Rules, which unequivocally mandate prior consultation with the Finance Ministry before land is dealt with, were not observed. There is nothing on record to show that the file was ever referred to the Finance Ministry; rather, only Director level officials in the Ministry of Urban Affairs expressed their concurrence with the view that direct allotment could be made to the appellant after the previous arrangement with DTTDC was cancelled.

39. In these circumstances, the argument of the appellant at both levels that the decision, i.e. allotment of 27.06.1995 was legal and enforceable and also that in any event it was the highest bidder in 1992, leading to the allotment by DTTDC, cannot prevail. The Central Government's has unquestionable power to review its own decisions. The decision communicated to the appellant through the allotment letter was not complete or sustainable for the reasons that it was not concurred with the Finance Ministry. The Central Government, therefore, acted within its rights to say that it would not proceed ahead and enter into the lease arrangement which the appellant wanted. The power of administrative review is inherent with the executive agency and can be exercised having regard to the peculiar exigencies and circumstances. In this case, concededly, the Central Government was not exercising its statutory power while making the allotment. It was dealing with its own property held for and on behalf of the general public under the Constitution. Its decision not to go ahead and enter into a lease deed, therefore, was in exercise of such inherent administrative power and is, therefore, supportable in law, taken to correct a flawed decision (ref. **R. R. Verma and Ors. v. Union of India (UOI) and Ors.,** 1980 (3) SCC 402 and **State of U.P. v. Maharaja Dharmander Prasad Singh,** (1989) 2 SCC 505). In R.R. Verma, the Court held that:

> "5. .....Surely, any Government must be free to alter policy or its decision in administrative matters. If they are to carry on their daily administration they cannot be hidebound by the rules and restrictions of judicial procedure though of course they are bound to obey all statutory requirements and also observe the principles of natural justice where rights of parties may be affected....."

In another decision, i.e **M. Satyanandam v. Deputy Secretary to Govt.**

of A.P. and Anr., (1987) 3 SCC 574, it was observed that *"In the facts of this case as noted by the High Court, we are unable to entertain these contentions. We are unable to accept the contention that the Government cannot review its own order."*

40. As far as the argument with respect to the appellants being the highest bidders in the bidding process conducted by the DTTDC in 1992 is concerned, as discussed earlier, that process ended with the cancellation of allotment to DTTDC. The Central Government's objection to that process precisely was that a long time arrangement was sought to be entered into without its involvement, approval or concurrence. Once that allotment – to the DTTDC – became final, one of the steps leading upto the cancellation, i.e. the bidding process, cannot, in the opinion of this Court, be assaulted to uphold the appellant's contention. In other words, the entire decision of the DTTDC to allot the plot to the appellant, being a case for cancellation of the DTTDC's own allotment, the appellant cannot be permitted to rely upon the fact that it was the highest bidder in such process. The fact remains that the allotment made directly to the appellant on 27.06.1995 was not preceded by any fair or transparent procedure inviting or involving other interested bidders – either through open tender bidding or by calling eligible parties for negotiations. Had such a process been resorted to, the appellant could have been justified in stating that the decision of the Central Government to review such allotment could not be allowed to stand on account of estoppel or other compelling principles.

41. The Appellants have also argued that under Section 199 of the Contract Act, the Central Government has by way of a subsequent decision to allot the plot in favour of the Appellant directly ratified the action of the DTTDC. While the effect of ratification is indeed what the Appellants claim to be – that of relating back to the date of the original contract (**Central National Bank Ltd. v. United Industrial Bank Ltd.,** AIR 1954 SC 181), in this case, the allotment to the Appellants was distinct, in the legal form, from the sub-license granted by the DTTDC – thus rendering this argument incorrect. In a case of ratification, the original action which is sought to be ratified comes into existence once again, whereas in this case, a fresh offer was made by the Government on 27.06.1995. Indeed, the admitted position of the Appellants is that the license agreement (the contractual agreement that may act as ratification) has not yet been concluded by the Land and Development Officer although,

it is alleged, that the Government had mandated the Officer do so. In such a case, the argument that ratification fails as there is neither an express nor an implied ratification of the previous act "as its (the Government's) own", where in fact, the letter of cancellation of the allotment to DTTDC qualifies as a "clear repudiation" (**Kadiresan Chettiar v. Ramanathan Chetti and Another,** AIR 1927 Mad 478, para 23)

42. This brings us to the fourth question of any right vested created in the Appellants in equity, i.e. through the doctrines of promissory estoppel and legitimate expectation, which could injunct the Government. The Appellants note that over the passage of 13 years, equities had been created in its favour, as also the fact that the representation made by the Land and Development Officer through the letter of allotment on 27th June, 1995, precludes the Government from back-tracking on that promise or assurance: "Accordingly, I am directed to convey the sanction of the President to the construction and commissioning of the Hotel by the East India Hotel Ltd.,/Centurion Hotels Ltd. on the aforesaid plot of land subject to compliance of the terms and conditions as enumerated in the license agreement dated 24.07.92 (copy enclosed) on usual terms and conditions which shall, inter alia, includes (sic) the following ..." For this, the Single Judge has rightly noted that the doctrine cannot create an expectation as against a public authority acting in public interest. The Supreme Court noted in **Hira Tikoo v. Union Territory, Chandigarh,** (2004) 6 SCC 765 that:

> "22. In public law in certain situations, relief to the parties aggrieved by action or promises of public authorities can be granted on the doctrine of legitimate expectation but when grant of such relief is likely to harm larger public interest, the doctrine cannot be allowed to be pressed into service....."

In this case, the larger public interest would no doubt be served through a fresh competitive bidding process today which will lead to greater accrual of revenue, as the Secretary, Urban Ministry has also alluded to.

43. Crucially, once the Central Government itself formed the opinion that disposal of its property by the allotment letter dated 27.06.1995 was not preceded by any fair or transparent procedure – which in the opinion of the Court is not a faulted conclusion – the argument of estoppel cannot prevail or apply. Estoppel as has been reiterated time and again is an equitable principle which would yield to substantive provisions. The

State cannot, consistent with its mandate to follow the non-discriminatory principle underlying Article 14, be bound down by what essentially was an unsupportable bargain shrouded in secrecy as the allotment of 27.06.1995 unquestionably was. To direct the Central Government in the facts and circumstances to follow up the allotment letter dated 27.06.1995 by application of the principle of promissory estoppel would be, in the opinion of the Court, contrary to its obligations under the Constitution to dispose of public property through fair and transparent process.

44. Furthermore, the doctrines of promissory estoppel and legitimate expectations – doctrines of equity – translate into a specific performance of the promise made. Indeed, such remedies of specific performance – even, for example, under the Specific Relief Act, though it is not applicable here – are available when "injustice can be avoided only by enforcement of the promise"(**M/s. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.,** AIR 1979 SC 621). As observed in **Att. Gen. For New South Wales v. Quin** 1990 (64) Aus LJ.Rep 327 the doctrine of legitimate expectations ought not to "unlock the gate which shuts the court out of review on the merits," and that the Courts should not trespass "into the forbidden field of the merits." Thus, the argument of the cancellation (of allotment dated 27.06.1995) contravening the legitimate expectations of the appellant and the resultant arbitrariness is of no avail. In this case, the Single Judge has ordered a return of the investment made by the Appellant in the property by way of payment to the Government. Indeed, neither has the Appellant has referred in its pleadings to any independent damage that cannot be compensated but for the specific remedy it requests.

45. Finally, it is important to note that the present proceedings involve the writ jurisdiction of this Court, and are not an alternative to the ordinary jurisdiction of civil courts. Indeed, if the Appellants believe that a contractual or quasi-contractual right exists between them and the Government, or if any right under common law or equity is violated, in such opinion, the proper forum for such a dispute would be the civil courts, with the proceedings in the writ courts limited to a question of arbitrariness on the part of the State or public agency's action. In this case, it is disputed between the parties whether a contract actually existed between them, in that the Land and Development Officer did not, in fact, conclude the license agreement on the terms of the DTTDC agreement as was the order of the Government through its letter dated 7th June,

1995. The question whether a contract was formed between the parties under the Indian Contract Act, and if a breach occurred as to justify either damages or specific performance, would engage the writ court in a matter properly reserved for the civil courts. A contrary conclusion would mean that any matter involving the State, a sovereign, in a plausible contractual relationship with a private entity would engage this Court's writ jurisdiction – a proposition contrary to well-settled law.

46. Accordingly, for the reasons set out above, this Court finds no reason to interfere with the judgment of the learned Single Judge; the appeal is dismissed with no order as to costs.

ILR (2014) I DELHI 539
WP (C)

ASSOCIATION FOR DEVELOPMENT AND ANR. ….PETITIONER

VERSUS

UNION OF INDIA AND ORS. …. RESPONDENTS

(S. RAVINDRA BHAT & NAJMI WAZIRI, JJ.)

WP (C) NO. : 10.55/2011 DATE OF DECISION: 07.11.2013

Constitution of India, 1950—Article 226—Commission for Protection of Child Rights Act, 2005—Section 3—petitioners challenged appointment of second and third respondent as members of National Commission for Protection of child Right—plea taken, selection procedure was not transparent or fair but was arbitrary—Those with qualifications and experience better than private respondents were kept out of consideration—UOI never adopted any fair method of inviting application—per contra plea taken, court should not substitute its opinion for that of UOI which

took into consideration all relevant materials objectively, fairly and in a bona fide manner while selecting private respondents as members of NCPCR—In absence of clear violation of statutory provisions and regulations laying down procedure for appointment, High Court has no jurisdiction even to issue a writ of quo warranto—Court should be circumspect in conducting a "merit" review which would result in court substituting its opinion for wisdom of statutory designated authority i.e. central government—Held—This court is to be guided by decision passed in earlier writ petition filed by petitioners and confine its enquiry as to whether appointments challenged are contrary to statute insofar as private respondents do not possess any qualification or do not fulfill any eligibility condition; procedurally illegal or irregular; not in bona fide exercise of power—Previous litigation was initiated at behest of first petitioner association and there being no dispute that second petitioner is association concerned and involved with child right issues with field experience for 13 years, court is of opinion that present petition is maintaintable as a public interest litigation—Mere circumstance that president of first petitioner was a candidate who had applied for appointment, would not bar scrutiny by court, especially in view of fact that second petitioner is a party to present proceeding—UOI did not publicly make known vacancy position in Commission—use of terms like "ability" "standing" "experience" and "eminence" highlights parliamentary intention that those of proven merit and track record, and singularly distinguished only should be chosen to man NCPCR—This court refrains from rendering any adverse finding with respect to Mr. Tikoo's candidature for reason that though materials regarding his ability, standing and eminence are scanty, there is something to indicate his eligibility vis-à-vis qualification—selection process

nowhere discusses, even in the barest minimum manner, strengths and weaknesses of short listed candidates, particularly where more than one applicant is listed under same head—What ultimately persuaded Committee to drop certain names, and accept names of those finally appointed, does not appear from record made available to court—Not is there any light shed in affidavit filed by UOI to indicate of relative qualification and experience of at least short listed candidates was considered, and whether some kind of ranking, marking or evaluating system was adopted—Having short listed many candidates, some whom were retained, there are complete lack of reasons for dropping names of other—Insistence for reasons is not to probe merits of decision to drop candidate's names, but as to what really struck Committee at stage and persuaded them to drop their candidature- Court is wary of commenting on choice of Committee selecting third respondent- At least he possesses educational qualifications, relevant to field (sociology and social work) and has placed on record some certificate in this regard—But in case of Dr. Dube, conspicuous inconsistencies in respect of his claim regarding educational qualifications were glossed over; his CV does not pin point specifically any relevant experience in relevant discipline or field- his final selection and appointment can be justified due to "absence of intellectual objectivity"- selection and appointment of second respondent being contrary to mandate of section 3(2)(b) of Act, is quashed.

Important Issue Involved: (A) In public law proceeding, procedural regularity, compliance with statute, fairness and bona fides (or lack of it) are the only grounds of judicial scrutiny.

(B) Even where the statute is silent, obligation of the executive authority is to take an informed decision.

(C) An individual may not be necessarily debarred from consideration merely because he does not have adequate qualification—though Some minimum qualifications would be necessary; he or she should possess some modicum of experience, ability or distinction in the field as to inspire confidence that the issues in the category or discipline for which he or she is selected, can be ably and efficiently handled.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Sh. Colin Gonsalves, Sr. Advocate with Sh. Tariq Adeeb, Advocate.

FOR THE RESPONDENTS : Mr. Sidharth Luthra, ASG with Mr. Sachin Datta, Sh. Gurmohan Singh Bedi and Sh. Vineet Tayal, Advocates for Respondent No. 1 Ms. Geeta luthra, Sr. Advocate with Mr. Manoj K. Mishra, Advocate for respondent No. 2 Ms. Shobha, Sh. R.N. Mahlawat, Advocates for Respondent No.3.

CASES REFERRED TO:

1. *Rajesh Awasthi* vs. *Nandlal Jaiswal* 2013 (1) SCC 501.
2. *N. Kannadasan* vs. *Ajay Khose* (2009 [7] SCC 1).
3. *Global Energy Ltd.* vs. *Central Electricity Regulatory Commission* AIR 2009 SC 3194.
4. *Dattaraj Nathuji Thaware* vs. *State of Maharashtra & Ors.* [(2005) 1 SCC 590].
5. *Ashok Kumar Pandey* vs. *State of West Bengal* [(2004) 3 SCC 349].
6. *Dr. Duryodhan Sahu & Ors.* vs. *Jitendra Kumar Mishra & Ors.* [(1998) 7 SCC 273].
7. *Dr. Kashinath G. Jalmi and Another* vs. *The Speaker and Others,* (1993) 2 SCC 703.

8. *R.K. Jain* vs. *Union of India & Ors.* [(1993) 4 SCC 119].

9. *Shri Kumar Prasad* vs. *Union of India and Others* [(1992) 2 SCC 428].

10. *Mir Ghulam Hussan & Ors.* vs. *The Union Of India* AIR 1973 SC 1138.

11. *Statesman* vs. *H.R. Deb* AIR 1968 SC 1495.

RESULT: Partly Allowed.

S. RAVINDRA BHAT, J.

1. The petitioners, in these writ proceedings, under Article 226 of the Constitution of India, challenge the appointment of the second and third respondent (hereafter "the private respondents" when referred to collectively, and referred to individually by their names as Dr. Dube and Mr. Tikoo, respectively) as members of the National Commission for Protection of Child Rights (hereafter "NCPCR" or "the Commission") under the Commissions for Protection of Child Rights Act, 2005 (hereafter "the Act") and to that end, quash the notification issued on 22-11-2010.

2. The first petitioner, Association for Development is represented through its President, Raj Mangal Prasad; the second petitioner HAQ Foundation, (hereafter "HAQ") is represented through its Co-Director, Ms. Bharti Ali. The petitioners allege that they wish, by these proceedings, to highlight the arbitrary nature of procedure adopted by the first respondent (the Union Government, hereafter called "UOI") in calling for applications of eligible candidates, and ultimately selecting the private respondents, as members of the Commission. The Petition claims that the Director of the first respondent, Raj Mangal Prasad, in addition to associating himself in public interest in these proceedings, is also seeking to agitate his private right claiming that as candidate who held himself out to the position of member of the NCPCR, his claim and application was wrongly overlooked. Both petitioners however state that:

> "More importantly, however, is the public interest part in as much as the Petitioners are very aggrieved, by the non consideration of several meritorious persons for appointment to the post. The Petitioners would hardly have any grievance if such meritorious persons were selected and they were not. The main concern of the Petitioners is that the practice of appointing persons for collateral reasons must cease and the best in the country should run statutory institutions such as the Commission."

It is further averred that the first petitioner was set up in 1993 with the objective of uplifting the weaker and voiceless sections of society, and that it has, through its endeavours over the years, sought to intervene in different ways to improve the quality of governance in the country. The petition avers that HAQ was registered as a society in 1999 and is an NGO that works towards the recognition, promotion and protection of rights of all children by mainstreaming their concerns into all developmental planning and action, establishing child rights as a core developmental indicator, monitoring state performance and holding state accountable. It is stated that HAQ believes that the State is the primary duty bearer in the realization of the rights of all children. Children's rights must therefore become an integral component of good governance.

3. The petitioners contend that they are deeply concerned that membership of the NCPCR be filled only on the basis of merit, since the Commission is the watch dog of body for implementing children's rights. They further underline the necessity of the UOI adopting a fair and transparent procedure in selection and appointment of members of the Commission, which ought to stand up for fairness, transparency and accountability. The petitioners refer to Section 3 of the Act, and highlight that in its terms, the UOI has to appoint six members, including two women, from among six specified categories or disciplines (education, child health, care, welfare or child development; juvenile justice or care of neglected or marginalized children or children with disabilities; elimination of child labour or children in distress; child psychology or sociology and laws relating to children). It is stated that the members of the NCPCR were first appointed in 2007 for three years their term ended on 10-4-2010. On 18-05-2010 Dr. Sinha was re-appointed as Chairperson of the NCPCR. The petitioners contend that the Act and Rules framed under it are silent about the selection process in respect of members of NCPCR, which has led to concerns about lack of transparency. This was the reason for an earlier proceeding (WP 10296/2009) before this Court under Article 226 of the Constitution of India. In those proceedings, the Court gave necessary orders. The UOI, Ministry of Women and Child Development had to implement those directions to follow a transparent process of selection. As part of this, particulars of members of the

Selection Committee as well as selected candidates together with their particulars had to be put up on the Ministry's website.

4. It is stated further that a selection committee comprising the Minister in charge, the Secretary to the Department of Women and Child Welfare and an independent expert of eminence in the field of child rights was constituted in April 2010; the expert was Ms. Padma Seth. The same month, she resigned, alleging that the Ministry was pressurizing her to select certain candidates against whom cases were pending in the High Court. The Petitioners quote a news report which stated that Ms. Seth, in a letter asked the minister to add special invitees as she felt the committee was too small. They further rely on a letter written by Ms. Seth to the Prime Minister which stated that if the UOI's action was challenged, the Government would be embarrassed. Ms. Seth was replaced by Dr. Shyama Chona; the date of her induction into the committee is unknown to the petitioners. The petition relies on the response of the CPIO of the Ministry to a query posed by Ms. Sonam Gulati of an NGO, Pratinidhi, to the effect that no advertisement was issued by the Ministry to fill up posts of Members. The three member committee, states the petition, short listed five candidates out of a list of 165 names who had responded, according to the facts disclosed in the UOI's website; they were Ms. Sukhanya Bharatram, Dr. Yogesh Dube, Ms. Dipa Dixit, Dr. Dinesh Laroia and Shri Vinod Kumar Tikoo.

The UOI, in compliance with the order in the previous writ petition, put up these names in the website on 01-10-2010 for information. The UOI put up the selected candidates' CVs but no other documents to disclose the public about suitability of the selected candidates.

5. It is alleged that the Committee never interacted with, or interviewed the candidates; nor is there anything to show that it had found evidence to enable assessment of validity of allegations made in the press about Dr. Dube. Reference is made to another proceeding, WP 7200/2010, filed by the petitioners regarding unsuitability of the candidates and the UOI's failure to comply with orders of the Court of 03-02-2010 to implement a transparent process for selection of members. The court had directed the petition to be treated as a representation and an appropriate order to be made by the UOI, reserving liberty to the petitioners to proceed in accordance with law in respect of any order to be made on the representation. The petitioners refer to media-expressed concerns

about the functioning of the NCPCR and its inability to settle any of the 227 cases pending since its inception as on 5-4-2010, as well as adverse criticism about Dr. Dube and Mr. Tikoo that they withheld vital information in the bio data submitted to the Selection Committee. It is submitted that the UOI sought to only technically comply with the previous directions of this court in respect of the selection procedure, violating it completely in the spirit. The Selection Committee, according to the petitioners, took no steps to verify credentials of the private respondents. They also submit that these concerns – articulated to the UOI, in the representations-were brushed aside in the letter of 09-12-2010.

6. The details of the meetings of the committee are mentioned by the petitioners. Reference is made to the meeting of 29-04-2010, when names of 9 candidates were short listed to fill 6 positions, without disclosing any reasons. In the next meeting of 09-07-2010, various candidates' names were dropped, including that of Mr. Gerry Pinto. Others had been included in the short list, which was surprising, because some of the candidates' applications had been received at the time of the initial meeting, such as Mr. Shashank Shekhar. Nothing was disclosed as to why their names were suddenly considered when they had not made it in the short list the first time. The meeting of 29-07-2010 had suddenly decided that representation of SC/ST category was essential; Dr. Paul Divakar (SC) was suddenly included, though his application had been received in before the first short list (which did not contain his name). However, after this meeting his name was not mentioned, or inexplicably, not considered. It is alleged that though between 3 to 5 individuals' names were short listed in the categories of education, health, juvenile justice or care, child labour and child laws, only one person was short listed for the person relating to child psychology or social welfare, i.e. Shri Tikoo, who was totally unqualified. The meetings of 29-04-2010, 09-07-2010 and 27-10-2010 considered 3 individuals for positions relating to Juvenile Justice, i.e. Raghavenddhiraa, J. P. Tiwari and Pradeep Rahunandan. Without any explanation, the committee ignored the short list and selected Ms. Amita Dhanda on 21-09-2010; her name was however excluded by the Ministry on 01-10-2010 when it excluded her name, announcing that her CV was not on its website. The petitioners also highlight the discrepancy about number of the committee's meetings; the response to an RTI query stated that five meetings were held, whereas the website of the Ministry mentioned that four meetings were held. The

claim of UOI that detailed discussions were held between members of the Selection Committee, is sought to be disputed by stating that there is no material to support the assertion. The petitioners state that a large number of individuals who were not even short listed were eminently suited for the post, due to their qualifications, expertise and experience.

7. The petitioners allege that Mr. Dube concealed crucial information about his affiliation to the ruling party. They state that he is a close associate of Sanjay Nirupam, the Congress MP from Mumbai North. The petition also highlights a discrepancy between the said candidates' assertions regarding his qualifications, in the instant selection process and what was declared by him when he stood for elections. He had also claimed to be the President of the Akhil Bharatiya Hindu Muslim Ekta Mahasangh without elaborating whether that body is registered. The petitioners state that several outfits which Mr. Dube claims to have been associated with are found to not be registered. The petitioners further rely on a news report that Mr. Dube ran a beer bar. The credentials of Mr. Tikoo to hold the position too are disputed; the petitioners state that his CV clearly establishes that he was working in a public sector enterprise for 23 years and that he was an intern at the time of pursuing his masters' degree in social work. The petitioners allege that this respondent had worked his entire career in a bank, where the husband of Ms. Krishna Tirath, the Minister of Woman and Child Development was working under him. This, allege the petitioners amount to nepotism and fraud. Mr. Tikoo's claim in the CV that he had done work in the field of child rights is disputed.

8. On the strength of all these allegations, the petitioners state that the selection procedure was not transparent or fair but was arbitrary. Those with qualifications and experience better than the private respondents were kept out of consideration; the UOI never adopted any fair method of inviting applications. The minute keeping in respect of meetings was not proper and no explanation is forthcoming as to why eminently suited and better qualified candidates were never considered. Nor is there any explanation as to why names in the short list of candidates was sought to be altered time and again.

9. It is argued by Mr. Colin Gonzalves learned senior counsel, that the selection procedure adopted for appointing the two members, i.e. M/s Dube and Tikoo was tainted and arbitrary. It is argued that the committee did not call for any names from the general public by adopting a fair

method, such as publication of vacancies to enable suitable candidates to apply. Furthermore, the entire procedure adopted by the Committee reeked of arbitrariness and favoritism. Why only 9 candidates were short listed; what qualities were possessed by them, to render them suited for the post; what made the committee reject the candidatures of 160 other candidates; why names were included and dropped in successive committee meetings, have not emerged from the record.

10. It is submitted that a look at the various minutes of meeting of the committee would reveal that neither the merits of the candidates not the suitability of such candidates to occupy the post having regard to the relative qualifications and experience was ever discussed. Counsel stressed upon the fact that the NCPCR is a specialized body, conceived to address children related issues. Emphasizing that the Act was brought into existence to fulfill India's obligations under the Convention on the Rights of the Child, in 1992, it was argued that Parliament intended the body (NCPCR) to be a meaningful authority, which would study and deal with not only issues, but also best practices and suggest policies to the appropriate authorities, with a view to achieving the obligations of the country under the Convention, and ensure that children are assured their rightful place in the nation.

11. Characterizing the selection process culminating in the appointment of the second and third respondents as one reeking in arbitrariness, it is contended that their appointments can be justified only on the ground of nepotism and political patronage. It was submitted that the impugned appointments have made a mockery of the NCPCR and undermined its prestige and dignity. Responding to the plea of lack of locus standi, (adopted by the UOI and the private respondents) Counsel relied on the decision reported as **State Of Punjab vs Salil Sabhlok & Ors.** (Civil Appeal Nos. 1365-1367/ 2013 decided by Supreme Court).

12. The UOI's position is that the members appointed by it, to the NCPCR were on the basis of recommendations of the Committee set up in accordance with the suggestions of the Court in WP 10296/2009. It is contended that the present petition is bereft of merit and that the petitioners have not disclosed how they possess locus standi to maintain these proceedings. The learned Additional Solicitor General (ASG) contends that the appointment of the two private respondents has neither violated the terms of any statute, nor statutory rules, or any guidelines. The said

two members were selected and recommended for appointment on the basis of extensive deliberations of the Committee and the Court should refrain from conducting an enquiry into the merits of the decision. It was stressed that even in the previous writ petition, the Court consciously refrained from spelling out any guidelines, having regard to the terms of the statute, which vested discretion with the UOI. All that could be properly enquired into in these proceedings, according to the UOI is whether the process was objective, did it eschew irrelevant considerations and if it was bona fide. If there is no material to suggest otherwise - as in the present case - the allegations of public interest petitioners, or even those who unsuccessfully applied for the same position, as in the case of Shri Prasad, are unfounded apprehensions which should not impel the court into upsetting what are clearly legal appointments. Reliance was placed on the decision reported as **High Court of Gujarat v Gujarat Kisan Mazdoor Panchayat** 2003 (4) SCC 71 for the proposition that quo warranto proceedings cannot be a weapon to control the executive from making public appointments. He also relied on **Rajesh Awasthi v Nand Lal Jaiswal** 2013 (1) SCC 501 to say that the court is concerned only with eligibility and legality of appointments to public offices, not suitability of individual candidates, in proceedings under Article 226 of the Constitution of India.

13. It was argued – on the basis of the counter affidavit filed in these proceedings that the Selection Committee first met on 06-04-2010 under the chairmanship of the Minister for Woman and Child Development. It included the Secretary of the Ministry and Dr. Padma Seth as an expert. The UOI denies allegations that any pressure was applied on anyone for the selection of any candidate and submits that Dr. Seth expressed her inability to attend the meeting because her sister was ill and in ICU. She further stated, in her letter dated 21-04-2010 that selecting candidates was a challenging task which could not be undertaken by her; as a result she requested that she be relieved from the duties as a member and someone else be appointed instead. Therefore, Dr. Shyama Chona was appointed as member of the Committee. The UOI denies the accuracy of the news report dated 19-05-2010; it also denies having received any letter from Dr. Seth asking special invitees to be asked to join the deliberations of the Selection Committee. It was argued that every effort was made by the UOI to ensure that the provisions of the Act were not violated; the Selection Committee tasked to make recommendations for

the position of members functioned effectively and without interference. In the circumstances, submits the learned ASG, the Court should not substitute its opinion for that of the UOI, which took into consideration all relevant materials objectively, fairly and in a bona fide manner, while selecting the private respondents as members of NCPCR and notifying their appointments on 22-11-2010.

14. Ms. Shobha, learned counsel, argued on behalf of Mr. Tikoo and contended that the present litigation is not maintainable. She relied on the rulings of the Supreme Court, reported as **State of Uttranchal Vs. Balwant Singh Chaufal & Ors.,** (2010) 3 SCC 402, to say that the so-called private interest of Mr. Prasad is the real motive behind this litigation. It was stressed that the petitioners cannot be said to have any bona fide interest in the appointment of members of the NCPCR because at best they could have – if at all sought a writ of quo warranto. However, the pleadings in the writ petition go beyond such relief, and invite the court to make an in-depth inquiry into the merits of the appointments, which is clearly beyond the permissible limits of jurisdiction under Article 226 of the Constitution of India.

15. Learned counsel placed reliance on the judgment of the Supreme Court, reported as **Centre for Public Interest Litigation and Anr v. Union of India & Anr.** [(2011) 4 SCC 1. It was argued that in the absence of clear violation of statutory provisions and regulations laying down the procedure for appointment, the High Court has no jurisdiction even to issue a writ of quo warranto. Learned counsel submitted that even this Court, in the previous writ petition (WP 10296/2009) consciously avoided framing guidelines in respect of how the selection committee ought to function, what kind of experts should man it and the nature of qualifications that members of NCPCR should possess and the extent of powers that the UOI has. It was argued that in fact, the Court stated that since the Act was silent on many aspects – apart from mentioning the disciplines which the members were to be drawn from - in these circumstances, it would be perilous for the court to conduct an indepth merit analysis of the merits of the candidates and conclude that the private respondents were somehow less deserving than others. It was also contended that in fact, the dispute sought to be raised is a service matter which cannot be entertained in public interest litigation. In this context, she relied on decisions reported as **R.K. Jain v. Union of India**

& Ors. [(1993) 4 SCC 119], **Dr. Duryodhan Sahu & Ors. v. Jitendra Kumar Mishra & Ors.** [(1998) 7 SCC 273] **Dattaraj Nathuji Thaware v. State of Maharashtra & Ors.** [(2005) 1 SCC 590], and **Ashok Kumar Pandey v. State of West Bengal** [(2004) 3 SCC 349].

16. It was submitted that the allegations levelled against Mr. Tikoo's being an officer superior to Ms. Tirath's husband, in the State Bank, constituting the primary reason for his appointment as NCPCR is false. It was highlighted that factually, the Minister's husband worked in the same branch as Shri Tikoo only for a year. Mr. Tikoo had voluntarily retired from the service of the bank over a decade ago. Counsel emphasized that he held a Master's degree in social work, and had several years' field experience to his credit. It was submitted that before his selection and appointment, the UOI had conducted verification of all candidates' credentials and claims. Counsel also submitted that the President of the first petitioner, Shri Prasad, and Mr. Tikoo studied from the same institution, i.e. the Delhi University and that Mr. Tikoo had secured better marks and position in that course. He also had wide experience in the field of child development, having conducted several programmes successfully for various organizations. His credentials to hold the post could not therefore be questioned.

17. Dr. Dube's objections to the maintainability of the petition, and limited jurisdiction of the Court, were on the same lines as those alleged on behalf of Shri Tikoo. It was argued in addition on his behalf, by Ms. Geeta Luthra, learned senior counsel that the allegations about his owning a beer bar are baseless. She argued that mere political affiliation with the ruling party could not be a ground for disqualifying a candidate from consideration. It was argued that Dr. Dube's credentials and eligibility for appointment as member should not be gone into. The UOI had verified the claims made in his curriculum vitae and his application was considered to be valid, and recommended not by one member, or officer, but a three member committee, set up in accordance with this Court's directions in the previous writ petition. Under these circumstances, the Court should be circumspect in conducting a "merit" review which would result in the court substituting its opinion for the wisdom of the statutory designated authority, i.e. the Central Government. She argued that as a consequence, the court should dismiss the petition. It was argued that no fault can be found with the selection procedure, since the statute is silent and the mechanism adopted was fair and reasonable.

Analysis and Findings

18. The NCPCR was established in March 2007 under the Act. Its object is to ensure that laws, policies, and mechanisms are in tune with the child rights perspective as envisioned in the Constitution of India as well as the UN Convention on the Rights of the Child. The Commission outlines its vision (in its website http://ncpcr.gov.in/) as follows:

> "The Commission visualises a rights-based perspective flowing into National Policies and Programmes, along with nuanced responses at the State, District and Block levels, taking care of specificities and strengths of each region. In order to touch every child, it seeks a deeper penetration to communities and households and expects that the ground experiences inform the support the field receives from all the authorities at the higher level. Thus the Commission sees an indispensable role for the State, sound institution-building processes, respect for decentralization at the level of the local bodies at the community level and larger societal concern for children and their well-being."

Section 3 of the Act outlines the composition of the Commission; to the extent it is relevant, that provision is extracted below:

> 3. (I) The Central Government shall, by notification, constituted a body to be known as the National Commission for Protection of Child Rights to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.
>
> (2) The Commission shall consist of the following Members, namely;
>
> (a) a Chairperson who is a person of eminence and has done outstanding work for promoting the welfare of children; and
>
> (b) six Members, out of which at least two shall be women, from the following fields, to be appointed by the Central Government from amongst persons of eminence, ability, integrity, standing and experience in,
>
> (i) education;
>
> (ii) child health, care, welfare or child development;

(iii) juvenile justice or care of neglected or marginalized children or children with disabilities;

(iv) elimination of child labour or children in distress;

(v) child psychology or sociology; and

(vi) laws relating to children."

Section 4, which is somewhat relevant, provides as follows:

"4. The Central Government shall, by notification, appoint the Chairperson and other Members:

Provided that the Chairperson shall be appointed on the recommendation of a three member Selection Committee constituted by the Central Government under the Chairmanship of the Minister in-charge of the Ministry of Human Resource Development."

19. In the previous writ petition, disposed of by this Court (Association For Development vs Union of India WP 10296/2009 decided on 03-02-2010, this court recorded the assurance on behalf of the UOI about the process of appointment of Members of NCPCR:

"The Learned Solicitor General without prejudice to his legal contentions, after obtaining instructions states that the Govt. of India desires the composition of the Selection Committee for selection of Chairperson and members to be left to be decided by and with the Minister in-charge of the Ministry of Human Resource Development as Chairperson of the Selection Committee. It is however assured that the suggestions aforesaid of this Court will be kept in view while deciding the composition of the Selection Committee and at least one member of the Selection Committee shall be an independent expert of eminence in the field of child rights or welfare. The Learned Solicitor General has further assured that immediately after completing the selection process and at least 30 days before the notification of appointment, the particulars of the members of the Selection Committee as well as of the selected candidate/s together with their qualification, experience and expertise shall be put up on the website of the Ministry of Human Resource Development. The Learned Solicitor General has contended that the aforesaid will allay the

apprehensions expressed and should be allowed to be tested in the first instance."

The Court had then noticed that the statute (i.e. the Act) was silent about the manner or procedure of appointments. The process indicated in a sense aligned the statutorily prescribed mandate (contained in proviso to Section 4 in respect of appointment of the Chairperson of the Commission) with the procedure to be followed for appointment of members, i.e. by selection through a three member Committee. The Court observed that it would not re-cast the words of the statute, or read into it requirements which are not spelt out. After quoting from **Global Energy Ltd. Vs. Central Electricity Regulatory Commission** AIR 2009 SC 3194 that the endeavour of the law is to reflect a framework of neutrality and objectivity and "to put sphere of general decision-making outside the discretionary power of those wielding governmental power" this Court observed that the Minister "would have regard to the aforesaid principles in choosing the other members of Selection Committee and also consider framing guidelines for constitution of Selection Committee to eliminate allegations of arbitrariness from future appointments and bring more transparency and objectivity therein."

20. This Court is to be guided by the above decision, and confine its enquiry as to whether the appointments challenged are (1) contrary to the statute insofar as the private respondents do not possess any qualification or do not fulfil any eligibility condition; (2) procedurally illegal or irregular; (3) not in bona fide exercise of power.

21. So far as the first ground, i.e. with respect to the maintainability of the present proceeding goes, the private respondents attack the locus standi of the first petitioner association, on the ground that its president, Shri Prasad, was himself a candidate. It is submitted that the petition at his behest is barred, because he has a private interest, and the pleadings clearly mention that the proceedings are more to highlight that other allegedly more meritorious candidates were not selected. Significantly, there is no challenge to the second petitioner's locus standi. There is yet another significant aspect- the first petitioner association had approached this court as a petitioner in WP 10296/2009 which was disposed off on 03-02-2010 recording the statements on behalf of the UOI. The reliance by the private respondents on **Dr. Duryodhan Sahu; Dattaraj Nathuji Thaware** (supra) no doubt indicate that a "service matter" cannot be the

subject matter of a public interest litigation. Yet, **N. Kannadasan v Ajay Khose** (2009 [7] SCC 1) is an authority for the proposition that such litigation is maintainable if the statutory prescriptions are not met with, in respect of the public office, or if the relevant materials are overlooked or not made available to the executive government or the selecting body.

22. Traditionally, a writ of quo warranto could be applied for by anyone complaining that the holder of a public office was not entitled to appointment by reason of his not fulfilling the requirements spelt out by statute to such office. The courts consistently held that anyone could complain of such inadequacy, and the courts would investigate that aspect; though not a writ of right, yet, if the complaint was well grounded, the courts would not hold back the relief, since its denial would result in a pretender, or one unsuited by law to hold it, continuing to hold public office (Ref **Statesman v H.R. Deb** AIR 1968 SC 1495; and **Mir Ghulam Hussan & Ors. vs The Union Of India** AIR 1973 SC 1138, both judgments by Constitution Benches). There are other judgments in the same vein: **Shri Kumar Prasad v. Union of India and Others** [(1992) 2 SCC 428] and **Dr. Kashinath G. Jalmi and Another v The Speaker and Others,** (1993) 2 SCC 703. The Supreme Court held that "while examining if a person holds a public office under valid authority or not, the court is not concerned with technical grounds of delay or motive behind the challenge, since it is necessary to prevent continuance of usurpation of office or perpetuation of an illegality." (**Kashinath G. Jalmi,** supra). In **Centre for Public Interest Litigation** (supra) itself, the Supreme Court held that "Before a citizen can claim a writ of quo warranto he must satisfy the court inter-alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of quo warranto is issued to prevent a continued exercise of unlawful authority."

23. Having regard to the undisputed facts of this case, i.e., that the previous litigation was initiated at the behest of the first petitioner association and there being no dispute that the second petitioner is an association, concerned and involved with child rights issues, with field experience for 13 years, the Court is of opinion that the present petition is maintainable as a public interest litigation. The mere circumstance that the President of the first petitioner was a candidate who had applied for appointment would not bar scrutiny by the Court, especially in view of the fact that

the second petitioner is a party to the present proceeding.

24. The next aspect is to the breadth of judicial review. In this respect, the Court is cognizant of the limitations placed upon it by the very nature of public law proceedings, where procedural regularity, compliance with statute, fairness and bona fides (or lack of it) are the only grounds of judicial scrutiny. The Court would desist from donning the mantle of what has been termed as a "primary decision maker" (**Union of India & Another vs. G. Ganayutham** AIR 1997 SC 3387) and test the wisdom of the appointment. In other words, as held in **Centre for Public Interest Litigation** (supra) the court does not sit in appeal over the opinion of the authority or committee required to recommend names for appointments (the HPC in that case, under the concerned Act of 2003). The role of the court was delineated as follows:-

> "What we have to see is whether relevant material and vital aspects having nexus to the object of the 2003 Act were taken into account when the decision to recommend took place on 3rd September, 2010. Appointment to the post of the Central Vigilance Commissioner must satisfy not only the eligibility criteria of the candidate but also the decision making process of the recommendation [see para 88 of N. Kannadasan (supra)]. The decision to recommend has got to be an informed decision keeping in mind the fact that CVC as an institution has to perform an important function of vigilance administration. If a statutory body like HPC, for any reason whatsoever, fails to look into the relevant material having nexus to the object and purpose of the 2003 Act or takes into account irrelevant circumstances then its decision would stand vitiated on the ground of official arbitrariness."

Elaborating further, it was held that:

> "While making recommendations, the HPC performs a statutory duty. Its duty is to recommend. While making recommendations, the criteria of the candidate being a public servant or a civil servant in the past is not the sole consideration. The HPC has to look at the record and take into consideration whether the candidate would or would not be able to function as a Central Vigilance Commissioner. Whether the institutional competency would be adversely affected by pending proceedings and if by that touchstone the candidate stands disqualified then it shall be

the duty of the HPC not to recommend such a candidate..."

As to the scope and nature of review, the Court held that the merits of the decision cannot be gone into in judicial review:

> "We reiterate that Government is not accountable to the courts for the choice made but Government is accountable to the courts in respect of the lawfulness/legality of its decisions when impugned under the judicial review jurisdiction. We do not wish to multiply the authorities on this point..."

25. A pertinent decision on the subject is **Rajesh Awasthi v Nandlal Jaiswal** 2013 (1) SCC 501 that had examined the appointment to the Electricity Regulatory Commission under the Electricity Act, 2003; the relevant provision (Section 84 (1)) stated that the Chairperson and members *"shall be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management."* The High Court had after considering the minutes of the Selection Committee as well as the bio data, concluded that the statutory requirements had not been fulfilled. Repelling the appellant's contention of judicial review overreach, the Supreme Court held that quo warranto is always available to highlight breach of statutory provisions, which might expose the public office holder to the charge of being a pretender to it. Deepak Misra, J, who delivered a concurring judgment, emphasized the necessity of adhering to the statute, and most crucially, the necessity of intellectual objectivity which is to be brought to bear while considering the candidature of individuals:

> "25. It is manifest in the selection of the appellant that there is absence of "intellectual objectivity" in the decision making process. It is to be kept in mind a constructive intellect brings in good rationale and reflects conscious exercise of conferred power. A selection process of this nature has to reflect a combined effect of intellect and industry. It is because when there is a combination of the two, the recommendations as used in the provision not only serves the purpose of a "lamp in the study" but also as a "light house" which is shining, clear and transparent. "

26. Keeping within the above precincts of permissible scrutiny in judicial review, the Court would now consider the material facts and

circumstances of this case. During the hearing, the UOI made available the relevant files and documents in relation to the selection and appointment of the private respondents. This court proposes to discuss those materials.

27. The UOI did not – and this is a conceded position of all parties- publicly make known the vacancy position, in the Commission. The file reveals that about 165 applications were received. Interestingly, in a response given under the RTI Act sometime in June, 2010, to the first petitioner's President, the concerned Joint Secretary of the Ministry of Woman and Child Development, furnished a tabular chart in respect of 130 applications received and the relative recommendations. That response is part of the record of the writ petition; it has not been denied. Of the 130 applications in respect of which information was given, 35 recommendations of candidates have been disclosed from Union Ministers; 18 are from political party functionaries (17 of which are from Congress leaders); 33 recommendations have been made by Members of Parliament and Members of Legislative Assemblies; 7 have been made by Chief Ministers and State Cabinet Ministers and 10 have been forwarded from the NCPCR (some of which have been endorsed by the Chairperson). 3 applications were forwarded from the Prime Minister's Office. Mr. Dube's application was recommended by a Member of Parliament, Shri Karan Singh; likewise the application of two other candidates was endorsed by the Chairperson of NCPCR.

28. It appears that the file containing the Bio Data/ curriculum vitae of applicants runs into over 900 pages; those documents were not made available to the Court. The Petition annexes the curriculum vitae of the private respondents, and also that of 4 others. It is not the task of this court to make a subjective assessment of those materials; doing so would exceed the mandate permitted by the Constitution and be entering into the arena of a "merit review" impermissible in law. That said, however, the Court would still have the obligation of satisfying itself that the Committee – and later, the UOI did not commit any procedural irregularity or deviate from the statute in making the impugned appointments.

29. Dr. Dube's curriculum vitae shows that he was born in 1974. Against the column "Qualification" he stated "B.Ed & Ph.D (Mumbai University) Diploma in Computer Science". He also stated that he was recipient of National Youth Award in 1996 and had been awarded the Rashtriyayuvak Samman in 2001, and later, in 2004 of the "Shresth

Baalak Paalak Puruskar". He also claimed to have authored several books, journals and research articles and was "President Bharatiya Vikas Sansthan" and that he ran "Child Relief Centre (AFFLT)". He was also President of the Akhil Bharatiya Hindu Muslim Ekta Mahasangh, Uttar Bharatiya Mahasangh, Chairman of Mahrastra Sanskritik Vikas Parishad, and several organizations. He was member of Hindi Advisory Committee, Union Ministry of Home Affairs, as well as of the Censor Board and of the Central Railway Committee, Ministry of Railways. In the next section he claimed that he was a "Dedicated Personality to child development and Rights" and elaborated that:

> "Dr. Yogesh Dubey is working from a long time for child rights, like organizing workshops, rallies for awareness of child rights, arranging seminars on child rights through his various forums and organizations. Works on grass root level for child rights. Dr. Yogesh work on child rights and welfare for education organizing scholarship for poor childs, awareness programme for below poverty line childs and parents for improving attendance in scools, distribution of school uniforms, books, pen, pencil as well as arranging sports material in low price.."

In the column "Child Psychology" Dr. Dube stated that he was working on Child Psychology

> "through his organizations, and organizing seminar and workshops, mainly focusing on the child (sic: children's) parents to develop them for observing and scrutinizing the child (sic: children's) behavior avoid imposing least required discipline, understand the normal behavior of children's, providing memory, development programmes for mentally retarded (sic: retarded) handicap children. Personality development program for Childs (sic: children) to improve their memory, development programmes for mentally handicap (sic: handicapped) children. Help them for their various activities like education, medical treatments, awareness programs for community mental disorder child's, organizing picnics, educational tours for poor child's and mental disorder child's, (sic: children's) training camp for the parents on child psychology."

The CV also mentioned achievements of Dr. Dube in the field of child labour:

> "CHILD LABOUR
>
> Child Labor is a serious problem of Indian Community. Dr. Yogesh Dube works on this subject through his various organizations arranging various seminars/workshops for preventive remedies and campaign against child labour. He conducted massive child drivers (sic: drives) against child labour. He liberated numbers of children's from various hotels, small industrial units in Mumbai apart from that he liberated child labour from works of carpet in Bhadohi Dist. of Uttar Pradesh during salvation on relief work he exposed violence and atrocities carried out on them. He organized mass campaigning for the legal side of child labour like taking work from below age of 14 years is crime and penalty of Rs.20000/- with imprisonment of one year. Arranged various meetings and group discussions with Labor Minister, Commissioner and Officers, Government authorities to implement rules and regulations effectively in this regards (sic: regard)."

30. In the counter affidavit, Dr. Dube deposes that he completed his BA in 1995 and then:

> "obtained B.Ed Degree in year 2006 from V.B.S. Purvanchal University (UP). He has done his Ph.D from Mumbai University, it is also respectfully submitted that the answering respondent is president of Akhil Bhariya Hindu Muslim Ekta Mahasangh, which is not a political party but is working for communal harmony in the society for welfare of the communities.....It is further submitted that Ghyanshyam Dube College of Arts, Commerce and Science is situated at Suriyava District Sant Ravi Das Nagar Dhadohi (UP) affiliated to Purvanchal University as approved by University Grant Commission (UGC) New Delhi.."

The documents on the official (UOI) record contain a letter written by Dr. Dube, on 28-10-2010 refuting the allegations pertaining to his irregular appointment. They enclose copies of certain documents, including the marks sheet in respect of the B.Ed. qualification he possesses from the VBS Purvanchal University (obtained in 2006) and a copy of the mark sheet evidencing that he was an external candidate of the Osmania University in 1995 in respect of BA subjects. Interestingly, the copy of the Mumbai University doctorate (Ph.D) conferred upon Dr. Dube in respect of a thesis in Hindi, submitted by him in 2006 has been placed

on record. It would appear that Dr Dube secured his B.Ed qualification from the Purvanchal University in the examination held in 2006 (page 151, UOI file No. 1-10/2010/CW-I). The same year (in March 2006) he appears to have submitted his doctoral thesis ("Thesis in Hindi presented in May, 2006" as per the copy of the Ph.D certificate which mentions the convocation date as 14th January, 2007). This was a clear discrepancy, which certainly required investigation. The CV only mentioned that Dr. Dube was a B.Ed and Ph.D (Mumbai University). Yet, the material on record reveal that the B.Ed qualification was not from Mumbai University; the documents evidencing that qualification show that it was conferred by the Purvanchal University in 2006. This fact undermined the CV submitted by Dr. Dube. Furthermore, these material left some questions unanswered, i.e. as to when did Dr. Dube acquire post graduate qualifications for eligibility to submit a doctoral thesis, and whether he cleared the B.Ed exams and also submitted the doctoral thesis in Hindi at the same time, in 2006. These aspects clearly give a lie to the UOI's affidavit, especially its assertion in response to Paras 31-32 that the selected persons' CVs were *"carefully seen and considered by the Selection Committee" and that the said selected candidates "are all persons having a standing and experience in the respective areas of work."* If one also keeps in mind the fact that in 2006 – even May, 2006, Dr. Dube was just 31 years, the possibility of his having "standing" and "experience" in the relevant field of child rights or child development was remote. The file noting of Ms. Anju Bhalla, (dated 03-11-2010) -which deals with objections as to discrepancy of the claims of Dr. Dube, that he concealed information and that "none of the outfits which Dr. Yogesh Dube claims to be associated with can be located on the Internet" rejected the objections stating the Committee had "carefully seen and considered" claims of all applications and that the said selected candidates "are all persons having a standing and experience in the respective areas of work."(Refer Para 7 of the file noting, which was ultimately accepted by all superior officers).

31. As far as Mr. Tikoo is concerned, the petitioners objections are that his principal experience is as a banker and that he had worked in a public sector bank for 23 years till he obtained voluntary retirement in 2001 and that he was close to the husband of the Minister in charge, Ms. Krishna Tirath, since he was his superior officer in the bank where he had previously worked. The UOI refutes this contending that both

individuals were in the same branch for one year. As far as eligibility or suitability goes, it is contended that Mr. Tikoo is a holder of post graduate degree in Master of Social Work. His curriculum vitae reads as follows:

"Academic Qualifications:

B. Sc. :	University of Kashmir With major Subjects as English, Mathematics, Physics & Chemistry
M.A. (S.W.) :	Delhi School of Social Work, Delhi University With Specialization in Child & Community Development
M. Phil :	1978 – Delhi School of Social Work, Delhi University With Specialization in Personnel Management & Industrial Relations

Block Field work in Children's Home Kingsway Camp and Community Development in Kingsway Camp & Qutram Lines with Special Emphasis on the women welfare & Child Development under the Community Welfare Programme specially in the Slum Areas of Delhi

Associated with Gram Mahila Kendra later renamed as Centre for Community Action and Development (CCAD).It is currently in operation in Burari Semi –Urban Area in Delhi. It envisions the creation of empowered community for improving the quality of life of the people, based on the principles of Social Justice and human rights. It has successfully organized three women's self help groups in the community and is concentrating the activities in shankarapura & Bhararigarhi clusters.

Associated with the Child Guidance Centre (CGC) established in 1971 as a field demonstration project and now renamed as centre for child and adolescent Wellbeing (CCAW). At the centre diagnostic treatment and referral services to the Children with behavioural and emotional problems and other specific childhood disorders of children aged above 3 years are provided, using inter-disciplinary approach with an aim to understand children's problems through planned interventions carried at the level of child, his/her Parents, Family, School, and Community, Services of visiting Psychiatriests, Child Psychologists, Doctors and

Homeopaths are utilized.

With over twenty Three years of experience as a Senior Manager cum Administrator in a Premier Public Sector Enterprises having worked across various Indian Cities in a variety of Role Functions in Field Operations as well as Administrative set up looking forward to work in a corporate environment which provides a platform to eke out the best in me and benefit the society at large through the interactive and innovative methods with my exposures, experience and capabilities. Also worked in the Sociology Division TCPO on the project "Social Cohesiveness and physical form"

The relevant extracts of Shri Tikoo's counter affidavit are as follows:

"The contents of the para no.28 & 29 of the Writ Petition are false, wrong, misleading and hence specifically denied. It is respectfully that the answering Respondent being a professionally qualified Social Worker from a Premier National University Institute, namely, Delhi School of Social Work, University of Delhi has every qualification for the post of member in the NCPCR also as per the provisions of the CPCR Act 2005. It is further submitted that based on the professional qualifications of the Respondent No.3 some of the path breaking works in protecting the child rights in the country including the infamous Bharat Vikas Sangh NGO run 'Apna Ghar' Rohtak, was exposed wherein 103 inmates were subjected to gross physical, sexual and psychological abuse or the sexual abuse of girls leading to their contracting HIV in "Drone Foundation", Gurgaon, or the sexual abuse of children in 'Superna Ka Angan', Gurgaon, Haryana or the malnutrition deaths in Raichur, Karnataka was inquired into, which was rendered as a National Shame by our Prime Minister. The infanticide and female foeticide cases in Rajasthan, the infant and Neo - natal mortality in Malda Medical College & Hospital, the deprivation of the right to education and healthcare of more than thousand children of Gangetic Chars in West Bengal ignored by the State for more than 40 years was addressed. The identification of children in Tihar Jails lodged as adults was also spearheaded by the answering respondent no.3. The news that Doctors are turning Scores of Girls into Boys, which was carried by a national daily and caught the attention of

not just the country but even the globe was also one of the path breaking inquiries handled by the answering respondent no.3. The respondent No.3 being a Member of the NCPCR, also took steps against three Governments in the High Court for not complying with the provisions of CPCR Act 2005 and was successful in getting reliefs on four important counts viz setting up of State Commissions for protection of Child Rights, for mapping up and registration of Child Care Institutions under Section 34 (3) of the Juvenile Justice (Care & Protection of Children) Act 2000, constitution of the selection Committee and setting up of a robust inspection mechanism by constitution of Inspection Committee for the child care Institutions.

The petitioners alleged that they have made due enquiry of its own initiative and attained numerous CVs, it seems that the Petitioners wish to assume the constitutional authority of the concerned administrative Ministry. It is further submitted that these allegations are false and frivolous as the other candidates have not challenge the appointments/ selection process conducted by the concerned ministry under the Respondent No1. It is further submitted that they have also not been arrayed in the petition nor any list of all the candidates applied for the post has been filed by the petitioners. Thus in the absence of the list of candidates the annexed CV's are not believable and cannot be relied upon in any manner whatsoever. Hence it is re-iterated that the petition be dismissed outright."

32. The Court is not inclined, nor equipped to inquire into the relative merits of the applications furnished by various candidates. Nevertheless, it cannot help wondering whether in the case of the candidature of the private respondents, their "experience in the field" and "expertise" vouchsafed for by the UOI in its affidavit reflects "ability" "standing" "experience" and "eminence". The use of these terms, to this Court's mind, highlights Parliamentary intention that those of proven merit and track record, and singularly distinguished only should be chosen to man the NCPCR. The Commission, like the National Commission for Human Rights, National Commission for Women, National Minorities Commission, etc., have been created with the purpose of bringing to bear expertise in various - though inter-related - disciplines, with the aim of improving policies, and evolving best practises. In the case of NCPCR,

the various areas indicated (education, child psychology, child health, care, welfare or child development; juvenile justice or care of neglected or marginalized children or children with disabilities; elimination of child labour or children in distress; child psychology or sociology; and laws relating to children are relevant disciplines or fields). Apart from leveling allegation of bias, the petitioner has not impleaded the Minister in charge. The allegation, by themselves are insufficient to measure up to the "reasonable apprehension" or "real danger" of bias standard applicable in the case, given that the said respondent left employment in 2001 and applied for the post in question in 2010. This Court refrains from rendering any adverse finding with respect to Mr. Tikoo's candidature for the reason that though the materials regarding his ability, standing and eminence are scanty, there is something to indicate his eligibility vis-a-vis qualifications. The Court is also cognizant of the fact that Mr. Tikoo is now 59 years, and as the per the noting (rejecting other candidates' application) ineligible for further appointment, as apparent from the file noting (dated 03.11.2010) that those "over aged or close to 58-59 years" could not be considered for appointment. He would therefore be ineligible for re-appointment.

33. In this case, the Selection Committee apparently met and deliberated on four occasions. The earliest view in regard to the appointments was taken on 11-2-2010 when the officers drew attention to the order of the court dated 03-02-2010, and stated that a selection Committee ought to be appointed. On 06-04-2010, the UOI issued an order constituting the Selection Committee in respect of members; it included the minister in charge, the Secretary to UOI, Ministry of Women and Child Development and Ms. Padma Seth. Ms. Seth's inability or disinclination led to Dr. Shyama Chona replacing her. The Committee met four times, to consider various names for appointment as members. The relative names approved in the minutes of each committee meeting are discussed below.

34. The first meeting, i.e. 29-04-2010 considered *"the nominations received under the different categories and shortlisted the following persons"* for appointment. For the heading "Education", Dr. Daphne Pillai (age not confirmed) and Dr. Renu Singh were shortlisted; for "Health" Dr. Dinesh Laroia was shortlisted; for Juvenile Justice or Care "Shri Ravendranddiraa was shortlisted with comment that his age was to be confirmed; For "Child Labour" Dr. Yogesh Dube, Ms. Alpa Vohra (with

comment "age to be confirmed" and Mr. Gerry Pinto (again "age to be confirmed") were shortlisted. For the heading "Child Laws" Ms. Dipa Dixit was shortlisted and for the head "Child psychology" Shri Vinod Kumar Tikoo was shortlisted. In the next meeting (second meeting), i.e. 09-07-2010, under "Education" the two names mentioned earlier were retained; however, Ms. Sukhanya Bharatram's name was added; for health, apart from Dr. Laroia, the names of Mr. Shashank Shekhar and Dr. Father Anthony Sebastian were added; for the head Juvenile Justice and Care, apart from Shri Ravendranddiraa (against whose name no comment about age appears) two other names were added, i.e. M/s J.P. Tewari and Sheri Pradeep Raghunandan (age to be confirmed). In the head Child Labour, while retaining the name of Dr. Dube and Ms. Alpa Vora, two other names (M/s Madan Mohan Vidyarthi and Ashok Singh) were added. Two names were added under the head Child laws, to that of Ms. Dipa Dixit, i.e. Dr. Charu Walikhanna and Sheri Sabu Thomas. Under the head Child Psychology, the lone name of Mr. Tikoo was retained. In the meeting of 27-07-2010, the names mentioned earlier were retained, (except in respect of Education) that the Committee felt that there had to be representation of SC/ST communities, and therefore added the name of Dr. N. Paul Divakar in the list pertaining to Child Health, Care, Welfare or Child Development. Under the head Education, the names which had been shortlisted first and reiterated in the second meeting, i.e. Dr. Daphne Pillai and Dr. Renu Singh were deleted. Though nothing turns on this aspect, since the appointment under the head "Education" is not under challenge, the manner of inclusion and deletion of names this reflects a fair degree of opaqueness in the deliberations of the Committee. The fourth meeting (01-09-2010) saw the committee finalizing only three names for selection, i.e. Ms. Sukanya Bharatram (Education); Ms. Dipa Dixit (Laws relating to Children) and Mr. Vinod Kumar Tikoo (Child Psychology or Sociology). In the final meeting, apart from reiterating these three names, the Committee selected three others, i.e. Dr. Dinesh Larioa (Child Care, Welfare and Development), Ms. Amita Dhanda (Juvenile Justice or Care or Marginalised Children or Children with Disabilities) and Dr. Dube (Elimination of Child Labour or Children in Distress).

35. This Court is acutely conscious of its limitation and the need to desist from undertaking a "merit review". Therefore, it is confining its scrutiny to the settled parameters, i.e. whether the procedure adopted

was fair, reasonable and transparent, and whether the private respondents could be set to have fulfilled the statutorily prescribed eligibility criteria. The selection process nowhere discusses - even in the barest minimum manner, the strengths and weaknesses of the short listed candidates, particularly where more than one applicant is listed under the same head. What ultimately persuaded the Committee to drop certain names, and accepts names of those finally appointed, does not appear from the record made available to the Court. Nor is there any light shed in the affidavit filed by the UOI to indicate if the relative qualifications and experience of at least the short listed candidates was considered, and whether some kind of ranking, marking or evaluating system was adopted. Granted that the statute is silent; yet the obligation of the executive authority is to take an informed decision. It is one thing to say that the process undertaken was fair, or apparently fair, but entirely another to say that the reasons for the decision are buried in the maker's mind. This Court is emphasizing that there is no duty to record reasons why one or the other candidate is short listed – after all, when a large number of applications is received, some sifting has to take place. The Court is not reviewing that level of scrutiny; yet, having shortlisted many candidates, some of whom were retained (especially in respect of the head "Elimination of Child Labour or Children in Distress" and reiterated them at least twice) there are complete lack of reasons for dropping the names of Alpa Vora, M/s Madan Mohan Vidyarthi and Ashok Singh. In the case of Alpa Vora, her CV indicates that she had about 23-24 years relevant experience in the field, and had worked for the UNICEF, as well as in areas of Juvenile Justice and Child Care. Her CV, is on the record; it discloses a wide ranging experience, including conducting specific programmes (the particulars of which are mentioned) and the several publications of this applicant. This court underlines that the insistence for reasons is not to probe the merits of the decision to drop this candidate's name, but as to what really struck the Committee at that stage and persuaded them to drop her candidature.

36. In this context, the Court is cognizant of the statutory requirement that the person chosen should possess "ability", "standing", "integrity" and be "eminent". The use of these terms, in the opinion of the Court was to focus the mind of the appointing authority to select and appoint persons who have outstanding and sterling qualities; in short, visionaries – and may be pioneers in the discipline. There is nothing on the record

to disclose which of these attributes was seen or noticed in respect of Dr. Dube. The Court is in this context wary of commenting on the choice of the Committee in selecting Mr. Tikoo- at least he possesses educational qualifications, relevant to the field (Sociology and Social Work) and has placed on record some certificate in this regard. But in the case of Dr. Dube, the conspicuous inconsistencies in respect of his claim regarding educational qualifications were glossed over; his CV does not pin point specifically any relevant experience in the relevant discipline or field. His doctoral thesis is in Hindi. His final selection and appointment can be justified due to "absence of "intellectual objectivity" (Rajesh Awasthi's case, supra). As far as the challenge to Shri Tikoo's appointment goes, this Court is not prepared to agree with the petitioners' contentions in that regard.

37. In view of the above discussion, this Court holds that the selection and appointment of Dr. Dube is contrary to the mandate of Section 3 (2) (b). The materials on record do not show that he possessed of qualifications relating to the field or discipline he was chosen for in the NCPCR; they also show that the Committee could not have by applying any standard, reasonably concluded that he had qualifications, standing, ability or eminence in the field. This court emphasizes that an individual may not be necessarily debarred from consideration merely because he does not have adequate qualification- though some minimum qualifications would be necessary; yet he or she should possess some modicum of experience, ability or distinction in the field as to inspire confidence that the issues concerning the NCPCR, particularly in the category or discipline for which he or she is selected, can be ably and efficiently handled. The conclusion that this Court has drawn is not based on a merit review of Dr. Dube's credentials, but on the basis of the available materials which nowhere reveal how he can be called as one having standing, ability or eminence in the chosen field.

38. Before parting, this Court expresses concern that the selection for a national level commission such as the NCPCR is not based on any objective guidelines. This omission is significant, because such guidelines are – in this court's opinion- necessary since the same language is repeated in respect of essential requirements for members of State Commissions. Also, prescribing some guidelines as to the nature of qualifications, as well as the quality of experience which is considered essential, would go a long way in making the task of future selection

committees easier. A further aspect which may be duly considered would be to introduce some objective evaluation method, which incorporates different weightage or marks for qualification, experience in the field, evaluation of publication and participation in seminars, workshops, etc. Such criteria can be in addition to the commitment of the UOI to constitute selection committee to screen and recommend names for members and Chairperson of NCPCR; the procedure of tentatively posting the recommended names on the UOI's web site may also be continued. More publicity should be given when the vacancies are to be filled up so that a wider range of prospective candidates from all over the country could apply and be considered for the Commission.

39. For the above reasons, the selection and appointment of Dr. Yogesh Dube, the second respondent, as member of NCPCR is hereby quashed. The writ petition is allowed to the above extent; there shall be no order as to costs.

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UNION OF INDIA ....APPELLANT

VERSUS

SYNBIOTICS LIMITED AND ANR. ....RESPONDENTS

(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)

LPA NO. 976/2002 DATE OF DECISION: 07.11.2013

Constitution of India, 1950—Article 226; Drugs (prices control order), 1979—clauses 7(2). 17; Essential Commodities Act, 1955: Appeal against the order of single judge whereby respondent's challenge to a demand made in terms of DPCO, was allowed—Respondent, a bulk drug manufacturer, firstly contended compulsion to sell respondent's products

at pooled price, as per DPCO, and not for a lower price—Secondly, Respondent as manufacturer of a bulk drug, could not be compelled to deposit the difference in the pooled price and retention price in the Drug price Equalization Account, especially since the amount is not realized if manufacturer sell the bulk drug at retention price.

Appellant contends that purpose of mechanism under DPCO was to avoid monopoly in essential products—"pooled price" is that which manufacturer can realize or the rate at which drug could be sold in the market, whereas "Retention price" is the price at which bulk drugs for manufacturing the formulation can be retailed—Purpose of Drug price equalization Account under clause 17 was to credit the difference between the two prices by the manufacturer if pooled price was higher, and to reimburse manufacturer from the fund in case the inverse happened- the system was one of benefits and compensation to small manufacturers, and a disincentive to large manufacturers to secure a monopoly.

Respondent contends that interpretation to the effect that irrespective of actual sale, the bulk drug manufacturer such as the Respondent, is to be made liable and not the formulator, is without merit—A plain reading of clause 7(2) of the DPCO clarifies that the difference between the pooled price and Retention price is to be borne by the formulator and not the bulk drug manufacturer—Question of bulk drug manufacturer being made to bear the burden once over defies logic, amounts to levying a penalty and import not authorized under the Essential commodities Act, 1955.

Held: The language of clause 7(2) of DPCO casts the obligation on the formulator to make good the

difference between the pooled price and the at which drug is procured from the bulk manufacturer to be deposited into the drug price equalization account—clause 17 of the DPCO does not independently create a liability—Further, there is no primary duty on the bulk drug manufacturer to pay into the fund—Therefore, court rejected appellant's argument on clause 17—Once the formulator's obligation under clause7(2) if fulfilled, the Central Government cannot seek to penalize a penalize a manufacturer for being able to sell bulk drugs at retention price. Appeal dismissed.

The plain language of Clause 7 (2) casts the obligation on the formulator to make good the difference between the pooled price and the price of the bulk drug, wherever it procures it at a rate lower than the pooled price (which is what is meant by the expression *"the price allowed to him in the price of his formulations")*, an obvious allusion to the price of the principal input, i.e. the bulk drug, which the formulator might have procured at less than pooled price – either at or below retention price (fixed for the bulk drug manufacturer) . This is evident from the terms "Where a manufacturer of formulation utilizes in his formulations and bulk drug", *either from his own production or procured by him from any other source,* when the price of the bulk drug is lower than *"the price allowed to him in the price of his formulations"* that formulation manufacturer, or formulator has to "to deposit into the Drug Prices Equalization Account referred to in paragraph 17 the *excess amount to be determined by the Government" (Clause 7 (2) (a))*. The other contingency (Clause 7 (2) (b)) is where the formulator has, *"to sell the formulations at such prices as may be fixed by the Government."* This was precisely what the Single judge stated, in the impugned order, when he found that the obligation or duty, if any, was cast upon the formulator to deposit or pay into the Drug Prices Equalisation Account the difference between the two prices, so as to offset any advantage it might have enjoyed. This Court holds that the

conclusions of the learned Single Judge on this score are justified. **(Para 16)**

As regards Clause 17, this Court is of opinion that it does not independently locate or create any liability. It can be said to be descriptive of what the fund is made up, when it refers to the two sources -Sub clause (1). The reference to Clause 7 (2) clarifies that it is the formulator's liability – because that class of manufacturer, who uses bulk drugs alone has been saddled with the liability to pay into the fund amounts, to offset any advantage secured by him, on account of procurement of bulk drugs, on account of their prices being lower than the determined pooled price. As far as Clause 17 (1) (b) goes, this Court is not persuaded by the Central Government's submission that this reinforces any obligation cast upon the bulk drug manufacturer. The reason for this is obvious. There is no primary duty on the bulk drug manufacturer to pay into the Fund, any amounts. Under Clause 7 (2), *it is the advantage presumably secured by the formulator which is sought to be offset by obliging it to deposit the difference determined, into the Fund.* If that obligation is fulfilled, the question of asking even the bulk drug manufacturer, who has not realized any excess amounts, to pay into the Fund, any amounts, cannot arise at all. It was not, and cannot be, in the circumstances of the present case at least, that the DPCO contains any taxing provision which casts general liability. If such is the case, there is no obligation in law cast upon bulk drug manufacturers to pay any amounts over incomes or advantages which they have not secured. On account of efficiencies in their production processes, they were able to sell bulk drugs at the prices fixed in respect of their units (retention price). What the Central Government is asking the Court to uphold is its action in demanding a penalty, as it were, for selling at prices fixed or determined by it. It would be useful to recollect in this context that what Clause 3 of the DCPO empowers the Central Government to do is to fix *".....the maximum price at which such bulk drug shall be sold".* The Court also holds that there is no infirmity with

the finding of the learned Single Judge that the formulator in this case was a different entity from the respondents.

(Para 17)

[An Ba]

APPEARANCES:

FOR THE PETITIONER	:	Sh. B.V. Niren CGSC with Sh. Prasouk Jain, advocate
FOR THE RESPONDENTS	:	Sh. Vibhubakhru, Sr. advocate with Sh. Pravin Bahadur, Ms. Mallika Joshi, Sh. Mohit Mudgal, Sh. Amit Agarwal and Sh. Rajan Narain, Advocates.

RESULT: Appeal Dismissed

S. RAVINDRA BHAT, J.

1. The present appeal by the Central Government (described as such, or as the "Union Government") impugns a judgment and order of a learned Single Judge by which the respondents' writ petition challenging a demand made in terms of the Drugs (Prices Control) Order (DPCO) of 1979 was allowed.

2. The Respondent No.1 is a manufacturer of various drugs and pharmaceutical products, including streptomycin and Respondent No.2 is its Director. The respondents herein, contended before the learned Single Judge that a manufacturer of a bulk drug like it cannot be compelled to sell its product only at the pooled price and not for lower price. It also argued that as manufacturer of bulk drugs it could not be compelled to deposit into the Drug Prices Equalisation Account excess amounts constituting the difference between the pooled price and the retention price particularly when such excess amount is not realized if the manufacturer sells the bulk drug at retention price.

3. Clause 3 of the DPCO empowered the Central Government to, with a view to regulating the equitable distribution of an indigenously manufactured bulk drug specified in the First Schedule or the Second Schedule and making it available at a fair price subject to Rule 3(2) and after making such inquiry as is deemed fit, ".....fix, from time to

time, by notification in the Official Gazette, the maximum price at which such bulk drug shall be sold....." Rule 3 (2) states that while fixing bulk drug prices, the Government "may" take into account the ".....average cost of production of such bulk drug manufactured by an efficient manufacturer and allow a reasonable return on networth." Clause 4 empowered the Central Government to, notwithstanding Clause 3, if it felt it necessary to increase production of indigenously manufactured bulk drugs under the First or Second Schedule, fix (a) a retention price for the bulk drug and (b) a common sale price for such bulk drug, taking into account the weighted average of the retention price fixed under Clause (a). Clause 7 states that where a bulk drug is indigenously manufactured as well as imported, the Central Government can, after making necessary adjustments, fix "(a) retention prices for individual manufacturers, importers or distributors of such bulk drugs" or (b) "a pooled price for the sale of such bulk drugs." Clause 7 (2) read as follows:

> "(2) Where a manufacturer of formulations utilises in his formulations any bulk drug, either from his own production or procured by him from any other source, the price of such bulk drug being lower than the price allowed to him in the price of his formulations, the Government may require such manufacturer-
>
> (a) to deposit into the Drug Prices Equalisation Account referred to in paragraph 17 the excess amount to be determined by the Government; or (b) to sell the formulations at such prices as may be fixed by the Government.."

4. On 02.04.1979 the Central Government issued an order fixing the pooled price for streptomycin and also the retention price for the writ petitioners (respondents herein) and other manufacturers. The pooled price for streptomycin was fixed at Rs. 475 per k.g. and retention price was fixed at Rs.449.71 per k.g. for first respondent and Rs.498 for other manufacturers. The Central Government by circular dated 19.11.1979 required further information in view of the representation from the manufacturers of drugs and pharmaceuticals for granting an immediate price increase for bulk drug and formulation in order to compensate for the rapid increase in the price of input materials, particularly petroleum based products. It was claimed – by the respondents herein that w.e.f. 01.07.1979 they had started selling all the streptomycin manufactured by

them to M/s. Sarabhai Chemicals, a division of Ambalal Sarabhai at the rate of Rs.449.71 per k.g. which was retention price allowed to the respondents herein, by order dated 02.04.1979. Sarabhai Chemicals manufactured formulations out of the said streptomycin supplied by M/s. Synbiotics Ltd. On 10.06.1980 the Central Government called upon the respondents -M/s. Synbiotics Ltd. to pay into the Drugs Prices Equalisation Account an amount calculated at Rs. 25.29 per k.g. on the entire produce of streptomycin sold by it after commencement of the said order. Arguing on behalf of the M/s. Synbiotics Ltd., learned counsel has contended that as no excess amount was collected by it, nothing was to be paid to the Drug Prices Equalisation Account. On 06.10.1980 in exercise of the power conferred by paragraph 7 (1) of the said order, the Central Government revised the respondents' [M/s. Synbiotics Ltd.'s] retention price from Rs.449.71 per k.g. downward to Rs.429.00 per k.g. The pooled price of streptomycin was, on the other hand, raised from Rs.475 per k.g. to Rs.660 per k.g. At the same time, retention price of streptomycin for other manufacturers were raised from Rs.498 to Rs.660.75, so that it was equal to the pooled price.

5. On 29th November, 1980, the Ministry of Petroleum, Chemicals & Fertilizers addressed two letters/orders to Petitioner No. 1 (Respondent No.1 in the present matter) stating that in October, 1980, petitioner No. 1 had been required to sell streptomycin at the pooled price of Rs.475/- per k.g, for the period 01.07.1979 to 06.10.1980, when the pooled price was revised to Rs.660.75/- . The Union's position was that the respondents' action in selling streptomycin at the retention price of Rs.449.71 per k.g. was without justification. Consequently, a demand was made upon it, to pay the difference between the pooled price and the retention price, into the Drug Prices Equalisation Account. It was in these circumstances, that the writ petition was preferred. The learned Single Judge held that the demand by the Central Government was unsustainable. The Central Government has appealed against that decision.

6. It is argued by the appellant – the Central Government, that the learned Single Judge fell into error in interpreting the Drugs (Prices Control) Order, 1979 [hereafter referred to as "DPCO"]. It is urged in this context that the Scheme required that the "Pooled Price" was the basis at which the bulk drug had to be sold in the market or what the manufacturer could realise. The "Retention Price", on the other hand, was the price at which he could retail the bulk drug for manufacturing

the formulation in the event he was also a formulator. The latter, i.e. Retention Price was fixed on the basis of returnable cost of production. The object of creating the Drug Prices Equalisation Account under Clause 17 of the DPCO was that in the event the Pooled Price was higher than the Retention Price, the difference between the two was to be credited to the account by the manufacturer and if the converse happened, the manufacturer was to be reimbursed from the fund. Learned counsel urged that this mechanism was necessary to ensure a suitable cost of goods and ensure that monopoly in essential products was avoided.

7. Elaborating on the submission, it was urged by Mr. B.V. Niren, learned counsel, that if an importer or a manufacturer, with access to resources, was in a position for some time, to ensure that the cost of production was lower than that of the competitors who might be small or new manufacturers, the Retention Price would naturally be lower in the former's case. The Pooled Price, on the other hand, was a concept arrived at to ensure that bulk drugs were sold at a uniform and suitable price. In the event the newer or smaller units' Retention Price was higher than the Pooled Price they would be driven out of the market, thus eliminating competition, and consequently, undermining competition and the larger public interest. Consequently, the Drug Price Equalisation Account ensured that such eventualities were dealt with, and the smaller or newer units are reimbursed the difference from the account which had to be credited by all concerned parties. In other words, the system was one of benefits and compensation and also of disincentive. The disincentive was to stop large manufacturers from selling below the indicated Pool price in a bid to secure monopoly; the benefit was to small or fresh manufacturers and new entrants in the market who would not be otherwise able to compete with economies of scale, thus giving rise to an undesirable monopolistic situations.

8. It was submitted that the Single Judge erred in holding that the DPCO did not mandate the deposit of the difference in the case of manufacturer selling the bulk drug at the Retention Price and not at the Pooled Price. In this context, it was submitted that Clause 17(a) (ii) is independent of the sale being made at the Pooled Price. The difference between the Pooled Price and the Retention Price necessarily had to be deposited into the account irrespective of the price at which the bulk drug was sold. In other words, the ability of the large manufacturer to sell the bulk drug at cost or Retention Price and at rates below the Pooled

Price was an irrelevant factor; in the event the Retention Price was lower than the Pooled Price, the manufacturer had to deposit the difference in the account.

9. It was argued next that the Single Judge fell into error in holding that the Central Government was obliged to invoke para 7(2) of the DPCO to realize the difference from the formulator, M/s. Ambalal Sarabhai Enterprises. Reliance was placed upon paras 17(1)(a)(ii) to say that such difference between Pooled Price and Retention Price is to be borne by the seller of the drug, into the account.

10. Learned senior counsel for the respondents submitted that the findings and conclusions of the learned Single Judge are sound and do not require interference. It is argued that a plain reading of para 7(2)(a) of DPCO clarifies that it applies to the formulator of drugs. When the provision itself is clear, the constrained interpretation sought to be placed by the Central Government was that irrespective of the actual sale, the bulk drug manufacturer, such as the respondent, is to be made liable, and not the formulator, is without merit. It was argued that the reference to Clause 17(1)(a)(ii) by the Central Government in this case to say that the bulk drug manufacturer like the respondent are to be made liable over and above the liability of the drug manufacturer under Clause 7(2), would amount to unjustly levying an impost not authorised by law.

11. Learned counsel contended that if indeed the Central Government's contentions with respect to large bulk drug manufacturers' ability to control prices and drive-out competitors is correct, the fact remains that the advantage derived from lower cost of procuring from such large manufacturers by the formulators is sought to be offset by Clause 7(2). It is for the Central Government to enforce that condition and recover the advantage derived by the formulator, if any, and credit the fund. If such eventuality is correct and valid, the question of the bulk drug manufacturer being made to bear the burden once over, not only defies logic but also amounts to levying a penalty and an impost which the Essential Commodities Act, 1955 did not clearly authorise.

12. Before dealing with the merits of the rival contentions, it would be necessary to analyse the salient features of the DPCO, 1970. Its relevant provisions are extracted below:

"DRUGS (PRICES CONTROL) ORDER, 1979

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2. **Definitions.**-In this Order, unless the context otherwise requires

(a) **"bulk drug"** means any substance including pharmaceutical, chemical, biological or plant product or medicinal gas conforming to pharmacopoeial or other standards accepted under the Drugs and Cosmetics Act, 1940 (23 of 1940), which is used as such or as an ingredient in any formulations;

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(c) **"distributor"** means a distributor of drugs or his agent or a stockist appointed by a manufacturer or an importer for stocking his drugs for resale to a dealer;

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(t) **"retention price"** in relation to a bulk drug means the price fixed under paras. 4 and 71a[which shall be the maximum retention price] for individual manufacturers, or importers, or distributors, of such bulk drugs;

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3. Power to fix the maximum sale price of indigenously manufactured bulk drugs specified in First Schedule or Second Schedule:-

(1) The Government may, with a view to regulating the equitable distribution of an indigenously manufactured bulk drug specified in the First Schedule or the Second Schedule and making it available at a fair price and subject to the provisions contained in subparagraph (2) and after making such inquiry as it deems fit, fix from time to time, by notification in the Official Gazette, the maximum price at which such bulk drug shall be sold.

(2) While fixing the price of a bulk drug under sub-paragraph (1), the Government may take into account the average cost of production of such bulk drug manufactured by an efficient manufacturer and allow a reasonable return on net-worth.

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4. Power to fix retention price and common sale price.- Notwithstanding anything contained in paragraph 3 the Government may, if it considers necessary or expedient so to do for increasing the production of an indigenously manufactured bulk drug specified in the First Schedule or the Second Schedule, [by order published in the Official Gazette], fix:(a) a retention price of such bulk drug;

(b) a common sale price for such bulk drug taking into account the weighted average of the retention price fixed under clause(a) :

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7. Power to fix retention price and pooled price for the sale of bulk drugs specified in First Schedule or Second Schedule indigenously manufactured as well as imported.-(l) Where a bulk drug specified in the First Schedule or the Second Schedule is manufactured indigenously and is also imported, the Government may, having regard to the sale price prevailing from time to time in respect of indigenously manufactured bulk drugs and those of imported bulk drugs, by order, fix, with such adjustments as the Government may consider necessary,

(a) retention prices for individual manufacturers, importers, or distributors of such bulk drugs;

(b) a pooled price for the sale of such bulk drugs.

(2) Where a manufacturer of formulation utilizes in his formulations and bulk drug, either from his own production or procured by him from any other source, the price of such bulk drug being lower than the price allowed to him in the price of his formulations, the Government may require such manufacturer

(a) to deposit into the Drug Prices Equalization Account referred to in paragraph 17 the excess amount to be determined by the Government ; or

(b) to sell the formulations at such prices as may be fixed by the Government.

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17. Drug Prices Equalization Account.-(1) The Government shall maintain an Account to be known as the Drugs Prices Equalization Account to which shall be credited

(a) by the manufacturer, importer or distributor, as the case may be

(i) the amount determined under subparagraph (2) of para. 7;

(ii)the excess of the common selling price or, as the case may be, pooled price over his retention price; and

(b) such other sums of money as the Central Government may, after due appropriation made by Parliament by law in this behalf, grant from time to time.

(2) The amount credited under sub-paragraph (1) shall be spent only:

(a) for paying to the manufacturer, importer or distributor, as the case may be, the short-fall between his retention price and the common selling price or, as the case may be, the pooled price for the purpose of increasing the production, or securing the equitable distribution and availability at fair prices, of drugs;

(b) for expenses incurred by the Government in discharging the functions under this paragraph.

(3) Every manufacturer, importer or distributor may, if he has any claim under clause (a) of sub-paragraph (2), make an application to the Government and the Government may, in settling the claim, require the manufacturer, importer or distributor, as the case may be, to furnish such details as may be specified by it in this behalf.

(4) The Government shall maintain account of all moneys credited to, and expended from out of, the Drugs Prices Equalization Account and such other reports and returns as it may consider necessary relating to the said account.

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13. The Central Government on 02.04.1979 fixed the Pooled Price for Streptomycin at Rs.475 per k.g. Simultaneously, the Retention Price in the case of respondents was fixed at Rs.449.71/- per kg. For other manufacturers, it was fixed at Rs.498/- . The respondents' claim that it had started selling all the Streptomycin with effect from 01.07.1979 to M/s. Sarabhai Chemicals, a division of Ambalal Sarabhai at the Retention Price levels fixed by the Government. The sole purchaser manufactured the formulation and sold them. On 10.06.1980 the Central Government called upon the respondent to pay into the Equalisation Fund the amount calculated at the rate of Rs.25.29/- per kg. on the entire produce of Streptomycin sold by the respondent after the Retention Price fixation. The respondents contended that in effect they had not recovered any amount in excess of price and seeking to extract the difference is arbitrary and unjustified. With effect from 06.10.1980, the Central Government revised the respondents' Retention Price downward to Rs.429/- per kg. for Streptomycin and at the same time increased the Pooled Price to Rs.660 per kg. Likewise the Retention Price for the product for the other manufacturers was increased to Rs.660.75/- per kg. The Central Government urged that the respondents had to sell Streptomycin at the Pooled Price for the period upto 06.10.1980 at Rs.475/- per kg. and thereafter at Rs.660.75/- and that having not done so and having sold it at lower price, was obliged to pay the difference.

14. The finding of the learned Single Judge on one aspect, which has a bearing on the discussion on merits of this case, is that the respondents disclosed that 52% of its share capital was held by Karamchand Premchand Pvt. Ltd. (KPPL) and balance by E.R. Squibb and Sons Inc., an American company. The respondent, therefore, was a joint-venture of those two groups. In 1978, the KPPL sold its shareholdings to M/s. Ambalal Sarabhai Enterprises. Learned Judge, on the basis of these materials – in the form of affidavits and documentary evidence alluded by the respondents held that it was a distinct and separate corporate entity, and therefore, could not be said to have connection with M/s. Ambalal Sarabhai Group of Companies.

15. The Learned Single Judge, after noticing the scheme of the DPCO held that there was merit in the respondents' contentions that no obligation was cast upon it to make good the difference between the Retention Price and the Pooled Price. Once it was established that it had not sold the drug above the Retention Price, the Single Judge also held

that the Central Government could have invoked the aid of DPCO and charged M/s. Ambalal Sarabhai, the formulator, the difference in terms of Clause 7(2). Not having done so, the deficiency could not have been recovered by default as it were, from the respondents.

16. The plain language of Clause 7 (2) casts the obligation on the formulator to make good the difference between the pooled price and the price of the bulk drug, wherever it procures it at a rate lower than the pooled price (which is what is meant by the expression *"the price allowed to him in the price of his formulations")*, an obvious allusion to the price of the principal input, i.e. the bulk drug, which the formulator might have procured at less than pooled price – either at or below retention price (fixed for the bulk drug manufacturer) . This is evident from the terms "Where a manufacturer of formulation utilizes in his formulations and bulk drug", *either from his own production or procured by him from any other source,* when the price of the bulk drug is lower than *"the price allowed to him in the price of his formulations"* that formulation manufacturer, or formulator has to "to deposit into the Drug Prices Equalization Account referred to in paragraph 17 the *excess amount to be determined by the Government" (Clause 7 (2) (a)).* The other contingency (Clause 7 (2) (b)) is where the formulator has, *"to sell the formulations at such prices as may be fixed by the Government."* This was precisely what the Single judge stated, in the impugned order, when he found that the obligation or duty, if any, was cast upon the formulator to deposit or pay into the Drug Prices Equalisation Account the difference between the two prices, so as to offset any advantage it might have enjoyed. This Court holds that the conclusions of the learned Single Judge on this score are justified.

17. As regards Clause 17, this Court is of opinion that it does not independently locate or create any liability. It can be said to be descriptive of what the fund is made up, when it refers to the two sources -Sub clause (1). The reference to Clause 7 (2) clarifies that it is the formulator's liability – because that class of manufacturer, who uses bulk drugs alone has been saddled with the liability to pay into the fund amounts, to offset any advantage secured by him, on account of procurement of bulk drugs, on account of their prices being lower than the determined pooled price. As far as Clause 17 (1) (b) goes, this Court is not persuaded by the Central Government's submission that this reinforces any obligation cast upon the bulk drug manufacturer. The reason for this is obvious.

There is no primary duty on the bulk drug manufacturer to pay into the Fund, any amounts. Under Clause 7 (2), *it is the advantage presumably secured by the formulator which is sought to be offset by obliging it to deposit the difference determined, into the Fund.* If that obligation is fulfilled, the question of asking even the bulk drug manufacturer, who has not realized any excess amounts, to pay into the Fund, any amounts, cannot arise at all. It was not, and cannot be, in the circumstances of the present case at least, that the DPCO contains any taxing provision which casts general liability. If such is the case, there is no obligation in law cast upon bulk drug manufacturers to pay any amounts over incomes or advantages which they have not secured. On account of efficiencies in their production processes, they were able to sell bulk drugs at the prices fixed in respect of their units (retention price). What the Central Government is asking the Court to uphold is its action in demanding a penalty, as it were, for selling at prices fixed or determined by it. It would be useful to recollect in this context that what Clause 3 of the DCPO empowers the Central Government to do is to fix *".....the maximum price at which such bulk drug shall be sold"*. The Court also holds that there is no infirmity with the finding of the learned Single Judge that the formulator in this case was a different entity from the respondents.

18. For the foregoing reasons, this Court is of opinion that the appeal is without merit. LPA No.976/2002 is consequently dismissed, without any order on costs.

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CRL.A.

NARESH KUMAR ETC. ....APPELLANTS

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 389/2003 & CRL. M.A. NO. : 1592/2003 & 7482/2004 **DATE OF DECISION: 25.11.2013**

Indian Penal Code, 1860—Section 308—Attempt to commit culpable homicide—Section 34—Common — intention—Appellants inflicted injuries to two persons—FIR No. 122/96 under Section 308/34 IPC registered at P.S.J.P. Kalan—Charge sheet filed—Charges for offences u/s. 308/325/34 IPC framed—Prosecution examined twelve witnesses—Statement of the accused persons recorded—Pleaded false implication—Examined one witness in defence—Appellants released on probation and directed to pay compensation to victims—Two accused persons acquitted—Acquittal not challenged by the State—Appellant no. 1 convicted for offence under section 325 IPC and other two appellants convicted for offence under Section 323 IPC—Appellants released on probation and directed to pay compensation to the victims—Being aggrieved appellants preferred appeal—During pendency of appeal appellant no. 1 expired—His legal heir substituted—Appellants opted not to challenge the findings on conviction—Prayed for direction to employer of appellant No.1 to release pension—Conviction affirmed—Court not aware of nature of disciplinary action against the appellant no.1—In absence of any cogent-material direction as

prayed cannot be given—Appeal dismissed.

Important Issue Involved: The word 'disqualification' contained in Section 12 Probation of Offenders Act 1958, refers to a disqualification provided in other statutes.

An employee cannot claim a right to continue in service merely on the ground that he has been given the benefit of probation under the Act.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANTS : Mr. Chirag Madan, Advocate with Mr. Sudeep Yadav, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

CASES REFERRED TO:

1. *Sushil Kumar Singhal* vs. *Regional Manager, Punjab National Bank,* (2010) 8 SCC 573.
2. *State of U.P.* vs. *Ranjit Singh,* AIR 1999 SC 1201.
3. *Harichand* vs. *Director of School Education* : (1998) 2 SCC 383.
4. *Rajbir* vs. *State of Haryana,* AIR 1985 SC 1278.
5. *Aitha Chander Rao* vs. *State of Andhra Pradesh.,* 1981 (Suppl.) SCC 17.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Naresh Kumar (A-1) (since deceased) represented by Smt.Kanta, Dharam Singh (A-2), Om Prakash (A-3), Ashok and Tripat were arrested in case FIR No. 122/96 under Sections 308/34 IPC registered at PS J.P.Kalan and sent for trial on the allegations that on 05.12.1996 at about 12.10 (Noon) in furtherance of common intention, they inflicted injuries to Balwan Singh and Vijay Singh. Vide order dated 01.04.1999, they were charged under Sections 308/325/34 IPC. The prosecution examined twelve witnesses to bring home their guilt. In their 313 statements, they

pleaded false implication and examined DW-1 (Suresh Kumar) in defence. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment dated 09.05.2003 in Sessions Case No. 166/02 held them guilty under Section 325 IPC (A-1) and under Section 323 IPC (A-2 & A-3). It is relevant to note that Ashok and Tripat were acquitted of the charges and the State did not challenge their acquittal. By an order dated 26.05.2003, A-1 to A-3 were released on probation and directed to pay total compensation of ' 20,000/- to the victims. Being aggrieved, A-1 to A-3 have preferred the appeal. It is apt to note that A-1 expired during the pendency of the appeal and his legal heir – Smt.Kanta was permitted to continue with the appeal vide order dated 05.04.2005.

2. During the course of arguments, learned counsel for the appellants, on instructions, stated at Bar that the appellants have opted not to challenge the findings of the Trial Court on conviction. He prayed to direct the A-1's employer to release A-1's pension and relied on **'Rajbir vs. State of Haryana',** AIR 1985 SC 1278.

3. Since the appellants have given up challenge to the findings of the Trial Court on conviction in the presence of overwhelming evidence, the conviction under Section 325/323 IPC is affirmed. The convicts were released on probation and were directed to pay compensation of Rs. 20,000/- to the victims which has since been deposited in the Court. Section 12 of the Probation of Offenders Act can be brought to the notice of the concerned authorities for getting the required relief and in case of non-compliance, deceased's legal heirs can avail legal remedies available under law. The Court is not aware as to what disciplinary action (if any) has been initiated by the concerned department against A-1 after his arrest and conviction in the present proceedings or in any other proceedings. Order-sheet dated 08.07.2003 records that A-1 was wanted in a shooting incident and it is not clear if he faced criminal proceedings in the said case or what was its outcome. In the absence of any cogent material before this Court, no direction, as prayed for by the appellant, can be given. In the case of **'Sushil Kumar Singhal vs. Regional Manager, Punjab National Bank',** (2010) 8 SCC 573, the Supreme Court held :

> "9. The sole question involved in this case is whether the benefit granted to the appellant under the provisions of Act, 1958 makes

him entitled to reinstatement in service. The issue involved herein is no more res integra. In **'Aitha Chander Rao v. State of Andhra Pradesh',** 1981 (Suppl.) SCC 17, this Court held :

As the appellant has been released on probation, this may not affect his service career in view of Section 12 of the Probation of offenders Act.

10. The said judgment in **Aitha Chander Rao** (Supra) was not approved by this Court in **Harichand v. Director of School Education** : (1998) 2 SCC 383, observing that due to the peculiar circumstances of the case, the benefit of the provisions of 1958 Act had been given to him and as in that case there had been no discussion on the words "disqualification, if any attaching to a conviction of an offence under such law", the said judgment cannot be treated as a binding precedent. This Court interpreted the provisions of Section 12 of the 1958, Act and held as under:

In our view, Section 12 of the probation of offenders Act would apply only in respect of a disqualification that goes with a conviction under law which provides for the offence and its punishment. That is the plain meaning of the words "disqualification, if any, attaching to a conviction of an offence under such law" therein. Where the law that provides for an offence and its punishment also stipulates a disqualification, a person convicted of the offence but released on probation does not by reason of Section 12, suffers the disqualification. It cannot be held that by reason of Section 12, a conviction for an offence should not be taken into account for the purposes of dismissal of the person convicted from government service.

(Emphasis added)

XXX XXX XXX

14. In **'State of U.P. v. Ranjit Singh',** AIR 1999 SC 1201, this Court has held that the High Court, while deciding a criminal case and giving the benefit of the U.P. First Offenders Probation Act, 1958, or similar enactment, has no competence to issue any direction that the accused shall not suffer any civil consequences. The Court has held as under:

We also fail to understand, how the High Court, while deciding a criminal case, can direct that the accused must be deemed to have been in continuous service without break, and, therefore, he should be paid his full pay and dearness allowance during the period of his suspension. This direction and observation is wholly without jurisdiction....

XXX XXX XXX

17. In view of the above, the law on the issue can be summarized to the effect that the conviction of an employee in an offence permits the disciplinary authority to initiate disciplinary proceedings against the employee or to take appropriate steps for his dismissal/ removal only on the basis of his conviction. The word 'Disqualification' contained in Section 12 of the Act, 1958 refers to a disqualification provided in other Statutes, as explained by this Court in the above referred cases, and the employee cannot claim a right to continue in service merely on the ground that he had been given the benefit of probation under the Act, 1958."

4. In the light of above discussion, the prayer asked for by the appellants cannot be incorporated in the judgment. The appeal stands dismissed. The compensation amount deposited in compliance of the judgment be released to the victims. Pending applications also stand disposed of.

ILR (2014) I DELHI 589
W.P. (C)

UOI & ORS. ....PETITIONERS

VERSUS

J.P. SINGH ....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 11881/2009 & CM NO. : 12008/2009 **DATE OF DECISION: 17.12.2013**

Constitution of India, 1950—Article 226; CCS (CCA) Rules 1965-Rule 14: Order of the CAT holding that there was unexplained delay in initiating disciplinary proceedings against Respondent, challenged in the present proceedings. Held—The Tribunal has noted that the Petitioner have not been able to adequately explain the inordinate delay in initiation of the charge sheet which would cause prejudice to the defence of the Respondent. The Petitioners have not been able to place explanation for the delay which has ensued before us as well. Reliance placed on UOI v. Hari Singh, wherein same issues were raised, held that Petitioners have not been able to place any explanation for delay—Other circumstances including the fact that Respondent was promoted, the order quashing penalty were accepted by the Petitioner as well as the fact the CBI found no culpability if the Respondent also lend substance to the case of Respondent. No merit in the challenge to the order of the CAT—Costs of Rs. 25,000. Petition Dismissed.

The Tribunal has noted that the respondents have not been able to adequately explain the inordinate delay in initiation of the charge-sheet which would cause prejudice to the defence of the respondent. The petitioners have not been

able to place any explanation for the delay which has ensued before us as well. **(Para 19)**

Other circumstances including the fact that the respondent was promoted; the order quashing the penalty which had been imposed upon the respondent were accepted by the petitioner herein; as well as the fact that the Central Bureau of Investigation found no culpability of the respondent also lend substance to the case of the respondent. We find no merit in the challenge which has been laid to the order of the Central Administrative Tribunal by way of the present writ petition. **(Para 20)**

Important Issue Involved: When there is inordinate delay in initiating disciplinary proceedings, the same are liable to be quashed.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. R.V. Sinha with Mr. P.K. Singh, Advocates.

FOR THE RESPONDENT : Dr. Ashwani Bhardwaj, Advocate.

CASE REFERRED TO:

1. *Union of India &Anr.* vs. *Hari Singh* WP (C) No.4245 of 2013.

RESULT: Writ Petition dismissed with costs.

GITA MITTAL, J. (Oral)

1. The petitioner has assailed the order dated 19th November, 2008 passed in OA No.1690 of 2007 by the Central Administrative Tribunal, Principal Bench, New Delhi. By this judgment, the Central Administrative Tribunal had held that there was unexplained delay and laches in initiating disciplinary proceedings against the present respondent. As a result, by the impugned order, the Tribunal has quashed the memorandum dated 19th May, 2006 whereby the declaration was made by the appointing authority to hold the disciplinary inquiry against the respondent under

Rule 14 of the CCS (CCA) Rules, 1965.

2. The respondent was an officer of the 1992 batch of the Indian Revenue Service of the Customs & Central Excise Services. During the relevant period, the respondent was posted as an Assistant Commissioner, with the service.

3. Investigations were initiated by the Directorate of Revenue Intelligence (DRI) at Mumbai against five benami companies namely M/s R.S. & Company, M/s Stitch & Style, M/s Himgiri Overseas, M/s Deepshikha Overseas and M/s Saharanpur Handicrafts into fraudulent exports as well as fraudulent claim of duty draw backs. Based on such investigation, a show cause notice dated 3rd December, 1999 was issued by the DRI under Section 124 of the Customs Act, 1962 read with Rule 16 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 for imposition of penalty under Section 114 (i), 114 (ii) and 117 of the Customs Act, 1962. The allegation was that the respondent had entered into conspiracy with one Rajesh Kumar for carrying out fraudulent exports by wrongfully declaring higher value of old and used garments for making the claim of duty drawback.

4. On the 7th of March, 2000, the respondent was placed under suspension which was revoked in March, 2001.

5. The respondent replied to the cause notice issued under the Customs Act and also made his written submissions on 15th October, 2001. A fine of Rs.2,00,000/- was imposed by an order dated 19th August, 2003 upon the respondent. This order imposing the fine was assailed by the respondent before the Custom Excise & Service Tax Appellate Tribunal (CESTAT). The penalty was initially stayed by an order passed on 29th October, 2003. The respondent's appeal was accepted by CESTAT by the final order passed on 2nd November, 2005 and the order imposing penalty upon him was quashed.

It is undisputed before us that this order has attained finality.

6. In addition thereto, during this period, on 25th September, 2002, the petitioner was promoted as a Joint Commissioner as well.

7. The petitioners thereafter issued the memorandum dated 19th May, 2006 intending to hold a disciplinary inquiry against the respondent under Rule 14 of the CCS (CCA) Rules, 1965 and informed him of the

charges which pertained to the afore-noticed export transaction only. The respondent submitted a reply on 1st September, 2006 and nothing happened thereafter for a period of over one and a half years.

8. It is to be noted that the respondent assailed the memo dated 19th May, 2006 before the Central Administrative Tribunal by way of OA No.1690 of 2007. More than six months after the filing of the petition before the Central Administrative Tribunal by the respondent, the petitioners issued an order dated 4th March, 2008 appointing an inquiry officer as well as a presenting officer to conduct disciplinary proceedings against the respondent.

9. We are also informed by Dr. Bhardwaj, learned counsel for the respondent that the Central Bureau of Investigation also conducted investigation into the allegations made by the petitioner. Nothing incriminating was found against the present respondent and no criminal case was initiated against him.

10. The respondent had challenged the order dated 19th May, 2006 before the Tribunal inter alia on the ground that the petitioners were contemplating conducting a departmental promotion committee for their non-functional selection grade in 2006 and the respondent was in the zone of consideration. The impugned memorandum dated 19th May, 2006 was issued only to interdict this consideration of the respondent.

11. The respondent has also contended that the memorandum of charge-sheet dated 19th May, 2006 was predicated on allegations which were identical to the show cause notice dated 3rd December, 1999.

12. The respondent has drawn our attention to the order dated 21st November, 2005 passed by the CESTAT wherein specific findings have been returned to the effect that there was no proof of any monetary flow to the respondent and that there was no other evidence as well against the respondent. The CESTAT has also noticed that there was no proof of any personal interest on the part of the respondent and that he had no role at all to play in respect of export of the goods. Our attention has also been drawn to the action of the respondent in stopping the payment of claim to the disputed companies and also the dues of the respondents which show that there was no engagement of the respondent with the companies in question.

13. An important circumstance which has weighed with the Central

Administrative Tribunal in accepting the challenge by the respondent is the fact that the allegations pertained to transactions of the year 1998 while the charge-sheet was issued as back as in the year 2006 based on material which was in the power, possession and knowledge of the petitioners in the year 1998 as well. The case was investigated by two agencies, firstly the Department of Revenue Intelligence & thereafter by the Central Bureau of Investigation which had not found any culpability of the respondent in the alleged transactions. The respondent has also averred prejudice on account of the delay as well as the fact that he had not had any opportunity to cross-examine such witnesses whose statements were recorded under the Customs Act and further that at this highly belated stage, no witnesses would be available at present to support his defence.

14. We find that there was delay not only in initiation of the disciplinary proceedings and issuance of the charge-sheet, but also gross and unexplained delay in appointment of the inquiry officer which was effected only on 4th March, 2008. The respondent has submitted that the purpose of the inquiry was to harass him despite his innocence and the same is devoid of any basis on merit.

15. It is noteworthy that with regard to the same transaction, the petitioners issued similar belated charge-sheets to other customs employees as well. Our attention is drawn also to fact that with regard to the same transaction, the petitioners had issued a memorandum of charge-sheet to one Joseph Kuok, then deployed as a Superintendent with Customs. The memorandum of charges was issued to him on 15th January, 2010 which he challenged by way of OA No.2727 of 2010 before the Central Administrative Tribunal. Joseph Kuok's challenge was based on grounds identical to that on which the respondent challenged the petitioner's action. The Tribunal accepted Joseph Kuok's challenge by way of an order dated 16th May, 2011 holding that the disciplinary proceedings were untenable because of unexplained and unwarranted delay in initiation of the departmental inquiry against Joseph Kuok. This order of the Tribunal was not challenged by the petitioners and has attained finality.

16. A third person namely Hari Singh who was working as an Inspector with the Customs department at the relevant time, was also issued a similar memorandum of charges in respect of the same transaction. The present petitioners (respondents in the challenge by Hari Singh)

relied on the same show cause notice under the Customs Act and the inquiry report as in the present case. Hari Singh's challenge to the memorandum of charges before the Central Administrative Tribunal had also succeeded by the judgment dated 8th January, 2013 passed in RA No.27 of 2012 in OA No.1844 of 2011 passed by the Central Administrative Tribunal.

17. The present petitioners challenged this judgment of the Tribunal by way of WP (C) No.4245 of 2013 which was dismissed by a judgment dated 23rd September, 2013. The findings of this court that there was inordinate and unwarranted delay in commencement of the disciplinary proceedings against the respondent were not challenged by the petitioner before any other court and the same have also attained finality.

18. We find that detailed reasons have been recorded by the Tribunal in the order dated 19th November, 2008 assailed by way of the present writ petition. The very issues on which the writ petition is based, were raised before us and were decided by us in the judgment dated 23rd September, 2013 passed in WP (C) No.4245 of 2013 entitled **Union of India &Anr. Vs. Hari Singh**. The challenge by the petitioners in the instant case is identical to that pressed by Hari Singh in that case.

19. The Tribunal has noted that the respondents have not been able to adequately explain the inordinate delay in initiation of the charge-sheet which would cause prejudice to the defence of the respondent. The petitioners have not been able to place any explanation for the delay which has ensued before us as well.

20. Other circumstances including the fact that the respondent was promoted; the order quashing the penalty which had been imposed upon the respondent were accepted by the petitioner herein; as well as the fact that the Central Bureau of Investigation found no culpability of the respondent also lend substance to the case of the respondent. We find no merit in the challenge which has been laid to the order of the Central Administrative Tribunal by way of the present writ petition.

21. This writ petition and application are, therefore, dismissed with costs which are quantified at Rs.25,000/- . The costs shall be paid to the respondent within eight weeks from today.

ILR I (2014) I DELHI 595
CRL. A.

AHMED SAYEED ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 738/2000 DATE OF DECISION: 06.01.2014

Indian Penal Code, 1860—Section 498A/304B—Appellant convicted by ASJ—Trial Court itself was not sure if soon before death deceased was subjected to cruelty—Deceased's younger sister was married to accused's younger brother—She was never subjected to cruelty and living happily in matrimonial home—She was not examined by the prosecution to ascertain conduct and attitude of the accused—Allegations regarding demand of dowry vague, unspecific and uncertain—No specific date mentioned as to when any specified dowry articles demanded—IO failed to investigate as to whether accused had illicit relations as alleged and whether that was provocation for the deceased to take the extreme step—Parents of deceased leveled allegation only after the suicide and no prior complaint—Deceased used to live at Hapur before shifting to Delhi about 1½ months prior to occurrence, whereas, accused was working in Delhi. Held, prosecution thus failed to establish beyond reasonable doubt that there was direct nexus between the cruelty and suicide. The prosecution is required to prove the very case it lodges and the Court cannot substitute its own opinion and make out a new case. The investigating officer did not collect surrounding circumstances which permitted to commit suicide. The accused was sleeping on the roof at the time of occurrence. Nothing came in evidence that he instigated deceased to commit suicide at that moment—Accused acquitted.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Arun Sharma with Mr. Saleem Malik, Advocates.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP for the State.

RESULT: Appeal allowed.

S.P. GARG, J.

1. Ahmed Sayeed (the appellant) impugns a judgment dated 07.06.2000 of Additional Sessions Judge in Sessions Case No.15/98 arising out of FIR No.311/98 registered at Police Station Rajouri Garden whereby he was held guilty for committing offences under Section 498A/304B IPC. By an order dated 9th June, 2000, he was awarded rigorous imprisonment for seven years under Section 304-B IPC and rigorous imprisonment for two years with fine Rs. 500/- under Section 498A IPC. Both the sentences were to operate concurrently.

2. Allegations against the appellant were that he used to harass Ishrat, his legally wedded wife, for or in connection with dowry demands during her stay at the matrimonial home. She committed suicide on the night intervening 17/18-05-1998. Daily Diary (DD) No.14/A was recorded on 06.00 A.M. on 18.05.1998 at Police Station Rajouri Garden in this regard. During the course of investigation, statements of witnesses conversant with the facts were recorded. Post-mortem examination of dead body of the deceased was conducted. After completion of investigation, a charge-sheet was submitted in the court against the appellant for committing offence under Section 498A/304-B IPC. The prosecution examined 15 witnesses to prove the appellant's guilty. In 313 statement, the appellant denied his complicity in the crime and stated that Ishrat used to remain depressed as no child was born to her. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment held the appellant guilty for the

offences mentioned previously. Being aggrieved, the appellant has come in appeal.

3. I have heard the learned counsel for the parties and have examined the record. It is not disputed that on the intervening night of 17/18-05-1998 Ishrat died due to burns otherwise than under normal circumstances at the matrimonial home i.e.F-143, Raghubir Nagar, Delhi within seven years of her marriage. The marriage had taken place between the parties about four years prior to the occurrence and no issue was born to her out of this wedlock. It has come on record that prior to the incident no complaint was ever lodged by the deceased or her parents against the appellant for treating her with cruelty on account of non-fulfillment of dowry demands. She was never taken for medical examination to ascertain if any time prior to the occurrence she was caused physical harm. No injuries on her body were noticed at the time of post-mortem examination. Nothing has come on record to infer if during her stay for about one and a half month at the said premises with the appellant any quarrel took place between the two or she was subjected to any physical or mental torture. PW-1 (Kamrul Islam) residing in the neighbourhood of the parties did not depose if the relations between the accused and the deceased were strained or that she was subjected to any harassment or cruelty any time by the appellant. PW-2 (Ram Dhan), landlord, also did not implicate the accused. In the cross-examination by learned Additional Public Prosecutor, he disclosed that he had not seen the accused quarrelling with his wife during her stay at the said house. The Investigating Officer did not examine any other neighbour to find out if the accused used to subject Ishrat with cruelty or had given beatings to her any time. He admitted in the cross-examination that he had not gone to the village of the accused to verify whether the deceased lived there happily or not. The Trial Court in the impugned judgment noted that there was no harassment to Ishrat due to dowry demands. The observations in para (20) of the judgment are relevant to note:

> *"Although, from the above circumstances, it cannot be held that the accused used to demand dowry but these circumstances clearly show that accused was dissatisfied with his wife and although, he was newly married, he did not try to fulfill the aspiration and ambitions of his newly wedded wife. The reason for his callous attitude towards his wife are not difficult to find, admittedly, the in-laws of the accused were not very well off. In fact, they had four daughters and one son and they belonged to lower middle income group and have been depending upon the meager income earned by them by selling the oil extracted from crushing the oil seeds in their 'kolhoo'. The meager income, in my opinion, was hardly sufficient to meet their day-to-day demand and under these circumstances, it was beyond their means to have given sufficient dowry to their daughter in her marriage. Consequently, the accused had felt dissatisfied when his wife had not brought sufficient dowry in her marriage. It was evident from the testimony of PW-6 Wahidan and PW-7 Abdul Aziz that accused used to demand scooter, Fridge, T.V. and '50,000/- in cash and when they failed to fulfill their demand, their daughter used to be beaten by him. In fact, it was made clear by PW-6 Wahidan, the mother of deceased that her daughter used to show abrasions and other injuries which were inflicted on her as a result of beating given to her by the accused. The accused had visited the house of his in-laws about 1+ months prior to the incident and had taken the deceased with him and at that time, he had even threatened the parents of the deceased that he will not send their daughter to their home in future. Perhaps the accused was desperate to get his dowry demand fulfilled and when he could not do so, he had even tried to black-mail the parents of the girl by threatening that he will not send their daughter to their home in future. It is also evident that the accused had taken his wife from her parent's house to his native place at Hapur and thereafter, he had taken her to his house at Raghubir Nagar, Delhi, where, she had resided with him for 25 days. Although, no evidence could be brought on record that during this period, the accused had committed any cruelty on his wife or not and although, PW-2 Ram Dhan and PW-1 Kamrul Islam, who were the immediate neighbours of accused have not stated adversely to the accused and had not seen the accused quarrelling with his wife but from the conduct of accused, it was quite evident that he had no sympathy with his wife and perhaps he was not feeling repentance and remorseful at the tragic death of his newly wedded wife. Admittedly, accused was sleeping on the roof of his house when this incident took place, it is but natural that his wife must have cried when she was engulfed in fire. In natural circumstances, he would have been the first person to arrive at*

the scene on hearing the shrieks of his wife. Although, PW-2 Ram Dhan and PW-1 Kamrul Islam were woken up on seeing the smoke coming from the roof of the house which was made of asbestos sheet but accused had continued to sleep while, his neighbours were woken up and tried to extinguish the fire. There is nothing on record to suggest that neither any efforts were made by the accused to extinguish the fire or to shout for help. The fact that deceased had sustained deep burns over her entire body and had sustained 100% burn clearly suggest that she had continued to burn for a pretty long time and nobody had come forward to her help. Although, the prosecution could not prove whether it was homicidal death or not but these circumstances clearly suggest that accused had general apathy towards his wife and had scant regard and respect for her in the inner core of his heart. Perhaps, he had developed contempt for his wife as his wife used to object regarding his consuming liquor and also having illicit relations with some woman which the accused was finding difficult to digest. Since, the deceased was not having good family background and belonged to poor family and had not brought sufficient dowry and since, she found her husband habitual drinker and womanizer, perhaps she could not digest the said unbecoming behavior of her husband and could not tolerate his willful misconduct which forced her to take her life which she found to be without charm and happiness. Consequently, in my opinion, from the testimony of PW-6 Wahidan, PW-7 Abdul Aziz as well as from the conduct of accused, it was quite evident that he had committed cruelty upon his wife in connection with the demand of dowry. Since, the deceased had met with a tragic death within 7 years of her marriage, a presumption can be raised under Section 113 (B) of the Indian Evidence Act that the accused has caused dowry death. Consequently, in my opinion, the accused was guilty for the offence punishable under Section 498 A as well as under Section 304-B IPC."

4. From the perusal of the above findings recorded, it reveals that the Trial Court itself was not sure if soon before death Ishrat was subjected with cruelty for or in connection with dowry demands. The impugned judgment is based upon surmises and conjectures. The

prosecution is required to prove the very case it alleges and the court cannot substitute its own opinion and make out a new case. It is relevant to note that the deceased's younger sister was married to the accused's younger brother and it has come on record that she was never subjected to cruelty and was living happily in the matrimonial home. The prosecution did not examine her to ascertain the conduct and attitude of the appellant towards the deceased during her stay at village Hapur. The allegations regarding the demand of dowry are vague, unspecific and uncertain. No specific date has been mentioned as to when any specified dowry article was demanded by the appellant from the deceased or her parents. PW-7 (Abdul Aziz) in the cross-examination admitted that Ishrat was kept well by the accused for one year and thereafter she was not treated well. Allegations have been leveled against the appellant that he used to have illicit relations with a lady. However, the Investigating agency could not reveal with whom the appellant had illicit relations and whether that was the provocation for the deceased to take the extreme step. The entire case of the prosecution is based upon the testimonies of PW-6 (Wahidan) and PW-7 (Abdul Aziz), the parents of the deceased, who have leveled allegations only after the deceased committed suicide. Prior to that, they had no complaint whatsoever against the appellant and his family members. During her stay at Raghubir Nagar, Delhi, she was not treated with cruelty. The Investigating Officer did not examine any witness at Hapur to prove cruelty or harassment on account of dowry demands. Admittedly, the appellant used to do his job/service in Delhi and the deceased used to live at Hapur before shifting to Delhi for about one and a half month prior to the occurrence. The prosecution has, thus, failed to establish beyond reasonable doubt that there was direct nexus between the cruelty and the suicide. The Investigating Officer did not collect the surrounding circumstances which prompted Ishrat to commit suicide. The appellant was sleeping on the roof of the house at the time of occurrence. Nothing has come in the evidence that he had instigated Ishrat to commit suicide at that moment. The evidence is lacking at this material aspect.

5. Observations of Supreme Court in case **'Gangula Mohan Reddy vs. State of Andhra Pradesh',** 2010 (1) SCC 750, are relevant to note:

> "In **State of West Bengal v. Orilal Jaiswal and Anr.** : (1994) 1 SCC 73, this Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of

each case and the evidence adduced in the trail for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

6. In the light of above discussion, the prosecution has failed to prove its case beyond reasonable doubt. Benefit of doubt is given to the appellant and he is acquitted. The appeal is accepted. Conviction and sentence of the appellant are set aside. Bail bond and surety bond stand discharged.

7. Trial Court record be sent back forthwith.

ILR I (2014) I DELHI 601
CRL. A.

A. NAGRAJAN ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 478/2000 DATE OF DECISION: 06.01.2014

Indian Penal Code, 1860—Section 498-A/306—Deceased committed suicide by hanging—Ornaments given to the deceased at the time of marriage, were pledged—No investigation as to the purpose of pledging of

ornaments—Employer of deceased where she was working, did not depose that the deceased was subjected to cruelty or harassment by in-laws on account of dowry—By no stretch of imagination it can be inferred that pledging of ornaments had any direct nexus with the suicide—Sufficient time elapsed between the pledging and death—IO did not investigate surrounding circumstances which prompted the deceased to commit suicide or the presence of accused at the time of occurrence—No neighbour examined to prove that deceased was subjected to cruelty—Allegations emerged after suicide and no complaint prior to it was ever lodged—Deceased never taken for medical examination regarding beatings inflicted to her—Divergent and conflicting version given by the prosecution witnesses about demand of dowry—Witnesses made vital improvements—Allegations vague and uncertain and without specific dates—Parents of deceased used to live at a short distance from matrimonial home, but they never confronted the accused and his family members for the cruelty meted out to the deceased—Simply because the accused was obsessed with drinking and used to waste money, not enough to infer that he was instrumental of death of deceased, without a positive act of instigation or aid in commission of suicide. Held, The cruelty established has to be of such a gravity as is likely to drive a woman to commit suicide. The mere fact that Meena committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband. The Court is required to look into all other circumstances of the case. One of the circumstances which has to be considered by the Court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave

injury or danger to life, limb or health of the woman. A reasonable nexus has to be established between the cruelty and the suicide in order to make good the offence of cruelty which is lacking in the instant case.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Tom Joseph, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

S.P. GARG, J.

1. A.Nagrajan (the appellant) questions the legality and correctness of a judgment dated 02.08.2000 of learned Addl. Sessions Judge in Sessions Case No. 569/96 arising out of FIR No. 232/88 PS Saraswati Vihar by which he was held guilty for committing offences punishable under Sections 498A/306 IPC. By an order dated 03.08.2000, he was awarded RI for three years with fine Rs. 5,000/under Section 306 IPC and RI for one and a half years with fine Rs. 1,000/- under Section 498A IPC. The brief facts which are relevant to dispose of this appeal are recapitulated as under :

2. Meena was married to the appellant (A. Nagrajan) and a male child was born to her out of this wedlock. Her parents had given various articles including gold ornaments, T.V., bed and almirah according to their financial capacity at the time of her marriage. On the night intervening 5/6.08.1988, Meena committed suicide at her matrimonial home. On the complaint of her brother – Parama Swamy, the First Information Report was lodged under Sections 498A/302/34 IPC on 06.08.1988. During the course of investigation, statements of the witnesses conversant with the facts were recorded. Post-mortem examination on the body was conducted. After completion of investigation, a charge-sheet was filed against the deceased's husband – A.Nagarajan and her mother-in-law - Pawlai for committing offences under Sections 498A/304B IPC. Both of them were duly charged and brought to trial. The prosecution examined fifteen witnesses to establish their guilt. In their 313 statements, the accused persons denied their complicity in the crime and alleged false implication. After appreciating the evidence and considering the rival

contentions of the parties, the Trial Court, by the impugned judgment convicted the appellant – A. Nagarajan under Sections 498A/306 IPC. Needless to say that Pawlai was acquitted of the charges and the State did not prefer any appeal against her acquittal.

3. I have heard the learned counsel for the parties and have examined the record. Initially, the case registered was under Sections 498A/302 IPC whereby the complainant -Parama Swamy suspected murder of his sister at the hands of the accused persons. During investigation, the investigating agency was unable to collect any evidence to charge-sheet the accused persons for committing murder. Since Meena's death had occurred within seven years of her marriage, both the accused persons were charged for committing offences under Sections 498A/304B IPC. Again, the prosecution was unable to substantiate the charge under Section 304B IPC during trial. The observations of the Trial Court in the impugned judgment are relevant to note :

> *"..... I fully agree with the contention of Ld.defence counsel. The evidence produced by prosecution to prove that Meena was being mal-treated or harassed for, or in connection with dowry soon before her death is very week type of evidence, and is not sufficient to come to conclusion that Meena was being harassed or mal-treated for, or in connection with dowry soon before her death. The prosecution has failed to prove the offence punishable u/s 304B IPC against accused persons."*

4. It is significant to note that on the same set of evidence, co-accused Pawlai, deceased's mother-in-law, was acquitted of the charges under Sections 498A/304B/306 IPC. The Trial Court observed :

> "In the present case sufficient evidence has not come on record against accused Pawlai whereby it could be held that she also abetted Meena to commit suicide. If accused Pawlai even had said anything to Meena even then she cannot be held guilty for any offence because crude and uncultured behaviour by mother-in-law towards her daughter-in-law is normal occurrence in Hindu families and it does not form and constitute abetment for the purpose of Section 306 IPC."

5. It is admitted position that Meena was married to A.Nagarajan

(the appellant) about one and a half years prior to the incident and a male child was born to her out of this wedlock. It is also not disputed that on the night intervening 5/6.08.1988, Meena committed suicide by hanging. No injuries whatsoever on her body were noticed in the post-mortem examination report (Ex.PW-7/A). It is not denied by the appellant that ornaments given to the deceased at the time of the marriage were pledged. In 313 statement, he explained that the ornaments were pledged to perform 'mundan' ceremony of his newly born son. Since they had not enough money to perform 'mundan' ceremony, her wife had taken ornaments to her mother through her brother -Parama Swamy for pledging. She brought Rs.3,500/- after pledging her jewellery. After 'mundan' ceremony, her wife asked her mother money to get release the gold ornaments but she declined. Subsequently, she got money from her employer Ram Nath Sachdeva and handed over it to her mother for getting the ornaments released. The Investigating Officer admitted in the cross-examination that during investigation, he had come to know that deceased had taken Rs. 3,400/- from Ram Nath Sachdeva to get release her pledged jewellery. It is, however, unclear as to when the ornaments were got released. The Investigating Officer did not investigate as to what was the purpose to get the ornaments pledged. From the testimony of PW-3 (Ram Nath Sachdeva), in whose house Meena used to work as maid reveals that Meena had no resentment for raising money on pledge of her ornaments. She was worried about the exorbitant interest being charged by the individual with whom the ornaments were pledged and for that reason, she had taken Rs. 3,400/- from Ram Nath Sachdeva to get release the ornaments to avoid payment of exorbitant interest and to repledge the ornaments with him. PW-3 (Ram Nath Sachdeva) deposed that on 05.08.1988, a day prior to the occurrence, Meena visited him and promised either to bring the money or to bring the ornaments to pledge or else her husband would bring money or ornaments. It did not happen. PW-3 (Ram Nath Sachdeva) did not reveal if Meena was depressed or stressed or had any grievance or complaint against her husband. She was working at PW-3 (Ram Nath Sachdeva)'s house for about 3 to 4 years and nothing has emerged if she ever complained to him about cruelty or harassment at the hands of her in-laws on account of dowry demands. By no stretch of imagination, it can be inferred that pledging of the ornaments had any direct nexus with the suicide. Sufficient time had elapsed between the pledging of the ornaments and the date when Meena took the extreme step of putting an end to her life. The Investigating

Officer did not investigate the surrounding circumstances which prompted the deceased to commit suicide on the night intervening 5/6.08.1988. In 313 statement, the appellant claimed that he was not present in the matrimonial home at that time. The Investigating Officer did not investigate about the presence of the appellant at a specific place at the time of occurrence. In the cross-examination, he admitted that enquiries were made from the neighbourers about the quarrel. However, no neighbour was examined to prove that the appellant used to harass or torture the deceased during her stay at the matrimonial home on account of non-fulfilment of dowry demands. Admittedly, all these allegations of her family members have emerged after the sad demise. Prior to the incident, no complaint whatsoever, was ever lodged by the deceased or her family members against the appellant and his mother for their conduct and attitude. The deceased was never taken for medical examination for the beatings inflicted to her any time. The prosecution witnesses have given divergent and conflicting version about the demand of dowry articles and money by the appellant. They have made vital improvements in their deposition before the Court. In the complaint PW-5 (Parama Swamy) alleged that the appellant and his mother used to harass and torture Meena in connection of dowry demands including T.V. from the very inception. It has come on record that T.V. was given at the time of marriage to the deceased and she was kept properly initially by the appellant and his mother. The allegations are vague and uncertain. No specific date has been given when Meena was given physical or mental torture or harassment. It is on record that the parents of the deceased used to live at a short distance from her matrimonial home. At no stage, they confronted the appellant and his mother for the cruelty meted out to the deceased. Simply because the appellant was obsessed with vice of 'drinking' and used to waste money is not enough to infer that he was instrumental in her death. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. There is no evidence that Meena was harassed, tortured, assaulted or there was continuous and incessant harassment driving her to commit suicide. The cruelty established has to be of such a gravity as is likely to drive a woman to commit suicide. The mere fact that Meena committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband. The Court is required to look into all other circumstances of

the case. One of the circumstances which has to be considered by the Court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. A reasonable nexus has to be established between the cruelty and the suicide in order to make good the offence of cruelty which is lacking in the instant case.

6. Observations of Supreme Court in case **'Gangula Mohan Reddy vs. State of Andhra Pradesh',** 2010 (1) SCC 750, are relevant to note :

> "In **State of West Bengal v. Orilal Jaiswal and Anr.** : (1994) 1 SCC 73, this Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trail for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

7. In the light of above discussion, the prosecution has failed to prove its case beyond reasonable doubt. Benefit of doubt is given to the appellant and he is acquitted. The appeal is accepted. Conviction and sentence of the appellant are set aside. Bail bond and surety bond stand discharged.

8. Trial Court record be sent back forthwith.

ILR (2014) I DELHI 608
W.P.

UMESH DUTT SHARMA ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

CM NO. : 66/2014 IN W.P. NO. : 40/2014 **DATE OF DECISION: 06.01.2014**

Constitution of India, 1950—Article 226: Petitioner herein has assailed order of the CAT, whereby Petitioner's challenge to his non-selection for the post of JE-II was rejected, as well as the order rejecting Petitioner's review application.

Present with petition filed challenging final selection list for the post of JE-II (25% LDCE Quota) wherein Petitioner's name was not included—Sole ground of challenge was claim of the Petitioner that he was entitled to 20 additional marks, under the "Personality Address, Leadership and Academic/Technical Qualifications" in terms of circular RBE No. 55/86.

Respondents countered Petitioner's claimon the ground of revised classification—Pursuant to Railway Board's directive on 22nd March, 2006, heading of "Personality Address, Leadership and Academic/ Technical Qualifications" stood deleted—Respondents conducted selection as per rules modified in notification dated 7th January, 2010.

Held: In view of the above directions, Petitioner not entitled to any additional benefit—No other ground

was pressed before the Tribunal—Therefore, the actions of the Respondents or the orders impugned herein cannot be faulted—Further, the factum of an earlier writ petition on the same ground concealed by the Petitioner—No merit in the writ petition.

The scheme of selection followed by the respondents declared that 50 marks are awarded for professional ability and 30 for service record. The respondents have submitted that the selection was conducted as per rules mentioned in notification dated 7th January, 2010. **(Para 5)**

In view of the above directions, the petitioner was not entitled to any additional benefit based on the dimplomas as additional qualifications which he claims. The petitioner did not press any other ground before the Tribunal.

These are reasons which have weighed with the Tribunal while rejecting the petitioner's claim by way of the impugned order dated 24th November, 2011. **(Para 6)**

In view of the above, the petitioner was not entitled to any additional benefit based on the qualifications which he claimed. The action of the respondents or the impugned orders dated 24th November, 2011 as well as the order dated 27th February, 2012 therefore cannot be faulted on any legally tenable ground. **(Para 8)**

It is pointed out by learned counsel for the respondent that the petitioner had filed an earlier writ petition in the year 2012 assailing the orders dated 24th November, 2011 and 27th February, 2012. The petitioner has concealed the factum of filing of the previous writ petition as well as its fate in the present writ petition. **(Para 9)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. R.D. Chauhan and Mr. Arun K. Chauhan and Mr. M.S. Negi, Advocates.

FOR THE RESPONDENTS : Mr. R.N. Singh and Mr. A.S. Singh, Advocates for R-1 to R-2.

RESULT: Writ petition dismissed.

GITA MITTAL, J. (oral)

1. The petitioner in the instant case has assailed the order dated 24th November, 2011 passed by the Central Administrative Tribunal dismissing the O.A.No.2995/2010 as well as the order dated 27th February, 2012 whereby the Review Application No.59/2012 was rejected.

2. The petitioner has assailed his non-selection for the post of JE-II (25% LDCE Quota) notified by the respondent on 7th January, 2010.

The petitioner had undertaken the written examination on 15th June, 2010. He was not found meritorious in the result declared on 13th July, 2010. The respondents however favourably considered the petitioner's representation dated 19th July, 2010 and corrected the select list by a letter dated 21st July, 2010 whereby the petitioner's name was included in the list of candidates who had qualified the written examination. The respondents declared that inclusion did not tantamount as a selection.

In the final select list issued on 27st July, 2010, three persons, other than the petitioner, were declared successful.

3. This select list was challenged by the petitioner before the Central Administrative Tribunal by O.A.No.2955/2010 on the sole ground that he possessed a Diploma in Rail Transport and Management had as well as Diploma in Electrical Engineering (having cleared it in the first class), as additional qualifications. Based on these certificates, the petitioner claimed that he was entitled to get additional 20 marks under the heading "Personality Address, Leadership and Academic/Technical Qualifications" in terms of the circular being RBE No.55/86. The petitioner placed reliance on the following extract of RBE No.55/86:

> "The question of granting weightage to the Diploma secured by the Railway Employees from the Institute of Rail Transport in the matter of selections held for promotion to selection post in the Group C has been under consideration of the Board for some time. In terms of extant rules, selection of a Railway servant for promotion to the posts classified as selection depends

on the marks secured by him under various heads one of which is Personality, Address, Leadership and Academic/Technical qualification" for which 20% marks have been allotted. It has now been decided that in respect of selections for promotion to Selection posts, Diploma of Institute of Rail Transport will be taken into account, along with any other Technical/Academic qualifications in awarding marks under the heading "Personality, Address, leadership and Academic/Technical Qualifications".

4. The respondents countered the petitioner's claim pointing out that after the recommendation of Sixth Central Pay Commission, merger of grades was effected and there was revised classification and mode of filling up of non-gazetted posts. It was pointed out that the post of JE-II was covered under Sl.No.18 for filling up vacancies as existed on 31st August, 2009. The procedure for holding selection to the post classified as "Selection". Pursuant to the Railway Board's letter dated 22nd March, 2006, the heading "Personality Address, leadership and Academic/Technical Qualifications" stands deleted. The directive dated 22nd March, 2006 reads as follows:

> "The matter has been carefully considered by the Ministry of Railways. It has been decided to altogether do away with the heading "Personality Address, Leadership and Academic/Technical Qualifications" from the selection procedure."

5. The scheme of selection followed by the respondents declared that 50 marks are awarded for professional ability and 30 for service record. The respondents have submitted that the selection was conducted as per rules mentioned in notification dated 7th January, 2010.

6. In view of the above directions, the petitioner was not entitled to any additional benefit based on the dimplomas as additional qualifications which he claims. The petitioner did not press any other ground before the Tribunal.

These are reasons which have weighed with the Tribunal while rejecting the petitioner's claim by way of the impugned order dated 24th November, 2011.

7. The rejection of review application by the order dated 27th February, 2012 was based on the above directives contained in the Railway Board's letter dated 22nd March, 2006. This was the only point

which was pressed in support of the application.

8. In view of the above, the petitioner was not entitled to any additional benefit based on the qualifications which he claimed. The action of the respondents or the impugned orders dated 24th November, 2011 as well as the order dated 27th February, 2012 therefore cannot be faulted on any legally tenable ground.

9. It is pointed out by learned counsel for the respondent that the petitioner had filed an earlier writ petition in the year 2012 assailing the orders dated 24th November, 2011 and 27th February, 2012. The petitioner has concealed the factum of filing of the previous writ petition as well as its fate in the present writ petition.

10. For all these reasons, we find no merit in the writ petition and application. The writ petition and the application are hereby dismissed.

ILR (2014) I DELHI 612
CRL.A.

RAVINDER KUMAR ....APPELLANT

VERSUS

THE STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 397/2001 DATE OF DECISION: 09.01.2014

Indian Penal Code, 1860—Section 307—The prosecution has to prove that the accused while inflicting injuries to the victim, had an intention to cause his death or he had the knowledge that the act done by him may result in the death of the victim and, there is an intention or knowledge coupled with some overt act in the execution thereof. Initially appellant did not give any injury—When the victim pushed him

out of the house, the appellant stuck a single blow on his chest with a sharp object—He did not harm his wife and son standing nearby—He did not inflict repeated blows with the sharp object in his possession. There was no previous history of animosity—The weapon was an ordinary scissor or some sharp object whose nature could not be ascertained. Nature of injuries—Doctor was not examined during trial. In the MLC depth of the injury was not indicated—Since the particular opinion has not been proved through the doctor who gave it and it is unclear on what basis he formed that opinion, it is not safe to hold that the injuries inflicted by the accused were 'grievous'. The patient was conscious and oriented when taken to hospital for medical examination—The appellant was under the influence of liquor and injury was caused in a scuffle. In these circumstances, it cannot be inferred that the single blow inflicted was with the avowed object or intention to cause death. The conviction under Section 307 IPC, thus, cannot be sustained and is altered to Section 324 IPC.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT	**:**	Mr. Anil Aggarwal, Advocate.
FOR THE RESPONDENT	**:**	Mr. Lovkesh Sawhney, APP for the State.

RESULT: Appeal Allowed.

S.P. GARG, J.

1. Ravinder Kumar (the appellant) impugns a judgment dated 02.05.2001 of learned Addl. Sessions Judge in Sessions Case No. 50/2000 arising out of FIR No. 184/96 PS Anand Vihar by which he was convicted for committing offence punishable under Section 307 IPC and by an order on sentence dated 04.05.2001, he was awarded RI for five years with fine Rs. 5,000/- .

2. Allegations against the appellant were that on 16.08.1996 in between 08.45 P.M. to 09.00 P.M. at house No. 381, Karkardooma, he inflicted injuries by a knife to Hukam Singh in an attempt to commit murder. The occurrence took place about 09.00 P.M. The victim Hukam Singh was taken to GTB Hospital from the spot. MLC (Ex.PW-5/A) records the arrival time of the patient at 09.30 P.M. Daily Diary (DD) No. 14 was recorded regarding the occurrence. PW-21 (Insp. Sanjay Singh) went to the spot and recorded Hukam Singh's statement (Ex.PW-1/A); made endorsement (Ex.PW-21/A) and lodged First Information Report at 11.55 P.M. There was no delay in lodging the report with the police. In the statement (Ex.PW-1/A), complainant gave vivid details of the incident and implicated Ravinder Kumar for inflicting injuries on the left side of the chest by a knife. He also disclosed appellant's motive to cause injuries. Since the appellant was named in the earliest available opportunity by the complainant, there was least possibility to concoct a false story in a short interval. While appearing as PW-1, the complainant – Hukam Singh proved the version given to the police at the first instance without any variation. He named Ravinder Kumar for causing injuries to him when he objected to abuses given by him to Pushpa Sharma, his tenant in house No. 271. In the cross-examination, specific suggestion was put to the victim that "after dissuading the accused from abusing the said lady, he (the complainant) did not return to his house or remained in the street or that he deliberately quarrelled with the accused in the street and sustained injuries". Presence of the accused at the spot was not denied. No explanation was given as to why the accused in the quarrel inflicted injuries to the complainant. Material facts deposed by the witness regarding the sequence of events leading to the infliction of the injuries remained unchallenged in the cross-examination. PW-2 (Krishan Lal), an independent witness from neighbourhood fully supported the complainant and corroborated his version in its entirety. He also implicated Ravinder Kumar for inflicting injuries to the complainant with a sharp edged weapon in his hand. PW-3 (Sonwati) and PW-4 (Sachin), wife and son of the victim, whose presence at the spot was natural and probable also supplemented the prosecution version and proved its case without any major discrepancies. PW-7 (Pushpa Sharma) also deposed that she had gone to lodge the complaint with her landlord – Hukam Singh for the abuses hurled at her by the appellant who used to visit another tenant Usha in the said premises. In the absence of any prior enmity or ill-will, all these witnesses were not expected to falsely rope

in the appellant and to let the real culprit go scot free. The ocular testimony of the prosecution witnesses is in consonance with medical evidence. PW-5 (Dr.R.Dayal) medically examined Hukam Singh on 16.08.1996 and prepared MLC

(Ex.PW-5/A). Minor discrepancies and contradictions highlighted by the appellant's counsel about the non-recovery of the weapon of offence and PW-16 (Yusuf Khan) turning hostile are inconsequential and do not affect the core of the prosecution case. Evidence has come on record that injuries were caused with a sharp edged weapon. It makes no difference if it was scissor or knife. There is nothing on record to suggest that the injuries were accidental in nature. PW-5 (Dr.R.Dayal) was not cross-examined in this regard. The prosecution was able to establish that the appellant was the author of the injuries sustained by the victim -Hukam Singh.

3. The next question, which requires consideration is what offence is made out against the accused – appellant. The Trial Court has convicted and sentenced the appellant for the offence under Section 307 IPC. For proving the case under Section 307 IPC, the prosecution has to prove that the accused while inflicting injuries to the victim, had an intention to cause his death or he had the knowledge that the act done by him may result in the death of the victim and if there is an intention or knowledge coupled with some overt act in the execution thereof, then the accused can be held guilty for the offence under Section 307 IPC. In the instant case, the initial confrontation had taken place with Pushpa Sharma at house No. 271, Karkardooma. Pushpa Sharma went to lodge complaint against him to her landlord – Hukam Singh who lived at house No. 381, Karkardooma. Hukam Singh accompanied Pushpa Sharma to house No. 271, Karkardooma and intervened in the quarrel. He pushed out the appellant who was under the influence of liquor and advised him not to hurl abuses. This resented the appellant and after a few minutes, he went to the house of the complainant at 381, Karkardooma and confronted him. At the initial stage, he did not give any injury to Hukam Singh. When the victim pushed him out of the house, the appellant stuck a single blow on his chest with a sharp object. He did not harm his wife and son standing nearby. He did not inflict repeated blows with the sharp object in his possession. There was no previous history of animosity between the complainant and the appellant. The crime weapon was an ordinary scissor or some sharp object whose nature could not be ascertained.

PW-16 (Yusuf Khan) denied that this scissor (Ex.P1) was recovered from his shop at the appellant's instance. Nature of injuries was opined 'grievous' by Dr.Rajesh, Senior Surgeon, who was not examined during trial. In the MLC (Ex.PW-5/A), depth of the injury was not indicated. Since the particular opinion has not been proved through the doctor who gave it and it is unclear on what basis he formed that opinion, it is not safe to hold that the injuries inflicted by the accused were 'grievous'. The patient was conscious and oriented when he was taken to hospital for medical examination. The appellant was under the influence of liquor and injury was caused in a scuffle. In these circumstances, it cannot be inferred that the single blow inflicted was with the avowed object or intention to cause death. The conviction under Section 307 IPC, thus, cannot be sustained and is altered to Section 324 IPC.

4. Appellant's nominal roll dated 06.12.2010 reveals that he suffered incarceration for six months and fifteen days besides earning remission for ten days as on 13.08.2001. Nominal roll further reveals that he was not involved in any other criminal case and had clean antecedents. His overall jail conduct was satisfactory. He has suffered the ordeal of trial / appeal for about fifteen years. Considering these mitigating circumstances, sentence order is modified and the substantive sentence is reduced to one year. Other terms and conditions of the sentence order are left undisturbed. The appellant shall, however, pay compensation Rs. 50,000/- to the complainant and shall deposit it within fifteen days before the Trial Court. The Trial Court shall issue notice to the complainant to receive the compensation.

5. The appeal stands disposed of in the above terms. The appellant is directed to surrender before the Trial Court on 16.01.2014 to serve out the remaining period of sentence. Trial Court record be sent back forthwith.

ILR (2014) I DELHI 617
CRL.A.

JAUDDIN @ PAPPU ....APPELLANT

VERSUS

THE STATE (NCT OF DELHI) ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 260/2003 DATE OF DECISION: 10.01.2014

Indian Penal Code, 1860—Sec. 458, 392 and 397—Arms Act—Sec. 27—Appellant Convicted Under Section 458/392 read with Section 397 IPC and 27 Arms Act—Awarded minimum sentence under section 397 IPC i.e. seven years—The peculiar circumstances and interest of justice compelled the Court to reduce the sentence—Appellant had already undergone actual imprisonment of about four years and four months and had earned a remission of over five months—The original record was not traceable. Attempts were made to reconstruct the original record to appreciate the appeal on merits. However, the Trial Court was unable to reconstruct the original record to scrutinize the testimonies of the material prosecution witnesses on merits. The documents on record are not at all sufficient to finally decide the appeal on merits—Considering the peculiar and special circumstances where the original record is not available and taking into consideration all the facts and circumstances for special and adequate reasons, the order on sentence modified and the appellant sentenced to undergo the sentence for the period already suffered in custody by him.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. J.P. Singh, Advocate with Mr. Rahul Kr. Singh, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the state. SI Laxmi Narain, PS Rohini.

RESULT: Appeal Allowed.

S.P. GARG, J. (ORAL)

1. The appeal is listed today for directions and with the consent of the parties, is disposed of today.

2. Jauddin @ Pappu (the appellant) is aggrieved by a judgment dated 12.09.2001 in Sessions Case No.169/2001 arising out of FIR No.389/98 registered at Police Station Rohini by which he and his associate Kali Charan were convicted for committing offences punishable under Section 458/392 read with Section 397 IPC and 27 Arms Act.

3. Allegations against the appellant were that on 12.06.1998 at about 09.30 P.M. at house No.F-17/162 Sector-8, Rohini, he and his associates Kali Charan and Israj committed robbery using deadly weapons. Complainant-Hari Om happened to reach at his residence and saw the assailants committing robbery. He raised alarm and with the assistance of the public persons was able to apprehend the appellant and Kali Charan at the spot. The deadly weapons were recovered from their possession. Israj succeeded to escape from the spot. The information was given to the police and DD No.66B was recorded. The Investigating Officer lodged First Information Report after recording Hari Om's statement. During the course of investigation, the statements of witnesses conversant with the facts were recorded. Israj was apprehended subsequently at Bus Stop. Robbed articles were recovered from the possession of accused persons. After completion of investigation, a charge-sheet was submitted against all of them in the court. They were duly charged and brought to trial. The prosecution examined 16 witnesses to substantiate the charges. In their 313 statement, the accused persons pleaded false implication and denied their complicity in the crime. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted both the appellant and Kali Charan for the offences mentioned previously. Israj was given benefit of doubt and was acquitted of all the charges. It is relevant to note that the State did

not challenge his acquittal. It appears that Kali Charan who had undergone the sentence awarded to him did not prefer to challenge the judgment.

4. I have heard the learned counsel for the parties. During the course of arguments, appellant's counsel on instructions from the appellant stated at Bar that the appellant has opted not to challenge the findings of the Trial Court on conviction. He, however, prayed to take lenient view as the appellant had remained in custody for substantial period. Since the appellant has given up challenge to the findings on conviction in the presence of overwhelming evidence, his conviction for offences mentioned in the judgment is confirmed. Nominal roll dated 22.05.2013 reveals that the appellant remained in custody for five years besides earning remission for eight months and fourteen days. He was enlarged on bail on 24.01.2004. He has clean antecedents and was not involved in any criminal case. Nothing has emerged if after enlargement on bail he was involved in any criminal activity or misused the liberty granted to him. The appellant has suffered ordeal of trial/appeal for about 15 years. Regarding modification of order on sentence, it reveals that he was awarded minimum sentence under Section 397 IPC i.e. seven years. However, this case has peculiar circumstances and interest of justice compels the Court to reduce the sentence. The appellant preferred the appeal against the impugned order of 2001 from jail. The appeal was admitted on 20.05.2003. Trial Court record was requisitioned vide order dated 30.04.2003. The substantive sentence of the appellant was suspended till the disposal of the appeal as the appellant had already undergone actual imprisonment of about four years and four months and had earned a remission of over five months vide order dated 20.05.203. It is relevant to note that the original record was not traceable. Attempts were made to reconstruct the original record to appreciate the appeal on merits. However, the Trial Court was unable to reconstruct the original record to scrutinize the testimonies of the material prosecution witnesses on merits. The documents on record are not at all sufficient to finally decide the appeal on merits.

5. Learned APP has no objection if the power under Section 482 Cr.P.C is exercised and the minimum sentenced awarded to the petitioner/ appellant RI for seven years is reduced to the period already undergone by him in this case. Considering the peculiar and special circumstances where the original record is not available and taking into consideration all the facts and circumstances recorded above, for special and adequate reasons, the order on sentence is modified and the appellant is sentenced

to undergo the sentence for the period already suffered in custody by him in this case.

6. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith. Copy of the order be sent to the jail Superintendent for information.'

ILR (2014) I DELHI 620
W.P. (C)

MAX HOSPITAL PITAMPURA ....PETITIONER

VERSUS

MEDICAL COUNCIL OF INDIA ....RESPONDENT

(G.P. MITTAL, J.)

W.P. (C) NO. : 1334/2013 DATE OF DECISION: 10.01.2014

Constitution of India, 1950—Article 226 and 227—Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002—Indian Medical Council Act, 1956—Section 20-A and Section 33 (m)—Delhi Nursing Homes Registration Act, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in treating patient (Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of hospitals and secondly, that Ethics Committee of MCI

acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by Ethics Committee of MCI about state of affairs in Petitioner hospital and same did not harm any legal right or interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against Petitioner hospital highlighted above.

Important Issue Involved: Ethics Committee of Medical Council of India has no jurisdiction to pass any order against a hospital under Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Observations made by the Ethics Committee reflecting upon the infrastructure facilities available in a hospital would be uncalled for and unsustainable since it has no jurisdiction to go into the same.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Sanjeev Puri, Senior Advocate with Mr. Sajad Sultan, Advocates.

FOR THE RESPONDENTS : Mr. Ashish Kumar, Advocate with Mr. Avijit Mani Tripathi, Advocate.

RESULT: Allowed.

G.P. MITTAL, J.

1. By virtue of this writ petition under Article 226 and 227 of the Constitution of India, the Petitioner hospital seeks quashing of the minutes of the meeting of the Ethics Committee dated 27.10.2012 whereby it was held that there was medical negligence on the part of Dr. Alka Gupta, Dr. Navita Kumari and Dr. Pooja Bhatia in treating the patient Nitika Manchanda (the deceased) post her Lower Segment Caesarian Section Procedure (LSCS) on 03.05.2009. The observations of the Ethics Committee against the doctors and the Petitioner hospital are extracted hereunder wherein the observations against the Petitioner hospital are highlighted:

"18. Appeal against order dated 07.06.2010 passed by Delhi Medical Council made by Mr. S.P. Manchanda (597/2010) 02:30 PM.

The Ethics Committee considered the matter and noted that Dr. Pooja Bhatia, Dr. Vikas and Dr. Rajeev Kapoor & Mr. S.P. Manchanda were asked to appear before the Ethics Committee and all the said persons appeared before the Commitee except Dr. Rajeev Kapoor. The hospital authorities submitted letter stating that Dr. Rajeev Kapoor was currently not working in their hospital.

After detailed discussion, the Ethics Committee noted that hospital records as well as oral statement submitted by the treating doctors/ consultants showed that there was lack of guidance and care as provided by the treating consultant Incharge. Moreover, it is found that the hospital did not provide the patient with standard post operative care. The hospital lacked in adequate blood component facilities, timely ultrasound examination, timely usage of appropriate drugs, which might be responsible for the death

of the patient Ms. Nitika Manchanda.

After going through the case, the Ethics Committee unanimously felt that there was definite professional misconduct on the part of the consultant/treating doctors in management of patient i.e. Nitika Manchanda, in so far as the post operative monitoring and management of the adverse events occurring on the 2nd post operative day, which ultimately led to the death of the patient. It appears that the patient had developed severe pain in the abdomen at around 10.00 p.m. on 4th May, 2009 which was managed by the Resident Doctor on duty by a very aggressive multi modal analgesia and sedation and did not advise any investigations like a routine Haemogram and Ultrasound investigations, which was strongly indicated in such a situation.

On going through the records, it was found that there were numerous over writings and alterations in crucial patient data as well as the timing of the notings. At some points additional data seems to have been inserted at later date. On page No.183, the note does not specify the blood pressure the column of B.P. has been left blank which is unusual for a patient developing severe post operative abdominal pain.

The Ethics Committee strongly recommended to the regulatory body concerned with quality of hospital care, to take necessary action on the hospital administration for the poor care and infrastructure authorities. The Committee found that the attending consultant was negligent in providing post-operative care and the Committee decided the following punishment:

(i) The name of Dr. Alka Gupta be struck of from the Indian Medical Register as well as from the Register of State Medical Council for a period of 3(three) years.

(ii) Dr. Navita Kumari – a warning letter may be issued to her.

(iii) Dr. Pooja – RMO (Jr. Resident) – a warning letter may be issued to her.

(iv) **The concerned State Govt. Authorities (Principal Secretary, Health and Family Welfare, Govt. of Delhi) who have given permission to this Max Hospital, Pitampura Delhi to function may be requested to take necessary action on the said hospital management for not having adequate infrastructure facilities necessary for appropriate care during the post-operative period which contributed substantially to the death of Mrs. Nikita Manchanda.".....**

2. It is not in dispute that Dr. Nikita Manchanda, 30 years old female was admitted in the Petitioner hospital under consulting Obstetrics and Gynaecologist Dr. Alka Gupta on 03.05.2009 at 5:07 a.m. She was prepared for LSCS and was immediately shifted to operation theatre at 5:15 a.m. LSCS under SA was done and a full term baby boy was delivered at 5:41 a.m. On the first day of the operation, there was complaint of occasional mild pain in the abdomen. On the second day, the deceased was observed to be stable. However, around 11:00 p.m., the deceased complained of severe pain in lower abdomen and back. She was attended to by the Resident Doctor on duty i.e. Dr. Pooja Bhatia (Obste & Gynae). Dr. Pooja Bhatia is alleged to have found tenderness in lower back L-3, L-4 and L-5 region. There was no obvious swelling. The deceased was advised to be administered injection voveran, injection fortwin and injection phenergan IM slowly. The case is stated to have been discussed by Dr. Pooja Bhatia with Consultant Anaesthetist Dr. Vikas Mangla, who advised tablet mobizox.

3. Thereafter, the patient again complained of severe pain and a call was made to Dr. Alka Gupta around 6:55 a.m. the next day. Before Dr. Alka Gupta could reach the hospital, the condition of the deceased severely deteriorated and the BP and pulse became non recordable. Urgent resuscitating measures are stated to have been taken. The deceased was shifted to POP/SICU for further resuscitation. Ultimately, the deceased died and was declared clinically dead at 12:30 p.m.

4. A criminal complaint with allegations of medical negligence was made by Mr. Aman Sarna, the deceased's husband to the Police. The DCP (Headquarter) sought an opinion from the Delhi Medical Council (the DMC) if there was any medical negligence on the part of the doctors.

5. The DMC issued notices to the concerned doctors and after hearing them opined that there was no medical negligence on the part of

the doctors (of Max Hospital, Pitampura, New Delhi) in the treatment administered by them to the deceased Nitika Manchanda. Being dissatisfied with the opinion given by the DMC, Shri S.P. Manchanda, the deceased's father made a representation in the form of an Appeal to the Medical Council of India (MCI) which after notice to the concerned doctors and the Petitioner hospital passed the impugned order which has been extracted above.

6. The Petitioner's grievance is twofold. Firstly, that since the Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) have been framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, these regulations do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The case of the Petitioner is that the Petitioner hospital is governed by the Delhi Nursing Homes Registration Act, 1953. It is urged that in fact, an inspection was also carried out on 22.07.2011 by Dr. R.N. Dass, Medical Superintendent (Nursing Home) under the Directorate of Health Services, Govt. of NCT of Delhi and the necessary equipments and facilities were found to be in order which negates the observations dated 27.10.2012 of the Ethics Committee of the MCI. It is also the plea of the Petitioner hospital that the Petitioner was not provided an opportunity of being heard and thus the principles of natural justice were violated.

7. In the counter affidavit filed by the Respondents, it is not disputed that the MCI under the 2002 Regulations has jurisdiction limited to taking action only against the registered medical practitioners. It's plea however, is that it has not passed any order against the Petitioner hospital therefore; the Petitioner cannot have any grievance against the impugned order. At the same time, it is stated that only simple observations were made by the Ethics Committee of the MCI about the state of affairs in the Petitioner hospital and the same did not harm any legal right or interest of the Petitioner. It will be apposite to extract the relevant paragraphs of the counter affidavit filed by the MCI as under:-

"4. Preliminary Objections:

(i) That the instant writ petition is not maintainable under Article 226 of the Constitution of India as there is no cause of action for filing of this instant petition. The MCI has not passed any order against the petitioner in the impugned minutes of meeting dated 27.10.2012, therefore, there is no cause of action for filing the instant writ petition.

(ii) That the MCI has not passed any order against the petitioner and nor does the impugned minutes of meeting dated 27.10.2012 affect any legal right or interest of the petitioner which the petitioner seeks to enforce by filing this writ petition and thus the same is not maintainable.

(iii) That the jurisdiction of MCI is limited only to take action against the registered medical professionals under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (hereinafter the 'Ethics Regulations') and has no jurisdiction to pass any order affecting rights/interests of any Hospital, therefore the MCI could not have passed and has not passed, any order against the petitioner which can be assailed before this Hon'ble Court in writ jurisdiction.

(iv) That a simple observation made by the Ethics Committee of MCI about the state of affairs in the petitioner Hospital has harmed no legal right/interest of the petitioner for which a writ can be issued by this Hon'ble Court against the answering respondent.

(v) That the petitioner contends that an adverse order has been passed by the MCI and that too without hearing the petitioner. Both these contentions of the petitioner are incorrect and frivolous as firstly, there is no adverse order made by the MCI against the petitioner as MCI does not have any such jurisdiction; secondly, the petitioner was throughout represented before the Ethics Committee of MCI during the proceedings initiated on complaint of one Mr. Sunil Manchanda against some of the doctors working in the petitioner hospital. The petitioner was heard through

its advocates on several occasions and had submitted several documents also in support of their stand."

8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order against the Petitioner hospital under the 2002 Regulations. In fact, it is stated that it has not passed any order against the Petitioner hospital. Thus, I need not go into the question whether the adequate infrastructure facilities for appropriate post-operative care were infact in existence or not in the Petitioner hospital and whether the principles of natural justice had been followed or not while passing the impugned order. Suffice it to say that the observations dated 27.10.2012 made by the Ethics Committee do reflect upon the infrastructure facilities available in the Petitioner hospital and since it had no jurisdiction to go into the same, the observations were uncalled for and cannot be sustained.

9. Since the MCI had no jurisdiction to go into the infrastructure facilities, I need not also go into the aspect that in the year 2011, the facilities available in the hospital were inspected and were found to be in order.

10. The petition therefore has to succeed. I hereby issue a writ of certiorari quashing the adverse observations passed by the MCI against the Petitioner hospital highlighted in Para 1 above.

11. The writ petition is allowed in above terms.

12. Pending applications, if any, also stand disposed of.

ILR I (2014) I DELHI 628
CRL. A.

GULSHAN SHARMA & ORS. ....APPELLANTS

VERSUS

STATE OF NCT OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 397/2003 DATE OF DECISION: 16.01.2014

Indian Penal Code, 1860—Sections 34, 307—Appellants impugning order of the Addl. Sessions Court convicting them u/s 307/34 IPC. Prosecution contended that accused inflicted injuries and stabbed the victim (PW-1) with a knife, being resentful of the victim demanding money owed to him from the accused—FIR was registered and during the course of investigation accused persons were arrested, weapon of crime recovered—Charge sheet filed u/s 307/201/34 IPC—Accused persons pleaded false implication—Addl. Sessions Court convicted all the accused u/s 307/34 IPC—Hence, present appeal filed—No appeal filed against acquittal u/s 201 IPC. Appellants contended that Addl. Sessions Court fell into grave error by relying upon interested witnesses with no corroboration—Improvements in statements of prosecution witnesses ignored—Ingredients of s. 307 not attracted—MLC does not record nature of injuries. Held:

- **Material facts proved by complainant remain unchallenged in cross examination—No reason to disbelieve eye witnesses—No previous enmity with accused persons to falsely implicate them in present incident—Therefore, no sound reason to disbelieve**

their ocular testimony which is duly corroborated by medical evidence.

- **Appellants 2 and 3 cannot be held vicariously liable for knife injuries inflicted by Appellant 1—They are only liable for the individual role played by them in beating by fists and blows at the first instance. Common intention must precede the act constituting the offence—In the absence of proof of a pre-arranged plan, mere fact of all three appellants being present at the scene of the crime, is not sufficient to make A-2 and A-3 liable for the crime of A-1.**

- **Period already undergone by A-2 and A-3 to be treated as substantive sentence—No further sentence is required to be awarded—However, from facts and circumstances, A-1 liable for his individual act u/s 307 IPC.**

Both PW-2 (Sushma Taneja) and PW-11 (Rajeev Taneja) had no previous enmity with the accused persons to falsely implicate them in the incident. They lived in the same vicinity as neighbourers. A-1 and A-2 were members of the committee being run by PW-2 (Sushma Taneja). The problem arose when PW-11 (Rajeev Taneja) went to A-1's house to demand unpaid dues in his absence and left the message with his wife (A3) which annoyed the accused persons. In the absence of prior enmity or animosity, the injured witness is not expected to let the real culprit go scot free and to falsely implicate an innocent one. There are no sound reasons to disbelieve their ocular testimony which is in consonance with medical evidence. MLC (Ex.PW-7/A) was prepared when Rajeev Taneja was taken to DDU Hospital at 09.55 P.M. on 01.06.2000 by his brother Vinod Kumar Taneja. PW-7 (Dr.K.K.Kumra), CMO, DDU Hospital, identified the handwriting and signatures of Dr.Amar Kumar on the MLC (Ex.PW7/ A). He deposed that the injuries sustained by the victim were caused by sharp weapon and were 'dangerous' in nature.

His testimony remained unchallenged in the cross-examination. The police was able to recover the crime weapon i.e. knife (Ex.P1) used in the incident. As per Forensic Science Laboratory report, human blood AB group which was of the victim was detected on it. The prosecution was able to prove that the accused persons were the author of the injuries caused to Rajeev Taneja.

(Para 5)

A-1 is the actual assailant who inflicted repeated injuries with a sharp edged weapon on the body of the victim Rajeev Taneja. The prosecution was, however, unable to prove that A-2 and A-3 shared common intention to inflict injuries to Rajeev Taneja with an intention to murder him. Victim's appearance with his mother at 09.00 P.M. in front of their house was sudden and without anticipation. A-2 and A-3 were not armed with any weapon. They had given beatings at the first instance to Rajeev Taneja and had not caused any injuries with any weapon. Subsequently, it was A-1 who took out a knife and caused multiple injuries to the victim. No role whatsoever was attributed to A-2 in the causing of the injuries by A-1. The prosecution was not able to establish beyond reasonable doubt that at the instigation of A-3, A-1 took out the knife to cause injuries to the victim. Nothing has come on record to show if A-2 and A-3 were aware about the possession of knife with A-1 prior to the occurrence. A-2 and A-3 did not facilitate A-1 in causing injuries with knife. It cannot be said with certainty that A-2 and A-3 shared common intention with A-1 when he inflicted injuries with a knife to the victim. In the absence of proof of a pre-arranged plan or prior concert among the three, the mere fact that all were together by itself is not sufficient to make A-2 and A-3 liable for the acts of A-1. Common intention must precede the act constituting the offence. Of course, all the accused persons at the first instance intended to beat Rajeev Taneja as they were annoyed for his visit to their house in the absence of male members to demand money and for that Rajeev Taneja was beaten with fists and blows at the time of

initial confrontation by all the accused persons. A-2 and A-3 cannot be vicariously held liable for the injuries caused with knife by A-1 to the victim. They are only liable for the individual role played by them in beating the victim by fists and blows at the first instance. Since they have remained in custody for long duration, no further sentence is required to be awarded to them for the beatings given to the victim.` **(Para 6)**

A-1 inflicted repeated multiple stab blows on the vital organs of the victim with a sharp weapon. The injuries were opined 'dangerous' in nature. As per MLC (Ex.PW-7/A), the following injuries were found on his body :

1. CLW 3 x 5 c.m. over the left side of the chest. 4 c.m. lateral to left nipple.

2. CLW 3 x 3 c.m. over the lateral aspect of left thigh to mid thigh level.

3. CLW 2 x 1 c.m. over the interior aspect of left thigh at the upper 1/3rd part of thigh.

4. CLW 2 x 1 c.m. over the posterior aspect of left shoulder joint.

The victim remained admitted in the hospital for sufficient long duration. Application (Ex.PW-13/A) was moved by the Investigating Officer on 14.08.2000 to obtain the result. The doctor by an endorsement on the application Ex.PW-13/A informed that the patient was still admitted in the hospital and type of injury will be given at the time of discharge. Apparently, the victim remained admitted in the hospital for more than two months. At the time he was taken to the hospital, he was unconscious. The victim was unarmed at the time of incident and A-1 inflicted 'dangerous' injuries with a deadly weapon on the vital organs without any provocation. From the facts and circumstances, it can be inferred that A-1 attempted to commit murder of the victim by causing injuries and was liable for his individual act under Section

307 IPC. The findings of the Trial Court on that score warrant no interference. A-1 has been awarded RI for five years with fine ' 5,000/- which cannot be termed excessive or unreasonable. **(Para 7)**

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. R.K. Thakur, Advocates with Mr. B. Mishra, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

RESULT: Appeal by A1 dismissed. Appeal by A2, 3- disposed of.

S.P. GARG, J.

1. Gulshan Sharma (A-1), Harish Sharma (A-2) and Kamni Sharma (A-3) challenge the legality and correctness of a judgment dated 03.03.2003 of learned Addl. Sessions Judge in Sessions Case No. 41/00 arising out of FIR No. 543/00 PS Rajouri Garden whereby they were convicted for committing offence punishable under Section 307/34 IPC. By an order on sentence dated 05.03.2003, they were awarded RI for five years with fine Rs. 5,000/- , each. The prosecution case as projected in the charge-sheet is as follows :

2. On 01.06.2000, Rajeev Taneja had gone at the residence of the accused persons to demand payment which A-1 had failed to pay being member of the committee. A-3 alone was present in the house. PW11 (Rajeev Taneja) left the message with her and came back. A-1 and A-2 were resentful of Rajeev Taneja's visit to their house in their absence and at about 06.00 P.M., they went to his house and threatened his mother. At about 09.00 P.M. when both PW-11 (Rajeev Taneja) and his mother PW-2 (Sushma Taneja) were crossing in front of the house of the accused persons, A-1 to A-3 caught hold of Rajeev Taneja and gave beatings to him. At the instigation of A-3, A-1 took out a knife and inflicted injuries to him (Rajeev Taneja). On his raising alarm, Vinod Kumar Taneja, his brother arrived at the scene. The accused persons fled the spot. The police machinery was set in motion when Daily Diary (DD) No. 27 (Ex.PW-1/A) was recorded at 09.35 P.M. on getting information of a stabbing incident. The investigation was entrusted to SI Vinay Malik who with Const.Surinder went to the spot. Vinod took his injured brother

to DDU Hospital and admitted him. Daily Diary (DD) No. 28 (Ex.PW-1/B) was recorded about his admission in the hospital. The Investigating Officer lodged First Information Report after recording Sushma Taneja's statement (Ex.PW-2/A). During the course of investigation, the accused persons were arrested and crime weapon i.e. knife was recovered. Statements of the witnesses conversant with the facts were recorded. After completion of the investigation, a charge-sheet was filed against them under Sections 307/201/34 IPC. The accused persons were duly charged and brought to trial. The prosecution examined eighteen witnesses to establish their guilt. In 313 statements, the accused persons pleaded false implication and denied their complicity in the crime. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held all of them guilty for the offences mentioned previously. Being aggrieved, the appellants are in appeal. It is significant to note that the accused persons were acquitted of the charge under Section 201 IPC and the State did not prefer any appeal challenging the said acquittal.

3. I have heard the learned counsel for the parties and have examined the record. Appellants' 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. The vital discrepancies and improvements in the statements of the prosecution witnesses were ignored without valid reasons. Ingredient of Section 307 IPC are not attracted and proved. The prosecution was unable to examine the doctor who opined the nature of injuries as 'dangerous'. MLC (Ex.PW-7/A) does not record the nature of injuries. Appellants' counsel adopted an alternative argument to release them in case of dismissal of their appeal for the period already suffered in custody by them in this case. Learned Addl. Public Prosecutor urged that the Trial Court's judgment is based upon fair appraisal of the evidence and no interference is called for.

4. The occurrence took place at about 09.00 P.M. Daily Diary (DD) No. 27 (Ex.PW-1/A) was recorded at Police Post Raghubir Nagar at 09.35 P.M. on getting information of stabbing at B-196, Raghubir Nagar. Vinod Kumar Taneja took injured Rajeev Taneja to DDU Hospital soon after the occurrence. At 09.50 P.M. Daily Diary (DD) No.28 (Ex.PW-1/B) was recorded when duty Const.Kanwar Singh conveyed the information. The Investigating Officer, after recording statement of

the victim's mother, sent rukka (Ex.PW-18/A) at 11.45 P.M. for registration of the First Information Report. Apparently, there was no delay in lodging the report with the police. In her statement (Ex.PW-2/A), Sushma Taneja at the first available opportunity implicated the accused persons for the injuries inflicted to her son Rajeev Taneja. She gave vivid detail of the occurrence and attributed specific role to each of the accused in causing injuries and also assigned motive for that. Since the FIR was lodged without undue delay, there was least possibility of the complainant to concoct a false story in a short interval. While appearing as PW-2, she proved the version given to the police at the first instance without any variation and specifically deposed that at about 09.00 P.M. when she and her son were returning from AB – Block market and were crossing the road in front of the house of the accused persons, they (the accused persons) came out and caught hold of Rajeev Taneja and started beating him with fists and leg blows. A-3 pulled his hair and instigated A-1 to take revenge as he had tried to outrage her modesty. Thereafter, A-1 took out a knife from his pocket and stabbed her son on his back shoulder and thigh. In the cross-examination, she reiterated that A-1 took out a knife from the backside of the pant. No public person was present at the spot at the time of occurrence. She fairly admitted that there was no animosity towards the accused persons. The material facts proved by the complainant remained unchallenged in the cross-examination. The accused persons were unable to extract any material discrepancy or inconsistency in her version to disbelieve her. Her presence at the spot was not challenged in the cross-examination. The accused persons did not deny their presence at the spot. The role attributed to them was also not questioned. Statement of the complainant has been corroborated in its entirety without any variation by PW-11 (Rajeev Taneja) who deposed that when they were crossing in front of the house, the accused persons standing outside their house started beating and abusing them with fist and blows. A-2 and A-3 pushed him down and A-1 pulled out a knife and stabbed him on left leg and chest. In the cross-examination, no material questions were put to challenge his testimony.

5. Both PW-2 (Sushma Taneja) and PW-11 (Rajeev Taneja) had no previous enmity with the accused persons to falsely implicate them in the incident. They lived in the same vicinity as neighbourers. A-1 and A-2 were members of the committee being run by PW-2 (Sushma Taneja). The problem arose when PW-11 (Rajeev Taneja) went to A-1's house

to demand unpaid dues in his absence and left the message with his wife (A3) which annoyed the accused persons. In the absence of prior enmity or animosity, the injured witness is not expected to let the real culprit go scot free and to falsely implicate an innocent one. There are no sound reasons to disbelieve their ocular testimony which is in consonance with medical evidence. MLC (Ex.PW-7/A) was prepared when Rajeev Taneja was taken to DDU Hospital at 09.55 P.M. on 01.06.2000 by his brother Vinod Kumar Taneja. PW-7 (Dr.K.K.Kumra), CMO, DDU Hospital, identified the handwriting and signatures of Dr.Amar Kumar on the MLC (Ex.PW7/ A). He deposed that the injuries sustained by the victim were caused by sharp weapon and were 'dangerous' in nature. His testimony remained unchallenged in the cross-examination. The police was able to recover the crime weapon i.e. knife (Ex.P1) used in the incident. As per Forensic Science Laboratory report, human blood AB group which was of the victim was detected on it. The prosecution was able to prove that the accused persons were the author of the injuries caused to Rajeev Taneja.

6. A-1 is the actual assailant who inflicted repeated injuries with a sharp edged weapon on the body of the victim Rajeev Taneja. The prosecution was, however, unable to prove that A-2 and A-3 shared common intention to inflict injuries to Rajeev Taneja with an intention to murder him. Victim's appearance with his mother at 09.00 P.M. in front of their house was sudden and without anticipation. A-2 and A-3 were not armed with any weapon. They had given beatings at the first instance to Rajeev Taneja and had not caused any injuries with any weapon. Subsequently, it was A-1 who took out a knife and caused multiple injuries to the victim. No role whatsoever was attributed to A-2 in the causing of the injuries by A-1. The prosecution was not able to establish beyond reasonable doubt that at the instigation of A-3, A-1 took out the knife to cause injuries to the victim. Nothing has come on record to show if A-2 and A-3 were aware about the possession of knife with A-1 prior to the occurrence. A-2 and A-3 did not facilitate A-1 in causing injuries with knife. It cannot be said with certainty that A-2 and A-3 shared common intention with A-1 when he inflicted injuries with a knife to the victim. In the absence of proof of a pre-arranged plan or prior concert among the three, the mere fact that all were together by itself is not sufficient to make A-2 and A-3 liable for the acts of A-1. Common intention must precede the act constituting the offence. Of course, all the

accused persons at the first instance intended to beat Rajeev Taneja as they were annoyed for his visit to their house in the absence of male members to demand money and for that Rajeev Taneja was beaten with fists and blows at the time of initial confrontation by all the accused persons. A-2 and A-3 cannot be vicariously held liable for the injuries caused with knife by A-1 to the victim. They are only liable for the individual role played by them in beating the victim by fists and blows at the first instance. Since they have remained in custody for long duration, no further sentence is required to be awarded to them for the beatings given to the victim.

7. A-1 inflicted repeated multiple stab blows on the vital organs of the victim with a sharp weapon. The injuries were opined 'dangerous' in nature. As per MLC (Ex.PW-7/A), the following injuries were found on his body :

1. CLW 3 x 5 c.m. over the left side of the chest. 4 c.m. lateral to left nipple.
2. CLW 3 x 3 c.m. over the lateral aspect of left thigh to mid thigh level.
3. CLW 2 x 1 c.m. over the interior aspect of left thigh at the upper 1/3rd part of thigh.
4. CLW 2 x 1 c.m. over the posterior aspect of left shoulder joint.

The victim remained admitted in the hospital for sufficient long duration. Application (Ex.PW-13/A) was moved by the Investigating Officer on 14.08.2000 to obtain the result. The doctor by an endorsement on the application Ex.PW-13/A informed that the patient was still admitted in the hospital and type of injury will be given at the time of discharge. Apparently, the victim remained admitted in the hospital for more than two months. At the time he was taken to the hospital, he was unconscious. The victim was unarmed at the time of incident and A-1 inflicted 'dangerous' injuries with a deadly weapon on the vital organs without any provocation. From the facts and circumstances, it can be inferred that A-1 attempted to commit murder of the victim by causing injuries and was liable for his individual act under Section 307 IPC. The findings of the Trial Court on that score warrant no interference. A-1 has been awarded RI for five years with fine Rs. 5,000/- which cannot be termed excessive or unreasonable.

8. In the light of above discussion, appeal preferred by A-1 (Gulshan Sharma) is dismissed being unmerited. His conviction and sentence are sustained. A-1 is directed to surrender before the Trial Court on 21st January, 2014 to serve out the remaining period of sentence. The period already undergone by A-2 (Harish Sharma) and A-3 (Kamni Sharma) in this case is treated as their substantive sentence for the beatings given to the victim and no further sentence is required to be awarded to them.

9. Appeal stands disposed of in the above terms. Trial Court record be sent back immediately.

ILR (2014) I DELHI 637
IA

JANAK DATWANI **....PLAINTIFF**

VERSUS

C.N.A. EXPORTS PVT. LTD. & ORS. **....DEFENDANTS**

(JAYANT NATH, J.)

IA NO. : 3265/2013 (U/O 6 R 17 CPC) IN CS(OS) NO. : 244/2013 **DATE OF DECISION: 17.01.2014**

Code of Civil Procedure, 1908—Order 6 Rule 17—Plaintiff filed suit seeking relief of declaration—He also moved an application U/o 6 Rule 17 CPC to amend the plaint by seeking to delete paragraph 20—Defendants objected to amendment and urged plaintiff, by way of application, was trying to withdraw admission made in plaint, thus, application not maintainable.

Held:- An admission cannot be resiled from but in a given case it may be explained or clarified.

In view of the four factors stated above, in my view the statement made in para 20 of the plaint, namely, that defendant No. 4 became fully aware of the extent of the fraud perpetuated by Mr. Anand Datwani in 2007 when Mr. Anand Datwani filed IA No. 2014/2007 and written statement in CS(OS) 118/2007 is prima facie a bona fide mistake. The plaintiffs have prima facie successfully explained as to why the said statement was a mistake in the background of the four contentions elaborated above. Even otherwise, mere filing of IA No. 2014 in 2007 and the written statement by defendant No. 2 in 118/2007 would not lead to knowledge of the contents of the said pleadings to defendant No. 4 herein inasmuch as she is not a party in the said suit. There may be other evidence to show the date of knowledge of defendant 4 of the acts done by defendant No.2, but for the present application none are averred: Defendant 1 and 2 may be able to prove the same on the basis of other evidence. **(Para 27)**

Important Issue Involved: An admission cannot be resiled from but in a given case it may be explained or clarified.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Amit Sibal and Mr. Ayush Agrawal, Advocate.

FOR THE DEFENDANTS : Mr. Pradeep K. Bakshi and Mr. Suresh Singh, Advocate for D-1 and 2. Mr. Nikhil Rohatgi, Advocate for D-4. Mr. Anuj Aggarwal, Advocate for ROC.

CASES REFERRED TO:

1. *Gopi Dargan* vs. *Praveen Kumar,* 187(2012) DLT 546.
2. *Jagdish Bansal* vs. *Kumar Pal* in CS(OS) 1949/2011.
3. *Vivek Narayan Pal* vs. *Sumitra Pal,* 169(2010) DLT 443

(DB).

4. *Ram Krishan & Sons Charitable Trust* vs. *IILM Busines School,* 2010(44) PTC 198.

5. *Pramod Khann & Anr.* vs. *Subod Khanna & Anr.,* 169(2010) DLT 62.

6. *Bright Electricals* vs. *Ramesh Kumar Patel,* 2009(12)DRJ 372.

7. *Rivajeetu Builders and Developers* vs. *Narayanswamy and Sons and Ors.,* (2009) 10 SCC 84.

8. *Sukhbiri Devi & Ors.* vs. *UOI & Ors.,* 162(2009) DLT 720.

9. *Radhika Devi* vs. *Bajrangi Singh and Ors.,* (1996) 7 SCC 486.

10. *Jeewan Mehrotra* vs. *Kalawanti Kotwani,* 1993(27) DRJ 79.

11. *Shri Chand Krishan Bhall* vs. *Surinder Singh,* 1984(7) SCC 189.

12. *Panchdeo Narain Srivastava* vs. *K.M. Jyoti Sahay and Anr.,* 1984 (supp) SCC 594.

RESULT: Application allowed.

JAYANT NATH, J.

IA No. 3265/2013 (u/O 6 R 17 CPC)

1. This is an application filed under Order 6 Rule 17 CPC for amendment of the Plaint. The plaintiff has filed the accompanying plaint seeking relief of declaration for declaring all the acts and deeds done by or on behalf of defendants No.1 and 2 to transfer or to facilitate the transfer of the shares of Mrs.Sushma Ravi Das to defendant No.2 including Gift Deed dated 12.1.1998, Transfer Deed dated 23.3.1998 and other acts done by defendants No.1 and 2 as illegal, null and void. A decree of declaration is also sought declaring the plaintiff as an owner of 1500 shares and other reliefs are also sought.

2. As per the Suit the controversy centres around 1500 shares owned by defendant No.4/Mrs.Sushma Ravi Das in CNA Exports Private

Limited, defendant No.1. It is averred that defendant No.1 company is a closely held family company. The plaintiff claims to own 1500 shares comprising 13.33 % of the shareholding. Same is the position regarding defendant No.4. It is averred that defendant No.4 acted on the advise of Mrs.Jamuna Datwani and transferred her shares to the plaintiff vide Gift Deed dated 20.3.2008, Power of Attorney dated 10.9.2008, Power of Attorney dated 6.12.2010 and share transfer form executed on 6.12.2010. It is stated that subsequently in 2011 influenced by fraudulent misrepresentations the defendant No.4 sought to cancel the aforesaid transfer to the plaintiff. The plaintiff thereafter instituted proceedings in the superior Court, New Jersey, USA and vide order dated 29.5.2012 the cancellation done by defendant No.4 was held to be void and it was held that the plaintiff was the owner of the shares previously owned by the said defendant No.4. As two years had lapsed since execution of the share transfer form (hereinafter referred to as STF) the said defendant No.4 executed a duly stamped and completed STF dated 14.7.2012 to transfer shares to the plaintiff. On 26.8.2012 the plaintiff applied to defendant No.1 company for registration of the said share transfer. The STF was sent to the said company. However, the letter and the STF was returned undelivered. Hence, the present Suit has been filed. The following reliefs are sought in the Suit:-

(i) Pass a decree of declaration declaring all acts and deeds done by or on behalf of defendants No.1 and 2 to transfer or to facilitate the transfer of the shares of Mrs.Sushma Ravi Das to defendant No.2 including gift deed dated 12.01.1998, transfer deed dated 23.3.1998 and board and shareholder meetings, and any and all acts done by Defendants No.1 and 2 subsequent to the said transfer, as illegal, null and void;

(ii) Pass a decree of declaration declaring the plaintiff as the owner of the 1500 shares bearing distinctive numbers 1-11 to 5-1505;

(iii) Pass a decree of mandatory injunction in favour of the plaintiff and against defendant No.1 to register and give effect to the transfer of 1500 shares in defendant No.1 by Mrs.Sushma Ravi Das to the plaintiff herein;

(iv) Pass a decree of mandatory injunction in favour of the

plaintiff directing defendant No.3 to register and give effect to the transfer of 1500 shares in defendant No.1 by Mrs.Sushma Ravi Das to the plaintiff herein;

(v) Pass a decree of permanent injunction in favour of the plaintiff and against defendant No.1 restraining defendant No.1 or any person acting or purporting to act on behalf of defendant No.1 from alienating any right in or otherwise encumbering the properties owned by defendant No.1 or from constructing on or demolishing or otherwise altering the immovable properties owned by defendant No.1;

(vi) Pass a decree of permanent injunction in favour of the plaintiff and against defendant No.1 and 2 restraining defendant No.1 from holding any board meeting and shareholders meeting of defendant No.1 without the permission of this Court and without recognizing the plaintiff as the owner of the 1500 shares bearing distinctive numbers 1-11 to 5-1505;

3. Paragraph 20 of the plaint reads as follows:-

"20. That Mrs. Das (defendant No.4), the plaintiff and the other shareholders became fully aware of the extent of the fraud perpetrated by Mr.Anand Datwani only in 2007, when Mr.Anand Datwani filed an interlocutory application being IA No.2014 of 2007 and a written statement on behalf of the defendant No.1 Company and himself in CS(OS) No.118 of 2007. The said suit, CS(OS) No.118 of 2007 was filed by Mr.Dayal Shahdadpuri, the brother in-law of late Mrs.Jamna Datwani, before this Hon'ble Court inter alia seeking a declaration that Mr.Shahdadpuri had bought and become the owner of the 2500 shares in the defendant No.1 company held by Mrs.Nitya Bharany. It was Mr.Anand Datwani's case in the said suit that all the shareholders of the defendant No.1 company including Mrs.Das and the plaintiff, had gifted and/or transferred their shares to Mr.Anand Datwani pursuant to a family settlement.

4. The above matter came up for hearing on 8.2.2013 when this Court held as under:

"1.Upon it being pointed out to the counsel for the plaintiff that

as per the averments in para 20 of the plaint, the defendant No.4 through whom the plaintiff claims title in the shares qua which declaration is claimed in the present suit came to know of the forgery committed by the defendant No.2 as far back as in the year 2007 and as to how the suit today would be within time, the counsel for the plaintiff has argued that since the shares were transferred by the defendant No.4 to the plaintiff now only, the right to sue to the plaintiff has accrued now.

2. To my mind, if the claim of the predecessor in interest of the plaintiff is barred by time, the same cannot be revived merely by transfer of a so called right, enforcement whereof has become barred by time.

3. The counsel for the plaintiff also states that it has been erroneously so mentioned in para 20 of the plaint."

5. On 26.2.2013 the present application filed by the plaintiff for amendment of the plaint came up for hearing. The application seeks, apart from other amendments, to modify para 20 of the plaint and to delete the line that defendant No.4 became aware of the extent of the fraud in 2007. The Court passed the following order:-

"3. Though the summons of the suit have not been issued to the defendants as yet but since the amendment may be in the nature of withdrawal of an admission in para 20 of the plaint as originally filed and which is stated to be an inadvertent error, it is not deemed appropriate to allow the same without notice to the defendants.

4. Issue notice to the defendants by all modes including dasti and through electronic media, returnable on 12th March, 2013."

6. The defendants have entered appearance and have filed reply opposing the present application.

7. In the present application the plaintiff seeks to delete the said statement made in paragraph 20. It is stated that inadvertently and due to oversight and on account of error of drafting a mistake has crept in. It is stated that the first line of the para which states "that Mrs. Das (defendant No.4), the plaintiff and the other shareholders" be changed and substituted with the line "that the plaintiff and other family shareholders

which does not include Mrs. Das (defendant No.4)". Hence, the effect of the said amendment sought is that it is sought to be averred that the defendant No.4 was not aware of the extent of fraud perpetrated by Mr.Anand Datwani, as has been stated in the plaint in 2007 when Mr.Anand Datwani filed IA No.2014/2007. It is further stated that inadvertently and by oversight and error of drafting declaratory relief in the present plaint and consequential averments have been stated in relation to the alleged Gift Deed dated 12.1.1998 and alleged share transfer form dated 23.3.1998 pertaining to ownership of 1500 shares of defendant No.4 instead of placing the declaratory relief on the share transfer form dated 14.7.2012. It is further stated that the existing prayer clause (i) may not be necessary as in another connected suit the issue is already pending.

8. There is also an attempt to explain that the position of the plaintiff and defendant No. 4 all along has been that the defendant No.4 was not aware about the acts of defendant No.2 including the alleged Gift Deed dated 12.1.1998 and transfer deed dated 23.3.1998 which is stated to have been executed by defendant No.4 in favour of defendant No.2. The application points out that there are three other suits pending between the parties pertaining to the shareholding of defendant No.1 company. It is pointed out that CS(OS) 556/2008 was filed by Mrs.Jamna Datwani, mother of the plaintiff and some of the defendants herein where various alleged Gift Deeds and transfer deeds alleged to have been executed by shareholders of defendant No.1 in favour of defendant No.2 are sought to be challenged as being forged and fabricated. It is averred that in the said Suit Smt.Jamna Datwani had claimed a relief of declaration that plaintiff No.1 i.e. herself and defendants No.2 to 6 therein continued to be shareholders of defendant No.1 company and that there is no transfer of the shareholding by them in favour of defendant No.2.

9. Another Suit being CS(OS) 118/2007 is filed by one Mr.Dayal Shahdadpuri, a close relative of plaintiff and defendant No.2 in respect of 1500 shares which he claims he purchased from Mrs. Nitya Bharany, the sister of the plaintiff and defendant No.2.

10. CS(OS) 1113/2007 is filed by the plaintiff in respect of 1500 share of defendant No.1 owned by him as it was illegally and wrongfully alleged by defendant No.2 for the first time in the pleadings in Suit No.118/2007 that the shares had been allegedly gifted by the plaintiff to his mother Mrs.Jamna Datwani who later allegedly transferred the same

to defendant No.2 in 1998.

11. It is further stated that for the first time it was revealed to the plaintiff about the alleged transfer of shares by the other shareholders and alleged Gift Deeds, share transfer forms allegedly in favour of defendant No.2 when defendant No.2 in the said CS(OS) 118/2007 filed an interlocutory application i.e. IA No. 2014/2007 and written statement dated 28.5.2007. It is further clarified that defendant No.4 is not a party in CS(OS) 118/2007 and hence she had no knowledge of the pleadings in the said Suit or for that matter of pleading in CS(OS) 1113/2007 where also she is not a party. It is further stated that though defendant No.4 is a party in CS(OS) 556/2008 but she has not been served in the said proceedings until December, 2010. Hence, it is stated that the admitted case of the parties is that the defendant No.4 had no knowledge about the claim of defendant no.2 regarding the said alleged transfer forms and gift deeds in his favour allegedly executed by defendant No.4.

12. Reliance is also placed on the testimony and deposition recorded on oath in the legal action initiated by the plaintiff in the Superior Court of New Jersey, USA on 3rd October, 2011 where defendant No.4 has stated that she was not aware of the legal action pertaining to shareholding of defendant No.1 and she learnt about it from the plaintiff herein in December 2010. In the said testimony she has also held that she has never executed Gift Deed dated 12.1.1998 or any STF dated 23.3.1998 in favour of defendant No.2. She has further stated that she has not visited India in the year 1998.

13. Reliance is also placed upon an application being IA No.2347/2011 filed by defendant No.4 in CS(OS)556/2008 for being deleted from the array of parties. In the application she has stated that after execution of STF dated 6.12.2010 in favour of the plaintiff, she may be deleted from the array of parties. Notice in the said IA was stated to have been issued on 28.2.2011. It is stated that in the said application she has acknowledged that she has no earlier knowledge of the pending litigation in this Court. It is further stated that defendant No.4 had no knowledge about CS(OS)556/2008 as no notice was served on her. The Plaint gives here address as that of Bombay whereas she has been living in USA for many years.

14. Based on the above averments, it is stated that the submissions in paragraph 20 of the Plaint that defendant No.4 was aware about the

fraud perpetuated by defendant No.2 in 2007 when IA No.2014/2007 was filed by Mr.Anand Datwani is an inadvertent error.

15. In the reply filed by defendants No.1 and 2 they have opposed the present amendment application vehemently. It is stated that plaintiff is trying to withdraw admissions made in the plaint regarding knowledge of its predecessor in interest in respect of transfer of 1500 shares originally held by defendants No.4 in defendant No. 1 company. It is further stated that the suit based on the alleged forgery and execution of Gift Deed dated 12.1.1998 and share transfer form dated 23.3.1998 executed by defendant No.4 in favour of defendant No.2 is barred by limitation in view of Article 56 of the Limitation Act. It is stated that it is the plaintiff's own case that he became fully aware of the alleged fraud and forgery by defendant No.2 in 2007 and the present Suit has been filed six years after the date of its knowledge of fraud and forgery and it is clearly barred by time. It is further stated that defendant No.4 was fully aware of the transfer of shares in favour of defendant No.2 in 2005 and in any case by 2008. Reference is made to the annual reports of the defendant No.1 company for the period 1998-2004. It is further stated that defendant No.4 is stated to have executed a Power of Attorney dated 10.9.2008 in favour of plaintiff in respect of the shares in dispute. It is claimed that as plaintiff was the Power of Attorney Holder he was bound to disclose facts to defendant No.4. It is averred that knowledge of the agent is knowledge of the principle.

16. Learned counsel appearing for the plaintiff submits that the so called admission in para 20 of the plaint is no admission inasmuch as it is not made by defendant No. 4. Hence, the date on which defendant No.4 got to know about the said fraud perpetuated by Mr. Anand Datwani is something which only defendant No. 4 could really state. The statement of the plaintiff cannot bind defendant No. 4. It is reiterated that the said statement is patently erroneous and made on account of a bonafide mistake which is apparent inasmuch as defendant No. 4 is not a party to CS(OS) 118/2007. Hence, the question of defendant No. 4 knowing the details of the fraud in 2007 when Mr.Anand Datwani filed an interlocutory application and a written statement in the said Suit No.118/2007 is obviously erroneous on the face of it. The contents of the present application are reiterated. Reliance is placed on the cross-examination of Smt. Sushma Das before the Superior Court of New Jersey. Reference is also made to the application filed by defendant No.

4 in CS(OS) 556/2008 in 2011 where an averment is made that the said defendant/applicant is neither necessary nor proper party. In that application, it was categorically stated that the applicant/defendant No. 4 herein recently got to know about the pendency of CS(OS) 556/2008 as in the memo of parties, her address is given as Church Gate whereas she is actually residing for the last 36 years at New Jersey, USA. It is stressed that the averment regarding knowledge of defendant No. 4 in para 20 of the plaint as of 2007 is an inadvertent error. Hence, the present amendment application can be allowed. Reliance is placed upon the judgment of the Hon'ble Supreme Court in the case of **Panchdeo Narain Srivastava vs. K.M. Jyoti Sahay and Anr.,** 1984 (supp) SCC 594 where the Hon'ble Supreme Court has stated that an admission made by a party may be withdrawn or explained away and that it cannot be said that by amendment an admission of fact cannot be withdrawn. Reliance is also placed on the following judgments to argue that the amendment in the present case can be allowed.

(i) **Shri Chand Krishan Bhall vs. Surinder Singh,** 1984(7) SCC 189

(ii) **Jagdish Bansal vs. Kumar Pal** in CS(OS) 1949/2011

(iii) **Bright Electricals vs. Ramesh Kumar Patel,** 2009(12)DRJ 372

17. Learned counsel for defendant No. 4 has vehemently argued that the statement made by the plaintiff does not bind defendant No. 4. Defendant No. 4 had no knowledge about the fraud perpetuated by defendant No. 2 in 2007. Hence, she has supported the case of the plaintiff.

18. Learned counsel appearing for defendants No. 1 and 2 has vehemently opposed the amendment pointing out that there is no inadvertent error. It is stated that defendant No. 4 was fully aware about the transfer deeds signed by her in favour of defendant No. 2 on 23.03.1998 and the gift deed dated 12.01.1998. It is reiterated that the present suit for declaration is barred by limitation in view of the fact that the plaintiff has himself admitted knowledge of the earlier deeds in favour of defendant No. 2 in 2007. It is argued that the amendment which is now sought has the effect to withdraw an admission and to contend that the suit is within time. Hence, it is stated that the amendment cannot be

allowed. Learned counsel relies on the judgment of the Hon'ble Supreme Court in the case of **Rivajeetu Builders and Developers vs. Narayanswamy and Sons and Ors.,** (2009) 10 SCC 84 in which the Hon'ble Supreme Court held that an admission cannot be got rid of which would have the effect of changing the character of the suit. Learned counsel has also placed reliance on the following judgments to substantiate the submission that the plaint cannot be permitted to be amended as sought.

(i) **Vivek Narayan Pal vs. Sumitra Pal,** 169(2010) DLT 443 (DB)

(ii) **Ram Krishan & Sons Charitable Trust vs. IILM Busines School,** 2010(44) PTC 198

(iii) **Pramod Khann & Anr. vs. Subod Khanna & Anr.,** 169(2010) DLT 62

(iv) **Gopi Dargan vs. Praveen Kumar,** 187(2012) DLT 546

(v) **Radhika Devi vs. Bajrangi Singh and Ors.,** (1996) 7 SCC 486

(vi) **Sukhbiri Devi & Ors. vs. UOI & Ors.,** 162(2009) DLT 720

19. I have heard learned counsel for the parties.

20. The facts as stated by the plaintiff in para 20 do appear to be a bonafide mistake. Prima facie defendant No. 4 could not be aware of the fraud perpetuated by Mr. Anand Datwani in 2007 as stated in para 20 of the plaint.

21. Firstly , the said para 20 itself states that knowledge of the fraud is derived from the fact that Mr. Anand Datwani-Defendant No. 2 filed an interlocutory application i.e. I.A. 2014/2007 and a written statement of defendant No. 1 Company in CS(OS) 118/2007. In that written statement, it is averred by Mr. Anand Datwani that all the shareholders of defendant No. 1 Company including defendant No. 4 herein and the plaintiff had gifted/transferred their shares to him pursuant to a family settlement. Defendant No. 4 is not a party in CS(OS) 118/2007. Hence, mere filing of the written statement and the application by defendant No. 2 in the said suit cannot ipso facto imply that defendant No. 4 got knowledge about the alleged transfer of shares in favour of defendant No. 2.

22. Secondly, it is also a matter of fact that among various pending litigations, between the parties defendant No. 4 is a party only in CS(OS) 556/2008. She has, however, explained that she was not served in the said suit and she had no knowledge about pendency of the said suit as her address given in the memo of parties was erroneous inasmuch as the address given is of Church Gate, Mumbai whereas defendant No. 4 has been residing for the last 36 years at New Jersey, USA.

23. Thirdly, reference may also be had to the cross-examination of defendant No. 4 that took place on 03.10.2011 in the Superior Court of New Jersey. Relevant portion of this cross-examination reads as follows:

"Q.Are you aware that there is an action pending in the High Court in New Delhi involving ownership of CNA Exports at this time?

A. I found out only when Janak told me about it. But I didn't know the details of what was going on.

Q.When did Janak tell you about it?

A. When the shares were already transferred, in 2010, when he came to see me.

Q. So I think what you are saying is in 2010, he.... after the shares were transferred....

A. Right

Q. ... he told you about this case?

A. About the case, Otherwise, I didn't know anything. I thought the transfer and everything was just, you know, that was it, it had nothing to do with court case or anything.

Q. Okay. Did you know that you were a part of that action?

A. No.

Q.Did anyone ever send you any documents or anything before then?

A. No, no."

24. The above cross-examination of defendant No. 4 further fortifies the stand of the plaintiff that it has always been the stand of defendant

No. 4 that she was not aware about the alleged fraudulent action done by defendant No. 2 in 2007.

25. Fourthly, it is also a matter of fact that it was in 2011 that defendant No. 4 has moved an application i.e. IA No. 2347/2011 in CS(OS) 556/2008 for deletion from the array of parties. In the application she has stated to have said that she got knowledge about the acts of defendant No.2 recently.

26. Even otherwise, defendant No. 4 cannot be bound by the statement made by the plaintiff about the date of her knowledge. It is the plaintiff who has stated that defendant No. 4 had knowledge in 2007. The basis of that knowledge as already stated above is an application filed by defendant No. 2 in suit No. 118/2007 in which suit defendant No. 4 is not a party. That apart, there is nothing else to show in the plaint as to when defendant No. 4 got knowledge about the said act. The contention of the plaintiff cannot bind defendant No. 4.

27. In view of the four factors stated above, in my view the statement made in para 20 of the plaint, namely, that defendant No. 4 became fully aware of the extent of the fraud perpetuated by Mr. Anand Datwani in 2007 when Mr. Anand Datwani filed IA No. 2014/2007 and written statement in CS(OS) 118/2007 is prima facie a bona fide mistake. The plaintiffs have prima facie successfully explained as to why the said statement was a mistake in the background of the four contentions elaborated above. Even otherwise, mere filing of IA No. 2014 in 2007 and the written statement by defendant No. 2 in 118/2007 would not lead to knowledge of the contents of the said pleadings to defendant No. 4 herein inasmuch as she is not a party in the said suit. There may be other evidence to show the date of knowledge of defendant 4 of the acts done by defendant No.2, but for the present application none are averred: Defendant 1 and 2 may be able to prove the same on the basis of other evidence.

28. Reference may be had to the judgments filed by the plaintiff. The Hon'ble Supreme Court in the case of **Panchdeo Narain Srivastava vs. K.M. Jyoti Sahay and Anr.**(supra)in para 3 held as follows:-

> "3... We may, in this connection, refer to **Ganesh Trading Co. v. Moji Ram,** wherein this Court after a review of number of decisions speaking through Beg, C.J. observed that procedural

> law is intended to facilitate and not to obstruct the course of substantive justice. But the learned counsel for the respondents contended that by the device of amendment a very important admission is being withdrawn. An admission made by a party may be withdrawn or may be explained away. Therefore, it cannot be said that by amendment an admission of fact cannot be withdrawn."

29. The above view is reiterated by this High Court in the case of **Shri Chand Krishan Bhall vs. Surinder Singh** (supra) and also in the case of **Jeewan Mehrotra vs Kalawanti Kotwani,** 1993(27) DRJ 79.

30. Learned counsel appearing for defendants No. 1 to 2 has relied upon the judgment in the case of **Rivajeetu Builders and Developers vs. Narayanswamy and Sons and Ors.** (supra) passed by the Hon'ble Supreme Court. In the said judgment, the Hon'ble Supreme Court has referred to the cases of **Usha Balashahed Swami v. Kiran Appaso Swami** and **Modi Spinning & Weaving Mills Co. Ltd. vs. Ladha Ram & Co.** where it was held that once a written statement contained an admission in favour of the plaintiff, by amendment such an admission of the defendant cannot be withdrawn. However in para 63 of the said judgment, the Hon'ble Supreme Court has culled out the principles on the basis of which amendment is allowed. Para 63 of the said judgment reads as follows:

> "63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
>
> (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
>
> (2) whether the application for amendment is bona fide or mala fide;
>
> (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequate in terms of money;
>
> (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application. There are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

31. The learned counsel for defendant No.1 and 2 has also relied on the judgment of the Hon'ble Supreme Court in the case of **Radhika Devi versus Bajrangi Singh** (supra,). In that case the Court held that the amendment of the plaint is normally granted and only in exceptional cases that this relief may be declined when the effect of the amendment would be to take away from a party a legal right which had accrued by lapse of time. In that case no steps were taken to amend the plaint despite lapse of three years from the date of filing of the Written Statement. This lapse of time resulted in the additional relief sought being barred by time. The facts of the present case are not similar.

32. Similarly, the reliance of the learned counsel for the defendant on the judgment of the Division Bench of this Court in the case of **Vivek Narayan Pal vs. Sumtra Pal,** (supra) is also misplaced. Relevant portion of para 9 of this judgment reads as follows: "9.... The Supreme Court summed up the law, as a categorical admission cannot be resiled from but in a given case it may be explained or clarified."

33. In view of the judgment of the Division Bench of this High Court, I need not to deal with the other judgments cited by the learned counsel for defendants No. 1 and 2 in the case of **Ram Krishan & Sons Charitable Trust vs. IILM Busines School,** (supra), **Pramod Khann & Anr. vs. Subod Khanna & Anr.**(supra), **Gopi Dargan vs. Praveen Kumar** (supra) and **Sukhbiri Devi & Ors. vs. UOI & Ors.**(supra)which have been rendered by the Single Judges of this High Court.

34. Hence, the legal position that follows is that as stated by the Division Bench of this High Court, namely, that an admission cannot be resiled from but in a given case it may be explained or clarified. As stated above in my view the plaintiff has explained/clarified the position. The deletions sought from para 20 which have been strongly opposed by

defendants No. 1 and 2 have been explained to be bona fide mistakes. One also cannot lose sight of the fact that proposed amendments does not change the character of the case. The amendment sought is imperative for proper and effective adjudication of the case.

35. For the reasons stated above, the present application is allowed. The amendments as sought are allowed in the Plaint.

36. The application is disposed of.

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CRL. A.

VISHAL **....APPELLANT**

VERSUS

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

(S.P. GARG, J.)

CRL.A. NO. : 648/2011, **DATE OF DECISION: 20.01.2014**
CRL. M.B. NO. : 647/2013

Indian Penal Code, 1860—Sec. 392, 397—Under Section 392 read with Section 397 IPC and Arms Act—R. 27—The complainant did not offer any explanation as to why the accused apprehended at the spot with a crime weapon, was not handed over to PCR officials who allegedly arrived at the spot after about 20 minutes of the occurrence—Despite police remand, the IO was unable to ascertain the identity of the appellant's associates and apprehend them. The robbed cash could not be recovered—The exact location where occurrence took place could not be ascertained—In his Court statement, the complainant did not attribute any specific role to the each assailants and in vague

terms disclosed that the 'four individuals' pushed him and asked him to keep hands up on the pretext of rush in the bus. He vaguely stated that they 'forcibly' took out Rs. 16,500/- from the inner pocket of his wearing pant. He did not describe as to what force was used and in what manner the currency lying in his inner pocket were taken out by any specific individual. No specific and definite role was attributed to the appellant in depriving him of cash from his pocket. The appellant was not apprehended while taking out the currency notes from the pocket of the complainant. It is unclear as to when and at what place the bus stopped and the four assailants alighted from—The bus. Driver and conductor or any other passenger in the bus was not associated at the time of conducting search of the accused. After his apprehension, no instrument to pick-pocket was recovered from his possession.

The appellant who was allegedly armed with a deadly weapon, did not use it to avoid his apprehension. No injuries with knife were inflicted to the complainant or the public giving beating to him—Possibility of mistaken identity cannot be ruled out. Sole testimony of the complainant is not safe to convict the appellant in the absence of any corroboration in the light of various discrepancies and infirmities in the prosecution case—Delay in lodging the FIR has not been explained.

None of the offenders used any deadly weapon to overawe or scare the complainant. The appellant was not found in possession of any robbed/stolen article and did not use knife (a) in order to the committing of the theft; or (b) in committing the theft; or (c) in carrying away or attempting to carry away property obtained by theft, to attract Section 390 IPC when theft becomes robbery under above noted circumstances. The knife was allegedly taken out by the appellant when he was being chased to avoid his apprehension—Appeal allowed—Conviction and sentence set aside.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Ms. Garima Bhardwaj, Advocate with Ms. Naiem Jahan Heena, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

RESULT: Appeal Allowed.

S.P. GARG, J.

1. Vishal (the appellant) seeks to question his conviction for offences under Section 392 read with Section 397 IPC and 27 Arms Act by a judgment dated 04.08.2010 in Sessions Case No. 56/10 arising out of FIR No. 128/10 PS Sarai Rohilla. By an order on sentence dated 07.08.2010, he was awarded RI for seven years under Section 392 IPC read with Section 397 IPC and SI for three years under Section 27 Arms Act. The factual matrix from which the appeal germinates is as under :

2. On 21.04.2010 at about 12.15 P.M. Surender Kumar boarded a private bus No. 3553 on route no. 231 from Daya Basti to go Deputy Ganj Market to purchase a dinner set for the marriage of his daughter. He had Rs. 16,500/- in his pocket. He was robbed of Rs. 16,500/- by four assailants in the heavily crowded bus. On raising alarm, the assailants alighted from the bus and were chased by the complainant. He was able to apprehend the appellant who attempted to resist by taking out a buttandar knife out of his possession. The complainant overpowered him and informed the police. The Investigating Officer lodged First Information Report after recording his statement (Ex.PW-1/A). Efforts were made to find out the appellant's associates but in vain. Statements of the witnesses conversant with the facts were recorded and after completion of the investigation, a charge-sheet was filed against the appellant, in which he was duly charged and brought to trial. The prosecution in all examined six witnesses. In 313 statement, the appellant denied complicity in the crime and alleged false implication. The trial resulted in his conviction as aforesaid.

3. I have heard the learned counsel for the parties and have scrutinized the trial court record minutely. The police machinery was set in motion when Daily Diary (DD) No. 36B (Ex.PW-2/B) was recorded at 13.30 hours at PS Sarai Rohilla. The contents of the DD entry, however, reveal that it was an information about a 'quarrel' at jhuggi No. G-307, Daya Basti, RPF Line, Machhi Market. The name of the informant does not find mention in it. This information was recorded on getting intimation from PCR. However, during trial, no such PCR official was examined. The occurrence took place at about 12.15 P.M. and soon thereafter, the appellant was allegedly apprehended at the spot and the complainant informed the police at 100. Complainant did not disclose in the statement (Ex.PW-1/A) if PCR officials had arrived at the spot or that the accused along with weapon was handed over to them. Endorsement (Ex.PW-3/A) over Ex.PW-1/A does not reveal presence of any PCR official at the time of arrival of the Investigating Officer from the local police. The complainant did not offer any explanation as to why the accused apprehended at the spot with a crime weapon was not handed over to PCR officials who allegedly arrived at the spot after about 20 minutes of the occurrence. The local police arrived after about 10 /15 minutes thereafter. In the disclosure statement (Ex.PW-1/D), it was recorded that the appellant's associates used to contact him (the appellant) to pick-pockets in the buses on his mobile. However, no such mobile phone was recovered from the appellant's possession soon after his arrest. Disclosure statement (Ex.PW-1/D) records that the mobile phone in possession of the appellant fell on the ground after the crime. However, no such mobile phone was recovered by the police at any stage of the investigation. Despite seeking police remand, the Investigating Agency was unable to ascertain the identity of the appellant's associates and apprehend them. The robbed cash could not be recovered. The Investigating Officer did not verify as to from where the complainant had arranged Rs.16,500/- . The exact location where occurrence took place could not be ascertained. No independent public witness was associated at any stage of the investigation. It has come on record that the appellant was beaten by the public and was medically examined. Despite availability of the public persons none of them was joined

without any plausible reason.

4. The complainant in his earliest version given to the police in his statement (Ex.PW-1/A) disclosed that when he raised alarm in the bus, four assailants alighted and started fleeing the spot. He was able to apprehend one of the assailants who took out a knife. The said boy was overpowered and a buttandar knife was snatched from his right hand. The words 'khuli halat mei' seems to have been inserted subsequently in the statement (Ex.PW-1/A). The complainant did not describe the features of the other associates / companions of the appellant who had pushed him in the bus and had robbed him of cash Rs.16,500/- . In his Court statement as PW-1, the complainant did not attribute any specific role to the each 7 assailants and in vague terms disclosed that the 'four individuals' pushed him and asked him to keep hands up on the pretext of rush in the bus. He vaguely stated that they 'forcibly' took out Rs. 16,500/- from the inner pocket of his wearing pant. He did not describe as to what force was used and in what manner the currency lying in his inner pocket were taken out by any specific individual. No specific and definite role was attributed to the appellant in depriving him of cash from his pocket. The appellant was not apprehended while taking out the currency notes from the pocket of the complainant. It is unclear as to when and at what place the bus stopped and the four assailants alighted from the bus. Driver and conductor or any other passenger in the bus was not associated at the time of conducting search of the accused. After his apprehension, no instrument to pickpocket was recovered from his possession. The appellant who was allegedly armed with a deadly weapon did not use it to avoid his apprehension. No injuries with knife were inflicted to the complainant or the public giving beatings to him. The complainant himself disclosed that after that the appellant was taken to Murga market, he was made to sit there. He did not attempt to abscond from there. Mere presence of the complainant inside the bus without any specific / overt act attributed to him is not enough to prove or establish his guilt particularly when no robbed article was recovered from his possession. It is true that PW-1 (Surender Kumar) had no ulterior motive to falsely implicate the accused with whom he had no prior animosity. But possibility of mistaken identity cannot be ruled out. There were four individuals who allegedly were instrumental in committing the crime. The police was unable to ascertain the nexus of the present appellant with the other three who fled the spot. Sole testimony of the complainant is not

safe to convict the appellant in the absence of any corroboration in the light of various discrepancies and infirmities in the prosecution case. Delay in lodging the FIR has not been explained.

5. Besides above, conviction with the aid of Section 397 IPC was not proper as no 'deadly' weapon was used by the appellant at the time of committing robbery. The incident of alleged robbery had taken place inside the bus where none of the offenders used any deadly weapon to overawe or scare the complainant. The appellant was not found in possession of any robbed / stolen article and did not use knife (a) in order to the committing of the theft; or (b) in committing the theft; or (c) in carrying away or attempting to carry away property obtained by theft, to attract Section 390 IPC when theft becomes robbery under above noted circumstances. The knife was allegedly taken out by the appellant when . he was being chased to avoid his apprehension. In 'Queen Empress vs. Beni', (1901) ILR 23 All 78, wherein Henderson, J. Held that "where several persons were found endeavouring to break into a house, and some of them, being armed, used violence, but only in attempting to escape being arrested it was held that they could not properly be convicted under Section 397 read with Section 511 of the Indian Penal Code."

6. In the light of above discussion, the appeal is allowed. Conviction and sentence passed by learned Addl. Sessions Judge are set aside. The appellant is acquitted of the charge. He be set at liberty forthwith, if not required in any other case. Trial Court record be sent back forthwith. Pending application also stands disposed of.

ILR (2014) I DELHI 658
IA.

RAJ RANI & ANR. ....PLAINTIFF

VERSUS

SUMITRA PARASHAR & ANR. ....DEFENDANT

(JAYANT NATH, J.)

IA.NO. : 8419/2013 IN CS (OS) NO. : 2154/2010 **DATE OF DECISION: 21.01.2014**

Code of Civil Procedure, 1908—Order 6 Rule 17—Plaintiff filed suit seeking relief of possession, recovery of damages mesne profits, permanent and mandatory injunction—After filing evidence of PW1 by way of affidavit, plaintiff moved application to seek amendment and to add relief praying for declaration—Defendant challenged application and urged application was barred as trial had commenced.

Held:- Commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments.

The phrase completion of trial would have a flexible meaning. It cannot be merely because an Affidavit by way of evidence has been filed and the affidavit has been tendered in evidence and examination-in-chief has been partly recorded on only one date of hearing it would mean that plaintiff has been knocked out from being able to amend his plaint. Such an interpretation of proviso under Order 6 Rule 17 PC would clearly not have been envisaged. **(Para 20)**

Important Issue Involved: Commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Ravi Gupta, Senior Advocate with Mr. Lalit Gupta, Mr. Kamal Mehta and Ms. Payal Gupta, Advocates.

FOR THE DEFENDANT : Mr. Harish Malhotra, Senior Advocate with Mr. B.C. Pandey and Mr. Rajinder Aggarwal, Advocates.

CASES REFERRED TO:

1. *Tejinder Singh* vs. *Surjit Rai and Anr.* (2011) 163 PLR 318.
2. *Vidyabai and others* vs. *Padamlatha and another,* (2009) 2 SC 409.
3. *Rajkumar Gurawara* vs. *S.K.Sarwagi and Company Private Limited and another* (2008) 14 SCC 364.
4. *Link Engineers (P.) Ltd.* vs. *ASEA Brown Boveri Limited & Ors.,* 140(2007) DLT 533.
5. *Baldev Singh and others* vs. *Manohar Singh and another,* 2006(6) SCC 498.
6. *Salem Advocate Bar Association* vs. *Union of India,* (2005) 6 SCC 344.
7. *Pankaja and Another* vs. *Yellapa* (2004) 6 SCC 415.

RESULT: Application allowed.

JAYANT NATH, J.

IA No.8419/2013 (Order VI Rule 17 CPC)

1. The present application is filed for amendment of the plaint. The

plaintiff has filed the present Suit seeking the relief of possession, recovery of damages/mesne profits, permanent and mandatory injunction pertaining to property No.53, Sector-12, Block-B, Dwarka, New Delhi. It is averred in the plaint that the parties to the Suit are close relatives i.e. plaintiff No.2 and defendant No.2 being real brothers while plaintiff No.1 is wife of plaintiff No.2 and defendant No.1 is the wife of defendant No.2. The suit property it is stated was originally allotted by DDA to one Ishwar Singh. The defendant No.2 at that time was working in the Land & Building Department of the Delhi Government situated at ITO. Plaintiff No.2 was engaged in the business of sale and purchase of properties. It is stated that the defendant No.2 informed plaintiff No.2 that Shri Ishwar Singh was ready to sell his property. Accordingly, it is stated that the plaintiff purchased the rights of Shri Ishwar Singh for valuable consideration. It was stated that a registered General Power of Attorney dated 25.01.1994, two Special Power of Attorney of the same date, Agreement to Sell, possession letter, receipt etc. were executed.

2. It is stated that defendant No.2 offered to the plaintiff that he would get the suit property converted to freehold. Hence, the plaintiffs handed over the entire file containing all original documents to defendant No.2. Later defendant No.2 is stated to have claimed that the documents were misplaced. FIR No.971/2001 dated 20.08.2001 was got registered at Police Station Sarojini Nagar, Delhi.

3. In September, 2009 it is stated that the plaintiff learnt that defendant No.2 is raising construction on the suit property. Hence, the present Suit is filed seeking a decree of possession, mesne profit etc.

4. The Suit was filed on 23rd October, 2010. The defendant filed written statement on 3.1.2011 stating that the property was actually bought by Shri Ram Dhan Sharma, father of plaintiff No.2 and defendant No.2 from the said original allotee Shri Ishwar Singh. Shri Ishwar Singh is stated to have executed Agreement to Sell, Power of Attorney, receipt and Will etc on 27.5.1994 in favour of the said Shri Ram Dhan Sharma. The defendant No.1 was stated to have bought the said property vide Agreement to Sell dated 11.7.2001 from Shri Ram Dhan Sharma. Thereafter on 17.10.2005 a Conveyance Deed was executed in favour of the defendants by DDA.

5. Issues were framed in this case on 28th November, 2011. Issue No.4 reads as follows:-

"4. Whether the suit is not maintainable without challenging the Conveyance Deed executed by DDA in favour of the defendants? (OPD)

6. List of witnesses were filed by the plaintiff. PW 1 Shri Bhagwan Sharma also tendered his evidence by way of Affidavit on 2nd May, 2012. Minimal examination-in-chief was done on the said date. Thereafter the plaintiff filed IA No.2703/2013 under Order 14 Rule 5 CPC seeking to delete the aforesaid issue No.4 on the ground that the same does not arise from the pleadings of the parties. The said application was dismissed on 18.2.2013 with a clarification that the said dismissal of the application will not come in the way of the plaintiffs/applicants, if so advised, to seek amendment of the plaint. Hence, the present application has now been filed seeking amendment of the Plaint.

7. By the present application plaintiff seeks to amend the plaint to add averments challenging the documents executed by Shri Ishwar Singh in favour of Shri Ram Dhan Sharma. A decree of declaration is sought declaring all documents of alleged transfer of title dated 27.5.1994 executed by Shri Ishwar Singh in favour of Shri Ram Dhan Sharma as forged and fabricated and also similar declaration qua the document executed by Shri Ram Dhan Sharma dated 11.7.2001 in favour of the defendants. Challenge is also sought to be made to the Conveyance Deed dated 17.10.2005 executed by DDA in favour of the defendants. It is averred in the said application for amendment that at the relevant time, the defendants have admitted execution of various documents dated 25.1.1994. It is further stated that in the entire written statement filed by the defendants, it is nowhere pleaded that the present Suit filed by the plaintiff is not maintainable without challenging the Conveyance Deed executed by DDA in favour of the defendants. It is also averred that the plaintiff was not aware about existence of documents dated 27.5.1994, 11.7.2001 and Conveyance Deed dated 17.10.2005 at the time of filing of the Suit/ Plaint. Hence, it is averred that there was no question of the plaintiff challenging the Conveyance Deed executed by DDA in favour of the defendants or other documents at the time of filing of the present Suit.

8. Reliance is placed on the liberty granted by this Court in its order dated 18.02.2013 permitting the plaintiff to file the present application.

9. Learned senior counsel appearing for the plaintiff submits that the powers of this Court are extremely wide and that the said amendments

are necessary for the purpose of determining the real questions in controversy between the parties.

10. Learned senior counsel for the defendant, on the other hand, has vehemently opposed the present application. It is urged that the present application, apart from being barred under Order 6 Rule 17 CPC is nothing but a dilatory tactic. It is averred that issues were framed on 28.11.2011. Evidence of PW 1 has been filed on 19.1.2012 and was tendered on 2.5.2012. Thereafter the plaintiff has filed an application under Order 14 Rule 5 CPC for dropping of issue No.4 which was also dismissed on 18.2.2013. In May, 2013 the present application is filed belatedly. It is further urged that the evidence has already commenced. Hence, in view of proviso to Order 6 Rule 17 CPC the present application is barred. Reliance is placed on the judgment of the Supreme Court in **Rajkumar Gurawara versus S.K.Sarwagi and Company Private Limited and another** (2008) 14 SCC 364, **Salem Advocate Bar Association versus Union of India,** (2005) 6 SCC 344 and **Vidyabai and others versus Padamlatha and another,** (2009) 2 SC 409 to contend that the proviso to Order 6 Rule 17 is couched in a mandatory form and that the jurisdiction of this Court is taken away when evidence has commenced, unless the party seeking an amendment can show that in spite of due diligence the said party could not have raised the matter before commencement of trial.

11. Learned senior counsel for the plaintiff in rebuttal has stressed that no doubt the evidence by way of Affidavit of PW 1 has been filed and tendered in evidence. However, it is urged that cross-examination is yet to commence. Further, only nominal examination-in-chief took place on one date of hearing. He submits that no prejudice would be caused to the defendant in case the present amendment is allowed. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of **Baldev Singh and others versus Manohar Singh and another,** 2006(6) SCC 498 and; **Pankaja and Another versus Yellapa** (2004) 6 SCC 415 and judgment of this High Court in the case of **Link Engineers (P.) Ltd. vs. ASEA Brown Boveri Limited & Ors.,** 140(2007) DLT 533 to contend that the proviso is applicable only once the entire pleadings are completed and the discretion of the Court in allowing an amendment has not been completely done away with but has only been curtailed.

12. The issue hence basically centers around whether in view of

proviso to Order 6 Rule 17 CPC the present application can be allowed. Order 6 Rule 17 CPC reads as under:

> **"17.Amendment of pleadings.**-The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties: Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

13. The proviso which has been inserted w.e.f. 1.7.2002 states that no application of amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

14. In my view, plaintiff has given a plausible explanation to show that despite due diligence he could not have inserted the amendments as now stated by the present application at an earlier stage i.e. prior to the alleged commencement of the trial. Issues were framed on 28.11.2011. An issue was framed whether the Suit was not maintainable without challenging the Conveyance Deed executed by DDA. It is averred that there is no such averment made by the defendant in the written statement. There is no serious denial to this. It appears that the plaintiff seems to have realized that in the absence of any pleadings challenging the Conveyance Deed executed by DDA in favour of the defendants dated 17.10.2005, and in view of issue No.4 framed on 28.11.2011, the plaintiff may face a problem. The plaintiff hence filed IA No.2703/2013 under Order 14 Rule 5 CPC on 14.2.2013 for deletion of Issue No.4. The application was dismissed on 18.2.2013 but it was clarified that the dismissal of the said application will not come in the way of the plaintiff seeking amendment of the plaint. The present application is filed on 17.5.2013. Hence, a plausible explanation has been given for the delay in filing of the present application for amendment, at this stage.

15. However, even assuming that the present application has not been filed without due diligence, in my view the amendment as sought by the plaintiff cannot be shut out.

16. Reference may be had to the judgment of the Hon'ble Supreme Court in the case of **Baldev Singh and others versus Manohar Singh** (supra) where in paragraph 17 the Court held as follows:-

> "17.Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings."

17. Further, the Supreme Court in the case of **Pankaja and Another versus Yellapa**(supra) the Court in paragraph 14 held as follows:-

> "14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case."

18. Reference may also be had to the judgment of the Supreme

Court in the case of **Pradeep Singhvi and Anr v. Heero Dhankani and Ors.** (2004) 13 SCC 432 where in para 4, the Supreme Court has held as follows:

> "4. Of course, by the time the defendants moved an application for amending the written statement, the trial had commenced but the proposed amendment, if allowed, would not have irreparably prejudiced the plaintiffs. At the most, the plaintiff would have been re-examined. We do not think that the trial court was justified in refusing the prayer for amendment in written statement which would have the effect of excluding the defendants from raising a plea material for their defence."

Similarly, the Punjab and Haryana High Court in the case of **Tejinder Singh vs. Surjit Rai and Anr.** (2011) 163 PLR 318 in para 12 of the judgment, has held as follows:

> 12. Now coming to the other plea raised by the defendant that no amendment could be allowed after the trial has commenced. In this case, from the facts and circumstances as referred to above, it transpires that the trial had yet commenced as after framing of the issues, the plaintiff had tendered affidavits of the witnesses and only two witnesses were cross-examined. In such circumstances, where the element of diligence was found to be in favour of the plaintiff the amendment could be allowed. The Apex Court in a case has gone to the extent that since the court should look for determining the real question into controversy and if the amendment does not cause any prejudice and the opposite party, would have the opportunity to meet such amendment while leading evidence, then such amendment should be allowed and the prejudice could only airise after the completion of the evidence. A reference if any could be made to the judgment delivered by the Apex Court in case **Rajkumar Gurawara v. S.K. Sarwagi and Co. Pvt Ltd. and another, AIR 2008 SC 2303**."

19. Similarly, in **Link Engineers (P) Limited versus M/s.Asea Brown Boveri Limited & Ors.** (supra) this Court held that filing of Affidavits by examination-in-chief cannot be considered as commencement of trial. In paragraph 17 this Court held as follows:

> "17.In my considered view, it is not in doubt that if the affidavits of examination-in-chief were not to be filed but the witnesses were to be examined the date for appearance of the witness itself would be the date for commencement of trial. The only difference in the present case is that in view of the present procedure the evidence is filed by way of affidavit. However, it is also true that the affidavit is taken into account and read in evidence on the appearance of the witness before the Court and accepting that he was tendering the affidavit as his examination-in-chief. The application for amendment has been filed after the last date for filing of affidavit of 23.10.2006 but before the date for appearance of witness on 4.12.2006.

20. In view of the judgment of the Hon'ble Supreme Court in the case of **Baldev Singh and others versus Manohar Singh and another** (supra), the phrase completion of trial would have a flexible meaning. It cannot be merely because an Affidavit by way of evidence has been filed and the affidavit has been tendered in evidence and examination-in-chief has been partly recorded on only one date of hearing it would mean that plaintiff has been knocked out from being able to amend his plaint. Such an interpretation of proviso under Order 6 Rule 17 PC would clearly not have been envisaged.

21. Here evidence by way of affidavit having been filed by PW1, the same was tendered as Ex.PW1/A on 2.5.2012. In the short examination-inchief that took place on that date, the said PW1 sought to tender various documents all of which were objected to by learned counsel for the defendant. Hence, on the request of the plaintiff, further examination-inchief was deferred as the plaintiff sought time to file an application for leave to place the documents on record. In my view, the examination-inchief of PW1 is substantially incomplete. Keeping in view the legal position stated by the Hon'ble Supreme Court in the case of Baldev Singh versus Manohar Singh (supra, namely, that the proviso to Order 6 Rule 17 CPC must be understood in the limited sense and meaning final hearing of the Suit, examination of witnesses etc., it cannot be held that the evidence in the present case has commenced as envisaged under Order 6 Rule 17 CPC.

22. The reliance of the learned senior counsel appearing for the defendant upon the observations of the Supreme Court in the case of

Rajkumar Gurawara versus **S.K.Sarwagi and Company Private Limited and another** (supra) does not alter the above position. In paragraph 13 the Supreme Court held as follows:-

> "13.To put it clear, Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pretrial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso."(emphasis added)

Clearly after evidence is complete, the Court would be slow to allow amendments, unless the conditions set out in the proviso are satisfied. Somewhat similar is the position with respect to the judgment of the Hon'ble Supreme Court in the case of **Vidyabai and others versus Padamlatha and another** (supra)relied upon by senior counsel for the defendant. In paragraph 10 the Court held as follows:-

> "10. ... It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial."

23. Hence proviso to Order 6 Rule 17 CPC does not apply to the facts of this case. It cannot be disputed that the amendments sought are necessary for the purpose of determining the real questions in controversy between the parties. In case the amendment is not allowed, it would tantamount to actually knocking out the case of the plaintiff as in the absence of the Conveyance Deed dated 17.10.2005 being set aside, the declaration of the title of the plaintiff would remain in dispute. No fundamentally new case is sought to be propounded.

24. As has been repeatedly held, procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice (See Mr. Shaikh Salim Haji Abdul Khayumsab v. Mr. Kumar and Ors. AIR 2006 SC 396). It would not be appropriate to knock out the case of the plaintiff on such a strict interpretation of the rules of the procedure.

25. Accordingly, the application is allowed subject to payment of costs of Rs.20,000/- payable to the defendant.

CS (OS) 2154/2010

List on 11.03.2014 before the Joint Registrar.

ILR (2014) I DELHI 668
CRL.A.

MADAN LAL .....APPELLANT

VERSUS

THE STATE (GOVT. OF NCT OF DELHI) .....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 768/2000 DATE OF DECISION: 22.01.2014

Indian Penal Code, 1860—Section 307—Non-recovery of weapon of offence is not fatal as injuries were inflicted with a 'sharp weapon'.

Minor discrepancies, contradictions and improvements are insignificant and do not affect the core of the prosecution case regarding infliction of injury with a sharp object on the abdomen of the victim.

There was no animosity between the appellant and the victim. Only when confrontation took place, in a fit

of rage, on the spur of the moment the appellant whipped out a knife; inflicted a solitary knife blow on the abdomen and fled the spot. He did not cause any harm to PW-11 of PW-8— No repeated blows with sharp weapon were caused to the victim. The crime weapon could not be recovered to ascertain its dimensions. The parties had cordial relations prior to 27.04.1985 and participated in the functions.

Held, no inference can be drawn that injury inflicted was with the avowed object or intention to cause death. The determinative question is intention or knowledge, as the case may be, and not nature of injury.

The appellant voluntarily inflicted 'dangerous' injuries with a sharp weapon on the vital organ and was liable for conviction under Section 326 IPC. The conviction is accordingly, altered from Section 307 IPC to Section 326 IPC.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Jitendra Sethi, Advocate with Mr. Rajesh Kaushik & Mr. Hemendra Jailia, Advocates.

FOR THE RESPONDENTS : Mr. M.N. Dudeja, APP for the State.

RESULT: Appeal Allowed.

S.P. GARG, J.

1. Madan Lal (the appellant) questions the legality and correctness of a judgment dated 17.11.2000 of learned Addl. Sessions Judge in Sessions Case No. 499/96 arising out of FIR No. 214/85 PS Subzi Mandi by which he was held guilty for committing offence punishable under Section 307 IPC. By an order dated 23.11.2000, he was awarded RI for three years with fine Rs. 5,000/- .

2. Allegations against the appellant were that on 29.04.1985 at about 09.45 P.M. in front of house No. 10621, Gali No. 6, Andha Mugal, he inflicted injuries to Tara Chand in an attempt to murder him. During the course of investigation, statements of the witnesses conversant with the facts were recorded. The appellant was arrested and pursuant to his disclosure statement, crime weapon i.e. churi was recovered. After completion of investigation, a charge-sheet was submitted in the Court against him; he was duly charged and brought to trial. The prosecution examined seventeen witnesses to establish his guilt. In 313 statement, the appellant denied his complicity in the crime and alleged false implication. DW-1 (Prem Wati) was examined in defence. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, convicted Madan Lal for the offence mentioned previously. Being aggrieved, he has preferred the appeal.

3. Learned counsel for the appellant 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 PW-8 (Brij Mohan) and PW-11 (Sona Devi) who were interested witnesses and whose presence at the spot could not be established. They did not offer any reasonable explanation for recording their statements under Sections 161 Cr.P.C. after a considerable delay. Vital contradictions and discrepancies in the testimonies of the prosecution witnesses were not considered. PW-4 (Naipal Singh) opted not to support the prosecution case and turned completely hostile. PW-6 (Tara Chand)'s version cannot be accepted due to conflicting and inconsistent statements regarding his presence at the time of incident at the spot or in the function. Ingredient of Section 307 IPC are not attracted or proved. Learned Addl. Public Prosecutor urged that all the material witnesses have fully supported the prosecution and there are no sound reasons to disbelieve them.

4. The occurrence took place at about 09.45 P.M. on 29.04.1985. Tara Chand was taken to Hindu Rao Hospital by his son Brij Mohan and admitted there. Daily Diary (DD) No. 23 (Ex.PW-15/A) was recorded on getting information from Duty Const. Bijender Kumar at Hindu Rao Hospital about admission of Tara Chand by Brij Mohan in injured condition at about 10.30 P.M. The Investigation was assigned to ASI Raja Ram who with Const. H.C. Nisar Ahmad went to the spot. He lodged First Information Report after making endorsement (Ex.PW-2/A) over Ex.PW-15/A at 11.30 P.M. MLC (Ex.PW-5/A) records the arrival time of the

patient at 10.30 P.M. PW-5 (Dr.Vikas) who medically examined Tara Chand proved the MLC (Ex.PW-5/A) prepared by him. It records that the injured was brought at Hindu Rao Hospital by his son Birj Mohan; 'stabbed by Madan'. The history was given by the patient himself. The injured was conscious at the time of admission at Hindu Rao Hospital. PW-5 (Dr.Vikas), in the cross-examination claimed that Brij Mohan who had brought Tara Chand to the hospital was present at the time of medical examination. He admitted that the words 'history given by the patient himself' was written on the second line within brackets. PW-5 (Dr.Vikas) had no ulterior reasons to fabricate the MLC. Name of the assailant finds mentioned in the MLC (Ex.PW-5/A). Since injured Tara Chand was not fit to make statement, no adverse inference can be drawn for recording his statement on 30.04.1985 the next day of the incident.

5. Injuries sustained by Tara Chand are not under challenge. Suggestions have been put that Tara Chand suffered injuries due to attack by his rivals in the trade and that Madan Lal was implicated on account of the incident occurred on 27.04.1985. Another suggestion was put that Madan Lal was falsely implicated as he was suspected to be the informer of the police against him and when some quarrel took place with the other party, he (Madan Lal) was involved in the case. It has come on record that Tara Chand sustained injuries 'dangerous' in nature by sharp object. PW5 (Dr.Vikas) noted the following injury on his body in the MLC (Ex.PW5/ A) :

"One incised would at the left iliac fossa with the length of gut exposed"

6. The Crime weapon i.e. knife (Ex.P1) was shown and he was of the opinion that injury could be possible with that knife (Ex.P1). PW-7 (Dr.V.P.Singh) deposed that on operation two perforations in intestine and an injury in mesentery were detected and repaired. The patient was discharged on 09.05.1985. He was of the opinion that the nature of injuries was 'dangerous'. In the cross-examination, he clarified that the operation was conducted under his supervision on the same night in his presence by Dr.Dhawan. There were no post-operative complications till the discharge of the patient. He fairly admitted that he did not measure depth of the injury but explained that it was not required and the wound was peritoneum deep. Since Tara Chand had sustained injuries 'dangerous' in nature on vital organ, he was not expected to let the real culprit go

scot free and to falsely rope in the appellant with whom he had no animosity before 27.04.1985.

7. In his Court statement Tara Chand appearing as PW-6 deposed that on 27.04.1985 in a marriage function a quarrel had taken place when Naipal Singh casually came into contact with Shanti (mother of the accused) and was slapped. The matter was pacified by his son-in law Pardeep. On 29.04.1985 a party was arranged on the eve of marriage of Premo's daughter by the bridegroom side at Andha Mugal, Partap Nagar. At about 09.00 / 09.30 P.M. when he was present with his wife and son Brij Mohan in front of his house on a cot, Madan Lal arrived there and enquired about Pardeep. When he asked Madan Lal as to why he was in search of Pardeep, the accused told him that he would not spare him (Pardeep) that day. When he told Madan Lal that he would not allow it to happen, the accused took out a 'chhoora' from the back of his wearing 'tehmat' (lungi) and stabbed on the left-side of abdomen as a result of which his intestines came out. The assailant Madan Lal fled the spot and he became unconscious and taken to Hindu Rao Hospital. In the cross-examination, he was questioned about his involvement in criminal cases. He disclosed that he had made statements to the police on 30.04.1985 and 24.10.1985. He claimed that at the time of occurrence, he was sitting in front of his house on a 'charpai'. His wife and son were sitting on the other 'charpai' next to him. He denied the suggestion that at 09.30 P.M. his wife and son had already left to attend the reception at the 'pandal' and he was in his house for selling intoxicants. On scanning the entire testimony of the injured witness, it reveals that despite lengthy and searching cross-examination, the appellant was unable to extract or elicit any material discrepancies or contradictions to disbelieve his version. The material facts deposed in the examination-in-chief remained unchallenged and uncontroverted. The role assigned to the appellant in inflicting injuries to him was not questioned or challenged in the cross-examination. The accused did not deny his presence at the time of incident at the spot. There are no good reasons to disbelieve Tara Chand who was the victim of suffering 'dangerous' injuries. PW-8 (Brij Mohan) corroborated his version in its entirety and implicated Madan Lal for inflicting injuries to his father Tara Chand. He further revealed that Madan Lal had arrived at the spot after searching Pardeep to whom he wanted to inflict injuries. When he was asked by Tara Chand as to how he could cause harm to his son-in-law Pardeep, the accused stabbed him

with a knife / churi on the abdomen as a result of which Tara Chand fell down and his intestines came out. He took his father to Hindu Rao Hospital. In the cross-examination, he disclosed that he made statement in the hospital at about 10.45 P.M. the same day. His statement was recorded on 30.04.1985. He had not gone to inform his relatives and remained in the hospital till the arrival of the police. It is true that in the rukka (Ex.PW-15/A), the Investigating Officer recorded that no eye witness was available at the hospital and lodged First Information Report after making endorsement over DD No.23 (Ex.PW-15/A). The Trial Court has dealt with this aspect minutely and found the conduct of the Investigating Officer faulty in not recording statement of Brij Mohan who had taken his father to Hindu Rao Hospital soon after the occurrence and whose name appeared in the MLC (Ex.PW-5/A) collected by the Investigating Officer. For lapses on the part of the investigation not to lodge First Information Report after recording Brij Mohan's statement, the testimony of PW-6 (Tara Chand) cannot be discredited. PW-11 (Sona Devi) whose presence at the spot was natural and probable has also implicated the accused.

8. Ocular testimonies of PW-6 (Tara Chand) and PW-8 (Brij Mohan) coupled with medical evidence which is not at variance prove the guilt of the appellant without reasonable doubt. Apparently, Madan Lal was the author of the injuries. Merely because PW-4 (Naipal Singh) for the reasons known to him did not opt to support the prosecution regarding incident dated 27.04.1985, it does not affect the prosecution case particularly when suggestion was put by the appellant that his implication was due to incident dated 27.04.1985. Recovery of knife (Ex.P1) was not accepted and believed by the Trial Court. Non-recovery of weapon of offence is not fatal as injuries were inflicted with a 'sharp weapon'. The Trial Court has dealt with all the relevant contentions of the appellant elaborately and the findings are based upon fair appraisal of the evidence and no deviation is called for. Minor discrepancies, contradictions and improvements highlighted by the appellant's counsel are insignificant and do not affect the core of the prosecution case regarding infliction of injury with a sharp object on the abdomen of the victim.

9. The appellant was convicted for committing the offence under Section 307 IPC. Record reveals that prior to 27.04.1985 there was no animosity between the appellant and the victim. On that day, both the parties had participated in the marriage. Unfortunately, in the said function,

confrontation took place when Naipal Singh was suspected to have outraged the modesty of appellant's mother – Shanti. The matter was pacified due to the intervention of the relatives. On 29.04.1985, Madan Lal had arrived at the spot in search of Pardeep. It is unclear as to what was the immediate provocation for Madan Lal to search Pardeep that day. Apparently, when he arrived at the spot to enquire about Pardeep from his father-in-law – Tara Chand, he had no intention whatsoever to inflict injuries to him (Tara Chand). Only when confrontation took place with Tara Chand, in a fit of rage, on the spur of the moment the appellant whipped out a knife; inflicted a solitary knife blow on the abdomen and fled the spot. He did not cause any harm to PW-11 (Sona Devi) or PW-8 (Brij Mohan). No repeated blows with sharp weapon were caused to the victim. The crime weapon could not be recovered to ascertain its dimensions. The parties had cordial relations prior to 27.04.1985 and participated in the functions. In my considered view, no inference can be drawn that injury inflicted was with the avowed object or intention to cause death. The determinative question is intention or knowledge, as the case may be, and not nature of injury. The appellant voluntarily inflicted 'dangerous' injuries with a sharp weapon on the vital organ and was liable for conviction under Section 326 IPC. The conviction is accordingly altered from Section 307 IPC to Section 326 IPC.

10. The appellant was awarded RI for three years with fine Rs. 5,000/- . It is stated that the appellant has suffered ordeal of trial / appeal for about 28 years. Nominal roll reveals that he suffered incarceration for two months and five days as on 06.07.1985 and is not a previous convict. Some medical documents have been placed on record to show him suffering from some ailments. It is true that the appellant has suffered agony of trial / appeal for about 28 years and is not a previous convict. At the same time, the injury inflicted on the vital organ of the victim was deliberate and intentional without any provocation by an unarmed victim present outside his house. The victim had to undergo operation as his intestines had come out and remained admitted in the hospital for about more than nine days. Even for the incident dated 27.04.1985, he was not at fault. Considering all these circumstances, sentence order is modified and the substantive sentence of the appellant is reduced to two years. Other terms and conditions of the sentence order are left undisturbed. However, the appellant shall pay compensation of Rs. 25,000/- to the victim and deposit it within fifteen days before the Trial Court.

Compensation amount will be released to the complainant after due notice. Madan Lal shall surrender before the Trial Court on 29th January, 2014 to serve the remaining period of substantive sentence.

11. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith.

ILR (2014) I DELHI 675
W.P. (C)

NATIONAL TECHNICAL RESEARCH ORGANIZATION **....PETITIONER**

VERSUS

P. KULSHRESTHA & ORS. **....RESPONDENTS**

(GITA MITTAL AND DEEPA SHARMA, JJ.)

W.P.(C) NO. : 385/2014 **DATE OF DECISION: 23.01.2014**

Constitution of India, 1950—Art. 226—Service Law—Promotion Respondents claiming they were beneficiaries of Flexible Complementing Scheme (FCS), filed application before Central Administrative Tribunal seeking a direction for promotions from date of completion of eligible service in promotional post wherein they were given in situ promotion on subsequent dates—Orders of Tribunal allowing application, challenged before High Court—Plea taken, directions made by Tribunal in impugned judgment tantamount to granting pay to respondents for work which they have not done—Held—It is admitted position that petitioner has only effected in situ promotions to respondents—There is no distinction in work which was being discharged by respondents prior to their promotion or thereafter—Only variation

is in financial benefit which would accrue to respondents after their promotions—Principle of 'no work no pay' has no application to instant case—From very expression in situ, it is apparent that there is no change in either place or position in which respondents are working—Therefore, it cannot be contended that respondents are being paid any amount for work they have not discharged—We find no merit in these petitions and applications which are dismissed with costs which are quantified at Rs. 2,000/- per respondent.

Important Issue Involved: From expression in situ promotion, it is apparent that there is no change in either the place or the position. Therefore, it cannot be contended that any payment is being made for work not discharged.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ruchir Mishra, Advocate.

FOR THE RESPONDENTS : Mr. M.K. Bhardwaj, Advocate.

CASES REFERRED TO:

1. *Union of India & Anr.* vs. *S.K. Murti,* Appeal (CC) No.6864/2011.
2. *Union of India & Ors.* vs. *Dr.S.K. Murti & Anr. Union of India & Ors.* (CC No.6864 of 2011).
3. *Union of India & Anr.* vs. *Tarsen Lal & Ors.* Civil Appeal No.4222 of 2006.

RESULT: Dismissed.

GITA MITTAL, J. (Oral)

CM Nos.766-767/2014 in WP (C) Nos.385/2014 & CM Nos.802-803/2014 in WP (C) No.407/2014

1. Allowed, subject to just exceptions.

W.P.(C) No.385/2014 & CM No.765/2014

WP (C) No.407/2014 & CM No.801/2014

2. The respondents in this case are scientists who are working with the National Technical Research Organization as Scientists and claiming that they were beneficiaries of the Flexible Complementing Scheme ('FCS' hereafter) issued by the Government of India vide OM No.2/41/97-PIC dated 9th November, 1998. The applicants filed an original application being OA Nos.2142 of 2011 and 578 of 2012 before the Central Administrative Tribunal (Principal Bench) seeking a direction against the respondents for promotions from the date of completion of eligible service in the promotional post wherein they were given in situ promotion at subsequent dates. The petitioners placed reliance on a judgment of this court dated 5th October, 2010 titled as **S.K. Murti Vs. Union of India** which was carried in appeal by way of Special Leave to Appeal (Civil) (CC No.6864 of 2011) entitled **Union of India & Ors. Vs. Dr.S.K. Murti & Anr. Union of India & Ors.** dismissed by the Supreme Court by a judgment dated 2nd May, 2011. It is undisputed that the judgment of this court in WP (C) No.14263 of 2004 and the Supreme Court decision dated 2nd May, 2011 arose out of a consideration of the benefits under the Flexible Complementing Scheme which was relied upon by the present respondents before the Central Administrative Tribunal.

3. As per this scheme, the process to award promotion to the next higher grade is required to be completed prior to completion of three years and four years in the scales of pay of Rs.15600-39100 + Grade Pay Rs.5400/- and Rs.15600-39100 + Grade Pay Rs.7600/- . The scheme further postulates that assessment by a duly constituted Assessment Board under the Chairmanship of the concerned department by the Government of India based on the minimum residency period linked to the performance for in situ promotion to the higher grade of Scientists. Thereafter, the Assessment Board would make recommendations to the competent authority for award of promotion to the grade of Scientists "B" to "C" in the scale of Rs.15,600-39,100 + Grade Pay Rs.5400/- , Scientist "C" to "D" in the scale of Rs.15600-39100 + Grade Pay Rs.7600/- and Scientist "D" to "E" in the scale of Rs.37400-67000 + Grade Pay Rs.8700/- from the date of completion of residency periods. The provisions exist for the effective date of promotion to the next higher grade either w.e.f. 1st January or 1st July of every calendar year based on

recommendation of the Assessment Board.

4. In the instant case, the respondents contended that they became due for promotion on 1st July, 2009 and in some cases on 1st January, 2009. They were, however, denied consideration and promotion till the respondents passed an order on 29th October, 2010 whereby they were actually granted promotions.

5. The respondents made a grievance before the Tribunal that the petitioner had even failed to fulfil the Annual Confidential Reports of the Scientists within the stipulated period which were required to be completed 90 days prior to the ending of 31st December of the respective year.

6. In addition, no steps whatsoever have been taken to constitute the Assessment Board. We are today informed on behalf of the respondents that the petitioner has not constituted any Board since 2010 after the passing of the order dated 29th October, 2010.

7. A material fact which requires to be noted herein is that it is an admitted position that the petitioner has only effected in situ promotions to the respondents. Nothing has been placed before us which would show that there is any distinction in the work which was being discharged by the respondents prior to their promotion or thereafter. It appears that the only variation is in the financial benefit which would accrue to the respondents after their promotions.

8. It is noteworthy that a similar claim made by **Dr.S.K. Murti & Ors.** by way of OA No.826 of 2003 culminated in a judgment dated 3rd December, 2003, which was rejected. The Tribunal had held that those applicants were entitled only to notional promotions from the date of being declared successful by the Departmental Review Committee/ Screening Committee. This was assailed by way of WP (C) No.14263 of 2004.

9. It appears that just as in the present cases, both sides relied on the FCS Scheme set out in the Office Memorandum dated 17th July, 2002, the relevant extracts whereof reads as follows:-

> "The recommendations made by the Fifth Central Pay Commission for modifying the Flexible Complementing Scheme (FCS) in operation in scientific and technological departments for in situ promotion of scientific technical personnel with a

view to removing the shortcomings/inadequacies in the scheme had been examined some time back and this Department in O.M. No.2/41/97-PIC dated 9.11.1998 had issued detailed guidelines modifying the then existing FCS. From a number of references received in this Department, it appears that an element of confusion exists in some scientific departments on the date from which in situ promotions under FCS are to be given effect. Promotions are made effective from a prospective date after the competent authority has approved the same. This is the general principle followed in promotions and this principle is applicable in the case of in situ promotions under FCS as well.

2. As a matter of fact, no occasion requiring application of promotion with retrospective effect should arise in FCS cases, as it is provided in t he rules for scientific posts that the Assessment Boards shall meet at least once a year to consider cases of in situ promotions. Rules notified for scientific posts also contain a provision for review of promotion by the Selection Committee/Assessment Board twice a year before 1st January and 1st July of every year and the Selection Committee/ Assessment Board is required to make its recommendation on promotions keeping in view these crucial dates of 1st January and 1st July. The competent authority, which has to take a final view based on these recommendations, shall ensure that no promotion is granted with retrospective effect."

10. WP (C) No.14263 of 2004 was favourably decided in favour of **Dr.S.K. Murthy & Ors.** by the judgment dated 5th October, 2003. It was held by this court that the Office Memorandum dated 17th July, 2002 mandates that the authorities are required to take effective steps whether in advance keeping in view the crucial dates of 1st January & 1st July wherefrom the in situ promotions under the flexible complementing scheme have to be effected. The operative part of the High Court judgment reads thus:-

"5. Suffice would it be to state that the memorandum requires Flexible Complementing Scheme in situ promotions to be effected each year and for which the circular mandates that the assessments should be made well in advance keeping in view the crucial dates being 1st January and 1st July with effect wherefrom

the Flexible Complementing Scheme in suit promotions have to be effected.

6. The last sentence of para 20 is relied upon by the respondents to urge that the office memorandum clearly states that no promotion should be granted with retrospective effect. To this the answer by the petitioner is that the preceding two sentences makes it very clear that the Assessment Boards have to be constituted well in advance keeping in view the fact that 1st January and 1st April of each year are crucial dates to effect promotions.

7. Now, nobody can take advantage of his own wrong. Nothing has been shown to us by the respondents to justify not constituting the Assessment Board/Selection Committee in time.

8. That apart, instant case of promotion is not one where promotion has to be effected upon a vacancy arising. Subject to being found suitable the petitioner was entitled to be promoted in situ. The situation would be akin to granting a selection scale to a person and the date of eligibility would be the date wherefrom the benefit has to be accorded.

9. Under the circumstances we hold in favour of the petitioner and direct that the benefit granted to the petitioner be reckoned with effect from 1.1.1999 instead of 19.9.2000. Arrears would be paid within 12 weeks from today but without any interest."

11. The challenge by the authorities to the decision of this court by way of Special Leave to Appeal (CC) No.6864/2011) **Union of India & Anr. Vs. S.K. Murti,** was rejected by the Supreme Court by a judgment dated 2nd May, 2011 wherein the court held thus:-

"We have heard Smt. Indira Swahney, learned counsel for the petitioners and Mr. Jitendra Mohan Sharma, learned counsel for the petitioners and Mr. Jitendra Mohan Sharma, learned counsel for the respondent, who has entered on caveat and carefully perused the record.

The respondent, who was working as Scientist Grade-D in the Botanical Survey of India became eligible for promotion under FCS with effect from 1.1.1999. However, on account of delayed

convening of the Departmental Review Committee/Selection Committee, his promotion was delayed and by an order dated 20.10.2000, he was promoted with effect from 19.9.2000.

The respondent and 10 other Scientists of Botanical Survey of India filed Original Application No. 826/203 for directing the petitioners to promote them with effect from the date of eligibility , i.e. 1.1.1999. The Tribunal dismissed the original application and held that in view of the clarification given in O.M. Dated 10.11.1998, the applicants were not entitled to promotion with retrospective effect. The review petition filed by the respondent was dismissed by the Tribunal vide order dated 14.1.2004. However, Write Petition (C) No. 14263/2004 filed by the respondent was allowed by the Division Bench of the High Court and the petitioners were directed to give him all the benefits on the basis of deemed promotion with effect from 1.1.1999.

In our view, reasons assigned by the High Court for directing the petitioners to promote the respondent with effect from the date of acquiring the eligibility are legally correct and the impugned order does not suffer from any legal error warranting interference under Article 136 of the Constitution.

It is not in dispute that vacancies existing when the Departmental Review Committee considered the case of the respondent and other similarly situated persons for promotion. It is also not in dispute that in terms of paragraph 51.25 of the Vth Pay Commission Recommendations, the Departmental Review Committee/Assessment Board was required to meet every six months, i.e. in January and July and the promotions were to be made effective from the date of eligibility. Therefore, it is not possible to find any flaw in the direction given by the High Court.

The special leave petition is accordingly dismissed."

12. Before us, the petitioner has placed reliance on the very same Office Memorandum dated 17th July, 2002 which sets out the FCS Scheme.

13. We may note that so far as the present petitions are concerned, the formal order with regard to their promotions was passed by the

petitioner on 29th October, 2010. The principles laid down by this court by its judgment dated 5th October, 2010 on the construction of the scheme dated 17th July, 2002 would squarely apply to the respondents. The challenge to the judgment was also rejected as back as on 2nd May, 2011.

14. Before us, Mr. Mishra, learned counsel for the petitioner has placed reliance on an Office Memorandum dated 21st September, 2012 which is really in the nature of a clarification of the earlier Office Memorandum dated 17th July, 2002. A reading of the same would show that the same only reiterates what is stipulated in the office memorandum of 2002 and emphasises the need for the petitioners to act with expedition and urgency so far as promotions of personnel is concerned. It is to be noted that this office memorandum is subsequent to the date from which the respondents are claiming rights. So far as the present consideration is concerned, we are bound by the pronouncement of the Supreme Court and the prior adjudication and construction of the manner in which the petitioner is required to discharge their duties. This has also been expounded in the judgment dated 5th October, 2010.

15. Our attention has been drawn to an order dated 17th November, 2008 which was annexed with the original application filed by the respondents before the Tribunal. By this order, the very relief which was claimed by the present respondents in its original applications stand granted to several other identically placed personnel of the petitioner organization. There is no explanation at all on the record for not granting the same benefit to the respondents as has been granted to other similarly placed persons by the petitioners.

16. Before us, it has been vehemently contended on behalf of the petitioner that the directions made by the Tribunal in the impugned judgment dated 15th March, 2012 tantamounts to granting pay to the respondents for work which they have not done. We fail to see how the principle of 'no work no pay' at all applies to the instant case. It is an admitted position that the respondents have been granted 'in situ promotion' which would mean that they were discharging the very functions which they were required to discharge upon their promotion. From the very expression in situ, it is also apparent that there is no change in either the place or the position in which they are working. Therefore, it cannot be contended that the respondents are being paid any amount for work they have not

discharged.

17. Learned counsel for the petitioner has also placed reliance on a pronouncement of the Supreme Court dated 21st September, 2006 in Civil Appeal No.4222 of 2006 **Union of India & Anr. Vs. Tarsen Lal & Ors.** In this case, the Supreme Court was considering directions under the Indian Railways Establishment Manual. The respondents had actually not performed duties and responsibilities of the higher posts. In these circumstances, it was held that no arrears on account of an administrative error in making his promotion could be granted. It is not so in the p resent case.

18. Learned counsel for the respondents has also pointed out that this very judgement was distinguished by the Supreme Court in a latter pronouncement reported at 2007 (6) SCC 254 State of Kerala & Anr. Vs. E. Bhaskaran Pillai. After consideration of several judgments (including the judgment in Union of India Vs. Tarsem Lal (Supra)), the Supreme Court has held thus:- "We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenge the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard-and-fast rule. The principle "no work no pay" cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also."

19. It is also noteworthy that the impugned judgment was passed as back as on 15th March, 2013. The respondents have been constrained to move the Central Administrative Tribunal by prior proceedings under

the Contempt of Courts Act against the petitioner. It is the filing of the contempt petition which has motivated the instant writ petitions.

20. For all the foregoing reasons, we find no merit in these petitions and applications which are hereby dismissed with costs which are quantified at Rs.2,000/- per respondent. The costs shall be paid to the respondents within a period of four weeks from today.

ILR (2014) I DELHI 684
CRL.A

RASHID **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(S.P. GARG, J.)

CRL.A. NO. : 583/2000 **DATE OF DECISION: 24.01.2014**

Indian Penal Code, 1860—Sections 304/324: Appellant is challenging conviction by the Trial Court u/s 304/324 IPC. Appellant contends that victims wanted to withdraw water out of turn due to a wedding in the family, due to which a dispute arose- During the dispute, one life was lost, two other victims sustained grave injuries- Appellant denies being author of the injuries, pleads false implication- further contends to having received injuries himself at the hands of the complainants- Trial Court convicted Appellant u/s 304/324 IPC- Hence, present appeal. Appellant contended that TC erred in relying upon interested witnesses, without independent corroboration- Testimony of eye witnesses not corroborated by medical evidence- Highly improbable for injured witnesses to testify to the injuries of the deceased, when they were attacked

simultaneously. Held:

- **Defence taken by Appellant is conflicting- Version of Appellant entirely contradicted by Defence witnesses- Nothing on record to show that Appellant sustained injuries as claimed.**

- **Prompt and vivid reporting of the incident gives assurance regarding its true version.**

- **Testimony of an injured witness is accorded a special status in law- His statement is generally considered reliable- Unlikely that injured witness would spare the actual witness in order to falsely implicate someone else. Convincing evidence is required to discredit an injured witness. Victim was father and grandfather of PW2 and PW1. They were not expected to let the real culprit go scot free to falsely rope in an innocent.**

- **Trite law that minor variations between medical evidence and oral evidence do not take away the primacy of the latter= Minor contradictions and discrepancies are inconsequential- Do not affect core of the prosecution case.**

- **PW-2 suffered injuries 'simple' in nature- Conviction u/s 324 IPC altered to s. 323 IPC.**

- **Impugned judgement based on fair appraisal of the evidence and all the relevant contentions of the appellant have been considered. No reason to interfere with the findings. Appellant has suffered ordeal of trial/appeal for 15 years- Clean antecedents- No history of enmity- Substantive sentence is modified to 5 years.**

Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding its true version. In the instant case, the First Information Report was

lodged in promptitude and the complainant – Anil Kumar whose presence at the spot is undisputed gave detailed account of the occurrence and implicated Rashid for inflicting injuries to his father and grandfather while pelting bricks from the roof of his house. Since the FIR was lodged without delay, there was least possibility of the complainant to concoct a false story in such a short interval. The complainant narrated the genesis of the occurrence minutely. While appearing as PW-1 in his Court statement Anil Kumar proved the version given to the police at the earliest available opportunity without any variation. He deposed that when he went to fetch water from the water tank, Rashid was also standing among others there. He asked them to allow him to take water first due to marriage in their family to which the accused objected. He and his associate started beating him. When his family members came to know, his father and grandfather arrived there. Rashid went to the roof of his house and started pelting stones which hit his father and grandfather and they sustained injuries on head. They were taken to hospital. Police recorded his statement (Ex.PW1/A). His grandfather expired at Safdarjung Hospital. In the cross-examination, he denied that statement made by him was tutored by the police outside the court. He denied that he had removed the utensils of Rashid and Harish and forcibly wanted to take water out of turn. He denied that when they forcibly tried to take water out of turn, they were beaten by 'other persons' who had assembled there and not by the accused. He further denied that they had given beatings to the appellant and Harish. On scanning the testimony of the witness, it transpires that material facts deposed by him remained unchallenged and uncontroverted in the cross-examination. No material discrepancies could be elicited to discard his version. Presence of the appellant at the spot is not under challenge. The residents of the locality had gathered to take water from the water tank. Those persons living in the vicinity of the appellant must be known to him. However, he did not divulge the name of any such individual with whom the victims had confrontation; and

was assaulted and injured. PW-2 (Ghanshyam), Anil Kumar's father has corroborated his testimony in its entirety and has implicated Rashid for inflicting injuries to him and his father with bricks from the roof top of his house. Again, the cross-examination could not bring any material discrepancy to disbelieve him. He also denied the suggestion that they forcibly prevented Rashid from taking water on his turn, and assaulted and injured him. He further denied that they had quarrelled with 'those' who were taking water from the tanker. Again, this injured witness had no ulterior motive to falsely implicate Rashid with whom he had no prior animosity. The testimony of an injured witness has its own relevancy and efficacy. It is a settled preposition of law that the evidence of the stamp witness must be given due weightage as his presence at the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he would spare the actual assailant in order to falsely implicate someone else. The testimony of an injured witness is accorded a special status in law. Convincing evidence is required to discredit an injured witness. In the instant case, victim was the father and grandfather of PW-2 and PW-1, respectively and they were not expected to let the real culprit go scot free and to falsely rope in an innocent. **(Para 6)**

The defence taken by the appellant is conflicting and contradictory. In 313 statement, the appellant did not deny his presence at the spot where he had gone to fetch water. He claimed that when he was taking water from the water tank the utensils were forcibly removed by the complainant side and he was assaulted and injured by them. Entirely contradictory version was narrated by defence witnesses. DW-1 (Rahmit Ullaha) appeared on 19.05.2000 and his further examination was deferred. However, he did not opt to appear again. DW-2 (Suraj Pal) and DW-3 (Chaman Lal) deposed that a quarrel had taken place at the spot when complainant had attempted to take water on priority and it was objected to by the individuals present at the tanker. This resulted in an altercation and both the parties started

pelting stones. Rashid did not participate in the throwing of the stones. He came on a bicycle at the spot and sustained brick bat injury on his neck. He fell down after sustaining injuries and was taken for interrogation from the spot by the police. Apparently, the version given by the witnesses is in conflict with the defence taken by the appellant in his 313 statement as well as suggestions put to the prosecution witnesses in the cross-examination. There is nothing on record to show as to when the appellant was taken to hospital for medical examination. The doctor who medically examined him was not produced in defence. The defence version inspires no confidence and needs outright rejection. **(Para 8)**

The impugned judgment is based upon fair appraisal of the evidence and all the relevant contentions of the appellant have been considered. I find no sound reasons to interfere with the findings recorded by the Trial Court. Since, PW-2 (Ghanshyam) had sustained injuries 'simple' in nature by blunt object, the offence committed by him fell under Section 323 IPC. Conviction under Section 324 IPC is altered to Section 323 IPC. **(Para 9)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Bhalla, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

RESULT: Appeal Disposed.

S.P. GARG, J.

1. Rashid (the appellant) challenges the legality and correctness of a judgment dated 15.09.2000 of learned Addl. Sessions Judge in Sessions Case No. 116/98 arising out of FIR No. 431/98 PS Sultanpuri whereby he was convicted for committing offences punishable under Sections 304/324 IPC. By an order on sentence dated 19.09.2000, he was awarded RI for seven years with fine Rs. 1,000/- under Section 304 IPC and RI for one year with fine Rs. 500/- under Section 324 IPC. Both the sentences were to operate concurrently.

2. Allegations against the appellant were that on 03.07.1998 at about 08.00 A.M. opposite Hanuman Mandir, P-4 Block, Sultanpuri, he and his associate Harish Kumar inflicted injuries to Anil Kumar, Ghanshyam and Dhani Ram. Dhani Ram succumbed to the injuries and post-mortem examination on the body was conducted. During the course of investigation, statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against the appellant and Harish Kumar for committing offences under Section 304/324/34 IPC. Vide order dated 01.02.1999, Harish was discharged. Charge under Section 304/324 IPC was framed against the appellant to which he pleaded not guilty and claimed trial. To bring home the charge, the prosecution examined seven witnesses. In 313 statement, the appellant pleaded false implication and claimed that he was assaulted and injured by the complainant party when the people present at the spot did not permit them to forcibly draw water from the water tank. DW-1 (Rahmit Ullaha), DW-2 (Suraj Pal) and DW-3 (Chaman Lal) appeared in his defence. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment held Rashid guilty for the offences mentioned previously. Being aggrieved, the appellant has preferred the appeal.

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 and fell in grave error in relying upon the testimonies of interested witnesses without independent corroboration. The Trial Court did not notice that ocular testimony of the deceased's relatives was at variance with medical evidence. It was highly improbable for PW-1 (Anil Kumar) and PW-2 (Ghanshyam) to observe as to how and by whom the injuries were inflicted to Dhani Ram when allegedly they were attacked simultaneously. Vital discrepancies and contradictions emerging in the statements of PW1 and PW-2 were ignored without valid reasons. Counsel adopted alternative argument to take lenient view as Rashid had already undergone 13 months in custody. Learned Addl. Public Prosecutor urged that the impugned judgment is based upon fair appraisal of the evidence and needs no interference.

4. It is admitted position that dispute arose on 03.07.1998 at about 08.00 A.M. at the spot when PW-1 (Anil Kumar) had gone to fetch water from a water tank. It is also not denied that in the said quarrel, PW-1 (Anil Kumar), PW-2 (Ghanshyam) and Dhani Ram sustained injuries.

Appellant's contention is that he was not the author of the injuries and these were inflicted by public persons preset at the water tank who had not allowed the complainant party to draw water from the water-tank out of turn and they wanted to get water on priority due to marriage in their family. Further contention of the appellant is that he also received injuries at the hands of the complainant party and was medically examined.

5. The occurrence took place at around 08.00 A.M. in which PW-1 (Anil Kumar), his father PW-2 (Ghanshyam) and grandfather (Dhani Ram) sustained injuries. Daily Diary (DD) No. 21 B (Ex.PW-5/A) was recorded at 08.25 A.M. at PS Sultanpuri on getting information about the quarrel. The investigation was assigned to SI Sri Kishan who with Const. Puran Mal went to the spot. The injured had already been taken to DDU Hospital. Dhani Ram's MLC (Ex.PW-5/B) and Ghanshyam's MLC (Ex.PW-5/C) recorded their arrival time at about 09.23 A.M. and 09.57 A.M., respectively. The Investigating Officer, after recording Anil Kumar's statement (Ex.PW-1/A) lodged First Information Report without undue delay. In the statement, complainant – Anil Kumar disclosed that at about 08.00 A.M., he had gone to fetch water from a water tank near Hanuman Mandir, P-4 Block, Sultanpuri where a large crowd was present. Rashid and Harish who lived at P-4 Block were getting water from the water tank. He requested Rashid to allow him to take water due to marriage at their home. On that, Rashid started beating him with fist and blows. Harish also gave him beatings. When his father and grandfather came to know about the quarrel, they rushed to the spot to intervene. Harish fled the spot and Rashid went to the roof of his house and started throwing bricks at them as a result his father and grandfather sustained injuries on their heads. He also got injury in a scuffle with a sharp object on his right hand.

6. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding its true version. In the instant case, the First Information Report was lodged in promptitude and the complainant – Anil Kumar whose presence at the spot is undisputed gave detailed account of the occurrence and implicated Rashid for inflicting injuries to his father and grandfather while pelting bricks from the roof of his house. Since the FIR was lodged without delay, there was least possibility of the complainant to concoct a false story in such a short interval. The complainant narrated the genesis of the occurrence minutely. While appearing as PW-1 in his Court statement Anil Kumar proved the

version given to the police at the earliest available opportunity without any variation. He deposed that when he went to fetch water from the water tank, Rashid was also standing among others there. He asked them to allow him to take water first due to marriage in their family to which the accused objected. He and his associate started beating him. When his family members came to know, his father and grandfather arrived there. Rashid went to the roof of his house and started pelting stones which hit his father and grandfather and they sustained injuries on head. They were taken to hospital. Police recorded his statement (Ex.PW1/ A). His grandfather expired at Safdarjung Hospital. In the cross-examination, he denied that statement made by him was tutored by the police outside the court. He denied that he had removed the utensils of Rashid and Harish and forcibly wanted to take water out of turn. He denied that when they forcibly tried to take water out of turn, they were beaten by 'other persons' who had assembled there and not by the accused. He further denied that they had given beatings to the appellant and Harish. On scanning the testimony of the witness, it transpires that material facts deposed by him remained unchallenged and uncontroverted in the cross-examination. No material discrepancies could be elicited to discard his version. Presence of the appellant at the spot is not under challenge. The residents of the locality had gathered to take water from the water tank. Those persons living in the vicinity of the appellant must be known to him. However, he did not divulge the name of any such individual with whom the victims had confrontation; and was assaulted and injured. PW-2 (Ghanshyam), Anil Kumar's father has corroborated his testimony in its entirety and has implicated Rashid for inflicting injuries to him and his father with bricks from the roof top of his house. Again, the cross-examination could not bring any material discrepancy to disbelieve him. He also denied the suggestion that they forcibly prevented Rashid from taking water on his turn, and assaulted and injured him. He further denied that they had quarrelled with 'those' who were taking water from the tanker. Again, this injured witness had no ulterior motive to falsely implicate Rashid with whom he had no prior animosity. The testimony of an injured witness has its own relevancy and efficacy. It is a settled preposition of law that the evidence of the stamp witness must be given due weightage as his presence at the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he would spare the actual assailant in order to falsely implicate someone else. The testimony of an injured witness is accorded

a special status in law. Convincing evidence is required to discredit an injured witness. In the instant case, victim was the father and grandfather of PW-2 and PW-1, respectively and they were not expected to let the real culprit go scot free and to falsely rope in an innocent.

7. PW-2 (Ghanshyam) was taken to DDU Hospital by HC Raghubir of PCR and was admitted at 09.57 A.M. MLC (Ex.PW-5/C) was prepared and the nature of injuries were opined 'simple' caused by blunt object. PW-6 (Dr.Narnaware, CMO, DDU Hospital) identified signatures of Dr.Alok on the MLC (Ex.PW-5/C). Dhani Ram was also taken to DDU Hospital and was admitted at 09.23 A.M. by HC Raghubir of PCR and MLC (Ex.PW-5/B) was prepared by Dr.Alok and proved by PW-6 (Dr.Narnaware, CMO, DDU Hospital). Dhani Ram remained under treatment and succumbed to the injuries on 18.07.1998 and DD No. 14B (Ex.PW-5/J) was recorded. Post-mortem examination on the body was conducted by PW-3 (Dr.B.Swani, CMO Safdarjung Hospital) on 19.07.1998. Post-mortem report examination (Ex.PW-3/A) records the following external injuries on the body :

"1. Abrasion 3x2 c.m. present over left termporparital Region 6 c.m. above left ear.

2. Abrasion 2.5x 2 c.m. over left forehead 5.5 c.m. above middle of eye brow.

3. Stiched wound 10 c.m. in length extends from right frontal to right temporal region. Injuries were in U Shape.

4. Abrasion 4x2 c.m. present over right frontroprital region 8 c.m. above right eye brow.

5. Abrasion 1.5 x 1 c.m. over right temporal region 5 c.m. above right ear.

6. Abrasion 3x2 c.m. over top of right thigh.

7. Abrasion 4x3 c.m. on the top of left thigh margins showing infection.

8. Bed sore wound 7x5 c.m. in interbrutial region."

Injuries were ante-mortem in nature and cause of death was cranio-cerebral injuries (head injuries) consequent upon blunt force impact. Injury No.1 to 5 were sufficient to cause death individually and collectively in the ordinary course of nature. In the cross-examination, the witness

stated that injury No.1 could be caused by a blunt object such as a brick thrown from a distance. There was no sign of infection of injury No.1 or 2. Injury No.3 was a surgical interference. Injury No.8 was a bed sore. Injuries from 1 to 7 were almost of same age. Apparently, there was no major conflict between the ocular and medical evidence. It is trite law that minor variations between the medical evidence and oral evidence do not take away the primacy of the latter. Unless, medical evidence in its terms goes so far as to completely rule out possibilities whatsoever of injuries taking place in the manner stated by the eye-witnesses, their testimony cannot be rejected or discarded. Since, PW-1 and PW-2 had sustained injuries in the scuffle and brick bats were thrown simultaneously upon all of them, possibility of PW-1 and PW-2 not exactly noticing the number of injuries on the body of the deceased could not be ruled out. They were certain that serious head injuries were caused to Dhani Ram due to throwing of bricks by the accused. There was direct nexus between the injuries inflicted to the victim by bricks and his death. The victim remained admitted in the hospital for about fifteen days. Despite availability of medical treatment soon after the occurrence, he was unable to survive. It reflects the impact and force with which injuries were inflicted by bricks by the appellant. Minor contradictions and discrepancies highlighted by the appellant's counsel are inconsequential as they do not affect the core of the prosecution case. Non-examination of independent public witness from the locality is not fatal. Non-recovery of the bricks / stones with which injuries were inflicted is a lapse on the part of the Investigating Officer for which the witnesses cannot be held responsible and their statements cannot be disbelieved or discredited.

8. The defence taken by the appellant is conflicting and contradictory. In 313 statement, the appellant did not deny his presence at the spot where he had gone to fetch water. He claimed that when he was taking water from the water tank the utensils were forcibly removed by the complainant side and he was assaulted and injured by them. Entirely contradictory version was narrated by defence witnesses. DW-1 (Rahmit Ullaha) appeared on 19.05.2000 and his further examination was deferred. However, he did not opt to appear again. DW-2 (Suraj Pal) and DW-3 (Chaman Lal) deposed that a quarrel had taken place at the spot when complainant had attempted to take water on priority and it was objected to by the individuals present at the tanker. This resulted in an altercation and both the parties started pelting stones. Rashid did not participate in

the throwing of the stones. He came on a bicycle at the spot and sustained brick bat injury on his neck. He fell down after sustaining injuries and was taken for interrogation from the spot by the police. Apparently, the version given by the witnesses is in conflict with the defence taken by the appellant in his 313 statement as well as suggestions put to the prosecution witnesses in the cross-examination. There is nothing on record to show as to when the appellant was taken to hospital for medical examination. The doctor who medically examined him was not produced in defence. The defence version inspires no confidence and needs outright rejection.

9. The impugned judgment is based upon fair appraisal of the evidence and all the relevant contentions of the appellant have been considered. I find no sound reasons to interfere with the findings recorded by the Trial Court. Since, PW-2 (Ghanshyam) had sustained injuries 'simple' in nature by blunt object, the offence committed by him fell under Section 323 IPC. Conviction under Section 324 IPC is altered to Section 323 IPC.

10. The appellant was awarded RI for seven years with total fine Rs. 1,500/- , Nominal roll dated 03.11.2000 reveals that he has suffered incarceration for eight months and fourteen days as on 30.10.2000. Nominal roll further reveals that he is not involved in any other criminal case and his overall jail conduct was satisfactory. He was aged about 18 / 19 years on the day of incident. The quarrel had taken place suddenly over a trivial issue of getting water. There was no pre-planning and the crime weapon used was bricks available on the roof. The appellant has suffered the ordeal of trial / appeal for about fifteen years. He has clean antecedents. There was no previous history of enmity between the parties and they lived in neighbourhood in the locality. Considering the mitigating circumstances, sentence order is modified and the substantive sentence of the appellant is reduced to five years under Section 304 IPC and six months under Section 323 IPC. Other terms and conditions of the sentence order are left undisturbed.

11. The appeal stands disposed of in the above terms. The appellant is directed to surrender before the Trial Court on 31.01.2014 to serve out the remaining period of sentence. Trial Court record be sent back immediately.

ILR (2014) I DELHI 695
CRL. A.

JAGBIR @ JAGGI .....APPELLANT

VERSUS

STATE & ANR. ....RESPONDENTS

(S.P. GARG, J.)

CRL.A. NO. : 355/2003 DATE OF DECISION: 24.01.2014

Indian Penal Code, 1860—Section 392, 186—In the Court, the complainant did not subscribe to the version given to the police at the first instance, though he stood by the story of snatching of Rs. 40,000/- from his possession when he was keeping it in the dickey of the scooter. He did not identify Appellant to be the assailant who had snatched the envelope containing cash and from whom the stolen cash was recovered. He was declared hostile and was cross-examined by learned Additional Public Prosecutor in which also, nothing material could be elicited to establish the identity of the appellant—He rather gave a conflicting statement that after the envelope containing cash was snatched, he went to Mr. S.L. Banga, from whom he had taken the cash, to inform him about the incident, thereafter he saw a crowd of people standing across his house, the police informed him that they had recovered the cash from the individual who was in their custody. He was not even aware if any knife was recovered from the appellant's possession—Statements of PWs full of contradictions and no implicit reliance can be placed to establish the guilt of the appellant beyond reasonable doubt.

Medical examination after an inordinate delay at 12:15 A.M. —Constable who allegedly sustained injuries at the hands of the appellant in an attempt to apprehend him was taken to hospital at 01:35 A.M. in the night intervening 3/4-07-1999. Again no explanation has been given as to why Constable was taken for medical examined belatedly—Constables who allegedly apprehended the appellant and recovered the bag containing the envelope having cash, are not witnesses to the seizure memo or sketch of he knife or seizure memo of knife or on personal search memo—Conviction and sentence of the appellant cannot be sustained.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Mir Akhtar Hussain, Advocate with appellant present in person.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP for the State.

RESULT: Appeal Allowed.

S.P. GARG, J.

1. Jagbir Singh @ Jaggi (the appellant) impugns the legality and correctness of a judgment dated 12.05.2003 of learned Additional Sessions Judge in Sessions Case No.17/2002 arising out of FIR No.609/1999 registered at Police Station Paschim Vihar by which he was convicted for committing offence under Section 392 and 186 IPC. By an order on sentence dated 16.05.2003, he was awarded rigorous imprisonment for seven years with fine Rs. 5,000/- under Section 392 IPC and rigorous imprisonment for two months under Section 186 IPC. Both the sentences were to operate concurrently.

2. Allegations against the appellant were that on 03.07.1999 at about 03.20 P.M. in front of House No.373, Behra Enclave, Paschim Vihar, he committed robbery and deprived complainant-Vivek of Rs. 40,000/- when he was keeping it in the dickey of the scooter. The appellant was given chase by the complainant and public persons and

was apprehended from inside the park with the assistance of Const.Raj Kumar and Const.Mukesh who arrived at the scene. In the process, the appellant inflicted injuries to Const.Raj Kumar by a knife on his left arm. During the course of investigation, statements of witnesses conversant with the facts were recorded. Both the appellant and Const.Raj Kumar were medically examined. After completion of investigation, a charge-sheet was filed against the appellant for committing offences punishable under Sections 379/386/411/506/186/353/307 and 25/27 Arms Act. The appellant was charged under Section 186/394 read with Section 397 IPC by an order dated 23.03.2002 and brought to trial. The prosecution examined seven witnesses to establish his guilt. In 313 statement, the appellant denied complicity in the crime and claimed that he was falsely implicated in the case after he was lifted from Jwala Heri market where he had gone to purchase some articles with his wife and was given beatings. He examined DW-1 (Lajjo), his mother, in defence. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted the appellant for the offences mentioned previously. Being aggrieved, the appellant has come in appeal.

3. I have heard the learned counsel for the parties and have examined the record. SI Dilip Kaushik lodged first information report after recording Vivek statement (Ex.PW-1/A) by making endorsement (Ex.PW-6/C) over it at 05.50 P.M. on 03.07.99. In the complaint, the complainant gave detailed account of the occurrence and named Jagbir @Jaggi for snatching an envelope containing ‘40,000/- from his possession when he was putting it in the dickey of the scooter. He further disclosed that he raised alarm and the appellant was chased by him and public persons. Jagbir was arrested from inside the park and the stolen cash was recovered from his possession. The accused had attempted to inflict injuries to the public persons and caused stab wound on the left arm of Const.Raj Kumar who with the aid of Const. Mukesh was able to apprehend him. However, in the Court statement as PW-1, the complainant did not subscribe to the version given to the police at the first instance though he stood by the story of snatching of the cash ‘40,000/from his possession when he was keeping it in the dickey of the scooter. He did not identify Jagbir @ Jaggi to be the assailant who had snatched the envelope containing cash and from whom the stolen cash was recovered. He was declared hostile and was cross-examined by learned Additional Public Prosecutor

after obtaining court’s permission. In the cross-examination also, nothing material could be elicited to establish the identity of the appellant to have snatched the envelope containing cash from him. He rather gave a conflicting statement that after the envelope containing cash was snatched, he went to Mr.S.L.Banga, from whom he had taken the cash, to inform him about the incident. Thereafter he saw a crowd of people standing across his house. The police informed him that they had recovered the cash from the individual who was in their custody. The complainant, however, did not recognize the assailant who was in the custody of the police that time. He further gave contradictory statement that he was not able to see the individual who had snatched the envelope containing ‘40,000/- when he was putting it in the dickey. The complainant did not depose that the assailant was apprehended by the police officials in his presence or that the envelope containing cash was recovered from his possession. No ulterior motive was assigned to the complainant who was the victim to resile from the statement (Ex.PW-1/A) made to the police at the first instance. He disclosed that his statement was recorded at the police station and the signatures were taken on various documents there. He was not even aware if any knife was recovered from the appellant’s possession or he had injured Const. Raj Kumar with that knife.

4. It is alleged that PW-4 (Const.Mukesh) and PW-5 (Const.Raj Kumar) were able to apprehend and recover the stolen cash and knife from the appellant. PW-4 (Const.Mukesh) and PW-5 (Const.Raj Kumar) have supported the prosecution in this regard, however, they did not lodge any report with the police for the alleged incident. PW-6 (SI Dilip Kaushik) happened to reach at the spot all of a sudden and took the investigation on his own and lodged first information report after recording complainant’s statement. Statements of PWs 4, 5 and 6 are full of contradictions and no implicit reliance can be placed to establish the guilt of the appellant beyond reasonable doubt. The appellant sustained multiple injuries on his body and was taken to DDU hospital at 12.50 A.M. on the night intervening 3/4-07-1999. Allegedly the injuries were inflicted to the appellant by public persons when they confronted him inside the park to apprehend him. No explanation has been offered as to why the appellant was taken to hospital for medical examination after an inordinate delay at 12.15 A.M. No independent public witness was associated during investigation. Name of the public persons who allegedly gave beatings to the appellant never emerged. No action was taken against any such

individual who inflicted multiple injuries to the appellant when he had not caused any harm to any such individual with the knife allegedly in his possession. Const.Raj Kumar who allegedly sustained injuries at the hands of the appellant in an attempt to apprehend him was taken to DDU hospital at 01.35 A.M. in the night intervening 3/4-07-1999. Again no explanation has been given as to why Const.Raj Kumar was taken for medical examined belatedly. PW-5 (Const.Raj Kumar) has given contradictory version that he was taken to hospital soon after the apprehension of the appellant and was medically examined at 10.00 P.M. Apparently Const. Raj Kumar was medically examined after the medical examination of Jagbir @ Jaggi.

5. Recovery of stolen articles in the manner claimed by the prosecution is suspect. PW-1 (Vivek-Complainant) did not support the prosecution on this aspect and did not claim if any stolen cash was recovered in his presence from the appellant. PW-4 (Const.Mukesh) and PW-5 (Const.Raj Kumar) who allegedly apprehended the appellant and recovered the bag containing the envelope having '40,000/- cash are not witnesses to the seizure memo (Ex.PW-4/A). Their signatures also do not find mention in Ex.PW-6/A (sketch of the knife), Ex.PW-6/B (seizure memo of knife), Ex.PW-6/D (site plan) and Ex.PW-6/F (personal search memo). The investigating officer did not explain as to why the signatures of material witnesses (PWs 4 and 5), who had handed over the knife and bag containing cash were not taken on the respective seizure memos. PW-5 (Const.Raj Kumar) in examination-in-chief deposed that polythene was not checked in his presence and he was unable to say as to what was lying therein. He recollected subsequently that the polythene contained currency notes but he was not aware as to the amount of cash. The lapses in the investigation are writ large. The investigation officer did not examine Mr.S.L.Banga to corroborate the testimony of PW-1 (Vivek).

6. The family members of the appellant sent telegrams to various authorities for false implication of the appellant and a complaint case was filed against police officials in which some of the police officials have been summoned by the concerned Metropolitan Magistrate. The revision petition against the summoning order is pending before the Ld.Additional Sessions Judge. Since the matter is pending before the competent court, no observation or comments are made about the merits of the said proceedings in these proceedings. Though it is not believable that the police officials would plant a huge recovery of '40,000/- cash from their

possession, nevertheless, the prosecution was unable to establish its case beyond reasonable doubt and to prove and establish that the cash was recovered from the possession of the appellant in the manner and on the day and time alleged by it. It appears that the prosecution has not presented true facts.

7. In the light of the above discussion, conviction and sentence of the appellant cannot be sustained. The appeal is accepted. Conviction and sentence awarded to him are set aside. Bail bonds and surety bonds stand discharged. It is, however, made clear that the observation in the judgment will have no impact on the complaint case instituted by the appellant and the Trial Court will record its own findings on merits.

8. Trial Court record be sent back forthwith.

ILR (2014) I DELHI 700
CRL. A.

STATE **....APPELLANT**

VERSUS

RAMPAL SINGH AND ANR. **....RESPONDENTS**

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

CRL. A. NO. : 372/1998 **DATE OF DECISION: 24.01.2014**

Indian Penal Code, 1860—Sections 302, 392, 382 and 120B—Indian Evidence Act, 1872—Section 25, 26 and 27—Appellant State challenged acquittal of respondents U/s 302/392/382 r/w section 120B of Code—According to appellant, prosecution case rested purely on circumstantial evidence and all the circumstances including discovery and establishment of fact of use of motorcycle in commission of offences proved beyond iota of doubt by it.

Held:- Section 27 of the Act which is in the form of an exception to Sections 25 and 26 of the Act admits only so much of the information given by an accused which distinctly relates to the facts discovered in pursuance of the information. The recovery of the object has to be distinguished from the fact thereby discovered. If in pursuance of the information provided, any fact is discovered which connects the accused with the commission of the crime, then only the fact discovered becomes relevant.

In **Pulukuri Kottaya & Ors. v. Emperor,** AIR 1947 PC 67, the Privy Council very vividly brought out the distinction between the object discovered and discovery of a fact in pursuance of an information provided by a person accused of an offence while he is in police custody. Their Lordships observed as under:-

> "Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in cones quence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead

body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many

years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informent."

(Para 21)

In the instant case, there was no discovery of any material fact in pursuance of the alleged disclosure statement that motor cycle No.UP-14-A7813 was used in the commission of the offence. Thus, disclosure statement to that extent is inadmissible in evidence. The circumstance No.7 relied upon by the prosecution is consequently irrelevant.

(Para 22)

Important Issue Involved: Section 27 of the Act which is in the form of an exception to Sections 25 and 26 of the Act admits only so much of the information given by an accused which distinctly relates to the facts discovered in pursuance of the information. The recovery of the object has to be distinguished from the fact thereby discovered. If in pursuance of the information provided, any fact is discovered which connects the accused with the commission of the crime, then only the fact discovered becomes relevant.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Ms. Rajdipa Behura, APP for the State with SI Sandeep Sharma, PS Vasant Kunj.

FOR THE RESPONDENTS : Mr. Aman Lekhi, Senior Advocate with Mr. Jitendra Tripathi, Advocate.

CASES REFERRED TO:

1. *Arulvelu & Anr.* vs. *State & Anr.,* (2009) 10 SCC 206.
2. *Sattatiya* vs. *State of Maharashtra,* (2008) 3 SCC 210.
3. *Syed Peda Aowlia* vs. *The Public Prosecutor, High Court of A.P., Hyderabad,* (2008) 11 SCC 394.
4. *Gaya Dikn* vs. *Hanuman Prasad,* (2001) 1 SCC 501.
5. *Pradeep Gandhi* vs. *State (Govt. of NCT of Delhi),* Criminal Appeal No.76/1997.
6. *Sharad Birdhichand Sarda* vs. *State of Maharashtra,* (1984)4 SCC116).
7. *Hanumant Govind Nargundkar & Anr.* vs. *State of Madhya Pradesh,* AIR 1952 SC 343.
8. *Pulukuri Kottaya & Ors.* vs. *Emperor,* AIR 1947 PC 67.

RESULT: Appeal dismissed.

G.P. MITTAL, J.

1. Respondents Ram Pal Singh and Parvinder Singh have faced trial in Sessions Case No.58 of 1996 for the offence punishable under Sections 302/392/382 read with Section 120-B of the Indian Penal Code (IPC). By a judgment dated 29.09.1997, they were acquitted of all the charges framed against them.

2. Feeling aggrieved, the State sought Leave to Appeal against the impugned judgment and the same was granted by an order dated 26.08.1998. Before dealing with the grounds of Appeal, it will be apposite to pen down the prosecution version.

3. On 22.01.1994 at about 9:30 a.m., the Complainant (Captain Harcharan Singh Kohli/PW-4), father of the deceased Saran Pal Sigh Kohli tried to contact his son on telephone but there was no response from his house. Again at about 2:00 p.m., he called up on the residential telephone installed at the house of Late Saran Pal Singh Kohli but again there was no response. At about 3:00 p.m., the Complainant received a telephone call from one Neeru who enquired from him (the Complainant) that Rajesh Kaur (deceased wife of deceased Saran Pal Singh Kohli) was to visit the house of Neeru's brother, i.e. C-80, Malviya Nagar, New Delhi on 20.01.1994 to attend a Kirtan but she had not gone there. The

Complainant got anxious and again rang up his son's residence but received no response.

4. The Complainant was worried and therefore at about 4:45 p.m., he rang up his son's neighbour Mr. Wadhwa and had a talk with his wife and requested her to go to his son's house and see as to why there was no response to the telephone calls made by him. Wadhwa's wife went to the deceased's house and found the door of the flat open and observed blood spots near the door. She was terrified and passed on the information to the Complainant on telephone. The Complainant immediately informed the police at 5:00 p.m. and simultaneously proceeded to his son's residence along with his another son Ravinder Singh Kohli. When the police and the Complainant reached Flat No.D-III/3122, Ground Floor, Vasant Kunj, New Delhi, i.e. house of the deceased Saran Pal Singh Kohli, they found that Saran Pal Singh Kohli, his wife Rajesh Kaur and his two sons Teg Partap Singh and Rana Partap Singh were lying in a pool of blood with multiple injuries on various parts of their bodies. Thereafter, Amarjit Singh (PW-3), brother of Late Rajesh Kaur along with his wife Jasbir Kaur (PW-2) also reached there.

5. The Complainant made a statement Ex.PW-4/A to the SHO detailing the facts mentioned earlier. The SHO made an endorsement Ex.PW-46/A and sent it to the Police Station for registration of a case. In the endorsement, it was mentioned that although the house had been ransacked but a large number of valuables, i.e. wrist watches, video camera, VCR, TV, etc. etc. were found to be intact. In the endorsement, the SHO also mentioned that Harcharan Singh Kolhi (the Complainant) and his relations were not able to tell much about the availability of the cash and jewellery in the house at the moment.

6. The crime team visited the spot. Twenty one chance prints, one purse (Ex.P-39) containing a photograph of one Amalraj and a pair of gloves lying near the bathroom were seized. The crime team prepared a report Ex.PW-34/A wherein it was mentioned that the property stolen was not known. During the course of investigation, specimen finger/palm prints of a large number of persons (perhaps 52 specimens) who were known to the deceased or who could be connected with the crime were obtained. Respondent Ram Pal Singh was one such person and therefore, his finger prints were also obtained on 14.02.1994. It is the case set up by the prosecution that on 19.02.1994, on receipt of unofficial

information that one of the chance prints matched with the specimen finger print of Respondent Ram Pal Singh, he was arrested. During interrogation, he made his first disclosure statement on 20.02.1994. On the basis of the said disclosure statement, recovery of some small items of jewellery was effected from the house of Ram Pal Singh's father in village Chaubara, Rajasthan. After arrest of the first Respondent, second Respondent Parvinder Singh was arrested on 21.02.1994. He made his first disclosure statement on 21.02.1994 and the second disclosure statement on 24.02.1994. In pursuance of the disclosure statements of the two accused persons, two Gandasas were recovered from an open place near Power House, Nelson Mandela Marg. Dr. Arvind Thergaonkar (PW-20) who conducted post-mortem examination on the dead bodies of the four deceased opined that the injuries on their bodies could have been caused with the Gandasas Ex.P-21 and P-22. Some share certificates were also allegedly recovered at the instance of Respondent Parvinder Singh which were in the name of deceased Saran Pal Singh or his family members or in the name of third persons.

7. The jewellery recovered from the house of Ram Pal Singh's father in village Chaubara when put for test identification was identified by the brother and sister-in-law of deceased Rajesh Kaur. After completion of the investigation, a report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was presented against the Respondents.

8. On Respondents pleading not guilty to the charge for the offence punishable under Section 302/392/397/449 read with Section 120-B and 34 of the IPC, the prosecution in order to bring home the Respondents guilty examined 43 witnesses. The learned Additional Sessions Judge (ASJ) culled out 09 circumstances relied upon by the prosecution to connect the Respondents with the commission of the offence. On appreciation of evidence, the learned ASJ found that the prosecution had failed to prove the circumstances relied upon by it and thus acquitted the Respondents of the charge framed against them.

9. It is well settled that in an Appeal against acquittal, unless the judgment of the Trial Court is perverse, the Appellate Court would not be justified in substituting it's own view and reversing the judgment of acquittal. In **Arulvelu & Anr. v. State & Anr.,** (2009) 10 SCC 206 relying on **Gaya Dikn v. Hanuman Prasad,** (2001) 1 SCC 501, the Supreme Court observed that expression 'perverse' means that the findings

of the subordinate authority are not supported by the evidence brought on record or they are against the law or suffer from the vice of procedural irregularity. If a decision is arrived at no evidence or on evidence which is thoroughly unreliable and no reasonable persons would act upon it, the order would be perverse.

10. In **Syed Peda Aowlia v. The Public Prosecutor, High Court of A.P., Hyderabad,** (2008) 11 SCC 394, after referring to various judgments as to the approach to be adopted while hearing Appeals against the acquittal, the Supreme Court held as under:-

> "5. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. See **Bhagwan Singh and Ors. v. State of Madhya Pradesh, (2002) 4 SCC 85.** The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference."

11. Ms. Rajdipa Behura, learned APP for the State has taken us through the 09 circumstances culled out by the learned ASJ and the evidence produced by the prosecution to emphasise that the case against the Respondents was in fact proved beyond the shadow of all reasonable

doubt. She argues that the learned ASJ faulted in returning a finding of not guilty. She urges that the conclusion reached by the learned ASJ is therefore liable to be reversed.

12. On the other hand, Mr. Aman Lekhi, learned senior counsel for the Respondents contends that the Trial Court has given valid and justifiable reasons to reach the conclusion that there was no incriminating circumstance to connect the Respondents with the offence with which they were charged and thus, it cannot be said that the finding reached is perverse. He very strenuously convasses that there were too many gaps and missing links in the circumstances put forth by the prosecution and thus, the impugned judgment is well founded and logical.

13. 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).

14. The nine circumstances relied upon by the prosecution and culled out in Para 10 of the impugned judgment are extracted hereunder:-

> "1. That the deceased Saranpal Singh Kohli and the accused Ram Pal Singh were last seen together on 21.1.94 in the office of Ravish Kumar Matta.
>
> 2. That the wallet Ex.P-39 containing the photograph Ex.P-40 were found to be lying at the spot and the same were later on found to have been stolen by the accused persons from the house of the Malkhana Moharrar of P.S. Kotwali, Ghaziabad.
>
> 3. That the pair of gloves which were blood stained were also seized from the spot and the same were found to have been purchased by the accused persons before this crime was committed.

4. That the specimen finger prints of accused Ram Pal Singh were obtained and the same were found to be identical by the finger prints expert by comparing the same with the chance prints developed from the spot.

5. That at the time of the arrest of accused Ram Pal Singh and thereafter in pursuance to his disclosure statement currency notes of Rs. 7067/- stated to be the sale proceeds of dollars was also recovered from his possession of the said accused, the robbed jewellery was recovered from the house of his father from village Chaubara and thereafter the said accused also got recovered his bloodstained clothes and shoes from his house in Ghaziabad and the jacket Ex.P-64 of the said accused was also seized.

6. That the jewellery recovered from the house of the father of accused Ram Pal Singh from Village Chaubara was later on identified by the witnesses during the TIP, being the same which belonged to deceased Saranpal Singh Kohli and Smt. Rajesh Kaur.

7. That after the arrest of accused Parvinder Singh he got recovered the motor cycle Ex.P-23 which was used by the accused persons in the commission of this crime and the said motor cycle was found to have been stolen by them from the malkhana of P.S. Kotwali, Ghaziabad and the said motor cycle was also found to have been earlier stolen from the area of P.S. Lajpat Nagar.

8. That the accused Parvinder Singh also got recovered the share certificates and the foreign currency which was found to be that of the deceased Saranpal Singh Kohli and of his mother family members and his bloodstained clothes i.e. shirt Ex.P-61, pant Ex.P-62 and sweater Ex.P-63 were also seized.

9. That both the accused persons in pursuance of their disclosure statements also got recovered gandasas Ex.P-21 and Ex.P-22 with which the murders were committed and the doctors who conducted the post-mortem on the dead bodies of all the deceased also opined that the injuries found on the dead bodies of the deceased could have been caused with the said gandasas."

CIRCUMSTANCES 1,2,3 & 7

15. These circumstances, in our view cannot at all be said to be incriminating or materially relevant circumstances in any way to connect the Respondents with the commission of the crime. Turning to circumstance No.1, it is not even the case of the prosecution that the deceased Saran Pal Singh Kohli was last seen alive in the company of either of the Respondents. The prosecution has tried to set up a case that the deceased was seen alive in the company of Respondent Ram Pal Singh in the office of one Mr. Matta at about 3:00 p.m. the day before the incident. Admittedly, there were so many persons in the office of Mr. Matta. No evidence has been led that Respondent Ram Pal Singh accompanied the deceased to his (deceased's) house from the office of Mr. Matta in Nehru Place. It is the case of the prosecution that the deceased's father (PW-4) also spoke to the deceased on telephone at his residence at about 10:30 p.m. The last seen theory comes into play when the time gap between the death of the deceased and when the deceased was seen alive in the company of the accused is so small as to put onus on the accused to explain as to where the deceased parted company with him. The proximity of the place where the deceased was last seen alive and the place where he is found dead is another important aspect which is to be seen. There is a large time gap as also a great distance between the place where the deceased and the first Respondent were seen together and the time of the deceased's death and the place of his death.

16. Similarly, the prosecution tried to build up a case that the wallet Ex.P-39 was intentionally left by the Respondents to mislead the police as to the actual perpetrators of the crime. It was sought to be proved that the Respondents came in possession of the wallet Ex.P-39 belonging to Amalraj through one Manoj, who was the son of the police official in U.P. police wherein the said Amalraj had deposited his wallet at the Malkhana when he was an accused in a case bearing FIR No.16/1991. Although statement of said Amalraj was recorded under Section 164 Cr.P.C. during investigation, yet the same is of no consequence as it could be used only for the purpose of corroboration of the statement made in the Court. It is well settled that a statement under Section 164 Cr.P.C.is not a substantive piece of evidence by itself as the accused does not have right and opportunity of cross-examination. It was sought to be suggested that PW Amalraj could not be produced as he had died. However, death of Amalraj was also not proved. His death certificate

was not even produced on record.

17. The Trial Court also noticed that FIR No.16/1991 registered at P.S. Sector 49, Noida, in which the purse Ex.P-39 was sought to be seized was not produced. PW-41 HC Maha Dev Singh also could not say whether the purse Ex.P-39 was the same which was found in PS Noida. Thus, the Trial Court rightly concluded that circumstance No.2 was not established by the prosecution.

18. As far as circumstance No.3 is concerned, the prosecution tried to build up a case that these gloves were purchased by Respondents Ram Pal Singh and Parvinder Singh from one M/s. Bhartiya Medical Store owned by one Sudhir Kumar (PW-13). In his examination in the Court, PW-13 could neither identify the gloves as having been sold by him nor could he identify the Respondents as the persons who purchased any gloves from him. The recovered gloves are ordinary rubber gloves easily available in the market. Recovery of the gloves from the spot of the crime by itself did not in any way connect the Respondents with the commission of the crime. Hence, the Trial Court rightly discarded circumstance No.3.

19. According to the prosecution, it was discovered and established that the crime was committed by use of the motorcycle Ex.P-23. We are unable to appreciate as to how this could be a circumstance against the Respondents. There was not even an iota of evidence (except the disclosure/confessional statement made by the Respondents) that motorcycle bearing No.UP-14-A7813 was used in this crime.

20. Section 25 of the Indian Evidence Act, 1872 (the Act) excludes the confession made to a police officer from any consideration. Similarly, Section 26 of the Act excludes the confession made by any person while he is in custody of a police officer unless it is made in the immediate presence of a Magistrate. Section 27 of the Act which is in the form of an exception to Sections 25 and 26 of the Act admits only so much of the information given by an accused which distinctly relates to the facts discovered in pursuance of the information. The recovery of the object has to be distinguished from the *fact thereby discovered*. If in pursuance of the information provided, any fact is discovered which connects the accused with the commission of the crime, then only the fact discovered becomes relevant.

21. In **Pulukuri Kottaya & Ors. v. Emperor,** AIR 1947 PC 67, the Privy Council very vividly brought out the distinction between the object discovered and discovery of a fact in pursuance of an information provided by a person accused of an offence while he is in police custody. Their Lordships observed as under:-

> "Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in cones quence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object

subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informent."

22. In the instant case, there was no discovery of any material fact in pursuance of the alleged disclosure statement that motor cycle No.UP-14-A7813 was used in the commission of the offence. Thus, disclosure statement to that extent is inadmissible in evidence. The circumstance No.7 relied upon by the prosecution is consequently irrelevant.

CIRCUMSTANCE NO.4

23. Much emphasis is laid by the learned APP for the State on this circumstance in her effort to overturn this order of acquittal. The learned APP urges that science of finger prints is almost a perfect science. PW-34 ASI Chet Ram lifted 21 chance prints from the spot immediately after the occurrence. One of the change prints tallied with the specimen finger print impression of Respondent Ram Pal Singh which were obtained on 14.02.1994. The learned ASJ declined to believe that the specimen finger prints tallied with the chance prints on the grounds that (a) the Britannia cake tin dabba from which identical chance print was taken was not

seized; (b) Head Constable Inder Singh who took the photographs of the chance prints, developed by ASI Chet Ram (PW-34) was not produced; and (c) negatives in respect of chance prints were not produced by Jagjit Kumar Kaushik (PW-36), Director CFSL.

24. We may note that it was very mysterious as to how the negatives of the chance prints were placed on record by Insp. Ramesh Kaushik (PW-46) as although he stated that he got collected the negatives from SI Lalit Mohan (PW-45) but PW-45 nowhere stated that he had collected the negatives of the photographs from Finger Print Bureau. The Trial Court noticed that it was also very mysterious on the part of Insp. Ramesh Kaushik (PW-46) to have stated that the unofficial information was received on 19.02.1994 that one of the chance prints developed from the spot had been found to be identical with the specimen finger print of Respondent Ram Pal Singh. The Trial Court noticed that Inspector Ramesh Kaushik was asked about the source of the unofficial information, who then brought into picture DCP U.N. Rao as the person who passed on this information. The Trial Court observed that DCP U.N. Rao had not been examined as a witness in the case and it was very difficult to believe whether any unofficial information can as such be passed on by the Director, CFSL.

25. We do agree with the conclusion reached by the Trial Court on this circumstance. In fact PW-36 in his cross-examination recorded on 13.05.1997 had deposed that the negatives (of chance prints) were available on the file brought by him. He stated that he could not tell without verifying the negatives in the sunlight if the negatives which were on the file were of Ex.P-36/D and P-36/E. The witness was permitted to go in the sunlight along with counsel for the accused. The Trial Court noticed that the witness without permission of the Court had collected various other negatives from the photographer of the Bureau who was standing outside the Court and that the witness after seeing the negatives, which he had taken to verify in the sunlight stated that the negatives of PW-36/D and PW-36/E were not on file.

26. We have taken out one strip of negative (containing four negatives of some finger prints) from one envelope available on Trial Court record. Admittedly, 21 chance prints were lifted from the spot. The prosecution is under an obligation to prove it's case against accused beyond shadow of any reasonable doubt. The evidence produced has to be aboveboard

and it cannot give any chance for speculation/suspicion that the evidence is botched up. Apart from the fact that the four negatives which were not seen by the expert (PW-36) surfaced on the file and reached the IO, all the 21 negatives including the 20 negatives in respect of chance prints which had not tallied ought to have been produced by the prosecution in seriatim with the negatives containing the chance print which tallied with the specimen finger prints of Respondent Ram Pal Singh. It was the bounden duty of the prosecution to have established that out of the 21 negatives in respect of chance prints, one negative at a particular serial number tallied with the specimen finger print of the Respondent. Thus, non examination of Head Constable Inder Singh, who took the photographs of the chance prints after the same were developed by ASI Chet Ram, non production of the negatives by PW-36, Director FSL; non production of all 21 negatives of the chance prints Q-1 to Q-20 and Q-13/A in seriatim pointing out the specific negative which contained the chance prints which tallied with the specimen finger print of Respondent Ram Pal Singh; introduction of the story that Respondent Ram Pal Singh was arrested on the basis of unofficial information received from the Finger Print Bureau by DCP U.N. Rao that one of the chance print had tallied with the specimen finger print of Respondent Ram Pal Singh on 19.02.1994; non-examination of DCP U.N. Rao as to how the unofficial information was passed on and by whom, do create very serious doubts with regard to the tallying of the chance prints with the specimen finger prints of Respondent Ram Pal Singh. This circumstance was therefore rightly discarded by the Trial Court and accordingly, we uphold the finding reached by the Trial Court on circumstance No.4. Although report of Director of finger print expert is admissible under Section 293 of the Cr.P.C., the same is of no consequence as the report itself becomes doubtful in view of our observations above.

CIRCUMSTANCE NO.5

27. Recovery of currency notes of '7067/- from Respondent Ram Pal Singh is of no consequence in view of our earlier observation and reference to Pulukuri Kottaya as there was no discovery of any material fact to connect the recovered notes with the commission of the crime. The alleged recovery from a person of means in the facts of the present case is inconsequential and not relevant.

CIRCUMSTANCE NO.6

28. We shall now turn to the alleged recovery of jewellery from the house of Ram Pal Singh's father in village Chaubara, Rajasthan which jewellery was alleged to have been robbed by the Respondents from the deceased's house. In pursuance of the disclosure statement of Respondent Ram Pal Singh made on 20.02.1994, the ancestral house of Ram Pal Singh is alleged to have been raided by the police party on the morning of 21.02.1994 at 7:30 a.m. and some gold articles like kada Ex.P-1, a gent's diamond ring Ex.P-2, lady's rings Ex. P-5 and P-7 and broken pieces of chain Ex.P-3 and P-4 were allegedly recovered from the earlier said house in village Chaubara. The police party at the time of search had joined two public witnesses, i.e., Sumer Singh (PW-6) and Ram Kumar Singh (PW-7). Both the public witnesses denied that the search of the house was carried out in their presence or that the articles as alleged were recovered in their presence. It is true that the testimonies of police officers who are associated in the raid and recovery cannot be completely discarded simply because the public witnesses have not supported the search and recovery. The evidence of the official witnesses in such circumstances has to be weighed and tested.

29. However, first of all we may notice that the alleged recovery in the case was not affected in the presence of Respondent Ram Pal Singh. There is no gainsaying that there can be discovery of a material fact in pursuance of the disclosure statement made by an accused in his absence and the same would be admissible under Section 27 of the Act. However, a perusal of the remand request dated 21.02.1994 reveals that Ram Pal Singh's remand was sought by the police (after 2:00 p.m.) on the grounds, inter alia, that 'looted property is to be recovered from outside Delhi. whereas the recovery memo Ex.PW-6/A coupled with the statement of PW-6 and PW-7 (public witnesses) as also PW-21 Insp. Surender Singh and PW-22 Insp. M.S. Sanga official witnesses reveal that the alleged search was already carried out at the house of Ram Pal Singh's father at 7:30 a.m. in his absence. Thus, it is evident that either the request made in the application seeking police custody remand was wrongly made (as the recovery had already been effected) or that the recovery did not take place in the manner as claimed by the prosecution as per the recovery memo Ex.PW-6/A.

30. It is urged by the learned APP for the State that a separate

police party had been sent to the Respondent's village and the I.O. who made a request may not be aware that the recovery had already been effected. In that event, since Respondent Ram Pal Singh had already been arrested and even if the police officers making request was not aware of the recovery (though it is highly improbable as the information is always passed from time to time), it would have been clearly mentioned in the remand request that a team has already been dispatched to Respondent's village to effect the recovery and it would not have been stated that the recovery of jewellery is to be effected as the purpose of police remand.

31. Be that as it may, we are not even inclined to believe that the motive for commission of the crime was to rob valuables from the house or from the person of the deceased. At this stage, we shall like to refer to the statement Ex.PW-4/A of the complainant on the basis of which the instant FIR was registered and the endorsement Ex.PW-46/A made thereon by the SHO. In his statement Ex.PW-4/A, the Complainant who is the father of the deceased and was in constant touch with his son, daughter-in-law and grand children is completely silent about any articles missing either from the bodies of the deceased or from the house. A perusal of the endorsement Ex.PW-46/A reveals that the costly articles like wrist watches, video camera, VCR, etc. etc. were found intact. Not only this, four gold bangles were present on the wrist of deceased Rajesh Kaur. One Rolex watch was also present on the wrist of deceased Saran Pal Singh. Statement of PW-3 Amarjit Singh, brother of deceased Rajesh Kaur runs counter to the statement Ex.PW-4/A made by the complainant on the basis of which case was registered. He tried to say that when he saw the body of Saran Pal Singh, he did not find the kara, ring and the chain which he used to wear. He deposed that both the bangles were available on the wrist of his sister but her *mangalsutra,* chain and rings were not there. He stated that the nose pin and two rings and ear tops were also present. It is highly improbable and difficult to believe that the culprits, in the instant case the Respondents, would not remove the costly items like Rolex watch, gold bangles, ear rings and the two rings on the finger of deceased Rajesh Kaur and would decamp with only the paltry items. We may also note that according to the prosecution, Respondent Ram Pal Singh was quite literate as he was dealing in shares and thus, he must be aware of the value of the Rolex watch and other costly items which were very easy to be taken away. There is another

aspect of the matter. Admittedly, Respondent Ram Pal Singh's specimen finger prints were obtained by the police on 14.02.1994. Thus, at least on this date, he was aware that there was a needle of suspicion against him. The Respondent had ample opportunity to remove, destroy and dispose of the robbed jewellery articles alleged to have been recovered from his father's house as he was arrested only on 19.02.1994. We are supported in our view by a Division Bench judgment in **Pradeep Gandhi v. State (Govt. of NCT of Delhi),** Criminal Appeal No.76/1997, decided on 18.01.2010 where in similar circumstances the recovery of some gold ornaments was disbelieved when the others were left on the dead body. Para 25 of the report is extracted hereunder:-

> "25. Further PW19, SI Badlu Khan, who conducted initial investigation of this case, has stated that after the inquest proceedings dead body of the deceased was sent to dead house, Subzi Mandi for post mortem. Constable Dalbir on return from the dead house brought one gold ring, a pair of gold tops and a pendent which were removed from the person of the deceased Shanno Bhandari at Subzi Mandi mortuary and handed over to him, which were seized vide memo Ex.PW10/A. Presence of gold ornaments on person of the deceased, particularly the gold tops and the gold pendent which could easily be removed from the body of the deceased, negatives the theory that the motive of murder was robbery. If robbery was the motive of the appellant, he obviously would have taken away the other gold ornaments instead making good with the gold chain Ex.P-3 only. In view of the above, we are of the opinion that the prosecution has not been able to establish the motive or the recovery of gold chain Ex.P-3 at the instance of the appellant beyond reasonable doubt."

32. In this view of matter, we are not inclined to believe the recovery of the earlier stated articles from the house of Respondent Ram Pal Singh's father. Their identification in the TIP therefore becomes inconsequential.

CIRCUMSTANCE NO.8

33. The prosecution claims recovery of some share certificates at the instance of Respondent Parvinder Singh. In the year 1994, the shares of listed companies could be transferred only by signing a Transfer Deed

and delivery of shares. At the same time, there was always a permanent record of transfer of shares. Share certificates could never be disposed of in the open market like currency. One could always track as to who was the holder of the shares on a particular date and who transferred it from time to time. Even if the share certificates were accompanied with some blank Transfer Deeds duly singed by the holder, the same would be normally entered with the stock broker. Respondent Ram Pal Singh, who as per the prosecution version was dealing in shares would have very well known that he could be tracked down if he sold the allegedly stolen shares in the market. In fact, it is very difficult to believe that Ram Pal Singh could have hatched a conspiracy to commit murder to remove the share certificates held by the deceased Saran Pal Singh and his family. Moreover, as stated above, while dealing with circumstance No.6, there was a needle of suspicion on Respondent Ram Pal Singh at least on 14.02.1994 and therefore, prudency requires that Respondent Parvinder Singh would have removed and destroyed the evidence which could have nailed the Respondents. We are also not inclined to believe the motive of the murder as robbery as has been held by us above while dealing with circumstance No.6. All the reasons equally apply to this circumstance as well. This circumstance therefore, cannot be said to have been established to convict the Respondents.

CIRCUMSTANCE No.9

34. The Respondents made disclosure statements about throwing of the *Gandasas* on 20.02.1994 and 21.02.1994. As stated earlier while dealing with circumstance No.6, since Respondent Ram Pal Singh was one of the suspects since 14.02.1994, he had all the opportunity to remove the *Gandasas* from the place where they were thrown to remove the incriminating evidence against him. Moreover, it is highly improbable that after recording disclosure statement on 20.02.1994/21.02.1994, the IO will wait for six days to effect the recovery on 26.02.1994. No explanation has been given by the IO as to why it took him six days to reach the place of recovery which was not very far from the Police Station to effect the recovery of the *Gandasas*. Moreover, blood group of the bloodstains found on *Gandasas* could not be deciphered so as to be matched with that of the deceased and thus, there cannot be said to be discovery of any material fact in pursuance of the alleged disclosure statement in view of the judgment in Pulukuri Kottaya. The opinion of the doctor that the injuries on the bodies of the deceased were possible

with the Gandasas Ex.P-21 and P-22 and presence of human blood on the Gandasas can be taken only as a corroborative evidence provided there was some material evidence to connect the Respondents with the commission of the crime.

35. In **Sattatiya v. State of Maharashtra,** (2008) 3 SCC 210, in similar circumstances the Supreme Court declined to attach any importance to the bloodstained clothes of the accused in the absence of any blood group match to connect him with the offence. In Para 26, the Supreme Court observed as under:-

> "26. The next thing which is to be seen is whether the evidence relating to the recovery of clothes of the appellant and the half blade, allegedly used for commission of crime, is credible and could be relied on for proving the charge of culpable homicide against the appellant. In this context, it is important to note that the prosecution did not produce any document containing the recording of statement allegedly made by the appellant expressing his desire to facilitate recovery of the clothes and half blade. The prosecution case that the accused volunteered to give information and took the police for recovery of the clothes, half blade and purchase of handkerchief is highly suspect. It has not been explained as to why the appellant gave information in piecemeal on three dates i.e. 3-10-1994, 5-10-1994 and 6-10-1994. Room No. 45 of "Ganesh Bhuvan" from which the clothes are said to have been recovered was found to be unlocked premises which could be accessed by anyone. The prosecution could not explain as to how the room allegedly belonging to the appellant could be without any lock. The absence of any habitation in the room also casts serious doubt on the genuineness and bona fides of recovery of clothes. The recovery of half blade from the roadside from beneath the wooden board in front of "Ganesh Bhuvan" is also not convincing. Undisputedly, the place from which half blade is said to have been recovered is an open place and everybody had access to the site from where the blade is said to have been recovered. It is, therefore, difficult to believe the prosecution theory regarding recovery of the half blade. The credibility of the evidence relating to recovery is substantially dented by the fact that even though as per the chemical examiner's report the bloodstains found on the shirt, pants and half blade were those

of human blood, the same could not be linked with the blood of the deceased. Unfortunately, the learned Additional Sessions Judge and the High Court overlooked this serious lacuna in the prosecution story and concluded that the presence of human bloodstains on the clothes of the accused and half blade were sufficient to link him with the murder."

36. In view of the foregoing discussion, it cannot be said that the finding of acquittal reached by the learned ASJ is perverse calling for any interference by this Court. On the other hand, for the reasons as stated above, we do support the judgment rendered by the learned ASJ.

37. The Appeal therefore has to fail; the same is accordingly dismissed.

ILR (2014) I DELHI 721
IA.

ISHPINDER KOCHHAR .....PLAINTIFF

VERSUS

DELUXE DENTELLES (P) LTD. & ANR. ....DEFENDANTS

(JAYANT NATH, J.)

IA. NO. : 10766/2012 IN CS(OS) NO. : 3075/2011 DATE OF DECISION: 24.01.2014

Code of Civil Procedure, 1908—Order 12 Rule 6—Delhi Rent Control Act, 1958—Section 6A and 8—Plaintiff filed suit seeking decree of possession and other consequential reliefs—He also moved application U/o 12 Rule 6 of Code praying for judgment on admissions—According to defendants, suit not maintainable as they are protected tenants under Delhi Rent Control Act and alleged notice sent by plaintiff, does not terminate tenancy—As per plaintiff,

Section 6 of Act not applicable as defendants paid the increased rent according to agreement to lease executed between parties.

Held:- Statutory provisions do not contain any prohibition prohibiting an agreement between landlord and tenant whereby they have agreed to increase the rent after periodic intervals on their own. Enhancement of rent by consent not barred U/s 6A and 8 of the Delhi Rent control Act.

The present facts are somewhat akin to the judgment of this Court in the case of **CONSEP India Pvt. Ltd. Vs. CEPCO Industries Pvt. Ltd.,** (supra) in which in para 38 and 39 this Court held as follows:

"38. A look at Section 6A and Section 8 of the Act, in my opinion, clearly shows that the said Section has no application to the instant case where the Lease Deed itself provided for the increase of the rent from time to time. Section 6A and Section 8 reads as under:

"6A. Revision of rent.-Notwithstanding anything contained in this Act, the standard rent, or, where no standard rent is fixed under the provisions of this Act in respect of any premises, the rent agreed upon between the landlord and the tenant, may be increased by ten per cent every three years."

"8. Notice of increase of rent.-(1) Where a landlord wishes to increase the rent of any premises, he shall give the tenant notice of his intention to make the increase and in so far as such increase is lawful under this Act, it shall be due and recoverable only in respect of the period of the tenancy after the expiry of thirty days from the date on which the notice is given. (2) Every notice under sub-section (1) shall be in writing signed by or on behalf of the landlord and given in the manner provided in section 106 of the

Transfer of Property Act, 1982 (4 of 1882)."

39. Clearly, Section 6A envisages and permits revision of rent by 10% every three years. Such increase, the Section envisages, shall be made upon the standard rent or where no standard rent is fixed under the provisions of the Act in respect of any premises, the rent agreed upon between the landlord and the tenant. As such, it is only the rent agreed upon between the landlord and the tenant which is subject to revision by 10% every three years. This provision clearly can have no application in a case where in Lease Deed itself provision is made for the increase of rent and the rent is agreed upon between the landlord and the tenant by consensus." **(Para 24)**

Hence, in view of section 6A of the said Act, it follows that the standard rent or where no standard rent is fixed the agreed rent between the landlord and tenant may be increased by 10% every three years. The mechanism to increase the rent is as stated in section 8 of the Act namely by giving a notice to the tenant of the intention to increase the rent. However, the statutory provisions do not contain any prohibition prohibiting an agreement between landlord and tenant whereby parties have agreed to increase the rent after periodic intervals on their own. The plaintiff here has not approached this Court seeking any direction for enhancement of rent in exercise of power under Sections 6A and 8 of the Delhi Rent Control Act. His case is that parties have not only agreed to increase rent @ 10% after every three years, but the increased rent also stands paid. In view of the judgment of this Court in the case of **CONSEP India Pvt. Ltd. Vs. CEPCO Industries Pvt. Ltd.,** (supra), enhancement of rent by consent done by defendant No.1, is not barred under Section 6A and Section 8 of the Delhi Rent Control Act. **(Para 25)**

Important Issue Involved: Statutory provisions do not contain any prohibition prohibiting an agreement between landlord and tenant whereby they have agreed to increase the rent after periodic intervals on their own. Enhancement of rent by consent not barred U/s 6A and 8 of the Delhi Rent Control Act.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Sumit Bansal, Mr. Ateev Mathur, Ms. Sumit Anand and Ms. Richa Oberoi, Advocates.

FOR THE DEFENDANTS : Mr. Neeraj Kishan Kaul, Senior Advocate with Ms. Rohini Musa, Advocate.

CASES REFERRED TO:

1. *Atma Ram Properties (P) Ltd.* vs. *M/s.Escorts Ltd,* 2012 VIII AD (Delhi) 395.
2. *Santosh Vaid & Anr.* vs. *Uttam Chand,* 2012 (128) DRJ 392.
3. *CONSEP India Pvt. Ltd.* vs. *CEPCO Industries Pvt. Ltd.,* ILR (2010) III Delhi 766.
4. *Jeevan Diesels and Electricals Ltd.* vs. *Jasbir Singh Chadha (HUF) and Anr.,* (2010) 6 SCC 601.
5. *Vijay Mayne* vs. *Satya Bhushan Kumar,* 142 (2007) DLT 483.
6. *Uttam Singh Dugal & Co. Ltd.* vs. *Union Bank of India & Ors.,* JT 2000 (9) SC 78.
7. *Usha Rani Jain* vs. *Nirulas Corner House Pvt. Ltd.,* 73(1998) DLT 124.
8. *Lallan Parsad* vs. *Sharda Parsad* AIR 1953 All 316.

RESULT: Suit decreed.

JAYANT NATH, J.

IA No. 10766/2012 (u/O 12 R 6 CPC)

1. This is an application under Order 12 Rule 6 CPC filed by the plaintiff seeking a judgment on admission. The accompanying plaint is filed by the plaintiff seeking a decree of possession in respect of eastern part of ground floor of property bearing No.10, Jor Bagh, New Delhi comprising of eastern shop, an office block, a mezzanine over the office block, a toilet, courtyard at the back and concerned verandah with a display window and also western portion of the ground floor of the said property. Other consequential reliefs are also being sought.

2. As per the Plaint the plaintiff is the absolute owner of the said property No.10, Block-172, Jor Bagh Market, New Delhi. The said property is stated to have been purchased from the erstwhile owner Smt.Neeta Mehra on 14.8.2006. Based on these documents a registered conveyance deed was executed by NDMC on 12.10.2009 in favour of the plaintiff.

3. Defendant No.1 had entered into an unregistered agreement of lease dated 21.11.1999 with the erstwhile owner Smt.Neeta Mehra with respect to 45% area of the said property which is falling on the eastern part. The Agreement to lease was to commence with effect from 18.11.1999 and is also stated to have expired on 28.2.2011. It is stated that defendants paid the entire rent for the lease period of 11 year 11 months amounting to Rs. 4,39,224/- . The actual payment was made after deduction of TDS of Rs. 65,884/- . It is further averred that as per the Agreement to lease the rent was fixed at Rs. 2,650/- per month and the rent was to be enhanced by 10% after every three years. Hence, it is stated that with effect from 17.11.2002 the rent went upto Rs. 2,915/- . Thereafter with effect from 17.11.2005 the rent is stated to have gone upto Rs. 3,207/- . It is further stated that from 17.11.2008 the rent has gone upto Rs. 3,527/- . It is further stated that if the said amount of Rs. 4,39,224 is bifurcated for 11 year 11 months then it would be in accordance with the calculation of rent as stated by the plaintiff after the necessary enhancement of 10% after every three years. There is a small difference of Rs. 13 in these calculations.

4. It is further averred that the said agreement of lease being an unregistered document, the tenancy of the defendants was on month to month basis. Further, as the rent of the premises with effect from

17.11.2008 stood enhanced to Rs. 3,527/- per month, after 17.11.2008 the tenancy stood governed by the provisions of the Transfer of Property Act, 1882.

5. It is stated that the plaintiff terminated the month to month tenancy of the tenant by giving notice dated 3.5.2010 under Section 106 of the Transfer of Property Act and that the tenancy stands terminated with effect from midnight of intervening 17/18th June, 2010.

6. It is stated that defendant instead of complying with the terms of the said legal notice dated 3.5.2010 sent a reply dated 30.6.2010 where the contentions of the plaintiff have been denied. Hence, the plaintiff has filed the present Suit for possession, mesne profit and damages.

7. It is further averred that certain portions of the western portion have been illegally occupied by the defendant. Hence, relief for possession to the said effect has also been sought.

8. The present application is filed urging that the written statement has clear admissions to the following effect that:-

(a) the defendant is a tenant of the eastern portion of the premises.

(b) they were served with legal notice for termination of tenancy.

(c) they have admitted that they were inducted by virtue of unregistered Agreement of lease dated 21.11.1999.

(d) that they have admitted that Rs. 4,39,224/- was paid after deduction of TDS as advance rent for a period of 11 year 11 months and that the initial rent of Rs. 2,650/- was to be increased at the rate of 10% every three years.

It is further stated that the defendants have also filed on record the ledger account which support the fact that payment of Rs. 4,39,224/- was made as advanced rent for a period of 11 year and 11 months. The ledger account also is stated to prove that the initial rent was Rs. 2,650/- per month commencing from November, 1999 and was also increased by 10% every three years and these rents have at the time of termination of the tenancy increased to more than Rs. 3,500/- per month.

9. In view of the above, it is stated that there is clear, unambiguous and unequivocal admission and keeping in view the provisions of Order

12 Rule 6 CPC and in view of judicial pronouncement and settled position of law the plaintiff is entitled to a decree of possession on the said admissions.

10. The defendants in their reply have denied the submissions of the plaintiff. It is stated that the defendants are protected tenants under the Delhi Rent Control Act, 1958 and hence, the legal notice dated 3.5.2010 sent by the plaintiff does not terminate the tenancy. It is further stated that the unregistered lease agreement and the clauses therein cannot be looked into as it is inadmissible in evidence since the same is unregistered. It is further stated that the provisions of Delhi Rent Control Act will prevail over the alleged/purported lease agreement signed but not acted upon by the parties. It is further stated that the sum of Rs. 4,39,224/- was paid in lumpsum towards rental for a period of approximately 14 years and not 11 years 11 months as claimed by the plaintiff. It is further stated that the defendant paid in lieu of security deposit/pagdi various sums including a sum of Rs. 19,95,523/- to the previous tenant on behalf of the erstwhile owner. Reliance is also placed on Section 6A of the Delhi Rent Control Act to state that there cannot be an automatic increase in the rent payable by the defendants unless the same is demanded in accordance with procedure as laid down under Section 8 of the said Act. Admittedly, it is stated that no notice as envisaged in the said Act was ever issued by Smt.Neeta Mehra, the erstwhile landlord.

11. Learned counsel appearing for the plaintiff has reiterated the submissions made by the plaintiff in the plaint and the application. It is stated that the execution of Agreement to Lease is admitted. The clause in the said agreement which stipulates the initial rent at Rs. 2,650/- per month and the enhancement clause is admitted. The only argument it is stated of the defendant is that the enhancement clause is contrary to the Delhi Rent Control Act. It is also stated that the admitted position is that the rent was enhanced and the enhanced rent has already been paid by the plaintiff.

12. Learned counsel for the plaintiff relies upon various judgments to submit that the present application should be allowed. He has placed heavy reliance on the judgment of this Court in the case of **CONSEP India Pvt. Ltd. Vs. CEPCO Industries Pvt. Ltd.,** ILR (2010) III Delhi 766 to contend that Sections 6A and 8 of the Delhi Rent Control Act

would have no application where the lease deed itself provides for increase of rent and rent is agreed between the landlord and tenant by consensus. Reliance is also placed on the judgment of the Supreme court in the case of **Uttam Singh Dugal & Co. Ltd. Vs. Union Bank of India & Ors.,** JT 2000 (9) SC 78 to contend that where there are clear, unambiguous and unconditional admissions, this Court in exercise of power under Order 12 Rule 6 CPC should pass appropriate judgment without waiting for determination of other questions.

13. Learned senior counsel appearing for the defendants has vehemently argued that the submissions raised by the parties clearly raise triable issues. He has submitted that the fact as to whether the rent was to increase after every three years and whether the submissions of the plaintiff that the advanced rent paid in 1999 was rent for 11 year 11 months, is or is not a correct calculation as claimed by the plaintiff are all triable issues. It is further averred that in view of section 6A and 8 of the Delhi Rent Control Act the claim of the plaintiff for enhanced rent is illegal. It is stressed that for any increase in rent as provided under the Delhi Rent Control Act notice has to be given as envisaged under Delhi Rent Control Act which has admittedly not been done by the plaintiff. It has been vehemently argued that for increase of rent, in terms of section 8, it is mandatory to give a legal notice as provided in Section 8 of the Rent Control Act before the rent could be increased. It is further argued that the rent effectively was never increased and this is only a bald averment being made by the plaintiff without any basis whatsoever. It is also vehemently argued by the learned senior counsel that the duration of the lease keeping in view the payments made in 1999 would show that the duration of the lease is nearly 14 years and not 11 year 11 months as claimed by the plaintiff. Hence, it is averred that in the absence of clear, unambiguous and unequivocal admissions, the present application is mischievous as serious disputed questions of law and fact arise. It further stressed, that even otherwise, the suit itself is barred by law and liable to be dismissed as it is hit by Delhi Rent Control Act.

14. Learned senior counsel for the defendants has also relied upon various judgments to contend that in the absence of clear and unambiguous admission, no order under Order 12 Rule 6 CPC can be passed. Reliance is placed on the judgment of the Supreme Court in the case of **Jeevan Diesels and Electricals Ltd. Vs. Jasbir Singh Chadha (HUF) and Anr.,** (2010) 6 SCC 601. Reliance is placed on the judgment of the

Division Bench of this Court in the case of **Atma Ram Properties (P) Ltd. Vs. M/s.Escorts Ltd,** 2012 VIII AD (Delhi) 395 and **Santosh Vaid & Anr. Vs. Uttam Chand,** 2012(128) DRJ 392 to stress that in view of Sections 6A, 8 and Section 50 of the Delhi Rent Control Act, it is the Rent Tribunal alone which has the jurisdiction for determination of the revision of rent.

15. In my view, the controversy herein is a narrow controversy. The defendants have admitted execution of the lease agreement dated 21.11.1999 (Ex.P1). The admission is however subject to a note put on the document during admission/denial which reads "admitted subject to pleadings and clarifications." The receipt of the legal notice dated 03.05.2010 sent by the plaintiff is admitted where a request was made to the defendants to handover vacant physical possession of the demised premises giving 15 days notice determining the lease in terms of Section 106 of the Transfer of Property Act. The defendants have in reply to the said legal notice on 30.06.2010 admitted that they were inducted as a tenant on 18.11.1999 on a monthly rent of Rs. 2,650/- . It is however stated in the reply that the rent continues to be Rs. 2,650/- per month. It is admitted that the defendants have paid Rs.4,39,224/- towards rent. It is further claimed that the same is the rent for more than 13 years and 9 months at the monthly rent of Rs. 2650/- .

16. In my view, the facts as projected by the defendants on rate of rent payable are contrary to admissions. The plaint in para 3 gives calculations as to how, as per the terms of lease deed dated 21.11.1999, the rent as of 17.11.2008 is Rs. 3,523/- per month. The said para of the Plaint reads as follows:-

> "3.That the said Agreement of Lease was to commence w.e.f. 18.11.1999 and was to expire on 28.02.2011. The defendants have paid the entire rent of the lease period of 11 years and 11 months amounting to Rs. 4,39,224/- . It may be noted that an amount of Rs.3,73,340/- was paid after deducting the TDS of Rs. 65,884/- to the erstwhile owner at the time of executing lease dated 21.11.1999. It is submitted that in terms of the said Agreement of Lease, initially the rent was fixed at '2,650/- per month. It was also agreed that the rent would be enhanced by 10% after every three years. Accordingly the rentals were enhanced in terms of the following schedule:

SN	DATE		RENT
1.	17.11.2002	:	2,915/-
2.	17.11.2005	:	3,207/-
3.	17.11.2008	:	3,527/

The following calculation be also noted:

Rent Amount	Period	Amount
Rs. 2650/-	36 Months	Rs. 95,400/-
Rs. 2915/-	36 Months	Rs. 1,04,940/-
Rs. 3207/-	36 Months	Rs. 1,15,452/-
Rs. 3,527/-	35 Months	Rs.1,23,445/
	Total	Rs. 4,39,237/-
	Less TDS	Rs. 65,884/-
	Net Total	Rs. 3,73,353/-

17. Reference may now be had to the written statement where para 3 reads as follows:

> "3. With reference to paragraph 3, various averments are based on the alleged lease agreement, are denied. It is submitted that the alleged lease agreement has neither any legal or factual consequences. It is submitted that allusion to the alleged lease agreement is without merit and cannot form the basis of the Plaintiff's case. The table given stating the alleged rents and enhancements are without any basis and cannot be countenanced inasmuch as they purport to depict exaggerated rent amounts which have no legal or factual basis. In point of fact, payments made by the answering Defendant for use and occupation as tenant were the following for the purposes stated hereinbelow:
>
> a. Rs. 19,95,523/- paid towards the security deposit/Pagdi;
>
> b. Rs. 2,650/- paid in lump sum as monthly rent for a period of approximately 14 years totalling Rs. 4,39,224/- ."

18. Clearly there is a bald denial of the calculations put forth by the

plaintiff in the plaint. The only stand is that rent remained stationery at '2650/- per month. Order 8 Rule 3 CPC provides that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff but the defendant must deal specifically with each allegation of fact. Order 8 Rule 4 CPC provides that where a defendant denies an allegation of fact in the plaint, he must not do so evasively but must answer the point of substance. Similarly, Order 8 rule 5 CPC reads as follows:-

> **"5.Specific denial.-**[(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:
>
> Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.
>
> [(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved."

The denial as contained in para 3 in the written statement is clearly evasive and does not answer the point in substance of the averment as given in the corresponding para of the plaint. I came to the conclusion as the calculations , taking into account the enhancement clause are not denied.What is stated is that the rent remained stationery at Rs. 2650/- per month.

19. The contention of the defendants that the rent continues to be Rs.2,650/- per month as stipulated in the lease deed dated 21.11.1999 is also contrary to the admitted documents placed on record by the defendants. The first such document is the agreement to lease dated 21.11.1999. This document is Ex.P-1. However, we may for a moment ignore this document as the defendant has strenuously urged that the said document cannot be looked into inasmuch as it is an unregistered document. We may look at the second document. The defendants have placed on record an abstract of the ledger of defendant No. 1 which is for the period 01.04.1999 to 31.03.2000. Relevant part of the same reads as follows:-

"Date	Vr. No.	Bank/Cash/Journal	Debit
21/11/99	00219	To State Bank of Saurashtra-301551 Paid: Neeta Mehra by chq.no.488017 dt.21/11/99 Narr: Advance rent for 11 yrs 11 months @ 2650 pm with	
		10% hike every 3 yrs	
23/01/00	80176	To State Bank of Saurashtra-301551 Paid: NEETA MEHRA by chq no.488099 dt 23/01/00 Narr: token advance rent for shop situated at 10 jar	
		Bagh mkt ndlh	
02/02/00	80202	To State Bank of Saurashtra-301551 Paid: Neeta Mehra by chq.no.499404 dt.02/02/00 Narr: advance rent for 11 yrs 11 month @ 2650 pm with	
		10% hike every 3 years"	

20. In the above entry in the accounts books of defendant No.1, there is a clear admission that the rent when the lease agreement was executed on 21.11.1999 was ' 2,650/- per month and it was agreed that there would be a 10% hike in rent after every three years. There is no explanation forthcoming from the defendant about the said entry and a clear unequivocal statement made therein that the said sum of Rs.4,39,224/ represents advance rent of 11 year 11 months @ 2650 per month with 10% hike every three year.

21. The third document on this aspect is the reply dated 30.6.2010 sent by the counsel for the defendant to the legal notice issued by counsel for the plaintiff dated 3rd May 2010. Reference may be had to paras 2, 3, 4, 5, 6 and 7 of the said reply which reads as follows;

> "S.N.Gupta & Co.
> Advocates & Legal Consultants
> R-26, Ground Floor, South Extension, Part-II,

New Delhi-110049

SUB: REPLY TO LEGAL NOTICE DATED 3RD MAY, 2010 ON BEHALF OF YOUR CLIENTESS SMT.ISHPINDER KOCHHAR.

We are instructed by our client M/s Deluxe Dentelles Pvt. Ltd. having its registered office at 10, Jor Bagh, New Delhi-110003 to address you as under:

1. ....

2. The true and correct facts are that my client was inducted as a tenant in premises No. at 10, Jor Bagh, New Delhi110003 on 18th November, 1999 and continues to be so at a monthly rent of Rs.2,650/- (Rupees Two Thousand Six Hundred Fifty Only).

3. That at the time my client was inducted into the premises, it was in a dilapidated condition and in order to make it habitable it required considerable investment. As my clients Landlady Mrs.Neeta Mehra was not in a financial condition to spend any amount on renovation and no one else was willing to invest substantial amount on renovation, she taking advantage of the fact that my client was in a desperate need of a shop and as no other suitable premises were available in the vicinity imposed unreasonable and arbitrary conditions. My clients landlady taking undue advantage of the situation included unreasonable conditions in the rent agreement that were neither legal nor binding upon my client. Since my client was in desperate need of a place, she agreed to invest substantial amounts on the condition that the lease would be for a longer period. Not only my client invested substantial amount on renovation but in addition she was also made to pay the entire rent in advance, even for the part period to be covered by the renewals. The terms were further in contravention of the provisions of the Delhi Rent Control Act, 1958. You are well aware that provisions of the said Act will prevail notwithstanding any agreement to the contrary.

4. Under these unfavourable conditions, my client was

persuaded to invest a substantial amount on such renovation that was required to make it habitable and in usable condition. My client was thus forced to sign on an agreement that was neither legal nor lawful and was made to part with huge amounts that were to be adjusted against future rent.

5. In order to make the shop presentable, the amount to be invested by my client would not be recovered within the contractual period of tenancy taking into account reasonable returns on the investment made by my client: It was thus stipulated that initially the contractual tenancy would be for a period of eleven years and 11 months and it further specifically stipulated that said contractual tenancy would be renewed for further a period of 11 years on the same terms and conditions at the option on my client.

6. That my client has paid Rs.4,39,224/- (Rupees Four Lakh Thirty Nine Thousand Two Hundred Twenty Four only) towards rent which after deduction of TDS comes to Rs.3,73,340/- (Rupees Three Lakhs Seventy Three Thousand Three Hundred Forty only) the amount that was paid to my client's landlady, which is for more than 13 years and 9 months at a monthly rent of Rs.2,650/(Rupees Two Thousand Six Hundred Fifty Only) keeping in view the fact that escalation clause is against the statutes. In that view of the matter my client continues to be the contractual tenant beyond July, 2012 and thereafter at its option for a further period of eleven years.

7. That provision in the agreement that the rent payable by the lessee to the lessor shall be enhanced/escalated by 10% after every three years, not having been followed in terms of Section 8 of the Act, is not legal and valid. Hence my client continues to be the contractual tenant @ 2,650/- per month as of now. Unless the procedure prescribed in Section 8 of the act, which is mandatory in nature, is followed and rent increased accordingly, there is no deemed enhancement of rent and therefore, my client still continues to be contractual tenant.

8. ...."

22. The above reply to the legal notice sent by counsel for the defendant unequivocally admits that the tenancy began w.e.f. 18.10.1999 and the agreed rent at that time was Rs.2650 per month. Existence of the escalation clause, namely, that the rent will be increased by 10% after every three year is admitted. The only explanation given is that the said rent enhancement clause is not legal and valid as the procedure as prescribed under Section 8 of the Delhi Rent Control Act which is mandatory has not been followed. Hence it is argued that the advance rent covers a period of nearly 14 years and not 11 years and 11 months. The explanation is purely legal. We may look into the merits of this explanation.

23. Reference may be had to the said statutory provisions. Section 6A and Section 8 of the Delhi Rent Control Act reads as follows:-

"[6A. **Revision of rent.**-Notwithstanding anything contained in this Act, the standard rent, or, where no standard rent is fixed under the provisions of this Act in respect of any premises, the rent agreed upon between the landlord and the tenant, may be increased by ten per cent, every three years.]

8.**Notice of increase of rent.**-(1) Where a landlord wishes to increase the rent of any premises, he shall give the tenant notice of his intention to make the increase and in so far as such increase is lawful under this Act, it shall be due and recoverable only in respect of the period of the tenancy after the expiry of thirty days from the date on which the notice is given.

(2)Every notice under sub-section (1) shall be in writing signed by or on behalf of the landlord and given in the manner provided in section 106 of the Transfer of Property Act, 1982 (4 of 1882)."

24. The present facts are somewhat akin to the judgment of this Court in the case of **CONSEP India Pvt. Ltd. Vs. CEPCO Industries Pvt. Ltd.,** (supra) in which in para 38 and 39 this Court held as follows:

"38. A look at Section 6A and Section 8 of the Act, in my opinion, clearly shows that the said Section has no application to the instant case where the Lease Deed itself provided for the increase of the rent from time to time. Section 6A and Section

8 reads as under:

"6A. Revision of rent.-Notwithstanding anything contained in this Act, the standard rent, or, where no standard rent is fixed under the provisions of this Act in respect of any premises, the rent agreed upon between the landlord and the tenant, may be increased by ten per cent every three years."

"8. Notice of increase of rent.-(1) Where a landlord wishes to increase the rent of any premises, he shall give the tenant notice of his intention to make the increase and in so far as such increase is lawful under this Act, it shall be due and recoverable only in respect of the period of the tenancy after the expiry of thirty days from the date on which the notice is given. (2) Every notice under sub-section (1) shall be in writing signed by or on behalf of the landlord and given in the manner provided in section 106 of the Transfer of Property Act, 1982 (4 of 1882)."

39. Clearly, Section 6A envisages and permits revision of rent by 10% every three years. Such increase, the Section envisages, shall be made upon the standard rent or where no standard rent is fixed under the provisions of the Act in respect of any premises, the rent agreed upon between the landlord and the tenant. As such, it is only the rent agreed upon between the landlord and the tenant which is subject to revision by 10% every three years. This provision clearly can have no application in a case where in Lease Deed itself provision is made for the increase of rent and the rent is agreed upon between the landlord and the tenant by consensus."

25. Hence, in view of section 6A of the said Act, it follows that the standard rent or where no standard rent is fixed the agreed rent between the landlord and tenant may be increased by 10% every three years. The mechanism to increase the rent is as stated in section 8 of the Act namely by giving a notice to the tenant of the intention to increase the rent. However, the statutory provisions do not contain any prohibition prohibiting an agreement between landlord and tenant whereby parties have agreed to increase the rent after periodic intervals on their own. The plaintiff here has not approached this Court seeking any direction for enhancement

of rent in exercise of power under Sections 6A and 8 of the Delhi Rent Control Act. His case is that parties have not only agreed to increase rent @ 10% after every three years, but the increased rent also stands paid. In view of the judgment of this Court in the case of **CONSEP India Pvt. Ltd. Vs. CEPCO Industries Pvt. Ltd.,** (supra), enhancement of rent by consent done by defendant No.1, is not barred under Section 6A and Section 8 of the Delhi Rent Control Act.

26. Reliance of the learned senior counsel for the defendants on the judgment of this High Court in the case of **Atma Ram Properties (P) Ltd. Vs. M/s.Escorts Ltd,**(supra) is misplaced. Paras 38 to 40 of the said judgment reads as follows:-

> "38. Section 6A provides for revision of rent wherein the rent may be increased by ten percent (the interpretation is discussed under the separate head). Section 14 (1) proviso (a) provides for the ground of eviction on non payment of the rent and the same can be done by preferring the application for eviction before the Rent Controller. The mechanism for tendering the rent before the Rent Controller is also provided under Section 26 and 27 of the Act. Further, the powers of the Rent Controller are akin to the civil court though for limited purposes and finality clause enacted in Section 43 gives finality to the orders of the Controller and specifically bars the calling into question in any original suit, application or execution proceeding except in cases provided by the Act. To dispel any further doubt, Section 50 of the Act, provides for the express bar of jurisdiction of civil court in relation to standard rent in respect of any premises to which this Act applied or to eviction of any tenant there from or to any other matter which the controller is empowered by or under the Act to decide.
>
> 39. All these provisions are indicative of the mechanism and working of the Rent Controller and appeal tribunal formed under the Act. The said provisions make it explicitly clear that the matters relating to standard rent or for that matter, increase in rent are the matters, which fall within the exclusive domain of the Rent Controller as the same is clear by way of reading of Section 6A read with Section 9 of the Act.
>
> 40. Therefore, the matters relating to increase in rent or the

> standard rent which are falling within the exclusive domain of the Rent Controller to decide, cannot fall within the domain of the civil court to decide in view of the express bar of jurisdiction envisaged under Section 50 of the Act. Thus, the suits pertaining to matters of standard rent or increase in standard rent as contained in Section 6, 7 and 9 of the Act would be straightforwardly barred by way of operation of Section 50 of the Act read with Section 9 of Code of Civil Procedure Code."

27. Similarly the Division Bench of this High Court in the case of **Santosh Vaid & Anr. Vs. Uttam Chand** (supra) in para 29 held as follows:-

> "29. We accordingly answer the question framed by us herein above as under:
>
> A landlord of a premises governed by the Delhi Rent Control Act, 1958 is entitled to have increase(s) in rent only in accordance with Section 6A and 8 thereof and not otherwise; such a landlord cannot approach the Civil Court contending that the rent stands increased or should be increased in accordance with the inflation or cost price index; the jurisdiction of the Civil Court in this regard is barred by Section 50 of the Delhi Rent Act."

Clearly the facts of above two cases are not the same as the facts of this case. Both the judgments envisage a situation where the landlord is seeking enhancement of rent from the tenant in exercise of powers under Section 6A of the Delhi rent control Act. In the present case, the plaintiff does not seek enhancement of rent under Section 6A of the Delhi Rent control Act. The plaintiff submits that the rent had to be increased in terms of the agreement to lease agreed upon between the parties and further that the provisions of the said enhancement of rent have also duly been complied with by the parties.

28. Reference may also be had to the judgment of the Allahabad High Court in the case of **Lallan Parsad v. Sharda Parsad** AIR 1953 All 316 where in para 4, the High Court of Allahabad held as follows:

> "4. I do not accept the contention that it was not open to the parties by mutual agreement to enhance the rent. Section 5 (2), U. P. (Temporary) Control of Rent and Eviction Act does not exhaustively lay down the ways in which the (agreed) rent can

be enhanced. It does not bar other lawful ways to enhance the rent. It uses the word 'may' suggesting that it is at the option of the landlord to use other means of enhancing the rent. The enhancement that is contemplated by Section 5 (2) is enhancement by unilateral action or which can be imposed upon fine tenant against his will. But it is always open to the parties by agreement between themselves to enhance the rent; no restriction on this right has been imposed by the Act. As a matter of fact if the parties agree to pay and receive a higher rent, that becomes the agreed rent and at once becomes liable to be paid by the tenant under Section 5 (l). Section 5(2) deals with enhancement of the agreed rent, i. e., enhancement in the absence of an agreement. No question of notice can possibly arise when the tenant not only knows everything about the enhancement, but has also accepted it as binding. Thus enhancement by mutual agreement has greater effect than enhancement imposed upon the tenant under Section 5 (2) of the Act. I hold that the enhancement to Rs. 20 P. M. did not become invalid because no notice as contemplated by Section 5 (2) was given."

The statutory provision mentioned above namely UP (Temp.) Control of Rent and Eviction Act, 1947, though differently worded, deals with the issue relating to enhancement of rent for the landlord.

29. Going back to the 3rd document that was being discussed earlier, namely, the reply of the counsel for the defendant dated 30.06.2010 to the legal notice sent by the counsel for plaintiff, it is apparent that the explanation as to why the rent-increase clause is not applicable, is completely without any basis and contrary to the provisions of Section 6A and 8 of the Delhi Rent Control Act. In view of the legal explanation given in the said document being without any merits, it is obvious that the said document also contains a clear admission that there existed an incremental clause for increase of rent after every three years at the rate of 10% per month as per agreed terms of a lease.

30. What follows? The lease agreement provides increase of rent after every three years. This is admitted in the statement of account of the defendant. This is admitted in the reply by counsel for the defendant in its reply dated 30.06.2010. The payment of Rs. 4,39,224/- by the defendants to the predecessor of the plaintiff read with para 3 of the

plaint shows that the said amount contemplates payment of rent for the said period including increased rent after every three years. There is no proper denial of this in the written statement. Hence there is an admission that the sum of Rs.4,39,224 represents rent for the period of 11 years 11 months with appropriate increase of 10% after every three years. In view of the above facts it would follow that the as on 17.11.2008 monthly rent is of Rs. 3,527/- and the property has ceased to be covered by the provisions of Delhi Rent Control Act, 1958 inasmuch as Section 3 of the said Act provides that where monthly rent exceeds Rs. 3,500/- per month, the said Act would have no application.

31. I will now deal with some other submission of the defendant. One of the submissions vehemently argued by the learned senior counsel for the defendants is that the lease agreement between the parties dated 21.11.1999 is an unregistered document and hence the same cannot be looked into for the purpose of holding that the defendants were liable to pay enhanced rent.

32. In my view, as already explained above, the said contention is misconceived. The plaintiff is not relying only on the said document to show the incremental clause for the rent. The reliance is on the books of accounts of the defendant which clearly stipulate that the defendants have agreed to increased rent @ 10% per month after every three years and also the fact that payment tendered by the defendants at the time when the lease was entered into in 1999 represents a lease of 11 years and 11 months with appropriate enhancement of rent after every three years. Reliance is also placed by the plaintiff on the reply dated 30.6.2010 by the counsel for the defendant to the legal notice sent by counsel for the plaintiff dated 3.5.2010. In the said reply dated 30.6.2010 there is no denial to the clause which in the agreement to lease provides for enhancement of rent @ 10% per month after every three years. The only contention made in the said reply is that the said clause is illegal and contrary to the Delhi Rent Control Act. Hence this contention of the defendants is without merits.

33. The next contention of the defendants that it has paid large amount on behalf of the erstwhile owner of the said property is a contention without any basis and does not affect the merit of the case. The defendants vehemently argued that it has paid on behalf of the erstwhile landlord a sum Rs. 19 lacs to the previous tenant as security/pagdi. These facts do

not in any way effect the factual and legal position namely that the defendants are the tenant of the plaintiff since 1999 at an agreed rent of Rs. 2,650/- per month for the lease period of 11 years and 11 months subject to the incremental clause and consequently that the property in 2008 has ceased to be a protected property under the Delhi Rent Control Act as the rent has crossed Rs.3,500/- per month.

34. For the purpose of the application of Order XII Rule 6 CPC, I may refer to the judgment of the Division Bench of this Court in the case of **Vijay Mayne vs. Satya Bhushan Kumar,** 142 (2007) DLT 483 where in paragraph 12 this Court held as under:-

> "12. It is not necessary to burden this judgment by extracting from the aforesaid authoritative pronouncement as the learned Single Judge has accomplished this exercise with prudence and dexterity. Purpose would be served by summarizing the legal position which is that the purpose and objective in enacting the provision like Order 12 Rule 6 CPC is to enable the Court to pronounce the judgment on admission when the admissions are sufficient to entitle the plaintiff to get the decree, inasmuch as such a provision is enacted to render speedy judgments and save the parties from going through the rigmarole of a protracted trial. The admissions can be in the pleadings or otherwise, namely, in documents, correspondence etc. These can be oral or in writing. The admissions can even be constructive admissions and need not be specific or expressive which can be inferred from the vague and evasive denial in the written statement while answering specific pleas raised by the plaintiff. The admissions can even be inferred from the facts and circumstances of the case. No doubt, for this purpose, the Court has to scrutinize the pleadings in their detail and has to come to the conclusion that the admissions are unequivocal, unqualified and unambiguous. In the process, the Court is also required to ignore vague, evasive and unspecific denials as well as inconsistent pleas taken in the written statement and replies. Even a contrary stand taken while arguing the matter would be required to be ignored."

35. Reference may also be had to the judgment of the Supreme Court in the case of **Usha Rani Jain vs. Nirulas Corner House Pvt. Ltd.,** 73(1998) DLT 124 para 18 of which reads as follows:-

> "18. The object of Order XII Rule 6 CPC is to enable a party to obtain a speedy judgment, at least, to the extent of the admissions of the defendant to which relief the plaintiff is entitled to. The rule permits the passing of the judgment at any stage without waiting for determination of other questions. It is equally settled that before a Court can act under Order 12 Rule 6, the admission must be clear, unambiguous, unconditional and unequivocal. Admissions in pleadings are either actual or constructive. Actual admissions consist of facts expressly admitted either in pleadings or in answer to interrogatories. In a suit for ejectment, the factors which deserves to be taken into consideration in order to enable the Court to pass a decree of possession favour of the plaintiff primarily are:
>
> 1) Existence of relationship of Lesser and lessee or entry in possession of the suit property by defendant as tenant;
>
> 2) Determination of such relation in any of the contingencies as envisaged in Section 111 of the Transfer of Property Act."

36. In my view the clear admissions are there about the relationship of landlord and tenant. The facts and documents as stated above demonstrate that the agreed rental of the premises as payable by the defendants as on 17.11.2008 is above Rs. 3,500/- per month. There is termination of the lease deed vide legal notice dated 03.05.2010. The defence raised by the defendants pertaining to the decree of eviction is moonshine and absolutely devoid of merits. The plaintiff would be entitled to an appropriate decree to be passed on the admissions in view of Order 12 Rule 6 CPC. The application is accordingly is allowed.

CS (OS) 3075/2011

In view of the above application being allowed, the suit is decreed in favour of the plaintiff and against the defendant for possession of the suit property in terms of prayer (a) of the Plaint. Decree sheet be drawn up accordingly.

List before the Joint Registrar on 18.02.2014 for further proceedings pertaining to balance reliefs.

ILR (2014) I DELHI 743
IA.

RAKESH KUMAR & ANR. ....PLAINTIFFS

VERSUS

SAROJ MARWAH & ANR. .....DEFENDANTS

(JAYANT NATH, J.)

IA. NO. : 1275/2013 DATE OF DECISION: 24.01.2014
& CS (OS) NO. : 1727/2012

Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002—Section 34—Recovery of Debts Due to Banks and Financial Institution Act, 1993—Sections 17 & 18—Plaintiffs filed suit seeking decree for declaration and mandatory injunction to be declared as lawful and absolute owners of suit property—According to defendant no. 2, suit was a collusive suit between plaintiffs and defendant no. 1 and was barred U/s 34 of SRFAESI Act and Section 17 & 18 of DRT Act.

Held:- DRT Act is not a bar for a civil court to apply the relief such as Section 56 of the Transfer of Property Act inasmuch as it was held that no prejudice is caused to the Bank inasmuch as it only directs that other properties be sold first to satisfy the mortgaged debt.

The Hon'ble Supreme Court in the case of **J.P. Builders & Anr. vs. A.Ramadas Rao and Anr.**(supra) where a claim for the relief of Marshalling from a civil court was sought/ held as follows:-

"57. It is the claim of the plaintiff before the High Court that having secured a decree for specific performance

as per Section 56 of the TP Act, 1882, by applying the principles of marshalling, directions may be issued to the Bank to exhaust its remedy from other items of property which are located in the prime places in Chennai before bringing the properties covered in the agreement of sale.

...

68. We are also satisfied that merely because for recovery of the loan secured by banks, a special Act, namely, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has been enacted it is not a bar for the civil court to apply to other relief such as Section 56 of the TP Act. We are also satisfied that by issuing such direction on the application of Section 56 of the TP Act, the Division Bench, has not modified or eroded the order passed by DRT. On the other hand, it is an admitted fact that the Bank has accepted the impugned verdict of the High Court and did not challenge the same before this Court by filing an appeal. We are also satisfied that by granting such a relief, the Bank is not prejudiced in any way by bringing other properties to sale first to satisfy the mortgage debt payable by defendants No.1 and 2. In fact, the High Court was conscious and also observed that if sale proceeds of other items of properties are not sufficient to satisfy the debt payable to the Bank by defendants No.1 and 2, in that event, Bank can proceed against the suit properties."

(Para 12)

Important Issue Involved: DRT act is not a bar for a civil court to apply the relief such as Section 56 of the Transfer of Property Act inasmuch as it was held that no prejudice is caused to be Bank inasmuch as it only directs that other properties be sold first to satisfy the mortgaged debt.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFFS : Mr. T.K. Ganju, Senior Advocate with Mr. Bharat Gupta, Advocate.

FOR THE DEFENDANTS : Mr. S. Suri with Ms. Gunjan Kumar and Ankit and Mr. Ankit Khurana, Advocates.

CASES REFERRED TO:

1. *J.P. Builders & Anr.* vs. *A.Ramadas Rao and Anr.,* (2011) 1 SCC 429.
2. *Nahar Industrial Enterprises Limited* vs. *Hong Kong and Shanghai Banking Corporation,* (2009) 8 SCC 646.
3. *Mukesh Bhargava & Anr.* vs. *Canara Bank & Ors.,* 2007 (96) DRJ 280.
4. *Indian Bank* vs. *ABS Marine Products Pvt. Ltd.,* AIR 2006 SC 1899.
5. *Mardia Chemicals Ltd. and Ors.* vs. *Union of India and Ors.,* (2004) 4 SCC 311.
6. *Roop Lal Sathi* vs. *Nachhattar Singh,* AIR 1982 SC 1559).

RESULT: Application dismissed.

JAYANT NATH, J.

IA No.1275/2013(u/O 7R 11 CPC)

1. The present suit is filed by the plaintiff seeking a decree of declaration and mandatory injunction. The plaintiff is stated to have purchased the suit property from defendant No.1 vide sale deed dated 19.05.2009. The property in question is half undivided share in property bearing No.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 576.53. square yards. It is urged that symbolic possession was handed over to the plaintiff at the time of sale inasmuch as defendant No.2 Bank was a tenant in the suit property running its currency chest from the entire two and a half storied building. It is stated that the plaintiff rigorously followed up with defendant No.1 as despite being a tenant of the premises, defendant No.2 was paying no rent to the plaintiff. After rigorous follow up, defendant No.2 through its counsel sent a

notice dated 17.07.2010 where it was pointed out that defendant No.1 in order to avail a term loan and cash credit facility from defendant No.2 has created equitable mortgage on the suit property by deposit of original title deeds. It was pointed out that defendant No.1 has availed a term loan of Rs. 1.65crores and cash credit facility of ‘6.9crores.

2. It is urged that after investigation what emerges is that there is a term loan on the suit property of ‘1.65crores. Further, M/s. Bitum Impex, proprietorship concern of Ms.Meenakshi Marwah, daughter-in-law of defendant No.1 has taken a cash credit facility of ‘3crores from defendant No.2. To secure the aforesaid credit facility, property has been mortgaged including the suit property by defendant No.1. The said facility has been enhanced to Rs.6.90 crores. The account of M/s Bitum Impex was declared as Non-Performing Asset. It is further pointed out that defendant No.2 has filed O.A.No.279/2010 before Debt Recovery Tribunal (DRT) and that defendant No.2 is claiming that the said debt which is now Rs.7.25crores is secured to the said defendant No.2 by mortgage of seven different immovable properties including the present suit property.

3. The plaintiffs have urged that they are the absolute and lawful owners of the suit property and bona fide purchasers for consideration. It is averred that the plaintiffs apprehend that defendant No.2 might sell the suit property and cause irreparable damage to the plaintiffs. It is urged that before taking adverse steps to deprive the plaintiffs of their rights, defendant No.2 Bank would have to follow the principle of Marshalling as provided in Section 56 of the Transfer of property Act, namely, that for satisfaction of a debt, defendant No.2 is firstly required to sell 6 properties which stand mortgaged and only thereafter, in case despite sale of the said properties the debt is not extinguished, sell the suit property. Hence, the present suit is filed seeking a decree of declaration declaring the plaintiffs to be the lawful and absolute owners of the suit property and decree for mandatory injunction against defendants No.1 and 2 restraining them from alienating, selling the suit property. Other reliefs are also sought. The prayer clause reads as follows:-

a. “Pass a decree of declaration thereby declaring and affirming the plaintiffs to be the lawful and absolute owners of the suit property bearing No.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 288.27 Sq.Yds or 241.03 Sq.Mtrs;

b. Pass a decree of Mandatory Injunction thereby restraining defendants No.1 and 2, their servants, agents and persons acting for and on behalf of defendants No.1 and 2, from alienating, selling, transferring, creating, conveying, offering for sale, or otherwise dealing in any manner with the suit property bearing no.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 288.27 Sq.Yds or 241.03 Sq.Mtrs.;

c. Pass a decree of Mandatory injunction directing defendant No.1 to pay the debts of defendant no.2;

d. Pass a decree of Mandatory injunction directing defendant No.2 to release and handover the original title deeds of suit property bearing no.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 288.27 Sq.Yds or 241.03 Sq.Mtrs or of the entire property bearing no.51/4, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 576.53 Sq.Yds to the plaintiffs;

e. Pass a decree of Mandatory injunction directing defendant No.2 to render accounts for rent accrued with respect to the suit property bearing no.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 288.27 Sq.Yds. or 241.03 Sq.Mtrs. w.e.f. 19.05.2009;

f. Pass a decree of Mandatory injunction directing defendants to apply the principle of Marshalling by bringing the other six properties as detailed in para 3 (xxiii) at serial nos. (a) to (c) and (e) to (g) above to sale first except the suit property, and if the debt is not satisfied out of the other properties only then to proceed against the suit property;

g. An enquiry be made by this Court into the damages suffered by the plaintiffs and a decree for such amount as may be adjudged to be the loss may be passed in favour of the plaintiffs and against the defendant No.1 and 2 jointly and severally, for which the plaintiffs undertake to pay the Court Fees at the appropriate stage."

4. Defendant No.2 has filed the written statement. It is stated in the written statement that the present suit is a collusive suit between the plaintiffs and defendant No.1 intending to deprive defendant No.2 of its

valuable rights. It is also urged that the alleged sale deed dated 19.05.2009 is collusive. It is stated that Debt Recovery Tribunal vide its order dated 27.01.2011 disposed of the matter in respect of the mortgage of the suit property though it is admitted that defendant No.2 has filed appeals before Debt Recovery Appellate Tribunal (DRAT) raising a limited challenge to the said order. The right of the plaintiffs claiming Marshalling is denied as it is stated that the mortgage is only in respect of the suit property. It is also strenuously urged that the suit is liable to be dismissed in view of specific bar under the provision of Section 34 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (SARFAESI Act) read with Sections 17 and 18 of Recovery of Debts Due to Banks and Financial Institution Act, 1993 (DRT Act).

5. The present application No.1275/2012 is filed by defendant No.2 under Order 7 Rule 11 CPC seeking rejection of the plaint on the ground that the matter is sub-judice before DRAT in Appeals No.137/2011 and 138/2011 and is hence bound by statute i.e. SARFAESI Act and DRT Act.

6. Apart from the above averments in the application, no further details are filed about the nature of proceedings pending before DRAT, the parties, etc. The application is completely devoid of these details.

7. There is no reference to any proceedings under the SARFAESI Act. The sum and substance of the submission of the learned counsel for the applicant/defendant No.2 appear to be that the suit is barred under Sections 17 and 18 of the DRT Act.

8. The basic contention of the learned counsel for defendant No.2/ the applicant is that in view of pendency of proceedings before DRAT, the present suit is barred under the SARFAESI Act and DRT Act. Strong reliance is placed on order dated 27.01.2011 passed by DRT in SANo. 372/2010 titled as **BITUM IMPEX vs. BOM.** Copy of the order in this case has been filed by the plaintiffs. Based on this order, it is stated that the present suit is barred.

9. On the other hand learned senior counsel appearing for the plaintiff has vehemently argued relying upon the judgment of the Hon'ble Supreme Court in the case of **J.P. Builders & Anr. vs. A.Ramadas Rao and Anr.,** (2011) 1 SCC 429 to contend that if relief of Marshalling if granted by a civil court that would not be contrary to the provisions

of DRT Act. He also relies upon the judgment of the Supreme Court in the case of **Indian Bank vs. ABS Marine Products Pvt. Ltd.,** AIR 2006 SC 1899 and **Mardia Chemicals Ltd. and Ors. vs. Union of India and Ors.,** (2004) 4 SCC 311 to contend that in a civil suit which is filed against a bank/financial institution, the jurisdiction of civil court is not completely ousted.

10. I have heard learned counsel for the parties. Reference may be had to the provision of Section 17 and 18 of DRT Act.

11. The said provision reads as follows:-

> **"17. Jurisdiction, powers and authority of tribunals.**-(1) A tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.
>
> (2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.
>
> 18. **Bar of jurisdiction.**-On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17."

12. The Hon'ble Supreme Court in the case of **J.P. Builders & Anr. vs. A.Ramadas Rao and Anr.**(supra) where a claim for the relief of Marshalling from a civil court was sought/held as follows:-

> "57. It is the claim of the plaintiff before the High Court that having secured a decree for specific performance as per Section 56 of the TP Act, 1882, by applying the principles of marshalling, directions may be issued to the Bank to exhaust its remedy from other items of property which are located in the prime places in Chennai before bringing the properties covered in the agreement of sale.
>
> …

> 68. We are also satisfied that merely because for recovery of the loan secured by banks, a special Act, namely, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has been enacted it is not a bar for the civil court to apply to other relief such as Section 56 of the TP Act. We are also satisfied that by issuing such direction on the application of Section 56 of the TP Act, the Division Bench, has not modified or eroded the order passed by DRT. On the other hand, it is an admitted fact that the Bank has accepted the impugned verdict of the High Court and did not challenge the same before this Court by filing an appeal. We are also satisfied that by granting such a relief, the Bank is not prejudiced in any way by bringing other properties to sale first to satisfy the mortgage debt payable by defendants No.1 and 2. In fact, the High Court was conscious and also observed that if sale proceeds of other items of properties are not sufficient to satisfy the debt payable to the Bank by defendants No.1 and 2, in that event, Bank can proceed against the suit properties."

13. Clearly the legal position would follow that DRT Act is not a bar for a civil court to apply the relief such as Section 56 of the Transfer of Property Act inasmuch as it was held that no prejudice is caused to the Bank inasmuch as it only directs that other properties be sold first to satisfy the mortgaged debt.

14. Section 18 of the DRT Act prohibits a civil court from exercising its jurisdiction in relation to matters specified in Section 17. The Hon'ble Supreme Court in the case of **Nahar Industrial Enterprises Limited vs. Hong Kong and Shanghai Banking Corporation,** (2009) 8 SCC 646 held as follows:-

> "85. If the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the bank or financial institution to approach it first. The continuance of its counterclaim is entirely dependent on the continuance of the applications filed by the bank. Before it no declaratory relief can be sought for by the debtor. It is true that claim for damages would be maintainable but the same have been provided by way of extending the right of counterclaim.

....

117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17 and 18 of the Act, it is difficult to hold that a civil court's jurisdiction is completely ousted. Indisputably the banks and the financial institutions for the purpose of enforcement of their claim for a sum below Rs. 10 lakhs would have to file civil suits before the civil courts. It is only for the claims of the banks and the financial institutions above the aforementioned sum that they have to approach the Debt Recovery Tribunal. It is also without any cavil that the banks and the financial institutions, keeping in view the provisions of Sections 17 and 18 of the Act, are necessarily required to file their claim petitions before the Tribunal. The converse is not true. Debtors can file their claims of set-off or counterclaims only when a claim application is filed and not otherwise. Even in a given situation the banks and/or the financial institutions can ask the Tribunal to pass an appropriate order for getting the claims of set-off or the counter claims, determined by a civil court...."

15. Though full details have not been given by the applicant/defendant No.2, presumably from the narration of facts in the plaint and written statement, there are no dues or dues payable by the plaintiffs to defendant No.2. Hence, apparently the plaintiffs are not parties to the proceedings initiated by defendant No.2 Bank before the DRT. Being a third party, the Hon'ble Supreme Court in the above judgment clearly recognised its independent right to approach a civil court. The plaintiff not being a debtor, the jurisdiction of the civil court in a proceeding initiated by the plaintiffs would not be ousted.

16. There is no reference to any proceedings commenced by defendant No.2 under the SARFAESI Act. However, in view of the judgment of the Hon'ble Supreme Court in the case of **J.P. Builders & Anr. vs. A.Ramadas Rao and Anr.**(supra), civil court would still have jurisdiction to deal with the relief of Marshalling as sought for by the plaintiffs. It is no doubt true that some of the reliefs, namely, reliefs which challenge the validity of the mortgage in favour of defendant No.2, sought by the plaintiff may be contrary to the SARFAESI Act. No cogent submissions were made in this regard by learned counsel for the defendant

No.2. However, in any case the settled legal position is that a part of the plaint cannot be rejected. (Reference **Roop Lal Sathi versus Nachhattar Singh,** AIR 1982 SC 1559).

17. Reliance by the learned counsel for defendant No.2 on the judgment in the case of **Mukesh Bhargava & Anr. vs. Canara Bank & Ors.,** 2007 (96) DRJ 280 is misplaced. That suit was filed seeking a declaration that the plaintiff was the owner of the suit property which had actually been mortgaged to the Bank. On the facts of that case, the Court held that the issue as to whether a title existed in the plaintiff and valid mortgage was created was an issue which has to be gone into by the DRT and the jurisdiction of the civil court was barred under Section 34 of the SARFAESI Act. The issue of Marshalling was not involved in that case.

18. The present application is accordingly dismissed.

CS(OS) No. 1727/2012

List before the Joint Registrar on 5.2.2014.

ILR (2014) I DELHI 752
W.P. (C)

UNION OF INDIA & ANR. ....PETITIONERS

VERSUS

SAIKAT ROY ....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 508/2014 DATE OF DECISION: 24.01.2014

Constitution of India, 1950—Art. 226—Service Law—Respondent participated in examination conducted by UPSC for selection to post of Junior Geologist Group 'A' in Geological Survey of India—Having qualified

said examination respondent was directed by petitioner to appear before Central Standing Medical Board at Safdarjung Hospital for medical examination—Medical Board, after examining respondent declared him 'unfit' on ground of his having undergone Lasik Surgery—Respondent successfully challenged order of petitioner before Administrative Tribunal before High Court—Held—There is no prescription in recruitment rules to effect that a person who had undergone Lasik Surgery to correct vision, would be disqualified for consideration for appointment—Medical Board which has examined respondent has not found his vision criterion—Only ground for rejecting him was fact that he had undergone corrective Lasik Surgery—In absence of any prescription in rule or regulation, mere fact that person has undergone corrective surgery ipso facto cannot tantamount to his being medically unfit and result in rejection of a candidate.

Important Issue Involved: In the absence of any prescription in rule or regulation, the mere fact that person has undergone corrective surgery ipso facto cannot tantamount to his being medically unfit and result in rejection of a candidate.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Rajinder Nischal with Mr. Asish Nischal, Advocates.

FOR THE RESPONDENTS : Mr. Saurabh Bhargavan and Ms. Surekha Bhargavan, Advocates.

CASES REFERRED TO:

1. *Ms. Sreeja K.* vs. *Union of India and Another* W.P.(C) No.3196/2012.
2. *Deepak Kumar* vs. *Union of India:* WP(C) No. 13159/2009 decided on 23.09.2010.

3. *Indian Council of Agricultural Research and Anr.* vs. *Smt. Shashi Gupta:* AIR 1994 SC 1241.

RESULT: Dismissed.

GITA MITTAL, J. (Oral)

Caveat No.71/2014

Respondent is represented through counsel.

Caveat accordingly stands discharged.

C.M.No.1008/2014 (for exemption)

Exemption is allowed subject to just exceptions.

Application is disposed.

W.P.(C) 508/2014 & C.M.No.1007/2014 (for stay)

1. The instant petition has been filed by the petitioner assailing the order dated 12th August, 2013 in O.A.No.2078/2012 passed by the Central Administrative Tribunal, Principal Bench, New Delhi. The factual matrix of the case is undisputed. The respondent had participated in an examination conducted by the Union Public Sevice Commission (UPSC) for selection to the post of Junior Geologist Group 'A' in the Geological Survey of India. Having qualifying the said examination, the respondent was directed by the petitioner to appear before the Central Standing Medical Board at Safdarjung Hospital, New Delhi on 20th January, 2011 for a medical examination. The medical board, after examining the respondent declared him 'unfit' on the ground of his having undergone Lasik Surgery.

2. Pursuant thereto the petitioner before us passed an order dated 28th February, 2012 operative part of which is to the following effect:

> "2. The Regulations relating to the Physical Examination stipulates that there is no right of appeal determine the fitness for the post of Geologist. However, you can appeal before the Government along with the evidence about the possibility of an error of judgment in the decision of the first Board. Evidence should contain, a note by the medical practitioner concerning to the effect that it has been given in full knowledge of the fact that the candidate had already been rejected as unfit for service by the Medical Board.

3. You are requested to submit the evidence within one month from the date of receipt of this communication. In case you fail to do so, no request for an appeal to a second Medical will be entertained."

3. The respondent questioned its order by way of O.A.No.2078/2012 submitting that he had undergone the Lasik Surgery for correction of his eye sight which could not be termed as disqualification and consequently be declared unfit for the post in the question.

4. It is not disputed that neither the recruitment rules for the said post nor the advertisement prescribe that Lasik Surgery for correction of eye sight would be treated as disqualification for the post of Junior Geologist, Group 'A'.

5. It appears that this very issue had been considered by the petitioners resulting in an order dated 2nd September, 2011 passed by the Director General of the Geological Survey of India sent to the Secretary, Government of India, Ministry of Mines, New Delhi. This communication referred to the consensus among senior officers of Geological Survey of India who had met at the Central Headquarters, Kolkata on 18th August, 2011 to the effect that any candidate having undergone Lasik Surgery cannot be disqualified medically for appointment in Geological Survey of India. This communication also added that if the Ministry of Mines approves, such candidate may be effectively deployed in one of the following offices/projects:

1. Marine Survey / or

2. Laboratory related works.

6. The issue of fitness of a candidate who had undergone Lasik Surgery for the post of Junior Geologist also arose for consideration before this court in an earlier writ petition being W.P.(C) No.3196/2012 in **Ms.Sreeja K. vs. Union of India and Another.** In that case the candidature of the of petitioner for the post of Junior Geologist was cancelled when the medical board declared 'unfit' on account of 'High Myopia'. The petitioner placed reliance on the aforesaid order dated 2nd September, 2011. On consideration of the matter, in the judgment dated 29th May, 2012 this court had held as follows:

7. We fail to see as to how the Medical Board could then have

declared the petitioner unfit. In fact, there are no rules prescribing that the person who has undergone LASIK Surgery would be disqualified or declared unfit for the post of Junior Geologist, in the Geological Survey of India. On the contrary, the learned counsel for the petitioner pointed out a letter dated 02.09.2011, issued by the Director General, Geological Survey of India, to the Secretary, Government of India, Ministry of Mines, New Delhi, indicating that after discussions held amongst the senior officers of Geological Survey of India at Central Headquarters, Kolkata on 18.08.2011, a general consensus was reached to the effect that any candidate having undergone LASIK Surgery cannot be disqualified medically for appointment in Geological Survey of India. However, in the same letter, it was added that if the Ministry of Mines approves, such candidate may be effectively deployed in one of the following offices/projects:-

1) Marine Survey/or

2) Laboratory related works

12. The learned counsel for the respondents has placed reliance on the case of **Deepak Kumar v. Union of India:** WP(C) No. 13159/2009 decided on 23.09.2010. However, on going through the said decision, we find that the same is clearly distinguishable in as much as the petitioner in that case had failed to meet the prescribed standards in both the medical examinations conducted to assess his fitness. In the present case, we have already stated that in so far as the second medical examination was concerned, the result of the test indicated that she fell within the parameters prescribed under the said Regulation. The other judgment which was referred to by the learned counsel for the respondents was that of the Supreme Court in the case of **Indian Council of Agricultural Research and Anr. v. Smt. Shashi Gupta:** AIR 1994 SC 1241. However, that case is also distinguishable inasmuch as the respondent before the Supreme Court had been medically examined and was found medically unfit. But, in the present case, despite the test results falling within the prescribed parameters, the second Medical Board held the petitioner to be unfit on account of LASIK surgery when there was no bar against correction of vision through such a procedure in any

rule, regulation, bye-law or order. The facts are different from that of the Supreme Court decision and so also the applicable rules etc. Therefore, the said decision is not at all applicable to the fact of this case and is of no assistance to the respondents.

13. In view of the foregoing, we hold that the order passed by the Tribunal in dismissing the petitioner's Original Application was erroneous. Consequently, the impugned order is set aside. The respondents are directed to consider the petitioner for appointment to the post of Junior Geologist by taking her to be medically fit and the same be done within two weeks."

(Emphasis supplied)

7. The respondent has also placed reliance on judgment dated 12th August, 2013 passed by the Central Administrative Tribunal in O.A.No.2078/2012 in support of her challenge. The present respondent had submitted that the challenge had been laid by the petitioner before the Hon'ble Supreme Court by way of Special Leave Petition filed against O.A.No.74/2012 dated 11th June, 2012 entitled **Shri Anjanjoti Deka vs. Union of India & Ors.** wherein the facts and circumstances were identical as to the case of **Ms.Sreeja K.**(Supra) had been dismissed vide order dated 15th April, 2013 leaving the question of law open.

8. Learned counsel for the petitioner submits that the order passed in **Ms.Sreeja K.** (Supra) by this court had been assailed by way of a Special Leave Petition which was pending before the Supreme Court. In the impugned order dated 12th August, 2013, the Tribunal has noted that the SLP in the case of **Sreeja K.** (supra) was pending without any stay, and directed in the interest of justice, the respondent be treated identically as the other two applicants. The application of the respondent was allowed with the direction to the petitioner to consider the respondent's case for appointment to the post of Junior Geologist taking him to be medically fit. However, the respondent's appointment would be subject to the outcome of the SLP in **Sreeja K.'s** case (supra).

9. Learned counsel for the respondent has entered appearance today as a Caveator and has placed copy of the order dated 19th August, 2013 passed by the Supreme Court whereby S.L.P.(Civil) no.33451/2012 entitled Union of India and Anr. Vs. Sreeja K. has been dismissed by the Supreme Court on the ground that the present petitioner had already issued letter

of appointment to her on 12th October, 2012. In view of this development, the S.L.P. was dismissed leaving the question of law open.

10. There is no dispute at all before us that there is no prescription in the recruitment rules to the effect that a person who had undergone Lasik Surgery to correct vision, would be disqualified for consideration for appointment. The medical board which has examined the respondent has not found his vision acuity to be defective. The respondent meets the prescribed vision criterion. The only ground for rejecting him was the fact that he had undergone corrective Lasik Surgery. It cannot be disputed that in the absence of any prescription in rule or regulation, the mere fact that the person has undergone corrective surgery ipso facto cannot tantamount to his being medically unfit and result in rejection of a candidate.

11. For all these reasons, we find no error in the decision of the Central Administrative Tribunal. The writ petition is accordingly dismissed.

ILR (2014) I DELHI 758
CM (M)

PREETI ARORA **....PETITIONER**

VERSUS

ANIKET SUBASH KORE **....RESPONDENT**

(NAJMI WAZIRI, J.)

CM (M) NO. : 1358/2013 **DATE OF DECISION: 27.01.2014**

Code of Civil Procedure, 1908—Order VII Rule 14—Indian Evidence Act, 1872—Section 65B—Petitioner challenged impugned order disallowing petitioner's application to bring on record print outs of certain e-mails allegedly exchanged between parties—Plea taken, proceedings pending before Trial Court are in context of a socially beneficial legislation concerning

marital relationship between parties—Courts would always take a view which would advance cause of justice and a strict interpretation which would cause irreparable loss and disadvantage to wife ought not to be taken—Per contra plea taken, law requires that documents relied upon are required to be filed at appropriate stage i.e. along with written statement which means that they have to be filed before replication is filed or otherwise with permission of Court at time of framing of issues but definitely before evidence starts—Held—Apart from reason that application for bringing on record print outs of e-mails had been occasioned only on account of change of counsel, no other reason has been provided—In opinion of this Court, that itself would not be sufficient reason in any case—To seek indulgence of a Court to accept additional documents under Order VIII Rule 14, party seeking to produce documents must satisfy Court that said documents were earlier not within part's knowledge or could not be produced at appropriate time in spite of due diligence—These documents are not new and were evidently in knowledge of petitioner wife prior to filing of divorce petition—Permitting same to be brought on record now would have its own cascading effect in form of amendment of written statement/reply, a rejoinder thereto issues have framed fresh evidence to be led, etc.—This would unnecessarily delay proceedings that CPC spells out for equitable framework and schedule with which parties have to comply and Courts ought to conduct proceedings before it—For aforesaid reasons, this Court is not persuaded to interfere with impugned order.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Somdutt Kaushik, Adv.

FOR THE RESPONDENT : Ms. Anu Narula, Adv.

RESULT: Dismissed.

NAJMI WAZIRI, J.

1. This is a petition challenging the order of the Additional District Judge disallowing the petitioner's application to bring on record print outs of certain e-mails allegedly exchanged between the parties. The Hon'ble Supreme Court had transferred the case to the Karkardooma Courts at Delhi with a direction that the petition be disposed off as expeditiously as possible, preferably within 9 months from the date of framing of issues. The reason for disallowing the petitioner's application was that after pleadings of the parties had been completed and issues were framed on 25.05.2013 and evidence of the petitioner have been completed on 20.09.2013 the documents were sought to be brought on record. It was objected to on the ground that the documents existed much earlier before the reply of the petitioner to the divorce petition had been filed, that they are not new documents, and that the application was filed simply because there has been a change of counsel and therefore a change of opinion.

2. According to the Trial Court, permission to bring the said documents on record at this stage would cause prejudice to the petitioner who may not have the opportunity to place his case in respect of the documents. On 16.12.2013 the proceedings before the trial court in HMA No.352/2012 had been stayed. The respondent husband has sought to challenge the said order on the following grounds:- the divorce petition was filed in April 2011 and the petitioner wife had all along known the case against her. Reply to the petition makes no whisper of this correspondence nor were these documents adduced to the reply or at any stage prior to the evidence of the respondent husband which has now been completed. Counsel appearing for the respondent/husband also drew attention of the Court to the fact that although on 26.11.2013 and 29.11.2013, 9.12.2013, 13.12.2013 and 14.12.2013, the petitioner/wife did not appear before the Trial Court, no medical certificate was presented before the Court on 9.12.2013 stating that she was unwell. She contends that the plea of illness is belied by the fact that the affidavit was sworn on 12.12.2013 before the Oath Commissioner appointed by the High Court. Evidently she was in a position to move about on 12.12.2013, yet she did not appear before the Court on 13.12.2013 and 14.12.2013. This

shows that the petitioner is trying to delay and frustrate the proceedings in the trial court on one pretext or the other. Counsel for the respondent Ms.Anu Narula contends that however the law requires that the documents relied upon are required to be filed at the appropriate stage i.e. along with the written statement which means that they have to be filed before the replication is filed or otherwise with the permission of the Court at the time of framing of issues but definitely before evidence starts. She further contends that the copies of e-mail which are sought to be brought on record were exchanged in the petitioner's affidavit of evidence filed on 09.07.2013 and tendered on 22.07.2013. However no application was filed for taking on record the said correspondence as required under Order VII rule 14. Such application was filed only on 24.10.2013. The plea that the delayed filing of the e-mail was on account of the fact that the respondent came to know about this lapse only when the file was sent by her counsel during her cross-examination is untenable. She further contends that the documents sought to be adduced now as a part of the evidence in any case not as per the requirement of Section 65B of the Indian Evidence Act, 1872. Counsel for the petitioner on the other hand says that the proceedings pending before the trial court are in the context of a socially beneficial legislation concerning the marital relationship between the parties. Therefore the courts would always take a view which would advance the cause of justice and a strict interpretation which would cause irreparable loss and disadvantage to the wife ought not to be taken.

3. Section 65 of the Indian Evidence Act prescribes the conditions for admissibility of physical records which inter alia requires a certificate to be adduced along with the purported evidence.

4. Sub-section 4 reads as under:-

Section 65 sub section (4)

4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say;-

(a) Identifying the electronic record containing the statement and describing the manner in which it was produced ;

(b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) Dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

5. From the facts as mentioned above the following position emerges that the petitioner had full knowledge of the case against her by as alleged in the divorce petition from April, 2011. The trial court was directed on 01.3.2012 to complete the proceedings preferably within 9 months from the date of framing of issues which was done on 23.05.2013. Therefore, the divorce petition has to be decided by 23.02.2014. Apart from the reason that the application for bringing on record the print outs of the e-mails had been occasioned only on account of change of counsel, no other reason has been provided. In the opinion of this Court, that itself would not be a sufficient reason in any case. To seek indulgence of a Court to accept additional documents under Order VII rule 14, the party seeking to produce documents must satisfy the Court that the said documents were earlier not within the party's knowledge or could not be produced at the appropriate time in spite of due diligence.[1] It has not been the case of the petitioner/wife that the documents were not within her power or that the same could not be produced despite exercise of due diligence. There is no whisper of such alleged correspondence eit her in the reply to the divorce petition or list of documents or list of reliance which was filed by the petitioner wife. These documents are not new and were evidently in the knowledge of the petitioner wife prior to the filing of the divorce petition. Permitting the same to be brought on record now would have its own cascading effect in the form of an amendment of the written statement/reply, a rejoinder thereto issues have framed fresh evidence to be led, etc. This would unnecessarily delay the proceedings and also defeat the scheme that the CPC spells out for an equitable framework and schedule with which the parties have to comply and the courts ought to conduct proceedings before it.

1. Gold Rock World Trade Ltd. v. Veejay Lakshmi Engineering Works Ltd. (2007 (143) DLT 113).

6. For the aforesaid reasons, this Court is not persuaded to interfere with the impugned order. The petition is dismissed as being without any merit.

ILR (2014) I DELHI 763
W.P.(C)

PRINCE GARG ....PETITIONER

VERSUS

GOVT. OF NCT & ORS. .....RESPONDENTS

(GITA MITTAL AND DEEPA SHARMA, JJ.)

WP (C) NO. : 361/2014 DATE OF DECISION: 29.01.2014

Constitution of India, 1950—Art. 226—Service Law—Representation of petitioner requesting for merger of pollution level test inspector and motor vehicle inspector cadres, rejected by respondents—Petitioner relieved from his posting with directions for duties in Taxi Unit, Burari-—Application of petitioner challenging both orders dismissed by Administrative Tribunal—Order of Tribunal challenged before HC- plea taken, posting in taxi unit, burari amounts to change of cadre- Transfer outside cadre in a different wing is bad in law being violative of conditions of service—In eventuality of refusal to merge two cadres independent to each other, petitioner be not transferred out of pollution control branch as it would amount to serving under junior officers of MVI bench-Held- Issues raised by petitioner are whether rejection of representation to merge PLTI and MVI cadres into one is unjustified and whether his transfer to taxi unit. Burari amounts to forcing him to work under his juniors- petitioner had challenged impugned orders before learned Tribunal and raised same contentions, as have been raised before us—Tribunal has carefully considered both submissions of petitioner and given sound reasons for rejection- Impugned order of Central Administrative Tribunal does not suffer with any infirmity—There are no grounds to interfere with findings of learned Tribunal- writ petition dismissed.

Important Issue Involved: When the Central Administrative Tribunal has carefully considered all the submissions of the petitioner and given sound reasons for rejection, findings of learned Tribunal cannot be interfered with.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : MR. M.K. Bhardwaj, Advocate.

FOR THE RESPONDENTS : Nemo.

CASE REFERRED TO:

1. *Lt.Governor of Delhi* vs. *SI Roop Lal* AIR 2000 SC 594.

RESULT: Dismissed.

DEEPA SHARMA, J.

C.M.No.714/2014 (for exemption)

Exemption is allowed subject to just exceptions.

Application is disposed of.

W.P.(C) No.361/2014 & CM Nos.713/2014 (for stay)

1. The petitioner was appointed as Pollution Level Test Inspector ('PLTI') on 19th January, 1990. The respondents made appointments in the separate cadre of Motor Vehicle Inspector ('MVI'). The petitioner's contention had been that all the said appointees in the cadre of MVI had been promoted to the higher post of Motor Licensing Officer ('MLO') whereas the petitioner is still continuing as PLTI.

2. The petitioner made a represention dated 21st December, 2010 requesting for merger of PLTI cadre and MVI cadre. He had first filed an O.A.No.2120/2012 before the Central Administrative Tribunal ('CAT'), stating that he had not got promotion for the last 25 years because he was part of PLTI Cadre whereas the Inspectors in the Cadre MVI/DTI/ RSIs have got third promotion. The learned Tribunal vide its order dated 29th June, 2012 disposed of the said application with the direction to decide the represention dated 21st December, 2010 of the petitioner.

3. Vide an order dated 27th July, 2012 passed by the respondents, the representation of the petitioner was disposed of whereby rejecting the request of merger of two Cadres. The petitioner was also relieved from his posting vide an order dated 30th July, 2012 with the direction to report for duties in Taxi Unit, Burari. The petitioner challenged both these orders before the learned Tribunal in O.A. No.2519/2012. The learned tribunal passed its order on 4th October, 2012 whereby the application of the petitioner was dismissed.

4. The petitioner has assailed the said order of the learned Tribunal before us on the grounds that the tribunal had committed grave error of law in passing the said order as it had not considered the law laid down by the Hon'ble Supreme Court in the case of **Lt.Governor of Delhi vs. SI Roop Lal** AIR 2000 SC 594 wherein it had been held that the Tribunal is required to follow the view taken by the Coordinate Bench. It is submitted that the Division Bench of the learned Tribunal not only in one but two decisions i.e. in O.A.NO.2491/2008 and 1427/1995 held that the transfer outside the cadre in a different wing is bad in law being violative of conditions of service.

5. It is further contended that the learned Tribunal had not considred all the issues in a proper manner. It is submitted that his posting in the Taxi Unit, Burari amounts to change of cadre. It is further submitted that the directios of Hon'ble the Supreme Court in SLP no.22909/1996 in March, 1997 had not been taken into consideration and the order is laible to be set aside. Request is also made to quash the orders dated 27th July, 2012 and 30th July, 2012.

6. In the alternative, it is prayed that in the eventuality of refusal to merge two Cadres being independent to each other, the petitioner be not transferred out of Pollution Control Branch (PCB) as it would amount to serving under junior officers of MVI bench.

7. We have heard the petitioner and have gone through the record.

8. The issues raised by the petitioner are:

(a) Whether rejection of the representation dated 21st December, 2010 to merge PLTI and MVI cadres into one vide order dated 27th July, 2012 is unjustified,

(b) Whether his transfer to Taxi Unit, Burari vide order dated 30th July, 2012 amounts to forcing him to work under his juniors.

9. The petitioner had challenged the orders dated 27th July, 2012 and 30th July, 2012 before the learned Tribunal and raised the same contentions, as have been raised before us. On a consideration of the rival contentions of the parties and relying on the factual postion of the case, the Tribunal has observed as under:

"8. The factual contentions of the applicant have also been rebutted by the respondents. In their short reply, while affirming about the two cadres being separate; the claim regarding the applicant being senior to the Motor Licensing Officer has been rebutted. It is averred that the contention of the applicant that he is senior to that of Motor Licensing Officer just because of his joining earlier is not a valid one. To reinforce the point further, the fact of the post of PLTI being a Non-Gazetted one with a lower pay scale and that of Motor Licensing Officer being a Group 'B' Gazetted post with higher pay scale has also been stated.

It has also been submitted that the applicant had been continuing in the existing post for more than 10 years. The instant transfer to Taxi Unit, Burari is stated to be in public interest. It has also been averred that among its various activities, testing of pollution is also one of them undertaken by the Taxi Unit, Burari. The factum of the applicant having not joined his new post despite having been relieved in utter disregard of the directions of the authority has also been submitted by the respondents.

9. As regards the specific aspects contended by the applicant's counsel against the impugned transfer, the respondents have made certain submissions by their Additional Affidavit dated 25.9.2012. In the matter of availability of a sanctioned post, it is submitted that presently there are a total of 38 posts of Pollution Level Test

Inspector under the Department. Without any unit-wise bifurcation, posting of the applicant is stated to be against out of the sanctioned post of PLTI. The respondents have reiterated that even in the event of his transfer to the Taxi Unit, Burari, the applicant would be working as PLTI only in his cadre and there will be no change of change of cadre. As regards the nature of work, the respondents have submitted that "considering reservations of the applicant, specific instructions can be issued to Taxi Unit that only pollution related work to be taken from the Applicant". Their stand that by virtue of his transfer, the applicant would not be made to work under a junior officer has been reiterated."

The Tribunal has carefully considered both submissions of the petitioner and given sound reasons for rejection.

10. The judgment of the hon'ble Supreme Court in SI Roop Lal (supra) relied upon by the petitioner has no relevance in this case as the findings in that case are based on entirely different set of facts.

11. In view of the above, it is apparent that the impugned order of the Central Administrative Tribunal, Principle Bench, New Delhi does not suffer with any infirmity. There are no grounds to interfere with the findings of learned Tribunal. The present writ petition is dismissed with no orders as to costs. The stay application also stands disposed of.

ILR (2014) I DELHI 768
CRL.A.

SEHZAD @ NADEEM .....APPELLANT

VERSUS

STATE .....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 1095/2011 DATE OF DECISION: 29.01.2014

Indian Penal Code, 1860—Sec. 394 and 398—Hostile witness—Evidentiary value. It is settled law that the evidence of a hostile witness can be relied upon at least to the extent it supported the case of the prosecution— The ocular testimony of the complainant is in consonance with medical evidence—Minor discrepancies, contradictions or improvement are not very material to affect the core of the prosecution case. The complainant's testimony inspires confidence and implicates the appellant without any doubt. The accused did not give plausible explanation to the incriminating circumstances proved against him. DW-1 did not lodge any complaint against any police officials for falsely implicating him in the case.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. A.J. Bhambhani with Ms. Lakshita Sethi and Mr. Apurv Chandola, Advocates.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

S.P. GARG, J.

1. Sehzad @ Nadeem questions the legality and correctness of a judgment dated 22.04.2010 of learned Additional Sessions Judge in Sessions

Case No.58/2009 arising out of FIR No.88/2009 registered at Police Station Chandni Mahal by which he was convicted under Section 394/ 398 IPC. By an order dated 24.04.2010 he was awarded rigorous imprisonment for seven years with fine Rs. 10,000/- under Section 398 IPC.

2. Allegations against the appellant were that on 25.09.2009 at about 11.00 P.M. at shop No.18, DDA Market, Turkman Gate, Delhi, he while armed with a deadly weapon attempted to rob complainant Ikramuddin of Rs.20,000/- and injured him. The complainant declined to give Rs.20,000/- to the appellant and raised alarm. The police officials on patrolling duty were able to apprehend and recover a country made pistol with a live cartridge from appellant's possession. First Information Report was lodged after recording Ikramuddin's statement (Ex.PW-1/A) by the Investigating Officer on the night intervening 25-26.09.2009 at 1.10 A.M. Statements of witnesses conversant with the facts were recorded. After completion of investigation a charge-sheet was filed against the appellant in the court. The prosecution examined 15 witnesses to substantiate the charges. In 313 statement, the appellant denied the allegations and pleaded false implication. He examined DW-1 (Naseem Akhtar) in defence. On appreciating the evidence and after considering the rival contention of the parties, the trial court by the impugned judgment convicted the appellant for the offences mentioned previously. Being aggrieved, the appeal has been preferred.

3. Appellant's counsel urged that the trial court did not appreciate the evidence in its proper and true perspective and fell in grave error in relying upon the testimony of interested witness with whom a quarrel had taken place and all including the appellant had sustained injuries. The appellant was falsely implicated in connivance with the police by the complainant who lived in his neighbourhood. Counsel pointed out various discrepancies and inconsistencies in the statements of the prosecution witnesses. PW-1 (Ikramuddin), complainant, was unable to identify the pistol recovered by the police. PW-3 (Mohd.Imran) turned hostile and did not support the prosecution on vital facts. The weapon of offence was not produced before the learned Metropolitan Magistrate at the time of production of the accused in the court. The MLC does not record the assailant's name. Learned Additional Public Prosecutor urged that the

trial court has observed demeanor of the witnesses and the accused who was the Bad Character (BC) of the area and was involved in many criminal cases. There are no sound reasons to discard the testimony of the complainant.

4. The occurrence took place at about 11.00 P.M. in the complainant's shop. First Information Report was lodged in promptitude at 01.10 A.M. on the same night after recording Ikramuddin's statement (Ex.PW-1/A). In the complaint Ikramuddin gave detailed account of the incident and narrated as to how and under what circumstances, the accused at the point of pistol in his hand attempted to extort '20,000/ from him on the pretext to get release his brother who was involved in a criminal case and was confined in jail. When he refused to give money, he was hit with the 'butt' of the pistol. On his raising alarm, the appellant tried to flee the spot 'but' was caught hold by the police officials on patrolling duty. The country made pistol was recovered from his possession and on opening it, a live cartridge was found in it. While appearing as PW-1 the complainant proved the version given to the police at the earliest available opportunity without major variations. He deposed that on 25.09.2009 at about 11.00 P.M. he along with his friend Imran was present at his shop No.18, DDA Market, Turkman Gate, Delhi. Accused Nadeem came at his shop, took out a katta, pointed it at him and asked him to give Rs.20,000/- for getting his younger brother released. He hit the katta on his face and caused injury below his right eye. Country made pistol was recovered vide seizure memo (Ex.PW-1/B). Learned Additional Public Prosecutor sought permission from the Court to cross-examine the witness as he could not give details of the incident. In the cross-examination, he admitted that the appellant's brother who was confined to jail was Naim. He admitted that when he refused to give money, the accused hit him with the 'butt' of the pistol. His friend Imran was also pushed on his intervention. The witness explained that he was under great tension and was not in a position to tell the measurement of the weapon recovered. In the cross-examination, he elaborated that the conversation with Nadeem continued for about 5-10 minutes. He fairly admitted that Nadeem had not told him as to where the money was to be delivered. He admitted that he was residing at a short distance from the appellant's house. The police seized the country made pistol from

outside his shop. Apparently, the appellant was unable to extract any material discrepancy in the statement of the complainant to disbelieve him. His testimony on relevant and material facts remained unchallenged and uncontroverted in the cross-examination. The accused did not deny his presence at the spot. No ulterior motive was assigned to the complainant to falsely implicate him as he had no prior animosity with him. In the absence of ill-will or enmity, the complainant who was running his shop in the area was not expected to suddenly rope in an innocent in the crime. The complainant assigned specific motive of the appellant to extort money from him.

5. PW-3 (Mohd Imran) though did not support the prosecution in its entirety, nevertheless, corroborated the complainant's version about the presence of the appellant inside the shop at the relevant time. He also deposed that the complainant and the appellant had conversation inside the shop and he had seen them quarrelling. He also deposed about sustaining of injuries by him and the complainant. In the cross-examination by Additional Public Prosecutor, he admitted that when Ikramuddin and he shouted 'Pakro Pakro', the police reached the shop and apprehended Nadeem. He admitted his signatures on various memos i.e. Ex.PW1/B and Ex.PW-1/C. The appellant did not put any question in the cross-examination as to why he had visited the shop of the complainant without any specific purpose at odd hours. It is settled law that the evidence of a hostile witness can be relied upon at least to the extent it supported the case of the prosecution.

6. PW-4 (Const.Ajay Rawat) who was on patrolling duty with ASI Surender and HC Narender in the area deposed about the apprehension of the accused with 'desi katta' in his right hand at about 11.00 P.M. He further deposed that when he and HC Narender tried to apprehend him, he fell down and was apprehended with great difficulty with the assistance of the complainant-Ikramuddin and his friend Imran. In the cross-examination, he revealed that they had started patrolling the area at about 06.00 P.M. No material infirmities could be elicited in his cross-examination. PW-5 (ASI Surender Singh) corroborated his testimony on all relevant facts. These police officials had no ulterior motive to falsely implicate the accused who was involved in number of other cases.

7. The ocular testimony of the complainant is in consonance with medical evidence. Soon after the occurrence, they all were taken to Lok

Nayak hospital. MLC (Ex.PW-14/A) records the arrival time of the patient Ikramuddin as 02.02 A.M. (brought by HC Narender Kumar). Alleged history records 'assault on 25.09.2009 at 11.00 P.M. as told by the patient'. The injuries were simple in nature. PW-3 (Imran) was also examined vide MLC (Ex.PW-14/B) and was taken to Lok Nayak hospital along with complainant at the same time. It shows his presence with the complainant at the spot. The accused who had sustained injuries due to fall was taken to the said hospital at 04.58 A.M. and found to have suffered simple injuries. The accused did not explain as to how and under what circumstances, he sustained injuries.

8. Minor discrepancies, contradictions or improvements highlighted by the appellant's counsel are not very material to affect the core of the prosecution case. The complainant's testimony inspires confidence and implicates the appellant without any doubt. The accused did not give plausible explanation to the incriminating circumstances proved against him. DW-1 did not lodge any complaint against any police officials for falsely implicating him in the case. The judgment is based upon fair appraisal of the evidence and all the relevant contentions have been dealt with. The findings of the trial court on conviction warrants no interference. The appellant has been granted minimum sentence of seven years prescribed under Section 398 IPC which cannot be reduced or altered. The sentence order records that the appellant was involved in as many as 21 criminal cases. DD No.32/A furnished by the prosecutor revealed that even his conduct during trial was violent and he fought with one Const.Ajay on 20.04.2010. Sentence order requires no modification except that the default sentence for non-payment of fine of '10,000/- will be one month instead of six months. Other terms and conditions of the sentence are left undisturbed.

9. The appeal stands disposed of in the above terms. Trial Court record be sent back immediately. Copy of the order be sent to Superintendent Jail for information.

ILR (2014) I DELHI 773
CRL. A.

LIYAKAT ALI ....APPELLANT

VERSUS

STATE .....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 99/2000 DATE OF DECISION: 30.01.2014

Indian Evidence Act, 1872—Section 106—The facts which are within the special knowledge of the person, he is bound to explain those facts under section 106 Evidence Act—It is well settled that even if an accused does not plead self-defence during trial, it is open to the court to consider such a plea if the same arises from the material on record. The burden of proving the existence of circumstances bringing a case within any exception is upon the accused—Of course that burden can be discharged by showing probabilities in favour of that plea. Under Section 105 of the Indian Evidence Act, the onus rests on the accused to establish his plea of self-defence. Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself by adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution—Right of private defence is primarily a defensive right and is available only to one who is suddenly confronted with the necessity of averting an impending danger.

There is no rule of law that if the court acquits certain accused on the evidence of a witness finding it to be open to some doubt with regard to them for definite reasons, other accused against whom there is positive evidence must be acquitted. The court has a duty in such cases to separate the grain from the chaff.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Jayant K. Sud with Mr. Ujas Kumar, Advocates with appellant present in person.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

RESULT: Appeal Dismissed.

S.P. GARG, J.

1. Liyakat Ali (the appellant) questions the legality and correctness of a judgment dated 29.01.1999 in Sessions Case No.25/1999 arising out of FIR No.248/1996 registered at Police Station Seema Puri by which he was convicted under Section 307/34 IPC & 27 Arms Act. By an order dated 31.01.1999, he was awarded rigorous imprisonment for three years with fine ‘3,000/- under Section 307 IPC and rigorous imprisonment for one year with fine ‘1,000/- under Section 27 Arms Act. Both the sentences were to operate concurrently. The facts as projected in the charge-sheet are as under:

2. Liyakat Ali, Akil Ahmed and Gauz Mohd. @ Taj Mohd. were arrested and sent for trial alleging that on 12.05.1996 at about 11.30 P.M. near railway crossing under the bridge, G.T.Road, Shahdara, they in furtherance of common intention inflicted injuries to Sanjay Kumar by firing at him with a service revolver issued to Liyakat Ali. The police machinery came into motion when DD No.39A (Ex.PW-12/B) was recorded at 11.50 P.M. at Police Station Seema Puri on getting information about the firing incident. The investigation was assigned to ASI Narpat Singh who with Ct.Pardeep went to the spot and came to know that the injured had already been taken to Guru Teg Bahadur hospital. He collected the MLC of injured Sanjay Kumar and lodged First Information Report after recording his statement (Ex.PW-11/A). In the meantime, Liyakat

Ali, and Gauz Mohd. who were brought to Police Station Seema Puri by Ct.Satender Kumar were sent for medical examination. Cross-case vide FIR No.249/1996 under Section 307/365/341/34 IPC was registered after recording Gauz Mohd @ Taj Mohd's statement. Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against all of them; they were duly charged and brought to trial. The prosecution examined 12 witnesses to bring home their guilt. In 313 statements, they denied their complicity in the crime and pleaded false implication. After considering the rival contentions of the parties and on appreciation of the entire evidence, the Trial Court, by the impugned judgment held Liyakat Ali perpetrator of the crime for the offences mentioned previously. It is relevant to note that Akil Ahmed and Gauz Mohd.@ Taj Mohd. were acquitted of all the charges and the State did not challenge their acquittal.

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 and fell in grave error in relying upon the tainted testimony of the complainant-Sanjay, who had criminal antecedents and was involved in a murder case. The appellant was falsely implicated at the behest of local police who deliberately manipulated the entire case. The Trial Court miserably erred in ignoring material irregularities. The investigating officer admitted in the cross-examination that Liyakat Ali (the appellant) and Gauz Mohd. @ Taj Mohd. were sent for medical examination and a cross-case was registered. The prosecution did not explain as to how and in what manner Gauz Mohd. @ Taj Mohd. got grievous injuries at the crime spot. The Investigating Officer admittedly came to know during investigation about the quarrel had taken place under flyover of G.T.Road between Gauz Mohd. @ Taj Mohd. and Akil Ahmed on one hand and Sanjay, Nand Kishore @ Nandu and Rakesh on the other, and grievous injuries were inflicted to Gauz Mohd. @ Taj Mohd. He further admitted that Liyakat Ali arrived at the spot after the quarrel and fired at Sanjay from his service revolver. Apparently, the appellant had no motive or intention to eliminate Sanjay. He further contended that from the evidence it was crystal clear that Liyakat Ali had reached the spot afterwards to rescue Gauz Mohd @ Taj Mohd. who was assaulted by PW-11 (Sanjay) and his associates. Liyakat Ali fired only in self-defence as there was impending threat to his life. Since Liyakat Ali and Gauz Mohd. @Taj Mohd. were

being chased by the assailants, they were forced to take lift from Ct. Satender Kumar who brought them to the police station. The prosecution was unable to establish if '4,850/- were snatched in the incident. Counsel adopted alternative argument to release the appellant on probation as he had no previous criminal record and was at the fag end of his career. Learned Additional Public Prosecutor while supporting the findings on conviction urged that there are no sound reasons to discard the testimony of the injured Sanjay. The appellant could not establish the plea of self-defence.

4. Admitted position is that Liyakat Ali was Head Constable with Delhi Police and a 9MM pistol with live cartridges was issued to him by an order dated 22.11.1995 for protection. It is not in dispute that in the occurrence that took place on 12.05.1996, PW-11 (Sanjay) sustained bullet injury on his body by the said service revolver (Ex.P4) at about 11.30 P.M. near railway crossing under the bridge, G.T.Road, Shahdara. DD No.39A (Ex.PW-12/B) was recorded at 11.50 P.M. at Police Station Seema Puri regarding the firing incident. Injured Sanjay Kumar was taken to GTB hospital soon after the incident by one Deepak. MLC (Ex.PW7/A) records arrival time of the patient as 12.50 A.M. with the alleged history of 'being shot at a short while ago'. The complainant-Sanjay Kumar who was declared 'fit for statement' disclosed to Investigating Officer in his statement (Ex.PW-11/A) that at about 11.30 P.M. when he was present near railway 'fatak' (crossing), Shahdara to go to his friend Arvind's house, Akil, Taj Mohd. and Liyakat arrived on a Scooter No.DL-5SG2848 and caught hold of him. Liyakat Ali fired at him and they all fled the spot. He further informed that there was some money dispute. While appearing as PW-11 in the Court statement Sanjay proved the version given to the police and implicated Liyakat and others for inflicting injuries to him. He further deposed that '4850/- were snatched from him. He assigned a definite and specific role to Liyakat Ali as he took out a pistol and fired at him on his abdomen. PW-7 (Dr.Ajay Kumar Sharma), who examined the victim on 13.05.1995 opined the nature of injuries as 'grievous' caused by a fire arm vide MLC (Ex.PW-7/A). PW-2 (Dr.S.C.Bhalla) who examined X-ray plate proved his report (Ex.PW-2/A). Undoubtedly, Sanjay Kumar had sustained grievous injuries on abdomen by firing with a revolver. In fact, injuries sustained by the victim are not under challenge. It was imperative for the appellant to explain as to how and under what circumstances, he went to the spot at odd hours far

away from his residence with his service revolver and how he was compelled or forced to use it for firing at the victim. These facts were within the special knowledge of the appellant and under Section 106 Evidence Act he was bound to explain. It has come on record in evidence that complainant-Sanjay and his associates Nand Kumar and Rakesh were history-sheeters and bad characters (BCs). The Investigating Officer PW-12 (ASI Narpat Singh) admitted that there was dispute among Taj Mohd. @ Gauz Mohd., Akil, Sanjay, Nand Kishore @ Nandu and Rakesh over sharing of money earned by selling prohibited narcotics like smack, charas etc. A quarrel took place among them at the spot and Taj Mohd. was severally beaten. The appellant did not offer any reasonable explanation as to why he had close association with individuals having criminal antecedents and what prompted him on his own to go to the spot to assist or save one of the groups and to use his service revolver. Being a Head Constable in Delhi police and after having being provided with a pistol for his protection and protection of the family members, he was not expected to use it at the instance of an individual whose criminal antecedents were known to him. The appellant took inconsistent and conflicting defence to justify use of the official weapon at his command. He alleged that he being neighbour of Gauz Mohd. @ Taj Mohd. went to the spot due to his friendship after being informed of the quarrel, and when he was attacked by PW-11 Sanjay and his accomplices, he had to fire in self-defence to protect himself. The appellant, however, miserably failed to substantiate it. He did not lodge any complaint against any individual for assaulting and injuring him. Outcome of the cross-case lodged at Gauz Mohd.@ Taj Mohd.'s complaint is unclear. Liyakat Ali (the appellant) had not suffered any serious injury and the investigating officer in the cross-examination explained that he had not seen any visible injury on the body and he was taken for medical examination on his request. In the MLC (Ex.PW12/DB), the doctor did not notice any major injury except abrasions on hand and fore-arm. Since alleged injuries were minor or superficial, non-explanation of these would not affect the prosecution case. In the cross-examination of the complainant, suggestion was put that he had fired at the appellant with a 'katta'. Again different suggestion was put that when the complainant and his associates were giving beatings to Gauz Mohd.; Liyakat Ali came to save him. In 313 statement, Liyakat Ali alleged that on 12.05.1996 Akil and Deepak met him near his house and told that Taj Mohd was in detention at police

station Seema Puri and he was called by the SHO for inquiry about him. He accompanied Deepak on a two-wheeler scooter towards Seema Puri and when they reached near railway crossing, he was surrounded by 8/10 boys including Nandu, Rakesh and Sanjay. Nandu fired at him from a country made pistol but it did not hit him. Rakesh hit him with a knife and his 'banayan' got cut marks. They caught hold of him and attempted to snatch his service revolver. He did not know how the bullet got fired from the service revolver. He started running from the spot and saw Gauz Mohd. lying in injured condition nearby; brought him at the main road; took lift from Constable Satender in the police vehicle and went to the police station Seema Puri. Akil who had allegedly gone to bring Liyakat Ali, in his 313 statement narrated a conflicting version. He claimed that at the railway fatak (crossing) Gauz Mohd. was taken after beatings by Sanjay, Nandu, Rakesh and their associates. He and Deepak were sent to call Liyakat Ali from his house on the pretext that he was called by SHO Seema Puri. He informed Liyakat Ali who was standing outside his house. Deepak took him to the spot. He did not know what happened thereafter. Akil Ahmed did not claim that Liyakat Ali was fired at by Sanjay or Rakesh in an attempt to snatch his pistol/service revolver. He also did not reveal if any injuries were caused to Liyakat Ali in the said scuffle. Gauz Mohd. in 313 statement took a plea that he was beaten and asked to pay '2 lacs as ransom and was taken to railway fatak with an intention to kill him. He was again beaten there and he suffered fracture on his left wrist. Akil and Liyakat came there to save him. Akil was sent to his house to bring money. He did not claim if there was any scuffle with Liyakat Ali or he was fired at. It appears that all the accused have given contradictory and conflicting version as to how the occurrence took place in which Sanjay and Gauz Mohd. sustained injuries. Akil and Gauz Mohd. did not claim if there was any attack by the assailants or that firing from the service revolver injuring Sanjay was accidental.

5. It is true that there are vital discrepancies in the statement of the complainant and PW-12 (ASI Narpat Singh), the Investigating Officer regarding the sequence of events leading to the incident. Apparently, the complainant has not presented true facts about the occurrence and has suppressed material facts. Deepak was not examined during investigation. The Investigation conducted is highly defective and faulty; no sincere efforts were made to find out the genesis of the quarrel. However, lapses on the part of Investigating Officer in conducting the investigation do not

ipso facto wipe out the crime when admittedly the appellant went to the spot and used his service revolver in firing at PW-11 (Sanjay). Each and every infirmity in prosecution case will not necessarily vitiate the trial.

6. During arguments, appellant's counsel submitted that he acted in self-defence and fired at Sanjay to ward off attack by his associates. The appellant during trial did not plead in so many words that he legitimately acted in the exercise of right of private defence. However, it is well settled that even if an accused does not plead self-defence, it is open to the court to consider such a plea if the same arises from the material on record. The burden of proving the existence of circumstances bringing a case within any exception is upon the accused. Of course that burden can be discharged by showing probabilities in favour of that plea. Under Section 105 of the Indian Evidence Act, the onus rests on the accused to establish his plea of self-defence. Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself by adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. Right of private defence is primarily a defensive right and is available only to one who is suddenly confronted with the necessity of averting an impending danger. In the instant case, the appellant did not set up any plea of self-defence and rather put a suggestion in the cross-examination to the complainant that he did not fire at him. There is no positive evidence to infer that complainant or Rakesh fired with country made pistol at Liyakat Ali. Sanjay was taken in injured condition to GTB hospital soon after the incident and the investigating officer did not recover any country made pistol from his possession. When PW-9 (Ct.Satender Singh) found him and Gauz Mohd, they were not being chased by any assailant. Apparently, the appellant had no imminent threat to his safety to avail the plea of self-defence.

7. Acquittal of co-accused Akil and Gauz Mohd. is of no benefit to the appellant as the prosecution was able to establish beyond doubt that he alone had fired from his service revolver at Sanjay and caused grievous hurt to him. After the occurrence the appellant fled the spot. He has admitted his physical presence at the spot. There is no rule of law that if the court acquits certain accused on the evidence of a witness finding it to be open to some doubt with regard to them for definite reasons, other accused against whom there is positive evidence must be acquitted. The court has a duty in such cases to separate the grain from the chaff.

The findings of the Trial Court are based upon fair appraisal of evidence and no interference is warranted. All the relevant contentions of the appellant have been dealt with in the impugned judgment. The findings on conviction under Section 307 IPC stand affirmed.

8. While awarding the sentence, the Trial Court considered the mitigating circumstances and took into consideration the exemplary work of the appellant and also getting out-of-turn promotion. The appellant was awarded Rigorous Imprisonment for three years with fine Rs.3,000/ under Section 307 IPC. Apparently, lenient view has been taken by the Trial Court. The appellant was a Head Constable in Delhi police and was provided with a service revolver and twelve live cartridges for self protection. Instead of using the official weapon for the purpose it was issued, he associated with criminals and went to the spot where there was quarrel over sharing of money among the two groups. The appellant had direct nexus with the individuals having criminal background and assisted them in their fight against the other. The appellant had no reason on his own to go to the spot on his scooter at odd hours without informing the local police and to intervene in the quarrel between the two groups and fire at one of the individuals i.e.PW-11 (Sanjay). He fired at the vital organ of the complainant without any reasonable apprehension and fled the spot without taking care of him. The injured was taken by the public to the hospital where he remained admitted for number of days. The appellant does not deserve leniency due to having direct nexus/ association with the criminals.

9. The appeal is unmerited and is dismissed. The appellant is directed to surrender before the Trial Court on 6th February, 2014 to serve the remaining period of sentence. Trial Court record along with a copy of order be sent back forthwith. A copy of the order be also sent to Jail Superintendent, Tihar Jail for intimation.

ILR (2014) I DELHI 781
CRL. A.

SRI NARAIN AND ANR. .....APPELLANTS

VERSUS

STATE (GOVT. OF NCT OF DELHI) .....RESPONDENT

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

CRL. A. NO. : 542/1998 DATE OF DECISION: 30.01.2014

Indian Evidence Act, 1872—Under Section 32 it is not the requirement of law that the person making the statement, must be under expectation of death.

Common intention—S.34 of IPC—It is true that the common intention could arise at the spur of moment and be formed suddenly even at the spot—However, there has to be positive evidence of the same. Particularly, where a fatal blow is given by one person and the others who are present at the spot are unarmed, there has to be some positive evidence to draw an inference of common intention—Since it is difficult to get direct evidence of the fact that any act done by the accused persons at the spot is in furtherance of the common intention of all or of some of them present at the scene of crime, the inference of common intention has necessarily to be drawn from the circumstances established by the prosecution.

Statement completely silent that appellants had exhorted to kill or to stab the deceased—Statement does not even show that the appellants were aware of co-accused carrying a knife with him—When the deceased was held by appellant SN he was given slaps and fist flows by appellant S. It was at this point

of time that co accused suddenly took out a knife and stabbed in the deceased's abdomen.

Held, no material to show that the appellants shared the common intention to inflict the knife injury by co-accused. It is not even stated that while the injuries were being inflicted, appellant S N continued to hold the deceased. Thus, the appellants' conviction under Section 302 read with Section 34 IPC cannot be sustained—Convicted for the offence punishable under section 323 read with Section 34 IPC.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Dinesh Chander Yadav, Advocate.

FOR THE RESPONDENT : Mr. Rajat Katyal, APP for the State with SI Premveer Singh, PS Sultan Puri.

RESULT: Appeal Allowed.

G.P. MITTAL, J.

1. This appeal relates to a small dispute with very serious and painful consequences wherein a mother (Sunderi Devi) lost one of her sons (Hari Prakash) whereas the other (Sri Narain) and his wife (Smt. Savita) were sentenced to imprisonment for life for committing murder of deceased Hari Prakash.

2. FIR No.512/1992 on the basis of which the appellants faced trial for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC) in Sessions Case No. 146 of 1996 was registered on the statement of deceased Hari Prakash, which the Trial Court (the Additional Sessions Judge) treated as a dying declaration. Believing the same to be true and voluntary, the ASJ relied on the same and held that the appellants shared a common intention to commit the murder of the deceased with one Late Surat Singh @ Bunty who was the brother of appellant Savita.

3. The English translation of the complaint Ex.PW2/B made by deceased Hari Prakash to SI Balbir Singh is extracted hereunder:-

"I stay at the above mentioned address. I had got my younger brother Sri Narain married around 1 + years ago at Rewari. This house has 2 rooms; in one of the rooms my younger brother Sri Narain resides with his wife Savita while I and my mother stay on the roof and the room on the ground floor has been given on rent. My brother Sri Narain and his wife Savita insisted that we should get the ground floor room vacated and stay in the same to which I replied that we shall get it vacated and stay there after I get married. On this topic only, Sri Narain's brother-in-law Surat Singh @ Bunty and his sister used to quarrel with my mother. They also fought on 24.10.1992. On 03.11.1992, at about 08:10 p.m., the dispute was again raised. My younger brother Sri Narain caught hold of me and his wife Savita gave me slaps and fist blows. Surat Singh @ Bunty, S/o Dutt Ram, R/o Bus Stand, Jhuggi took out a knife and stabbed in my abdomen and on my shoulder with an intention to kill me. Because Bunty was already in search of an opportunity to kill me and that is why he had stabbed me with a knife with an intention to kill me. My brother Sri Narain and his wife Savita had caught hold of me. They had already made a plan to take my life. Jagannath and others came to save me and my mother took me to DDU hospital. Please take legal action against them."

4. It is apparent from the MLC as also from the endorsement Ex.PW-2/C made by SI Balbir Singh on the statement Ex.PW-2/B made by deceased Hari Prakash that immediately after the incident, the deceased was removed to Deen Dayal Upadhyay (DDU) Hospital. SI Balbir Singh obtained the fitness certificate from the doctor to record the statement of the deceased. 5. In order to establish it's case, the prosecution has examined 18 witnesses. Sundari Devi, the deceased's mother who was also a witness to the occurrence died during the course of trial before her statement could be recorded. Thus, the prosecution was left to examine Jagan Nath, the solitary eye witness of the incident. However, he did not support the prosecution version that he was a witness to the occurrence. He deposed that on the day of the incident, when he returned from his duty, he came to know that a quarrel had taken place. He removed the injured Hari Prakash (now deceased) to the hospital. He was permitted to be cross-examined by the learned Additional Public Prosecutor

for the State but he stuck to his version and denied that he saw appellants Sri Narain and Savita catching hold of Hari Prakash and the third accused Surat Singh @ Bunty (since deceased) inflicting knife blows on the abdomen, shoulder and face of the deceased. Other witnesses examined by the prosecution have provided various links in the case of the prosecution to establish that the incident of stabbing took place at D-2/337, Sultan Puri, Delhi. Hari Prakash is stated to have succumbed to the injuries on 17.11.1992 (14 days after the incident). Dr. L.T.Ramani opined that the injury to abdominal viscera was sufficient to cause death in the ordinary course of nature. He stated that death was due to shock peritonitis following injury to the abdominal viscera.

6. In their examination under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.), the appellants have simply denied the incident. They have not given any account or any explanation as to how the incident actually occurred.

7. As stated earlier, the ASJ relied on the statement Ex.PW-2/B made by injured Hari Prakash (the deceased) treating it as a dying declaration. He repelled the contention raised on behalf of the appellants that the dying declaration recorded by the police officer ought not be believed as there was an opportunity to call the Magistrate, holding that Hari Prakash's death was not anticipated by PW-2 and therefore it was not a case where there was an opportunity to summon a Magistrate to record the dying declaration. Consequently, the appellants were convicted holding them constructively liable for the act of their deceased co-accused Surat Singh @ Bunty with the aid of Section 34 IPC.

8. There is twin challenge to the impugned judgment laid by the learned counsel for the appellants. First, since the deceased was not under expectation of death, statement Ex.PW-2/B could not have been taken as a dying declaration and second, there was no evidence to show that there was any pre-concert or prior meeting of minds or a pre-arranged plan to cause fatal injury on the person of the deceased between the appellants and the co-accused Surat Singh @ Bunty (since deceased). Therefore, they could not have been convicted under Section 302 with the aid of Section 34 IPC.

9. Coming to the first question, having recourse to Section 32 of the Indian Evidence Act, 1872 (the Act) we may say that it is not the

requirement of law that the person making the statement must be under expectation of death. The relevant portion of Section 32 of the Act is extracted hereunder:-

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death.- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person' s death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. (emphasis supplied)

(2) .....

(3) .....

(4) .....

(5) .....

(6) .....

(7) .....

(8) ....."

10. Thus, a bare perusal of the provisions of Section 32 of the Act discloses that for considering the circumstances of the transaction which resulted in a death, the statement made by the deceased person need not be made while he is under expectation of death.

11. In State of Haryana v. Mange Ram & Ors., (2003) 1 SCC 637, the Supreme Court highlighted the distinction on this aspect under the English Law and the Indian Law and held that the expectation of imminent death is not the requirement of Indian law and while reversing the judgment

of acquittal held thus:-

"**11.** The main reason for discarding Exhibit PQ is that when the statement was recorded by the police, the deceased was not under the shadow of death and the injuries received by him were not even considered dangerous to his life. The other reason given is delay in recording Exhibit PQ with the result that there was ample intervening time for deliberation and false implication of the accused on account of previous enmity as also the non-examination of Sant Ram by the prosecution and introduction of PW 5 as a false witness in the dying declaration. The basic infirmity committed by the High Court is in assuming that for a dying declaration to be admissible in evidence, it is necessary that the maker of the statement, at the time of making the statement, should be under the shadow of death. That is not what Section 32 of the Indian Evidence Act says. That is not the law in India. Under the Indian law, for dying declaration to be admissible in evidence, it is not necessary that the maker of the statement at the time of making the statement should be under the shadow of death and should entertain the belief that his death was imminent. The expectation of imminent death is not the requirement of law....."

12. The first contention raised is therefore bound to be rejected.

13. Coming to the second contention we may say that before the Court can convict a person constructively for the act of another, it must satisfy itself of the existence of a prior concert between them or a pre-arranged plan. It is true that the common intention could arise at the spur of moment and be formed suddenly even at the spot, however, there has to be positive evidence of the same. Particularly, where a fatal blow is given by one person and the others who are present at the spot are unarmed, there has to be some positive evidence to draw an inference of common intention.

14. In Laxmanji & Anr. v. State of Gujarat, (2008) 17 SCC 48 relying on Jai Bhagwan v. State of Haryana, (1999) 3 SCC 102, the Supreme Court held thus:-

"**11.** ..... In order to bring a case under Section 34 it is not necessary that there must be a prior conspiracy or premeditation. The common intention can be formed in the course of occurrence. To apply Section 34 apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation

of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. But if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked....."

15. Since it is difficult to get direct evidence of the fact that any act done by the accused persons at the spot is in furtherance of the common intention of all or of some of them present at the scene of crime, the inference of common intention has necessarily to be drawn from the circumstances established by the prosecution. In Brijlala Pd. Sinha v. State of Bihar, (1998) 5 SCC 699, the Supreme Court ruled that unless a common intention is established as a matter of necessary inference from the proved circumstances, the accused persons will be liable for their individual acts and not for the acts done by any other person. In para 11 of the report, the Supreme Court held as under:

"**11.** .....Unless a common intention is established as a matter of necessary inference from the proved

circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt, that a meeting of minds and a fusion of ideas had taken place amongst the different accused and in prosecution of it, the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence, there is doubt as to the involvement of a particular accused in the common intention, the benefit of doubt should be given to the said accused person...."

16. In Dharam Pal and Ors. v. State of Haryana, AIR 1978 SC 1492, the Supreme Court observed as under:

"**15.** A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends

upon the facts and circumstances of each case...."

17. In Salim @ Naju v. State, Criminal Appeal No.976/2012, decided by a Division Bench of this Court on 20.09.2013 to which one of us (G.P. Mittal, J.) was a party, the juvenile and the two appellants asked for the mobile phone from the deceased and the deceased refused to hand over the same to the accused persons. Immediately thereafter the co-accused, that is, the juvenile attacked the deceased with a knife which he took out. What provoked the juvenile to attack the deceased with the knife could not be deciphered. The Division Bench held that although it was difficult to accept the contention raised on behalf of the State that the three accused wanted to rob the deceased of the mobile phone, yet even if it was assumed that the three boys wanted to commit the robbery, there was no evidence to show common intention to cause injury on the vital part of the body of the deceased was shared by the two appellants.

18. In Surender Kumar @ Dimpy & Ors. v. State, Criminal Appeal No.702/2001, decided by a Division Bench of this Court on 19.11.2009, the facts were that the appellant Surender used to tease Usha, a neighbour. Usha made a complaint about the same to her father, two brothers and mother. All four had an altercation with appellant Surender. Surender's parents reached the spot. When the verbal dual was going on between Surender on the one hand and Rajesh, Naresh and Kishal Lal (the deceased) on the other hand, accused Ramesh Chand took Usha's brother Kishan Lal in a bear hug from behind and Surender gave him a knife blow. On facts, it was found that there was no evidence that the co-accused, that is, appellants Ramesh Chand and Ved Rani were aware of Surender carrying a knife. The Division Bench held that the co-accused Ramesh Chand and Ved Rani cannot be said to have shared common intention to inflict a knife injury on the chest of the deceased by Surender. Para 50 of the report in Surender Kumar @ Dimpy is extracted hereunder:-

"50. That apart, on the issue of common intention shared by the accused, it has to be noted that the starting point of the episode was Surender being the antagonist on the

street who teased Usha who went home and complained leading to the deceased, her two brothers and her mother going to the street to settle scores with Surender, who still remained the sole antagonist on the street. His parents joined the scene at stage two when at stage one a

verbal duel was going on between Surender on the one hand and the deceased, Rajesh, Naresh and Krishna on the other hand. What did they know about the deceased (sic Surender) carrying a knife with him? There is no evidence that they knew. Even if they caught hold of the deceased it cannot be said that they did so sharing any common intention to murder the deceased or the common intention to inflict a knife injury on the chest of the deceased by Surender."

19. In State v. Sunil @ Akash @ Sagar, Criminal L.P. 527/2011, decided on 23.01.2012 by another Division Bench of this Court, Respondent Sunil held the deceased's hands from the back and co-accused Vipin inflicted knife injuries on deceased's (Suraj) chest and then both the accused fled from the spot. In the absence of any knowledge that Vipin was armed with a knife and was bound to use it, the Division Bench opined that Sunil was rightly acquitted of the offence of murder with the aid of Section 34 IPC.

20. In **Kashmira Singh v. State of Punjab,** 1995 Supp (4) SCC 558, appellant Kashmira Singh was tried along with two others William and Sukhchain Singh for the offence under Section 302 read with Section 34 IPC. The three were alleged to be pick pocketers. As per the prosecution, on 30.05.1979, deceased Sukhbinder Singh and his brother PW-4 and uncle PW-5 had gone to Amritsar to get the tractor repaired. It was alleged that the appellant (Kashmira Singh) tried to put his hands in the shirt pocket of PW-5 who questioned him as to what was he doing. Thereupon, PW-5 called the deceased and the deceased tried to catch hold of the appellant. But in the process, the appellant and his co-accused Sukhcahin Singh caught hold of the deceased and William who happened to be there took out a knife from his pant pocket and gave a blow to the deceased on his neck. The deceased fell down and the trio ran away. The Supreme Court held that the appellants (Kashmira Singh as well as Sukhchain Singh) could not be said to have shared common intention with the co-accused William to cause injury with the knife on the vital part of the body. Allowing the appeal, the appellant Kashmira Singh and Sukhchain Singh, (who had not even preferred the appeal), were acquitted.

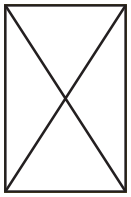
21. Coming to the facts of the instant case, it has to be borne in mind that it was the statement Ex.PW-2/B, being dying declaration, made by the deceased to the police, which formed the basis of the appellants'

conviction under Section 302 IPC with the aid of Section 34 IPC. The statement is completely silent that the appellants had exhorted Surat Singh @ Bunty to kill or to stab the deceased. The statement does not even show that the appellants were aware of co-accused Surat Singh @ Bunty carrying a knife with him. The statement reveals that when the deceased was held by appellant Sri Narain, he was given slaps and fist blows by appellant Savita. It was at this point of time that Surat Singh @ Bunty suddenly took out a knife and stabbed in the deceased's abdomen. Although, we affirm the view taken by the learned ASJ that there was no reason to disbelieve the statement Ex.PW-2/B made by the deceased to SI Balbir Singh when he was fully conscious and had no motive to falsely implicate anyone, yet there is absolutely no material to show that the appellants Sri Narain and Savita shared the common intention to inflict the knife injury by co-accused Surat Singh @ Bunty. It is not even stated that while the injuries were being inflicted, appellant Sri Narain continued to hold the deceased. Thus, the appellants' conviction under Section 302 read with Section 34 IPC cannot be sustained. The same is liable to be set aside.

22. However, from the dying declaration Ex.PW-2/B the appellants are clearly guilty of causing simple injuries with blunt object, that is, slaps and fists blows in furtherance of their common intention. They are, therefore, convicted for the offence punishable under Section 323 read with Section 34 IPC and are sentenced to undergo simple imprisonment for six months each, which they have already undergone.

23. The appellants were enlarged on bail in pursuance of the orders dated 13.01.1999 (Savita) and 03.04.2003 (Sri Narain) respectively passed by this Court. Their personal bonds and surety bonds are ordered to be discharged.

24. The appeal is allowed in above terms.



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INDIAN LAW REPORTS
DELHI SERIES
2014 (1)
VOLUME INDEX

CONTENTS
PART-II
JANUARY AND FEBRUARY, 2014

Pages

1. Comparative Table ..... J(i)-J(iv), F(i)-F(iv)

2. Statute Section ..... J(v)-J(vi)

3. Nominal Index 1-8

4. Subject Index 1-90

5. Case Law 443-790

LIST OF HON'BLE JUDGES OF DELHI HIGH COURT
During January and February, 2014

1. Hon'ble Mr. Justice N.V. Ramana Chief Justice (Till 17.02.2014)
2. Hon'ble Mr. Justice Badar Durrez Ahmed (ACJ from 17.02.14)
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6. Hon'ble Mr. Justice Sanjiv Khanna
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18. Hon'ble Mr. Justice V.K. Shali
19. Hon'ble Mr. Justice Manmohan Singh
20. Hon'ble Mr. Justice Rajiv Sahai Endlaw
21. Hon'ble Mr. Justice J.R. Midha
22. Hon'ble Mr. Justice Rajiv Shakdher
23. Hon'ble Mr. Justice Sunil Gaur
24. Hon'ble Mr. Justice Suresh Kait
25. Hon'ble Mr. Justice Valmiki J. Mehta
26. Hon'ble Mr. Justice V.K. Jain
27. Hon'ble Ms. Justice Indermeet Kaur
28. Hon'ble Mr. Justice A.K. Pathak
29. Hon'ble Ms. Justice Mukta Gupta
30. Hon'ble Mr. Justice G.P. Mittal
31. Hon'ble Mr. Justice R.V. Easwar
32. Hon'ble Ms. Justice Pratibha Rani
33. Hon'ble Ms. Justice S.P. Garg
34. Hon'ble Mr. Justice Jayant Nath
35. Hon'ble Mr. Justice Najmi Waziri
36. Hon'ble Mr. Justice Sanjeev Sachdeva
37. Hon'ble Mr. Justice Vibhu Bakhru
38. Hon'ble Mr. Justice V.K. Rao
39. Hon'ble Ms. Justice Sunita Gupta
40. Hon'ble Ms. Justice Deepa Sharma
41. Hon'ble Mr. Justice V.P. Vaish

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NOMINAL-INDEX
VOLUME-1, PART-II
JANUARY AND FEBRUARY, 2014

Pages

A. Nagrajan *v.* State 601

Abhimanyu Singh *v.* Union of India Through its Home Secretary & Ors. 237

Ahmed Sayeed *v.* State 595

Air India Ltd. *v.* Tej Shoe Exporters P. Ltd. & Anr. 484

Amardeep Dabas *v.* Union of India & Ors. 259

Amit Talwar and Ors.; Butna Devi *v.* 35

Aniket Subash Kore; Preeti Arora *v.* 758

Anil Khanna *v.* Geeta Khanna & Ors. 1

Anil Kumar Sharma *v.* Union of India & Ors. 149

Apar Industries Limited; Valvoline Cummins Limited *v.* 222

Arvind Garg *v.* Neeta Singhal 334

Asha Srivastava & Ors.; Dr. (Mrs.) Pramila Srivastava *v.* 201

Ashok Kumar Raizada *v.* The Bank of Rajasthan & Anr. 356

Asim Chaudhary *v.* Union of India and Ors. 187

Association for Development and Anr. *v.* Union of India and Ors. 539

Babu Ram *v.* Land & Building Department & Anr. 327

Babu Ram *v.* Union of India and Anr. 387

The Bank of Rajasthan & Anr.; Ashok Kumar Raizada *v.* 356

Bhupinder Narain Bhatnagar; Mahesh Singhal *v.* 340

Butna Devi *v.* Amit Talwar and Ors. 35

C.N.A. Exports Pvt. Ltd. & Ors.; Janak Datwani *v.* 637

DDA *v.* Durga Construction Co. 153

DDA; Nanak Chand *v.* 380

D.D.A. & Anr.; Seven Heaven Buildcons P. Ltd. & Anr. *v.* 301

D.D.A.; Tilak Raj Tanwar *v.* 141

Deluxe Dentelles (P) Ltd. & Anr.; Ishpinder Kochhar *v.* 721

Delhi Co-Operative Housing Finance Corporation Ltd. & Ors.; R.K. Anand and Ors. *v.* 242

Delhi Development Authority; Salim Lalvani *v.* 321

Deepak *v.* State 290

Director General Indo Tibetan Boarder Police (ITBP) Force & Others; Jasvir Singh *v.* 138

Durga Construction Co.; DDA *v.* 153

East India Hotel Ltd. and Anr. *v.* Union of India and Anr. 506

Geeta Khanna & Ors.; Anil Khanna *v.* 1

Gopi @ Hukam *v.* State 364

Govt. of NCT & Ors.; Prince Garg *v.* 763

Gulshan Sharma & Ors. *v.* State of NCT of Delhi 628

Harcharan Singh Hazooria *v.* Kulwant Singh Hazooria & Ors. 22

Hari Singh; Union of India & Anr. *v.* 443

Indraj Singh *v.* UOI and Ors. 126

Ishpinder Kochhar *v.* Deluxe Dentelles (P) Ltd. & Anr. 721

J.P. Singh; UOI & Ors. *v.* 589

Jagbir @ Jaggi *v.* State & Anr. 695

Jaipal Singh and Ors. *v.* UOI and Ors. 12

Janak Datwani *v.* C.N.A. Exports Pvt. Ltd. & Ors. 637

Jasvir Singh *v.* Director General Indo Tibetan Boarder Police (ITBP) Force & Others 138

Jauddin @ Pappu *v.* The State (NCT of Delhi) 617

Joginder Singh @ Mor *v.* State of Delhi 248

Jose Meleth *v.* UOI and Ors. 416

Kailash Chand Bansal *v.* Punjabi Bagh Club & Ors. 212

Kulwant Singh Hazooria & Ors.; Harcharan Singh Hazooria *v.* 22

Land & Building Department & Anr.; Babu Ram *v.* 327

Liyakat Ali *v.* State 773

MD. Taskeen *v.* The State (Govt. of NCT) Delhi 394

Madan Lal *v.* The State (Govt. of NCT of Delhi) 668

Mahesh Singhal *v.* Bhupinder Narain Bhatnagar 340

Mayank Pandey *v.* State & Ors. 374

Max Hospital Pitampura *v.* Medical Council of India 620

Medical Council of India; Max Hospital Pitampura *v.* 620

Nanak Chand *v.* DDA 380

Naresh Kumar Etc. *v.* State 584

National Technical Research Organization *v.* P. Kulshrestha & Ors. 675

Neeta Singhal; Arvind Garg *v.* 334

Nisha Priya Bhatia; Union of India *v.* 84

Om Parkash *v.* UOI & Ors. 144

Om Prakash *v.* Union of India & Ors. 471

P. Kulshrestha & Ors.; National Technical Research Organization *v.* 675

Dr. (Mrs.) Pramila Srivastava *v.* Asha Srivastava & Ors. 201

Pratap Singh & Ors.; Rahul Gupta *v.* 270

Preeti Arora *v.* Aniket Subash Kore 758

Prince Garg *v.* Govt. of NCT & Ors. 763

Pritam Chauhan *v.* The State (Govt. of NCT of Delhi) 130

Puneet Miglani *v.* Sufrace Finishing Equipment Co. & Ors. 119

Punjabi Bagh Club & Ors.; Kailash Chand Bansal *v.* 212

R.K. Anand and Ors. *v.* Delhi Co-Operative Housing Finance Corporation Ltd. & Ors. 242

Rahul Gupta *v.* Pratap Singh & Ors. 270

Raj Kumar *v.* State of Delhi 51

Raj Rani & Anr. *v.* Sumitra Parashar & Anr. 658

Rakesh Kumar & Anr. *v.* Saroj Marwah & Anr. 743

Ramesh Fonia *v.* UOI and Ors. 171

Rampal Singh and Anr.; State *v.* 700

Rashid *v.* State 684

Ravi Crop Science *v.* UOI & Ors. 404

Ravinder Kumar *v.* The State 612

Salim Lalvani *v.* Delhi Development Authority 321

Sanjay Kumar *v.* Union of India and Ors. 44

Saroj Marwah & Anr.; Rakesh Kumar & Anr. *v.* 743

Sehzad @ Nadeem *v.* State 768

Seven Heaven Buildcons P. Ltd. & Anr. *v.* D.D.A. & Anr. 301

Shri Satish Kumar Jhunjhunwala *v.* Union of India & Ors. 58

Sri Narain and Anr. *v.* State (Govt. of NCT of Delhi) 781

Sunil Kumar *v.* Union of India & Ors. 70

Suraj Bhan and Ors. *v.* UOI and Ors. 75

The State (NCT of Delhi); Jauddin @ Pappu *v.* 617

State (Govt. of NCT of Delhi); Sri Narain and Anr. *v.* 781

The State (Govt. of NCT) Delhi; MD. Taskeen *v.* 394

The State (Govt. of NCT of Delhi); Madan Lal *v.* 668

The State (Govt. of NCT of Delhi); Pritam Chauhan *v.* 130

The State; Ravinder Kumar *v.* 612

State; A. Nagrajan *v.* 601

State; Ahmed Sayeed *v.* 595

State; Deepak *v.* 290

State; Gopi @ Hukam *v.* 364

State of NCT of Delhi; Gulshan Sharma & Ors. *v.* 628

State & Anr.; Jagbir @ Jaggi *v.* 695

State of Delhi; Joginder Singh @ Mor *v.* 248

State of Delhi; Raj Kumar *v.* 51

State & Ors.; Mayank Pandey *v.* 374

State; Liyakat Ali *v.* 773

State; Naresh Kumar Etc. *v.* 584

Sumitra Parashar & Anr.; Raj Rani & Anr. *v.* 658

Sufrace Finishing Equipment Co. & Ors.; Puneet Miglani *v.* 119

State *v.* Rampal Singh and Anr. 700

State; Rashid *v.* 684

State; Sehzad @ Nadeem *v.* 768

Saikat Roy; Union of India & Anr. *v.* 752

Synbiotics Limited and Anr.; Union of India *v.* 569

The State of NCT of Delhi; Vishal *v.* 652

Tej Shoe Exporters P. Ltd. & Anr.; Air India Ltd. *v.* 484

Tilak Raj Tanwar *v.* D.D.A. 141

Union of India & Ors.; Amardeep Dabas *v.* 259

Union of India & Ors.; Anil Kumar Sharma *v.* 149

Union of India and Ors.; Asim Chaudhary *v.* 187

Union of India and Ors.; Association for Development and Anr. *v.* ... 539

Union of India and Anr.; Babu Ram *v.* 387

Union of India and Anr.; East India Hotel Ltd. and Anr. *v.* 506

Union of India & Anr. *v.* Hari Singh 443

Union of India *v.* Nisha Priya Bhatia 84

Union of India & Ors.; Om Prakash *v.* 471

Union of India & Anr. *v.* Saikat Roy 752

Union of India and Ors.; Sanjay Kumar *v.* 44

Union of India *v.* Synbiotics Limited and Anr. 569

Union of India & Ors.; Shri Satish Kumar Jhunjhunwala *v.* 58

Umesh Dutt Sharma *v.* Union of India & Ors. 608

Union of India & Ors.; Umesh Dutt Sharma *v.* 608

Union of India Through its Home Secretary & Ors.;
Abhimanyu Singh *v.* 237

UOI and Ors.; Indraj Singh *v.* 126

UOI & Ors. *v.* J.P. Singh 589

UOI and Ors.; Jaipal Singh and Ors. *v.* 12

UOI and Ors.; Jose Meleth *v.* 416

UOI & Ors.; Om Parkash *v.* 144

UOI and Ors.; Ramesh Fonia *v.* 171

UOI & Ors.; Ravi Crop Science *v.* 404

Union of India & Ors.; Sunil Kumar *v.* 70

UOI and Ors.; Suraj Bhan and Ors. *v.* 75

Valvoline Cummins Limited *v.* Apar Industries Limited 222

Vishal *v.* The State of NCT of Delhi 652

SUBJECT-INDEX
VOLUME-1, PART-II
JANUARY AND FEBRUARY, 2014

ARBITRATION & CONCILIATION ACT, 1996—S. 34-Objections-refiling-condonation of delay-166 days—S. 151 CPC—Inherent powers—Delhi High Court Rule—Volume 5 Chapter 1-A—Rule 5-an Application for condonation of delay of 166 days in refiling the objection moved under S. 151 CPC before single judge-dismissed—FAO preferred—Respondent contended-no jurisdiction to condone the delay beyond the period of 3 months and 30 days-not permitted in the first instance to file objection-cannot be permitted at the second instance-consequently a refiling done after prescribed statutory period-no jurisdiction to condone the delay beyond the period of 30 days—Held—The Court has jurisdiction to condone delay in refiling even if the period extends beyond the time specified under the Act-however-object of arbitration and conciliation act is to ensure that the arbitration proceedings are concluded expeditiously-jurisdiction not be exercised-delay in filing frustrate the object of the Act-the applicant to satisfy-pursued the matter diligently and delays beyond control and unavoidable-inordinate delay of 166 days-appellant not able to offer satisfactory explanation-liberal approach not called for-appeal dismissed.

DDA v. *Durga Construction Co.* *153*

ARMS ACT, 1950—Section 25 and 27—Possession and use of arms—Criminal Procedure Code, 1973—Section 357—Compensation to victim—Appellant/accused fired at the complainant PW6—Missed—Hit another person and caused injuries—Shot fired again—Hit PW6 and caused injuries—Appellants fled the spot—Injured removed to Hospital—DD No. 36 dated 08.06.1995 recorded—MLCs collected—Injuries to complainant opined to be dangerous and described as gunshot injuries—Injured opined to be grievous—On the Statement of complainant FIR No. 339/95 PS Janakpuri

registered—Accused persons named therein—Appellant/accused arrested—Made disclosure statements—Country made pistols recovered—Sent for expert examination to FSL—Appellant/accused person alongwith Ashwani and Sanjiv Sethi arrested and charge Sheeted—Accused persons Ashwani and Sanjiv Sethi discharged—Charges against the appellants/accused persons framed—prosecution examined 22 witnesses—Statement of appellants u/s. 313 Cr. P.C. recorded—Denied complicity in crime and pleaded false implication—Appellants convicted for offences u/s. 307/34 IPC and u/s. 25/27 Arms Act—Sentenced to undergo imprisonment and fine—Aggrieved appellants preferred appeals—Contended—Witnesses PW7 and PW19 not present the spot and falsely introduced as eye witnesses—Lacked creditability being interested witnesses—Complainant is B.C. of the area—Involved in a number for criminal cases—Recoveries are doubtful—Pistols recovered not connected/linked with the crime—Nature of injuries suffered by PW6 not proved—Other injured withheld and not produced—Investigation is tainted and unfair—Ld. APP contended—Conviction based upon fair appraisal of evidence—The other injured could not be traced and examined—Held—Conduct of PW7 and PW19 unnatural and unreasonable—presence at the spot highly suspicious—Complainant PW6 proved the version given to police at first instance without major variations—Other injured not traceable—No adverse inference can be drawn against the prosecution—Country made pistols recovered from the appellants— Shot fired from one of the pistols—Appellants arrived at the scene having made preparation, participated by firing and facilitated commission of crime—shared common intention—injury to PW6 caused on a vital organ—Injuries dangerous in nature—Injuries not self inflicted or accidental in nature—No variance and conflict between ocular and medical evidence—Involvement in the incident established beyond reasonable doubt—Conviction sustained—Substantive sentences modified—Compensation awarded—Appeal disposed of.

Joginder Singh @ Mor v. *State of Delhi* *248*

— R. 27—The complainant did not offer any explanation as to why the accused apprehended at the spot with a crime weapon, was not handed over to PCR officials who allegedly arrived at the spot after about 20 minutes of the occurrence—Despite police remand, the IO was unable to ascertain the identity of the appellant's associates and apprehend them. The robbed cash could not be recovered—The exact location where occurrence took place could not be ascertained—In his Court statement, the complainant did not attribute any specific role to the each assailants and in vague terms disclosed that the 'four individuals' pushed him and asked him to keep hands up on the pretext of rush in the bus. He vaguely stated that they 'forcibly' took out Rs. 16,500/- from the inner pocket of his wearing pant. He did not describe as to what force was used and in what manner the currency lying in his inner pocket were taken out by any specific individual. No specific and definite role was attributed to the appellant in depriving him of cash from his pocket. The appellant was not apprehended while taking out the currency notes from the pocket of the complainant. It is unclear as to when and at what place the bus stopped and the four assailants alighted from—The bus. Driver and conductor or any other passenger in the bus was not associated at the time of conducting search of the accused. After his apprehension, no instrument to pick-pocket was recovered from his possession.

— The appellant who was allegedly armed with a deadly weapon, did not use it to avoid his apprehension. No injuries with knife were inflicted to the complainant or the public giving beating to him—Possibility of mistaken identity cannot be ruled out. Sole testimony of the complainant is not safe to convict the appellant in the absence of any corroboration in the light of various discrepancies and infirmities in the prosecution case—Delay in lodging the FIR has not been explained.

— None of the offenders used any deadly weapon to overawe or scare the complainant. The appellant was not found in possession of any robbed/stolen article and did not use knife

(a) in order to the committing of the theft; or (b) in committing the theft; or (c) in carrying away or attempting to carry away property obtained by theft, to attract Section 390 IPC when theft becomes robbery under above noted circumstances. The knife was allegedly taken out by the appellant when he was being chased to avoid his apprehension—Appeal allowed—Conviction and sentence set aside.

Vishal v. *The State of NCT of Delhi* *652*

CCS (CCA) RULES, 1965—Rule 14: Order of the CAT holding that there was unexplained delay in initiating disciplinary proceedings against Respondent, challenged in the present proceedings. Held—The Tribunal has noted that the Petitioner have not been able to adequately explain the inordinate delay in initiation of the charge sheet which would cause prejudice to the defence of the Respondent. The Petitioners have not been able to place explanation for the delay which has ensued before us as well. Reliance placed on UOI v. Hari Singh, wherein same issues were raised, held that Petitioners have not been able to place any explanation for delay—Other circumstances including the fact that Respondent was promoted, the order quashing penalty were accepted by the Petitioner as well as the fact the CBI found no culpability if the Respondent also lend substance to the case of Respondent. No merit in the challenge to the order of the CAT—Costs of Rs. 25,000. Petition Dismissed.

UOI & Ors. v. *J.P. Singh* *589*

CARRIAGE BY AIR ACT, 1972—Ist Schedule—R. 22—Tej shoes (respondent herein) had sued air India (appellant herein) for value of loss of its goods, wrongfully released to the consignee- Respondents hired the services of appellant for transporting a consignment worth DM (Deutsche mark) 1,50,152 by Airway Bill No 09857645545 dated 21.08.09-named consignee under the airway bill was a bank - appellant-no declaration of the amount if consignment for the carrier in the said airway bill-appellant entrusted the goods to Lufthansa Airways second respondent) at Frankfurt- 30.08.1990,

ultimate consignee-genuine mistake and agreed to compensate appellant in terms of the maximum limited liability, i.e. US $ 20per kg- second respondent authorized appellant to settle the claims of respondent- in accordance with the terms of the contract of carriage, i.e. US $ 20 per kg—Not satisfied with the compensation- respondent filed a complaint under section 21 read with section 12 of the Consumer Protection Act, 1986 before the national Consumer Dispute Redressal Commission ("commission")- the Commission ordered appellant to pay respondent the equivalent of US $20 per kg- Respondent filed a special leave petition against that order of the Commission-later dismissed as withdrawn- on 02.11.1993, respondent-after gap of more than three years from the cause of action filed a suit for recovery-appellant contending that the claim was barred by limitation- stipulated by the 1972 Act- paid its liability @ US $ 20 per kg-vide order of the commission- LD. Single judge vide order dated 19.10.2006- decreed a sum of Rs 20,81,372 in favors of respondent-with 10% per suit, pendent lite and future interest, per annum-Hence, the present appeal. Held: under Rule 22 of the first schedule and second schedule of the Act incorporating the Hague protocol and earlier Warsaw Convention-restricts the liability of the carrier to a maximum of US $ 20 per kg- limits of liability prescribed in the Convention are absolute- Respondent wanted appellant to assume liability for an amount exceeding US $ 20-declare such amount for carriage and pay the applicable valuation charge—Interpretation which allows the consignor or consignee to recover more than the prescribed limits, on a gateway for unlimited liability under diverse and unforeseen conditions rendering unviable the business of air carriage- Had parliament intended that courts can exceed the liability limits imposed by statute for loss of goods, the structure of clause 22 would have been entirely different—The period of limitation prescribed under Articles 29 (of the first schedule) and 30 (of the second schedule) of the Act are contrary stipulation-which amount to period of limitation different from the period under the Limitation Act (section 29(2))- stipulations under the 1972 Act are under a special statute and are absolute in

terms- prevail over the general provisions of the Limitation Act.

Air India Ltd. v. *Tej Shoe Exporters P. Ltd. & Anr.* *484*

CODE OF CIVIL PROCEDURE, 1908—S. 1908—S. 9—Suit—Order XII Rule 6—Judgment on admission—Admission of fact clear and unambiguous-admission on law not required-not mandatory to act and pass judgment-an application for judgment against D4 tenant-admission in written statement-D4 admitted plaintiff and D1 to D3 co-sharer of the suit property-D4 inducted into the suit property as tenant by D1 to D3 at the back of the plaintiff-lease executed by D1 to D3 not valid D4 liable to vacate the premises—Contended right of tenancy could not be raised an vague plea of settlement-or a contrary plea of being co-sharer-pleadings insufficient for raising an issue—D4 contended-admissions as alleged not in the written statement-fact stated in the preliminary objection without prejudice-do not constitute reply on merit-verification averment in the preliminary objections-believed to be true-legal information received-D2 to WS division of property took place-being a disputed question could not be decided at this stage—Court Observed-distribution of equal portion to each co-parcner being in possession of each for a long time-accepted-enjoyed by them without any objection-hindrance-denial-obstruction-amounts to division/partition—Held- settled law if a co-parcner is in exclusive possession of any portion of undivided piece of land or property not exceeding his or her share-her share in possession cannot be disturbed until partition-transferee would also have the right and could not be dispossessed by other co-sharer until partition-the property ancestral-D1 to D3 have right in the said property-left behind by Sh. Ajay Khanna husband of D2 and also through WILL the preliminary objections based on legal advise-not replying on merit where the parties require to plead fact specifically-preliminary objection-contrary plea not amount to admission-further Held-for judgment on admission to be pronounced at any stage admission to be of fact clear and unambiguous-

admissions not required of questions of law-however not mandatory for the Court to act and pass judgment the facts and circumstances of each case have to be taken note of plaintiff himself filed lease agreement—Therefore, it cannot be said that the averment in the written statement vague resulting in passing of defence in favour of the plaintiff—Application dismissed.

Anil Khanna v. *Geeta Khanna & Ors.* *1*

— S. 9—Suit—Order VI Rule 16—Striking of the pleadings—S. 151—Inherent Power—Suit for declaration of lease as null and void-mandatory injunction-alienating the property-paint defamatory and malicious averment-matrimonial relation between his deceased brother and D1 wife of Mr. Ajay Khanna casting aspersions on the paternity of party-averments not relevant-would embarrass the fair trial-liable to be struck off Pleading directed to be struck off-amended plaint be filed.

Anil Khanna v. *Geeta Khanna & Ors.* *1*

— Order XIV, Rule 15—Application for deletion of issue. Suit praying for partition of the suit property in equal shares as per the Will of the late mother of the parties made in 1996. In the Written Statement Defendant have challenged Plaintiff's locus standi to file the present suit—Late mother of the parties, who was admittedly absolute owner of the property, had alienated the suit property during her life time vide gift deed to the answering Defendants—Therefore, alleged Will is irrelevant, since property was alienated before the Will came into operations. Plaintiff has disputed the validity of the gift deeds by which Defendants claim absolute ownership of the suit property—Plaintiff submits that in view of Defendants admitting to the Will, Plaintiff was no longer required to prove validity of the Will, therefore the relevant issues be modified accordingly. Held: There is no admission about the genuineness of the Will by the Defendants—The Defendants being absolute owners of the suit property, the plaintiff cannot claim partition thereof or claim any right, or little therein—To base a claim on a will, Plaintiff has to prove genuineness

of the Will, apart from existence. Admission about making a Will does not amount to admission of due execution of the Will. Therefore, Application dismissed.

Harcharan Singh Hazooria v. *Kulwant Singh Hazooria & Ors.* *22*

— Order VI—Rule 17, Order VIII, Rule 6A: Whether it is permissible for the Defendant to move an application for amendment of Written Statement after framing of issues and prior to evidence being led. Plaintiff filed the present suit seeking a declaration that sale deed entered into between the parties be declared null and void due to non payment of sale consideration along with a decree of permanent injunction—Alternatively prayed that Defendant be directed to pay the amount of consideration with damages—Subsequently, Plaintiff amended the plaint deleting the alternative prayer—Thereon the present application was filed by the Defendant/applicants to amend WS and file counter claim to incorporate the alternative prayer—Contended that amendment to WS is necessitated by the Plaintiff withdrawing alternative relief. Plaintiff contends that as per proviso to Order VI Rule 17, no application for amendment shall be allowed after commencement of trial—Current application being moved by the Defendants to overcome adverse orders whereby the Plaintiff's application for amendment of Plaint was allowed—Further, present application filed beyond period of limitation specified in Order VIII Rule 6A. Held: As Per O. 6 R. 17 CPC no application for the amendment shall be allowed after the trial has commenced unless the Court comes to a conclusion that inspite of due diligence the party could not have raised the matter before the commencement of trial. Leave to amend WS cannot be denied on the ground that trial had commenced—Counter claim necessitated by amendment of plaint by the Plaintiff—Period of limitation accrues from date of cause of action, i.e. when the Plaintiff amended the plaint—Present counter claim is within limitation—Defendant permitted to amend WS and file counter claim.

Butna Devi v. *Amit Talwar and Ors.* *35*

— Order 37, Rule 3(5): Suit filed by the Plaintiff u/o 37 for recovery of commission earned for the work done by Plaintiff, along with interest—Application filed by the Defendant u/O 37 R 3(5) seeking unconditional leave to defend. Plaintiff entered into an agreement with the Defendants for procuring orders for various products—As per the agreement Plaintiff was earning variable commissions on the orders secured—Plaintiff claims that due to Plaintiff's diligence, Defendants agreed to an enhanced flat commission rate of 10% verbally—However, thereafter commission was curtailed—Hence, the present suit. Defendants contend that for enforcement of verbal agreement, no suit under Order 37 CPC will lie—Plaintiff has filed no documents to verify the claim of the Plaintiff—Since case of plaintiff is not based on determined liability, Defendants/applicants are entitled to leave to defend, hence the instant application. Held: Agreement of enhancement of commission verbal, thus provisions of Order 37 Rule 1(2)(b) not applicable to the present case—In view of liability not being acknowledged, nor claim being in pursuance of a written agreement, Plaintiff has not made out a case for trial u/O 37, CPC—Defendants granted leave to defend.

Puneet Miglani v. *Sufrace Finishing Equipment Co. & Ors.* *119*

— First Appeal—Arbitration & Conciliation Act, 1996—S. 34-Objections-refiling-condonation of delay-166 days—S. 151 CPC—Inherent powers—Delhi High Court Rule—Volume 5 Chapter 1-A—Rule 5-an Application for condonation of delay of 166 days in refiling the objection moved under S. 151 CPC before single judge-dismissed—FAO preferred—Respondent contended-no jurisdiction to condone the delay beyond the period of 3 months and 30 days-not permitted in the first instance to file objection-cannot be permitted at the second instance-consequently a refiling done after prescribed statutory period-no jurisdiction to condone the delay beyond the period of 30 days—Held—The Court has jurisdiction to condone delay in refiling even if the period extends beyond the time

specified under the Act-however-object of arbitration and conciliation act is to ensure that the arbitration proceedings are concluded expeditiously-jurisdiction not be exercised-delay in filing frustrate the object of the Act-the applicant to satisfy-pursued the matter diligently and delays beyond control and unavoidable-inordinate delay of 166 days-appellant not able to offer satisfactory explanation-liberal approach not called for-appeal dismissed.

DDA v. *Durga Construction Co.* *153*

— Section 24 Scope—Consolidation of suits—Substantial & sufficient similarity of issues arising in two different suits—Eligible for consolidation—Probate petition and suit involve common issues and witnesses—Interest of parties is a factor to be considered for consolidation of two suit—Deposition of common witnesses is a factor in considering consolidation—No legal bar in trying both of them together.

Dr. (Mrs.) Pramila Srivastava v. *Asha Srivastava & Ors.* *201*

— Order XXXIX Rule 1 & 2—Injunction order sought—Balance of convenience is also not in favour of the plaintiff—Plaintiff failed to make out prima facie case—Injunction, if granted would tantamount to decreeing of suit—Hence denied.

Kailash Chand Bansal v. *Punjabi Bagh Club & Ors.* *212*

— Suit-S.9—Order XXXIX Rule 1 and 2—ad-interim injunction-trade mark Act, 1999—Trade mark-infringment of-identical-deceptively similar- Passing of—Intellectual property Appellate Board (IPAB)—Plaintiff having registered trade mark '4T PREMIUM'—India's first in growing lubricant market and producer of quality branded automotive/industrial product—Product available at more than 50,000 retail counters across India—Product imported under various famous trade marks-4T PREMIUM used extensively and continuously—uninterruptedly, since year 2003—Defendant adopted trade mark with mala fide intention—liable to be injuncted from

using 4T PREMIUM—Defendant contended—plaintiff could not claim exclusive right either in the word '4T' OR '4T PREMIUM'—word '4T' denoted 4 strokes engine—word PREMIUM a laudatory word—no one can claim right to use the word exclusively—defendant its trademark 'AGIP' WITH 4T PREMIUM—packing totally different from the plaintiffs—no infringement or passing of. The passing of the defendant's goods as that of plaintiff—defendant never used 4T PRIMIUM separately- used the same with their trade name AGIP 4T PREMIUM—defendant already filed an application for cancellation of plaintiff trade mark before IPAB—Held—when the two marks not identical the plaintiff have to establish-mark used by the defendant so nearly resemble the plaintiff's trademark as it likely to mislead to a false conclusion in relation to good in respect to which it is registered—the defendant using word AGIP and its logo alongwith 4T PREMIUM and not simplicitor 4T PREMIUM—Even the plaintiff using the word 'VOLVOLINE' with 4T PREMIUM—application dismissed.

Valvoline Cummins Limited v. *Apar Industries Limited* *222*

— S, 9—Suit—Specific Relief Act, 1963—Suit for declaration and mandatory injunction—Order 1 Rule X CPC—Impleadment—proper party-Necessary party—First Appeal—S. 100 A—No further appeal in certain cases—Delhi High Court Act, 1966—S. 10—Appeal to Division Bench—Delhi High Court Rules—Chapter II of OS Rules—Rule 4—Letter Patent Appeal—preliminary objection—Maintainability—Appellant filed a suit seeking decree of declaration-possession and mandatory injunction in favour of plaintiff-Defendant no. R1 filed an application under order 1 Rule 10 (2) of CPC for impleadment—Application not opposed by R2 DDA—Plaintiff opposed the application R1 neither necessary party nor proper party to the proceedings-Contended-R1 claiming title to the half share of the suit property—Dispute could not be made to the subject matter of the suit—Appellant also resisted the application on the ground that the appellant was *dominous*

litus—Registrar accepted the contention of the appellant and rejected the application filed by R1 by order dated 14.12.2010—Preferred an appeal under Rules 4 of Chapter-II of original side Rules to single Judge-allowed-—Preferred LPA—Preliminary objection-maintainability-whether appeal barred under S. 100 A of CPC—Order passed by single Judge in exercise of his power—Provided for an appeal against the order made by the Registrar under Rule 3 of Chapter-II—Respondent contended—Appeal under S. 10 of Delhi High Court Act against the Judgment of Single Judge lies to Division Bench only-since the present impugned order not passed in exercise of original jurisdiction—Appeal under S. 10 of the Act would not be available in terms of Rule 1 of Chapter-II of Original Side Rules—Court observed—The suit had to be tried and heard by single judge—Registrar acts in certain matters as a delegatee of singe Judge—Rule 4 of Chapter-II of Original Side Rules provides an appeal against an order of the Registrar-in effect provided an appeal to the delegator from the order passed by delegatee in exercise of his power and discharge of functioning delegated to the delegate—Thus single Judge while hearing an appeal under Rule 4 in fact examines order passed in discharge of function of single Judge and in exercise of same power vested in the single judge under ordinary original civil jurisdiction—In view of it—An authority cannot sit in appeal against an order passed in exercise of his jurisdiction—Albeit by its delegate—The power exercised by single judge under Rule 4—The power to review-Re-Examine order passed by the registrar—The expression 'appeal' in Rule 4 misnomer—Original side rules have been framed in respect of practice and procedure in exercise of the ordinary original civil jurisdiction explicit in the said rule—Same also indicate that the rule contained in Chapter—II of the Original Side Rules relates to original civil jurisdiction—Entire scheme considered in this perspective—Apparent—Single judge exercises ordinarily original civil jurisdiction even while considering a challenge under Rule-4—an appeal under S. 10 would lie from the judgement of single Judge to Division Bench—S. 100 A of CPC is not applicable as the same cannot be termed as

appellate power—Preliminary objection regarding Maintainability of the appeal rejected.

Rahul Gupta v. *Pratap Singh & Ors.* *270*

— Order VI Rules 17—Party proposing to make amendment—Application for amendment of pleadings must clearly state what is proposed to be omitted, altered, substituted or added to the original pleadings—Amendment cannot be allowed if it tantamount to changing the whole plaint with a new plaint—Complete replacement of old plaint with a completely new plaint is not permitted under Order VI Rule 17.

Arvind Garg v. *Neeta Singhal*..... *334*

— Order XXI Rule 50(2)—Section 32 (2) of Partnership Act, 1932—Contract dated 15.10.1986 entered into between M/s Binode Engineering & Mechanical Works ("the judgment-debtor firm") and the Union of India—Certain disputes in the course of the performance of the contract matter were referred to arbitration in 1996 (through a letter dated 21.12.1996)—Award was passed on 25.03.1998 in favour of the Union of India—Award was then made a rule of Court under Section 17 of the Arbitration Act, 1940 in CS (OS) 815A/1998 on 15.03.2004 judgment debtor firm became non-functional due to differences between the partners—Union of India sought to initiate execution proceedings against petitioner—Admitted partner of the firm at the time of signing of the contract in Execution Case No. 119/2008 case was then transferred to the High Court of Calcutta by an order dated 17.04.2007 to facilitate execution against the property of petitioner—Petitioner pleaded that the proceedings against him were not maintainable—Recovery could only be against the firm and not against its partners—Application, EA No. 471/2008, for stay of the decree under Order XXI Rule 26 of the CPC by the judgment-debtor firm was also rejected by this Hon'ble Court—Union of India filed an application under Order XXI Rule 50(2) CPC, before a single Judge of this Court to satisfy the decree against properties of petitioner—The Single Judge granted leave under Order XXI Rule 50(2), leading to the

present appeal. Held: Court which passed the decree, i.e. the Court which made the arbitral award in question a rule of Court under Section 17 of the Arbitration Act, 1940—Execution proceedings the matter was transferred under Section 39, CPC—Assets sought to be utilized in the execution of the decree situated in the jurisdiction of the Calcutta High Court—Appellant made three fold suggestions first, appellant was neither provided notice of the underlying suit or of the execution proceedings, until proceedings reached the Calcutta High Court-second, words referred to in clause (b) or clause (c) of sub-rule (1) of Rule 50 of Order XXI are to be read in contradistinction to the persons, i.e. partners, referred to in clauses (b) and (c)-third, after transferring the decree, the transferor court, i.e. this Court, has no jurisdiction in respect of the proceedings Sub-rule (2), if read as against sub-rule 1 does not refer to partners of the firm but to third persons unappealing—Clauses (b) and (c) of sub-rule 1 do not exhaust all categories of partners that may be proceeded against—Such that sub-rule (2) only deals with thirds persons—Core of Rule 50-individual partners not involved in the proceedings-in which case they would be covered under clauses (b) or (c) of sub-rule 1-their assets may still be utilized in the execution proceedings Court which passed the decree grants leave after hearing the individual on the question of his liability vis-a-vis his relationship with firm finally, Court which passed the decree in this was this Court which made the arbitral award into a rule of Court—No distinction can be read into Rule 50(2) between the bench seized of the execution proceedings and that which heard the matter on the original side—Transferring the decree, the transferor Court does not retain the power to grant leave, is contrary to the express terms of Section 42 transferee Court does not obtain the power to grant leave to execute such decree against any person other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI retiring partner discharged from any liability to a third party for acts of the firm done before his retirement by an agreement made by him with third party and the partners of the reconstituted

firm—Such agreement may also be implied by a course of dealing after he had knowledge of the retirement.

Shri Satish Kumar Jhunjhunwala v. *Union of India & Ors.* *58*

— Order 6 Rule 17— Plaintiff filed suit seeking relief of declaration—He also moved an application U/o 6 Rule 17 CPC to amend the plaint by seeking to delete paragraph 20—Defendants objected to amendment and urged plaintiff, by way of application, was trying to withdraw admission made in plaint, thus, application not maintainable.

Held:- An admission cannot be resiled from but in a given case it may be explained or clarified.

Janak Datwani v. *C.N.A. Exports Pvt. Ltd. & Ors.* *637*

— Plaintiff filed suit seeking relief of possession, recovery of damages mesne profits, permanent and mandatory injunction—After filing evidence of PW1 by way of affidavit, plaintiff moved application to seek amendment and to add relief praying for declaration—Defendant challenged application and urged application was barred as trial had commenced.

Held:- Commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments.

Raj Rani & Anr. v. *Sumitra Parashar & Anr.* *658*

— Delhi Rent Control Act, 1958—Section 6A and 8—Plaintiff filed suit seeking decree of possession and other consequential reliefs—He also moved application U/o 12 Rule 6 of Code praying for judgment on admissions—According to defendants, suit not maintainable as they are protected tenants under Delhi Rent Control Act and alleged notice sent by

plaintiff, does not terminate tenancy—As per plaintiff, Section 6 of Act not applicable as defendants paid the increased rent according to agreement to lease executed between parties.

Held:- Statutory provisions do not contain any prohibition prohibiting an agreement between landlord and tenant whereby they have agreed to increase the rent after periodic intervals on their own. Enhancement of rent by consent not barred U/s 6A and 8 of the Delhi Rent control Act.

Ishpinder Kochhar v. *Deluxe Dentelles (P) Ltd. & Anr.* *721*

— Order VII Rule 14—Indian Evidence Act, 1872—Section 65B—Petitioner challenged impugned order disallowing petitioner's application to bring on record print outs of certain e-mails allegedly exchanged between parties—Plea taken, proceedings pending before Trial Court are in context of a socially beneficial legislation concerning marital relationship between parties—Courts would always take a view which would advance cause of justice and a strict interpretation which would cause irreparable loss and disadvantage to wife ought not to be taken—Per contra plea taken, law requires that documents relied upon are required to be filed at appropriate stage i.e. along with written statement which means that they have to be filed before replication is filed or otherwise with permission of Court at time of framing of issues but definitely before evidence starts—Held—Apart from reason that application for bringing on record print outs of e-mails had been occasioned only on account of change of counsel, no other reason has been provided—In opinion of this Court, that itself would not be sufficient reason in any case—To seek indulgence of a Court to accept additional documents under Order VIII Rule 14, party seeking to produce documents must satisfy Court that said documents were earlier not within part's knowledge or could not be produced at appropriate time in spite of due diligence—These documents are not new and were evidently in knowledge of petitioner wife prior to filing of divorce petition—Permitting same to be brought on record

now would have its own cascading effect in form of amendment of written statement/reply, a rejoinder thereto issues have framed fresh evidence to be led, etc.—This would unnecessarily delay proceedings that CPC spells out for equitable framework and schedule with which parties have to comply and Courts ought to conduct proceedings before it—For aforesaid reasons, this Court is not persuaded to interfere with impugned order.

Preeti Arora v. *Aniket Subash Kore* *758*

COMMISSION FOR PROTECTION OF CHILD RIGHTS ACT, 2005—Section 3—petitioners challenged appointment of second and third respondent as members of National Commission for Protection of child Right—plea taken, selection procedure was not transparent or fair but was arbitrary—Those with qualifications and experience better than private respondents were kept out of consideration—UOI never adopted any fair method of inviting application—per contra plea taken, court should not substitute its opinion for that of UOI which took into consideration all relevant materials objectively, fairly and in a bona fide manner while selecting private respondents as members of NCPCR—In absence of clear violation of statutory provisions and regulations laying down procedure for appointment, High Court has no jurisdiction even to issue a writ of quo warranto—Court should be circumspect in conducting a "merit" review which would result in court substituting its opinion for wisdom of statutory designated authority i.e. central government—Held—This court is to be guided by decision passed in earlier writ petition filed by petitioners and confine its enquiry as to whether appointments challenged are contrary to statute insofar as private respondents do not possess any qualification or do not fulfill any eligibility condition; procedurally illegal or irregular; not in bona fide exercise of power—Previous litigation was initiated at behest of first petitioner association and there being no dispute that second petitioner is association concerned and involved with child right issues with field experience for 13 years, court is of opinion that present

petition is maintaintable as a public interest litigation—Mere circumstance that president of first petitioner was a candidate who had applied for appointment, would not bar scrutiny by court, especially in view of fact that second petitioner is a party to present proceeding—UoI did not publicly make known vacancy position in Commission—use of terms like "ability" "standing" "experience" and "eminence" highlights parliamentary intention that those of proven merit and track record, and singularly distinguished only should be chosen to man NCPCR—This court refrains from rendering any adverse finding with respect to Mr. Tikoo's candidature for reason that though materials regarding his ability, standing and eminence are scanty, there is something to indicate his eligibility vis-à-vis qualification—selection process nowhere discusses, even in the barest minimum manner, strengths and weaknesses of short listed candidates, particularly where more than one applicant is listed under same head—What ultimately persuaded Committee to drop certain names, and accept names of those finally appointed, does not appear from record made available to court—Not is there any light shed in affidavit filed by UOI to indicate of relative qualification and experience of at least short listed candidates was considered, and whether some kind of ranking, marking or evaluating system was adopted—Having short listed many candidates, some whom were retained, there are complete lack of reasons for dropping names of other—Insistence for reasons is not to probe merits of decision to drop candidate's names, but as to what really struck Committee at stage and persuaded them to drop their candidature- Court is wary of commenting on choice of Committee selecting third respondent- At least he possesses educational qualifications, relevant to field (sociology and social work) and has placed on record some certificate in this regard—But in case of Dr. Dube, conspicuous inconsistencies in respect of his claim regarding educational qualifications were glossed over; his CV does not pin point specifically any relevant experience in relevant discipline or field- his final selection and appointment can be justified due to "absence of intellectual objectivity"- selection and

appointment of second respondent being contrary to mandate of section 3(2)(b) of Act, is quashed.

Association for Development and Anr. v. *Union of India and Ors.* *539*

CODE OF CRIMINAL PROCEDURE, 1973—S. 482—Inherent Power-Quashing of FIR—Indian Penal Code—S. 376—Rape-compromise-living as husband and wife-charge sheet already filed—Petitioner and prosecutrix R2-working in the same branch of a private company—Started conversing on the telephone—Prosecutrix visiting petitioner at his residence-staying with him occasionally had developed physical relation refused to marry her—Prosecutrix made complaint—Petitioner forced himself upon her and raped her—FIR under S. 376 IPC registered—Petitioner arrested-reached at understanding-married prosecutrix—Petition under S. 482 filed for quashing of FIR-compromised-petitioner and R2 living happily as husband and wife-marriage certificate photographs-placed on record-prosecutrix not to pursue complaint-prosecution opposed the quashing-offence not compoundable—Held—While considering quashing of FIR under S. 482 Cr. PC High Court must have due regard to the nature and gravity of crime-heinous and serious offences of mental depravity or offences like murder-rape-dacoity etc.-not fittingly quashed-even though the victim and victim family and offenders have settled the dispute-such offences not private in nature and have serious impact on society—Petition dismissed.

Mayank Pandey v. *State & Ors.* *374*

— Section 357—Compensation to victim—Appellant/accused fired at the complainant PW6—Missed—Hit another person and caused injuries—Shot fired again—Hit PW6 and caused injuries—Appellants fled the spot—Injured removed to Hospital—DD No. 36 dated 08.06.1995 recorded—MLCs collected—Injuries to complainant opined to be dangerous and described as gunshot injuries—Injured opined to be grievous—On the Statement of complainant FIR No. 339/95

PS Janakpuri registered—Accused persons named therein—Appellant/accused arrested—Made disclosure statements—Country made pistols recovered—Sent for expert examination to FSL—Appellant/accused person alongwith Ashwani and Sanjiv Sethi arrested and charge Sheeted—Accused persons Ashwani and Sanjiv Sethi discharged—Charges against the appellants/accused persons framed—prosecution examined 22 witnesses—Statement of appellants u/s. 313 Cr. P.C. recorded—Denied complicity in crime and pleaded false implication—Appellants convicted for offences u/s. 307/34 IPC and u/s. 25/27 Arms Act—Sentenced to undergo imprisonment and fine—Aggrieved appellants preferred appeals—Contended—Witnesses PW7 and PW19 not present the spot and falsely introduced as eye witnesses—Lacked creditability being interested witnesses—Complainant is B.C. of the area—Involved in a number for criminal cases—Recoveries are doubtful—Pistols recovered not connected/linked with the crime—Nature of injuries suffered by PW6 not proved—Other injured withheld and not produced—Investigation is tainted and unfair—Ld. APP contended—Conviction based upon fair appraisal of evidence—The other injured could not be traced and examined—Held—Conduct of PW7 and PW19 unnatural and unreasonable—presence at the spot highly suspicious—Complainant PW6 proved the version given to police at first instance without major variations—Other injured not traceable—No adverse inference can be drawn against the prosecution—Country made pistols recovered from the appellants— Shot fired from one of the pistols—Appellants arrived at the scene having made preparation, participated by firing and facilitated commission of crime—shared common intention—injury to PW6 caused on a vital organ—Injuries dangerous in nature—Injuries not self inflicted or accidental in nature—No variance and conflict between ocular and medical evidence—Involvement in the incident established beyond reasonable doubt—Conviction sustained—Substantive sentences modified—Compensation awarded—Appeal disposed of.

Joginder Singh @ Mor v. *State of Delhi* *248*

CONSTITUTION OF INDIA, 1950—Article 226—Petitioners seek quashing of Signals whereby benefit to Petitioners under ACP scheme has been denied on the grounds that if they have qualified SUOCC Course after completion of 24 years of service then the benefit can be given only from the date of completion of the course and not from completion of 24 years of regular service. Impugned Signals in contravention to the letter issued by the Directorate General in consultation with Ministry of Home Affairs. Respondent cannot be allowed to take advantage of their own wrong. Petitioners did not undertake said course since the Respondents did not detail the Petitioners to undergo the same. Held- It is the responsibility of the respondent to detail the individual for the pre promotional cadre course. Having not done so, the respondents cannot be allowed to withhold the benefits entitled to an individual for their own faults. Petitioners granted financial upgradation from date of completion of 24 years of service, and granted arrears. Writ allowed.

Jaipal Singh and Ors. v. *UOI and Ors.* *12*

— Article 226—Rule 9—Research & Analysis wing (Recruitment, Cadre & Service) Rules, 1975 ("Rules")—Respondent was Class I Executive cadre officer in the Cabinet Secretariat [also known as the R&AW]—Respondent alleged sexual harassment at workplace sometime in 2007—Constitution of two Committees reports of the Committee (dated 19.05.2008 and 30.09.2008), although not direct subject matter of these proceedings-allegations of sexual harassment could not be substantiated—The Union Government under Rule 135(1)(a) of the Rules, compulsorily retired the respondent on the ground of her being exposed as an Intelligence Officer—Respondent challenged the order of compulsory retirement in O.A. 50/2010 the CAT quashed the said order of compulsory retirement and directed consequential relief to be granted to her—Union Government questioned the decision in the CAT in W.P. (C) 2735/2010 ("the UOI's 2010 petition")—On 3.05.2010, Court, issued notice to show cause to the respondent; stayed the order of the CAT—On

10.05.2010, an order fixing the respondent's provisional pension under Rule 69 of the CCS (Pension) Rules, 1972 ("Pension Rules") based upon her pay drawn as on 28.08.2008, with effect from 19.12.2009, issued—Respondent contested the order of provisional pension before CAT by filing O.A. 1665/2010—Contending that the submission of UOI in ("the UOI's 2010 petition") alleging unauthorised absence between 29.08.2008 and 26.11.2009 was not justified—Respondent also filed O.A. 1967/2010, urging grounds similar and identical to those in O.A. 1665/2010—Respondent's aforesaid application—Treatment of the period between August 2008 and November 2009 as unauthorized absence was not justified—Disposed of by common order dated 28.04.2011—On 29.09.2011 respondent filed O.A. 3613/2011—CAT, by its impugned order allowed O.A. 3613/2011 on 11.05.2012 directing the regularization of two spells of alleged unauthorised absence-enjoining the Government from initiating disciplinary proceedings against the respondent-directing the Union Government to revise the respondent's pension with consequential benefits-hence this present writ petition.

Union of India v. *Nisha Priya Bhatia* *84*

— Art. 226—Petitioner, lawful owner of property in Mahavir Enclave which got acquired, sought a writ for directing the DDA to allot alternate residential DDA flat in view if the scheme of 2004 for evictees of Mahavir Enclave—at the time of valuation report in respect of the superstructure, inadvertently name of brother of petitioner was mentioned by the Collector, so compensation for superstructure was awarded to brother of the petitioner only, who is respondent no.3— Learned ADJ corrected the mistake on reference and held the petitioner entitled to the compensation—since respondent no.3, brother of petitioner preferred not to contest, it is evident that he has no claim in respect of alternate allotment under the scheme.

Tilak Raj Tanwar v. *D.D.A.* *141*

— Writ petition— latches—Petitioner sought mandamus directing

the respondents to allot alternative plot in Dwarka on the grounds that his father was owner of the land in Jasola which was acquired and his father passed away in 1986, though he received compensation in 1987— held, since petitioner did not even respond to the letters of the respondent no.2 in 1991 and 1992 and falsely took up the plea that he was asked to produce the documents in 1997, though he failed to produce any such letter of respondent no.2, the petition is bad for delay and laches and cannot be entertained.

Om Parkash v. *UOI & Ors.* *144*

— Article 226: Petitioner joined BSF in November, 1997 and suffered two injuries during the course of his duties in 1998, and then against in 2006—Medical Board observed that the Petitioner was permanently incapacitated for any kind of service, noting that such incapacitation occurred in the course of service—Thereby, Petitioner was retired on 4th September, 2009 on the ground of physical unfitness—The Accounts Division refused to grant the Petitioner disability pension due to the Petitioner, on the grounds that Petitioner was himself responsible for the injury and the injury sustained by him was attributable to a bona fide government duty as opined by the Court of injury proceedings. The Petitioner's case is that Medical board proceedings were never served—Secondly, injury sustained was attributable to service, therefore Petitioner is entitled to disability pension—Respondents contend that Petitioner failed to appeal against the finding of the Medical Board and that after the 1998 injury, Petitioner ought to have refrained from physically strenuous activities. Held: The copy of the Medical Boards's proceedings were not served on the Petitioner—Hence, no meaningful challenge to the same could be laid out—Secondly, evening games were an internal part of the petitioner's duties. Therefore, injuries suffered by the Petitioner while playing volleyball at the BOP was suffered by him while he was on duty and are attributable to bonafide government service, which has resulted in his disability. Rejection of petitioners claim for disability pension quashed—Arrears due to be computed and paid—Further entitled to

costs of Rs.20,000.

Ramesh Fonia v. *UOI and Ors.* *171*

— Article 226; Whether there is a right and entitlement of a deputationist to continue on deputation after expiration of period of original appointment. Petitioner is an officer of ONGC—Petitioner applied for deputation as Director (Administration) of FSSAI, a nascent organization in 2010—Advertisement stipulated that tenure of deputation would be three years—In Petitioner's appointment letter it was specified that appointment was for a period of one year, extendable to two years—Petitioner unconditionally accepted such terms and joined the organization.

— Upon expiry of one year—Petitioner's tenure was extended only for another 6 months. Upon expiry of such period Petitioner was relieved of his duties and was repatriated to ONGC—Petitioner raised an objection regarding such repatriation a day before expiry by stating that terms of advertisement in terms of tenure, be followed—Respondents replied stating that Petitioner's duties as a consultant were specified in letter of appointment, and Petitioner could not be regularized to the said post Petitioner approached CAT. Respondents contended that petitioner is bound by the well settled legal principle that a deputationist has no right to continue after period of deputation—Tribunal dismissed the petition, hence the present writ petition. Held: No challenge laid to the authority of the borrowing department to make an appointment for a period of less than three years. Petitioner unequivocally accepted terms of appointment in appointment letter, thus accepting respondent's action. Tenure of petitioner being clearly stipulated, contention that period of deputation has to be for three years is devoid of legal merits. Further, petitioner has concealed material facts, which is not disputed. Therefore, resent challenge is not legally tenable. Petition dismissed.

Asim Chaudhary v. *Union of India and Ors.* *187*

— Article 2226—Writ Petition—Service Law-delay and laches—Condonation of 18 years delay-unauthorized absence without leave-dismissal-petitioner while posted with 11th BN BSF at Dhole Chera Assam on 8th May, 1995—Received a letter from his home regarding sickness of his wife and children-leave application not granted-distress upon the illness of his wife and children-could not bear anxiety. Being stressed and in fit of emotions, left unit on 11.05.1995 for home in Bihar—Having just recovered from injury in a grenade attack in G&K and condition of wife and children went into deep depression-remained hospitalized-respondent issued show cause notice on 25.07.1995—Tentative to terminate services for long period of absence without sanction-given opportunity to make representation before the Commandant on or before 24.08.1995, failing which to be presumed no defence to put forth—Failed to respond—Dismissed from service from 25.10.1995—Preferred writ petition—Court observed-the ground of sickness not supported by documents-long period of unauthorized absence from duty in disciplined force such as BSF did not permit condonation of unauthorized absence—Held—18 years of long delay after passing of the order, would itself merit rejection of the petition on account of unexplained delay laches—Writ petition dismissed.

Abhimanyu Singh v. *Union of India Through its Home Secretary & Ors.* *237*

— Article 226—Writ Petition—Delhi Co-operative Societies Act, 2003—S. 70—Delhi Co-operative Housing Finance Corporation Ltd. (DCHFC)-Housing Loan-Default-Recovery certificate—Loan of Rs.51.52 lacs taken from the DCHFC to complete the construction of flats of Neelkamal CO-operative group Housing Society for its members-Society defaulted in making timely payment of installment—Loan secured by way of mortgage deed—DCHFC proceeded with recovery suit in 2010-recovery certificate issued for 1,20,06,7.1/- with interest @ 15.9% execution proceedings filed—R4 Assistant Collector/ Recovery Officers—Issued a public dated 4.3.2013 for sale of assets of society including the flats occupied by different

members—During the proceedings of execution-order dtd. 14 August, 2013 passed-directing members/GPF holders/ residents to apportion amounts payable by Society in terms of recovery certificate—Further informed-no objection certificate (NOC) could be issued against the members who clear full and final payment-Some members filed objections disputing liability-objections pending-Petitioners No. 3 to 7 deposited the amount in compliance of the order by way of cheque and sought NOC-R4 returned the cheques-appears that the society claiming amount against several members in proceedings under S. 70 of Delhi Co-operative Societies Act, 2003—Preferred writ petition—Contended-depite *bona fide* as well as sincere efforts to comply with the order, non acceptance of tender would be foisting-unwarranted interest liability and would be highly prejudicial—Held-directed R4 to accept payment from such members of the Society who are willing to pay as apportioned by R4 subject to subsequent adjustment on the finalization of proceedings before different forums—Writ petition disposed of.

R.K. Anand and Ors. v. *Delhi Co-Operative Housing Finance Corporation Ltd. & Ors.* *242*

— Article 226—Writ Petition—Armed force Tribunal (AFT)—Air Force Order 3 of 2008—Para 38—Disciplinary proceedings—Censure-Selection-appointment-right of—Petitioner enrolled in Indian Air Force on the post of Airman in June, 2000—Appointed as Leading Aircraft Man in June 2001—Deployed on security duty in July, 2005 at Forward Air Base, Tejpur, Assam—Complaint made by civilian—Petitioner involvement in making civil driving licences from DTO-commission basis-Enquiry initiated-Awarded censure-Trade changed from Indian Air Force Police to ESSA-not challenged-Also awarded some adverse entries in service record-Respondent invited application from eligible airman to apply for ground duty officer course—Petitioner applied—Application processes by Board of Officers—Cases recommended to command H.Q. for inclusion in the written examination-qualified written examination as well as in the

interview-Included in the list of successful candidates-also found medically fit-informed by Commanding Officer name not included for commissioning-candidature cancelled-because of censure-proceeded with cancellation based on para 38 (f) of AFO 3 of 2008—filed O.A.-challenged-unsuccessful—Preferred writ petition—Contended—Application and candidature required to be Processed in terms of AFO 39 of 2006—Procedure for commission prescribed-once the petitioner's candidature cleared by Board and head quarter-no discretion available to reject the candidate—Contended AFO3 of 2008 in terms of Para 38 (a) award of censure can be considered only once by the authority or the board of officers—Held—After examining the scheme of air force order—Para 38 shows that sub—Para (f) mandatorily provides censure given to the candidate by competent authority to be considered for suitability of airman for commissioning into the air force-use of expression "also" clearly shows power under (f)-additional to the power conferred in Sub—Para (a) to (e)—Sub—Para (f) strictly related to commissioning—further held—Merely because a person is brought on merit list does not give a person right for appointment—Writ petition dismissed.

Amardeep Dabas v. *Union of India & Ors.* *259*

— Article 226; whether petitioners are entitled to refund of earnest money along with interest. Respondent invited tenders for shops/offices—Petitioner successfully bid for a unit—Earnest money deposited—Petitioner failed to deposit balance bid amount within the prescribed period—Respondents then cancelled allotment and forfeited bid amount—Hence, the present petition. Admittedly, not disclosed in tender document that same unit was earlier bid upon, and cancelled since Chief Post Master General expressed an interest in the property—However, since no further action was taken by CPMG, unit was auctioned again, by which present Petitioner was declared successful—Earlier bidder, whose bid was cancelled, filed a civil suit against the DDA in which the Petitioner was impleaded. No restraint order was granted against DDA from

execution of a conveyance in favour of the petitioner— Suit of earlier bidder was dismissed during pendency of present writ petition—Petitioners contend that they were unable to secure a loan for the balance bid amount due to pendency of the civil suit—Therefore, they are entitled to refund of the earnest money along with interest. Respondents contend that it was not a condition that the purchaser would be entitled to raise a loan—No document has been placed on record to prove the same—Successful bidder cannot be allowed to withhold payment due to frivolous litigation commenced by a third person. Held: Petitioner successful in auction—Failed to pay entirely—Reason stated that he could not avail loan to pay due to some pending litigation on auctioned property—Held, no valid reason—It was not one of the conditions of auction that successful builder would be entitled to avail loan—Forfeiture of earnest money is in terms of tender.

Seven Heaven Buildcons P. Ltd. & Anr. v. *D.D.A. & Anr.* *301*

— Article 226: Whether on account of dispute between legal heirs of a deceased who was a lease holder of a DDA plot and a third person, DDA can withhold mutation in favour of the legal heir or make it subject to the outcome of such dispute. Petitioner's father was alloted land by DDA. After the death of father and mother and upon execution of relinquishment deed by Petitioner's sister, Petitioner became sole lease holder of the said plot. Despite repeated request DDA did not substitute name of petitioner as lessee. Writ petition filed by Petitioner allowed and DDA directed to decide application of Petitioner. Not decided, Petitioner filed contempt. DDA contended that suit for specific performance filed by third party against the petitioner had earlier sold a portion of the plot to the third party—Intimated Respondent that petitioner had earlier sold a portion of the plot to the third party, thereby in view of pending litigation mutation was effected subject to outcome of the civil suit. Whether on account of dispute between legal heirs of a deceased who was a lease holder of a DDA plot and a third person, DDA can withhold mutation in favour of

the legal heir or make it subject to the outcome of such dispute. HELD—DDA does not dispute the genuineness/validity of documents on the basis of which the petitioner became entitled to the lease hold rights in the plot. There is no existing right in favour of third party. DDA therefore, is neither under any obligation nor is expected to entertain any application by any third party and to either delay mutation or pass an order of substitution subject to any dispute which might be raised by any third party. In case third party succeeds in the litigation nothing prevents DDA from taking action in accordance with law. Writ petition allowed. DDA directed to amend the contents of the mutation by deleting the words that mutation/ substitution of the subject property shall be "subject to the outcome of court case no. CS (OS) 1995/2008".

Salim Lalvani v. *Delhi Development Authority* *321*

— Article 226—Petitioner seeking reopening of file for allotment of an alternative plot which was closed in 1992—Petitioner applied for allotment of alternative plot of land on lieu of land acquired for development, as per policy of Govt. of Delhi in 1989. Despite expiry of sufficient time petitioner failed to receive any information—RTI filed in 2005 revealed file of the Petitioner was closed since relevant documents weren't furnished despite communications —Petitioner didn't receive communication, alleged malafides on the part of the Respondent—Hence, present writ petition. Respondent contends despite repeated requests Petitioner didn't furnish required information—Petitioner's case therefore closed in 1992 and the same communicated to the Petitioner—Policy doesn't allow reopening of closed cases. Held: Petitioner does not specifically deny receiving communications from the Respondent—Petitioner approached Respondent after 20 years of closure of his case—While Limitation Act normally doesn't apply to proceedings u/Article 226, settled law that WP filed beyond period of limitation prescribed for civil suits be dismissed on delay and laches.

Babu Ram v. *Land & Building Department & Anr.* *327*

— Article 226—Petitioner, ex service man applied in SC category and participated in selection process for post of SI/AI in CPO—Petitioner successfully participated—However, no appointment letter issued—Hence, present writ petition. Respondents contended Petitioner was overage despite age relaxation, and thus not offered appointment. In response, Petitioner urged that he may be considered for a Group C posting, incase he was overage for a Group B posting. Held: Petitioner overage by 2 years for Group B posting—No representation made for Group C posting. Even in the writ petition Petitioner seeks appointment to Group B post—Petitioner not entitled to Group C appointment as prayed for. Petition dismissed.

Babu Ram v. *Union of India and Anr.* *387*

— Article 226—Customs Act, 1962—Section 2(2), 110(1), (2) and (3) and 124—Petitioner filed writ petition for de-freezing its account frozen by Respondent No. 2 (Directorate of Revenue Intelligence)—Plea taken, Petitioner has neither been indicted nor arraigned as a Notice in show cause notice purported to haver been issued in pursuance of investigation—As per Provisions of Section 110(1) of Act if any goods liable for confiscation under Act are seized and a show cause notice under Section 124 of Act is not Given within six months, then goods are liable to be restored to person from whom goods have been seized—Per contra plea taken, although notice Section 110 (2) to be served within a period of six months is mandatory, yet no such time limit is laid down under Section 124 and thus of goods can continue under Section 124 of Act—Seizure of bank account was under Section 110(3) and there is no provision to serve any notice upon person from whose possession any documents or things are seized—Held—Section 110 (3) of Act deals with seizure of documents or things which in opinion of proper person would be relevant to any proceedings under Act—Freezing of bank account will not be seizure of any document or thing useful or relevant to any proceedings under Act—Bank account is frozen with a view to recover evaded customs Duty, penalty *etc. etc.,*

freezing of bank account may not amount to seizure of any document, but at same time it cannot also amount to seizure of any goods liable for confiscation as well—Since freezing of bank account was not seizure of 'goods' as envisaged under Section 110 of Act, Petitioner is not entitled to de-freezing of bank account unconditionally—Amount deposited in bank Account shall be released, Subject to furnishing of a Bank guarantee to Respondent No. 2 in respect of amount credited in account from date of freezing of amount.

Ravi Crop Science v. *UOI & Ors.* *404*

— Articles 32 & 226—University grant Commission Act, 1956—Section 3 and 26(1)—UGC—(Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in Universities and Colleges) Regulations, 2000—Clause 1.3.1—Petitioner filed petition seeking writ of quo warranto for declaring that fourth respondent Dr. S. Sivakumar is not entitled to hold his position as Research Professor at Indian Law Institute (ILI)—Plea taken, Sivakumar fraudulently obtained post by making false statements and fraudulent misrepresentation before selection committee—Sivakumar's appointment was contrary to statutory rules as he did not have requisite qualifications in terms of advertisement issued by ILI inviting applications for post of Research Professor and in terms of UGC Regulations for appointment—Per contra plea taken, present proceedings are motivated—Writ Petition of quo warranto is not maintainable as Sivakumar's selection and appointment was not to a statutory post—Petitioner does not have any locus standi to claim quashing of appointment since he was not a candidate—RTI responses received by petitioner from Kerala Law Academy were manipulated and are therefore, to be ignored—Selection of Sivakumar was not only within terms of advertisement issued and bye-laws of ILI, but merited—Held—Points for consideration in this case are whether petitioner has locus standi to agitate this matter—If so, do facts warrant issuance of writ of quo warranto—Petitioner, in opinion of this Court, despite being outsider, possesses

necessary locus standi to question appointment in violation of UGC Regulations, which have force of statute—A particular institution may, based upon its internal peculiarities, choose to lay a different emphasis on particular requirements inter se candidates, fact remains that all minimum qualifications prescribed in 2000 UGC Regulations must necessarily be complied with—Limited inquiry to be conducted by this Court while considering a writ of quo warranto is not whether Sivakumar was more qualified candidate for post but rather whether his credential fell below minimum statutory bar imposed by UGC Regulations—If documentary proof provided by petitioner is to be believed, Dr. Sivakumar did not have cumulative ten years teaching or research experience required under 2000 Regulations, whilst if Dr. Sivakumar's documentary proof is considered, that requirement is clearly satisfied—Comprehensive details disclosed in "Academic Profile" render Sivakumar eligible for post of Research Professor under Second alternate criterion i.e. outstanding scholar with established reputation who has made significant contribution to knowledge and that being case, his further selection lies at discretion of Selection Committee—There is no infirmity in appointment of Dr. Sivakumar as Research Professor at ILI—Writ petition dismissed with cost of Rs. 50,000/-.

Jose Meleth v. *UOI and Ors.* *416*

— Article 226—Petitioner got himself registered for allotment of MIG flat under Ambedkar Awas Yojna—At time of registration, he gave his current and permanent address—Petitioner was allotted a government accommodation—Petitioner requested DDA for incorporating his changed address in record of DDA—DDA asked him to submit attested copy of ration card or election card so that his address could be changed in office record—Said documents were not submitted by Petitioner as he did not possess same—In spite of representations of Petitioner to DDA to allot a flat, he did not receive any response—In a public meeting in 2012, Petitioner came to know about allotment of a flat in Dwarka to him in year, 2001

and that Demand-cum-Allotment letter (DAL) of same had been returned back undelivered and that allotment of flat made to him had been cancelled on account of non payment of cost of flat within stipulated period—Petitioner approached HC by way of instant petition seeking allotment of a similar flat as allotted to earlier—Plea taken by DDA, DAL was sent to Petitioner at his correspondence/postal address as mentioned in application form with advice to deposit demanded amount as per schedule given in letter—Since Petitioner failed to deposit amount as required, allotment automatically stood cancelled—Held—Even if DAL was initially sent at old address and received back with report of 'left', DDA was under obligation to send same at current address of Petitioner which was duly provided in year, 2001—Not only this admittedly, information about allotment of flat was also not sent at Petitioner's occupational/office address—It is very unfortunate that in spite of residential address of Petitioner of Government flat allotted to him being available, in respect of government employees also, DDA wants to take a plea that it was not under obligation to send allotment letter at current residential which was duly informed—Writ of Mandamus issued directing DDA to allot a flat of equivalent size preferably in same area, that is Dwarka at price prevalent on date of this order, within period of 12 weeks.

Nanak Chand v. *DDA* *380*

— Article 226—Petition against the order of Central Administrative Tribunal (CAT) quashing the disciplinary proceedings initiated by the petitioner, against the respondent. Respondent joined the customs department in 1976- posted as inspector at the export shed, ICD in 1998 wherein he conducted inspections of consignment presented for export from the said port. Directorate of intelligence review (DRI) initiated an inquiry into availment of duty drawback on export of UPFC pipes between 1998-1999 by M/S. Aravali (India) Ltd.- show cause notice was issued to the exporter (but not to the respondent) in 2000 by the DRI and the matter stood concluded in 2001 without anything incriminating the

respondent- In August, 2003, the DRI in a letter to the Chief Commissioner of central excise recommended action against 23 mentioned officials who had attended to the above export case- yet no action was initiated. In 2004, the respondent was summoned and interrogated by the vigilance department, thereafter which no action was taken against him under the Customs' Act or Customs Conduct Rules (CCS)- in the background of the absence of copies of the shipping bills of the relevant period, another inquiry officer was appointed in 2010, and chargesheet was issue vide office memo dated 25th February, 2011. Aggrieved, respondent approached the CAT—Initially the explanation given by the petitioner for delay being non availability of shipping bills was accepted by CAT, however on review, CAT noted that relevant documents were available with the petitioner and there was an excessive delay in issuance of charge sheet-on merits, the Tribunal recalled its earlier order and office memo dated 25th Feb, 2011 was quashed and set aside. Aggrieved, the present writ petition was field contending that delay on part of the petitioner was bona fide. Held: plea of the petitioner baseless—Rightly rejected by the CAT—The action of the petitioner is grossly belated—Delay in initiating disciplinary proceedings would constitute denial of reasonable opportunity to defend the charges and therefore, amounts to violation of Principles of atural justice—Writ dismissed- cost awarded.

Union of India & Anr. v. *Hari Singh* *443*

— Article 226; Air Force Rules, 24, 45, 48—Petitioner implicated for unauthorized selling liquor, Charges framed—Initially court martial found petitioner not guilty of 1st , 2nd and 3rd charge but found him guilty of 4th charge. Confirming Authority passed order for revision of findings on 1st , 2nd and 3rd charge. Court martial reassemble, no fresh finding was recorded, petitioner was heard and thereafter found guilty of 1st, 2nd and 3rd charged and awarded sentence of dismissal from service. Confirming Authority reduced sentence to reduction in Rank. Appeal against the said order was dismissed by Chief of air staff. Writ petitioner filed—Was transferred

to the Armed Forces Tribunal which was rejected by the impugned order. Petitioner has assailed the proceedings of the court martial on the ground that the same are in violation of Rule, 45 and 48. Held- contention rejected relying on *Lt. Col. Prithipal Singh Bedi v. Union of India,* (1982) 3 scc 140.

Om Prakash v. *Union of India & Ors.* *471*

Petitioner assailed the impugned order on the ground that there is no evidence- held- it's not a case of no evidence—The deposition of the witnesses unequivocally implicated the petitioner—No legally tenable grounds raised; petition dismissed.

Om Prakash v. *Union of India & Ors.* *471*

— Article 226; Government of India (Transaction of business) Rules, 1961; Indian Contract Act, 1872- Section 199: appeal against order of Ld. Single judge dismissing the petition praying for quashing cancellation notification for grant of land to the petitioner- whether the appellants have a remedy under public law- appellant contends that allotment made by the respondent was a concluded contract, wherein amounts were paid towards consideration- Accordingly, respondent estopped from contending that such manner of allotment was flawed, since decision to allot plot to appellant was based on due consideration of facts by all authorities.

Respondent contends that the allotment letter dated 27.06.1995 had no authority, since no approval was obtained from the Ministry of Finance—The allotment was made without following proper procedure—Further, the allotment letter indicated that there would be a license agreement executed in favour of the appellant- No such license agreement was executed—Therefore, appellant had no enforceable right. Appellant only entitled to round along with interest.

Held: validity of a competitive bidding process is beyond question—Thus, decision to cancel allotment letter cannot be termed arbitrary- from the relevant records it is clear that there

is on approval from the Finance Ministry, which compelled and Union Cabinet to decide that such allotment could not be sustained- Transaction of business rules which mandate prior consultation with the finance ministry before land is dealt with, were not observed. Central government is within its rights to say it would not proceed ahead with the lease agreement- no arbitrary conduct on part of the respondents—Public interest would be served through a fresh bidding process—Finally, no legitimate expectation is created or promissory estoppel operates against the government in matters of public law, where reasoned decisions taken in public interest will take precedence.

East India Hotal Ltd. and Anr. v. *Union of India and Anr.* *506*

— Article 226—Commission for Protection of Child Rights Act, 2005—Section 3—petitioners challenged appointment of second and third respondent as members of National Commission for Protection of child Right—plea taken, selection procedure was not transparent or fair but was arbitrary—Those with qualifications and experience better than private respondents were kept out of consideration—UOI never adopted any fair method of inviting application—per contra plea taken, court should not substitute its opinion for that of UOI which took into consideration all relevant materials objectively, fairly and in a bona fide manner while selecting private respondents as members of NCPCR—In absence of clear violation of statutory provisions and regulations laying down procedure for appointment, High Court has no jurisdiction even to issue a writ of quo warranto—Court should be circumspect in conducting a "merit" review which would result in court substituting its opinion for wisdom of statutory designated authority i.e. central government—Held—This court is to be guided by decision passed in earlier writ petition filed by petitioners and confine its enquiry as to whether appointments challenged are contrary to statute insofar as private respondents do not possess any qualification or do not fulfill any eligibility condition; procedurally illegal or irregular;

not in bona fide exercise of power—Previous litigation was initiated at behest of first petitioner association and there being no dispute that second petitioner is association concerned and involved with child right issues with field experience for 13 years, court is of opinion that present petition is maintaintable as a public interest litigation—Mere circumstance that president of first petitioner was a candidate who had applied for appointment, would not bar scrutiny by court, especially in view of fact that second petitioner is a party to present proceeding—UoI did not publicly make known vacancy position in Commission—use of terms like "ability" "standing" "experience" and "eminence" highlights parliamentary intention that those of proven merit and track record, and singularly distinguished only should be chosen to man NCPCR—This court refrains from rendering any adverse finding with respect to Mr. Tikoo's candidature for reason that though materials regarding his ability, standing and eminence are scanty, there is something to indicate his eligibility vis-à-vis qualification—selection process nowhere discusses, even in the barest minimum manner, strengths and weaknesses of short listed candidates, particularly where more than one applicant is listed under same head—What ultimately persuaded Committee to drop certain names, and accept names of those finally appointed, does not appear from record made available to court—Not is there any light shed in affidavit filed by UOI to indicate of relative qualification and experience of at least short listed candidates was considered, and whether some kind of ranking, marking or evaluating system was adopted—Having short listed many candidates, some whom were retained, there are complete lack of reasons for dropping names of other—Insistence for reasons is not to probe merits of decision to drop candidate's names, but as to what really struck Committee at stage and persuaded them to drop their candidature- Court is wary of commenting on choice of Committee selecting third respondent- At least he possesses educational qualifications, relevant to field (sociology and social work) and has placed on record some certificate in this regard—But in case of Dr. Dube, conspicuous inconsistencies in respect of his claim

regarding educational qualifications were glossed over; his CV does not pin point specifically any relevant experience in relevant discipline or field- his final selection and appointment can be justified due to "absence of intellectual objectivity"- selection and appointment of second respondent being contrary to mandate of section 3(2)(b) of Act, is quashed.

Association for Development and Anr. v. *Union of India and Ors.* *539*

— Article 226; Drugs (prices control order), 1979—clauses 7(2). 17; Essential Commodities Act, 1955: Appeal against the order of single judge whereby respondent's challenge to a demand made in terms of DPCO, was allowed—Respondent, a bulk drug manufacturer, firstly contended compulsion to sell respondent's products at pooled price, as per DPCO, and not for a lower price—Secondly, Respondent as manufacturer of a bulk drug, could not be compelled to deposit the difference in the pooled price and retention price in the Drug price Equalization Account, especially since the amount is not realized if manufacturer sell the bulk drug at retention price.

Appellant contends that purpose of mechanism under DPCO was to avoid monopoly in essential products—"pooled price" is that which manufacturer can realize or the rate at which drug could be sold in the market, whereas "Retention price" is the price at which bulk drugs for manufacturing the formulation can be retailed—Purpose of Drug price equalization Account under clause 17 was to credit the difference between the two prices by the manufacturer if pooled price was higher, and to reimburse manufacturer from the fund in case the inverse happened- the system was one of benefits and compensation to small manufacturers, and a disincentive to large manufacturers to secure a monopoly.

Respondent contends that interpretation to the effect that irrespective of actual sale, the bulk drug manufacturer such as the Respondent, is to be made liable and not the formulator,

is without merit—A plain reading of clause 7(2) of the DPCO clarifies that the difference between the pooled price and Retention price is to be borne by the formulator and not the bulk drug manufacturer—Question of bulk drug manufacturer being made to bear the burden once over defies logic, amounts to levying a penalty and import not authorized under the Essential commodities Act, 1955.

Held: The language of clause 7(2) of DPCO casts the obligation on the formulator to make good the difference between the pooled price and the at which drug is procured from the bulk manufacturer to be deposited into the drug price equalization account—clause 17 of the DPCO does not independently create a liability—Further, there is no primary duty on the bulk drug manufacturer to pay into the fund—Therefore, court rejected appellant's argument on clause 17—Once the formulator's obligation under clause7(2) if fulfilled, the Central Government cannot seek to penalize a penalize a manufacturer for being able to sell bulk drugs at retention price. Appeal dismissed.

Union of India v. *Synbiotics Limited and Anr.*..... *569*

— Article 226; CCS (CCA) Rules 1965-Rule 14: Order of the CAT holding that there was unexplained delay in initiating disciplinary proceedings against Respondent, challenged in the present proceedings. Held—The Tribunal has noted that the Petitioner have not been able to adequately explain the inordinate delay in initiation of the charge sheet which would cause prejudice to the defence of the Respondent. The Petitioners have not been able to place explanation for the delay which has ensued before us as well. Reliance placed on UOI v. Hari Singh, wherein same issues were raised, held that Petitioners have not been able to place any explanation for delay—Other circumstances including the fact that Respondent was promoted, the order quashing penalty were accepted by the Petitioner as well as the fact the CBI found no culpability if the Respondent also lend substance to the

case of Respondent. No merit in the challenge to the order of the CAT—Costs of Rs. 25,000. Petition Dismissed.

UOI & Ors. v. *J.P. Singh* *589*

— Article 226: Petitioner herein has assailed order of the CAT, whereby Petitioner's challenge to his non-selection for the post of JE-II was rejected, as well as the order rejecting Petitioner's review application.

Present with petition filed challenging final selection list for the post of JE-II (25% LDCE Quota) wherein Petitioner's name was not included—Sole ground of challenge was claim of the Petitioner that he was entitled to 20 additional marks, under the "Personality Address, Leadership and Academic/ Technical Qualifications" in terms of circular RBE No. 55/86.

Respondents countered Petitioner's claimon the ground of revised classification—Pursuant to Railway Board's directive on 22nd March, 2006, heading of "Personality Address, Leadership and Academic/Technical Qualifications" stood deleted—Respondents conducted selection as per rules modified in notification dated 7th January, 2010.

Held: In view of the above directions, Petitioner not entitled to any additional benefit—No other ground was pressed before the Tribunal—Therefore, the actions of the Respondents or the orders impugned herein cannot be faulted—Further, the factum of an earlier writ petition on the same ground concealed by the Petitioner—No merit in the writ petition.

Umesh Dutt Sharma v. *Union of India & Ors.* *608*

— Article 226 and 227—Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002—Indian Medical Council Act, 1956—Section 20-A and Section 33 (m)—Delhi Nursing Homes Registration Act, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in treating patient

(Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of hospitals and secondly, that Ethics Committee of MCI acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by Ethics Committee of MCI about state of affairs in Petitioner hospital and same did not harm any legal right or interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against Petitioner hospital highlighted above.

Max Hospital Pitampura v. *Medical Council of India* *620*

— Art. 226—Service Law—Promotion Respondents claiming they were beneficiaries of Flexible Complementing Scheme (FCS), filed application before Central Administrative Tribunal

seeking a direction for promotions from date of completion of eligible service in promotional post wherein they were given in situ promotion on subsequent dates—Orders of Tribunal allowing application, challenged before High Court—Plea taken, directions made by Tribunal in impugned judgment tantamount to granting pay to respondents for work which they have not done—Held—It is admitted position that petitioner has only effected in situ promotions to respondents—There is no distinction in work which was being discharged by respondents prior to their promotion or thereafter—Only variation is in financial benefit which would accrue to respondents after their promotions—Principle of 'no work no pay' has no application to instant case—From very expression in situ, it is apparent that there is no change in either place or position in which respondents are working—Therefore, it cannot be contended that respondents are being paid any amount for work they have not discharged—We find no merit in these petitions and applications which are dismissed with costs which are quantified at Rs. 2,000/- per respondent.

National Technical Research Organization v. *P. Kulshrestha & Ors.* *675*

— Art. 226—Service Law—Representation of petitioner requesting for merger of pollution level test inspector and motor vehicle inspector cadres, rejected by respondents—Petitioner relieved from his posting with directions for duties in Taxi Unit, Burari-—Application of petitioner challenging both orders dismissed by Administrative Tribunal—Order of Tribunal challenged before HC- plea taken, posting in taxi unit, burari amounts to change of cadre- Transfer outside cadre in a different wing is bad in law being violative of conditions of service—In eventuality of refusal to merge two cadres independent to each other, petitioner be not transferred out of pollution control branch as it would amount to serving under junior officers of MVI bench- Held- lssues raised by petitioner are whether rejection of representation to merge PLTI and MVI cadres into one is unjustified and whether his

transfer to taxi unit. Burari amounts to forcing him to work under his juniors- petitioner had challenged impugned orders before learned Tribunal and raised same contentions, as have been raised before us—Tribunal has carefully considered both submissions of petitioner and given sound reasons for rejection- Impugned order of Central Administrative Tribunal does not suffer with any infirmity—There are no grounds to interfere with findings of learned Tribunal- writ petition dismissed.

Prince Garg v. *Govt. of NCT & Ors.* *763*

— Art. 226—Service Law—Respondent participated in examination conducted by UPSC for selection to post of Junior Geologist Group 'A' in Geological Survey of India—Having qualified said examination respondent was directed by petitioner to appear before Central Standing Medical Board at Safdarjung Hospital for medical examination—Medical Board, after examining respondent declared him 'unfit' on ground of his having undergone Lasik Surgery—Respondent successfully challenged order of petitioner before Administrative Tribunal before High Court—Held—There is no prescription in recruitment rules to effect that a person who had undergone Lasik Surgery to correct vision, would be disqualified for consideration for appointment—Medical Board which has examined respondent has not found his vision criterion—Only ground for rejecting him was fact that he had undergone corrective Lasik Surgery—In absence of any prescription in rule or regulation, mere fact that person has undergone corrective surgery ipso facto cannot tantamount to his being medically unfit and result in rejection of a candidate.

Union of India & Anr. v. *Saikat Roy* *752*

CUSTOMS ACT, 1962—Section 2(2), 110(1), (2) and (3) and 124—Petitioner filed writ petition for de-freezing its account frozen by Respondent No. 2 (Directorate of Revenue Intelligence)—Plea taken, Petitioner has neither been indicted nor arraigned as a Notice in show cause notice purported to

haver been issued in pursuance of investigation—As per Provisions of Section 110(1) of Act if any goods liable for confiscation under Act are seized and a show cause notice under Section 124 of Act is not Given within six months, then goods are liable to be restored to person from whom goods have been seized—Per contra plea taken, although notice Section 110 (2) to be served within a period of six months is mandatory, yet no such time limit is laid down under Section 124 and thus of goods can continue under Section 124 of Act—Seizure of bank account was under Section 110(3) and there is no provision to serve any notice upon person from whose possession any documents or things are seized—Held—Section 110 (3) of Act deals with seizure of documents or things which in opinion of proper person would be relevant to any proceedings under Act—Freezing of bank account will not be seizure of any document or thing useful or relevant to any proceedings under Act—Bank account is frozen with a view to recover evaded customs Duty, penalty *etc. etc.,* freezing of bank account may not amount to seizure of any document, but at same time it cannot also amount to seizure of any goods liable for confiscation as well—Since freezing of bank account was not seizure of 'goods' as envisaged under Section 110 of Act, Petitioner is not entitled to de-freezing of bank account unconditionally—Amount deposited in bank Account shall be released, Subject to furnishing of a Bank guarantee to Respondent No. 2 in respect of amount credited in account from date of freezing of amount.

Ravi Crop Science v. *UOI & Ors.* *404*

DELHI CO-OPERATIVE SOCIETIES ACT, 2003—S. 70—Delhi Co-operative Housing Finance Corporation Ltd. (DCHFC)-Housing Loan-Default-Recovery certificate—Loan of Rs.51.52 lacs taken from the DCHFC to complete the construction of flats of Neelkamal CO-operative group Housing Society for its members-Society defaulted in making timely payment of installment—Loan secured by way of mortgage deed—DCHFC proceeded with recovery suit in 2010-recovery certificate issued for 1,20,06,7.1/- with interest @ 15.9%

execution proceedings filed—R4 Assistant Collector/Recovery Officers—Issued a public dated 4.3.2013 for sale of assets of society including the flats occupied by different members—During the proceedings of execution-order dtd. 14 August, 2013 passed-directing members/GPF holders/residents to apportion amounts payable by Society in terms of recovery certificate—Further informed-no objection certificate (NOC) could be issued against the members who clear full and final payment-Some members filed objections disputing liability-objections pending-Petitioners No. 3 to 7 deposited the amount in compliance of the order by way of cheque and sought NOC-R4 returned the cheques-appears that the society claiming amount against several members in proceedings under S. 70 of Delhi Co-operative Societies Act, 2003—Preferred writ petition—Contended-depite *bona fide* as well as sincere efforts to comply with the order, non acceptance of tender would be foisting-unwarranted interest liability and would be highly prejudicial—Held-directed R4 to accept payment from such members of the Society who are willing to pay as apportioned by R4 subject to subsequent adjustment on the finalization of proceedings before different forums—Writ petition disposed of.

R.K. Anand and Ors. v. *Delhi Co-Operative Housing Finance Corporation Ltd. & Ors.* *242*

DELHI DEVELOPMENT AUTHORITY—Allotment of Flats—Constitution of India, 1950—Article 226—Petitioner got himself registered for allotment of MIG flat under Ambedkar Awas Yojna—At time of registration, he gave his current and permanent address—Petitioner was allotted a government accommodation—Petitioner requested DDA for incorporating his changed address in record of DDA—DDA asked him to submit attested copy of ration card or election card so that his address could be changed in office record—Said documents were not submitted by Petitioner as he did not possess same—In spite of representations of Petitioner to DDA to allot a flat, he did not receive any response—In a public meeting in 2012, Petitioner came to know about

allotment of a flat in Dwarka to him in year, 2001 and that Demand-cum-Allotment letter (DAL) of same had been returned back undelivered and that allotment of flat made to him had been cancelled on account of non payment of cost of flat within stipulated period—Petitioner approached HC by way of instant petition seeking allotment of a similar flat as allotted to earlier—Plea taken by DDA, DAL was sent to Petitioner at his correspondence/postal address as mentioned in application form with advice to deposit demanded amount as per schedule given in letter—Since Petitioner failed to deposit amount as required, allotment automatically stood cancelled—Held—Even if DAL was initially sent at old address and received back with report of 'left', DDA was under obligation to send same at current address of Petitioner which was duly provided in year, 2001—Not only this admittedly, information about allotment of flat was also not sent at Petitioner's occupational/office address—It is very unfortunate that in spite of residential address of Petitioner of Government flat allotted to him being available, in respect of government employees also, DDA wants to take a plea that it was not under obligation to send allotment letter at current residential which was duly informed—Writ of Mandamus issued directing DDA to allot a flat of equivalent size preferably in same area, that is Dwarka at price prevalent on date of this order, within period of 12 weeks.

Nanak Chand v. *DDA* *380*

DELHI NURSING HOMES REGISTRATION ACT, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in treating patient (Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of

hospitals and secondly, that Ethics Committee of MCI acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by Ethics Committee of MCI about state of affairs in Petitioner hospital and same did not harm any legal right or interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against Petitioner hospital highlighted above.

Max Hospital Pitampura v. *Medical Council of India* *620*

DELHI RENT CONTROL ACT, 1958—Section 6A and 8—Plaintiff filed suit seeking decree of possession and other consequential reliefs—He also moved application U/o 12 Rule 6 of Code praying for judgment on admissions—According to defendants, suit not maintainable as they are protected tenants under Delhi Rent Control Act and alleged notice sent by plaintiff, does not terminate tenancy—As per plaintiff, Section 6 of Act not applicable as defendants paid the increased rent according to agreement to lease executed between parties.

Held:- Statutory provisions do not contain any prohibition prohibiting an agreement between landlord and tenant whereby they have agreed to increase the rent after periodic intervals on their own. Enhancement of rent by consent not barred U/s 6A and 8 of the Delhi Rent control Act.

Ishpinder Kochhar v. *Deluxe Dentelles (P) Ltd. & Anr.* *721*

ESSENTIAL COMMODITIES ACT, 1955—Appeal against the order of single judge whereby respondent's challenge to a demand made in terms of DPCO, was allowed—Respondent, a bulk drug manufacturer, firstly contended compulsion to sell respondent's products at pooled price, as per DPCO, and not for a lower price—Secondly, Respondent as manufacturer of a bulk drug, could not be compelled to deposit the difference in the pooled price and retention price in the Drug price Equalization Account, especially since the amount is not realized if manufacturer sell the bulk drug at retention price.

Appellant contends that purpose of mechanism under DPCO was to avoid monopoly in essential products—"pooled price" is that which manufacturer can realize or the rate at which drug could be sold in the market, whereas "Retention price" is the price at which bulk drugs for manufacturing the formulation can be retailed—Purpose of Drug price equalization Account under clause 17 was to credit the difference between the two prices by the manufacturer if pooled price was higher, and to reimburse manufacturer from the fund in case the inverse happened- the system was one of benefits and compensation to small manufacturers, and a disincentive to large manufacturers to secure a monopoly.

Respondent contends that interpretation to the effect that irrespective of actual sale, the bulk drug manufacturer such as the Respondent, is to be made liable and not the formulator, is without merit—A plain reading of clause 7(2) of the DPCO clarifies that the difference between the pooled price and Retention price is to be borne by the formulator and not the

bulk drug manufacturer—Question of bulk drug manufacturer being made to bear the burden once over defies logic, amounts to levying a penalty and import not authorized under the Essential commodities Act, 1955.

Held: The language of clause 7(2) of DPCO casts the obligation on the formulator to make good the difference between the pooled price and the at which drug is procured from the bulk manufacturer to be deposited into the drug price equalization account—clause 17 of the DPCO does not independently create a liability—Further, there is no primary duty on the bulk drug manufacturer to pay into the fund—Therefore, court rejected appellant's argument on clause 17—Once the formulator's obligation under clause7(2) if fulfilled, the Central Government cannot seek to penalize a penalize a manufacturer for being able to sell bulk drugs at retention price. Appeal dismissed.

Union of India v. *Synbiotics Limited and Anr.*..... *569*

INDIAN CONTRACT ACT, 1872—Section 199: appeal against order of Ld. Single judge dismissing the petition praying for quashing cancellation notification for grant of land to the petitioner- whether the appellants have a remedy under public law- appellant contends that allotment made by the respondent was a concluded contract, wherein amounts were paid towards consideration- Accordingly, respondent estopped from contending that such manner of allotment was flawed, since decision to allot plot to appellant was based on due consideration of facts by all authorities.

Respondent contends that the allotment letter dated 27.06.1995 had no authority, since no approval was obtained from the Ministry of Finance—The allotment was made without following proper procedure—Further, the allotment letter indicated that there would be a license agreement executed in favour of the appellant- No such license agreement was executed—Therefore, appellant had no enforceable right. Appellant only entitled to round along with interest.

Held: validity of a competitive bidding process is beyond question—Thus, decision to cancel allotment letter cannot be termed arbitrary- from the relevant records it is clear that there is on approval from the Finance Ministry, which compelled and Union Cabinet to decide that such allotment could not be sustained- Transaction of business rules which mandate prior consultation with the finance ministry before land is dealt with, were not observed. Central government is within its rights to say it would not proceed ahead with the lease agreement- no arbitrary conduct on part of the respondents—Public interest would be served through a fresh bidding process—Finally, no legitimate expectation is created or promissory estoppel operates against the government in matters of public law, where reasoned decisions taken in public interest will take precedence.

East India Hotel Ltd. and Anr. v. *Union of India and Anr.*..... *506*

— Section 25, 26 and 27—Appellant State challenged acquittal of respondents U/s 302/392/382 r/w section 120B of Code—According to appellant, prosecution case rested purely on circumstantial evidence and all the circumstances including discovery and establishment of fact of use of motorcycle in commission of offences proved beyond iota of doubt by it.

Held:- Section 27 of the Act which is in the form of an exception to Sections 25 and 26 of the Act admits only so much of the information given by an accused which distinctly relates to the facts discovered in pursuance of the information. The recovery of the object has to be distinguished from the fact thereby discovered. If in pursuance of the information provided, any fact is discovered which connects the accused with the commission of the crime, then only the fact discovered becomes relevant.

State v. *Rampal Singh and Anr.*..... *700*

INDIAN EVIDENCE ACT, 1872—Section 106—The facts which are within the special knowledge of the person, he is

bound to explain those facts under section 106 Evidence Act—It is well settled that even if an accused does not plead self-defence during trial, it is open to the court to consider such a plea if the same arises from the material on record. The burden of proving the existence of circumstances bringing a case within any exception is upon the accused—Of course that burden can be discharged by showing probabilities in favour of that plea. Under Section 105 of the Indian Evidence Act, the onus rests on the accused to establish his plea of self-defence. Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself by adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution—Right of private defence is primarily a defensive right and is available only to one who is suddenly confronted with the necessity of averting an impending danger.

There is no rule of law that if the court acquits certain accused on the evidence of a witness finding it to be open to some doubt with regard to them for definite reasons, other accused against whom there is positive evidence must be acquitted. The court has a duty in such cases to separate the grain from the chaff.

Liyakat Ali v. *State* *773*

— Under Section 32 it is not the requirement of law that the person making the statement, must be under expectation of death.

Common intention—S.34 of IPC—It is true that the common intention could arise at the spur of moment and be formed suddenly even at the spot—However, there has to be positive evidence of the same. Particularly, where a fatal blow is given by one person and the others who are present at the spot are unarmed, there has to be some positive evidence to draw an inference of common intention—Since it is difficult to get direct evidence of the fact that any act done by the accused

persons at the spot is in furtherance of the common intention of all or of some of them present at the scene of crime, the inference of common intention has necessarily to be drawn from the circumstances established by the prosecution.

Statement completely silent that appellants had exhorted to kill or to stab the deceased—Statement does not even show that the appellants were aware of co-accused carrying a knife with him—When the deceased was held by appellant SN he was given slaps and fist flows by appellant S. It was at this point of time that co accused suddenly took out a knife and stabbed in the deceased's abdomen.

Held, no material to show that the appellants shared the common intention to inflict the knife injury by co-accused. It is not even stated that while the injuries were being inflicted, appellant S N continued to hold the deceased. Thus, the appellants' conviction under Section 302 read with Section 34 IPC cannot be sustained—Convicted for the offence punishable under section 323 read with Section 34 IPC.

Sri Narain and Anr. v. *State (Govt. of NCT of Delhi)* *781*

— Section 65B—Petitioner challenged impugned order disallowing petitioner's application to bring on record print outs of certain e-mails allegedly exchanged between parties—Plea taken, proceedings pending before Trial Court are in context of a socially beneficial legislation concerning marital relationship between parties—Courts would always take a view which would advance cause of justice and a strict interpretation which would cause irreparable loss and disadvantage to wife ought not to be taken—Per contra plea taken, law requires that documents relied upon are required to be filed at appropriate stage i.e. along with written statement which means that they have to be filed before replication is filed or otherwise with permission of Court at time of framing of issues but definitely before evidence starts—Held—Apart from reason that application for bringing on record print outs of e-mails had

been occasioned only on account of change of counsel, no other reason has been provided—In opinion of this Court, that itself would not be sufficient reason in any case—To seek indulgence of a Court to accept additional documents under Order VIII Rule 14, party seeking to produce documents must satisfy Court that said documents were earlier not within part's knowledge or could not be produced at appropriate time in spite of due diligence—These documents are not new and were evidently in knowledge of petitioner wife prior to filing of divorce petition—Permitting same to be brought on record now would have its own cascading effect in form of amendment of written statement/reply, a rejoinder thereto issues have framed fresh evidence to be led, etc.—This would unnecessarily delay proceedings that CPC spells out for equitable framework and schedule with which parties have to comply and Courts ought to conduct proceedings before it—For aforesaid reasons, this Court is not persuaded to interfere with impugned order.

Preeti Arora v. *Aniket Subash Kore* *758*

INDIAN MEDICAL COUNCIL ACT, 1956—Section 20-A and Section 33 (m)—Delhi Nursing Homes Registration Act, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in treating patient (Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of hospitals and secondly, that Ethics Committee of MCI acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered

medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by Ethics Committee of MCI about state of affairs in Petitioner hospital and same did not harm any legal right or interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against Petitioner hospital highlighted above.

Max Hospital Pitampura v. *Medical Council of India* *620*

INDIAN PENAL CODE, 1860—Sections 342, 304, 34—Appellant was convicted U/s 342/304 /34 of Code—He challenged conviction urging FIR was not lodged promptly and is fatal to prosecution case. Held:—The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

Raj Kumar v. *State of Delhi* *51*

— Section 307—Attempt to murder—Quarrel between appellant and victim on slapping a boy aged 8 or 10 years—Appellant brought knife from his house and inflicted injuries on left cheek—Attempt to strike knife blow on stomach foiled Blow on neck taken on left arm, assaulted on left leg, palm and

fingers—Injured became unconscious appellant fled the spot taken to hospital—DD No. 43 B recorded on the victim's statement FIR No. 22/1999 under section 307 IPC P.S. Sarita Vihar registered—Injuries opined to be grievous appellant/ accused arrested-chargesheeted Convicted for offence u/s. 307 IPC-aggrieved appellant preferred appeal- contended- crime weapon not recovered- injuries were not dangerous in nature- Ingredients of section 307 missing- APP urged- multiple injuries inflicted on various body parts- judgement requires no interference- Held- No animosity between the appellant and victim- no ulterior motive assigned to victim- material facts deposed by injured remained unchallenged in cross examination- victim's version corroborated by PW5- injuries sustained by victim not accidental nor self inflicted—no ground to disbelieve the injured—ocular and medical evidence not at variance—non recovery of crime weapon not fatal as injuries caused by sharp weapon—findings based on proper appreciation of evidence—injuries caused were not on vital organs—crime weapon ordinary vegetable knife—no pre-plan or meditation to inflict injuries—playing cricket without confrontation—no intention to cause bodily injury sufficient to cause death—offence u/s. 307 IPC not made out—injuries caused voluntarily with sharp weapon—grievous in nature—held guilty for offence u/s. 326 IPC—conviction altered—substantive sentence modified—compensation of Rs.50,000/- awarded—appeal disposed of.

Pritam Chauhan v. *The State (Govt. of NCT of Delhi)* *130*

— Section 307—Attempt to Murder—Section 34—Common intention—Arms Act, 1950—Section 25 and 27—Possession and use of arms—Criminal Procedure Code, 1973—Section 357—Compensation to victim—Appellant/accused fired at the complainant PW6—Missed—Hit another person and caused injuries—Shot fired again—Hit PW6 and caused injuries—Appellants fled the spot—Injured removed to Hospital—DD No. 36 dated 08.06.1995 recorded—MLCs collected—Injuries

to complainant opined to be dangerous and described as gunshot injuries—Injured opined to be grievous—On the Statement of complainant FIR No. 339/95 PS Janakpuri registered—Accused persons named therein—Appellant/ accused arrested—Made disclosure statements—Country made pistols recovered—Sent for expert examination to FSL—Appellant/accused person alongwith Ashwani and Sanjiv Sethi arrested and charge Sheeted—Accused persons Ashwani and Sanjiv Sethi discharged—Charges against the appellants/ accused persons framed—prosecution examined 22 witnesses—Statement of appellants u/s. 313 Cr. P.C. recorded—Denied complicity in crime and pleaded false implication—Appellants convicted for offences u/s. 307/34 IPC and u/s. 25/27 Arms Act—Sentenced to undergo imprisonment and fine—Aggrieved appellants preferred appeals—Contended—Witnesses PW7 and PW19 not present the spot and falsely introduced as eye witnesses—Lacked creditability being interested witnesses—Complainant is B.C. of the area—Involved in a number for criminal cases—Recoveries are doubtful—Pistols recovered not connected/ linked with the crime—Nature of injuries suffered by PW6 not proved—Other injured withheld and not produced—Investigation is tainted and unfair—Ld. APP contended—Conviction based upon fair appraisal of evidence—The other injured could not be traced and examined—Held—Conduct of PW7 and PW19 unnatural and unreasonable—presence at the spot highly suspicious—Complainant PW6 proved the version given to police at first instance without major variations—Other injured not traceable—No adverse inference can be drawn against the prosecution—Country made pistols recovered from the appellants— Shot fired from one of the pistols—Appellants arrived at the scene having made preparation, participated by firing and facilitated commission of crime—shared common intention—injury to PW6 caused on a vital organ—Injuries dangerous in nature—Injuries not self inflicted or accidental in nature—No variance and conflict between ocular and medical evidence—Involvement in the incident established beyond reasonable doubt—Conviction sustained—Substantive

sentences modified—Compensation awarded—Appeal disposed of.

Joginder Singh @ Mor v. *State of Delhi* *248*

— Section 307, 326, 397—Appellant impugns the order of the Addl. Sessions Court convicting Appellant u/s 307, 304 r/w s. 397, IPC. Case of the prosecution is that Appellant, along with another in furtherance of common intention inflicted injuries to the victim with a knife, and deprived him of Rs. 800/- FIR was registered and on completion of investigation Appellant was chargesheeted and brought to trial—Appellant claimed false implication—Addl. Sessions Court—Convicted—Contended that testimony of PW1 who turned hostile during cross examination and thus could not be relied upon—That conviction u/s 397 IPC was unsustainable due to non recovery of crime weapon—Further,. that Appellant wasn't charged u/s 392, IPC, therefore conviction under the same was unsustainable Held: Prosecution has established case beyond reasonable doubt—Simply because witness turned hostile in the cross examination, version given under oath during examination in chief cannot be disbelieved—Law to the effect that merely when the witness turns hostile, whole of his evidence is not liable to be thrown away, is well settled.

- The prosecution was not able to prove that the appellant had intention and knowledge to cause death. The conviction u/s 307 require alternation to offence u/s 326 IPC.

- No force in the contention that conviction with the aid of S. 397 is not permissible in the absence of non recovery of knife.

Deepak v. *State* *290*

— Section 304B—The Ingredients "cruelty soon before death"—Marriage of the deceased survived only for five months during which for four onths she lived in her matrimonial home, so her parents were not expected to rush to the police with the complaint as initial attempts are made to resolve the dispute and save the marriage—Three days before the incident, there

was a quarrel between the accused and the deceased which forced the deceased to commit suicide, so it is difficult to imagine a more proximate link between harassment and death of the deceased—Further held, where the dying declaration does not suffer from any infirmity, its veracity could be the basis of conviction without any corroboration.

Gopi @ Hukam v. *State* *364*

— Sec. 376—Sentence—Sentencing for any offence has a social goal—Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed—It serves as a deterrent—The principle of proportionality between an offence committed and the penalty imposed are to be kept in view—It is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications as well as its repercussions on the victim.

— Rape is one of the most heinous crimes committed against a woman—It insults womanhood—It dwarfs her personality and reduces her confidence level—It violates her right to life guaranteed under Article 21 of the Constitution of India.

— A minimum of seven years sentence is provided under Section 376(1) of the Indian Penal code (IPC—Sentence for a term of less than seven years can be imposed by a court only after assigning adequate and special reasons for such reduction—Thus, ordinarily sentence for an offence of rape shall not be less than seven years—When the legislature provides for a minimum sentence and makes it clear that for any reduction from the minimum sentence of seven years, adequate and special reasons have to be assigned in the judgment, the courts must strictly abide by this legislative command—Whether there exists any "special and adequate reason" would depend upon a variety of factors and the peculiar facts and circumstances of each case—No hard and fast rule can be laid down in that behalf for universal application.

MD. Taskeen v. *The State (Govt. of NCT) Delhi*..... *394*

— S. 376—Rape-compromise-living as husband and wife-charge sheet already filed—Petitioner and prosecutrix R2-working in the same branch of a private company—Started conversing on the telephone—Prosecutrix visiting petitioner at his residence-staying with him occasionally had developed physical relation refused to marry her—Prosecutrix made complaint—Petitioner forced himself upon her and raped her—FIR under S. 376 IPC registered—Petitioner arrested-reached at understanding-married prosecutrix—Petition under S. 482 filed for quashing of FIR-compromised-petitioner and R2 living happily as husband and wife-marriage certificate photographs-placed on record-prosecutrix not to pursue complaint-prosecution opposed the quashing-offence not compoundable—Held—While considering quashing of FIR under S. 482 Cr. PC High Court must have due regard to the nature and gravity of crime-heinous and serious offences of mental depravity or offences like murder-rape-dacoity etc.-not fittingly quashed-even though the victim and victim family and offenders have settled the dispute-such offences not private in nature and have serious impact on society—Petition dismissed.

Mayank Pandey v. *State & Ors.* *374*

— Section 307—The prosecution has to prove that the accused while inflicting injuries to the victim, had an intention to cause his death or he had the knowledge that the act done by him may result in the death of the victim and, there is an intention or knowledge coupled with some overt act in the execution thereof. Initially appellant did not give any injury—When the victim pushed him out of the house, the appellant stuck a single blow on his chest with a sharp object—He did not harm his wife and son standing nearby—He did not inflict repeated blows with the sharp object in his possession. There was no previous history of animosity—The weapon was an ordinary scissor or some sharp object whose nature could not be ascertained. Nature of injuries—Doctor was not examined during trial. In the MLC depth of the injury was not indicated—Since the particular opinion has not been proved

through the doctor who gave it and it is unclear on what basis he formed that opinion, it is not safe to hold that the injuries inflicted by the accused were 'grievous'. The patient was conscious and oriented when taken to hospital for medical examination—The appellant was under the influence of liquor and injury was caused in a scuffle. In these circumstances, it cannot be inferred that the single blow inflicted was with the avowed object or intention to cause death. The conviction under Section 307 IPC, thus, cannot be sustained and is altered to Section 324 IPC.

Ravinder Kumar v. *The State* *612*

— Sec. 458, 392 and 397—Arms Act,, 1959—Sec. 27—Appellant Convicted Under Section 458/392 read with Section 397 IPC and 27 Arms Act—Awarded minimum sentence under section 397 IPC i.e. seven years—The peculiar circumstances and interest of justice compelled the Court to reduce the sentence—Appellant had already undergone actual imprisonment of about four years and four months and had earned a remission of over five months—The original record was not traceable. Attempts were made to reconstruct the original record to appreciate the appeal on merits. However, the Trial Court was unable to reconstruct the original record to scrutinize the testimonies of the material prosecution witnesses on merits. The documents on record are not at all sufficient to finally decide the appeal on merits—Considering the peculiar and special circumstances where the original record is not available and taking into consideration all the facts and circumstances for special and adequate reasons, the order on sentence modified and the appellant sentenced to undergo the sentence for the period already suffered in custody by him.

Jauddin @ Pappu v. *The State (NCT of Delhi)* *617*

— Section 308—Attempt to commit culpable homicide—Section 34—Common —intention—Appellants inflicted injuries to two persons—FIR No. 122/96 under Section 308/34 IPC registered at P.S.J.P. Kalan—Charge sheet filed—Charges for offences u/s. 308/325/34 IPC framed—Prosecution examined twelve

witnesses—Statement of the accused persons recorded—Pleaded false implication—Examined one witness in defence—Appellants released on probation and directed to pay compensation to victims—Two accused persons acquitted—Acquittal not challenged by the State—Appellant no. 1 convicted for offence under section 325 IPC and other two appellants convicted for offence under Section 323 IPC—Appellants released on probation and directed to pay compensation to the victims—Being aggrieved appellants preferred appeal—During pendency of appeal appellant no. 1 expired—His legal heir substituted—Appellants opted not to challenge the findings on conviction—Prayed for direction to employer of appellant No.1 to release pension—Conviction affirmed—Court not aware of nature of disciplinary action against the appellant no.1—In absence of any cogent-material direction as prayed cannot be given—Appeal dismissed.

Naresh Kumar Etc. v. *State* *584*

— Section 498A/304B—Appellant convicted by ASJ—Trial Court itself was not sure if soon before death deceased was subjected to cruelty—Deceased's younger sister was married to accused's younger brother—She was never subjected to cruelty and living happily in matrimonial home—She was not examined by the prosecution to ascertain conduct and attitude of the accused—Allegations regarding demand of dowry vague, unspecific and uncertain—No specific date mentioned as to when any specified dowry articles demanded—IO failed to investigate as to whether accused had illicit relations as alleged and whether that was provocation for the deceased to take the extreme step—Parents of deceased leveled allegation only after the suicide and no prior complaint—Deceased used to live at Hapur before shifting to Delhi about 1½ months prior to occurrence, whereas, accused was working in Delhi. Held, prosecution thus failed to establish beyond reasonable doubt that there was direct nexus between the cruelty and suicide. The prosecution is required to prove the very case it lodges and the Court cannot substitute its own opinion and make out a new case. The investigating officer

did not collect surrounding circumstances which permitted to commit suicide. The accused was sleeping on the roof at the time of occurrence. Nothing came in evidence that he instigated deceased to commit suicide at that moment—Accused acquitted.

Ahmed Sayeed v. *State* *595*

— Section 498-A/306—Deceased committed suicide by hanging—Ornaments given to the deceased at the time of marriage, were pledged—No investigation as to the purpose of pledging of ornaments—Employer of deceased where she was working, did not depose that the deceased was subjected to cruelty or harassment by in-laws on account of dowry—By no stretch of imagination it can be inferred that pledging of ornaments had any direct nexus with the suicide—Sufficient time elapsed between the pledging and death—IO did not investigate surrounding circumstances which prompted the deceased to commit suicide or the presence of accused at the time of occurrence—No neighbour examined to prove that deceased was subjected to cruelty—Allegations emerged after suicide and no complaint prior to it was ever lodged—Deceased never taken for medical examination regarding beatings inflicted to her—Divergent and conflicting version given by the prosecution witnesses about demand of dowry—Witnesses made vital improvements—Allegations vague and uncertain and without specific dates—Parents of deceased used to live at a short distance from matrimonial home, but they never confronted the accused and his family members for the cruelty meted out to the deceased—Simply because the accused was obsessed with drinking and used to waste money, not enough to infer that he was instrumental of death of deceased, without a positive act of instigation or aid in commission of suicide. Held, The cruelty established has to be of such a gravity as is likely to drive a woman to commit suicide. The mere fact that Meena committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her

husband. The Court is required to look into all other circumstances of the case. One of the circumstances which has to be considered by the Court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. A reasonable nexus has to be established between the cruelty and the suicide in order to make good the offence of cruelty which is lacking in the instant case.

A. Nagrajan v. *State* *601*

— Sections 34, 307—Appellants impugning order of the Addl. Sessions Court convicting them u/s 307/34 IPC. Prosecution contended that accused inflicted injuries and stabbed the victim (PW-1) with a knife, being resentful of the victim demanding money owed to him from the accused—FIR was registered and during the course of investigation accused persons were arrested, weapon of crime recovered—Charge sheet filed u/s 307/201/34 IPC—Accused persons pleaded false implication—Addl. Sessions Court convicted all the accused u/s 307/34 IPC—Hence, present appeal filed—No appeal filed against acquittal u/s 201 IPC. Appellants contended that Addl. Sessions Court fell into grave error by relying upon interested witnesses with no corroboration—Improvements in statements of prosecution witnesses ignored—Ingredients of s. 307 not attracted—MLC does not record nature of injuries. Held:

• Material facts proved by complainant remain unchallenged in cross examination—No reason to disbelieve eye witnesses—No previous enmity with accused persons to falsely implicate them in present incident—Therefore, no sound reason to disbelieve their ocular testimony which is duly corroborated by medical evidence.

• Appellants 2 and 3 cannot be held vicariously liable for knife injuries inflicted by Appellant 1—They are only liable for the individual role played by them in beating by fists and blows

at the first instance. Common intention must precede the act constituting the offence—In the absence of proof of a pre-arranged plan, mere fact of all three appellants being present at the scene of the crime, is not sufficient to make A-2 and A-3 liable for the crime of A-1.

• Period already undergone by A-2 and A-3 to be treated as substantive sentence—No further sentence is required to be awarded—However, from facts and circumstances, A-1 liable for his individual act u/s 307 IPC.

Gulshan Sharma & Ors. v. *State of NCT of Delhi* *628*

— Sec. 458, 392 and 397—Arms Act,, 1959—Sec. 27—Appellant Convicted Under Section 458/392 read with Section 397 IPC and 27 Arms Act—Awarded minimum sentence under section 397 IPC i.e. seven years—The peculiar circumstances and interest of justice compelled the Court to reduce the sentence—Appellant had already undergone actual imprisonment of about four years and four months and had earned a remission of over five months—The original record was not traceable. Attempts were made to reconstruct the original record to appreciate the appeal on merits. However, the Trial Court was unable to reconstruct the original record to scrutinize the testimonies of the material prosecution witnesses on merits. The documents on record are not at all sufficient to finally decide the appeal on merits—Considering the peculiar and special circumstances where the original record is not available and taking into consideration all the facts and circumstances for special and adequate reasons, the order on sentence modified and the appellant sentenced to undergo the sentence for the period already suffered in custody by him.

Jauddin @ Pappu v. *The State (NCT of Delhi)* *617*

— Section 307—Non-recovery of weapon of offence is not fatal as injuries were inflicted with a 'sharp weapon'.

Minor discrepancies, contradictions and improvements are insignificant and do not affect the core of the prosecution case regarding infliction of injury with a sharp object on the abdomen of the victim.

There was no animosity between the appellant and the victim. Only when confrontation took place, in a fit of rage, on the spur of the moment the appellant whipped out a knife; inflicted a solitary knife blow on the abdomen and fled the spot. He did not cause any harm to PW-11 of PW-8— No repeated blows with sharp weapon were caused to the victim. The crime weapon could not be recovered to ascertain its dimensions. The parties had cordial relations prior to 27.04.1985 and participated in the functions.

Held, no inference can be drawn that injury inflicted was with the avowed object or intention to cause death. The determinative question is intention or knowledge, as the case may be, and not nature of injury.

The appellant voluntarily inflicted 'dangerous' injuries with a sharp weapon on the vital organ and was liable for conviction under Section 326 IPC. The conviction is accordingly, altered from Section 307 IPC to Section 326 IPC.

Madan Lal v. *The State (Govt. of NCT of Delhi)*.... *668*

— Sec. 392, 397—Under Section 392 read with Section 397 IPC and Arms Act, 1959—R. 27—The complainant did not offer any explanation as to why the accused apprehended at the spot with a crime weapon, was not handed over to PCR officials who allegedly arrived at the spot after about 20 minutes of the occurrence—Despite police remand, the IO was unable to ascertain the identity of the appellant's associates and apprehend them. The robbed cash could not be recovered—The exact location where occurrence took place could not be ascertained—In his Court statement, the complainant did not attribute any specific role to the each assailants and in vague terms disclosed that the 'four individuals' pushed him and asked

him to keep hands up on the pretext of rush in the bus. He vaguely stated that they 'forcibly' took out Rs. 16,500/- from the inner pocket of his wearing pant. He did not describe as to what force was used and in what manner the currency lying in his inner pocket were taken out by any specific individual. No specific and definite role was attributed to the appellant in depriving him of cash from his pocket. The appellant was not apprehended while taking out the currency notes from the pocket of the complainant. It is unclear as to when and at what place the bus stopped and the four assailants alighted from—The bus. Driver and conductor or any other passenger in the bus was not associated at the time of conducting search of the accused. After his apprehension, no instrument to pick-pocket was recovered from his possession.

— The appellant who was allegedly armed with a deadly weapon, did not use it to avoid his apprehension. No injuries with knife were inflicted to the complainant or the public giving beating to him—Possibility of mistaken identity cannot be ruled out. Sole testimony of the complainant is not safe to convict the appellant in the absence of any corroboration in the light of various discrepancies and infirmities in the prosecution case—Delay in lodging the FIR has not been explained.

— None of the offenders used any deadly weapon to overawe or scare the complainant. The appellant was not found in possession of any robbed/stolen article and did not use knife (a) in order to the committing of the theft; or (b) in committing the theft; or (c) in carrying away or attempting to carry away property obtained by theft, to attract Section 390 IPC when theft becomes robbery under above noted circumstances. The knife was allegedly taken out by the appellant when he was being chased to avoid his apprehension—Appeal allowed—Conviction and sentence set aside.

Vishal v. *The State of NCT of Delhi* *652*

— Sections 304/324: Appellant is challenging conviction by the Trial Court u/s 304/324 IPC. Appellant contends that victims

wanted to withdraw water out of turn due to a wedding in the family, due to which a dispute arose- During the dispute, one life was lost, two other victims sustained grave injuries- Appellant denies being author of the injuries, pleads false implication- further contends to having received injuries himself at the hands of the complainants- Trial Court convicted Appellant u/s 304/324 IPC- Hence, present appeal. Appellant contended that TC erred in relying upon interested witnesses, without independent corroboration- Testimony of eye witnesses not corroborated by medical evidence- Highly improbable for injured witnesses to testify to the injuries of the deceased, when they were attacked simultaneously. Held:

- Defence taken by Appellant is conflicting- Version of Appellant entirely contradicted by Defence witnesses- Nothing on record to show that Appellant sustained injuries as claimed.

- Prompt and vivid reporting of the incident gives assurance regarding its true version.

- Testimony of an injured witness is accorded a special status in law- His statement is generally considered reliable- Unlikely that injured witness would spare the actual witness in order to falsely implicate someone else. Convincing evidence is required to discredit an injured witness. Victim was father and grandfather of PW2 and PW1. They were not expected to let the real culprit go scot free to falsely rope in an innocent.

- Trite law that minor variations between medical evidence and oral evidence do not take away the primacy of the latter= Minor contradictions and discrepancies are inconsequential- Do not affect core of the prosecution case.

- PW-2 suffered injuries 'simple' in nature- Conviction u/s 324 IPC altered to s. 323 IPC.

- Impugned judgement based on fair appraisal of the evidence

and all the relevant contentions of the appellant have been considered. No reason to interfere with the findings. Appellant has suffered ordeal of trial/appeal for 15 years- Clean antecedents- No history of enmity- Substantive sentence is modified to 5 years.

Rashid v. *State* *684*

— Section 392, 186—In the Court, the complainant did not subscribe to the version given to the police at the first instance, though he stood by the story of snatching of Rs. 40,000/- from his possession when he was keeping it in the dickey of the scooter. He did not identify Appellant to be the assailant who had snatched the envelope containing cash and from whom the stolen cash was recovered. He was declared hostile and was cross-examined by learned Additional Public Prosecutor in which also, nothing material could be elicited to establish the identity of the appellant—He rather gave a conflicting statement that after the envelope containing cash was snatched, he went to Mr. S.L. Banga, from whom he had taken the cash, to inform him about the incident, thereafter he saw a crowd of people standing across his house, the police informed him that they had recovered the cash from the individual who was in their custody. He was not even aware if any knife was recovered from the appellant's possession—Statements of PWs full of contradictions and no implicit reliance can be placed to establish the guilt of the appellant beyond reasonable doubt.

Medical examination after an inordinate delay at 12:15 A.M. —Constable who allegedly sustained injuries at the hands of the appellant in an attempt to apprehend him was taken to hospital at 01:35 A.M. in the night intervening 3/4-07-1999. Again no explanation has been given as to why Constable was taken for medical examined belatedly—Constables who allegedly apprehended the appellant and recovered the bag containing the envelope having cash, are not witnesses to the seizure memo or sketch of he knife or seizure memo of knife

or on personal search memo—Conviction and sentence of the appellant cannot be sustained.

Jagbir @ Jaggi v. *State & Anr.* *695*

— Sec. 394 and 398—Hostile witness—Evidentiary value. It is settled law that the evidence of a hostile witness can be relied upon at least to the extent it supported the case of the prosecution— The ocular testimony of the complainant is in consonance with medical evidence—Minor discrepancies, contradictions or improvement are not very material to affect the core of the prosecution case. The complainant's testimony inspires confidence and implicates the appellant without any doubt. The accused did not give plausible explanation to the incriminating circumstances proved against him. DW-1 did not lodge any complaint against any police officials for falsely implicating him in the case.

Sehzad @ Nadeem v. *State* *768*

— Sections 302, 392, 382 and 120B—Indian Evidence Act, 1872—Section 25, 26 and 27—Appellant State challenged acquittal of respondents U/s 302/392/382 r/w section 120B of Code—According to appellant, prosecution case rested purely on circumstantial evidence and all the circumstances including discovery and establishment of fact of use of motorcycle in commission of offences proved beyond iota of doubt by it.

Held:- Section 27 of the Act which is in the form of an exception to Sections 25 and 26 of the Act admits only so much of the information given by an accused which distinctly relates to the facts discovered in pursuance of the information. The recovery of the object has to be distinguished from the fact thereby discovered. If in pursuance of the information provided, any fact is discovered which connects the accused with the commission of the crime, then only the fact discovered becomes relevant.

State v. *Rampal Singh and Anr.* *700*

MEDICAL COUNCIL OF INDIA (PROFESSIONAL CONDUCT, ETIQUETTE AND ETHICS) REGULATIONS, 2002—Indian Medical Council Act, 1956—Section 20-A and Section 33 (m)—Delhi Nursing Homes Registration Act, 1953—Ethics Committee of MCI held that there was medical negligence on the part of doctors of Petitioner hospital in treating patient (Nikita Manchanda) and requested State Government Authorities to take necessary action on said hospital management for not having adequate infrastructure facilities necessary for appropriate care during post operative period which contributed substantially to death of patient—Minutes of meeting of Ethics Committee challenged before High Court—Plea taken, regulations do not govern or have any concern with facilities, infrastructure or running of hospitals and secondly, that Ethics Committee of MCI acting under regulations had no jurisdiction to pass any direction or judgment on infrastructure of any hospital which power rests solely with concerned State Government—Per contra plea taken, it is not disputed that MCI under 2002 Regulations has jurisdiction limited to taking action only against registered medical practitioners—It has not passed any order against petitioner hospital, therefore, petitioner cannot have any grievance against impugned order—Only simple observations were made by Ethics Committee of MCI about state of affairs in Petitioner hospital and same did not harm any legal right or interest of Petitioner—Held—It is clearly by Respondent that it has no jurisdiction to pass any order against Petitioner hospital under 2002 Regulations—In fact, it is stated that it has not passed any order against Petitioner hospital—Thus, there is no need to go into question whether adequate infrastructure facilities for appropriate post operative care were in fact in existence or not in Petitioner hospital—Suffice it to say that observations made by Ethics Committee do reflect upon infrastructure facilities available in petitioner hospital and since it had no jurisdiction to go into same, observations were uncalled for and cannot be sustained—Writ of certiorari issued quashing adverse observations passed by MCI against

Petitioner hospital highlighted above.

Max Hospital Pitampura v. *Medical Council of India* *620*

RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTION ACT, 1993—Sections 17 & 18—Plaintiffs filed suit seeking decree for declaration and mandatory injunction to be declared as lawful and absolute owners of suit property—According to defendant no. 2, suit was a collusive suit between plaintiffs and defendant no. 1 and was barred U/s 34 of SRFAESI Act and Section 17 & 18 of DRT Act.

— Held:- DRT Act is not a bar for a civil court to apply the relief such as Section 56 of the Transfer of Property Act inasmuch as it was held that no prejudice is caused to the Bank inasmuch as it only directs that other properties be sold first to satisfy the mortgaged debt.

Rakesh Kumar & Anr. v. *Saroj Marwah & Anr.* *743*

RESEARCH & ANALYSIS WING (RECRUITMENT, CADRE & SERVICE) RULES, 1975—Respondent was Class I Executive cadre officer in the Cabinet Secretariat [also known as the R&AW]—Respondent alleged sexual harassment at workplace sometime in 2007—Constitution of two Committees reports of the Committee (dated 19.05.2008 and 30.09.2008), although not direct subject matter of these proceedings-allegations of sexual harassment could not be substantiated—The Union Government under Rule 135(1)(a) of the Rules, compulsorily retired the respondent on the ground of her being exposed as an Intelligence Officer—Respondent challenged the order of compulsory retirement in O.A. 50/2010 the CAT quashed the said order of compulsory retirement and directed consequential relief to be granted to her—Union Government questioned the decision in the CAT in W.P. (C) 2735/2010 ("the UOI's 2010 petition")—On 3.05.2010, Court, issued notice to show cause to the

respondent; stayed the order of the CAT—On 10.05.2010, an order fixing the respondent's provisional pension under Rule 69 of the CCS (Pension) Rules, 1972 ("Pension Rules") based upon her pay drawn as on 28.08.2008, with effect from 19.12.2009, issued—Respondent contested the order of provisional pension before CAT by filing O.A. 1665/2010—Contending that the submission of UOI in ("the UOI's 2010 petition") alleging unauthorised absence between 29.08.2008 and 26.11.2009 was not justified—Respondent also filed O.A. 1967/2010, urging grounds similar and identical to those in O.A. 1665/2010—Respondent's aforesaid application—Treatment of the period between August 2008 and November 2009 as unauthorized absence was not justified—Disposed of by common order dated 28.04.2011—On 29.09.2011 respondent filed O.A. 3613/2011—CAT, by its impugned order allowed O.A. 3613/2011 on 11.05.2012 directing the regularization of two spells of alleged unauthorised absence-enjoining the Government from initiating disciplinary proceedings against the respondent-directing the Union Government to revise the respondent's pension with consequential benefits-hence this present writ petition.

Union of India v. *Nisha Priya Bhatia* *84*

SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (SARFAESI ACT)—Section 34—Whether the civil Court has no jurisdiction to entertain the suit on account of Section 34 of SARFAESI Act?—Facts of the present case show that there is an arguable case of fraud—The relationship between the plaintiff and defendant of a creditor and a borrower is denied in the present case—Hence, civil Court has jurisdiction to entertain the suit despite Section 34 of SARFAESI Act.

Ashok Kumar Raizada v. *The Bank of Rajasthan & Anr.* *356*

— Section 34—Recovery of Debts Due to Banks and Financial Institution Act, 1993—Sections 17 & 18—Plaintiffs filed suit

seeking decree for declaration and mandatory injunction to be declared as lawful and absolute owners of suit property—According to defendant no. 2, suit was a collusive suit between plaintiffs and defendant no. 1 and was barred U/s 34 of SRFAESI Act and Section 17 & 18 of DRT Act.

Held:- DRT Act is not a bar for a civil court to apply the relief such as Section 56 of the Transfer of Property Act inasmuch as it was held that no prejudice is caused to the Bank inasmuch as it only directs that other properties be sold first to satisfy the mortgaged debt.

Rakesh Kumar & Anr. v. *Saroj Marwah & Anr.* *743*

SERVICE LAW—Armed Forces—Central Civil Services (Temporary Services) Rules, 1965—Rule, 5 (1)—Petitioner was issued a driving license which bore no. 83920/Mth by District Transport office, Thoubal, Manipur—Pursuant to advertisement regarding filling up of vacancy for post of Constable/Driver in CRPF, Petitioner applied for appointment to said post—After a rigorous selection process and having fulfilled all eligibility requirements relevant to appointment, Petitioner was issued order of appointment to post of Constable (Driver)—Respondents sought verification of driving of Petitioner from District Transport Officer/ Respondent No. 4 which had issued DL to Petitioner—Respondent No. 4 writing from Manipur wrongly mentioned DL No. 83920/Mth—In view of erroneous communications received from District Transport Officer, Manipur, to effect that Petitioner was holding DL No. 83920/Mth, Respondents proceeded to issue a notice informing that his services would stand terminated w.e.f. date of expiry of period of one month from date which notice was served upon him—Faced with this difficult situation, Petitioner proceeded to office of Respondent No. 4 personally whereupon a letter was issued by Respondent No. 4 reaffirming validity correctness of license issued to Petitioner as well as fact that same bore no. 83920/Mth and specifically stated that reply furnished by his

office earlier was erroneous and wrong—However, no heed was given thereof and services of Petitioner were terminated without conducting inquiry—Order challenged before HC—Held—Show cause notice and impugned orders of termination resulted merely on account of erroneous communications which Respondent No. 3 received from Respondent No. 4—Respondent No. 3 has conducted a verification and re-verification and has received correct information based thereon—Only reason on which show cause notice was issued to Petitioner and his services were terminated was fact that driving license no. 83920/Mth was not verified by concerned authority as having been validly issued to Petitioner—This position was factually erroneous and impugned orders based thereon are, therefore, not sustainable.

Sanjay Kumar v. *Union of India and Ors.* *44*

— Disciplinary proceedings—Petitioner, on Departmental Inquiry found guilty of having assaulte d the fellow employee causing grievous injuries and also the previous three punishments and the allegation of his being habitual of misconduct—Disciplinary Authority, accepting the inquiry report awarded punishment of removal from service-appeal rejected-revision rejected—Challenged in writ—Held, finding of guilty on the charge of assault on fellow employee stands supported by evidence on record—However, as regards the previous misconduct, the same was the allegations that he overstayed the leave unauthorizedly for which minor penalties were imposed on him—In view of the circumstances of the petitioner, respondents directed to reconsider the proportionately of sentence, though upholding the finding of guilt.

Sunil Kumar v. *Union of India & Ors.* *70*

— Petitioners challenged denial of benefit under ACP Scheme on the ground that if they had qualified SUOCC course after completion of 24 years of service, then they would be eligible for second financial upgradation under ACP Scheme from completion of the said promotional course and not from

completion of 24 years of regular service—Held, since all the petitioners had completed 24 years of regular service without any promotion in past 12 years and the respondents did not grant second financial upgradation on the ground that under ACP scheme a person is required to fulfill all the norms required in normal promotion, on the grounds that the petitioners had not undertaken the pre-promotional cadre course despite completion of 24 years of service, in view of the law laid down in Hargovind Singh case, petitioners could not be deprived of financial upgradation—Further held, since the petitioners were detained for undertaking SUOCC course only in 2005 and they successfully undertook the same between October 2005 to January 2006, petitioners could not be denied all their rightful dues till date—Also, held respondents having not fulfilled their responsibility to detain the petitioners for pre-promotional cadre course, they cannot be allowed to withhold the benefits entitled to the petitioners—Respondents directed to grant second financial upgradation from the date they have completed 24 years of regular service.

Suraj Bhan and Ors. v. *UOI and Ors.* *75*

— Court of Inquiry—Petitioner, deployed at Tripura fell ill and was administered treatment in 2001, whereafter upon deterioration of condition, shifted to AIIMS for further treatment till 2002—Petitioner applied for inquiry about his disease and for payment of Seema Prehari Bima Yojana as well as hard area lump sum grant—Court of Inquiry conducted in 2006 by the Deputy Commandant challenged by petitioner on the grounds that the same proceeded on presumption as if petitioner was suffering with pulmonary tuberculosis—Held, in view of the record of the inquiry, petitioner deserves to be given opportunity to place on record his treatment record and examined material witnesses, so petitioner deserves the issuance of directions to conduct Court of Inquiry.

Indraj Singh v. *UOI and Ors.*..... *126*

— Petitioner challenged termination of his services as constable of ITBP during probation—admittedly, the petitioner failed to inform his employer about the pendency of serious criminal charges against him—Petitioner took a plea that the form was filled up as dictated by his senior—Held, the plea taken up for the first time during writ petition is misconceived—further held, merely because the petitioner was acquitted in the criminal case, the charge of suppression of vital information does not get diluted.

Jasvir Singh v. *Director General Indo Tibetan Boarder Police (ITBP) Force & Others* *138*

— Compassionate appointment—father of petitioner who was employed with BSF, suffered an injury which required his discharge in 1982 from BSF—on attaining the age of majority, the petitioner applied for compassionate appointment in 1988 and was offered a post of water carrier in 2004 which he accepted—after accepting the appointment in class IV, the petitioner made representations that he is entitled to appointment in class III post—respondents rejected the representations, so petitioner filed WP(C) 6957/05 for the same benefit, which was dismissed in 2005—petitioner again made representations to the respondents followed by legal notice—respondents rejected the representations, hence the petitioner had no legal right or entitled to the reliefs sought.

Anil Kumar Sharma v. *Union of India & Ors.*..... *149*

— Promotion Respondents claiming they were beneficiaries of Flexible Complementing Scheme (FCS), filed application before Central Administrative Tribunal seeking a direction for promotions from date of completion of eligible service in promotional post wherein they were given in situ promotion on subsequent dates—Orders of Tribunal allowing application, challenged before High Court—Plea taken, directions made by Tribunal in impugned judgment tantamount to granting pay to respondents for work which they have not done—Held—It is admitted position that petitioner has only effected in situ promotions to respondents—There is no distinction in work

which was being discharged by respondents prior to their promotion or thereafter—Only variation is in financial benefit which would accrue to respondents after their promotions—Principle of 'no work no pay' has no application to instant case—From very expression in situ, it is apparent that there is no change in either place or position in which respondents are working—Therefore, it cannot be contended that respondents are being paid any amount for work they have not discharged—We find no merit in these petitions and applications which are dismissed with costs which are quantified at Rs. 2,000/- per respondent.

National Technical Research Organization v. *P. Kulshrestha & Ors.* *675*

— Respondent participated in examination conducted by UPSC for selection to post of Junior Geologist Group 'A' in Geological Survey of India—Having qualified said examination respondent was directed by petitioner to appear before Central Standing Medical Board at Safdarjung Hospital for medical examination—Medical Board, after examining respondent declared him 'unfit' on ground of his having undergone Lasik Surgery—Respondent successfully challenged order of petitioner before Administrative Tribunal before High Court—Held—There is no prescription in recruitment rules to effect that a person who had undergone Lasik Surgery to correct vision, would be disqualified for consideration for appointment—Medical Board which has examined respondent has not found his vision criterion—Only ground for rejecting him was fact that he had undergone corrective Lasik Surgery—In absence of any prescription in rule or regulation, mere fact that person has undergone corrective surgery ipso facto cannot tantamount to his being medically unfit and result in rejection of a candidate.

Union of India & Anr. v. *Saikat Roy* *752*

— Representation of petitioner requesting for merger of pollution level test inspector and motor vehicle inspector cadres, rejected by respondents—Petitioner relieved from his posting with

directions for duties in Taxi Unit, Burari-—Application of petitioner challenging both orders dismissed by Administrative Tribunal—Order of Tribunal challenged before HC- plea taken, posting in taxi unit, burari amounts to change of cadre-Transfer outside cadre in a different wing is bad in law being violative of conditions of service—In eventuality of refusal to merge two cadres independent to each other, petitioner be not transferred out of pollution control branch as it would amount to serving under junior officers of MVI bench- Held-Issues raised by petitioner are whether rejection of representation to merge PLTI and MVI cadres into one is unjustified and whether his transfer to taxi unit. Burari amounts to forcing him to work under his juniors- petitioner had challenged impugned orders before learned Tribunal and raised same contentions, as have been raised before us—Tribunal has carefully considered both submissions of petitioner and given sound reasons for rejection- Impugned order of Central Administrative Tribunal does not suffer with any infirmity—There are no grounds to interfere with findings of learned Tribunal- writ petition dismissed.

Prince Garg v. *Govt. of NCT & Ors.* *763*

SPECIFIC RELIEF ACT, 1963—Section 16 (c)—Plaintiff filed the suit seeking specific performance of an agreement to sell—Plaintiff deposited the balance amount in the form of fixed deposit and the defendant was restrained from creating any third party interest or transfer possession of property in question—Plaintiff filed the application seeking withdrawal of deposit but prayed for continuation of interim injunction—Combined reading of Section 16(c) and Explanation (i) leads that there is no statutory provision under the Specific Relief Act to Claim specific performance for the plaintiff to deposit the balance sale consideration when filing a suit pertaining to specific performance—It is not necessary that before grant of injunction in a suit for specific performance for purchase of immovable property that a direction has to be passed for deposit of balance sale consideration—It is based on facts and equity—Held, Plaintiff is allowed to withdraw sale

consideration deposited in the Court—Evidence shall be recorded expeditiously—Plaintiff to remain bound to re-deposit the amount as directed by the Court.

Mahesh Singhal v. *Bhupinder Narain Bhatnagar* *340*

— Suit for declaration and mandatory injunction—Order 1 Rule X CPC—Impleadment—proper party-Necessary party—First Appeal—S. 100 A—No further appeal in certain cases—Delhi High Court Act, 1966—S. 10—Appeal to Division Bench—Delhi High Court Rules—Chapter II of OS Rules—Rule 4—Letter Patent Appeal—preliminary objection—Maintainability—Appellant filed a suit seeking decree of declaration-possession and mandatory injunction in favour of plaintiff-Defendant no. R1 filed an application under order 1 Rule 10 (2) of CPC for impleadment—Application not opposed by R2 DDA—Plaintiff opposed the application R1 neither necessary party nor proper party to the proceedings-Contended-R1 claiming title to the half share of the suit property—Dispute could not be made to the subject matter of the suit—Appellant also resisted the application on the ground that the appellant was *dominous litus*—Registrar accepted the contention of the appellant and rejected the application filed by R1 by order dated 14.12.2010—Preferred an appeal under Rules 4 of Chapter-II of original side Rules to single Judge-allowed-—Preferred LPA—Preliminary objection-maintainability-whether appeal barred under S. 100 A of CPC—Order passed by single Judge in exercise of his power—Provided for an appeal against the order made by the Registrar under Rule 3 of Chapter-II—Respondent contended—Appeal under S. 10 of Delhi High Court Act against the Judgment of Single Judge lies to Division Bench only-since the present impugned order not passed in exercise of original jurisdiction—Appeal under S. 10 of the Act would not be available in terms of Rule 1 of Chapter-II of Original Side Rules—Court observed—The suit had to be tried and heard by single judge—Registrar acts in certain matters as a delegatee of singe Judge—Rule 4 of Chapter-II of Original Side Rules provides an appeal against an order of the Registrar-in effect provided an appeal to the delegator from

the order passed by delegatee in exercise of his power and discharge of functioning delegated to the delegate—Thus single Judge while hearing an appeal under Rule 4 in fact examines order passed in discharge of function of single Judge and in exercise of same power vested in the single judge under ordinary original civil jurisdiction—In view of it—An authority cannot sit in appeal against an order passed in exercise of his jurisdiction—Albeit by its delegate—The power exercised by single judge under Rule 4—The power to review-Re-Examine order passed by the registrar—The expression 'appeal' in Rule 4 misnomer—Original side rules have been framed in respect of practice and procedure in exercise of the ordinary original civil jurisdiction explicit in the said rule—Same also indicate that the rule contained in Chapter—II of the Original Side Rules relates to original civil jurisdiction—Entire scheme considered in this perspective—Apparent—Single judge exercises ordinarily original civil jurisdiction even while considering a challenge under Rule-4—an appeal under S. 10 would lie from the judgement of single Judge to Division Bench—S. 100 A of CPC is not applicable as the same cannot be termed as appellate power—Preliminary objection regarding Maintainability of the appeal rejected.

Rahul Gupta v. *Pratap Singh & Ors.* *270*

TRADE MARK ACT, 1999—Trade mark-infringment of-identical- deceptively similar- Passing of—Intellectual property Appellate Board (IPAB)—Plaintiff having registered trade mark '4T PREMIUM'—India's first in growing lubricant market and producer of quality branded automotive/industrial product—Product available at more than 50,000 retail counters across India—Product imported under various famous trade marks-4T PREMIUM used extensively and continuously—uninterruptedly, since year 2003—Defendant adopted trade mark with mala fide intention—liable to be injuncted from using 4T PREMIUM—Defendant contended—plaintiff could not claim exclusive right either in the word '4T' OR '4T PREMIUM'—word '4T' denoted 4 strokes engine—word PREMIUM a laudatory word—no one can claim right to use

the word exclusively—defendant its trademark 'AGIP' WITH 4T PREMIUM—packing totally different from the plaintiffs—no infringement or passing of. The passing of the defendant's goods as that of plaintiff—defendant never used 4T PRIMIUM separately- used the same with their trade name AGIP 4T PREMIUM—defendant already filed an application for cancellation of plaintiff trade mark before IPAB—Held—when the two marks not identical the plaintiff have to establish- mark used by the defendant so nearly resemble the plaintiff's trademark as it likely to mislead to a false conclusion in relation to good in respect to which it is registered—the defendant using word AGIP and its logo alongwith 4T PREMIUM and not simplicitor 4T PREMIUM—Even the plaintiff using the word 'VOLVOLINE' with 4T PREMIUM—application dismissed.

Valvoline Cummins Limited v. *Apar Industries Limited* *222*

UNIVERSITY GRANT COMMISSION ACT, 1956—Section 3 and 26(1)—UGC—(Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in Universities and Colleges) Regulations, 2000—Clause 1.3.1—Petitioner filed petition seeking writ of quo warranto for declaring that fourth respondent Dr. S. Sivakumar is not entitled to hold his position as Research Professor at Indian Law Institute (ILI)—Plea taken, Sivakumar fraudulently obtained post by making false statements and fraudulent misrepresentation before selection committee—Sivakumar's appointment was contrary to statutory rules as he did not have requisite qualifications in terms of advertisement issued by ILI inviting applications for post of Research Professor and in terms of UGC Regulations for appointment—Per contra plea taken, present proceedings are motivated—Writ Petition of quo warranto is not maintainable as Sivakumar's selection and appointment was not to a statutory post—Petitioner does not have any locus standi to claim quashing of appointment since he was not a candidate—RTI responses received by petitioner from Kerala Law Academy were manipulated and are therefore,

to be ignored—Selection of Sivakumar was not only within terms of advertisement issued and bye-laws of ILI, but merited—Held—Points for consideration in this case are whether petitioner has locus standi to agitate this matter—If so, do facts warrant issuance of writ of quo warranto—Petitioner, in opinion of this Court, despite being outsider, possesses necessary locus standi to question appointment in violation of UGC Regulations, which have force of statute—A particular institution may, based upon its internal peculiarities, choose to lay a different emphasis on particular requirements inter se candidates, fact remains that all minimum qualifications prescribed in 2000 UGC Regulations must necessarily be complied with—Limited inquiry to be conducted by this Court while considering a writ of quo warranto is not whether Sivakumar was more qualified candidate for post but rather whether his credential fell below minimum statutory bar imposed by UGC Regulations—If documentary proof provided by petitioner is to be believed, Dr. Sivakumar did not have cumulative ten years teaching or research experience required under 2000 Regulations, whilst if Dr. Sivakumar's documentary proof is considered, that requirement is clearly satisfied—Comprehensive details disclosed in "Academic Profile" render Sivakumar eligible for post of Research Professor under Second alternate criterion i.e. outstanding scholar with established reputation who has made significant contribution to knowledge and that being case, his further selection lies at discretion of Selection Committee—There is no infirmity in appointment of Dr. Sivakumar as Research Professor at ILI—Writ petition dismissed with cost of Rs. 50,000/-.

Jose Meleth v. *UOI and Ors.*..... *416*