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argument of Petitioner is that it should be paid for its equity shares, CCPS and FCDS at face value of Rs. 2,687.83 per share—Per contra plea taken, there is no dispute between parties which requires to be referred to arbitration and in any event, arbitration clause till date has not been invoked by LTL—Claim was itself premature—Even for placing monies in a no lien account, approvals would have to be obtained. There was no pleading that ARIL was siphoning off funds in any unlawful manner—Although scope of Section 9 of Act was wide and Court could exercise all powers vested in it, pleadings in main petition were insufficient for grant of any such relief—Held—While neither ARPL nor ARIL has denied liability to honour commitments under SPA, SHA and EA, there is justification in their contention that there is no specific averment made in petition by LTL that either of them is trying to siphon off funds or transfer properties of ARPL which is one of prerequisites for grant of relief under Order XXXVIII Rule 5 CPC—No doubt Section 9 of Act gives vide powers to Court including same power for making orders as it has for purpose of and in relation to any proceedings before it—Nevertheless, that discretion is not to be exercised lightly—Court must be satisfied that essential conditions for grant of such relief have been met by party seeking it—Till date, LTL has not formally invoked arbitration clause—Court is not inclined at this stage to express any view on contentious issues which are left open to be decided by arbitral Tribunal—Petition disposed of with directions.

Lalea Trading Limited v. *Anant Raj Projects Pvt. Ltd. & Anr.* *1679*

BORDER SECURITY FORCE ACT, 1968—Section 11—Border Security Force Rules, 1969—Rule 22—Sector HQs Hospital, Amritsar referred petitioner to Base Hospital, Jalandhar for further treatment—Petitioner neither reported in that hospital nor informed respondents and went to his home town, Moradabad—As petitioner's period of absence exceeded 30

days, a Court of Inquiry was conducted—Show cause was also dispatched to petitioner informing that it was tentatively proposed to terminate his services by way of order of dismissal—Petitioner failed to respond to respondents and vide impugned orders, petitioner dismissed from service and appeal of petitioner also rejected—Orders challanged before HC—Plea taken, petitioner was unwell and was taking treatment for tuberculosis and for this reason has failed to report at place of duty—Held—Petitioner had gone to his home town, Moradabad instead of Base Hospital, Jalandhar consciously—Medical certificate relied upon by petitioner is after petitioner received show cause notice—There is no contemporary record of prescriptions, treatment or of any medication(s) which petitioner may have taken, if he was actually sick or was under treatment—Stand of respondents that no reply having been received from petitioner and petitioner having been given a notice to show cause in accordance with law, respondents had no option but to pronounce order recording its satisfaction that petitioner was absent without leave without any reasonable cause and his further retention in service was undesirable—Treating petitioner's absence as a period of petitioner having been on leave without pay would not impact order of punishment—Writ petition dismissed.

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order and directed Assistant Commissioner (Tech.) to file appeals to Commissioner (Appeals) against order-in-original—Appeals dismissed holding that substantial benefit given to respondent cannot be taken away on ground of procedural infractions—Revision application filed before Central Government also dismissed—Writ petition filed to issue a writ of certiorari quashing impugned order and a writ of mandamus directing GOI to pass fresh orders after re-adjudication—Preliminary objection taken by respondent that no writ can be filed by a government functionary questioning decision of Government itself, nor can UOI question its own order—Held—One cannot be said to be aggrieved by one's own order and in this view of matter Central Government cannot question its own order passed under Section 35EE of Act—If Central Government is of view that order of Commissioner (Appeals) is legal and proper and requires no interference (by way of enhancement of duty, fine or penalty), there is no right conferred upon Commissioner of Central Excise to challenge decision to drop proceedings—If Commissioner of Central Excise chooses to take appeal route against order of Commissioner (Appeals) to CESTAT, he may lawfully pursue his challenge right up to Supreme Court—But if he chooses to take revisionary route and question legality and propriety of order of Commissioner (Appeals) before Central Government under Section 35EE, he must, if decision of Central Government goes against him, accept it as final—Preliminary objection taken by respondent upheld and writ petition dismissed in limine.

Union of India Through Commissioner Central Excise Commissionerate Delhi-II v. *Ind Metal Extrusions Pvt. Ltd. & Anr.* *1641*

CODE OF CIVIL PROCEDURE, 1908—Order XXXIX Rule 1 & 2—Interim Injunction—Plaintiff a manufacturer of the famous antiseptic liquid under the trademark 'DETTOL'—Plaintiff came out with a new product 'DETTOL HEALTHY

KITCHEN' Dis and Slab Gel, a kitchen cleaner which helps kill germs. Defendant manufacturer of rival kitchen cleaner 'VIM LIQUID'—Defendant came out with an advertisement purportedly disparaging the plaintiff and its brand DETTOL, equating its product to a "Harsh Antiseptic"—Plaintiff alleged that reference in the advertisement of defendant was clearly directed to the plaintiff's brand DETTOL being referred to as a Harsh Antiseptic and that the defendant attempted to misrepresent that the plaintiff had done nothing but repackage its Antiseptic Liquid as DETTOL HEALTHY KITCHEN. Injunction Granted. Held—Prima facie the impugned advertisement subtly yet certainly targets the plaintff's brand and its product—It it common knowledge that the plaintiff's brand DETTOL is synonymous with the term antiseptic in the FMCG market in India. The public at large carry an impression in their minds that all DETTOL products are antiseptic. Therefore, the usage of the term antiseptic in the impugned advertisement directs the viewers of the advertisement to the plaintiff's brand or product. Held, The generic disparagement of a rival product, without specifically identifying to pin-pointing the rival product is obejctionable—False, misleading, unfair and deceptive advertising is not protected under "Commercial speech"—Comparative advertising is permissible as long as while comparing own with rival/competitor's product, the latter's product is not derogated, discredited, disgraced, though while comparing some amount of 'showing down' is implicit; however the same should be within the confines of ***De Beers Abrasive v. International General Electric Co.,*** 1975 (2) All ER 599, which Courts in India have frequently referred to.

Reckit Benkciser (India) Ltd. v. *Hindustan Unilever Ltd.* *2002*

— Order XXXVIII Rule 5—Income Tax Act, 1961—Section 163—Respondents ARPL and AIPL approached Petitioner LTL with a proposal to invest in their project of developing a

retail mall—Pursuant thereto Share Subscription Agreement (SSA) was entered into between parties whereby LTL agreed to subscribe to equity shares representing 26% of total working share capital of ARPL—Funds were infused in ARPL by LTL—Simultaneous with execution of SSA, parties entered into Share Holding Agreement (SHA) where ARIL assured LTL 8 % Investment Return Rate (IRR) in every financial year—According to LTL, construction of Mall was inordinately delayed and Respondents expressed inability to adhere to 18 % preferred IRR and asked for it to be reduced—It was mutually agreed between parties Respondents would return US Dollar component of LTL's investment in ARPL with 8 % IRR on or before expiry of three year lock-in-period—Exit Agreement (EA) was executed between parties—Present petition was filed by LTL for a direction to ARIL to secure sum equivalent to 8% IRR on LTL's investment, to cooperate and allow CA nominated by LTL to conduct regular internal financial audits of ARPL and ARIL, to direct respondent's to file records and particulars of relevant bank accounts by way of which remittance amounts where secured, to disclose details of statutory filings with Government departments, to direct ARIL not to alienate/encumber/sell/create charge on shares held by ARPL and ARIL, directing ARPL not to create charge/alienate/encumber/sell shares with respect to 26% shareholding of LTL, directing Respondents not to create any liability, mortgage, lien, encumbrance in any manner on properties and assets of ARPL until adjudication of disputes between parties—In short, argument of Petitioner is that it should be paid for its equity shares, CCPS and FCDS at face value of Rs. 2,687.83 per share—Per contra plea taken, there is no dispute between parties which requires to be referred to arbitration and in any event, arbitration clause till date has not been invoked by LTL—Claim was itself premature—Even for placing monies in a no lien account, approvals would have to be obtained. There was no pleading that ARIL was siphoning off funds in any unlawful manner—Although scope

of Section 9 of Act was wide and Court could exercise all powers vested in it, pleadings in main petition were insufficient for grant of any such relief—Held—While neither ARPL nor ARIL has denied liability to honour commitments under SPA, SHA and EA, there is justification in their contention that there is no specific averment made in petition by LTL that either of them is trying to siphon off funds or transfer properties of ARPL which is one of prerequisites for grant of relief under Order XXXVIII Rule 5 CPC—No doubt Section 9 of Act gives vide powers to Court including same power for making orders as it has for purpose of and in relation to any proceedings before it—Nevertheless, that discretion is not to be exercised lightly—Court must be satisfied that essential conditions for grant of such relief have been met by party seeking it—Till date, LTL has not formally invoked arbitration clause—Court is not inclined at this stage to express any view on contentious issues which are left open to be decided by arbitral Tribunal—Petition disposed of with directions.

Lalea Trading Limited v. *Anant Raj Projects Pvt. Ltd. & Anr.* *1679*

CODE OF CRIMINAL PROCEDURE, 1973—Section 374—Indian Penal Code, 1860—Section 307, 34—Appeal against conviction u/s 307/34 on the grounds that prosecution was unable to establish and prove motive to inflict injuries, weapon of offence was not recovered, victim did not disclose the name of the assailants to the doctor examining him—Held—Evidence of an injured witness cannot be disbelieved without assigning cogent reasons. Proof of motive recedes into background in cases where the prosecution relies upon eye witness account of occurrence. Non recovery of weapon of offence is not fatal. There is specific ocular and medical evidence to prove that the injuries were caused by gunshot. It is not mandatory for a doctor to record in the MLC or to make enquiry from the injured about the name of the assailant. Omission of injured to disclose the assailant's name to the

doctor does not discredit his testimony—Held considering the aggravating and mitigating circumstance, sentence reduce from 8 years to 6 years. Appeal disposed off.

Noor Salam v. *The State (Govt. NCT of Delhi)*..... *1732*

— Section 378(1)—Indian Penal Code, 1860—Sections 376 and 377—Indian Evidence Act, 1872—Section 118—Statement of a child witness—Manner of conducting competency test—Insufficient attention paid; no real assessment of the capacity and capabilities children accorded special treatment—Extensive guidelines laid down by the Supreme Court and the Delhi High Court—Pronouncements bind all trial courts in Delhi—Knew no exceptions—Adherence is mandatory—Questions put should meet the requirements of law having special regard to age and circumstances of the person required to depose—Questions to be put to child witness ought to be sensitively framed—Education, socio economic background, age and capacity to be kept in mind—Directions issued.

State v. *Rahul* *1861*

— Section 438—Anticipatory Bail—Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989—Section 3—Section 18—Bar to grant anticipatory bail—Indian Penal Code, 1860—Section 34—Sections 341/323/34—Utterance of caste remark to the complainant—Complainant and his brothers beaten up—Final report submitted against the three accused persons—Application for grant of anticipatory bail—Dismissed by the Sessions Judge—Preferred present application for anticipatory bail—Pleaded business rivalry between petitioners and complainant had filed petition alleging harassment by complainant—SHO was directed to provide adequate protection—DCP filed affidavit confirming business rivalry—FIR is an afterthough—Filed when the petitioner was in hospital having suffered beatings from the complainant—FIR is counter blast to FIR filed by the petitioner—The chain of events points to falsity of the complaint—challan filed is

— Section 482—Medical Termination of Pregnancy Act, 1971—Section 3—Termination of pregnancy—Victim of rape—Medically examined—Had pregnancy of 6 weeks—Living alone in Delhi; does not want to bear a child—Writ petition filed for directions to State for terminating her pregnancy and to preserve the foetus for DNA test—Status report filed—Pregnancy can be terminated with minimal know risks—State has no objection for termination of pregnancy—Enquiries made—Victim is major; has consultation with her counsel; understands the consequences of her act—Expressed willingness to terminate the pregnancy—Consent of woman essential for termination of pregnancy—Likely to face mental, physical, social and economical problems in future—Petition allowed—Directions issued.

X (Assumed name of the prosecutrix) v. *The State (N.C.T. of Delhi) & Ors.* *1813*

COMPANIES ACT, 1956—Sections 391 to 394—Scheme of Compromise and arrangement—Sanctioned and company ordered to be wound up vide order dated 25.04.2000—Scheme of compromise and arrangement proposed—Petition filed for sanction of the scheme—Order for holding of meeting of the shareholders, secured and unsecured creditors—Meeting accordingly held—shareholders, secured creditors and unsecured creditors approved the scheme—Petitioner stated the scheme will benefit all the parties concerned and will be in public interest—Notices issued to Ministry of Corporate Affairs and also the official liquidator—Objections filed by the OL and the Regional Director (RD), Ministry of Corporate Affairs—OL stated strategic investor not disclosed—The balance sheets, profit and loss accounts and re-structing of existing liabilities highly fanciful and imaginary—New plant and machinery would be quite expensive—RD stated no mention of rehabilitation of the workmen—Not stated about having obtained no objection from SEBI and Stock exchanges—Propounder filed affidavit stating no objection received from

all the stakeholders—Rejoinder to objection of OL filed wherein it was stated all creditors except IFCI approved the scheme—Strategic investors paid substantial amount—Scheme viable and if given effect to, will wipe out all liabilities of TAML (TAHAPAR AGRO MILLS LTD.)—Net worth certificate enclosed total cost of the scheme is much more than assests—Further affidavit filed by propounder updating information regarding dues of creditors—Some dues already paid in full—Some payable within 30 days of sanction of the scheme and some within 4 months of the sanction—Counter Affidavit filed by IARC—Agreed to receive the balance in 4 months—IFCI agreed to accept the balance in 6 months—IDBI acknowledged payment—Held, 90% shareholders, secured and unsecured creditors approved the scheme—Strategic investor demonstrated its bonafides—Terms of balance amount payment reasonable—Objections of OL do not survive—Points raised by RD also accounted for entire sums claimed by departments and statutory bodies—Govt. bodies served of the notice of meeting—No objections filed till date—Sanction accorded to the scheme with modifications—Petition allowed.

Gujarat State Financial Services Ltd. v. *Thapar Agro Mills Ltd.* *1798*

— Section 433(e), 434, 439—Winding up petition on the grounds of inability to pay debt—Settlement arrived at during pendency. Recorded in order and petition disposed of with direction that if there is default of even one installment, the petitioner are at liberty to take remedy of contempt and also provisional liquidator should also be appointed. Default in payment—Application for appointment of Provisional Liquidator and for reviving of Company petition filed—Affidavit filed by respondent for dropping the notice of contempt and for modification of order—Held—Despite unambiguous language of the order, Respondent did not seek directions of the Court when it became plain to it that it would be unable to adhere to the undertakings given to the Court in the event the CDR

scheme was approved. Reasons stated in the affidavit are neither satisfactory nor convincing. Respondent not in a position to repay the outstanding amounts which it owes the petitioner. Applications allowed. Company petition revived and provisional liquidator appointed.

Australia and New Zealand Banking Group Ltd. v. *Tulip Telecom Ltd. Ors.* *1933*

— Section 392—Joint application by Transferor and Transferee company for dismissal of petition in which order was passed approving the scheme of demerger of NLD and ILD from Transferor Company to Transferee company. ROC apprised the Court that Central Government had no objection to Applicants withdrawing the petition subject to following conditions.

In the Matter of Vodafone Essar South Ltd. *1979*

CONSTITUTION OF INDIA, 1950—Article 215—Contempt of Court Act, 1971—Petition is filed seeking initiation of contempt proceedings against the respondent on account of his deliberate and wilful violation of the order passed by a Single Judge of this Court dated 29.09.2011 in Contempt Petition No. 360/2011—Respondent holds the petitioners responsible for having him suspended from service from 2007-2010, nixing his chances of becoming Commissioner of Income Tax. Respondent assailed his suspension order before the CAT, which petition also made scurrilous remarks about the petitioners-Petition was allowed and suspension stayed—In the interim, the petitioners filed complaints against the respondent with the Income Tax Department citing sexual harassment—Due to no action being taken, petitioner's moved the HC by way of a writ petition—Court issued an order dated 01.03.2011 restraining the Respondent from communicating with the Petitioners—In blatant violation of this order, the Respondent wrote yet another defamatory letter consequent to which the petitioners filed contempt case No. 360/2011, in which the

respondent filed a reply purporting remorse with the added caveat that he would refrain from communicating with the Petitioners—However, respondent sent a similar defamatory letter to Sh. C.K. Jain, SIT a few months later—Notice was again issued to Respondent since aforesaid communication provided fresh cause of action—Affidavit filed by Respondent, ostensibly to explain his conduct, did not reflect any remorse—In the meanwhile, Respondent filed a writ petition bearing No. 6802/2012 praying that the Petitioners be removed from the office Respondents No. 1 and 2 being Department of Revenue and Chief Commissioner Income Tax, Cadre Controlling Authority, respectively, which made further defamatory remarks about the petitioners—This writ petition, while being dismissed as withdrawn, was tagged with the contempt petition to demonstrate the aggravation of the injury caused to them by the conduct of the Respondent—Counsel for Respondent pleaded mercy and acceptance of apology by the Court—Held—The Respondent is undoubtedly guilty of wilfully violating the orders of the Court—Not a matter of course that a Judge can be expected to accept any apology—Respondent's behaviour reveals his skewed mind set, no penitence or remorse visible in the demeanour of the respondent—Therefore, only conclusion is that, the respondent is guilty of wilfully and consciously violating the orders of the Court dated 01.03.2011, 29.09.2011 as also order dated 30.07.2012—The Respondent is directed to be committed to civil prison to undergo simple imprisonment for a period of 15 days. In addition, a fine of Rs. 2000 is imposed on the respondent.

X & Anr. v. *SK Srivastava & Anr.* *1649*

— Article 227—Writ of Mandamus—Whether withholding the promotion of an official for the reason of his required expertise in the speciality/department currently he's engaged with, even after rejection for fixation of basic pay which is held due to that senior post, be valid?—Held, that retention of an employee

as against his promotion due to the reason of his expertise needed in the current department shall not be held against him and also, reduction of his salary, on account of late joining in the department, is wholly unjustified and arbitrary act of the respondents and not the fault of the petitioner.

Suneel Kumar Khatri v. *Union of India & Ors.*..... *1671*

— Article 227—Service matter—Armed Forces Tribunal—Whether the Petitioner who was discharged from Indian Air Force, is entitled to pension for reserved period of service, if the services of the petitioner are terminated subsequently? Held-once appointment has been given and the service of the Petitioner has been availed, the employer is under an obligation to grant pension taking into consideration the reserve period of service, despite subsequent termination. Petition allowed.

Ex-CPL Pritam Singh v. *Union of India and Ors.* *1719*

— Article 226—Appeal against order of reinstatement with arrears of salary—Respondent appointed to the post of Junior Assistant cum Typist on direct recruitment by the Appellant, pursuant to a public advertisement which stated that the post was permanent—However, the appointment letter mentioned that the appointment was subject to outcome of a writ petition 2357/93, filed by one Shri K.N. Pandey—On the writ petition 2357/93 being allowed, the respondent's appointment was terminated—Consequently, respondent filed a petition under Article 226 before the High Court challenging her termination—Appellant's contention was that after the judgment in *K.N. Pandey's* case, it was necessary to make a reversion from the existing holders of the post—Respondent was the junior most and her appointment was made expressly subject to the outcome of the above case, she was justly terminated—Single Judge held that as a result of K.N. Pandey's writ petition being allowed, he had to be accommodated to a promotional post, which had nothing to do with the direct

recruit vacancy to which the respondent had been appointed—Outcome of K.N. Pandey's writ petition held to be irrelevant to the respondent's appointment—The Respondent was reinstated into service with arrears of salary to the post of Junior Assistant (LDC). Held no interference called for—Appeal dismissed.

The Principal Delhi College or Arts & Commerce v. *Sunita Sharma & Anr.* *1743*

— Article 226—Appellant contents that the respondent should have sought a reference before the Tribunal under Industrial Disputes Act—Held—While the doctrine of availability of alternate remedy exists to limit this Court's jurisdiction, it is ultimately the discretion of the Writ Court and not an invariable rule.

The Principal Delhi College or Arts & Commerce v. *Sunita Sharma & Anr.* *1743*

— Article 226—Writ petition—Code of Criminal Procedure, 1973—Section 482—Medical Termination of Pregnancy Act, 1971—Section 3—Termination of pregnancy—Victim of rape—Medically examined—Had pregnancy of 6 weeks—Living alone in Delhi; does not want to bear a child—Writ petition filed for directions to State for terminating her pregnancy and to preserve the foetus for DNA test—Status report filed—Pregnancy can be terminated with minimal know risks—State has no objection for termination of pregnancy—Enquiries made—Victim is major; has consultation with her counsel; understands the consequences of her act—Expressed willingness to terminate the pregnancy—Consent of woman essential for termination of pregnancy—Likely to face mental, physical, social and economical problems in future—Petition allowed—Directions issued.

X (Assumed name of the prosecutrix) v. *The State (N.C.T. of Delhi) & Ors.* *1813*

— Article 226—Code of Criminal Procedure, 1973—Section 327—Ban imposed on reporting of a rape trial which has a seering public interest—Interpretation of S. 327—Whether open trial a rule—Does S. 327 (2) which provides for in camera trial in a rape case envisages access and is so in what manner—Advisory was issued by the Public Relations Officer, of the Delhi Police that since the Magistrate had taken cognizance u/s 302 and 376 (2)(g) IPC in the charge sheet, the provisions of section 327(2) and (3) of the CrPC got triggered—Petitioner moved an application before the Magistrate seeking permission to report the Court proceedings which was dismissed by the Magistrate—Present writ petition filed challenging the ban—Petitioner contends that the primary object of S. 327 is to provide for a fair trial—Sub Section 2 and 3 were introduced by amendment to protect the dignity of rape victim—As victim has died, sub Section 2 and 3 will have no applicability and that the media had acted with due restraint in reporting the case—Provisions of s. 327 being used to cover the inadequacy of the State, in particular, that of the police—Blanket ban is illegal—Respondent contended that right of the media to report Court proceedings is not an absolute right as is clearly envisaged in Sub-section (3) of s. 327 CrPC—Ban was imposed taking into account the sensitivity of the case, the safety of accused and the concern of the Court to maintain anonymity qua the identity of the victim, her family as also the accused—Held: Composite and a close reading of the provisions of Section 327 of the Cr.P.C. clearly point to the fact:

— Guidelines for the mode and manner in which such discretion is to be exercised.

— Further Held—Even in a rape trial the Court is required to consider the various facets and dimensions obtaining in the case-mechanical approach is to be abjured—Directions issued

in the present case.

Vijay Singhal & Ors. v. *Govt. of NCT of Delhi & Anr.* *1817*

— Article 226—Code of Criminal Procedure, 1973—Section 397, 482—Respondents contend that present writ petition is not maintainable—Ought to have filed a revision petition u/s 397 or a petition u/s 482 of the CrPC—Held, as all three proceedings would lie in the High Court, as presently positioned, the mere fact that the Petitioners have chosen to approach this Court by way of a petition under Article 226 of the Constitution of India, will not come in the way of the Court entertaining petition. The power under Article 226 of the Constitution, which is available to the Court, is far wide. As a matter of fact, the Petitioners not being a party to the criminal proceeding, would perhaps not be entertained if, a revision petition were to be filed under Section 397 of the Cr.P.C. or a petition under Section 482 of the Cr. P.C. This would, however, not fetter the Court from entertaining proceedings on its own against orders of the Court below, if deemed fit, in a given case.

Vijay Singhal & Ors. v. *Govt. of NCT of Delhi & Anr.* *1817*

— Articles 14, 19(1) (g) and 265 and entry 97 of List I (Union List) of 7th Schedule—Delhi Value Added Tax Act, 2004—Section 2(1) (zc) (vi) and 84—Finance Act, 1994—Section 65 (105) (zzzq)—Commissioner, Department of Trade and Taxes to Govt. of NCT of Delhi on examination of agreement entered into between petitioner and telecom operators, held that entire amount of consideration received from sharing telecom operators for providing access to passive infrastructure would amount to consideration for transfer of right to use goods and was exigible to tax—Order challanged before HC—Plea taken, there was no transfer of right in any

goods by petitioner to sharing telecom operators and therefore, levy of VAT on assumption to contrary was wholly erroneous and untenable—Held—Petitioner has not transferred possession of passive infrastructure to sharing telecom operators in manner understood in law—Limited access provided to them can only be regarded as permissive use or a limited licence to use the same—Possession of passive infrastructure always remained with Indus—Sharing telecom operators did not therefore, have any right to use passive infrastructure—Assessment order framed on basis that petitioner transferred right to use passive infrastructure to sharing telecom operators, quashed.

Indus Towers Limited v. *UOI and Ors.* *1905*

— Article 226—Respondent DDA came up with a scheme in 1970 for allotment of industrial plots to persons carrying on business in non conforming areas—Appellant applied for a plot asserting that he is carrying a business of reconditioning motor parts and using big machines, grinders, etc in a non conforming area at Nichalson Road, Delhi—On 1/2/1977 DDA sanctioned a one acre plot of land to the appellant and asked him to deposit a sum of Rs.2,33,193,.80/-—Appellant deposited only Rs. 1,06,600/- on the ground that he had not been given any description of the plot and its location and will deposit the balance only when the plot is made available—Vide communication dated 8/4/1981 and 22/2/1988 DDA conveyed to the appellant that the size of the plot was proposed to be reduced to 2000 sq. meter and he was now being considered for an allotment of an industrial plot in Okhla Industrial Area at the current market rate—Appellant protested to both the letters and pointed out that the reduction of plot area and demand for payment of a plot at current market price was unfair—Vide letter dated 31/1/1989 DDA finally rejected the application of the appellant for allotment of plot on the ground firstly that 50% of the payment had not been made by the appellant and secondly that the industry of the appellant was

a service industry and no purpose would be served by shifting it—Appellant challenged the said order in the writ petition which was dismissed by the Ld. Single Judge. Held: At no stage a binding allotment came to be made by DDA to the appellant and hence no vested right accrued in favour of the appellant. Whenever DDA made an offer, the appellant came up with a counter offer and a counter offer is not an acceptance of the offer. It is also to be taken note of that the appellant has already shifted his factory out of Nicholson Road, New Delhi and his factory and trade license had all expired and the premises is only being used for storage purposes and the DDA has taken a specific stand that the area of Nicholson Road is a conforming area—Appeal dismissed. However, DDA directed to refund the amount paid by the appellant along with interest.

Punjab Motor Workshop v. *DDA and Anr.* *1986*

— Article 53, 226 and 227—General Clauses Act, 1897—Section 3(8)—Respondent lodged rebate claims in respect of excise duty paid on goods procured from manufactures initially for home consumption but subsequently exported—Claim rejected by Assistant Commissioner (Tech.) who issued a show cause notice—Accepting objections of respondent, petitioner allowed rebate claims and passed order-in-original to that effect—Commissioner, Central Excise reviewed order-in-original and took view that it was not in order and directed Assistant Commissioner (Tech.) to file appeals to Commissioner (Appeals) against order-in-original—Appeals dismissed holding that substantial benefit given to respondent cannot be taken away on ground of procedural infractions—Revision application filed before Central Government also dismissed—Writ petition filed to issue a writ of certiorari quashing impugned order and a writ of mandamus directing GOI to pass fresh orders after re-adjudication—Preliminary objection taken by respondent that no writ can be filed by a government functionary questioning decision of Government itself, nor can

conditions, customs and traditions. It is difficult to lay down precise definition or to give exhaustive description of the circumstances which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extend due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, entitling the complaining spouse to secure divorce. Filing numerous police complaints against husband and his family members with the police and in husband's office that they used to demand dowry and treated her with cruelty when she failed to fulfill their demands and that husband was having illicit relations with his colleague amounts to mental cruelty thereby entitling him to decree of divorce u/s 13(1)(ia). Trial Court's order affirmed.

Suman Singh v. *Sanjay Singh* *2045*

INCOME TAX ACT, 1961—Section 163—Respondents ARPL and AIPL approached Petitioner LTL with a proposal to invest in their project of developing a retail mall—Pursuant thereto Share Subscription Agreement (SSA) was entered into between parties whereby LTL agreed to subscribe to equity shares representing 26% of total working share capital of ARPL—Funds were infused in ARPL by LTL—Simultaneous with execution of SSA, parties entered into Share Holding Agreement (SHA) where ARIL assured LTL 8 % Investment Return Rate (IRR) in every financial year—According to LTL, construction of Mall was inordinately delayed and Respondents expressed inability to adhere to 18 % preferred IRR and asked for it to be reduced—It was mutually agreed between parties Respondents would return US Dollar component of LTL's investment in ARPL with 8 % IRR on or before expiry of three year lock-in-period—Exit Agreement (EA) was executed between parties—Present petition was filed by LTL for a direction to ARIL to secure sum equivalent to 8% IRR on LTL's investment, to cooperate and allow CA

nominated by LTL to conduct regular internal financial audits of ARPL and ARIL, to direct respondent's to file records and particulars of relevant bank accounts by way of which remittance amounts where secured, to disclose details of statutory filings with Government departments, to direct ARIL not to alienate/encumber/sell/create charge on shares held by ARPL and ARIL, directing ARPL not to create charge/alienate/encumber/sell shares with respect to 26% shareholding of LTL, directing Respondents not to create any liability, mortgage, lien, encumbrance in any manner on properties and assets of ARPL until adjudication of disputes between parties—In short, argument of Petitioner is that it should be paid for its equity shares, CCPS and FCDS at face value of Rs. 2,687.83 per share—Per contra plea taken, there is no dispute between parties which requires to be referred to arbitration and in any event, arbitration clause till date has not been invoked by LTL—Claim was itself premature—Even for placing monies in a no lien account, approvals would have to be obtained. There was no pleading that ARIL was siphoning off funds in any unlawful manner—Although scope of Section 9 of Act was wide and Court could exercise all powers vested in it, pleadings in main petition were insufficient for grant of any such relief—Held—While neither ARPL nor ARIL has denied liability to honour commitments under SPA, SHA and EA, there is justification in their contention that there is no specific averment made in petition by LTL that either of them is trying to siphon off funds or transfer properties of ARPL which is one of prerequisites for grant of relief under Order XXXVIII Rule 5 CPC—No doubt Section 9 of Act gives vide powers to Court including same power for making orders as it has for purpose of and in relation to any proceedings before it—Nevertheless, that discretion is not to be exercised lightly—Court must be satisfied that essential conditions for grant of such relief have been met by party seeking it—Till date, LTL has not formally invoked arbitration clause—Court is not inclined at this stage to express any view on contentious issues which are left open

required to build a warehouse cum workshop and hand over the same to assessee—Assessee advanced certain sums to the lessors which were liable to be adjusted against monthly rent and had also incurred substantial expenditure on the development and interiors of the property—Workshop was however demolished by the DDA on 1/6/2000 by claiming that the leased land belonged to DDA and not the lessors—Assessee claimed a write off from his taxable income, a sum of Rs. 64,60,707, on account of the advance rent of Rs. 33,82,289 paid by him to the lessors and Rs. 30,78,418/- spent by him on the property and also filed a suit for recovery for the said amounts—Assessing Officer held that the amounts incurred being of enduring nature were capital expenditure and could not be written off—In the appeal filed before the CIT, decision of the Assessing Officer to disallow the writ off of the amount spent on the workshop was upheld and with respect to the advanced amount, it was held that since the assessee had filed a civil suit for recovery for the said amount, it could not be allowed to be deducted as a revenue loss or a bad debt—On further appeal, the Tribunal granted relief with regard to the advance rent of Rs. 33,82,289 by holding that the pendency of the civil suit was not a bar on writing off the debt. Held: No infirmity in the view expressed by the Tribunal. For an assessee to claim deduction in relation to the bad debts it is now no longer necessary for the assessee to establish that the debt had become irrecoverable and it is sufficient if the assessee forms such an opinion and writes off the debt as irrecoverable in its accounts.

Commissioner of Income Tax-III v. *Samara India Pvt. Ltd.* *1995*

— Section 41 (1)—Respondent assessee company was engaged in the business of trading in agricultural commodities and for the assessment year 2008-2009 declared its taxable income as nil on the assertion that it did not conduct any business in

the year 2007-2008 and suffered losses—The return was originally accepted but subsequently on finding that the liabilities due to four sundry creditors had ceased to exist, the Assessing Officer added a sum of Rs. 1,57,15,137, being the aggregate of the amounts shown as payable to the said four sundry creditors, as income of the assessee under Section 41 (1) of the Act—On appeal, CIT agreed with the assessee that since it continued to reflect amounts payable to its creditors in its balance sheets, there would be no cessation of liability and CIT detected the additions made by the AO with respect to amounts payable to all creditors except one creditor namely M/S Elephanta Oil and Vanaspati Ltd. on the ground that the assessee had failed to establish the genuineness of the said liability—On further appeal, Tribunal accepted the plea raised by assessee that its books of accounts had been examined in the past and it would not be correct now to doubt the genuineness of its transactions. Held: It is well settled that in order to attract the provisions of Section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived and if an assessee continues to reflect amounts payable to its creditors in its balance sheets, there would be no cessation of liability. The liability of the assessee towards M/S Elephanta Oil and Vanaspati Ltd. cannot thus, be considered as having ceased and the said liability also cannot be held to be time barred for reflecting an amount as outstanding in the balance sheet by a Company amounts to the Company acknowledging the debt for the purposes of section 18 of the Limitation Act, 1963 and since the assessee Company has continued to reflect amounts payable to M/S Elephanta Oil and Vanaspati Ltd. in its balance sheets, the period of limitation would stand extended. Further, the genuineness of a credit entry can only be examined in the year when the liability was recorded as having arisen and in the present case the liability having been recorded in the year 1984-85, and the Revenue having accepted it over several years, it was not open to the CIT to

doubt its genuineness, more so when no credit entry had been made in the books of the assessee in the previous year relevant to the assessment year 2008-2009.

The Commissioner of Income Tax Delhi-II v. *Jain Export Pvt. Ltd.* *2066*

INDIAN EVIDENCE ACT, 1872—Section 6—Appeal against conviction on the grounds that conviction based on testimony of prosecutrix and her mother without independent corroboration—Vital discrepancies and contradictions in the statements of witnesses. Doctor who examined the prosecutrix, not produced. Doctor who appeared deposed facts which were not mentioned in the MLC—Held—Prosecutrix is a child victim; has no ulterior motive to falsely implicate the accused. Despite searching cross examination no material discrepancies emerged in the statement to discard her version. Her conduct is quite reasonable and natural and is relevant under section 6 of Evidence Act—No inconsistency in the version given by her in her statements under S. 161 and 164 Cr. PC and in the Court—Ocular testimony of prosecutrix is in consonance with medical evidence—Non examination of doctor and non production of medical report would not be fatal to the prosecution case, if evidence of prosecutrix and other witnesses is worthy of credence. Conviction based upon fair appraisal of the evidence and requires no interference.

Asgar Ali v. *The State (NCT of Delhi)*..... *1772*

— Section 118—Statement of a child witness—Manner of conducting competency test—Insufficient attention paid; no real assessment of the capacity and capabilities children accorded special treatment—Extensive guidelines laid down by the Supreme Court and the Delhi High Court—Pronouncements bind all trial courts in Delhi—Knew no exceptions—Adherence is mandatory—Questions put should meet the requirements of law having special regard to age and

circumstances of the person required to depose—Questions to be put to child witness ought to be sensitively framed—Education, socio economic background, age and capacity to be kept in mind—Directions issued.

State v. *Rahul* *1861*

INDIAN PENAL CODE, 1860—Section 307, 34—Appeal against conviction u/s 307/34 on the grounds that prosecution was unable to establish and prove motive to inflict injuries, weapon of offence was not recovered, victim did not disclose the name of the assailants to the doctor examining him—Held—Evidence of an injured witness cannot be disbelieved without assigning cogent reasons. Proof of motive recedes into background in cases where the prosecution relies upon eye witness account of occurrence. Non recovery of weapon of offence is not fatal. There is specific ocular and medical evidence to prove that the injuries were caused by gunshot. It is not mandatory for a doctor to record in the MLC or to make enquiry from the injured about the name of the assailant. Omission of injured to disclose the assailant's name to the doctor does not discredit his testimony—Held considering the aggravating and mitigating circumstance, sentence reduce from 8 years to 6 years. Appeal disposed off.

Noor Salam v. *The State (Govt. NCT of Delhi)*..... *1732*

— Section 34, 308, 323—Accused arrested and challaned to trial for committing offence u/s 308/34. On appreciation of evidence, accused convicted for offence u/s 323/34. Cross appeals—Accused challenging conviction and complainant challenging acquittal of accused u/s 308—Held—Accused were residing in same premises and had property disputes. A quarrel had taken place on trivial issue. Accused were not armed with deadly weapons. Only a single brick blow was inflicted on the temporal region of the complainant and as per MLC it was a mere cut and lacerated wound. Within a few hours the complainant was discharged. No attempt was made

to inflict repeated blows from the brick No harm was caused to any other family member of complainant—These circumstances rule out intention of the accused to cause injuries which could be fatal. Conviction of accused u/s 323 maintained—Appeal filed by victim dismissed. Convicts have been sentenced to imprisonment till the rising of the Court. Considering the age, character, antecedents and the fact that two of them are government servants, instead of sentencing them at once to any punishment these are ordered to be released on probation of good conduct on furnishing personal bonds.

Vikas v. *The State of (NCT of Delhi) & Ors.* *1765*

— Section 376—Indian Evidence Act, 1872—Section 6—Appeal against conviction on the grounds that conviction based on testimony of prosecutrix and her mother without independent corroboration—Vital discrepancies and contradictions in the statements of witnesses. Doctor who examined the prosecutrix, not produced. Doctor who appeared deposed facts which were not mentioned in the MLC—Held—Prosecutrix is a child victim; has no ulterior motive to falsely implicate the accused. Despite searching cross examination no material discrepancies emerged in the statement to discard her version. Her conduct is quite reasonable and natural and is relevant under section 6 of Evidence Act—No inconsistency in the version given by her in her statements under S. 161 and 164 Cr. PC and in the Court—Ocular testimony of prosecutrix is in consonance with medical evidence—Non examination of doctor and non production of medical report would not be fatal to the prosecution case, if evidence of prosecutrix and other witnesses is worthy of credence. Conviction based upon fair appraisal of the evidence and requires no interference.

Asgar Ali v. *The State (NCT of Delhi)*..... *1772*

— Section 342, 452, 307, 34—Appeal against conviction and

sentence u/s 342, 452, 307, 34 on the grounds that conviction based on sole testimony of complainant. Inconsistent versions as on which date and place the accused were identified by complainant. No crime weapon recovered from accused. Statement of complainant was recorded after inordinate delay and there is discrepancy whether it was recorded at the police station or at his residence—Held—Discrepancies in versions is of no consequence as accused refused to participate in TIP proceedings and the complainant thereafter identified him in Court. Complainant has no ulterior motive to falsely recognize the accused. There was no valid reason for the accused to decline participation in TIP proceedings, adverse inference to be drawn against the accused. Complainant has offered reasonable explanation for delay in recording statement. Minor contradictions as to where the statement was recorded is not enough to throw away his entire version about the incident given in Court—Held—Prosecution unable to find motive of the accused to inflict vital injuries to the victim. It is settled legal proposition that motive has greater significance in a case, involving circumstantial evidence but where direct evidence is available, which is worth relying upon, motive loses its significance. Ocular testimony of witnesses as to the occurrence cannot be disregarded only by reason of the absence of motive. Appeal has no merits and is dismissed.

Deepak Kumar v. *State (Delhi)*..... *1780*

— Section 148, 149, 395—Appeal against conviction under section 148, 149 and 395 on the grounds that conviction based on testimonies of interested witnesses, no independent public witness was associated at any stage of the investigation—Held—Appellant could not illicit material discrepancies in the cross examination of victims who had no ulterior motive to falsely implicate the accused. There is no good reason to disbelieve the cogent and reliable testimony of the victims. Minor contradictions, discrepancies and improvements highlighted by the counsel do not effect the

core issue and are insignificant. Presence of accused as member of unlawful assembly is sufficient for conviction. He was not a mute spectator or passive witness. U/s 149 IPC even if no overt act is imputed to a particular person, the presence of the accused as a part of unlawful assembly is sufficient for conviction. Every member of an unlawful assembly is vicariously liable for the acts done by others either in prosecution of common object or members of assembly knew were likely to be committed. Conviction based upon fair appraisal of the evidence and requires no interference.

Bihari Lal & Anr. v. *State (NCT of Delhi)* *1791*

— Sections 376 and 377—Indian Evidence Act, 1872—Section 118—Statement of a child witness—Manner of conducting competency test—Insufficient attention paid; no real assessment of the capacity and capabilities children accorded special treatment—Extensive guidelines laid down by the Supreme Court and the Delhi High Court—Pronouncements bind all trial courts in Delhi—Knew no exceptions—Adherence is mandatory—Questions put should meet the requirements of law having special regard to age and circumstances of the person required to depose—Questions to be put to child witness ought to be sensitively framed—Education, socio economic background, age and capacity to be kept in mind—Directions issued.

State v. *Rahul* *1861*

— Section 308, 341 and 34—Probation of Offenders Act, 1958—Section 4 and 12—Petitioner was successful at selection process for post of Constable Executive in Delhi Police but was not offered appointment—Commissioner of Police took view that in view of his being guilty of having committed offence punishable under Section 308 of IPC though released on probation for which he had furnished a bond to keep good behaviour for two years, petitioner was

unfit to be appointed as a Constable in Delhi Police—This led to filing of OA which was dismissed—Order challanged before HC—Plea taken, release on probation washes away finding of culpability for having committed offence punishable under Section 308—Per contra plea taken, release of petitioner would not wash away wrong conduct of petitioner—Held—Larger question which falls for consideration in this case is, whether petitioner having been released under Section 4 of Offenders Act, does not suffer disqualification because of Section 12 of said Act—Release of petitioner under Section 4 of Offenders Act would not obliterate conduct / act which constitutes offence—Petitioner would not be entitled to any relief even on interpretation of Section 12 of Offenders Act—So when conduct / act constituting offence is not washed of, employer in this case, Delhi Police was within its right not to appoint petitioner as Constable (Executive) Male, that too, when no right is said to have accrued in favour of petitioner who was only on threshold of being appointed—In law or facts petitioner would not be entitled to get appointed as Constable Executive (Male)—Conclusion of Tribunal cannot be interfered with.

Ajit Kumar v. *Commissioner of Police and Ors.* *1921*

— Section 34—Sections 341/323/34—Utterance of caste remark to the complainant—Complainant and his brothers beaten up—Final report submitted against the three accused persons—Application for grant of anticipatory bail—Dismissed by the Sessions Judge—Preferred present application for anticipatory bail—Pleaded business rivalry between petitioners and complainant had filed petition alleging harassment by complainant—SHO was directed to provide adequate protection—DCP filed affidavit confirming business rivalry—FIR is an afterthough—Filed when the petitioner was in hospital having suffered beatings from the complainant—FIR is counter blast to FIR filed by the petitioner—The chain of events points to falsity of the complaint—challan filed is

ambiguous—Continuous improvements made by complainant—Allegation of caste remark made after one month of the incident—Witness also made improvements—APP pleaded bar of Section 18 of the SC/ST Act to section 438 Cr. PC—Made caste remark in public view—Clear averments in the complaint—Held—Section 18 is an absolute bar to applicability of Section 438 Cr. PC—Absence of utterance in public view is the limited exception—Specific allegations against each of the accused a must—Section 34 IPC cannot be brought in aid—Accused Manjeet Singh uttered caste remark in a public street—No such charges against other two petitioners—Application of Manjeet Singh rejected—Other two petitioners admitted to bail.

Manjeet Singh & Ors. v. *State of Delhi*..... *1971*

INDUSTRIAL DISPUTES ACT, 1947—Section 33C (2)—Whether in proceedings under S. 33C(2) Industrial Disputes Act which are in the nature of execution, interest can be granted, if it was not granted in the substantive award—Held—The Appellant raised an industrial dispute, which was referred to the Tribunal under the Industrial Disputes Act claiming the scale of Rs. 330 Rs. 560 prevailing at that time—Finding that the appellant had been discriminated against Labour Court promoted him to the pay scale of Rs. 330 Rs. 560 w.e.f. 01.01.1973—Instead of promoting the appellant w.e.f. 15.12.1962, the appellant was promoted to the revised scale only from 01.01.1973—Appellant made a claim for pay for the intervening period—Management paid an amount of Rs. 4,000 to the Appellant in 1987—Being dissatisfied, the Appellant challenged the order u/s 33C(2) in the Central Government Industrial Tribunal—Tribunal in 1996 computed the amount payable as Rs. 40,139 and invoking principle of equity and restitution, directed payment of interest. Aggrieved by the award, management approached the Court u/s 33C (2) of the Industrial Disputes Act to the extent that it directed payment of interest—Single Judge held that section 33C(2)

conferred limited jurisdiction upon the Industrial Tribunal, that if the component of interest was not directed to be paid in the substantive award or rules applicable to the employee, he would be disentitled to claim the same under section 33C(2), which was in the nature of execution proceedings-Thereby, the award was modified by the Single Judge to the extent that the payment of interest at 15% was quashed—On appeal, without going into the merits of the matter held that the HC in a proceeding under Article 226 could certainly invoke substantive and residuary jurisdiction to direct payment of interest in view of the fact that the petitioner claimed that his rights had been defeated by non-implementation of the substantive award and the subsequent award—Award of Single Judge was modified and payment of interest at 9% was ordered.

Bhim Singh Bajeli v. *P.O. Central Govt. Industrial Tribunal* *1724*

LAND ACQUISITION ACT, 1894—Section 4, 6 & 14—Land of appellant was notified to be acquired—Land Acquisition Collector passed award and awarded compensation in favour of appellant—Being dissatisfied with compensation, appellant sought reference which was forwarded by Land Acquisition Collector but with objection that reference petition was time barred—Reference petition was rejected—Reference was then made to Ld. Additional District Judge—Respondent filed written statement and raised preliminary objection of reference being barred by limitation and therefore, not maintainable—No replication to written statement was filed and no issue on plea of limitation taken by respondent, was framed—However, Ld. Additional District Judge vide impugned order rejected reference as barred by limitation—Aggrieved, appellant preferred appeal. Held If the plea of limitation can be decided without recording evidence, it may not be necessary to frame an issue before returning a finding on such a plea. If, however,

the decision on a plea of limitation requires recording of evidence, it would not be appropriate to return a finding without framing an issue and giving an opportunity to the parties to lead evidence by disputing the factual aspect of the issue.

Kartar Singh v. *Union of India & Anr.* *2014*

MEDICAL TERMINATION OF PREGNANCY ACT, 1971—Section 3—Termination of pregnancy—Victim of rape—Medically examined—Had pregnancy of 6 weeks—Living alone in Delhi; does not want to bear a child—Writ petition filed for directions to State for terminating her pregnancy and to preserve the foetus for DNA test—Status report filed—Pregnancy can be terminated with minimal know risks—State has no objection for termination of pregnancy—Enquiries made—Victim is major; has consultation with her counsel; understands the consequences of her act—Expressed willingness to terminate the pregnancy—Consent of woman essential for termination of pregnancy—Likely to face mental, physical, social and economical problems in future—Petition allowed—Directions issued.

X (Assumed name of the prosecutrix) v. *The State (N.C.T. of Delhi) & Ors.* *1813*

PREVENTION OF CORRUPTION ACT, 1988—Section 13(1)(e) and Section 13(2)—Delhi Special Police Establishment Act (DSPE Act)—Section 6A—Complaint forwarded by CVC to CBI—Discreet verification done—FIR registered—Official website did not disclose the status of the petitioner—Investigation started—Searches conducted—During investigation, revealed the petitioner to be joint secretary level officer—Investigation kept in abeyance ex-post facto approval sought—Approval granted—Petition filed for quashing of FIR—Contended—Petitioner being joint secretary level officer, prior approval of the Central Government was mandatory before investigation undertaken—Subsequent

approval is of no avail—CBI did not register preliminary inquiry—Acted in violation of its manual—FIR itself illegal; liable to be quashed—CBI contended—Petitioner in his communications referred himself as Director and never informed about his joint secretary level status—CBI not aware of his that status when FIR registered—Approval taken once his status was known—Investigation carried only thereafter—Held—Except checking the website, no efforts made to find out the status of the petitioner—Obligatory to obtain the consent from the Central Government—Approval can be taken ex-post facto as well on receipt of information about the status of the petitioner, investigation kept on hold—Approval taken, thereafter investigation started—Investigation cannot be accepted or quashed piecemeal—Illegality committed at the inception of investigation gets cured—No averment as to miscarriage of justice, earlier investigation cannot be quashed—Petition dismissed.

A.P. Pathak v. *CBI*..... *1958*

PROBATION OF OFFENDERS ACT, 1958—Section 4 and 12—Petitioner was successful at selection process for post of Constable Executive in Delhi Police but was not offered appointment—Commissioner of Police took view that in view of his being guilty of having committed offence punishable under Section 308 of IPC though released on probation for which he had furnished a bond to keep good behaviour for two years, petitioner was unfit to be appointed as a Constable in Delhi Police—This led to filing of OA which was dismissed—Order challanged before HC—Plea taken, release on probation washes away finding of culpability for having committed offence punishable under Section 308—Per contra plea taken, release of petitioner would not wash away wrong conduct of petitioner—Held—Larger question which falls for consideration in this case is, whether petitioner having been released under Section 4 of Offenders Act, does not suffer disqualification because of Section 12 of said Act—Release of petitioner under Section 4 of Offenders Act would not

obliterate conduct / act which constitutes offence—Petitioner would not be entitled to any relief even on interpretation of Section 12 of Offenders Act—So when conduct / act constituting offence is not washed of, employer in this case, Delhi Police was within its right not to appoint petitioner as Constable (Executive) Male, that too, when no right is said to have accrued in favour of petitioner who was only on threshold of being appointed—In law or facts petitioner would not be entitled to get appointed as Constable Executive (Male)—Conclusion of Tribunal cannot be interfered with.

Ajit Kumar v. *Commissioner of Police and Ors. 1921*

SALE—Power of Attorney and Agreement to Sell—Transfer of Ownership—Brief Facts—Respondents 2 and 3 were allotted a residential plot bearing No. 135, Block K-I, Chittranjan Park, New Delhi, and a perpetual lease deed dated 01.10.1990 was executed in their favour—Case of the petitioner is that vide Agreement to Sell dated 23.10.1990, coupled with a registered Power of Attorney of the same date, ownership of room No. 2 on the ground floor, measuring 142 squire feet was transferred to him for a consideration of Rs. 60,000/- and he is in physical possession of the same—Lease of the aforesaid property was cancelled by the Lieutenant Governor of Delhi vide order dated 10.11.1992—Pursuant to cancellation of the lease deed, an eviction order dated 16.06.2000 came to be passed by the Estate Officer against the petitioner and other occupants of the building—Appeal preferred against the order of the Estate Officer, was dismissed by the learned Additional District Judge vide his order dated 07.12.2002—During pendency of the appeal before the Estate Officer, the said property was sealed by DDA on 16.09.2002—An application is alleged to have been submitted to DDA for converting the aforesaid property from leasehold to freehold and on refusal of DDA to convert the aforesaid property into freehold a writ petition being W.P. (C) No. 4693 of 2003 was filed by the petitioner, challenging the aforesaid decision of DDA—The

said petition came to be disposed of vide order dated 18.11.2003—A demand letter dated 08.12.2003 was then issued by DDA, requiring him to deposit a sum of Rs. 1,17,87,223/-, comprising Rs. 73,89,895/- towards misuse charges for the period from 31.11.1990 to 16.09.2002, Rs. 31,350/- towards restoration charges, Rs. 15,000/- towards de-sealing charges, Rs. 75,000/- towards maintenance charges, Rs. 42,35,222/- towards unearned increase, Rs. 22,695/- towards ground rent and Rs. 18,061/- towards interest on ground rent—Aggrieved from the sealing, the petitioner preferred the present writ petition, seeking direction to the respondent to deseal the premises with immediate effect subject to the undertaking to pay the legitimate demand of misuse charges as and when raised. Held—The first question which arises for consideration in this case is as to whether the petitioner has any locus standi to maintain this writ petition—Admittedly, the land underneath building in question was allotted by DDA to respondents 2 and 3 and not to the petitioner—Though the petitioner claims to have purchased a portion of the property subject matter of the writ petition, admittedly, no sale deed has been executed in his favour—Petitioner has neither, submitted to DDA nor filed in this Court the Power of Attorney and Agreement to Sell alleged to have been executed by respondents 2 and 3 in his favour—In the absence of such documents, it is not possible to accept the case set out by the petitioner in this regard—Assuming, however, that there was an Agreement to Sell, coupled with a Power of Attorney executed by respondents 2 and 3 in favour of the petitioner in respect of a portion of the property subject matter of this writ petition, he does not become owner of the portion of the property subject matter of this writ petition, he does not become owner of the occupied by him merely on the strength of the Agreement to Sell and Power of Attorney, alleged to have been executed in his favour, nor does such a transaction constitute "sale" as held by the Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. vs.*

State of Haryana and Anr. (2012) 1 SCC 656—Since the petitioner is not the owner/lessee/allottee of the property subject matter of this writ petition, he has absolutely no locus standi to file a writ petition, challenging the sealing of the aforesaid property by DDA—It is only the owner/lessee/allottee of the property who can maintain such a petition—Petition has been filed in the individual capacity of the petitioner and not as attorney of the lessees/allottees who have been impleaded as respondents 2 and 3 in the writ petition—For this reason alone, the writ petition is liable to be dismissed. Even assuming that the petitioner has the locus standi to maintain a writ petition against sealing of the property, no ground for de-sealing the property has been made by him—Property came to be sealed inter alia on account of unauthorized construction and misuse of the property, in contravention of the terms of the lease deed—This is not the case of the petitioner that there was no unauthorized construction in the property—Admittedly, the property in question was leased out for residential purpose and could not have been used for a non-residential purpose, without prior permission of the lessor—This is not the case of the petitioner that the said property is being used only for residence and no portion of the property is being used for a non-residential purpose—In fact, petitioner did not even dispute his liability to pay misuse charges till the date the property in question came to be sealed by DDA—This is also not the case of the petitioner that the misuse in the property has since been stopped altogether and the unauthorized construction has since been demolished—Therefore, there is no ground, on merits, for de-sealing the property subject matter of the writ petition—No merit in the writ petition and the same is hereby dismissed.

S.K. Bahl v. *Delhi Development Authority & Ors.* *2020*

SCHEDULE CASTES AND SCHEDULE TRIBES (PREVENTION OF ATROCITIES) ACT, 1989—Section 3—

Section 18—Bar to grant anticipatory bail—Indian Penal Code, 1860—Section 34—Sections 341/323/34—Utterance of caste remark to the complainant—Complainant and his brothers beaten up—Final report submitted against the three accused persons—Application for grant of anticipatory bail—Dismissed by the Sessions Judge—Preferred present application for anticipatory bail—Pleaded business rivalry between petitioners and complainant had filed petition alleging harassment by complainant—SHO was directed to provide adequate protection—DCP filed affidavit confirming business rivalry—FIR is an afterthough—Filed when the petitioner was in hospital having suffered beatings from the complainant—FIR is counter blast to FIR filed by the petitioner—The chain of events points to falsity of the complaint—challan filed is ambiguous—Continuous improvements made by complainant—Allegation of caste remark made after one month of the incident—Witness also made improvements—APP pleaded bar of Section 18 of the SC/ST Act to section 438 Cr. PC—Made caste remark in public view—Clear averments in the complaint—Held—Section 18 is an absolute bar to applicability of Section 438 Cr. PC—Absence of utterance in public view is the limited exception—Specific allegations against each of the accused a must—Section 34 IPC cannot be brought in aid—Accused Manjeet Singh uttered caste remark in a public street—No such charges against other two petitioners—Application of Manjeet Singh rejected—Other two petitioners admitted to bail.

Manjeet Singh & Ors. v. *State of Delhi*..... *1971*

SERVICE LAW—Constitution of India, 1950—Article 227—Writ of Mandamus—Whether withholding the promotion of an official for the reason of his required expertise in the speciality/department currently he's engaged with, even after rejection for fixation of basic pay which is held due to that senior post, be valid?—Held, that retention of an employee as against his

promotion due to the reason of his expertise needed in the current department shall not be held against him and also, reduction of his salary, on account of late joining in the department, is wholly unjustified and arbitrary act of the respondents and not the fault of the petitioner.

Suneel Kumar Khatri v. *Union of India & Ors.*..... *1671*

— Appointment to the post of Head Constable (Ministerial) as a OBC candidate, belonging to the caste "Sonar"—Brief facts—Petitioner applied for the post of Head Constable (Ministerial) as a OBC candidate, belonging to the caste "Sonar"—He was asked to appear for the written examination, held on 10th July, 2011—At this stage, respondents made an endorsement that the OBC certificate furnished by Petitioner was not in the prescribed format—Petitioner successfully undertook the written examination on 13th August, 2011 and was required to appear for the 2nd phase tests, i.e. typing speed/shorthand test on the 27th of September, 2011—Having successfully cleared the same, Petitioner was required to appear for the interview on 3rd October, 2011 where he again produced his caste certificate dated 28th May, 2011 issued from the office of the Deputy Commissioner, East Singhbhum, Jamshedpur, Jharkhand—This certificate was rejected by the respondents on the ground that his caste certificate was not in the prescribed format and the petitioner was told to get another caste certificate within a week—Petitioner promptly approached the District Magistrate of East Singhum, Jamshedpur but unfortunately, the Circle Officer passed an order dated 8th October, 2011 arbitrarily declining/refusing to issue a certificate to the petitioner on the ground that his family's land was not recorded in the Government record and therefore he could not be issued a domicile certificate—Document endorses the fact that the petitioner was covered within "Other Backward Category" under the "Sonar" caste and an affidavit and salary slip had been submitted—Head of

the Panchayat in the village Aundi Post Chilkahr, Balia, Uttar Pradesh issued a caste certificate in the Central Government format by the Tehsildar, Rasda, balia, Uttar Pradesh to the effect that he belonged to "Sonar" caste which is covered in the Other Backward Category—This certificate submitted by the petitioner on the 5th of November, 2011 with the office of respondent no.5—In the medical examination which was conducted on 15th November, 2011, the petitioner was declared medically fit and he was informed that he would finally receive his appointment letter—Despite all these directives, nothing was done for a period of five months—After passage of five months, by a letter dated 5th March, 2012 sent by respondent no.5, the petitioner was informed that for the reasons that the OBC certificate dated 15th October, 2011 had been issued from District Balia (Uttar Pradesh) whereas his earlier certificate had been issued from Jharkhand State, he was required to give an explanation for submitting the OBC certificate from two States—Petitioner was also required to provide domicile certificate from concerned authorities—Petitioner obtained a domicile certificate dated 23rd April, 2012 by the office of the Deputy District Officer Ballia and submitted the same to respondent no.4—In response to the report dated 5th June, 2012, was informed vide letter dated 19th July, 2012 that the matter was still under consideration—Finally a communication dated 7th August, 2012 was issued by respondent no.5 informing the petitioner that his candidature was being cancelled on the ground that despite opportunities, he had not produced the Other Backward Category/Domicile certificate from his home town—Hence, the present Writ Petition. Held—Both the certificate which have been produced by the petitioners and furnished to the respondents were genuine—Both certificates affirm the petitioner's claim that he belongs to the "Sonar" sub-caste which fell under the category of Other Backward Class—It is an admitted position before us that the petitioner's father Om Prakash Prasad is employed as Head Constable

(Driver) by the Central Reserve Police Force under the OBC category—This is a material factor which was within the knowledge of the respondents—It was brought to the notice of the respondents—Yet they have chosen to deliberately overlook the same—Therefore, so far as the claim of the petitioner to the effect that he was covered under the OBC category is concerned, the same could not have been doubted—Petitioner cannot be denied employment at this stage on the specious ground that the certificate was not in the prescribed format or the certificates were submitted belatedly—Grave and unwarranted injustice has been done to the petitioner—He has been made to run from pillar to post without any fault on his part despite the admitted factual position especially with regard to the caste of his father and the fact that his father was recruited under the Other Backward category and continues to be so even on date—Petitioner's certificates were also unfairly doubted—Respondents also unreasonably sat over the matter for several days—Writ petition is allowed.

Neeraj Kumar Prasad v. *UOI and Ors.* *2035*

— Denial of appointment to the post of Constable (GD) in the Central Armed forces—Signatures in capital letters in English—Petitioner has impugned Memorandum dated 15th March, 2013 vide which his candidature for the post of Constable (GD) in the ITBPF was cancelled on the ground that upon scrutiny of the documents, the respondents found that the petitioner has signed in capital letters of English which was not permissible as per notice of the examination. Held—Issues raised in the instant writ petition are squarely covered by the judicial pronouncements of this Court in the following cases (i) Decision dated 24th February, 2012 in W.P. (C) No. 1004/2012 titled as *Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another.* (ii) Decision dated 5th November, 2012 in W.P. (C) No. 6959/

2012 titled as *Bittoo v. Union of India and Another,* (iii) Decision dated 4th December, 2012 in W.P. (C) No. 7158/2012 titled as Pawan Kumar and Union of India and Another—The adjudication in the above noted judgments and orders would guide adjudication of the present matter as well—It is well settled that there is no law which prohibits a person to sign in capital letters—As observed in *Pawan Kumar* (Supra), a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters—Petitioner cannot be denied consideration for appointment, and if otherwise eligible for the appointment, to the post of Constable (GD) in the ITBPF on the ground his signatures have been done in English capital letters—Writ petition is allowed in the above terms.

Bhagat Singh v. *UOI and Ors.* *2080*

ILR (2013) III DELHI 1641
W.P. (C)

UNION OF INDIA THROUGH COMMISSIONER CENTRAL EXCISE COMMISSIONERATE DELHI-II **....PETITIONER**

VERSUS

IND METAL EXTRUSIONS PVT. LTD. & ANR. **....RESPONDENTS**

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

W.P. (C) NO. : 504/2010 **DATE OF DECISION: 02.01.2013**

Central Excise Act, 1944—Section 35A, 35B (1) 35EE (1A) and 35E (2)—Central Excise Rules, 2002—Rule 18—Constitution of India, 1950—Article 53, 226 and 227—General Clauses Act, 1897—Section 3(8)—Respondent lodged rebate claims in respect of excise duty paid on goods procured from manufactures initially for home consumption but subsequently exported—Claim rejected by Assistant Commissioner (Tech.) who issued a show cause notice—Accepting objections of respondent, petitioner allowed rebate claims and passed order-in-original to that effect—Commissioner, Central Excise reviewed order-in-original and took view that it was not in order and directed Assistant Commissioner (Tech.) to file appeals to Commissioner (Appeals) against order-in-original—Appeals dismissed holding that substantial benefit given to respondent cannot be taken away on ground of procedural infractions—Revision application filed before Central Government also dismissed—Writ petition filed to issue a writ of certiorari quashing impugned order and a writ of mandamus directing GOI to pass fresh orders after re-adjudication—Preliminary objection taken by respondent that no writ can be filed by a government functionary questioning decision of Government itself, nor can UOI question its own order—Held—One cannot be said to be aggrieved by one's own order and in this view of matter Central Government cannot question its own order passed under Section 35EE of Act—If Central Government is of view that order of Commissioner (Appeals) is legal and proper and requires no interference (by way of enhancement of duty, fine or penalty), there is no right conferred upon Commissioner of Central Excise to challenge decision to drop proceedings—If Commissioner of Central Excise chooses to take appeal route against order of Commissioner (Appeals) to CESTAT, he may lawfully pursue his challenge right up to Supreme Court—But if he chooses to take revisionary route and question legality and propriety of order of Commissioner (Appeals) before Central Government under Section 35EE, he must, if decision of Central Government goes against him, accept it as final—Preliminary objection taken by respondent upheld and writ petition dismissed in limine.

The preliminary objection seems to us to be well-taken. The order passed by the Central Government under section 35EE cannot be challenged or questioned by a functionary of the Central Government. The Act is a central Act. The functionaries under the Act, such as the Assistant Commissioner, Deputy Commissioner, Joint Commissioner, Additional Commissioner, Commissioner of Central Excise, Commissioner (Appeals) or Chief Commissioner of Central Excise are all functionaries under the Central Government, executing the Act. It is the Central Government itself which acts under section 35EE as revisionary authority, dealing with revision applications filed both by the assessee and the Commissioner of Central Excise. Since the Central Government also has to act only through human agency, the function is entrusted to an official of the Central

Government who is of the rank of Joint Secretary in the Ministry of Finance. He does not pass the revision order in his individual capacity or as a functionary under the Act; his orders are those of the central government itself. The section repeatedly refers to the "Central Government" and not to any official or functionary thereof. The Joint Secretary acts for the Central Government in passing the order. A perusal of the impugned order shows that there is repeated reference to the Central Government; thus the decision is of the Central Government itself. If this position is realised, it would appear clear that the contention of the petitioner that the writ petition has been filed not against the Central Government but against a decision of the Joint Secretary acting as revisionary authority is untenable. There is finality attached to the order which cannot be questioned by functionaries under the Act since the order is passed by the Government – Union of India – itself. **(Para 9)**

Important Issue Involved: One cannot be said to be aggrieved by one's own order. If Commissioner of Central Excise chooses to take revisionary route and question the legality and propriety of order or Commissioner (Appeals) before the Central Government under Section 35EE of the Central Excise Act, 1944 he must, if the decision of the Central Government goes against him, accept it as final. He cannot question further order passed by the Central Government in a writ.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Dr. Ashwani Bhardwaj and Mr. Jitender Choudhary, Advocates.

FOR THE RESPONDENT : Mr. C. Hari Shankar with Mr. S. Sunil, Mr. Pushkar Kumar Singh and Mr. Jagdish N., Advocates.

RESULT: Dismissed.

R.V. EASWAR, J.

1. The respondent, Ind Metal Extrusions Pvt. Ltd. has raised a preliminary objection to the maintainability of the writ petition. Since it goes to the root of the matter, it needs to be dealt with first.

2. The matter arises under the Central Excise Act, 1944. The respondent is a merchant-exporter and registered with the central excise authorities. It lodged rebate claims under Rule 18 of the Central Excise Rules, 2002 in respect of excise duty paid on goods procured from manufacturers initially for home consumption but subsequently exported. The claim was rejected by the Assistant Commissioner (Tech.), Central Excise, Delhi-II, who is the petitioner herein on the ground that some of the goods were exempt from duty as they were manufactured in specified areas, disentitling the respondent from claiming the rebate. A show-cause notice was accordingly issued to which the respondent objected on various grounds, including the ground that the notice had become infructuous due to the amendment made to Rule 18 by the Finance Act, 2008. Accepting the objections, the petitioner allowed the rebate claims. An order-in-original to that effect would appear to have been passed on 26.11.2008.

3. The order-in-original passed as above was reviewed by the Commissioner, Central Excise, Delhi-II who took the view that it was not in order. He accordingly directed the Assistant Commissioner (Tech.) to file appeals to the Commissioner (Appeals), Central Excise, Delhi-II against the order-in-original under section 35E (2) of the Act. The appeals were however rejected by the Commissioner (Appeals) by order dated 20.01.2009, holding that the substantial benefit given to the respondent herein cannot be taken away on the ground of procedural infractions. This order was passed by the Commissioner (Appeals) under section 35A of the Act.

4. The Commissioner, Central Excise, Delhi-II, being dissatisfied with the appellate order passed by the Commissioner (Appeals), directed the Asst. Commissioner (Tech.) to file a revision application before the Central Government in terms of Section 35EE(1A). A revision application was accordingly filed, reiterating the same grounds on which an appeal was preferred by the petitioner herein in the appeal filed before the Commissioner (Appeals).

5. By order dated 11.09.2009 in Office order No. 316/09-CX, the Central Government dismissed the revision application. After a detailed examination of the facts and the contentions and on a survey of the relevant case-law, the Central Government, acting through the Joint Secretary to the Government of India, upheld the order of the Commissioner (Appeals). The operative portion of the order in revision is as under:

> "From the perusal of the records, Govt. observes that the Commissioner (Appeals) has already passed a very detailed and reasoned order. Govt. agrees with the findings in said order and finds no reason to interfere with the said impugned order-in-appeal.
>
> 11. In view of the above discussions & findings, Govt. observes that the rebate was admissible in this case and accordingly Govt. upholds the impugned orders-in-appeal and rejects the revision application being devoid of merit."

6. The present writ petition was originally filed by the Assistant Commissioner (Tech.), who passed the order-in-original accepting the rebate claim challenging the order passed by the Government of India in revision under section 35EE of the Act. An amended memo of parties was later filed showing the "Union of India through Commissioner, Central Excise Commissionerate, Delhi-II" as the petitioner and the assessee, the Commissioner (Appeals) and the Joint Secretary (Ministry of Finance) as respondents. We are asked to issue a writ of certiorari quashing the impugned order and a writ of mandamus directing the Government of India to pass fresh orders after re-adjudication.

7. The preliminary objection taken by the respondent, both in its counter-affidavit and in the written submissions supported by oral arguments before us is that neither the Assistant Commissioner (Tech.), Central Excise, Delhi-II nor the Union of India can question the order passed in revision as it has been passed by the Central Government; that no writ can be filed by a government functionary questioning the decision of the Government itself, nor can the Union of India question its own order.

8. Section 35EE of the Act deals with "Revision by Central Government". Under sub-section (1), any person aggrieved by an order-

in-appeal passed under section 35A which is of the nature specified in the first proviso to sub-section (1) of section 35B, may move an application to the Central Government for annulment or modification of such order. Sub-section (1A) inserted by Act 27 of 1999 w. e. f. 11.05.2009 confers a similar right to the Commissioner of Central Excise in case he is of opinion that an order passed by the Commissioner (Appeals) under section 35A is "not legal and proper". He may direct the proper officer to make an application on his behalf to the Central Government for revision of such order. He is the real and actual applicant before the Central Government, and the "proper officer" who is directed to file an application for revision merely performs the ministerial function of filing the application. No filing fee is prescribed in case the application is filed by the Commissioner of Central Excise. Sub-section (4) of section 35EE empowers the Central Government, of its own motion, to annul or modify any order referred to in sub-section (1). Sub-section (5) provides for enhancement of penalty or fine by the Central Government subject to certain conditions. Sub-section (6) makes similar provision for enhancement of duty. No appeal, either by the assessee or by the Commissioner of Central Excise, against the order passed by the Central Government under section 35EE to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has been provided by the Act. The order of the Central Government passed in revision is thus final, subject only to judicial review under Article 226/227 of the Constitution of India.

9. The preliminary objection seems to us to be well-taken. The order passed by the Central Government under section 35EE cannot be challenged or questioned by a functionary of the Central Government. The Act is a central Act. The functionaries under the Act, such as the Assistant Commissioner, Deputy Commissioner, Joint Commissioner, Additional Commissioner, Commissioner of Central Excise, Commissioner (Appeals) or Chief Commissioner of Central Excise are all functionaries under the Central Government, executing the Act. It is the Central Government itself which acts under section 35EE as revisionary authority, dealing with revision applications filed both by the assessee and the Commissioner of Central Excise. Since the Central Government also has to act only through human agency, the function is entrusted to an official of the Central Government who is of the rank of Joint Secretary in the Ministry of Finance. He does not pass the revision order in his individual capacity or as a functionary under the Act; his orders are those of the

central government itself. The section repeatedly refers to the "Central Government" and not to any official or functionary thereof. The Joint Secretary acts for the Central Government in passing the order. A perusal of the impugned order shows that there is repeated reference to the Central Government; thus the decision is of the Central Government itself. If this position is realised, it would appear clear that the contention of the petitioner that the writ petition has been filed not against the Central Government but against a decision of the Joint Secretary acting as revisionary authority is untenable. There is finality attached to the order which cannot be questioned by functionaries under the Act since the order is passed by the Government – Union of India – itself.

10. There is no definition of "Central Government" either in section 35EE or in any other provision of the Act. Section 3(8) of the General Clauses Act, 1897 defines "Central Government" in an inclusive manner. Clause (b) says that *"in relation to anything done or to be done after the commencement of the Constitution means the President"*. Under Article 53 of the Constitution, the executive power of the Union of India is vested in the President. It is however not possible to consider the order passed by the Central Government under section 35EE of the Act as an executive order in that sense; the order is passed on an application by the aggrieved party – the assessee or the Commissioner of Central Excise – questioning the legality and propriety of the order passed in appeal under section 35A, and has to be necessarily viewed as a quasi-judicial order. The proper question to be asked is whether the fact that the order is a quasi-judicial order can sustain the maintainability of a writ against it by the Central Government itself.

11. The question was decided by the Nagpur Bench of the Bombay High Court in **CCE, Nagpur v Indorama Textiles Ltd.,** 2006 (204) E.L.T. 222 (Bom.) a decision cited on behalf of the petitioner, where the Division Bench pointed out the distinction between an executive or administrative order passed by the Central Government and a quasi-judicial order passed by it; it was held that in the latter case, the Central Government (the revisionary authority) acts as a quasi-judicial Tribunal and so its order would be amenable to the jurisdiction under Article 226 at the instance of the aggrieved party, be it the Central Government itself. This decision limits itself to the nature of the order passed by the revisionary authority under section 35EE and, with respect, does not examine the further question, necessarily to be answered, whether the Central

Government can both be the author of the decision and also the aggrieved party. It is true – and in this aspect we respectfully agree with the Bombay High Court – that the order passed under section 35EE is quasi-judicial in nature; but in our view, whether the order is administrative or is quasi-judicial, the basic principle is that one cannot be said to be aggrieved by one's own order and in this view of the matter the Central Government cannot question its own order passed under that section. This aspect, with respect, does not appear to have been examined in the decision, though it did proceed on the basis that the order under section 35EE is in fact and law one passed by the Central Government.

12. The apprehension of the petitioner that there will be discriminatory result because of the view taken by us, in as much as the functionaries under the Act would be left with no judicial remedy against an erroneous order passed by the Central Government under section 35EE while an assessee would be entitled to seek judicial redress is, with respect, baseless. It is open to an assessee who feels aggrieved by an order passed by the Central Government under section 35EE to strain every nerve to challenge the same in appropriate proceedings; that is only a constitutional means of seeking redress. But that is not true in the case of an order of the Central Government passed under section 35EE which is sought to be challenged by the Central Government itself – i.e., the authorities executing the Act, which is a central Act. There is an inherent impossibility or contradiction in countenancing such a view, in addition to fostering indiscipline and chaos in the administration of the Act.

13. Counsel for the respondent is right in relying on sub-sections (5) and (6) of section 35EE to point out that in case the Central Government suo motu decides to issue notice to the assessee to enhance the penalty or fine or duty and after hearing the assessee decides to drop the proceedings, no grant of any opportunity to the Commissioner of Central Excise or any other officer executing the Act is envisaged. This shows that if the Central Government is of the view that the order of the Commissioner (Appeals) is legal and proper and requires no interference (by way of enhancement of duty, fine or penalty), there is no right conferred upon the Commissioner of Central Excise to challenge the decision to drop the proceedings. If the Commissioner of Central Excise chooses to take the appeal route against the order of the Commissioner (Appeals) to the CESTAT, he may lawfully pursue his challenge right up to the Supreme Court. But if he chooses to take the revisionary route and

question the legality and propriety of the order of the Commissioner (Appeals) before the Central Government under section 35EE, he must, if the decision of the Central Government goes against him, accept it as final. The section does not recognise any grievance that the Commissioner may nurse against the decision of the Central Government. In short, the Commissioner of Central Excise cannot claim to be more loyal than the King!

14. The result of the foregoing discussion is that the preliminary objection taken by the respondent is upheld and the writ petition is dismissed in limine with no order as to costs. We clarify that we have not examined the merits in the view we have taken.

ILR (2013) III DELHI 1649
CONT. CAS(C)

X & ANR. ....PETITIONERS

VERSUS

SK SRIVASTAVA & ANR. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

CONT. CAS(C) NOS. : 330/2012 DATE OF DECISION: 04.01.2013

Constitution of India, 1950—Article 215—Contempt of Court Act, 1971—Petition is filed seeking initiation of contempt proceedings against the respondent on account of his deliberate and wilful violation of the order passed by a Single Judge of this Court dated 29.09.2011 in Contempt Petition No. 360/2011—Respondent holds the petitioners responsible for having him suspended from service from 2007-2010, nixing his chances of becoming Commissioner of Income Tax. Respondent assailed his suspension order

before the CAT, which petition also made scurrilous remarks about the petitioners-Petition was allowed and suspension stayed—In the interim, the petitioners filed complaints against the respondent with the Income Tax Department citing sexual harassment—Due to no action being taken, petitioner's moved the HC by way of a writ petition—Court issued an order dated 01.03.2011 restraining the Respondent from communicating with the Petitioners—In blatant violation of this order, the Respondent wrote yet another defamatory letter consequent to which the petitioners filed contempt case No. 360/2011, in which the respondent filed a reply purporting remorse with the added caveat that he would refrain from communicating with the Petitioners—However, respondent sent a similar defamatory letter to Sh. C.K. Jain, SIT a few months later—Notice was again issued to Respondent since aforesaid communication provided fresh cause of action—Affidavit filed by Respondent, ostensibly to explain his conduct, did not reflect any remorse—In the meanwhile, Respondent filed a writ petition bearing No. 6802/2012 praying that the Petitioners be removed from the office Respondents No. 1 and 2 being Department of Revenue and Chief Commissioner Income Tax, Cadre Controlling Authority, respectively, which made further defamatory remarks about the petitioners—This writ petition, while being dismissed as withdrawn, was tagged with the contempt petition to demonstrate the aggravation of the injury caused to them by the conduct of the Respondent—Counsel for Respondent pleaded mercy and acceptance of apology by the Court—Held—The Respondent is undoubtedly guilty of wilfully violating the orders of the Court—Not a matter of course that a Judge can be expected to accept any apology—Respondent's behaviour reveals his skewed mind set, no penitence or remorse visible in the demeanour of the respondent—Therefore, only conclusion is that,

the respondent is guilty of wilfully and consciously violating the orders of the Court dated 01.03.2011, 29.09.2011 as also order dated 30.07.2012—The Respondent is directed to be committed to civil prison to undergo simple imprisonment for a period of 15 days. In addition, a fine of Rs. 2000 is imposed on the respondent.

Having given some thought to the matter before me, I have no doubt in my mind that the respondent is guilty of contempt. As a matter of fact, this fact, as noticed above by me, is unhesitatingly accepted by the respondent's counsel at the hearing held on 22.11.2012. The facts emerging in this case establish quite clearly the guilt of the respondent and the repeated violation by the respondent of the orders of this court, including those passed by me in these very proceedings. **(Para 19)**

While notice in the present contempt petition was issued on 25.05.2012, on the returnable date i.e. 31.07.2012, I had once again injuncted the respondent from addressing a communication to any third party, which contained remarks qua the petitioners of the nature found in communication dated 02.04.2012. No sooner was this order dated 31.07.2012 passed, the respondent chose to violate the said order by issuing a communication dated 01.08.2012 to the CBI, in which, similar offending statements were made against the petitioners. As indicated by me above, the respondent thereafter got his wife Mrs Soni Srivastava to address a letter to the Finance Minister, in which, offending statements identical to the ones made by the respondent in his earlier communications were made qua the petitioners. As a matter of fact, the respondent filed a writ petition bearing no. 6802/2012, which was moved couple of days before his wife shot of the aforementioned communication to the Finance Minister. The said writ petition, which was adjourned to 21.11.2012, was withdrawn by the respondent's counsel, on the instructions of the respondent. **(Para 20)**

Having regard to the aforementioned facts, I have no doubt that not only is the respondent guilty of willfully violating the order of the court dated 29.09.2011, but also the order of the court passed in the present contempt petition dated 31.07.2012, which is why on 18.10.2012 I had issued a notice of contempt to the respondent. The fact that even thereafter the respondent filed a petition, in which offending statements were made against the petitioner, only goes to show that the respondent is unrepentant. To perhaps get around the strict letter of the law the respondent had his wife Mrs Soni Srivastav address a communication to the Finance Minister, which as noticed by me above, contains the same set of offending remarks against the petitioners. This approach of the respondent clearly reveals, the skewed mind-set, of the respondent. **(Para 21)**

The observations of the Supreme Court in **Patel Rajnikant Dhulabhai and Another Vs. Patel Chandrakant Dhulabhai and Others,** (2008) 14 SCC 561, that apology cannot be made as a weapon of defence is aptly captured in the following observations of the judgment:-

> " 74. In Hiren Bose, Re, AIR 1969 Cal 1 : 72 Cal WN 82, the High Court of Calcutta stated;
>
> "13.....It is also not a matter of course that a Judge can be expected to accept any apology. Apology cannot be a weapon of defence forged always to purge the guilty. It is intended to be evidence of real contrition, the manly consciousness of a wrong done, of an injury inflicted and the earnest desire to make such reparation as lies in the wrong-doer's power. Only then is it of any avail in a Court of justice But before it can have that effect, it should be tendered at the earliest possible stage, not the latest. Even if wisdom dawns only at a later stage, the apology should be tendered unreservedly and unconditionally, before the Judge has indicated the trend of his mind. Unless that is done, not only is the tendered apology

robbed of all grace but it ceases to be an apology It ceases to be the full, frank and manly confession of a wrong done, which it is intended to be".

75. It is well-settled that an apology is neither a weapon of defence to purge the guilty of their offence, nor is it intended to operate as a universal panacea, it is intended to be evidence of real contriteness [Vide **M.Y. Shareaf v. Hon'ble Judges of the High Court of Nagpur;** (1955) 1 SCR 757 : **M.B. Sanghi v. High Court of Punjab & Haryana,** (1991) 3 SCR 312].

76. In **T.N. Godavarman Thirumulpad v. Ashok Khot & Anr.,** 2006 (5) SCC 1, a three Judge Bench of this Court had an occasion to consider the question in the light of an 'apology' as a weapon of defence by the contemnor with a prayer to drop the proceedings. The Court took note of the following observations of this Court in **L.D. Jaikwal v. State of U.P.,** (1984) 3 SCC 405 (Ashok Khot case SCC p. 17 para 32):

"32....We are sorry to say we cannot subscribe to the 'slap-say sorry and forget' school of thought in administration of contempt jurisprudence. Saying 'sorry' does not make the slapper taken the slap smart less upon the said hypocritical word being uttered. Apology shall not be paper apology and expression of sorrow should come from the heart and not from the pen. For it is one thing to 'say' sorry-it is another to 'feel' sorry".

The Court, therefore, rejected the prayer and stated;

"31. Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace, the apology is shorn of penitence and hence it is liable to be rejected. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment it ceases to be an apology and

becomes an act of a cringing coward".

Similar view was taken in other cases also by this Court.

77. We are also satisfied that the so-called apology is not an act of penitence, contrition or regret. It has been tendered as a "tactful move" when the contemnors are in the tight corner and with a view to ward off the Court. Acceptance of such apology in the case on hand would be allowing the contemnors to go away with impunity after committing gross contempt of Court. In our considered opinion, on the facts and in the circumstances of the case, imposition of fine in lieu of imprisonment will not meet the ends of justice."

(Para 22)

Apart from anything else, at each of the dates the respondent has been present in court. While his counsel pleaded for mercy, I have not seen, in the demeanour of the respondent, any penitence or remorse. Therefore, the only conclusion that I can come to, is that, the respondent is guilty of willfully and consciously violating the orders of the court dated 01.03.2011, 29.09.2011, as also order dated 31.07.2012.

(Para 23)

In these circumstances, I direct that the respondent be committed to civil prison to undergo simple imprisonment for a period of fifteen (15) days. It is ordered accordingly. In addition, a fine of Rs.2000 is also imposed on the respondent. However, the sentence imposed will be kept in abeyance for a period of two weeks to enable the respondent to prefer an appeal, if he so desires. **(Para 24)**

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. Jayant K. Mehta & Mr. Sukant Vikram, Advocates.

FOR THE RESPONDENTS : Mr. S.K. Gupta & Mr. Vishnu

Sharma, Advocate for Respondent no.1. Ms. Maneesha Dhir & Ms. Mithu Jain, Advocates for Respondent no.2.

CASES REFERRED TO:

1. *Patel Rajnikant Dhulabhai and Another* vs. *Patel Chandrakant Dhulabhai and Others,* (2008) 14 SCC 561.
2. *Patel Rajnikant Dhulabhai & Anr.* vs. *Patel Chandrakant Dhulabhai & Ors.* (2008) 14 SCC 561.
3. *T.N. Godavarman Thirumulpad* vs. *Ashok Khot & Anr.,* 2006 (5) SCC 1.
4. *Bar Association* vs. *Union of India & Anr.* (1998) 4 SCC 409.
5. *M.B. Sanghi* vs. *High Court of Punjab & Haryana,* (1991) 3 SCR 312].
6. *L.D. Jaikwal* vs. *State of U.P.,* (1984) 3 SCC 405.
7. *M.Y.Shareaf* vs. *Hon'ble Judges of the High Court of Nagpur;* (1955) 1 SCR 757.

RESULT: Respondent is guilty of willfully violating orders of the Court. Committed to civil prison for a period of 15 days and payment of fine of Rs. 2000.

RAJIV SHAKDHER, J.

1. Since this is a case in which the petitioners have sought to invoke the contempt jurisdiction of this court under Article 215 of the Constitution of India read with the relevant provisions of the Contempt of Court Act, 1971 (in short the said Act), based on repeated and consistent acts of gross misdemeanor by the respondent, to which I would be making a reference hereinafter; I have thought it fit to obliterate the name of the petitioners, so as to avoid any unintended ignominy to the petitioners. Therefore, petitioner no. 1 would be referred to as Ms X, while petitioner no. 2 would be referred to as Ms. Y; though collectively they will be referred to as petitioners.

2. The present petition is filed seeking initiation of contempt proceedings against the respondent on account of his deliberate and

willful violation of the order passed by a Single Judge of this court dated 29.09.2011 in Contempt Petition no. 360/2011. As a matter of fact, when the present contempt petition came up for hearing before me for the first time, on 31.07.2012, after noting the scurrilous nature of language used in a communication dated 02.04.2012, the respondent was injuncted from addressing any further communication to any third party in which there is a reference of like nature to petitioners, as in the letter dated 02.04.2012.

3. Subsequent events have revealed that the aforesaid order passed by me, has had no affect on the respondent. In order to fully appreciate the unrepentant and unremorseful conduct of the respondent, despite repeated orders passed by various judges of this Court, the following chronology of events have to be noted.

4. The respondent, apparently, seems to be aggrieved and perhaps holds the petitioners responsible for having him suspended from the service for a period of three years between the period 2007 to 2010 and nixing his chance of getting promoted to the post of Commissioner of Income tax. It is in this context that he has sent communications to the superior officers of the petitioners, time and again which are both uncivil and in poor taste, to say the least.

4.1 The first such public tirade by the respondent against the petitioners was launched in a petition filed by him before the Central Administrative Tribunal (in short the Tribunal), to assail the order of suspension dated 22.10.2009, issued by Director, AD-VI, CBDT. His petition before the Tribunal was numbered as OA No. 3661/2009. Apparently, the petition was allowed and the suspension order was quashed. In the said petition the petitioners were arrayed as respondent nos. 11 and 12. In the said petition the respondent had made scurrilous remarks against the petitioners while accusing them of having caused a loss of Rs. 100 of crores to the exchequer by assisting a particular assessee.

5. The petitioners, being under the impression that the CBDT would engage a lawyer to defend the proceedings initiated by the respondent in the Tribunal, qua them as well, did not file their affidavits-in-reply. The Tribunal, having regard to the fact that the averments made in the petition and the allegations of personal malafides had gone untraversed, in view of the fact that there was no affidavit-in-reply filed by the petitioners in those proceedings, took them as having been admitted by the petitioners

herein. These findings of the Tribunal, were subject matter of two orders dated 09.04.2010 and 31.05.2010.

6. The petitioners being aggrieved, filed a writ petition in this court, which was, numbered as WP(C) 6650/2010. A Division Bench of this court by order dated 07.10.2010, with the consent of the counsel for the respondent, directed that portions of the pleadings, which impugned the character of the petitioners, be expunged.

7. In the interregnum, it appears, the petitioners had filed complaints with the Income Tax Department, alleging sexual harassment by the respondent. Since, perceptibly, no action was taken on their complaint, the petitioners moved this court by way of a writ petition. The said writ petition was numbered as: WP(C) 1373/2011. In this petition the respondent herein, was impleaded as respondent no. 5. By an order dated 01.03.2011, this court issued the following direction qua the respondent:

> "....4. In the meanwhile, the Respondent no. 5 is restrained from writing any letter similar to the one annexed as Annexure P-13 to the paper book. Respondent nos. 2 to 4 are directed to take appropriate action to ensure that such communications are not distributed within the organization..."

8. It may be important, at this stage, to refer to the document marked as Annexure P-13. This document is a letter dated 27.01.2011, which is addressed to the Commissioner of Income Tax with copies to Chairman, CBDT of the Income Tax Department. As a matter of fact, on the same date, three separate communications to the same officer, i.e., CIT(Vigilance) CBDT were sent by the respondent, in which, amongst other allegations, there were also statements made qua the petitioners. The relevant extracts of the statement made by the respondent read as follows:

> "5. It is brought on record that to wreak havoc upon me and to intimidate others into silence lest the illicit sexual intimacies between Sri B.K. Jha and Ms Y and Sri S.S. Rana and Ms X in organized prostitution wherein Sri B.K. Jha and Ms Y is practicing the illegal trade of prostitution is objected to and punished as per law, Sri B.K. Jha and his accomplices have fraudulently and incorrectly fabricated fake, forged, false and counterfeit records to allege that criminal cases are pending against me and hence

> promotion should be denied to me. To cover up such fraud and forgeries, Directorate of Income Tax (HRD) and Sri B.K. Jha, DIT (HRD) and Sri S.S. Rana DGIT(HRD) are willfully not handing over these records and are tampering with and manipulating those records. ...
>
> ....5. It is matter of record that having failed in their illegal activities to harass me, Sri P.K. Misra and his accomplices that includes Ms X (IRS 99005) and Ms Y (IRS 99010) and who have admitted to have illicit extra-marital sexual intimacies amongst them travelling together and staying in five Star Hotels and Guest Houses as man and wife, through Sri Shankar Das (IPA 1994 AGMUT, originally from DANIPS) filed two FIRs against me alleging that through my official reports submitted to my superiors in course of official work, I have enraged the modesty of those two women, ie.., Ms X and Ms Y vide FIR no. 153 of 2009, P.S. Barakhamba Road, on 30.9.2009 and FIR No. 514 of 2009 P.S. R.K. Puram on 28.10.2009. Both the FIRs were malafidely filed with express intention of stalling the promotion of undersigned and is being used precisely for the same.
>
> 6. Both these women, i.e., Ms X and Ms Y apart from being in extra-marital sexual intimacies with Sri P.K. Misra and a large number of other male colleagues are also involved in organized prostitution and are prostitutes in terms of clause (f) of Section 2 of the Immoral Traffic Prevention Act, 1956. Besides, they nurse animus against me for having inspected their work while working as Addl. DIT(IT) and detected and reported theft and embezzlement of public money and public revenue in excess of Rs 10,000 crores like case of M/s NDTV Ltd. where Ms X embezzled Rs. 1,46,82,836/- by passing an illegal order u/s 143(1)(a) in A.Y. 2004-05 after initiation of proceedings u/s 143(2) on 28.3.2005 and issuing illegal refund from public exchequer and in lieu thereof accepting bribe and illegal gratification like all expenses paid free pleasure trip to Europe for self and family involving an estimated expenditure of about Rs. 1,00,00,000/- in April, 2005 whereof she left the country on 12.04.2005 by British Airways Flight No. 142 and returned back by British Airways flight no. 143 on 20.04.2005. Ms X has actively connived and conspired with M/s NDTV Ltd. in laundering

the black money of M/s NDTV Ltd. worth more than Rs. 2000 crores through M/s NDTV Plc., UK and M/s NDTV BV, Netherlands and five of its subsidiaries. Likewise, Ms Y because of her illicit sexual intimacies with some rogue touts operating in Income Tax Department has caused theft of more than Rs. 100 crores by passing illegal orders u/s 154 making substantive additions u/s 154 on serious Audit objections to get those additions knocked down in appeal.....

.....3. Ms Y, JDIT (HRD), garishly painted and gaudily attired befitting a prostitute of her caliber, is visiting various places including premises of Ld. CAT, Principle (sic Principal) Bench, Delhi acting in most suggestive and provocative manner offering immoral gratification if person upon whom she is working agreed to conspire with her against me. Log record of operational vehicle assigned to Ms Y would reveal her nocturnal trips to various places and people to canvass support against me through illicit and extra-marital sexual favours....” (emphasis supplied)

9. It is pertinent to note that, on 20.04.2011 the court continued the operation of its interim order dated 01.03.2011, and that despite the order, on 06.05.2011, the respondent wrote yet another letter, which contained similar scurrilous statements qua the petitioners.

9.1 Consequently, the petitioners were constrained to file a contempt petition, which was numbered as contempt case no. 360/2011. It appears that a reply was filed by the respondent in the first instance, which he sought to withdraw; though an objection was raised by the petitioners that the reply itself was contumacious. The court, however, granted the respondent herein an opportunity to file an additional reply.

9.2 By way of the additional reply, the respondent (who was impleaded as respondent no. 1 in the contempt petition), evidently tendered an unqualified apology, stating therein that, the letter dated 06.05.2011 has been written in the state of emotional turmoil. The Court, at that stage, as reflected in its order dated 29.09.2011, came to the conclusion that the respondent was, perhaps remorseful and therefore, went on to accept the apology, with the caveat that: “he shall neither in the present nor in the future write any letter or other form of communication in terms of the order of this Court dated 01.03.2011....”.

10. One would have thought that, the respondent, had been chastened, and would, desist from issuing communications, which impugned the character of the petitioners. This, however, proved to be a forlorn hope, as within less than six months of the order of this Court, vide communication dated 02.04.2012, the respondent repeated his unacceptable conduct in gross violation of the orders of this Court. This is demonstrable from the following extract from the communication dated 02.04.2012 addressed by the respondent, once again, to Sh. K.C. Jain, CIT:

“....4. Likewise, Ms X in lieu of illicit extra-marital sex which she had with Sri P.K. Mishra and his customers in Bangalore in Suite No. 10 of Income Tax Guest House, Infantry Road, Bangalore during 16th November, 2005 to 10th November, 2005 got the vigilance cases against herein the matter of her having received bribe from M/s NDTV Ltd. hushed up....

...6. In 2009 Ms X by providing illicit extra-marital sex to Sri SSN Murthy got her posted in Delhi after her promotions as JCIT when CBDT has asserted before Hon’ble Delhi High court that transfer out of station on promotion is rule in CBDT, however because of illicit extra-marital sex which Ms X had with Sri SN Murthy, she was retained in Delhi even after her promotion to the rank of JCIT.

7. By offering her body to ingratiate the debauched male lust and freely having illicit extra-marital sex with her benefactors being a full blown serving prostitute involved in the prostitution racket of Sri P.K. Mishra alongwith Ms R. (exact particulars are obliterated) and Ms Y; Ms X, JCIT Range-21 has been subverting the rule of law and due process of law with impunity and has so far got away with the consequences of her illegal acts because of liberally provided illicit extra-marital sex on demand to her male benefactors....” (emphasis supplied)

10.1 The aforementioned letter was followed by a letter dated 10/16.4.2012. This communication was also sent to the same gentleman, i.e., Sh. K.C. Jain, CIT. The relevant portions are extracted hereinbelow:

“....8.1 Ms X alongwith Ms Y and others has stolen the “Secret & Confidential” Govt. records and documents from the offices of ACIT, circle 40 (1) and other senior officers of the

I.T. Deptt. and placed those records in public domain to enable Sri P.K. Mishra, her pimp and business partner in prostitution racket of I.T. Deptt taking advantage of which, Sri P.K. Mishra has filed series of writ petitions against I.T. Deptt. (CWP No. 6011 of 2011, CWP no. 7977 of 2011 etc.) to stall inquiry into verifiable instances of tax evasion, receipt of bribe and illegal gratification and serial prostitution, etc. over concealment of income of Rs 20,00,00,000/- in A.Y. 2004-05 and Rs. 10,00,00,000/- for A.Y. 2005-06. Copy of affidavit filed by Ms X before Hon'ble Delhi High Court in CWP no. 1373/2011 is enclosed for necessary perusal. In addition, records of CCIT, Delhi XIII are relied upon wherein an inquiry has been ordered as to how Ms X got to get "Secret & Confidential" Govt. Records....

....8.4 Ms X during year 2011-12 by providing illicit extra-marital sex to Sri V.K. Sahgal, CIT, Delhi XVI got reference of 'Y' category TEP to DIT (inv.) in her case and that of her spouse to DIT (inv.) stalled as she was not sure of being able to stop investigation against her by providing sex on demand to officers of investigation wing of deptt.

8.5 Ms X, during year 2011-12 by providing illicit extra-marital sex has stolen the returns of Income and forms No. 16 in the case of Sri Abhisar Sharma, her spouse to cover up her having received bribe and illegal gratification from M/s NDTV Ltd. for facilitating theft of lawful taxes in excess of Rs. 1,200,00,00,000/- by M/s NDTV Ltd. The CIT, Delhi XVI has officially informed that those Returns are missing.

8.6 Ms X during year 2011-12 has conspired and connived with her pimps to cover up having received bribe and illegal gratification from M/s NDTV Ltd. by fraudulently claiming that not having done scrutiny assessment of M/s NDTV Ltd. she cannot be said to have official dealings with that company even though being A.O. of that assessee and having passed order u/s 143(1) and issued Refunds.....

....8.9 Ms X during year 2011-12 continued to be involved in "SEX & PROSTITUTION" racket of Sri P.K. Mishra, providing sex on demand and for consideration, to clients and customers

procured by Sri P.K. Mishra, Sri S.S. Rana, Sri B.K. Jha, Sri Timmy Khanna, etc.....

....12. By offering her body to ingratiate the debauched male lust and freely having illicit extra-marital sex with her benefactors being a full blown serving serial prostitute involved in prostitution racket of Sri P.K. Misra with Ms.R. and Ms Y, Ms X, JCIT Ragne-21 has been subverting the rule of law and due process of law with impunity and has so far got away with consequences of her illegal acts because of liberally provided illicit extra-marital sex on demand to her male benefactors....

....14. having entered into illicit extra-marital sexual relations with Sri P.K. Mishra, Sri R. Prasad, Sri R.R. Singh, Sri Prakash Chandra, Sri A.K. handa, Sri N.C. Johsi and providing illicit extra-marital sex on demand to those officers to escape vigilance inquiries in the matter having received bribe and illegal gratification from M/s NDTV Ltd. and facilitated theft of public revenue and embezzlement of govt. money by M/s NDTV Ltd. (specific instance being admitted and self-declared sex Mrs X had with Sri P.K. Mishra and his customers apart from providing group sex, unnatural sex, oral sex and sexual orgies in Suite No. 10 of Income Tax Guest House on Infantry Road, Bangalore during November 16th 2005 to November 21st 2005 and wherefrom about 20 used and several packets of unused male contraceptives and strips of female birth control pills were found and removed), Ms X alongwith Ms Y joined the prostitution racket of Sri P.K. Mishra as serial prostitute, serving clients and customers of Sri P.K. Mishra and pimps like Sri B.K. Jha, Sri S.S. Rana, Sri Timmy Khanna etc.

15. Thus, being serial prostitutes providing sex on demand to clients and customers for consideration, Ms X and Ms Y were hired by M/s NDTV Ltd. through pimp Sri P.K. Mishra to fake sexual harassment, molestation, sexual assault and rape by me both at their residences in NOIDA and offices in Delhi with the intent to stall the inquiries and the investigations into illegal and unlawful activities of M/s NDTV Ltd. being evasion of tax of about Rs 1,200,00,00,000/-, laundering of illegal black money through the illegal hawala and fictitious jamakharch entries being

bribe received by the public servants in 2 G Scam and embezzlement of govt. money of Rs. 1,46,82,836/- by getting the petitioner placed under suspension and for that agenda, Ms X and Ms Y, serial prostitutes providing sex on demand, escorted their pimps and customers on 2.6.2006 to CVC and on 6.6.2006 to CBDT and faked sexual harassment, sexual assault, molestation and rape by me based upon which, Sri P.K. Mishra proposed on 14.6.2006 to dismiss me under Article 311(2) of Constitution read with rule 19(2) of CCS (CCA) Rules, 1965 without inquiry and pending that to place me under suspension.....

.....17. In January, 2007, when Ms Indira Bhargava, Chairman, CBDT did not agree to proposals of Sri P.K. Mishra to place me under suspension on the charges of alleged sexual harassment, sexual assault, molestation and rape of Ms X and Y, Ms X for had illicit sex with Sri R. Prasad and Sri R.R. Singh, Members of the CBDT and then along with Ms R (exact particulars are obliterated) and Ms Y, other prostitutes from prostitution racket of Sri P.K. Mishra went around alleging sexual harassment, sexual assault and rape by me and forced them on Ms Indira Bhargava, Chairman, CBDT, where Ms R. (exact particulars are obliterated) Ms X and Ms Y, serial prostitutes selling their bodies to debauched clients for sex on demand, enacted their sob drama and displayed their undergarments by smearing tomato ketchup and blow-drying that as proof of my bestiality and because of such drama by those serial prostitutes from the ranks of IRS, I was placed under suspension and inquires into illegal and unlawful activities of M/s NDTV Ltd. came to an end.....”

11. Continued disobedience of the orders of this court was brought to my notice, on 31.07.2012, when I had injuncted the respondent from issuing any communication to a third party which had reference to the petitioners, of the nature, as found in the letter dated 02.04.2012, addressed by the respondent to Sh. K.C. Jain, CIT.

12. Against the aforementioned order dated 31.07.2012, an appeal was preferred by the respondent, which I was informed by the counsel for the respondent, at the hearing held on 18.10.2012, was withdrawn, on 17.09.2012, with liberty to approach the concerned court. At the hearing held on 18.10.2012, I was also informed by the counsel for the

petitioners that, a communication had been addressed on 01.08.2012, to the Central Bureau of Investigation, ACB, Bhuvneshwar, Orissa, wherein similar statements had been made. These statements made by respondent in his communication of 01.08.2012 are extracted hereinbelow for the sake of convenience:

“...ix) Sri P.K. Misra, in lieu of bribe and sexual favours provided by Ms Y (as admitted by her that she escorted Sri P.K. Mishra to various places for providing illicit sexual favours to him under incorrect names and introduced her as Ms Y or Ms Y Nele, being the fifth wife of Sri P.K. Mishra), hushed up illegal losses caused by Ms Y to placate Sri Timmy Khanna, her alleged husband and her pimp in her prostitution in excess of Rs.1,00,00,00,000/- which she deliberately caused to enable Sri Timmy Khanna to procure bribe, etc. Petitioner refers to specific cases where in lieu of huge bribe and illegal gratification obtained by Sri Timmy Khanna, Ms Y caused illegal losses to public exchequer and got the matter hushed up by providing illegal sexual favours to Sri P.K. Mishra and others and by joining the prostitution racket of Sri P.K. Mishra as a prostitute, as under-

a) Ms Prayag Hospital & Research Centre Pvt. Ltd., A.Y. 2000-01, revenue effect Rs. 1,32,72,500/-.

b) M/s United Hotels Ltd., A.Y. 2000-01, revenue effect-Rs. 68,33,947/-.....”

13. Since the aforesaid communication provided fresh cause to petitioners, under the Contempt of Court Act, a notice was issued to the respondent. Both the respondent and his counsel were present in court. Time was sought to file a reply. The mater was adjourned for further proceedings to 22.11.2012.

13.1 At the hearing held on 22.11.2012, counsel appearing for the respondent, unhesitatingly stated, that the respondent was in violation of the orders issued by this court as he continued to issue defamatory material qua the petitioners. Leave was however sought to file an affidavit to explain his conduct. The matter was adjourned for further proceedings to 29.11.2012.

13.2 On the said date, i.e., on 29.11.2012, an affidavit was filed; albeit in court, by the counsel for the respondent. The counsel for the

petitioner chose not to file a rejoinder, as according to him, the reply of the respondent by itself did not reflect penitence or remorse.

13.3 I was also informed that the disciplinary authority had not accepted the conclusions of the complaints, committee which went into the allegations of the sexual harassment, and had consequently directed reconstitution of a new committee to investigate the complaints made by the petitioners. It may be relevant to note that the complaints, committee had come to the conclusion that no case for sexual harassment had been made out, which was a conclusion that the disciplinary authority has not accepted, and consequently, proceeded to issue the aforesaid direction.

13.4 On the said date the matter was heard-in-part, and was adjourned to 11.12.2012. Consequently, on 11.12.2012, after arguments in the matter were completed, judgment was reserved in the matter.

14. It may also be important to note that, the respondent had, in the meanwhile, filed a writ petition bearing no. 6802/2012, wherein inter alia-prayers had been made to transfer/remove the petitioners from the office of respondent no. 1 and 2, i.e., the Union of India, through Secretary, Department of Revenue and Chief Commissioner Income Tax, Cadre Controlling Authority, respectively. This writ petition was moved before me, on 22.11.2012 when, the counsel for the respondent herein, i.e., the writ petitioner, chose to withdraw the said writ petition. The counsel for the petitioners herein, who were impleaded as respondent nos. 5 & 6 in the said writ petition, took stand that while the petitioners herein had no difficulty in the court allowing the respondent to withdraw his writ petition, the said writ petition should be tagged alongwith the present contempt petition, as they would want to place reliance on the averments made in the said writ petition, to demonstrate the aggravation of the injury caused to them by the continued distasteful conduct of the respondent. Accordingly, while dismissing the writ petition as withdrawn, a direction was issued to the registry to tag writ petition 6802/2012, with the present contempt petition.

15. I may only note that in the writ petition, the respondent, once again, made averments to the effect that the petitioners were "women of dubious repute and character" involved in illegal and unlawful activities, which were, offences, inter alia, under the Immoral Traffic Act. The petitioners were referred to as "serial prostitutes". These are averments made in paragraph 18 and 50 of the said writ petition. There are also

references of similar kind, in paragraph 54 of the petition.

16. I may also note that prior to the hearing held, on 29.11.2012, an additional affidavit had been filed by the petitioners, on 20.11.2012. Alongwith the said affidavit they appended a letter dated 22.10.2012, in which, identical statements have been made in a communication addressed to the Finance Minister, Government of India; though this time, the author of the communication, is apparently, the wife of respondent, i.e., Mrs Soni Srivastava.

17. In the reply filed by the respondent, while offering his apology and seeking mercy of the court, an attempt is made to attribute his repeated violation of the orders of this court to the alleged unwarranted allegations made by the petitioners regarding the integrity and moral character of the respondent which resulted, firstly; in his suspension from service between 2007 to 2010, and thereafter, denial of promotion to the post of the Commissioner of Income Tax, on account of pendency of disciplinary proceedings. The respondent has averred that this conduct of the petitioners caused trauma and suffering and, therefore, resulted in issuance of a series of communications, to which, I have already made a reference above. The respondent seems to attribute his repeated reference to the alleged infamous character of the petitioners, to the cut and paste methodology, he adopted qua each of his communications to third parties. While conceding that he has violated the orders of the court, he seeks mercy of the court on the basis of circumstances detailed out in the affidavit.

18. I have considered the matter at some length. The learned counsel for parties made their submissions on behalf of their respective clients.

18.1 Mr Jayant Mehta, who appeared for the petitioners, made a reference to the series of communications of the respondent, to which I have already made a reference above, to show the continued violation of the orders issued by this court from to time, by the respondent. It is Mr Mehta's submission that the respondent was unrepentant and was using his last affidavit, which purports to be mercy plea, only as a ruse to somehow avoid the rigour of law. Mr Mehta submitted that there is neither remorse nor a genuine repentance shown by the respondent and, therefore, the court ought not to accept his apology. In support of his submissions, Mr Mehta relied upon the following judgments of the Supreme Court: **Patel Rajnikant Dhulabhai & Anr. vs Patel**

Chandrakant Dhulabhai & Ors. (2008) 14 SCC 561 and Supreme Court **Bar Association vs Union of India & Anr.** (1998) 4 SCC 409.

18.2. On the other hand, counsel for the respondent referred to their affidavit dated 27.11.2012 to show the circumstances in which the respondent had made a reference to the petitioners in his communication to various officers of the Income Tax Department. The counsel pleaded for mercy and acceptance of apology by the court. They also made reference to the two FIRs filed against the respondent as also to the judgment of the Division Bench dated 13.07.2012 passed in writ petition no. 4022/2012, whereby the petitioner no. 1's action to lay challenge to initiation of proceedings under Section 148 of the Income Tax Act, had failed. The said order was cited to show that, based on the respondent's complaint against petitioner no. 1, the assessment order qua petitioner no. 1 for the assessment year 2005-06 had been re-opened.

19. Having given some thought to the matter before me, I have no doubt in my mind that the respondent is guilty of contempt. As a matter of fact, this fact, as noticed above by me, is unhesitatingly accepted by the respondent's counsel at the hearing held on 22.11.2012. The facts emerging in this case establish quite clearly the guilt of the respondent and the repeated violation by the respondent of the orders of this court, including those passed by me in these very proceedings.

19.1. This is precisely the reason why I have extracted the relevant statements made by the respondent from time to time. A bare perusal of the extracts would show that the respondent has refused to relent in his tirade against the petitioners.

19.2 The first such statement was made by the respondent in his petition filed with the Tribunal which came to be expunged pursuant to the orders of the Division Bench dated 07.10.2010, passed in WP(C) 6650/2012. The respondent, however, within less than three months, issued three separate communications dated 27.01.2011 repeating therein, his distasteful diatribe against the petitioners. A Single Judge of this court by an order dated 01.03.2011 restrained the respondent from issuing similar communications. Though the said interim order was continued on 20.04.2011 till the next date of hearing, the respondent on 06.05.2011, once again issued an offending communication. This gave rise to a contempt petition bearing no. 360/2011. By an order dated 29.09.2011, the contempt petition was disposed of and the notice of contempt was

discharged, based on an affidavit of the respondent, tendering unqualified apology. Notably in this affidavit his deviant conduct was sought to be explained by referring to the emotional turmoil he had experienced on being issued a suspension order. The court, while disposing of the contempt petition, specifically restrained the respondent from issuing any communication in future, of the nature, to which a reference had been made in the court's order dated 01.03.2011. Within less than six months, the respondent made similar offending statements in two communications dated 02.04.2012 and 10/16.04.2012. This resulted in the institution of the present contempt petition.

20. While notice in the present contempt petition was issued on 25.05.2012, on the returnable date i.e. 31.07.2012, I had once again injuncted the respondent from addressing a communication to any third party, which contained remarks qua the petitioners of the nature found in communication dated 02.04.2012. No sooner was this order dated 31.07.2012 passed, the respondent chose to violate the said order by issuing a communication dated 01.08.2012 to the CBI, in which, similar offending statements were made against the petitioners. As indicated by me above, the respondent thereafter got his wife Mrs Soni Srivastava to address a letter to the Finance Minister, in which, offending statements identical to the ones made by the respondent in his earlier communications were made qua the petitioners. As a matter of fact, the respondent filed a writ petition bearing no. 6802/2012, which was moved couple of days before his wife shot of the aforementioned communication to the Finance Minister. The said writ petition, which was adjourned to 21.11.2012, was withdrawn by the respondent's counsel, on the instructions of the respondent.

21. Having regard to the aforementioned facts, I have no doubt that not only is the respondent guilty of willfully violating the order of the court dated 29.09.2011, but also the order of the court passed in the present contempt petition dated 31.07.2012, which is why on 18.10.2012 I had issued a notice of contempt to the respondent. The fact that even thereafter the respondent filed a petition, in which offending statements were made against the petitioner, only goes to show that the respondent is unrepentant. To perhaps get around the strict letter of the law the respondent had his wife Mrs Soni Srivastav address a communication to the Finance Minister, which as noticed by me above, contains the same set of offending remarks against the petitioners. This approach of the

respondent clearly reveals, the skewed mind-set, of the respondent.

22. The observations of the Supreme Court in **Patel Rajnikant Dhulabhai and Another Vs. Patel Chandrakant Dhulabhai and Others,** (2008) 14 SCC 561, that apology cannot be made as a weapon of defence is aptly captured in the following observations of the judgment:-

> " 74. In Hiren Bose, Re, AIR 1969 Cal 1 : 72 Cal WN 82, the High Court of Calcutta stated;
>
> > "13.....It is also not a matter of course that a Judge can be expected to accept any apology. Apology cannot be a weapon of defence forged always to purge the guilty. It is intended to be evidence of real contrition, the manly consciousness of a wrong done, of an injury inflicted and the earnest desire to make such reparation as lies in the wrong-doer's power. Only then is it of any avail in a Court of justice But before it can have that effect, it should be tendered at the earliest possible stage, not the latest. Even if wisdom dawns only at a later stage, the apology should be tendered unreservedly and unconditionally, before the Judge has indicated the trend of his mind. Unless that is done, not only is the tendered apology robbed of all grace but it ceases to be an apology It ceases to be the full, frank and manly confession of a wrong done, which it is intended to be".
>
> 75. It is well-settled that an apology is neither a weapon of defence to purge the guilty of their offence, nor is it intended to operate as a universal panacea, it is intended to be evidence of real contriteness [Vide **M.Y.Shareaf v. Hon'ble Judges of the High Court of Nagpur;** (1955) 1 SCR 757 : **M.B. Sanghi v. High Court of Punjab & Haryana,** (1991) 3 SCR 312].
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> 76. In **T.N. Godavarman Thirumulpad v. Ashok Khot & Anr.,** 2006 (5) SCC 1, a three Judge Bench of this Court had an occasion to consider the question in the light of an 'apology' as a weapon of defence by the contemnor with a prayer to drop the proceedings. The Court took note of the following observations of this Court in **L.D. Jaikwal v. State of U.P.,** (1984) 3 SCC 405 (Ashok Khot case SCC p. 17 para 32):

> > "32....We are sorry to say we cannot subscribe to the 'slap-say sorry and forget' school of thought in administration of contempt jurisprudence. Saying 'sorry' does not make the slapper taken the slap smart less upon the said hypocritical word being uttered. Apology shall not be paper apology and expression of sorrow should come from the heart and not from the pen. For it is one thing to 'say' sorry-it is another to 'feel' sorry".
>
> The Court, therefore, rejected the prayer and stated;
>
> > "31. Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace, the apology is shorn of penitence and hence it is liable to be rejected. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment it ceases to be an apology and becomes an act of a cringing coward".
>
> Similar view was taken in other cases also by this Court.
>
> 77. We are also satisfied that the so-called apology is not an act of penitence, contrition or regret. It has been tendered as a "tactful move" when the contemnors are in the tight corner and with a view to ward off the Court. Acceptance of such apology in the case on hand would be allowing the contemnors to go away with impunity after committing gross contempt of Court. In our considered opinion, on the facts and in the circumstances of the case, imposition of fine in lieu of imprisonment will not meet the ends of justice."

23. Apart from anything else, at each of the dates the respondent has been present in court. While his counsel pleaded for mercy, I have not seen, in the demeanour of the respondent, any penitence or remorse. Therefore, the only conclusion that I can come to, is that, the respondent is guilty of willfully and consciously violating the orders of the court dated 01.03.2011, 29.09.2011, as also order dated 31.07.2012.

24. In these circumstances, I direct that the respondent be committed to civil prison to undergo simple imprisonment for a period of fifteen (15) days. It is ordered accordingly. In addition, a fine of Rs.2000 is also imposed on the respondent. However, the sentence imposed will be kept

in abeyance for a period of two weeks to enable the respondent to prefer an appeal, if he so desires.

25. With the aforesaid directions in place, the contempt petition is disposed of.

ILR (2013) III DELHI 1671
W.P. (C)

SUNEEL KUMAR KHATRI ....PETITIONER

VERSUS

UNION OF INDIA & ORS. RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 2826/2012 DATE OF DECISION: 10.01.2013

Service Law—Constitution of India, 1950—Article 227—Writ of Mandamus—Whether withholding the promotion of an official for the reason of his required expertise in the speciality/department currently he's engaged with, even after rejection for fixation of basic pay which is held due to that senior post, be valid?—Held, that retention of an employee as against his promotion due to the reason of his expertise needed in the current department shall not be held against him and also, reduction of his salary, on account of late joining in the department, is wholly unjustified and arbitrary act of the respondents and not the fault of the petitioner.

[As Ma]

APPEARANCES:

FOR THE PETITIONER : Ankur Chhibber, Adv.

FOR THE RESPONDENTS : Mr. Saqib, Adv. with Mr. Joshi, AR/CRPF.

CASE REFERRED TO:

1. *Ashok Kumar* vs. *UOI* W.P.(C) No.21900/2005.

RESULT: Allowed.

GITA MITTAL, J. (Oral)

1. The petitioner in the instant case has sought quashing of the order dated 10th October, 2011 and 9th December, 2011 whereby his case has been wrongly rejected for fixation of his basic pay as well as appropriate seniority in the rank of Assistant Commandant w.e.f. 2nd August, 2005 which would have been at par with his batch mates. The petitioner has further sought for issuance of a writ of mandamus seeking a direction to the respondents to correct their error and to treat the petitioner as having been promoted to the rank of Assistant Commandant w.e.f. 2nd August, 2005 as well as fixation of his pay and increments according to his batch mates and consequently grant time scale to the petitioner w.e.f. 2nd August, 2009 as has been given to his batch mates.

2. We have heard learned counsel for the parties and perused the record which has been produced before us.

3. The facts giving rise to the present petition are in a narrow compass and are briefly noticed hereafter. On account of the petitioner's competence, knowledge and expertise with regard to matters relating to IT, the petitioner was posted on 1st August, 2005 with Electronic Data Process (EDP) Cell of the Directorate General of the CRPF at New Delhi. There is no dispute that by a signal dated 2nd August, 2005 the petitioner and 35 other inspectors were promoted to the Bihar sector to the post of Asst. Commandant.

4. The order of promotion dated 2nd August, 2005 contained the following mandatory condition:

> "(3) All promotes shall be relieved immediately on receipt of unit allotment and will be directed to join new place latest by 25/08/2005."

5. The IGP, Eastern Sector vide a signal dated 5th August, 2005 posted the petitioner as Asst. Commandant which was then located at

Tripura.

6. As the petitioner was not being relieved for joining at his new posting, he submitted representations dated 24th August, 2005 and 24th November, 2005. In the meantime, the batch mates of the petitioner were permitted to pick up their promotions.

7. These representations do not appear to have been considered by the respondents and evoked no response of any kind. As a result, he submitted a request dated 5th December, 2005 (at pg.38) seeking an interview with the Directorate General, CRPF for redressal of his grievance.

8. It is undisputed that the petitioner was granted an interview which resulted in issuance of a signal dated 27th January, 2006 which was to the following effect:

> "COMPETENT AUTHORITY HAS ALLOWED INSP. S.K. KHATRI EDP CELL TO TAKE OVER ON PROMOTION AS ASSTT. COMDT. THIS DTE ITSELF IN PUBLIC INTEREST AND XXXXX TO BE RETAINED IN DTE GENL (EDP CELL) XXXXXX A SPL CASE TILL ARRIVAL OF SHRI AJAY DWIVEDI XXXXX COURSE..."

9. Mr. Ankur Chhibber, learned counsel for the petitioner has rightly pointed out that it was the stand of the CRPF that on account of the petitioner's expertise in the requisite speciality, the respondents were not relieving him in public interest. Even as per the signal directing his posting, the respondents have directed that the petitioner would take over on promotion in the directorate itself. It was further directed that he would be retained till his reliever joins the posting.

10. The present writ petition has been necessitated for the reason that though the signal dated 27th January, 2006 finally gave directions for the petitioner picking up his promotion. The respondents gave the petitioner the emoluments as given to his batch mates upon promotions. However, in November, 2008, without any justification or notice to the petitioner, his basic pay was reduced by the respondents from 17,550/- to Rs.16,880/- on the pretext that the petitioner had joined the promoted post after 31st December, 2005.

11. The petitioner's representations in this regard dated 16th March, 2007, 28th January, 2009, 29th December, 2010 and 25th July, 2011

evoked no positive response. Finally, a letter dated 10th October, 2011 was addressed by the respondents purporting to deal with the petitioner's representation (which is also not specified therein). This communication contains an unequivocal admission which deserves to be considered in extenso and reads as follows:

> "2 In this connection it is intimated that Inspector Sunil Kumar Khatri of Dte. General was released on promotion as A/C vide Pers Dte. General Signal dated 2.8.2005 and allotted to E/Sector for further posting. The said Inspector was allotted to 66 Bn vide E/S signal dated 5.8.05. E/S vide signals dated 30.8.05, 6.10.05, 21.10.05, 2.11.05 and 10.11.05 had requested DIG (Adm) Dte. General to relieve said Inspector on promotion as A/C to 66 Bn as DIG (Adm) is Cadre Controlling Authority for NGOs of Dte. General. However, the said Inspector was not relieved by EDP to 66 Bn where he was posted on promotion and a case for his retention was forwarded to Pers Dte. Vide note dated 5.9.2005 as services of said officer was very much essential in IT Wing for maintenance /implementation of SELO project. The case was examined in Pers Dte. And same was rejected by competent authority which was conveyed to IT Wing vide ION dated 21.09.2005. Instead of relieving the said Inspector on promotion, an application of said Inspector dated 24.11.2005 was again forwarded to Pers Dte. by IT Wing vide note dated 5.12.2005 after a lapse of three months with the request to permit him to take over the charge of A/C at a place other than declared HQr i.e. In Dte. General. Though IG E/Sector is competent to accord such approval after concurrence from Pers Dte., the case was examined and the then IG (Pers) had permitted said Inspector to take over the charge as A/C at Dte. itself as a special case till arrival of Sh. Ajai Dwivedi A/C who was earmarked as his substitute by IT Wing. This was conveyed to IT Wing vide Pers Dte. signal dated 27.1.2006 and Inspector Sunil Kumar Khatri has taken over the charge of A/C on 27.1.2006 at Dte. General (other than declared HQr i.e. 66 Bn).
>
> From the date of taking over charge as A/C to date i.e. 27.1.2006 to 25.7.2011 (5 + years), the said officer remained silent. Now, when he was not granted STS being not eligible for the same by virtue of his taking over charge as A/C, he has submitted

application for re-fixation of appointment date in the rank of A/C and grant of STS, drawal of arrears etc.

3. After thorough examination of representation of the officer, competent authority remarked that "while the officer is also partially responsible but a greater fault lies with his controlling officer for not releasing him on time or taking up the case on time. Let IG (IT) fix up responsibility for the lapse"

12. The petitioner is aggrieved by the fact that the respondents have found fault with the conduct of the officials of the CRPF who were responsible for not permitting the petitioner to join the post to which he stood promoted and in delaying his release from his posting with the EDP Cell, still they chose to fault the petitioner. The petitioner is also aggrieved by the failure of the respondents to notice that the petitioner had made a representation at the earliest on 24th August, 2005 for being relieved which was not even acknowledged, let alone given favourable consideration from the respondents. It is submitted that no fault can be attributed to the petitioner for the delay in joining the promotion post and the petitioner cannot be penalized for the fault of the respondents who took a considered view that the petitioner could not be relieved from his posting at the EDP Cell at Delhi.

13. In support of his contentions, Mr. Ankur Chhibber, learned counsel for the petitioner has placed reliance on the pronouncement dated 27th October, 2009 in W.P.(C) No.21900/2005, **Ashok Kumar vs. UOI** and connected writ petitions, this Court is concerned with the eligibility condition of two years' service in a duty battalion for promotion to the post of Inspector and 2 IC under BSF as also the post of Inspector under CRPF. This Court had found that the posting was the responsibility of the respondents and the petitioners could not be faulted on being unable to meet such a requirement for the purposes of promotion. Given the fact, the respondents had power to waive such condition, the Court had found the action of the respondents in refusing to waive this stipulation as arbitrary and unjustified and the writ petitions were allowed.

14. The counter affidavit is blissfully silent on the manner in which the petitioner's representation dated 24th August, 2005 and 24th November, 2005 were dealt with. Given the factual narration noticed above, there appears to be merit in the petitioner's contentions. It has also been brought to the notice of this Court that by the order dated 10th

October, 2011, the DIG (Pers.) directed the IG(IT) to fix responsibility for the lapse in not releasing the petitioner and not letting him join his promotion posting. The counter affidavit also does not disclose the steps taken by the IG(IT) to fix up the responsibility in terms of the directions made in the order dated 10th October, 2011. The petitioner unfortunately still continues to draw salary less than the salary which is being drawn by his colleagues, who were also promoted by the order dated 2nd August, 2005.

15. Learned counsel for the respondents has contended that the petitioner was drawing a salary of Rs.16,880/- as on September, 2008 and not Rs.17,500/-. Not much turns on this submission. The fact remains that the respondents unilaterally, arbitrarily and without any justification reduced the salary of the petitioner.

16. We had noted the above facts in our order dated 23rd November, 2012 and granted time to the respondents to place on record the petitioner's representations dated 24th August, 2005, 24th November, 2005 as well as action taken by the IG(IT) pursuant to the order dated 10th October, 2011. The respondents were also directed to produce the relevant record before us.

17. It appears that no action at all was taken by the respondents despite the directions of the senior officers in the respondents organization. Today, Mr. Saqib, learned counsel for the respondents has handed over a copy of the signal dated 9th January, 2013 whereby a court of enquiry has now been directed to find out the facts/circumstances under which the petitioner had not been relieved from the EDP Cell on his promotion and for fixation of lapse for the same. It appears that it was the scrutiny by this Court which has compelled the respondents even to issue the above signal. Be that as it may, the court of enquiry is of little relief to the petitioner to whom grave injustice has been done as is evident from the above facts.

18. It is established that the respondents have deliberately paid scant heed to the requirement of the signal dated 2nd August, 2005 promoting the petitioner to the post of Assistant Commandant. The petitioners representations dated 24th August, 2005, 24th November, 2005 and 5th December, 2005 requesting the respondents to immediately release him appear to have fallen on deaf ears. The reason for not releasing the petitioner is however evident from the signal dated 27th

January, 2006. It is also evident from the facts noted in the letter dated 10th October, 2011. The respondents have unequivocally accepted that even though the petitioner was promoted, the EDP Cell had forwarded a request for his retention as the services of the petitioner were essential in the IT Wing for maintenance/implementation of the SELO Project being undertaken by the EDP Cell. We are informed that, the SELO Project was a prestigious Project being undertaken by the CRPF which was essential for nationwide connectivity of the CRPF installations and the retention of the petitioner was effected by the EDP Cell only because of his expertise in the field. The petitioner was deliberately not relieved for no fault on in his part but in order to complete the Project in the need of the organisation. While the retention may have in public interest, however, certainly the petitioner cannot be prejudiced because of his expertise.

19. It is undisputed that all batch mates of the petitioner were permitted to join the place of posting on the promoted rank in terms of the signal dated 2nd August, 2005 whereas the petitioner was permitted to do so only by signal dated 27th January, 2006 because the respondents deemed it appropriate to relieve him as his services were required at a particular position. We find that the communication dated 10th October, 2011 extracted hereinabove also underscores the above facts. Though a vague reference is made therein that the petitioner is partially responsible for joining the promoted post of the Assistant Commandant, however, we are unable to find any factual or legal basis for such an observation.

20. The petitioner could have joined only if the respondents relieved him. The respondents admit that they did not relieve the petitioner or permit him to join.

21. We accordingly hold that and no fault at all for the delay in joining attributable to the petitioner. The action of the respondents for denying compliance with the signal dated 2nd August, 2005 and the promotion at the appropriate stage and the benefits thereof to the petitioner is arbitrary, unfair and illegal. In the given facts and circumstances, the petitioner is entitled to all benefits which would have been enured to him if he would have permitted to join his promotion post in terms of signal dated 2nd August, 2005 just as his other batch mates.

22. It is noteworthy that the respondents recognized this position and for this reason made payment of the salary to the petitioner on rates

admissible in the promotion post after the signal which salary benefit was unfairly withdrawn in November, 2008 on the specious ground that the petitioner had joined the promotion post after 31st December, 2005. As noted above, it is not the petitioner who had any choice in the matter and had joined the promotion post after 31st December, 2005 because he wished to do so. Such delayed joining was squarely because of the action of the respondents in not permitting him to do so. The petitioner cannot be made to suffer for the acts of the respondents.

23. The petitioner thereafter made repeated representations to the respondents to do the justice and to restore the payments to him and fix his seniority appropriately. The respondents unfortunately rejected the same by the order dated 10th October, 2011 and 9th December, 2011 which orders are unsustainable in law as they are not based on relevant material.

24. The respondents appear to have not even considered the representations of the petitioner and despite receipt has passed no orders thereon. In the aforesaid order, the respondents have wrongly come to a conclusion that the petitioner had kept mum for five years and had made a representation belatedly.

25. All the batch mates of the petitioner having been granted senior time scale w.e.f. 2nd August, 2009 i.e. a period of 4 years after the 2nd August, 2005 when they were promoted. The petitioner was promoted by the same order as his batch mates and given the facts and circumstances of the case would be entitled to all emoluments, grant of senior time scale on the same date as his batch mates.

26. In view of the above, we direct as follows:

(i) The orders dated 10th October, 2011 and 9th December, 2011 are hereby set aside and quashed.

(ii) The respondents are directed to treat the petitioner as having been promoted to the rank of Assistant Commandant w.e.f. 2nd August, 2005 and his pay be fixed according to his batch mates. The seniority of the petitioner shall also notionally be fixed accordingly and the petitioner would be entitled to all other benefits including the senior time scale w.e.f. 2nd August, 2009 which has been granted to his batch mates.

27. The respondents shall pass appropriate orders in terms of the above directions within a period of eight weeks and make all payments

found due and payable to the petitioner within the same period.

28. The petitioner shall be entitled to costs in the present matter which are quantified at Rs.10,000/- to be paid by the respondents to the petitioner along with his next month's salary.

29. It is directed that this case shall not be treated as a precedent in any other case and is being made only on the facts and circumstances of the present case.

30. This writ petition is allowed in the above terms.

31. Dasti to both the parties.

ILR (2013) III DELHI 1679
O.M.P.

LALEA TRADING LIMITED ....PETITIONER

VERSUS

ANANT RAJ PROJECTS PVT. LTD. & ANR. ....RESPONDENTS

(S. MURALIDHAR, J.)

O.M.P. NO. : 718/2012 DATE OF DECISION: 10.01.2013

Arbitration and Conciliation Act, 1996—Section 9 and 17—Code of Civil Procedure, 1908—Order XXXVIII Rule 5—Income Tax Act, 1961—Section 163—Respondents ARPL and AIPL approached Petitioner LTL with a proposal to invest in their project of developing a retail mall—Pursuant thereto Share Subscription Agreement (SSA) was entered into between parties whereby LTL agreed to subscribe to equity shares representing 26% of total working share capital of ARPL—Funds were infused in ARPL by LTL—

Simultaneous with execution of SSA, parties entered into Share Holding Agreement (SHA) where ARIL assured LTL 8 % Investment Return Rate (IRR) in every financial year—According to LTL, construction of Mall was inordinately delayed and Respondents expressed inability to adhere to 18 % preferred IRR and asked for it to be reduced—It was mutually agreed between parties Respondents would return US Dollar component of LTL's investment in ARPL with 8 % IRR on or before expiry of three year lock-in-period—Exit Agreement (EA) was executed between parties—Present petition was filed by LTL for a direction to ARIL to secure sum equivalent to 8% IRR on LTL's investment, to cooperate and allow CA nominated by LTL to conduct regular internal financial audits of ARPL and ARIL, to direct respondent's to file records and particulars of relevant bank accounts by way of which remittance amounts where secured, to disclose details of statutory filings with Government departments, to direct ARIL not to alienate/encumber/sell/create charge on shares held by ARPL and ARIL, directing ARPL not to create charge/alienate/encumber/sell shares with respect to 26% shareholding of LTL, directing Respondents not to create any liability, mortgage, lien, encumbrance in any manner on properties and assets of ARPL until adjudication of disputes between parties—In short, argument of Petitioner is that it should be paid for its equity shares, CCPS and FCDS at face value of Rs. 2,687.83 per share—Per contra plea taken, there is no dispute between parties which requires to be referred to arbitration and in any event, arbitration clause till date has not been invoked by LTL—Claim was itself premature—Even for placing monies in a no lien account, approvals would have to be obtained. There was no pleading that ARIL was siphoning off funds in any unlawful manner—Although scope of Section 9 of Act was wide and Court could exercise all powers

vested in it, pleadings in main petition were insufficient for grant of any such relief—Held—While neither ARPL nor ARIL has denied liability to honour commitments under SPA, SHA and EA, there is justification in their contention that there is no specific averment made in petition by LTL that either of them is trying to siphon off funds or transfer properties of ARPL which is one of prerequisites for grant of relief under Order XXXVIII Rule 5 CPC—No doubt Section 9 of Act gives vide powers to Court including same power for making orders as it has for purpose of and in relation to any proceedings before it—Nevertheless, that discretion is not to be exercised lightly—Court must be satisfied that essential conditions for grant of such relief have been met by party seeking it—Till date, LTL has not formally invoked arbitration clause—Court is not inclined at this stage to express any view on contentious issues which are left open to be decided by arbitral Tribunal—Petition disposed of with directions.

Important Issue Involved: Specific averment that respondent is trying to siphon off the funds or transfer the properties is one of the prerequisites for the grant of relief under Order XXXVIII Rule 5 CPC. Section 9 of the Arbitration and Conciliation Act, 1996 gives wide powers to the Court including "the same power for making orders as it had for the purpose of and in relation to any proceedings before it". Nevertheless that discretion is not to be exercised lightly. The Court must be satisfied that the essential conditions for the grant of such relief have been met by the party seeking it.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajiv Nayar and Mr. Neeraj Kishan Kaul, Senior Advocates with Mr. Saurabh Seth, Mr. Vijay Kaundal, Mr. Ajay Bhargava, Mr. Sushmit Pushkar, Mr. Sumit Roy, Ms. Udisha Sahey and Mr. Anchit Oswal, Advocates.

FOR THE RESPONDENTS : Mr. Sudhir Nandrajog, Senior Advocate with Mr. Vivek Sibal and Ms. Pooja M. Saijwal, Advocates for R-1. Mr. C.S. Vaidhyanathan and Mr. Vibhu Bakhru, Senior Advocates with Mr. Gyanendra Kumar, Ms. Anuradha Mukherjee and Ms. Jyoti Dastidar, Advocates for R-2.

CASES REFERRED TO:

1. *Aditya Birla Retail Ltd.* vs. *Ashapura Developers* 2009 (6) MHLJ 154.
2. *Raman Tech. & Process Engg. Co.* vs. *Solanki Traders* (2008) 2 SCC 302.
3. *Shin Satellite Public Co. Ltd.* vs. *Jain Studios Ltd.* 2008 (2) Arb LR 242 (Del).
4. *Numero Uno International Ltd.* vs. *Prasar Bharti* 2008 (5) RAJ 1.
5. *National Shipping Company* vs. *Sentrans Industries Ltd.* AIR 2004 Bom 136.
6. *Goel Associates* vs. *Jivan Bima Rashtriya Avas Samiti Ltd.* 114 (2004) DLT 478.
7. *ITI Ltd.* vs. *Siemens Public Communications Network Ltd.* (2002) 3 SCR 1122.
8. *Global Company* vs. *National Fertilizers Ltd.* AIR 1998 Del 397.

RESULT: Disposed of.

S. MURALIDHAR, J.

1. Lalea Trading Limited ('LTL'), Cyprus has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996

('Act') seeking certain interim reliefs against the Respondents arising out of a Share Subscription Agreement ('SSA') dated 26th June 2008, a Share Holders Agreement ('SHA') dated 26th June 2008, an Exit Agreement ('EA') dated 12th July 2010 and a Share Purchase Agreement ('SPA') dated 12th July 2010 entered into between the parties.

Background Facts

2. It must be mentioned at this stage that in the SSA the parties are described as LTL, Anant Raj Industries Ltd. and Anant Raj Projects Private Limited. In the memo of parties, Respondent No.1 has been described as Anantraj Projects Pvt. Ltd. and Respondent No.2 as Anantraj Industries Pvt. Ltd. However, both in its reply and in the affidavit in support thereof Respondent No.1 describes itself as Anant Raj Projects Ltd. ('ARPL'). That is how it is shown in the cause title in the first page of the petition. Likewise both in its reply and in the affidavit in support thereof Respondent No.2 describes itself as Anant Raj Industries Ltd. ('ARIL'). Consequently, for the purposes of the present case, Respondent No.1 is hereinafter referred to as ARPL and Respondent No.2 as ARIL.

3. ARPL is the owner of immovable property at 67, Industrial Area, Najafgarh Road, Kirti Nagar, New Delhi (hereinafter referred to as 'the project land'). The 100% share capital of ARPL was, prior to the execution of the SSA, held by AIPL which has its registered office in Haryana. The project land had been transferred by AIPL to ARPL for a total sale consideration of Rs.216.32 crores. The sale consideration was paid by ARPL to AIPL by allotment of 4,50,000 equity shares of face value of Rs.10 each at an aggregate premium of Rs.5.20 crores; 20 lakh Optionally Convertible Redeemable Preference Shares ('OCRPS') of Rs.10 each at par in ARPL. The balance amount of Rs.208.67 crores was recorded as a loan due by ARPL to AIPL.

4. Around January/February 2008, ARPL and AIPL through an international private consultant named DTZ International Property Advisers Private Limited, India approached LTL with a proposal to invest in the said project of ARPL which was in the process of developing a retail mall ('mall') on the project land. Pursuant thereto the SSA was entered into between the parties on 26th June 2008 whereby LTL agreed to subscribe

to equity shares representing 26% of the total working share capital of ARPL.

5. In terms of the SSA, LTL was to hold 26% of the total working share capital of ARPL, and Compulsorily Convertible Preference Shares ('CCPS') and fully convertible debentures ('FCD') in accordance with the SSA. It is stated that by way of the said SSA, the arrangement of the Foreign Direct Investment ('FDI') by LTL in ARPL was arrived in terms of Press Note 2 of 2005 issued by the Department of Industrial Policy and Promotion, Government of India.

6. Under Clause 2.3 of the SSA, LTL was required to transfer a sum of Rs.216.38 crores in two tranches:

"(i) INR 37,59,45,900 towards subscription of investor FCD and

(ii) INR 178,78,54,100 towards subscription on Investor equity shares and CCPS."

7. Under Clause 2.4 of the SSA, ARPL was to allot LTL:

"(i) 1,75,676 equity shares of Rs.10 each at a premium of Rs.2025.40 per equity share,

(ii) 7,02,703 CCPS of Rs.10 each at a premium of 2025.40 per CCPS and,

(iii) 37,59,459 FCD of Rs.100 each."

8. LTL states that it infused funds in ARPL as under:

"Date of Transfer	INR/US$	US$ Invested	INR
03.07.08	43.15	$5,00,88,000	2,16,12,95,906
15.07.08	42.62	$58,032	24,73,350
23.07.08	42.45	$762	32,347
	43.15	$5,01,46,794	2,16,38,01,603"

9. Pursuant to the allotment of the above instruments in favour of LTL by ARPL, the following was the share holding pattern of ARPL:

"Name of Shareholder	Number and Type of Shares	Voting Interest
Investor (Petitioner, herein)	1,75,676 Equity Shares 7,02,703 CCPS	26.0 %
	37,59,459 Fully Convertible Debentures.	
ARIL (Respondent No.2,herein)	5,00,000 Equity Shares 20,00,000 OCRPS Allot up to 107,00,000 NCDs (of which 69,04,175 NCDs have been allotted as of March 31, 2011.)	74 %"

10. Simultaneous with the execution of the SSA, the parties entered into the SHA containing specific representations and warranties given by both ARPL and ARIL. In the SHA, LTL was defined as an 'Investor', ARPL as 'Company' and ARIL as such. The equity shareholding of the Investor and ARIL was at all times to be maintained as 26%:74% unless changed in accordance with Clause 3.1.6 or at the 'Exit Event' as provided in the SHA. Under Clause 4.2 of the SHA it was agreed that the Distributable Net Profits of ARPL would be distributed by it in the order of priority under Clause 4.4 of the SHA other than the Exit Event. The order of priority of distribution was recorded as under:

> "(i). First, simultaneously to ARIL and the Investor agreed coupon rate on ARIL NCDs cumulative, in every financial year and repayment of ARIL NCDs as per the terms of issuance of NCDs and to the investor, agreed coupon rate on the Investor FCDs cumulative, in every financial year. Provided that in case of inadequate of cash flows, ARIL will be entitled to the coupon on ARIL NCDs in that financial year and coupon rate on the Investor FCDs shall accrue and be payable to the Investor on exit as provided in Clause 4.4 of this Agreement, subject to overall agreed rate of distribution as provided in Clause 4.4 of this Agreement.
>
> (ii). Second, to the Investor a preferred return at 8% (eight

> percent) IRR on the Investor Investment. Provided, however, the preferred return at 8% IRR on the Investor Investment shall be inclusive of the coupon rate payable on the Investor FCDs to the Investor by the Company (the "Investor Return") in (i) above and also coupon rate payable on CCPS to Investor in any financial year.
>
> (iii). Third, to ARIL a return at 8% (eight percent) IRR on ARIL Investment (the "ARIL Return"). Provided, however, the preferred return at 8% IRR on the investment by ARIL in the Company shall not be inclusive of the coupon rate payable to ARIL on ARIL NCDs by the Company in (i) above but shall be inclusive of the coupon rate payable on OCRPS to ARIL in any financial year. It is hereby clarified that unless the Investor receives the distributions as stated in (ii) above, no distributions will be made to ARIL. It is hereby further clarified that in the event of shortfall of the funds, if the return under this clause is not paid to ARIL, along with the return paid to the Investor under (ii) above the same shall keep on accruing and shall be payable to ARIL on exit as provided in Clause 4.4 of this Agreement.
>
> (iv). Fourth, the repayment of any third party debt.
>
> (v). Fifth, the repayment of Shareholder Loans other than ARIL NCDs and Investor FCDs, if any, and interest thereon.
>
> (vi). Sixth, the balance of the Distributable Net Profits to be shared by both the Investor and ARIL in the ratio of their shareholding in the Company."

11. Under Clause 4.3.1 of the SHA, it was agreed that LTL's return and ARIL's return as defined in Clause 4.2.1 of the SHA was to be paid by exercise of the following options:

> "(a) buy back by the Company of the Investor Equity Shares and ARIL Equity Shares;
>
> (b) Payment of coupon rate cumulative on the Investor FCDs to the Investor;
>
> (c) Payment of coupon rate on ARIL NCDs to ARIL;
>
> (d) Payment of dividend on the CCPS and OCRPS to the Investor

and ARIL, respectively, by the Company;

(e) Payment of dividend on the Equity Shares to the Investor and ARIL, respectively, by the Company."

12. If LTL chose to participate in the buyback pursuant to Clause 4.3.1(a) then CCPS would be converted into Equity Shares so as to achieve equity share holding of 26% in ARPL.

13. In terms of Clause 4.6 of the SHA, ARIL assured LTL 8% Investment Return Rate ('IRR') in every financial year. In the event of failure to receive such returns, ARPL would make good the same as soon as the funds would be available. Schedule V to the SHA recorded that LTL would receive an IRR of 18% on its investment at the time of exit. Under Clause 6 of the SHA, ARIL undertook to implement the entire project in one phase and agreed to complete the said project not later than 9 months from the date of execution of the SHA dated 26th June 2008. The respective covenants of ARIL and ARPL were in Clause 7 of the SHA.

14. Under Clause 10.2.1 of the SHA, LTL could nominate one nominee Director and ARIL could nominate two Directors on the Board of Directors of ARPL. Under Clause 10.14 no 'Major Decision' could be taken in respect of the items mentioned in the said clause by ARPL at any General Meeting or by the Board or Committee or by the Managing Director ('MD') of ARPL unless the said item was consented to by the nominee Director of LTL.

15. According to LTL, the construction of the mall was inordinately delayed. Both ARPL and ARIL expressed inability to adhere to the 18% preferred IRR and asked for it to be reduced. According to LTL after several discussions it was agreed mutually by the parties that ARPL and ARIL would return the US Dollar ('USD') component of LTL's investment in ARPL with 8% IRR on or before the expiry of the three year lock-in period applicable on such items in terms of Press Note 5 of the FDI Policy. Acceding to the above request, the EA was executed on 12th July 2010 between the parties. Simultaneous with the execution of the EA, the SPA was also executed. ARIL also gave a corporate guarantee in favour of LTL agreeing that in case ARIL failed to comply with the obligation under the EA and the SPA, LTL could invoke the corporate guarantee. In order to facilitate the complete exit, ARIL agreed to purchase LTL's

equity shares, CCPS and FCD in the manner contemplated in the EA. In the event the CCPS or FCD could not be bought back as such, they were to be converted into equity shares before such buy back.

16. Clause 1 of the EA defines 'Complete Exit' as under:

"Complete Exit shall mean purchase of all the Investor Securities by ARIL or buying back by the Company of all the Investor Securities, on or before the Definitive Exit Window or such other date in terms of this Agreement, to the satisfaction of the Investor, at such price which shall ensure payment of Investor Sale Securities Consideration to the Investor, in such a manner that the Investor shall have received the amounts from the Company for buyback or from ARIL for purchase of Investor Sale Securities, whatsoever in respect of this Agreement and the Investor ceases to be a Shareholder of the Company."

17. In terms of Clause 2.1 read with Clause 2.3 of the EA, ARPL was to convene a meeting of its Board to declare payment of 8% IRR on the Total Invested Capital (in USD), as Investor Semi Annual Coupon ('ISAC'), to LTL. The ISAC was to be calculated in USD from 13th June 2008 to 31st March 2010. The ISAC was to be put on or before 15th August 2010. Until LTL achieved complete exit from ARPL there was to be no repayment of the promoter's loan or any interest thereon and the payment of interest or dividend to ARIL on its NCDs, OCRPS and equity shares was to remain under suspension till the time LTL received a return on its total invested capital.

18. Under Clause 3.1 of the EA, it was agreed that the parties would jointly apply to the Foreign Investment Promotion Board ('FIPB') within seven days of the execution of the EA for approval for the exit of LTL from ARPL prior to the expiry of the lock-in period. Under Clause 3.2 of the EA, the parties envisaged a complete exit of LTL from ARPL by 8th August 2011. At a meeting held on 12th August 2010 it was resolved that in order to enable LTL to receive the agreed 8% coupon rate, LTL's 64,739 fully paid equity shares of the face value of Rs.10 each, representing 9% of the paid up equity share capital of ARPL would be purchased for an aggregate sum of Rs.23,27,48,358.02 being the exchange value of USD 4,184,165. It was agreed that the buy-back would be implemented in one or more tranches, from time to time as considered appropriate. A letter of offer was issued by which ARPL

offered to buy back 64,739 equity shares in accordance with Section 77A of the Companies Act, 1956 and the Private Listed Company and Unlisted Public Limited Company (Buy-back of Securities) Rules, 1999 ('PLC Rules 1999') at the above price.

19. Since LTL was located outside India along with the tendering of 64,739 equity shares it also submitted Form FCTRS along with certain other documents to the authorised dealer i.e. State Bank of India ('SBI') in terms of the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident Outside India) Regulations 2000 ('FEM Regulations 2000') on 15th September 2010. SBI then sought clarifications and a letter was sent by ARPL to SBI on 29th September 2010 clarifying that the term 'original investment' meant the minimum capitalization amount which was 5 million USD in case of a joint venture. It is stated that while the buy-back was in the process, the Department of Industrial Policy and Promotion ('DIPP') introduced a revised and consolidated FDI Policy on 1st October 2010. It was clarified that as far as FDI in development of townships, housing, built up infrastructure and construction development projects was concerned, the 'Original Investment' meant in the entire amount invested which could not be repatriated before a period of three years from the date of investment. It was clarified that the lock-in period of three years would be computed from the date of receipt of each instalment/tranche of FDI or from the date of completion of minimum capitalisation whichever was later. LTL states that in view of the changed policy the parties decided to put the buy-back process on hold and wait for the completion of the three years lock-in period. Consequently, it was decided not to approach the FIPB.

20. On 27th July 2011 the Janpath Branch of the SBI wrote to the Chief Manager alleging defaults by ARPL in complying with the FDI Policy and asking it to first seek approval of the appropriate authority. Meanwhile, LTL requested ARPL to appoint another authorised dealer in view of the delays being caused for the exit process to be completed. At a Board meeting held on 4th August 2011, ARPL stated that even the Hongkong and Shanghai Banking Corporation ('HSBC') had taken the view that the investment of LTL in ARPL which was under the 'Automatic FDI route' had lost the status of automatic route and hence certain regulatory approvals had to be obtained in order to remit the consideration to LTL for the said buy back. The reason was that LTL had sought the buy-back of its shares by ARPL within the three year lock-in period.

21. Disputes arose between the parties when LTL alleged that there were discrepancies in the minutes of the Board meeting held on 5th, 6th, 8th and 18th August 2011. The stand taken by LTL was that the views expressed by the HSBC were only in relation to the buy-back process of 64,739 equity shares and not for purchase of shares by ARIL from LTL. According to LTL at the meeting held with the SBI on 8th August 2011 it became clear that there was no requirement to obtain any approvals from the FIPB/DIPP/RBI since the three year lock-in period had come to an end on 21st July 2011. LTL states that the delay thereafter in the Respondents facilitating the complete exit of LTL was not justified. LTL also informed ARPL and ARIL by e-mail dated 7th September 2011 that it was willing to adjust the exit remittance amount with the potential capital gains liability under the Income Tax Act, 1961 ('IT Act').

22. According to LTL despite exchange of correspondence between the parties thereafter the impasse was not resolved. LTL states that despite extending its full cooperation and expressing preparedness to fulfil its obligations under the EA, ARPL and ARIL were unnecessarily harassing it and delaying its exit from ARPL on baseless grounds. Further they were also delaying the remittance of the buy-back amount of Rs.23,27,48,358.02 on unjustified grounds despite the lock-in period of three years having expired.

The present petition

23. In the above circumstances, the present petition was filed by LTL for a direction to ARIL to secure the sum of Rs.3,38,79,83,250 (being the amount of USD 60,771,000) which is equivalent to 8% IRR on LTL's investment, to secure the sum of approx. Rs.23.27 crores by depositing it in the Court, to cooperate and allow the Chartered Accountant nominated by LTL to conduct regular internal financial audits of ARPL and ARIL, to direct ARPL and ARIL to file records and particulars of the relevant bank accounts by way of which the remittance amounts were secured, to disclose the details of the statutory filings with the Government departments, to direct ARIL not to alienate/encumber/sell/ create charge on the shares held by ARPL and ARIL, directing ARPL not to create charge/alienate/ encumber/sell shares with respect to the 26% shareholding of LTL, directing ARIL and ARPL not to create any liability, mortgage, lien, encumbrance in any manner on the properties and assets of ARPL until adjudication of the disputes between the parties. It was

stated in the petition that LTL was in the process of initiating arbitral proceedings under Clause 10.14 of the EA.

24. Pursuant to an order passed by this Court on 8th August 2012, LTL filed an affidavit dated 13th August 2012 of Mr. Sanjay Lal, its authorised representative. In the said affidavit it was stated that LTL was established for the purpose of carrying on the business of an investment holding company and had a single Director who was based in Cyprus. The 100% issued and paid up capital of LTL was at present held by Acacia India Retail Limited ('AIRL'), a company incorporated under the laws of Territory of the British Virgin Islands. It was stated that amongst the shareholders of AIRL were Taib Bank B.S.C. (C), a private bank based in Bahrain, Acacia Investments B.S.C. (c), a real estate investment company incorporated in Bahrain and other prominent business/royal families in the GCC. A subsidiary of Dubai Group, namely-Dubai Ventures L.L.C., held a 51% equity stake in AIRL. LTL has no permanent establishment in India.

25. On 17th August 2012, in the presence of learned counsel for the Respondents, the Court passed the following order:

> "1. Affidavit stated to have been filed by the Petitioner on 13th August 2012 vide Diary No. 130087 in terms of the order dated 8th August 2012 be traced out by the Registry and placed on record.
>
> 2. This Court has heard the submissions of Mr. Neeraj Kishan Kaul, learned Senior counsel for the Petitioner, Mr. Sudhir Nandrajog, learned Senior counsel for Respondent No. 1 and Mr. Vibhu Bakhru, learned Senior counsel for Respondent No. 2.
>
> 3. On behalf of the Petitioner Mr. Kaul expresses apprehension that the board meetings of Respondent No. 1 company are not being held with the full participation of the nominee director of the Petitioner. Mr. Kaul states that the minutes of the Board meeting are not being properly recorded.
>
> 4. In response to the above submission, it is stated by Mr. Nandrajog as well as Mr. Bakhru, learned Senior counsel for Respondent Nos. 1 and 2 that a board meeting of Respondent No. 1 company can be convened within a fortnight which can

> be attended by the nominee director of the Petitioner, currently located in Bahrain, or any of the alternate directors nominated by the Petitioner who are residing in India. They are prepared to have the board meeting recorded on video to allay any apprehension.
>
> 5. It is agreed between the parties that a meeting of the Board of Directors of Respondent No. 1 Company will be convened on 19th September 2012, which can be attended by the nominee director of the Petitioner or any of the alternate directors. It is directed that the proceedings of the said meeting will be videographed. The minutes of the board meeting and the video recording will be produced in Court on the next date.
>
> 6. Mr. Nandrajog and Mr. Bakhru further state that the nominee director of the Petitioner would be entitled to exercise affirmative vote in terms of the Articles of Association of Respondent No. 1 company. It is directed that no action which requires the affirmative vote of the nominee Director of the Petitioner will be taken without such affirmative vote.
>
> 7. Independent of whatever issues that the nominee director of the Petitioner may raise at the said Board meeting, the Petitioner will, within one week from today, address a letter to Respondent Nos. 1 and 2 listing the issues that it wishes to discuss and have resolved.
>
> 8. As regards the apprehension expressed by Mr. Kaul that the Petitioner is not aware of the manner of utilization of the moneys invested by the Petitioner in Respondent No. 1 company, Mr. Nandrajog and Mr. Bakhru state that copies of numerous documents have been furnished to the Petitioner as requested by it. As regards the further request made by the Petitioner in its letter dated 9th August 2012, it is stated by them that those documents will also be provided to the Petitioner prior to the board meeting to be held on 19th September 2012. It is directed that Respondent Nos. 1 and 2 will keep ready for inspection by the nominee Director of the Petitioner at the board meeting, such documents as will be indicated by the Petitioner to it at least one week in advance.

9. Mr. Kaul submitted that the sum equivalent to the amount invested by the Petitioner together with the expected return thereon should be placed by the Respondents in an escrow account. On this aspect, both Mr. Bakhru and Mr. Nandrajog state that they wish to file detailed replies to explain the factual as well as legal position. Mr. Nandrajog, on instructions, states that within thirty days of all approvals and clearances being granted, Respondent No. 1 is prepared to pay the Petitioner the buy-back amount. On behalf of Respondent No. 2 Mr. Bakhru states that Respondent No. 2 has sufficient reserves and there can be no room for any apprehension by the Petitioner that Respondent No. 2 will not be able to meet its financial obligations arising out of the Exit Agreement entered into with the Petitioner.

10. Respondent Nos. 1 and 2 should file their respective replies within four weeks. Rejoinders thereto, if any, be filed before the next date.

11. List on 8th October 2012."

26. Pursuant to the above directions, an affidavit was filed by the MD of ARPL on 10th October 2012 enclosing a copy of the compact disc containing the video recording and transcript of the meeting of the Board of Directors of ARPL on 19th September 2012 along with its transcript. ARPL and ARIL claim that the necessary documents and information was provided to the nominee director of LTL. On 5th October 2012 both ARPL and ARIL filed their respective replies. Rejoinders to both affidavits have been filed by LTL on 7th December 2012.

Submissions of counsel

27. This Court has heard the submissions of Mr. Rajiv Nayar and Mr. Neeraj Kishan Kaul, learned Senior counsel appearing for LTL, Mr. C.S. Vaidyanathan and Mr. Vibhu Bakhru, learned Senior counsel appearing for ARIL and Mr. Sudhir Nandrajog, learned Senior counsel appearing for ARPL.

28. On behalf of LTL it is contended by Mr. Rajiv Nayar and Mr. Neeraj Kaul that there was no justification for ARIL and ARPL not to honour their commitments under the EA and the SPA. Referring to Clause 4.1(b) of the SPA it was submitted that the purchase price calculated in terms of Schedule I had to be deposited by the purchaser

(ARIL) on or before the completion date "in a separate no-lien bank account" and "an authorised representative of the Seller (LTL) shall be the signatory to such no-lien bank account". In terms of Clause 2.1 Schedule IV of the SSA the CCPSs held by LTL was compulsorily convertible to equity shares at the time of exit. Going by the definition 'complete exit' under the EA read with Clause 4.1(b) of the SPA, ARIL was eligible to purchase all three instruments i.e. equity shares, CCPS and FCDs. One CCPS is equivalent to one equity share. It is pointed out that according to M/s. SBD and Co. the valuation of on equity share of ARPL was Rs.3595.18 as on 31st March 2010. It is on that basis that the buy-back of 64,739 CCPS was initiated by ARPL by converting it into equity shares. The same Auditors had now valued one equity share of ARPL as on 31st July 2011 at Rs.2687.83. This was "on fully diluted basis on post conversion of convertible preference shares into equity shares". It is submitted that even accepting the said valuation the payment owing was well above Rs.38 crores. LTL has also worked out a calculation by not converting the FCDs into the equity shares by selling them as such on their full value of Rs.100 each.

29. The total claim of LTL is as under:

"S.No.	Towards Type of Instrument	Total No.	Total amount (approx)
1.	Equity Shares	175,676 at Rs.2687.83/ per share	Rs. 47.22 crores
2.	CCPS	702,703-64,739 (already converted by R/1 for buyback) = 637,964 at Rs. 2687.83/per share	Rs. 171.47 crores
3.	FCD	3,759,459	Rs. 37.59 crores
	TOTAL		Rs. 256.28 Crores"

30. Reference is made to Clause 2.1 of Schedule IV to the SHA which reads as under:

"2.1 CCPSs shall be fully and mandatorily converted into Equity Shares of Rs. 10 each at such premium as may be decided by the Board at the time of exit under clause 4.4 of the Shareholder Agreement but prior to expiry of 10 years from the date of its issuance at the option of the Investor."

31. In short the argument is that LTL should be paid for its equity shares, CCPS and FCDs at the value of Rs.2,687.83 per share. Even if an FCD is taken only at its face value, the total claim of LTL at this stage would be to a sum of Rs.256.28 crores. It is submitted that the said amount should be directed to be deposited in a no-lien account by ARIL and ARPL which can be subject to the outcome of the arbitral proceedings. A reference is also made to the stand taken by both ARIL and ARPL in their replies where they do not actually deny the liability to pay LTL under the EA but identified the only barriers as the compliance with requirement of the law.

32. Relying on the decision in **National Shipping Company v. Sentrans Industries Ltd.** AIR 2004 Bom 136 it is submitted Section 9 of the Act is much wider than Order XXXVIII Rule 5 Code of Civil Procedure, 1908 ('CPC') and is designed to do complete justice between the parties. Reliance is placed also on the decision in **Aditya Birla Retail Ltd. v. Ashapura Developers** 2009 (6) MHLJ 154. It is added that LTL has already issued a Cure Notice dated 12th September 2012 and is agreeable to submit to the jurisdiction of any retired judge of the Supreme Court appointed by this Court as sole Arbitrator to adjudicate various disputes between the parties including valuation of shares of ARPL. It is clarified that LTL "is not seeking directions for repatriation." However it is urged that the Respondents should be directed to deposit the sum in an interest bearing no lien account or with the Court. The sum payable by ARPL is asked to be deposited in a special bank account even according to the PLC Rules 1999. As far as ARIL was concerned, it is submitted that the sum payable by should be directed to be deposited in a no-lien account in terms of Clause 4.1 (b) of the SPA. Reference is made to the decision in **Numero Uno International Ltd. v. Prasar Bharti** 2008 (5) RAJ 1.

33. On behalf of ARPL and ARIL it is first contended that there is, in fact, no dispute between the parties which requires to be referred to arbitration and that in any event the arbitration clause till date has not

been invoked by LTL. Therefore the claim was itself pre-mature. It is further submitted that assuming that as stated in the Court during the course of hearing LTL did not desire to repatriate the money immediately, even for placing the monies in a no-lien account, approvals would have to be obtained. It is submitted that since LTL had sought the buy-back of shares even prior to the lock-in period it could no longer avail of the 'automatic route' and had to necessarily seek FIPB approval.

34. On behalf of ARIL it is submitted by Mr. Bakhru, learned Senior counsel, that there were no pleadings to the effect that ARIL was siphoning off the funds in any unlawful manner. There was not even an averment to that effect in the petition. Relying on the decisions in **ITI Ltd. v. Siemens Public Communications Network Ltd.** (2002) 3 SCR 1122, **Raman Tech. & Process Engg. Co. v. Solanki Traders** (2008) 2 SCC 302, **Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.** 2008 (2) Arb LR 242 (Del), **Global Company v. National Fertilizers Ltd.** AIR 1998 Del 397 and **Goel Associates v. Jivan Bima Rashtriya Avas Samiti Ltd.** 114 (2004) DLT 478, it is submitted that the provisions of Order XXXVIII Rule 5 CPC ought not to be likely invoked in the absence of any case being made out by LTL for grant of any relief similar to an adjudication. It is submitted that although the scope of Section 9 of the Act was wide and the Court could exercise all the powers vested in it, the pleadings in the main petition were insufficient for grant of any such relief.

35. It is submitted that while converting the CCPS held by LTL, the "simultaneously converted securities" of ARIL would also have to be considered such that the percentage share holding between the securities held by LTL and that by ARIL remain at 26%:74%. It is accordingly submitted that the share valuation would have to be adjusted to account for the increase in the total number of shares upon conversion and the claim of Rs. 256.28 crores is "on the face of it, erroneous." It was further submitted that the shares of LTL itself had changed hands several times. If there was to be a buy-back of shares from LTL then ARIL would become a 'representative assessee' for the purposes of Section 163 of the Income Tax Act 1961 ('IT Act'). According to him, LTL had already applied to the Advance Ruling Commission for a decision on its possible liabilities under the IT Act. It is submitted that ARIL was a going concern with high turnover and had several ongoing projects, requiring it to place such a huge amount in a no-lien bank account would badly

affect its liquidity position and there was nothing warranting such an extreme step. Mr. Bakhru stated that without prejudice to any of the above contentions, ARIL was willing to undertake that it will not alienate, encumber, sell, transfer or otherwise create any third party interest or charge in relation to the Project Land and the Mall. ARIL was willing to deposit their title deeds in the Court.

36. Mr. Nandrajog, learned Senior counsel appearing on behalf of ARPL supplemented the above submissions on behalf of ARPL. He pointed out that the assets of ARPL could not be alienated without the consent of LTL and, therefore, they were more than secure as regards their claims. Therefore, there was no occasion for any direction for deposit of moneys in a no-lien account. He too submitted that the title deeds of the Project Land and the Mall could be deposited in this Court and be kept as such till the conclusion of the arbitral proceedings.

Buy back of 64, 739 shares

37. At the outset a distinction requires to be made between the two distinct prayers in the petition. The first concerns ARPL's liability to pay Rs. 23,27,48,358.02 for the buy-back of 64,739 CCPS into equity shares. There is no dispute about the valuation of the said shares at Rs. 3595.18 per equity chare. The only reason for ARPL not yet remitting the said sum to LTL or even placing it in a separate no-lien account is due to the stand taken by the Authorised Dealers, SBI and HSBC, that the 'automatic route' is not available to LTL. In light of the change in the FDI Policy of the DIPP and considering that the lock-in period is over, this objection prima facie does not appear to be justified. Further LTL has made it clear that it does not wish to repatriate the sum as of now. ARPL does not deny that the said shares have been surrendered by LTL and have been defaced. In the considered view of the Court therefore, there can be no difficulty in directing ARPL to keep the aforementioned sum in a separate no-lien interest bearing account or better still in a fixed deposit with the SBI and not encash or raise loans on it or deal with it in any manner without previous orders of the arbitral Tribunal.

Relief under Order XXXVIII Rule 5 CPC

38. That brings to fore the main dispute between the parties at this stage. This concerns the prayer of LTL that the Respondents should be directed to deposit a sum of Rs. 256.28 crores in a separate account to

facilitate LTL's exit from ARPL. The legal issue that arises in this connection is whether LTL has made out a case for issuing a peremptory injunctive order analogous to one under Order XXXVIII Rule 5 CPC?

39. The narration of facts shows that LTL has been seeking a complete exit from ARPL but has been unable to do so because of the stand taken by ARPL and ARIL that certain legal and statutory requirements require to be met. In the rejoinder filed by LTL, the following submissions of ARPL in its reply have been highlighted:

> "...It may be appropriate to mention that the Respondent No.1 has, on two occasions arranged for the requisite amount towards remittance however on both the occasions the authorised dealer has advised that FIPB approval is required to proceed further with the request for remittance. (See page 6 of the Reply)"
>
> "...The Respondent No.1 is financially sound company holding assets in excess of Rs.300 crores and is in fact earning annual lease rentals rental from the project in question of over 20 crores per annum alone. As already submitted the Respondent No.1 is committed to its obligations and covenants as regards the exit arrangement of Petitioner. The Respondent No.1 reiterates that it is committed to ensure that the remittance of Rs.23,27,48,358.02 amount is carried out within the agreed time period and without delay once the approval from FIPB are received."

40. On its part ARIL has in para 5 (l) & 6 (f) of its reply stated as under:

> "5(1) That it is therefore submitted that the Respondent No.2 has always been ready and willing to purchase the shares of the Petitioner and has taken all steps required. The inability of the Respondent No.2 and the Petitioner to (conclude the transfer of shares) is on account of restrictions in law and the actions of the Petitioner itself, which cannot be attributed to the Respondents."
>
> "6 (f) It is submitted that the above factors exposes the Respondents, to being treated as 'representative assesses' under the Income-Tax Act, 1961 which would make them liable for the taxes which the Petitioner would be found in default of. It is submitted that the above factors would have a remarkable bearing on the consideration sought to be remitted to the Petitioner

abroad."

41. While neither ARPL nor ARIL has denied the liability to honour the commitments under the SPA, SHA and EA, there is justification in their contention that there is no specific averment made in the petition by LTL that either of them is trying to siphon off the funds or transfer the properties of ARPL which is one of the prerequisites for the grant of relief under Order XXXVIII Rule 5 CPC. No doubt Section 9 of the Act gives wide powers to the Court including "the same power for making orders as it has for the purpose of and in relation to any proceedings before it". Nevertheless that discretion is not to be exercised lightly. The Court must be satisfied that the essential conditions for the grant of such relief have been met by the party seeking it.

42. Order XXXVIII Rule 5 reads as under:

> **"5. Where defendant may be called upon to furnish security for production of property.**—(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-
>
> (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
>
> (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.
>
> (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the properly so specified. (4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

43. The scope of the power under the above provision was explained by the Supreme Court in **Raman Tech & Process Engg. Co.** in para 5 as under:

> "5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of court settlements under threat of attachment."

44. The following observations of the Division Bench of the Bombay High Court in **National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd.** are also relevant:

> ".... Though the power given to the Court under Section 9(ii)(b) is very wide and is not in any way controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the Arbitrator is in a position to get the fruits of such adjudication and in executing the Award. While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the Arbitration, the Court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order inasmuch as in the absence of such order, the applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the application under Section 9(ii)(b). The party seeking protection order under Section 9(ii)(b) ordinarily must place some material before the Court, besides the merits of

the claim that order under Section 9(ii)(b) is eminently needed to be passed as there is likelihood or an attempt to defeat the Award, though as indicated above, the provisions of Order 38, Rule 5, CPC are not required to be satisfied. The statutory discretion given to the Court under Section 9(ii)(b) must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief under Section 9(ii)(b) and we hold that the provisions of Order 38, Rule 5 of the Civil Procedure Code cannot be read as it is and imported in Section 9 of the Act of 1996. We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) outside the provisions of Order 38, Rule 5 of the Code of Civil Procedure. Each case under Section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience. The power of the Court under Section 9(ii)(b) cannot be restricted to the power conferred on the Court under Civil Procedure Code though analogous principles may be kept in mind."

45. In para 73 of the petition it is stated by LTL that ARIL and ARPL have been "unnecessarily harassing the Petitioner by delaying the exit of the Petitioner from Respondent No.1 on baseless and frivolous grounds". It is further stated that they were seeking to "delay the remittance on various frivolous issues". In para 74 it is alleged that the information being provided by both ARIL and ARPL was inadequate and that LTL has no option but to move the Court to "secure and protect its investment and returns". These averments do not satisfy the requirement of the law that there is a genuine apprehension that the Respondents will divert the assets of ARPL and frustrate the relief that is likely to be granted to LTL in the arbitral proceedings.

46. As explained in National Shipping Company of Saudi Arabia the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) of the Act "outside the provisions of Order 38, Rule 5 of the Code of Civil Procedure." However, it has also been pointed out that "each case under Section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and

on the principles of equity, fair play and good conscience." Therefore, even while the Court is not inclined to grant the prayer of LTL for a direction to the Respondents at this stage to deposit a sum of Rs. 256.28 crores a separate no-lien account, the Court takes on record the offer of the Respondents that they will deposit in the Court the title deeds of the project land and the Mall constructed thereon. Additionally it has been stated by the Respondents on 17th August 2012 that no action which requires the affirmative vote of LTL will be taken without such affirmative vote.

47. Although it was repeatedly urged by Mr. Neeraj Kaul that LTL was willing to go in for arbitration and that this Court could itself appoint an arbitral Tribunal, the fact remains that till date LTL has not formally invoked the arbitration clause. It has only issued a Cure Notice to the Respondents.

48. The Court is not inclined at this stage to express any view on the contentious issues concerning the proper valuation of the shares, the CCPS and the FCD, the requirement of obtaining FIPB approval, and the other contentions which have noted earlier. These are left open to be decided by the arbitral Tribunal. Further it is clarified that the arbitral tribunal will decide the issues that arise before it in accordance with law independent of the tentative views of the Court in this order.

Directions

49. The petition is disposed of with the following directions: (a) Within a period of ten days from today, LTL will write formally to the Respondent invoking the arbitration clause and seek the constitution of an arbitral Tribunal in terms of the agreements executed. Thereafter it will be open to LTL to take further steps in accordance with law for constitution of such arbitral Tribunal.

(b) Within one week from today ARPL will deposit with the Registrar General of this Court a fixed deposit receipt (FDR) issued in its name by the SBI for a sum of Rs. 23,27,48,358.02 valid initially for a period of not less than one year and which FDR will be kept renewed during the pendency of the arbitral proceedings and subject to orders that may be passed by the arbitral Tribunal.

(c) Within one week from today ARPL and ARIL will deposit with the Registrar General of this Court the original title deeds of the Project

Land and the Mall. The title deeds so deposited will be kept in a sealed cover by the Registrar General till such time appropriate orders are passed by the arbitral Tribunal in that regard at any stage of the arbitral proceedings.

(d) All contentions of the parties on merits are left open to be urged before the arbitral Tribunal. It will be open to either party to seek appropriate interim reliefs, not limited to variation or modification of the present order, under Section 17 of the Act before the arbitral Tribunal.

ILR (2013) III DELHI 1703
W.P. (C)

RAMBAGH PALACE HOTELS PRIVATE LIMITED **....PETITIONER**

VERSUS

DEPUTY COMMISSIONER OF INCOME TAX, NEW DELHI **....RESPONDENT**

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

W.P. (C) NO. : 7023/2010, 8825/2011 AND 7206/2012, 7513/2010, 7516/2000 **DATE OF DECISION: 10.01.2013**

Income Tax Act, 1961—Section 142 (1), 143 (1), (2) and (3), 147, 148 and 154—Five writ petitions filed against reassessment notices issued by respondents—Plea taken, it was duty of assessing officer (AO) to show that petitioner has failed to furnish primary facts fully and truly at time of original assessment and that his duty has not been discharged by him—Held—For assessment year (AY) 2003-04, at least in respect of foreign travel expenses, no details were furnished by

assessee at time of original assessment, except a bare noting that a part of such expenditure was incurred in foreign currency—No details of place visited and purpose of visit and how visit was connected to business of petitioner were furnished—Assessee was under a duty to disclose these particulars fully and truly at time of original assessment—There was thus, a failure on part of petitioner which would attract first proviso to Section 147 of Act—Contention that reopening was prompted by a mere allegation of irregularities without any tangible material or finding, is not acceptable—Complaint has been filed by one of Directors before Company Law Board (CLB) and some credibility has to be accorded to same as it was filed before a statutory authority competent to deal with complaint; it must be taken to have been filed with some responsibility—Reopening of assessment for AY, 2003-04 is not without jurisdiction—So far as AY, 2004-05 is concerned, not only did petitioner furnish all relevant details relating to purchase of fixed assets, repairs and maintenance of buildings but also details relating to foreign travel expenses—AO had raised queries regarding repairs and maintenance of building, plant and furniture which were answered by petitioner—In these circumstances, it cannot be said that there was any failure on part of petitioner to submit full and true particulars at time of original assessment—It was for AO to examine details and draw appropriate inference—Notice under Section 148 of Act issued for AY, 2004-05 is therefore, without jurisdiction—For AY, 2005-06, AO has properly assumed jurisdiction to reopen assessment—There was no scrutiny assessment under Section 143(3) in first instance; return filed by petitioner was merely processed under Section 143 (1)—Complaint by one of Directors before CLB constitutes tangible material on basis of which action to reopen assessment can be taken in good faith, belief entertained by AO on basis

of complaint which has been filed with some responsibility by one of directors of petitioner, cannot be said to be a mere pretence nor can belief be said to be divorced from material—Complaint constitutes relevant material for belief—Fact that petitioner submitted all details to AO along with return of income is not relevant where only intimation under Section 143(1) is issued after merely processing return without scrutiny—There should however, be reason to believe that income had escaped assessment and this condition has been satisfied in respect of AY, 2005-06—Notice issued under Section 148, upheld—Validity of reopening notices issued by respondent under Section 148 for AY, 2003-04 to petitioners 'MJS' and 'MPS' also upheld as one of allegations in complaint is that funds of hotel were being siphoned off by present petitioners in guise of purchase of fixed assets, repairs and maintenance expenses and foreign travel expenses—Respondent has arrived at a tentative belief that 50% of amounts allegedly siphoned off by petitioners have to be treated as income that has escaped assessment in each of their assessments—Jurisdiction of respondent to reopen assessment of petitioners, upheld.

Important Issue Involved: It is necessary that the assessing officer must have "reasons to believe" that income chargeable to tax had escaped assessment. There must be tangible material before him on the basis of which he could form the belief, *bonafide* and in good faith, that there was escapement of income. The material must have a live link or nexus with the formation of the belief. The belief cannot be a mere pretence. These are the most basic and indispensable requirements for the validity of the notice under Section 148 of the Income Tax Act, 1961.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

FOR THE RESPONDENT : Mr. Sanjeev Rajpal, Sr. Standing Counsel.

CASE REFERRED TO:

1. *G.K.N. Driveshafts, (India) Ltd.* vs. *ITO & Ors.* (2003) 259 ITR 19 (SC).

RESULT: WP (C) Nos. 7023/2010, 7513/2010, 7516/2010 and 2706/2012 are dismissed and WP (C) No. 8825/2011 is allowed.

R.V. EASWAR, J.

1. These are five writ petitions of which three have been filed by M/s Rambagh Palace Hotels Pvt. Ltd. and one each by Maharaja Jai Singh and Maharaja Prithviraj Singh. They are all directed against the reassessment notices issued by the respondents under Section 148 of the Income Tax Act, 1961. We may first take up the writ petitions filed by M/s Rambagh Palace Hotels Pvt. Ltd., which is hereinafter referred to as "hotel". These are WP(C) Nos.7023 of 2010, 8825 of 2011 and 7206/2012 relating to the assessment years 2003-04, and 2004-05 and 2005-06 respectively.

2. In WP(C) No. 7023/2010 which relates to the assessment year 2003-04 the facts in brief are that the petitioner-hotel is a private limited company incorporated on 15.7.1972 and regularly assessed to income tax from the assessment year 1974-75. It is engaged in the business of running hotels consisting of five independent units i.e. Rambagh plants, the Sawai Madhopur Lodge, the Rambagh Lodge, the Airport Cafeteria and SMS Hotel. It filed a return of income declaring a loss of Rs. 4,29,22,365/-. The return was processed under Section 143(1) and an intimation was issued on 18.3.2004. Thereafter, it was selected for scrutiny and after issuing notices under Sections 143(2) and 142(1) and after examining the details furnished by the petitioner, an assessment order was passed under Section 143(3) in which the loss was computed at Rs.4,12,89,641/-. The order was passed on 27.12.2005. On 12.9.2006 the assessing officer passed a rectification order under Section 154 reducing the loss to Rs.4,01,80,811/-.

3. On 26.3.2010 i.e. after the lapse of four years from the end of the relevant assessment year, the respondent issued a notice under Section 148 of the Act to reopen the assessment on the ground that income chargeable to tax had escaped assessment. The petitioner-hotel filed a return of income in response to the notice declaring the loss at the figure at which the respondent had determined it by the order of rectification. It also requested the respondent to supply a copy of the reasons recorded for reopening the assessment.

4. On 18.8.2010 the reasons recorded were supplied to the petitioner. The reasons are as under :

"11. Reasons for the belief that income has escaped assessment:

A complaint against the assessee company has been filed by Shri Raj Kumar Devraj, one of the Directors of the assessee company vide which it has been pointed out that more than Rs.100 crores of rupees has been siphoned by Maharaja Prithvi Raj & Maharaja Jai Singh out of the companies accounts which require the proper investigation & scrutiny of accounts of the company for the last 6 years. It has further been alleged by the complainant before the company law board in petition that Maharaja Prithviraj and Maharaja Jai Singh in the year 2002-03, 2003-04, 2004-05, 2006-07, 2007-08 and 2008-09 had debited of Rs.50 crores approx. under the head repairs and maintenance of bldg. and Rs.50 crores approx. towards addition to the fixed assets and this sum has been withdrawn and siphoned by illegal withdrawals with the connivance of the contractors appointed in consultation and for the personal benefit of Maharaja Prithviraj & Maharaja Jai Singh which require proper investigation and scrutiny of the accounts of the company and all the expenses illegally withdrawn by Maharaja Prithviraj and Maharaja Jai Singh are of capital in nature should be disallowed. Further it has been alleged that under the head traveling conveyance from the year 2002-03 to 2007-08, a sum of approx. Rs.5 crores has been illegally withdrawn and siphoned out by Maharaja Prithviraj and Maharaja Jai Singh out of company fund. These expense are not related to the business of the company as the company is not procuring any business from outside India & as per terms of the operational agreement with Indian Hotel company Ltd. (chain of

Taj group hotels) company do not have to incur any expenditure for foreign tourist and not to meet any travel agent because all the expenses relating to business operation of the company is being looked after by Indian Hotel Company Ltd.

In view of the above facts, I have reasons to believe that an amount of Rs.9,09,15,751/- has escaped assessment in the A.Y. 2003-04.

1. Which comprises of expenses towards repair & maintenance

Building	4,50,15,315/-
Machinery	45,54,181/-
Others	28,39,563/-
	5,24,09,060/-

2. Traveling Rs.68,57,669/-

3. Addition to fixed assts Rs.3,16,49,022/-

Totaling to Rs.9,09,15,751/-

Thus the assessee has failed to disclose all material facts truly and fully that were necessary for assessment. Here it is relevant to mention the explanation 1 in section 147 that states that "production before the AO of account books or other evidence from which material evidence could with the diligence have been discovered by the AO will not necessarily amount to disclosure with the meaning of the foregoing proviso.

In view of above facts, I have reason to believe that income chargeable to tax amounting to Rs.9,09,15,751/- has escaped assessment in the case and the same is to be brought to tax under section 147/ 148 of the I.T. Act. Sanction for issue of notice u/s 148 as prescribed u/s 151, to re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to the notice subsequently during the course of assessment proceedings, may kindly be accorded. (Signature of Officer) Sd/-

Name : B. SRINIVAS KUMAR
Dated: 15.03.2010 Designation : DCTI, Circle-15(1)
New Delhi"

5. The petitioner filed objections to the initiation of reassessment proceedings as envisaged by the judgment of the Supreme Court in **G.K.N. Driveshafts, (India) Ltd. Vs. ITO & Ors.** (2003) 259 ITR 19 (SC). In these objections the petitioner submitted that all the details and information required by the assessing officer were submitted at the time of the original assessment proceedings including information regarding the expenses under the heads, repairs and maintenance, additions to fixed assets etc. and there was no failure to furnish full and true particulars, that there was no new material or facts to justify the reopening of the assessment, and that the complaint stated to have been made by Raj Kumar Devraj was wholly extraneous and irrelevant and was not valid material in the eyes of law and that in these circumstances the respondent had no jurisdiction to reopen the assessment. The contentions were also sought to be supported by reference to several decisions on the subject. These objections were disposed of by the respondent by order dated 28.9.2010. In this order the respondent stated that there was fresh material by way of information received from Raj Kumar Devraj pointing to escapement of income chargeable to tax and thus he had jurisdiction to reopen the assessment. He further stated that the contents of the information also showed that the assessee did not disclose full and true particulars or primary facts at the time of the original assessment. The petitioner's objections were accordingly dismissed.

6. The contention of the petitioner before us is that since the assessment is sought to be reopened after the lapse of four years from the end of the assessment year, it was the duty of the assessing officer to show that the petitioner had failed to furnish primary facts fully and truly at the time of the original assessment and that this duty has not been discharged by him. It was contended that the complaint made by Raj Kumar Devraj which formed the basis of the reopening of the assessment was only a bundle of allegations of irregularities and there was no finding that such irregularities have actually been committed by the petitioner. Accordingly, it is contended that the complaint cannot constitute tangible material for reopening the assessment.

7. As regards full and true disclosure, our attention was drawn to page 117 of the writ petition which sets out Schedule "L" to the profit and loss account for the year ended 31.3.2003 in which repairs and maintenance expenses relating to building, machinery and other assets have been separately shown. At page 120, the petitioner has disclosed the

"significant accounting policies and notes to accounts". Under the head "fixed assets", the petitioner has stated that all fixed assets are stated at their original cost of acquisition including incidental expenses related to acquisition and installation of concerned assets and are stated net of accumulated depreciation.

8. On 16.9.2005, the respondent had issued a questionnaire to the petitioner requiring it to submit details in respect of 16 queries; item no.10 of the questionnaire relates to addition of Rs.1,71,85,084/- to fixed assets and the petitioner was asked to "submit details of all assets added along with date of purchase, value and justify liability of depreciation as per IT Rules, produce original bills for verification". Query No.14 relates to details of expenses. The petitioner was called upon to provide details of several items of expenses and justify their allowability. This includes expenses of Rs.4,50,15,315/- as repairs and maintenance to building, Rs.45,54,152/- as repairs and maintenance to machinery and Rs.28,39,563/- as repairs and maintenance of other assets. The petitioner's reply is from pages 183 to 201 of Annexure 8 to the writ petition. The reply is dated 9.12.2005. The assessee has enclosed the entire annexures to the profit and loss account and balance sheet to this letter which show the summary of additions in different hotels owned by it. In respect of other fixed assets, full details such as the name of the party from whom the asset was purchased, the brief particulars of the asset, the bill number, date and the amount paid have all been filed in the form of separate charts. So far as the repair and maintenance expenses are concerned, a separate letter dated 21.12.2005 was filed with the assessing officer containing the details which run from page 270 to page 286. In these pages the petitioner has furnished details in respect of the repairs and expenses exceeding Rs.1,000/- per bill.

9. Since a perusal of the reasons recorded showed that one of the allegations in the complaint was that the petitioner had siphoned off monies as travelling and conveyance from the years 2002-03 to 2007-08 and that such expenses were not related to the petitioner's business because as per the terms of the operational agreement with the Taj Group of Hotels, the petitioner does not have to incur any expense on foreign tours. We called upon the ld. counsel for the petitioner to show the disclosure relating to the foreign travelling expense incurred by the petitioner for the year ended 31.3.2003. It was stated by him that no particulars about the foreign travel expenses were called for by the

assessing officer and therefore no particulars were filed except those required to be filed under the head "expenditure in foreign currency". Such expenditure was shown as note No.11 under the head "significant accounting policies and notes to accounts" in schedule "O". These details are at page 125. Item "b" under note 11 shows that expenditure on foreign currency for foreign travel amounted to Rs.12.58 lakhs. No other details were filed by the petitioner in respect of the foreign travel expenses at the time of the original assessment.

10. The above narration of the facts and the submissions would show that at least in respect of the foreign travel expenses, no details were furnished by the assessee at the time of the original assessment, except a bare noting that a part of such expenditure was incurred in foreign currency. No details of the place visited and the purpose of the visit and how the visit was connected to the business of the petitioner were furnished. The assessee was under a duty to disclose these particulars fully and truly at the time of the original assessment; this is particularly so because under the arrangement with the Taj Group of Hotels it would appear that the petitioner was not under any obligation to incur the expenditure. Our attention was not drawn by the ld. counsel for the petitioner to any particular document or record in which the full and true particulars of the foreign travel expenses were submitted by the petitioner at the time of the original assessment; nor was it disputed that there was such a clause in the agreement with Taj group. There was thus a failure on the part of the petitioner which would attract the first proviso to Section 147 of the Act. The contention that the reopening was prompted by a mere allegation of irregularities without any tangible material or finding is not acceptable. The complaint has been filed by Raj Kumar Devraj-one of the directors-before the Company Law Board and some credibility has to be accorded to the same as it was filed before a statutory authority competent to deal with the complaint; it must be taken to have been filed with some responsibility. There is also mention in the reasons recorded to an agreement between the petitioner and the Taj Group of Hotels under which the responsibility of incurring foreign travel expenses is with the Taj Group. It is also a fact that the petitioner did not furnish any particulars relating to the foreign tours and their connection with the business. In these circumstances, we are not able to say that the reopening of the assessment is without jurisdiction.

11. So far as the assessment year 2004-05 is concerned in WP(C)

No.8825/2011, the return declaring loss of Rs.3,66,34,670/- was first processed and accepted under Section 143(1) but was later selected for scrutiny and notices were issued to the petitioner under Sections 143(2) and 142(1). Questionnaires were also issued calling for details relating to fixed assets, loans and advances, opening and closing inventory, sundry debtors, loss on sale of fixed assets, repairs and maintenance expenses, details of travelling expenses for foreign visits etc. and these queries were answered by the petitioner and the information was submitted. The assessment was completed under Section 143(3) on 28.11.2006 on a loss of Rs.3,41,42,535/-.

12. On 30.3.2011 notice under Section 148 was issued in response to which the petitioner filed a return declaring a loss as assessed under Section 143(3); it also filed detailed objections to the validity of the reassessment proceedings. The objections were disposed of by the respondent on 23.11.2011. The respondent did not agree with the objections and held that the reassessment was validly initiated. The contention of the petitioner is the same as in WP(C) No.7023/2010.

13. In response to the questionnaire issued by the assessing officer, the petitioner submitted a reply dated 16.10.2006 in respect of 10 items which included details of additions/deletions to the fixed assets along with the name of the party, address, description of assets, bill number and date etc., bifurcation of the fixed assets into those acquired before 30th September, 2003 and after that date, etc. There were no details furnished in this letter regarding the foreign tour expenses. By letter dated 31.10.2006 the petitioner submitted, inter alia, details of repairs and maintenance expenses of building, machinery and other assets as well as the details of the foreign travel expenses of the directors and staff and stated that the foreign travel was undertaken for the purpose of business and out of commercial expediency. This letter was followed up by another letter dated 22.11.2006 in which it was stated that the copies of the resolutions passed in the board meeting authorizing the foreign travel for the purpose of the business and approving the incurring of the expenses were being submitted, along with the visa details of the persons who undertook the foreign travel as well as the letter to the money changer for release of the foreign exchange for the purpose of the travel.

14. We are concerned with the assessment year 2004-05 and the period of four years from the end of that assessment year expired on

31.3.2009. The notice under Section 148 was issued on 30.3.2011 i.e., beyond the period of four years. This is therefore a case of the first proviso to Section 147. Therefore, action for reopening the assessment can be taken only if there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. The reasons for reopening as recorded by the assessing officer are identical to those recorded in respect of the assessment year 2003-04 in WP(C) No.7023/2010. One of the reasons recorded was that expenditure was debited under the head "repairs and maintenance of building and additions to fixed assets", but the amounts were actually siphoned off by illegal withdrawals with the connivance of the contractors appointed in consultation and for the personal benefit of Maharaja Prithviraj Singh and Maharaja Jai Singh. However, the particulars relating to the additions to the assets for the year ended 31.3.2004 are found given under cover of the letter dated 16.10.2006 written by the petitioner in response to the queries raised by the respondent. Item No.7 of this letter reads as follows:

> "7(a). Details of additions/ deletions to fixed assets with complete description are given in Tax audit Report. However, we are enclosing one more copy of the addition/ deletion to fixed assets along with name of the Party, address, description of assets, Bill No. and date, amount, date of receipt in the premises with date of installation and putting it into use.
>
> (b) Details of additions made to the fixed assets bifurcating the same into first half and second half as per the Income-tax Act, 1061 have been enclosed as per Annexure 2.1 to 2.6 of the Tax Audit Report."

The annexures to the tax audit report in Form No.3CA contain the aforesaid details running into several pages (about 20 pages) in which the particulars of the asset, the date of purchase, cost, depreciation, profit and the closing written down value are all given. The details relating to the foreign travel expenses of the directors and the staff were given under cover of letter dated 31.10.2006. The copies of the board resolution authorizing the foreign travel, the visa details, details for release of foreign exchange etc. were furnished by letter dated 22.11.2006. All these details were filed in the course of the original assessment proceedings. By letter dated 27.11.2006 the petitioner submitted further details to the assessing officer in response to certain queries raised by the latter as to why

certain items of expenditure on account of repairs and maintenance of building, plant and furniture should not be disallowed as capital in nature. These queries related to R & M Building amounting to Rs.7,74,302/-, details relating to R & M Sanitary Fittings amounting to Rs.2,56,572/- and details relating to R & M Electricals amounting to a sum of Rs.6.87 lakhs.

15. It is thus seen that in respect of the assessment year 2004-05, not only did the petitioner furnish all the relevant details relating to the purchase of fixed assets, repairs and maintenance of buildings but also the details relating to the foreign travel expenses. The proceedings relating to the original assessment also show that the assessing officer had raised queries regarding repairs and maintenance of building, plant and furniture which were answered by the petitioner. No query would appear to have been raised in relation to the foreign travel expenses in regard to which the petitioner had furnished the relevant details. In these circumstances, it cannot be said that there was any failure on the part of the petitioner to submit full and true particulars at the time of the original assessment. It was for the assessing officer to examine the details and draw the appropriate inferences. The notice under Section 148 issued for the assessment year 2004-05 is therefore without jurisdiction.

16. We now take up WP(C) No.7206 of 2012 relating to the assessment year 2005-06. In respect of this year, the return of income filed by the petitioner on 31.10.2005 declaring Nil income was processed under Section 143(1) and an intimation was issued on 6.6.2006. On 30.3.2012 notice under Section 148 was issued reopening the assessment on the ground that income chargeable to tax had escaped assessment. The reasons recorded by the respondent for reopening the assessment not only referred to the complaint filed by Raj Kumar Devraj before the Company Law Board regarding irregularities in the accounts of the petitioner, but also contains the following further reasons.

> "In the Assessment Year 2005-2006, the company has claimed repair and maintenance of Rs.78384501/-, addition of fixed assets of Rs.3,27,44,758/- and expenses on account of travelling Rs.1,00,57,098/- including foreign travelling. The assessee has an agreement with TAJ Group and the brand name is used who runs the hotel. The travelling expenses of Rs.1,00,57,098/- is highly unreasonable as the brand name of TAJ is already used by

the assessee and they market the hotel business accordingly. Hence, for the director to claim this huge expenses puts the weight age on the complaint which appears to be reasonable and bonafide in this regard. The repair and maintenance expenses of Rs.7,83,84,501/- appears to be on higher side as the property is maintained and run by TAJ group. Even if the repair and maintenance expenses are established by the assessee as bona fide, the same would be treated s(sic) capital expenditure considering the volume of repair and maintenance being carried out by the assessee year after years and only depreciation eligible would be applicable. The gross profit to turnover ratio is 25.16% and NP to turnover ratio is 2.44%. The hotel is run professionally by the TAJ group. However, the NP to turnover ratio is very skewed on the contrary which makes the allegations of the complainants bonafide and reasonable especially when the allegations are made by the close family relative. The market value of the property of assessee co. is worth Rs.100 crs. and more wherein even the rental income itself will fetch higher than what assessee has shown as income in the A.Y. 2005-2006. In view of the above facts, I have reasons to believe that an amount of Rs.12,11,86,357/- has escaped assessment in the AY 2005-06.

In view of above facts, I have reason to believe that income chargeable to tax amounting to Rs.12,11,86,357/- has escaped assessment in the case and the same is to be brought to tax under section 147 of the I.T. Act as there has been a failure on the part of the assessee to disclosed fully and truly all material facts necessary for its assessment in the AY 2005-06. Section for issue of notice u/s 148 as prescribed u/s 151, to re-assessee such income which has escaped assessment, may kindly be accorded."

After carefully considering the rival submissions, we are of the view that the assessing officer has properly assumed jurisdiction to reopen the assessment. There was no scrutiny assessment under Section 143(3) in the first instance; the return filed by the petitioner was merely processed under Section 143(1). Even so, it is necessary that the assessing officer must have "reasons to believe" that income chargeable to tax had escaped assessment. There must be tangible material before him on the basis of

which he could form the belief, bona fide and in good faith, that there was escapement of income. The material must have a live link or nexus with the formation of the belief. The belief cannot be a mere pretence. These are the most basic and indispensable requirements for the validity of the notice under Section 148. These requirements are satisfied in the present case. There was a complaint filed by one of the directors i.e. Raj Kumar Devraj, before the Common Law Board alleging irregularities such as illegal siphoning off of the company's funds by the other two directors in the guise of fixed assets, repairs and maintenances, travelling expenses etc. This complaint constitutes tangible material on the basis of which action to reopen the assessment can be taken in good faith; the belief entertained by the assessing officer on the basis of the complaint which has been filed with some responsibility by one of the directors of the petitioner, cannot be said to be a mere pretence nor can the belief be said to be divorced from the material. The complaint constitutes relevant material for the belief. In these circumstances, we are not able to say that the notice issued under Section 148 was without jurisdiction. The fact that the petitioner submitted all the details to the assessing officer along with the return of income is not relevant where only an intimation under Section 143(1) is issued after merely processing the return without any scrutiny. There should however be reason to belief that income had escaped assessment and this condition has been satisfied in respect of the assessment year 2005-06. In these circumstances, we uphold the notice issued under Section 148.

17. WP(C) No.7513/2010 and 7516/2010 have been filed by Maharaja Jai Singh and Maharaja Prithviraj Singh respectively questioning the validity of the reopening notices issued by the respondent under Section 148 for the assessment year 2003-04. There is no material difference between the facts of the two writ petitions. Subsequently, when notices under Section 143(2) were issued to the petitioners and they pointed out that the notices were barred by time, they were informed that the said notices were issued pursuant to reassessment proceedings initiated by notices dated 31.3.2010 under Section 148 of the Act and copies of the notices were served on the petitioners. The objections filed by the petitioners to the reassessment notices were rejected on 12.10.2010 (in both the cases) and it is against those orders and the notices issued under Section 148 that the present petitions have been filed.

18. The reasons recorded for reopening the assessments are common

in both the cases and are as under :

"A complaint against the assessee company has been filed by Shri Raj Kumar Devraj, one of the Directors of the assessee company vide which it has been pointed out that more than Rs.100 crores of rupees has been siphoned by Maharaja Prithvi Raj & Maharaja Jai Singh out of the companies accounts which require the proper investigation & scrutiny of accounts of the company for the last 6 years. It has further been alleged by the complainant before the company law board in petition that Maharaja Prithviraj and Maharaja Jai Singh in the year 2002-03, 2003-04, 2004-05, 2006-07, 2007-08 and 2008-09 had debited of Rs.50 crores approx. under the head repairs and maintenance of bldg. and Rs.50 crores approx. towards addition to the fixed assets and this sum has been withdrawn and siphoned by illegal withdrawals with the connivance of the contractors appointed in consultation and for the personal benefit of Maharaja Prithviraj & Maharaja Jai Singh which require proper investigation and scrutiny of the accounts of the company and all the expenses illegally withdrawn by Maharaja Prithviraj and Maharaja Jai Singh are of capital in nature should be disallowed. Further it has been alleged that under the head traveling conveyance from the year 2002-03 to 2007-08, a sum of approx. Rs.5 crores has been illegally withdrawn and siphoned out by Maharaja Prithviraj and Maharaja Jai Singh out of company fund. These expense are not related to the business of the company as the company is not procuring any business from outside India & as per terms of the operational agreement with Indian Hotel company Ltd. (chain of Taj group hotels) company do not have to incur any expenditure for foreign tourist and not to meet any travel agent because all the expenses relating to business operation of the company is being looked after by Indian Hotel Company Ltd. The funds of the company are being used by the director namely Sh. Maharaja Prithviraj for personal benefit.

In view of the above facts, I have reasons to believe that 50% of amount of Rs.9,09,15,751/- i.e. Rs.4,54,57,875/- has been used for personal use by Maharaja Jai Singh from P&L a/c of M/s. Ram Bagh Palace Ltd. and should have been offered for tax. The fund misappropriated are from the following accounts.

1.	Amount misappropriated from repair & maintenance	
	Building	4,50,15,315/-
	Machinery	45,54,181/-
	Others	28,39,563/-
		5,24,09,060/-
2.	Amount used for travelling	Rs.68,57,669/-
3.	Addition to fixed assts	Rs.3,16,49,022/-
	Totaling to	Rs.9,09,15,751/-

Thus the assessee has failed to disclose all material facts truly and fully that were necessary for assessment. Here it is relevant to mention the explanation 1 in section 147 that states that "production before the AO of account books or other evidence from which material evidence could with the diligence have been discovered by the AO will not necessarily amount to disclosure with the meaning of the foregoing proviso.

In view of above facts, I have reason to believe that income chargeable to tax amounting to Rs.4,54,57,875/- has escaped assessment in the case of Maharaja Jai Singh as the receipts have either to be taken as income on taxable perquisites and the same is to be brought to tax under section 147/ 148 of the I.T. Act. Sanction for issue of notice u/s 148 as prescribed u/s 151, to re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to the notice subsequently during the course of assessment proceedings, may kindly be accorded."

19. We have no hesitation in upholding the jurisdiction of the respondent in issuing the notices under Section 148. We have already held in the writ petitions filed by M/s Rambagh Palace Hotels Pvt. Ltd. that the complaint filed by one of the directors of the hotel, i.e. Raj Kumar Devraj in the Company Law Board alleging irregularities in the accounts of the hotel constitutes tangible and valid material on the basis of which the assessing officer can reasonably form a prima facie belief that income chargeable to tax had escaped assessment. One of the allegations in the complaint is that funds of the hotel were being siphoned off by the present petitioners in the guise of purchase of fixed assets, repairs and maintenance expenses and foreign travel expenses. The reasons

recorded referred to the allegations in the complaint from which the respondent has arrived at a tentative belief that 50% of the amounts allegedly siphoned off by the petitioners have to be treated as income that has escaped assessment in each of their assessments. If the complaint can constitute tangible material for reopening the assessments of the hotel, it can equally constitute tangible material giving rise to the belief that the amounts allegedly siphoned off by the present petitioners from the hotel had escaped assessment in their hands. It must be remembered that we are not at this stage concerned with the merits of the matter. We are at this stage concerned only with the question whether a prima facie belief regarding escapement of income can be entertained by the respondent on the basis of the complaint filed by the Company Law Board by Raj Kumar Devraj, one of the directors of the hotel. Our answer is in the affirmative. Accordingly, we uphold jurisdiction of the respondent to reopen the assessments of the petitioners.

In the result, W.P. (C) Nos.7023/2010, 7206/2012, 7513/2010 and 7516/2010 are dismissed and W.P. (C) No.8825/2011 is allowed. No costs.

ILR (2013) II DELHI 1719
W.P. (C)

EX-CPL PRITAM SINGH ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 1664/2012 DATE OF DECISION: 15.01.2013

Constitution of India, 1950—Article 227—Service matter—Armed Forces Tribunal—Whether the Petitioner who was discharged from Indian Air Force, is entitled to pension for reserved period of service, if the services of the petitioner are terminated subsequently? Held-once appointment has been given and the service of the Petitioner has been availed, the employer is under an obligation to grant pension taking into consideration the reserve period of service, despite subsequent termination. Petition allowed.

[As Ma]

APPEARANCES:

FOR THE PETITIONER : Mr. Gulab Chandra, Advocate.

FOR THE RESPONDENTS : Mr. Ankur Chhibber, Advocate.

CASE REFERRED TO:

1. *Sh. Sadashiv Haribabu Nargund & Ors.* vs. *Union of India & Ors.* TA No.564/2010.

GITA MITTAL, J. (Oral)

CM No.6568/2012

This is an application for condonation of delay in filing the counter affidavit. However, the counter affidavit is already brought on record. The application is disposed of as being infructuous.

WP(C) No.1664/2012

1. The instant petition assails an order dated 15th December, 2011 passed by the Armed Forces Tribunal in O.A. No.541/2011, Ex-CPL Pritam Singh v. Union of India & Ors.

2. The petitioner was discharged from the Indian Air Force on the 16th May, 1974 as per the discharge book extract placed before the court. The Armed Forces Tribunal was of the view that he had filed the petition for grant of pension after 37 years and therefore the petition was dismissed on this sole ground.

3. The petitioner has drawn our attention to a judgment dated 12th January, 2011 passed by the Armed Forces Tribunal in TA No.564/2010, **Sh. Sadashiv Haribabu Nargund & Ors. v. Union of India & Ors.**

This petition was originally filed as a writ petition in this Court [W.P.(C) No.6458/2009]. The writ petition was filed by the petitioner 46 years after the Sadashiv had been discharged from the Indian Air Force. The respondents had contested the same on the ground of delay and had pointed out that all record pertaining to him stood destroyed except the Long Roll. The Armed Forces Tribunal noted that the petitioner was seeking the relief of pension and on the objection of delay and laches the Armed Forces Tribunal vide judgment dated 12th January, 2011 held as follows:

> "5. It is true that this petition is extremely belated but this petition has been admitted by the Bombay High Court and, therefore, it will not be proper for us to dismiss the petition on account of laches alone. We can limit the relief to the petitioner on account of laches. However the pension is not a bounty payable on the sweet will and pleasure of the Government as has been held by the Apex Court in the case of Deokinandan Prasad v. State of Bihar AIR 1971 SC page 1409. Therefore we will accordingly consider modulating the relief after considering the case on the merits."

4. So far as the relief on merit was concerned, the Armed Forces Tribunal observed as follows:

> "6. It is admitted position that petitioner when recruited in Indian Army, he was under an obligation to serve 9 years as regular service and 6 years as reserve service and that has to be counted for making 15 years for the purposes of qualifying service. The qualifying service for PBOR is 15 years. A similar matter when approached before Hon'ble Kerala High Court, Hon'ble Kerala High Court took a view that the respondent Union of India is bound to take into consideration the reservist service for grant of pension Against this order an appeal was filed before the Division Bench which was dismissed as is clear from the judgment dated 3151 May 2006 in W.P.(C) No.29497 of 2004 In that judgment it has been mentioned that a similar order has been passed in earlier writ petitions also. In this connection, our attention was invited to the detailed Judgments delivered by the Chennai Bench and the Kolkata Bench which have taken a view relying on the decision given by the Hon'ble Kerala High Court

and the two decisions of the Division Bench of same Court held that reserve period is also liable to be counted for the purpose of pension. As a matter of fact in the initial appointment given to the petitioner it was clearly mentioned that petitioner will have to serve 9 year as regular service and 6 years as reserve service. Subsequently the respondents cannot reverse the situation that since the appointment has been terminated, therefore, they are not entitled to count 6 years reserve service. The respondents are bound by principle of promissory estoppels, that once they made a representation and asked the other party to act on it and petitioner has served for 9 years as regular service and kept him in reserve service for 6 years, they cannot wriggle out of this on the moral ground that subsequently after China War their services were terminated also. This is clear breach of terms and conditions of appointment. Once respondents availed the services of petitioners for 9 years as active service and kept them on reserved service for 6 years they cannot go back. During the reserved period, the petitioners were called in 1962 emergency i.e. at the time of China War and all the petitioners alleged to have offered their services at the disposal of the respondents. Therefore, the respondents have fully utilized all the services of these petitioners i.e. 9 years regular service and summoned tem during the 1962 China War also. Now it does not lie in the mouth of the respondents to turn back and say that since they have been terminated they are not entitled to get the benefit of reserved service. This is immoral and unjustified view and against the canons of principles of natural justice. We fail to appreciate that once the appointment has been given and petitioners have as per the terms of the appointment given their services to the respondents how can now they back and say that since we have terminated the services of the petitioners, we will not given them benefit of reserved service. This cannot be accepted and respondents cannot be permitted to take this plea.

xxx xxx xxx xxx

13. Therefore, respondent cannot be hard to say that we terminated the services of the petitioner, therefore, they are not under obligation to grant them pension taking into consideration the reserve liability.

14. The view taken by the Hon'ble Kerala High Court as well as Kolkata Bench of Armed Forces Tribunal is fully justified. The Kolkata bench of the tribunal has even directed the respondent to condone the delay, if there is any, for completing 15 years for qualifying service for pension maximum to the extent of one year."

5. The petitioner before us has pleaded facts which are similar to those placed by Sh. Sadashiv Haribabu Nargund before the Armed Forces Tribunal. Given the similarity of the facts and the identity of the objection raised, it would appear that the petitioner would have been entitled to the same relief.

6. In view of the above, the order dated 15th December, 2011 is hereby set aside. The matter is remanded for consideration afresh before the Armed Forces Tribunal in accordance with the principles laid down in the judgment dated 12th January, 2011 passed by the Armed Forces Tribunal in TA No.564/2010, **Sh. Sadashiv Haribabu Nargund & Ors. v. Union of India & Ors.**

7. The present writ petition is allowed in the above terms.

8. Parties shall appear before the Registrar of the Armed Forces Tribunal on 6th February, 2013 for directions.

Dasti to both the parties.

ILR (2013) III DELHI 1724
LPA

BHIM SINGH BAJELI ....APPELLANT

VERSUS

P.O. CENTRAL GOVT. INDUSTRIAL TRIBUNAL ....RESPONDENT

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

LPA NO. : 611/2003 DATE OF DECISION: 24.01.2013

Industrial Disputes Act, 1947—Section 33C (2)—Whether in proceedings under S. 33C(2) Industrial Disputes Act which are in the nature of execution, interest can be granted, if it was not granted in the substantive award—Held—The Appellant raised an industrial dispute, which was referred to the Tribunal under the Industrial Disputes Act claiming the scale of Rs. 330 Rs. 560 prevailing at that time—Finding that the appellant had been discriminated against Labour Court promoted him to the pay scale of Rs. 330 Rs. 560 w.e.f. 01.01.1973—Instead of promoting the appellant w.e.f. 15.12.1962, the appellant was promoted to the revised scale only from 01.01.1973—Appellant made a claim for pay for the intervening period—Management paid an amount of Rs. 4,000 to the Appellant in 1987—Being dissatisfied, the Appellant challenged the order u/s 33C(2) in the Central Government Industrial Tribunal—Tribunal in 1996 computed the amount payable as Rs. 40,139 and invoking principle of equity and restitution, directed payment of interest. Aggrieved by the award, management approached the Court u/s 33C (2) of the Industrial Disputes Act to the extent that it directed payment of interest—Single Judge held that section 33C(2) conferred limited jurisdiction upon the Industrial Tribunal, that if the component of interest

was not directed to be paid in the substantive award or rules applicable to the employee, he would be disentitled to claim the same under section 33C(2), which was in the nature of execution proceedings-Thereby, the award was modified by the Single Judge to the extent that the payment of interest at 15% was quashed—On appeal, without going into the merits of the matter held that the HC in a proceeding under Article 226 could certainly invoke substantive and residuary jurisdiction to direct payment of interest in view of the fact that the petitioner claimed that his rights had been defeated by non-implementation of the substantive award and the subsequent award—Award of Single Judge was modified and payment of interest at 9% was ordered.

This Court has considered the submissions. It is evident from the above discussion that the employee had to approach the Labour Court twice for determination of his rights. In the first instance, it was his good fortune that the reference ended within a time frame of three years and the substantive award decided what was due to him. Yet, the management did not honor the award. He was constrained to approach the concerned authority, i.e. the Industrial Tribunal under Section 33C(2). That the decision in that case was rendered almost a decade later, cannot be attributed to the appellant's fault. Although at one stage, learned counsel for the respondents urged that the claim was astronomical and unjustified, the fact remains that in final determination of 13.08.1996, the amount quantified as payable by the management (as on 24.02.1987) was Rs.40,139/-, i.e. more than 10 times the amount originally paid. Whilst there can be no two opinions about the fact that the plain language of Section 33C(2) does not clothe the Labour Court or the concerned Industrial Tribunal with the jurisdiction to direct any payment in excess of what was directed by the award, this Court is not unmindful of the fact that in the present instance, the dispute as to quantification itself consumed 10

years. Whilst the entire delay cannot be attributed to the respondents, large measure of it can, because had the respondent management given the whole amount and not the abysmal amount of Rs.4000/-, the dispute could have been avoided to a large measure. That being so, the question which this Court has to address is whether the grant of interest was justified. **(Para 6)**

As previously mentioned, even though the structure of Section 33C(2) does not confer jurisdiction to the Labour Court to grant interest, in the facts and circumstances of the case, the fact remains that the employee had approached this Court under Article 226 of the Constitution of India, complaining that his rights had been defeated by non-implementation of substantive award and subsequent award. At least in these proceedings, it was open for this Court to have directed payment of interest even if it were of the opinion that the Tribunal did not possess the primary jurisdiction to do so. Although the management has relied upon the decision of this Court in **Central Government Industrial Tribunal** (supra), at the same time, the Court is mindful of certain other decisions of the Bombay High Court in **Mrs. Prabhavati Ramgarib B. vs. Divisional Railway Manager, Western Railway Manager** 2010 (5) SLR 683 (W.P.(C) 5529/2009) and of the Punjab and Haryana High Court in **State of Haryana v. Hisam Singh & Anr.** 1999 (2) LLJ 335, where the Court relied on a larger equitable principle, as well as the public interest underlying Section 3 of the Interest Act and drawing analogy from Section Section 34 of the Civil Procedure Code (CPC), and upheld the jurisdiction of the authority under Section 33C(2), to award interest, having regard to the circumstances. **(Para 7)**

This Court is of the opinion that without entering into the merits or in any manner going into the correctness of the reasoning of the learned Single Judge in **Central Government Industrial Tribunal** (supra), which was followed in the impugned judgment; at least in the facts of

this case, the High Court, in a proceeding under Section 226 of the Constitution of India, could certainly have invoked the substantive and restitutionary jurisdiction, to direct payment of interest. The learned Single Judge, in the impugned order, in paras 12-13 was conscious that the other Writ Petition No. 78/1998 was also being heard for disposal by the common impugned order. However, in view of the conclusions arrived at by him in respect of the jurisdiction of the Labour Court, the relief was denied in entirety. **(Para 8)**

Important Issue Involved: If interest cannot be granted u/s 33C(2) which are in the nature of execution proceedings, the HC can certainly do so in exercise of extraordinary jurisdiction under Article 226.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Sh. D.S. Bora and Sh. R.S. Rawat, Advocates.

FOR THE RESPONDENT : Sh. Jagat Arora and Sh. Rajat Arora, Advocates for Respondent No. 2.

CASES REFERRED TO:

1. *Durlabhbhai Naranbhai Parmar* vs. *Divisional Commissioner* 2011 (3) LLJ 853 (Guj).
2. *Mrs. Prabhavati Ramgarib B.* vs. *Divisional Railway Manager, Western Railway Manager* 2010 (5) SLR 683 (W.P.(C) 5529/2009).
3. *State of Haryana* vs. *Hisam Singh & Anr.* 1999 (2) LLJ 335.
4. *UOI* vs. *Central Government Labour Court, Delhi and Anr.* 1985 (66) FJR 16.

RESULT: Appeal allowed.

S. RAVINDRA BHAT (OPEN COURT)

1. This appeal is directed against a judgment and order of the learned Single Judge dated 13.08.2001 whereby the award made in favor of the appellant to the extent it directed payment of 15% interest, was quashed.

2. The brief facts of the case are that the petitioner had raised an industrial dispute which was referred to the Tribunal under the Industrial Disputes Act (ID No. 169/83) on the question as to whether the employer, i.e. Khadi Gramodyog Bhawan had correctly placed him in the scale, which it had. The appellant claimed that he was entitled to be placed and appropriate order of fitment made in the scale of Rs.330-560/- prevailing at that time. The Labour Court vide orders dated 29.10.1986, and 24.02.1987, found that the appellant had been discriminated against in the matter of promotion and pay scale in as much as persons junior to him had been given promotion and higher scales of pay. The Labour Court, vide its amended award dated 24.02.1987, awarded pay scales of Rs.100-150/-, Rs.125-255/ and Rs.330-560/- w.e.f. 15.12.1962, 01.10.1963 and 01.01.1973 respectively. Instead of promoting the appellant w.e.f. 15.12.1962, the management promoted him to the revised scale of Rs.330-560/- only w.e.f. 01.01.1973. The petitioner's claim for pay for the intervening period in question was considered and an amount of Rs. 4000/- was paid by the respondent, i.e. the management, sometime in 1987 immediately after publication of the award in 1987. The appellant was dissatisfied with this and sought computation and payment of the outstanding amount due to him, by approaching the same authority, i.e. Central Government Industrial Tribunal, in 1987. The Tribunal, vide order dated 13.08.1996, ultimately computed the amount payable as Rs. 40,139/- (in addition to the amount disbursed to the appellant). Apart from the said computation, the Tribunal also issued a direction for payment of interest, in the following terms:

> ".....According to this from August 1963 upto December 86, the workman was entitled to a total sum of Rs.44139/14 p. Out of which he had been paid Rs.4000/- rupees. This joint inspection report has been prepared by both the parties after going through the record, it is not disputed. This also includes entitlement of the applicant according to the award given by my predecessor dated 24.02.1987. He is thus entitled to Rs.40139.14

p rounded off to Rs.40139/-. He shall be paid interest @ 15% from the date of the amount became due to him. The entire payment shall be made within one month from today. The costs of this application are also assessed at Rs.2000/ which shall also be paid to the applicant alongwith this amount by the management. This order disposes of LCA No. 1039/87."

3. The management approached the Court, claiming to be aggrieved by the award under Section 33C(2) of the Industrial Disputes Act, 1947, to the extent it directed payment of interest. The appellant too approached the Court, claiming that the respondents had not paid the amounts in time and had acted arbitrarily in withholding the amounts due. Besides payment, he was also entitled to consequential benefits. By the impugned order, learned Single Judge allowed the managements' Writ Petition and dismissed the appellant's petition. Learned Single Judge was of the opinion that having regard to the limited jurisdiction conferred upon the Labour Court (the Central Government Industrial Tribunal), in terms of Section 33C(2), the amount that can be quantified pursuant to the award, had to be calculated and given; and if the component of interest was not directed to be paid in the substantive award or rules applicable to the employee, he would be disentitled to claim under Section 33C(2), which was in the nature of execution proceedings. In arriving at this conclusion, learned Single Judge appears to have relied upon **UOI v. Central Government Labour Court, Delhi and Anr.** 1985 (66) FJR 16.

4. Learned counsel for the appellant contended that the impugned judgment has erroneously concluded that, under the circumstances of the case, the Industrial Tribunal was denuded of any jurisdiction to grant interest. It was submitted that the appellant had sought reference in 1983 and was able to secure award in his favor in 1987, which was eventually modified on 24.02.1987. As of that time, the management was aware of its liability. Nevertheless, it chose to pay only Rs.4000/-, which was only a fraction of the amount due while disputing the balance payable. The workman approached the Tribunal and immediately sought another proceeding under Section 33C(2). That this proceeding remained pending and could not be adjudicated was not his fault. As a matter of fact, his stand that a much larger amount was due, stood vindicated in 1996 when the Labour Court held that the management had to pay a further sum in excess of Rs.40,000/-, i.e. ten times more than the original amount paid to him. Being deprived of this amount for 10 years was a sufficient cause

for the Labour Court to invoke the principle of equity and restitution, directing payment of interest.

5. The respondents argue that the plain reading of Section 33C(2) limited the concerned authorities' (either the Labour Court or the Industrial Tribunal, as the case may be) jurisdiction in granting any amount in excess of what was due and payable. In other words, if the governing award of the Labour Court or Tribunal did not decree interest or such amounts were not payable in terms of the rules or conditions of rules governing the employee, he could not claim such payment on some equitable considerations. Learned counsel particularly relied upon the decisions of this Court in the **Central Government Industrial Tribunal** (supra). He also placed reliance on the judgment of the Gujarat High Court reported as **Durlabhbhai Naranbhai Parmar v. Divisional Commissioner** 2011 (3) LLJ 853 (Guj) where too the Court, noticing the structure of Section 33C, held that in the absence of any statutory provision, the Labour Court does not possess jurisdiction to award any interest to the workman.

6. This Court has considered the submissions. It is evident from the above discussion that the employee had to approach the Labour Court twice for determination of his rights. In the first instance, it was his good fortune that the reference ended within a time frame of three years and the substantive award decided what was due to him. Yet, the management did not honor the award. He was constrained to approach the concerned authority, i.e. the Industrial Tribunal under Section 33C(2). That the decision in that case was rendered almost a decade later, cannot be attributed to the appellant's fault. Although at one stage, learned counsel for the respondents urged that the claim was astronomical and unjustified, the fact remains that in final determination of 13.08.1996, the amount quantified as payable by the management (as on 24.02.1987) was Rs.40,139/-, i.e. more than 10 times the amount originally paid. Whilst there can be no two opinions about the fact that the plain language of Section 33C(2) does not clothe the Labour Court or the concerned Industrial Tribunal with the jurisdiction to direct any payment in excess of what was directed by the award, this Court is not unmindful of the fact that in the present instance, the dispute as to quantification itself consumed 10 years. Whilst the entire delay cannot be attributed to the respondents, large measure of it can, because had the respondent management given the whole amount and not the abysmal amount of

Rs.4000/-, the dispute could have been avoided to a large measure. That being so, the question which this Court has to address is whether the grant of interest was justified.

7. As previously mentioned, even though the structure of Section 33C(2) does not confer jurisdiction to the Labour Court to grant interest, in the facts and circumstances of the case, the fact remains that the employee had approached this Court under Article 226 of the Constitution of India, complaining that his rights had been defeated by non-implementation of substantive award and subsequent award. At least in these proceedings, it was open for this Court to have directed payment of interest even if it were of the opinion that the Tribunal did not possess the primary jurisdiction to do so. Although the management has relied upon the decision of this Court in **Central Government Industrial Tribunal** (supra), at the same time, the Court is mindful of certain other decisions of the Bombay High Court in **Mrs. Prabhavati Ramgarib B. vs. Divisional Railway Manager, Western Railway Manager** 2010 (5) SLR 683 (W.P.(C) 5529/2009) and of the Punjab and Haryana High Court in **State of Haryana v. Hisam Singh & Anr.** 1999 (2) LLJ 335, where the Court relied on a larger equitable principle, as well as the public interest underlying Section 3 of the Interest Act and drawing analogy from Section, Section 34 of the Civil Procedure Code (CPC), and upheld the jurisdiction of the authority under Section 33C(2), to award interest, having regard to the circumstances.

8. This Court is of the opinion that without entering into the merits or in any manner going into the correctness of the reasoning of the learned Single Judge in **Central Government Industrial Tribunal** (supra), which was followed in the impugned judgment; at least in the facts of this case, the High Court, in a proceeding under Section 226 of the Constitution of India, could certainly have invoked the substantive and restitutionary jurisdiction, to direct payment of interest. The learned Single Judge, in the impugned order, in paras 12-13 was conscious that the other Writ Petition No. 78/1998 was also being heard for disposal by the common impugned order. However, in view of the conclusions arrived at by him in respect of the jurisdiction of the Labour Court, the relief was denied in entirety.

9. In view of the above discussion, the Court is of the opinion that the impugned judgment cannot be sustained. The direction to pay interest

@ 15% is, however, modified to the extent that the rate of interest shall be 9% with effect from the date of application under Section 33C(2), till the date of the award, i.e. 13.08.1996. We make it clear that this direction has been made by the Court in exercise of its powers under Article 226. The appeal is allowed to the above extent. No order as to costs.

ILR (2013) III DELHI 1732
CRL. A.

NOOR SALAM ....APPELLANT

VERSUS

THE STATE (GOVT. NCT OF DELHI) ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 694/2010 DATE OF DECISION: 29.01.2013

Code of Criminal Procedure, 1973—Section 374—Indian Penal Code, 1860—Section 307, 34—Appeal against conviction u/s 307/34 on the grounds that prosecution was unable to establish and prove motive to inflict injuries, weapon of offence was not recovered, victim did not disclose the name of the assailants to the doctor examining him—Held—Evidence of an injured witness cannot be disbelieved without assigning cogent reasons. Proof of motive recedes into background in cases where the prosecution relies upon eye witness account of occurrence. Non recovery of weapon of offence is not fatal. There is specific ocular and medical evidence to prove that the injuries were caused by gunshot. It is not mandatory for a doctor to record in the MLC or to make enquiry from the injured about the name of the assailant. Omission

of injured to disclose the assailant's name to the doctor does not discredit his testimony—Held considering the aggravating and mitigating circumstance, sentence reduce from 8 years to 6 years. Appeal disposed off.

Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The prosecution was unable to establish and prove appellant's motive to inflict injuries on the victim. The weapon of offence was not recovered. The complainant and the appellant were known to each other prior to the incident. Had there been hostile relations between the two, the injured must not have volunteered to accompany them to an isolated spot. There is inconsistency if the victim was fired from close/distance range. The victim was not unconscious when he was medically examined. He did not disclose the name of the assailants to the doctor. He was fit for statement which demonstrates that he did not suffer any fatal injury. The duration for which he remained in the hospital has not come on record. The appellant was falsely implicated in this case. Only role attributed to him was that he exhorted the co-accused to fire at the victim.

(Para 6)

The evidence of an injured witness cannot be disbelieved without assigning cogent reasons. The law on this aspect has been detailed in **State of Uttar Pradesh vs. Naresh and ors.** (2011) 4 Supreme Court Cases 324 as under :

> "27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide **Jarnail Singh v. State of Punjab, Balraje v. State of Maharashtra** and **Abdul Sayeed v. State of M.P.**)" **(Para 12)**

From the un-rebutted testimony of PW-1 (Samir Ul Hassan) coupled with medical evidence on record it stands established that injuries were inflicted upon the victim by the accused persons in furtherance of their common intention. In the statement Ex.PW-1/A, the victim did not assign motive impelling the assailants to inflict injuries. However, in 313 Cr.P.C.' statement, co-accused Noor Alam admitted that there were number of cases against each other. He was also assaulted by complainant's brother for which a case was registered. Several litigations for land were also pending between them and complainant party. It is true that the victim had voluntarily accompanied the accused persons. It appears that he was not aware of the evil designs of the accused when he was taken to an isolated place on the pretext to attend some dawat/party at the house of an acquaintance of Noor Alam. Moreover, proof of motive recedes into the background in cases where the prosecution relies upon an eye witness account of the occurrence.

(Para 16)

Non-recovery of weapon of offence is not fatal. There is specific ocular and medical evidence to prove that the injuries were caused by gunshot. It is not mandatory for the doctor to record in the MLC or to make enquiry from the injured about the name of the assailant. Generally, the doctors on duty do not ask for the assailant's name. Omission of the injured to disclose the assailant's name to the doctor

does not discredit his testimony. **(Para 17)** **[An Ba]**

APPEARANCES:

FOR THE APPELLANT : Mr. R.M. Tufail, Advocate with Mr. Farooq Chaudhary & Mr. Vishal Raj, Advocates.

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

CASES REFERRED TO:

1. *State of Uttar Pradesh* vs. *Naresh and Ors.* (2011) 4 Supreme Court Cases 324.
2. *Abdul Sayed* vs. *State of Madhya Pradesh* (2010) 10 Supreme Court Cases 259.

RESULT: Appeal disposed off.

S.P. GARG, J.

1. The appellant-Noor Salam impugns the judgment and order on sentence passed in Sessions Case No.1/2010 arising out of FIR No.326/2005 registered at PS Timarpur by which he was convicted for committing offence punishable under Section 307/34 IPC and sentenced to undergo RI for eight years with fine ‘ 20,000/- and in default of payment of fine to further undergo SI for six months.

2. The police machinery came into motion on 01.07.2005, when Daily Diary (DD) No.78B was recorded at PS Timarpur at about 11.10 P.M. on getting information that a person had been shot at Nand Lal jhuggies, Mukherjee Nagar Police Picket and taken to Aruna Asaf Ali Hospital. The DD (Ex.PW9/A) was assigned to SI Rajneesh who with Const.Bijender reached the spot. No eye witness was present there. He proceeded to Aruna Asaf Ali Hospital and obtained MLC of the injured Samir Ul Hasssan and recorded his statement. He disclosed to the Investigating Officer that he was taken to the spot by Noor Salam, Noor Alam and Hafaz. At about 10.45 P.M. suddenly Noor Salam caught hold of him from behind and when he tried to rescue himself, Hafaz assaulted him with fists and made him to fall on the ground. Noor Salam exhorted Noor Alam to shoot and kill him. On that, Noor Alam took out a gun and fired at his face. When he got up and tried to run away, Noor Alam fired

another shot which hit him on his back. When he raised alarm, people gathered and the assailants fled the spot.

3. The Investigating Officer went to the spot. The crime team was present. Scene of incident was got photographed. First Information Report was lodged under Section 307/34 IPC. During the investigation, the Investigating Officer recorded statements of witnesses conversant with the facts. Efforts were made to recover the weapon of offence but in vain. The exhibits were sent to Forensic Science Laboratory, Rohini. After collecting the results, a charge-sheet was submitted against the assailants. The accused Hafaz was declared Proclaimed Offender. Noor Alam and Noor Salam were duly charged and brought to trial.

4. The prosecution examined sixteen witnesses. Their 313 Cr.P.C. statements were recorded. Noor Salam examined himself in defence. On appreciation of the evidence and documents on record and considering the rival contentions of the parties, the appellant- Noor Salam, and Noor Alam were convicted and sentenced by the impugned judgment.

5. At the outset, it may be mentioned that co-accused Noor Alam had filed Crl.A.1232/2010. However, during the course of arguments, he opted not to challenge the findings of the Trial Court on conviction and it was affirmed.

6. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The prosecution was unable to establish and prove appellant’s motive to inflict injuries on the victim. The weapon of offence was not recovered. The complainant and the appellant were known to each other prior to the incident. Had there been hostile relations between the two, the injured must not have volunteered to accompany them to an isolated spot. There is inconsistency if the victim was fired from close/distance range. The victim was not unconscious when he was medically examined. He did not disclose the name of the assailants to the doctor. He was fit for statement which demonstrates that he did not suffer any fatal injury. The duration for which he remained in the hospital has not come on record. The appellant was falsely implicated in this case. Only role attributed to him was that he exhorted the co-accused to fire at the victim.

7. Learned APP while supporting the judgment urged that it did not call for interference. The deposition of PW-1, Mohd.Samir-ul-Hasan/

injured has remained unchallenged and un-rebutted. The appellant did not opt to cross-examine him on any fact. His statement is in consonance with medical evidence. Pursuant to their pre-plan, the assailants took the victim to an isolated spot to inflict fatal injuries.

8. I have considered the submissions of the parties and examined the Trial Court record. Daily Diary (DD) No. 78B (Ex.PW-9/A) was recorded at PS Timarpur at 11.10 P.M. on getting information that a person has been fired near Nand Lal jhuggi, Mukherjee Nagar. PW-9 (HC Ram Phal) recorded the said DD. At Aruna Asaf Ali Hospital, PW-11 (SI Rajneesh Sharma) recorded the statement of the injured Samir Ul Hassan (Ex.PW-1/A). In the statement, the victim named the appellant as one of the assailants and attributed specific role to him in the incident. He gave graphic details as to how and under what circumstances he was taken to an isolated place and fired at. The occurrence took place at about 10.45 P.M. on 01.07.2005. The rukka was sent for lodging First Information Report under Section 307 IPC at 01.45 A.M. on the same night. There was no delay in lodging the First Information Report with the police. Since the FIR was recorded promptly, there was least possibility of its fabrication.

9. While appearing as PW-1, injured Samir Ul Hassan proved the version given by him to the police at the first instance without any variation. He testified that the accused persons were known to him. They all were natives of his village in Bihar. On 01.07.2005, in the evening the accused Noor Alam asked him that there was a programme of eating and dinner in the house of his acquaintance in Gopal Ganj and requested him to accompany him. At about 09.30 P.M., he along with the three accused persons (present in the Court) boarded a bus from Kamla Market for going to Gopal Ganj. Thereafter, the accused took him towards ganda nala to go to village Gopal Ganj. When they reached at ganda nala Mukhejee Nagar at about 10.45 P.M., it was dark and the place was an isolated one. Accused Noor Salam caught hold of him from his back. When he tried to free himself, the accused Hafaz hit him with fist blows and made him to fall on the ground. The accused Noor Salam exhorted Noor Alam *'Isko Goli Mar Kar Uda Do Taki Hamara Jhagra Hamesh Ke Liye Khatam Ho Jai'* and on that the accused Noor Alam took out a 'katta' and fired at his face below eye. He tried to run away but Noor Alam again fired at him on his back and he fell down. When he raised alarm of *'bachao bachao'*, people came there and the assailants fled the

spot with the katta. The police recorded his statement in the hospital (Ex.PW-1/A).

10. The witness was examined on 13.12.2005. As per Court's observation, he was brought to the Court for examination on a cot. The accused and their counsel stated that they did not want to cross-examine the witness. They were given an opportunity to cross-examine the injured but it was not availed. The testimony of PW-1, the injured, remained unchallenged. It is unclear as to why the accused or their counsel did not opt to cross-examine the witness on material facts. The record reveals that some witnesses were examined subsequently but were not cross-examined by the accused/counsel. Thereafter, an application was moved under Section 311 Cr.P.C. to recall those witnesses and they were cross-examined. Curiously, no attempt was ever made to recall PW-1 (Samir-Ul-Hassan) to cross-examine him. PW-1 (Samir-Ul-Hassan) expired in the village on 28.01.2007. The family members of the victim claimed that his death was due to the injuries sustained by him in the incident. However, no cogent evidence came on record to show that there was nexus between the injuries and the death of the victim as no post-mortem was conducted.

11. I have no reasons to disbelieve the version given by PW-1 (Samir Ul Hassan) as to how he sustained injuries. No ulterior motive was assigned to him for making false statement. He had sustained grievous injuries on his body. Being an injured/victim, he must be interested to bring the real culprit to book and is not expected to let the real assailant go scot free.

12. The evidence of an injured witness cannot be disbelieved without assigning cogent reasons. The law on this aspect has been detailed in **State of Uttar Pradesh vs. Naresh and ors.** (2011) 4 Supreme Court Cases 324 as under :

> "27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special

status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide **Jarnail Singh v. State of Punjab, Balraje v. State of Maharashtra** and **Abdul Sayeed v. State of M.P.**)"

13. Similarly in another case **Abdul Sayed vs. State of Madhya Pradesh** (2010) 10 Supreme Court Cases 259, Supreme Court laid down:

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide **Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P. (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P.** and **Balraje v. State of Maharashtra.**]

29. While deciding this issue, a similar view was taken in **Jarnail Singh v. State of Punjab,** where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka this Court has

held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In **State of U.P. v. Kishan Chand** a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide **Krishan v. State of Haryana**). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

14. There is no inconsistency between oral and medical evidence. PW-7 (Dr.Vijay Khari) examined the victim at 11.45 P.M. In the MLC (Ex.PW-7/A) it is mentioned that the 'patient' was brought in injured condition with the alleged history of sustaining injuries by gunshots with country-made pistol by PCR. He proved the MLC (Ex.PW-7/A). In the cross-examination, he admitted that the alleged history was given by the patient himself. PW-16 (Ms.Kanta Yadav) from Trauma Centre also proved MLC Ex.PW-7/A and produced photocopies of the admission and discharge records (Ex.PW-16/A1 to A3). She further informed that the patient remained admitted till 14.07.2005. On 31.08.2005, Dr.Nishant gave opinion about nature of injuries as 'grievous'. She identified his signatures at point 'B' on Ex.PW-16/A4. She also proved X-ray report Ex.PW-16/A5

prepared by Dr.Pankaj.

15. PW-6 (Amar Pal) whose name appears in the MLC Ex.PW-7/A deposed that when he was returning from village Gopalpur and reached the spot, he and Ravi heard noise of two fire from some fire arm. When they reached the spot, they found Samir Ul Hassan in injured condition and he was crying *'bachao bachao'*. On enquiry, the injured told him that one Noor Salam had brought him there on the pretext of *'Davat'* with Hafaz Alam and Noor Alam. He further told that Noor Salam along with Noor Alam and Hafaz Alam fired at him causing injuries. Ravi went to inform the police. PCR van reached the spot and took the injured to the hospital. In the cross-examination, he stated that the injured was not known to him previously. Statement of the injured was recorded in his presence. He remained in the hospital till 02.30 A.M. The statement of PW-6 (Amar Pal) is in consonance with the statement of the victim.

16. From the un-rebutted testimony of PW-1 (Samir Ul Hassan) coupled with medical evidence on record it stands established that injuries were inflicted upon the victim by the accused persons in furtherance of their common intention. In the statement Ex.PW-1/A, the victim did not assign motive impelling the assailants to inflict injuries. However, in 313 Cr.P.C.' statement, co-accused Noor Alam admitted that there were number of cases against each other. He was also assaulted by complainant's brother for which a case was registered. Several litigations for land were also pending between them and complainant party. It is true that the victim had voluntarily accompanied the accused persons. It appears that he was not aware of the evil designs of the accused when he was taken to an isolated place on the pretext to attend some dawat/party at the house of an acquaintance of Noor Alam. Moreover, proof of motive recedes into the background in cases where the prosecution relies upon an eye witness account of the occurrence.

17. Non-recovery of weapon of offence is not fatal. There is specific ocular and medical evidence to prove that the injuries were caused by gunshot. It is not mandatory for the doctor to record in the MLC or to make enquiry from the injured about the name of the assailant. Generally, the doctors on duty do not ask for the assailant's name. Omission of the injured to disclose the assailant's name to the doctor does not discredit his testimony.

18. In the light of above discussion, it is held that the conviction under Section 307/34 IPC is based upon cogent evidence and is affirmed.

19. Counsel for the appellant prayed to modify the order on sentence and to take lenient view because the appellant has already remained in custody in this case for about three years. He was not armed with any weapon. The only role attributed to him is that of exhortation. He is not a previous convict. He has 70 years old mother to take care; his father has already expired; his brother died in 2008; he has eight children including 17 years old daughter to maintain them.

20. As observed above, the injuries sustained by the victim were 'grievous' in nature. He remained admitted in the hospital till 14.07.2005. Even when he was examined in the Court, he was unable to walk and was brought on a cot. Apparently, he did not recover from the injuries sustained by him till 13.12.2005. He was taken to an isolated place in a pre-planned manner and an attempt was made to murder him by firing at him twice.

21. Considering the aggravating and mitigating circumstances, order on sentence is modified and the substantive sentence of the appellant is reduced from eight years to six years. Other sentences are left undisturbed.

22. The appeal filed by the appellant is disposed of in the above terms.

23. Copy of the order be sent to the appellant through Superintendent, Tihar Jail.

24. Trial Court record be sent back with the copy of the order.

ILR (2013) III DELHI 1743
LPA

THE PRINCIPAL DELHI COLLEGE OR ARTS & COMMERCE **....APPELLANT**

VERSUS

SUNITA SHARMA & ANR. **....RESPONDENTS**

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

LPA NO. : 747/2004 **DATE OF DECISION: 30.01.2013**

(A) Constitution of India, 1950—Article 226—Appeal against order of reinstatement with arrears of salary—Respondent appointed to the post of Junior Assistant cum Typist on direct recruitment by the Appellant, pursuant to a public advertisement which stated that the post was permanent—However, the appointment letter mentioned that the appointment was subject to outcome of a writ petition 2357/93, filed by one Shri K.N. Pandey—On the writ petition 2357/93 being allowed, the respondent's appointment was terminated—Consequently, respondent filed a petition under Article 226 before the High Court challenging her termination—Appellant's contention was that after the judgment in *K.N. Pandey's* case, it was necessary to make a reversion from the existing holders of the post—Respondent was the junior most and her appointment was made expressly subject to the outcome of the above case, she was justly terminated—Single Judge held that as a result of K.N. Pandey's writ petition being allowed, he had to be accommodated to a promotional post, which had nothing to do with the direct recruit vacancy to which the respondent had been appointed—Outcome of K.N. Pandey's writ petition held to be irrelevant to the respondent's appointment—The Respondent was reinstated into service with arrears of salary to the post of Junior Assistant (LDC). Held no interference called for—Appeal dismissed.

The single judge, in his impugned judgment, after noticing the contradictory averments of the appellant/College in the counter affidavit, held that the situation emerging as a result of Shri Pandey's writ petition being allowed was that he had to be accommodated to a promotional post; that had nothing to do with the direct recruit vacancy to which the respondent had been appointed. This Court is of opinion that the reasoning of the learned single judge is sound and unexceptionable. The argument of the appellant, in support of its stand that the junior most in the cadre had to make way for Shri Pandey, which was the reason for her termination, by relying on Deodhar, in the opinion of this Court is ill-founded and misplaced. The well settled proposition stated in Deodhar that for purposes of seniority and promotion (especially the latter) those who enter one cadre lose their birth mark, as it were (either as direct recruit or promotee), cannot be invoked in the present case. The respondent was concededly appointed against a clear permanent direct recruit vacancy. The result of litigation involving correctness of someone else's right to be considered for promotion to a seat reserved under a separate and distinct promotion quota, could therefore hardly affect her. That her appointment was made subject to such litigation does not advance the College's case at all, because such a condition was irrelevant. **(Para 7)**

Counsel for the college had argued that the respondent would gain undue benefit by the dismissal of this appeal, since she would be entitled to full arrears of salary without working on the post. This Court is of opinion that the College invited such a result, if it can be characterized as such, upon itself by preferring this appeal. To compound this, it sought a stay of the impugned judgment, which resulted in the respondent being denied work and the entitlement to earn salary. Furthermore, this Court is of

opinion that in such cases, there cannot be a blanket "no backwage" rule as is sought to be urged. An employee denied benefit of work and pay, is as much entitled to restitution in law, as a businessman whose contract is terminated capriciously. In the latter case, the courts award damages, a head which often include damages for loss of profit, and further direct payment of interest. Similarly, a tax payer who is made to pay amounts which cannot be legitimately recovered, is entitled to interest for the duration the amounts are retained by the tax authorities. A plaintiff who sues for illegal termination of contract of service (i.e a managerial cadre official in a private enterprise) on proof of illegal termination can succeed in getting damages. In the case of public employment, where the employee is terminated for no justifiable cause, surely restitution has to be likewise complete. Therefore, the Court upholds the impugned judgment and order of the learned single judge as regards full consequential benefits to the respondent. **(Para 9)**

(B) Constitution of India, 1950—Article 226—Appellant contents that the respondent should have sought a reference before the Tribunal under Industrial Disputes Act—Held—While the doctrine of availability of alternate remedy exists to limit this Court's jurisdiction, it is ultimately the discretion of the Writ Court and not an invariable rule.

As regards the question of exercise of jurisdiction under Article 226, this Court is of opinion that the reasoning of the learned single judge that while the doctrine of availability of alternative remedy exists to limit this Court's jurisdiction, at the same time it, "does not mean that under no circumstances or in no case where alternative remedy exist would the Court refuse to exercise jurisdiction under Article 226 of the Constitution of India" is equally unexceptionable. We may add that a writ court's reluctance to entertain a proceeding under Article 226 in some cases, is a matter of discretion, and not an invariable rule. In the light of the fact that in the

instant case, the Court has entertained the writ petition in the year 2003 and disposed it in the year 2004; while the appeal has come up about nine years after the writ was originally entertained by this Court; the approach adopted by the Supreme Court of India in **Krishan Lal v. Food Corporation of India and Ors.** (2012) 4 SCC 786" commends itself to this Court. There it has concluded that,

> "18. .....Availability of an alternative remedy for adjudication of the disputes is, therefore, not a ground that can be pressed into service at this belated stage....."

Similarly, in **State of H.P. and Ors. v. Gujarat Ambuja Cement Ltd. and Anr.** (2005) 6 SCC 499 the Supreme Court observed that,

> "22. .....When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational....."

In the same judgement, the Supreme Court also noticed the ratio of its earlier decision in **L. Hirday Narain v. Income Tax Officer, Bareilly** AIR 1970 SC 33 to the effect that,

> "23. .....if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non exhaustion of statutory remedies....."

In our view, therefore, the approach and conclusions of the learned single judge on this aspect too, do not call for interference. **(Para 8)**

Important Issue Involved: While the doctrine of availability of alternate remedy exists to limit the Court's jurisdiction, it is ultimately the discretion of the Writ Court and not an invariable rule.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. D.N. Goburdhan with Mr. Aayush, Advocates.

FOR THE RESPONDENT : Ms. Manisha Singh, Advocate for Respondent No. 2. Ms. Rajiv Sharma, Advocate for Respondent No. 3.

CASES REFERRED TO:

1. *Krishan Lal* vs. *Food Corporation of India and Ors.* (2012) 4 SCC 786.
2. *State of H.P. and Ors.* vs. *Gujarat Ambuja Cement Ltd. and Anr.* (2005) 6 SCC 499.
3. *U.P. State Bridge Corporation* vs. *U.P Rajya Setu Nigam S. Karamchari Sangh* 2004 (4) SCC 268.
4. *L. Hirday Narain* vs. *Income Tax Officer, Bareilly* AIR 1970 SC 33.
5. *R.S. Deodhar* vs. *State of Maharastra* 1974 (1) SCC 317.

RESULT: Appeal dismissed.

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The appellant questions a judgment and order of a learned single judge, of this Court, in which the respondent's petition under Article 226 of the Constitution of India was allowed, as a result of which she was directed to be reinstated into service, with arrears of salary to the post of Junior Assistant (LDC).

2. The brief facts are that the respondent was appointed to the post of Junior Assistant cum typist, on direct recruitment, pursuant to a public advertisement, in the Appellant-College's establishment (hereafter

called "the College") on 17-6-1998. The advertisement stated that the vacancy to be filled was a permanent one. In the appointment letter issued to the petitioner, besides mentioning that she was appointed as a probationer, it was stated that her appointment was subject to the outcome of a writ petition (WP 2357/93), filed by one Shri. K.N. Pandey.

3. Admittedly, the post of Junior Assistant to which the respondent was recruited is filled by promotion to the extent of 50% from amongst departmental candidates and 50% by direct recruitment.

4. On 26-11-2002, the College terminated the respondent's appointment. The termination order, after reciting that the appointment letter issued to her was on the, "understanding", that it was subject to the outcome of a writ petition filed by Shri Pandey; stated that the said petition was decided in favour of Shri Pandey, and the appeal against that order too was dismissed. The termination order then went on to state that:

> "..This judgment will result in reversion of those who have been promoted to their original post but in this case since her appointment was a direct recruitment through General Category so the College has no option but to terminate her services. Since Sh. K.N. Pandey has been directed to join the General Administration on 27-12-2002 (forenoon) so the services of Mrs. Sunita Sharma stand terminated with effect from 26-12-2002(Afternoon)...."

5. The respondent's writ petition challenging her termination was contested by the College, which urged that there was no infirmity in its order. It urged that the respondent ought to have sought a reference impugning her termination order before the Tribunal, under the Industrial Disputes Act, 1947. It also urged that the respondent's service had to be terminated as a result of this Court's order in Shri Pandey's writ petition because she was the junior most in the cadre of Junior Assistant. The learned single judge rejected both these contentions.

6. Mr. D.N. Goburdhan, learned counsel for the College, urges that the single judge fell into error in directing reinstatement and backwages. It was submitted that the course adopted by the College was reasonable and just, since the respondent concededly was junior most in the cadre of Junior Assistants. With the judgment in Shri Pandey's case, the new

development that emerged was the necessity to make a reversion from existing holders of the post. Since the respondent was the junior most Junior Assistant, and a probationer, whose appointment was made expressly subject to outcome of that petition, there was nothing unfair or unreasonable in terminating her from employment. It was argued that once appointed, the source of recruitment (i.e. whether as a direct recruit or promotee) becomes an irrelevant detail in such contexts, and the employer acts reasonably in reverting or terminating the employment of the junior most incumbent in the cadre. Learned counsel relied on the judgment reported as **R.S. Deodhar v State of Maharastra** 1974 (1) SCC 317 in that regard. Counsel also relied on the judgment reported as **U.P. State Bridge Corporation v U.P Rajya Setu Nigam S. Karamchari Sangh** 2004 (4) SCC 268 in support of the argument that the respondent ought to have approached the forum provided under the Industrial Disputes Act and this Court should have desisted from exercising its jurisdiction under Article 226 of the Constitution of India.

7. The single judge, in his impugned judgment, after noticing the contradictory averments of the appellant/College in the counter affidavit, held that the situation emerging as a result of Shri Pandey's writ petition being allowed was that he had to be accommodated to a promotional post; that had nothing to do with the direct recruit vacancy to which the respondent had been appointed. This Court is of opinion that the reasoning of the learned single judge is sound and unexceptionable. The argument of the appellant, in support of its stand that the junior most in the cadre had to make way for Shri Pandey, which was the reason for her termination, by relying on Deodhar, in the opinion of this Court is ill-founded and misplaced. The well settled proposition stated in Deodhar that for purposes of seniority and promotion (especially the latter) those who enter one cadre lose their birth mark, as it were (either as direct recruit or promotee), cannot be invoked in the present case. The respondent was concededly appointed against a clear permanent direct recruit vacancy. The result of litigation involving correctness of someone else's right to be considered for promotion to a seat reserved under a separate and distinct promotion quota, could therefore hardly affect her. That her appointment was made subject to such litigation does not advance the College's case at all, because such a condition was irrelevant.

8. As regards the question of exercise of jurisdiction under Article

226, this Court is of opinion that the reasoning of the learned single judge that while the doctrine of availability of alternative remedy exists to limit this Court's jurisdiction, at the same time it, "does not mean that under no circumstances or in no case where alternative remedy exist would the Court refuse to exercise jurisdiction under Article 226 of the Constitution of India" is equally unexceptionable. We may add that a writ court's reluctance to entertain a proceeding under Article 226 in some cases, is a matter of discretion, and not an invariable rule. In the light of the fact that in the instant case, the Court has entertained the writ petition in the year 2003 and disposed it in the year 2004; while the appeal has come up about nine years after the writ was originally entertained by this Court; the approach adopted by the Supreme Court of India in **Krishan Lal v. Food Corporation of India and Ors.** (2012) 4 SCC 786" commends itself to this Court. There it has concluded that,

> "18. .....Availability of an alternative remedy for adjudication of the disputes is, therefore, not a ground that can be pressed into service at this belated stage....."

Similarly, in **State of H.P. and Ors. v. Gujarat Ambuja Cement Ltd. and Anr.** (2005) 6 SCC 499 the Supreme Court observed that,

> "22. .....When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational....."

In the same judgement, the Supreme Court also noticed the ratio of its earlier decision in **L. Hirday Narain v. Income Tax Officer, Bareilly** AIR 1970 SC 33 to the effect that,

> "23. .....if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non exhaustion of statutory remedies....."

In our view, therefore, the approach and conclusions of the learned single judge on this aspect too, do not call for interference.

9. Counsel for the college had argued that the respondent would gain undue benefit by the dismissal of this appeal, since she would be entitled to full arrears of salary without working on the post. This Court is of opinion that the College invited such a result, if it can be characterized as such, upon itself by preferring this appeal. To compound this, it sought a stay of the impugned judgment, which resulted in the respondent being denied work and the entitlement to earn salary. Furthermore, this Court is of opinion that in such cases, there cannot be a blanket "no backwage" rule as is sought to be urged. An employee denied benefit of work and pay, is as much entitled to restitution in law, as a businessman whose contract is terminated capriciously. In the latter case, the courts award damages, a head which often include damages for loss of profit, and further direct payment of interest. Similarly, a tax payer who is made to pay amounts which cannot be legitimately recovered, is entitled to interest for the duration the amounts are retained by the tax authorities. A plaintiff who sues for illegal termination of contract of service (i.e a managerial cadre official in a private enterprise) on proof of illegal termination can succeed in getting damages. In the case of public employment, where the employee is terminated for no justifiable cause, surely restitution has to be likewise complete. Therefore, the Court upholds the impugned judgment and order of the learned single judge as regards full consequential benefits to the respondent.

10. During pendency of proceedings in appeal, this Court had permitted Shri Y.S. Chauhan to be impleaded as a third respondent, and made appropriate orders. The third respondent had sought impleadment on the ground that the impugned judgment contained certain observations and reference to him, which might prove to be prejudicial. It was pointed out on his behalf that by an order/ letter dated 16-3-2005 (DCAC/2005/579) four officials were permitted to continue holding certain posts; these included the fact that Shri Y.S. Chauhan would continue as Assistant and that the approval of post of Section Officer would "nullify" the reversion that had taken place earlier as a result of the outcome in K.N. Pandey's case. This Court notes only this submission, and records that this order may be taken into consideration by the College. However, the respondent shall under no circumstances be adversely affected by this development, since she was appointed to the post, as a direct recruit and is entitled in her own right to further benefits flowing from that status.

11. In view of the above discussion the Court holds that the appeal has to fail as lacking in merit; it is accordingly dismissed.

ILR (2013) III DELHI 1752
W.P. (C)

DELHI CHARTERED ACCOUNTANTS SOCIETY (REGD.) ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(BADAR DURREZ AHMED & R.V. EASWAR, JJ.)

W.P. (C) NO. : 4456/2012 & C.M. NO. : 9237/2012 (FOR STAY) **DATE OF DECISION: 01.02.2013**

Finance Act, 1994—Section 65(105) (s), 66, 66A, 66B, 67, 68, 93 and 94—Point of Taxation Rules, 2011—Rule 2(e) 4 (a) (ii), 7(c)—Export of Services Rules, 2005—Rule 3(1)—Writ filed for quashing of Circular No. 158/9/2012-ST dated 08.05.2012 and Circular No. 154/5/2012-ST dated 28.03.2012 and for declaration that taxable event is rendition of service and accordingly rate of tax payable is rate in force on date of providing service—Plea taken, circulars cannot override provisions of Finance Act, 1994 or Rules made thereunder and so far as they seek to levy enhanced rate of service tax of 12% in respect of 8 specified services, though services were rendered and invoices were issued but payments were received after 01.04.2012, are *ultra vires* of Act / Rules—Question before Court was what would be rate of tax where (a)

service is provided by Chartered Accountants (CAs) prior to 01.04.2012; (b) invoice is issued b CAs prior to 01.04.2012 but (c) payment is received after 01.04.2013—Held—New Rule 7 w.e.f. 01.04.2013 does not provide for determination of point of taxation in respect of services rendered by CAs—Both circulars proceed on erroneous basis that Rule 7 inserted w.e.f. 01.04.2012 covers services rendered by CAs—Circular No. 154 when it states that invoices issued on or before 31.03.2012 shall continue to be governed by Rule 7 as it stood before 01.04.2012, is erroneous because on and from 01.04.2012, old Rule 7 was no longer in existence, having been replaced by new Rule 7—Circular No. 158, insofar as it states that in case of eight specified services (which includes services of CAs), if payment is received or made, as case may be, on or after 01.04.2012, service tax needs to be paid at 12%, is again without any statutory basis—New Rule 7 does not cover services which were earlier referred to in Clause (c) of Rule 7 (including services of CAs) as it existed upto 31.03.2012—Circulars seems to have overlooked this crucial aspect—Where services of CAs were actually rendered before 01.04.2012 and invoices were also issued before that date, but payment was received after said date, rate of tax will be 10% and not 12%—Circulars quashed being contrary to Finance Act, 1994 and Point of Taxation Rules, 2011—Circulars have to be in conformity with Act and Rules and if they are not, they cannot be allowed to govern controversy—Writ petition allowed.

Important Issue Involved: (A) Where the services of the chartered accountants were actually rendered before 01.04.2012 and the invoices were also issued before that date, but the payment was received after the said date, the rate of tax will be 10% and not 12%.

(B) A circular which is contrary to the Act and the Rules, cannot be enforced.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ruchir Bhatia, Advocate.

FOR THE RESPONDENTS : Mr. Sumeet Pushkarna, CGSC with Mr. Varun Dubey, Advocate for R-1/UOI. Mr. Anshuman Chowdhury, Sr. Standing Counsel for Comm./S. Tax.

CASES REFERRED TO:

1. *Association of Leasing and Financial Service Companies* vs. *UOI & Ors.* : (2011) 2 SCC 352.
2. *Commissioner of Central Excise, Bolpur* vs. *Ratan Melting & Wire Industries* 2008 (13) SCC (1).

RESULT: Allowed.

R.V. EASWAR, J.

1. The petitioner is an association of Chartered Accountants, registered as a society in Delhi. The matter arises under the service tax provisions which were brought into force by the Finance Act, 1994. The prayer in this petition is for (a) quashing of the circular No.158/9/2012-ST dated 08.05.2012 and circular No.154/5/2012-ST dated 28.03.2012 as null and void and ultra vires the Constitution of India and/ or the provisions of the Finance Act, 1994; (b) issuance of a writ or order or direction in the nature of a writ declaring that under the provisions of the Finance Act, 1994, the taxable event is the rendition of the service and accordingly the rate of tax payable is the rate in force on the date of providing the service.

2. The petition came to be filed in this manner. The Finance Act, 1994 introduced the levy of service tax for the first time in India. Section 66 provided for the charge of service tax. Section 66A provided for the charge of service tax on services received from outside India. Section 67 provided for the valuation of taxable services for the purpose of charging

service tax. This section underwent certain changes under the Finance Act, 2006 w. e. f. 18.04.2006 but we are not concerned with them. Section 68 provided for the payment of service tax. There are other procedural provisions to give effect to the levy and collection of service tax with which we are not concerned. Section 93 conferred power upon the Central Government to grant exemption from the levy of service tax. Section 94 conferred power upon the Central Government to make rules for carrying out the provisions of Chapter V of the Finance Act, 1994.

3. A question arose as to what is the taxable event for the purpose of levy of service tax. In **Association of Leasing and Financial Service Companies Vs. UOI & Ors.** : (2011) 2 SCC 352 the Supreme Court held that the taxable event was the rendition of the service. However, w. e. f. 01.04.2011 the Point of Taxation Rules, 2011 were notified. Rule 2(e) of the said Rules defines "point of taxation" as the point in time when a service shall be deemed to have been provided.

4. Rule 4 provided as follows: -

"4. Determination of point of taxation in case of change in effective rate of tax - Notwithstanding anything contained in rule 3, the point of taxation in cases where there is a change in effective rate of tax in respect of a service, shall be determined in the following manner, namely:-

(a) in case a taxable service has been provided before the change in effective rate of tax,-

(i) where the invoice for the same has been issued and the payment received after the change in effective rate of tax, the point of taxation shall be date of payment or issuing of invoice, whichever is earlier; or

(ii) where the invoice has also been issued prior to change in effective rate of tax but the payment is received after the change in effective rate of tax, the point of taxation shall be the date of issuing of invoice; or

(iii) where the payment is also received before the change in effective rate of tax, but the invoice for the same has been issued after the change in effective rate of tax, the point of taxation shall be the date of payment;

(b) in case a taxable service has been provided after the change

in effective rate of tax,-

(i) where the payment for the invoice is also made after the change in effective rate of tax but the invoice has been issued prior to the change in effective rate of tax, the point of taxation shall be the date of payment; or

(ii) where the invoice has been issued and the payment for the invoice received before the change in effective rate of tax, the point of taxation shall be the date of receipt of payment or date of issuance of invoice, whichever is earlier; or

(iii) where the invoice has also been raised after the change in effective rate of tax but the payment has been received before the change in effective rate of tax , the point of taxation shall be date of issuing of invoice..

5. Rule 7 provided for determination of the point of taxation in case of specified services or persons. This rule was substituted by a new rule w.e.f. 01.04.2012. The old rule which existed prior to that date was as below:

"7. Determination of point of taxation in case of specified services or persons. - Notwithstanding anything contained in these rules, the point of taxation in respect of,-

(a) the services covered by sub-rule (1) of rule 3 of Export of Services Rules, 2005;

(b) the persons required to pay tax as recipients under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Finance Act, 1994;

(c) individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (g), (p), (q), (s), (t), (u), (za), (zzzzm) of clause (105) of section 65 of the Finance Act, 1994, shall be the date on which payment is received or made, as the case may be:

Provided that in case of services referred to in clause (a), where payment is not received within the period specified by the Reserve Bank of India, the point of taxation shall be determined, as if this rule does not exist.

Provided further that in case of services referred to in clause (b) where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be determined as if this rule does not exist.

Provided also that in case of "associated enterprises", where the person providing the service is located outside India, the point of taxation shall be the date of credit in the books of account of the person receiving the service or date of making the payment whichever is earlier..

6. The petitioner is an association of chartered accountants; services rendered by chartered accountants are taxable services u/s 65(105)(s) of the Act. Accordingly, sub-rule (c) of Rule 7 would apply, with the result that the date on which the payment for the services of the chartered accountants is made or received will be deemed to be the date on which the services were provided or rendered.

7. It is not in dispute that consequent to the insertion of Sec 66B into the Act, the rate of service tax was enhanced from 10% to 12%. The question before us is what would be the rate of tax where (a) the service is provided by the chartered accountants prior to 01.04.2012; (b) the invoice is issued by the chartered accountants prior to 01.04.2012 but (c) the payment is received after 01.04.2012.

8. In the present case there is no dispute that all the services were rendered before 01.04.2012 and even the invoices were raised before that date and it was only that the payment was received after the said date. In such a case, according to the petitioner, Rule 4(a)(ii) of the Point of Taxation Rules, 2011, applies and the point of taxation shall be the date of issuance of the invoice. The service tax authorities however rely on two circulars issued by the Tax Research Unit of the CBEC – Circular No.154 dated 28.03.2012 and Circular No.158 dated 08.05.2012 which are annexed to the writ petition. They are as follows: -

"Circular No.154/5/ 2012 – ST

FNo 334/1/2012- TRU
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs

Tax Research Unit
Room No 146, North Block, New Delhi
Dated: 28th March 2012

To

Chief Commissioner of Customs and Central Excise (All)
Chief Commissioner of Central Excise & Service Tax (All)
Director General of Service Tax
Director General of Central Excise Intelligence
Director General of Audit
Commissioner of Customs and Central Excise (All)
Commissioner of Central Excise and Service Tax (All)
Commissioner of Service Tax (All)

Madam/Sir,

Subject: - Clarification on Point of Taxation Rules - regarding.

1. Notification No.4/2012 - Service Tax dated the 17th March 2012 has amended the Point of Taxation Rules 2011 w.e.f. 1st April 2012, inter- alia, amending Rule 7 which applied to individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (g), (p), (q), (s), (t), (u), (za) and (zzzzm) of clause (105) of section 65 of the Finance Act, 1994. Rule 7 determined the point of taxation in such cases as the date of receipt of payment. The provisions have been amended both in the Point of Taxation Rules 2011 and the Service Tax Rules 1994 such that from 1st April 2012 the payment of tax shall be allowed to be deferred till the receipt of payment upto a value of Rs 50 lakhs of taxable services. The facility has been granted to all individuals and partnership firms, irrespective of the description of service, whose turnover of taxable services is fifty lakh rupees or less in the previous financial year.

2. Representations have been received, in respect of the specified eight services, requesting clarification on determination of point of taxation in respect of invoices issued on or before 31st March 2012 where the payment has not been received before 1st April 2012.

3. The issue has been examined. For invoices issued on or before 31st March 2012, the point of taxation shall continue to be governed by the Rule 7 as it stands till the said date. Thus in respect of invoices issued on or before 31st March 2012 the point of taxation shall be the date of payment.

4. Trade Notice/Public Notice may be issued to the field formations accordingly.

5. Please acknowledge the receipt of this circular. Hindi version to follow.

(Shobhit Jain)

OSD, TRU

Fax: 011-23092037.

"Circular No. 158/9/ 2012 – ST
F.No 354/69/2012- TRU
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs
Tax Research Unit
Room No 146, North Block, New Delhi
Dated : 8th May 2012

To

Chief Commissioner of Customs and Central Excise (All)
Chief Commissioner of Central Excise & Service Tax (All)
Director General of Service Tax
Director General of Central Excise Intelligence
Director General of Audit
Commissioner of Customs and Central Excise (All)
Commissioner of Central Excise and Service Tax (All)
Commissioner of Service Tax (All)

Madam/Sir,

Subject: - Clarification on Rate of Tax - regarding.

1. The rate of service tax has been restored to 12% w.e.f. 1st

April 2012. Representations have been received requesting clarification on the rate of tax applicable wherein invoices were raised before 1st April 2012 and the payments shall be after 1st April 2012. Clarification has been requested in case of the 8 specified services provided by individuals or proprietary firms or partnership firms, to which Rule 7 of Point of Taxation Rules 2011 was applicable and services on which tax is paid under reverse charge.

2. The rate of service tax prevalent on the date when the point of taxation occurs is rate of service tax applicable on any taxable service. In case of the 8 specified services and services wherein tax is required to be paid on reverse charge by the service receiver the point of taxation is the date of payment. Circular No 154/5/2012 – ST dated 28th March 2012 has also clarified the same. Thus in case of such 8 specified services provided by individuals or proprietary firms or partnership firms and in case of services wherein tax is required to be paid on reverse charge by the service receiver, if the payment is received or made, as the case maybe, on or after 1st April 2012, the service tax needs to be paid @12%.

3. The invoices issued before 1st April 2012 may reflect the previous rate of tax (10% and cess). In case of need, supplementary invoices may be issued to reflect the new rate of tax (12% and cess) and recover the differential amount. In case of reverse charge the service receiver pays the tax and takes the credit on the basis of the tax payment challan. Cenvat credit can be availed on such supplementary invoices and tax payment challans, subject to other restrictions and conditions as provided in the Cenvat Credit Rules 2004.

4. Trade Notice/Public Notice may be issued to the field formations accordingly.

5. Please acknowledge the receipt of this circular. Hindi version to follow.

(Dr. Shobhit Jain)

OSD, TRU

Fax: 011-23093037.

9. The grievance of the petitioner is that the circulars cannot override the provisions of the Finance Act, 1994 or the rules made thereunder and in so far as they seek to levy the enhanced rate of service tax of 12% in respect of the 8 specified services, though the services were rendered and the invoices were issued but payments were received after 01.04.2012, are *ultra vires* the Act/ Rules.

10. Before dealing with the grievance of the petitioner, it would be necessary to note that Rule 7 of the Point of Taxation Rules, 2011 was substituted by a new Rule w.e.f. 01.04.2012. The new Rule notified on 17.3.2012 by notification No.4/12-ST is as under :-

> **"7. Determination of point of taxation in case of specified services or persons. -** Notwithstanding anything contained in these rules, the point of taxation in respect of the persons required to pay tax as recipients of service under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Act, shall be the date on which payment is made:
>
> Provided that, where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be determined as if this rule does not exist:
>
> Provided further that in case of .associated enterprises., where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier."

11. A comparison of Rule 7 as it existed both before and from 01.4.2012 shows two significant changes. The first change is that while the old Rule referred to recipients of service only in respect of services notified under Section 68(2) and did not make any reference to the recipients of the service in either Clause (a) or Clause (c), the new Rule covers only the recipients of service in respect of services notified under Section 68(2). The second significant change is that the reference to services covered by sub-rule (1) of Rule 3 of Export of Services Rules, 2005 in Clause (a) of the old Rule and the reference to individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (g), (p), (q), (s), (t), (u), (za) and (zzzzm) of clause

105 of Section 65 of the Finance Act, 1994 in Clause (c) of the old Rule does not find any mention in the new Rule. The result is that the new Rule 7 inserted w.e.f. 01.04.2012 was not applicable to services rendered by chartered accountants under Section 65(105)(s) of the Act. Thus the position is that the new Rule 7 with effect from 01.04.2012 does not provide for the determination of point of taxation in respect of services rendered by chartered accountants. Both the circulars which are impugned in the present writ petition proceed on the erroneous basis that Rule 7 inserted w.e.f. 01.04.2012 covers the services rendered by chartered accountants. Circular No.154 when it states that invoices issued on or before 31.3.2012 shall continue to be governed by Rule 7 as it stood before 01.04.2012 is erroneous because on and from 01.04.2012, the old Rule 7 was no longer in existence, having been replaced by new Rule 7. Circular No.158, insofar as it states that in the case of the eight specified services (which includes the services of chartered accountants), if the payment is received or made, as the case may be, on or after 01.04.2012, the service tax needs to be paid at 12% is again without any statutory basis. The new Rule 7 does not cover the services which were earlier referred to in Clause (c) of Rule 7 (including services of chartered accountants) as it existed up to 31.3.2012. The circular seems to have overlooked this crucial aspect.

12. We still have to reckon with Section 66B of the Finance Act, 1994 inserted by the Finance Act, 2012 w.e.f. 1.7.2012 vide notification No.19/2012-ST, dated 5.6.2012. This Section is as follows :-

> **"66B.Charge of service tax on and after Finance Act, 2012** – There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent, on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

13. Rule 4 of the Point of Taxation Rules, 2011 which has continued even after 01.04.2012 is clearly the answer. We have already extracted the Rule hereinabove. It provides for a specific situation namely determination of the point of taxation in case of change in effective rate of tax. The words earlier used in the Rule were .change of rate.. In the place of these words, the words .change in effective rate of tax, were

inserted w.e.f. 01.04.2011. This was done by the Point of Taxation (Amendment) Rules, 2011 vide notification No.25/11-ST dated 31.3.2011. The petitioner has pointed out to sub-clause (ii) of Clause (a) of Rule 4. This Rule applies notwithstanding anything contained in Rule 3 which provides for the determination of point of taxation. As per Rule 4, whenever there is a change in the effective rate of tax in respect of a service, the point of taxation shall be determined in the manner set out in the Rule. Clause (a) provides for a case of taxable service which was provided before the change in effective rate of tax has taken place. Clause (b), in contrast provides for a case of a taxable service which has been rendered after the change in the effective rate of tax has taken place. W.e.f. 01.07.2012, there has been a change in the effective rate of tax from the earlier 10% to 12%. In the petitioner's case, the dispute is only with reference to the services provided by the chartered accountants before 01.04.2012. Clause (a) of Rule 4 would therefore govern its case. This clause provides for three further situations. Clause (i) covers a case where an invoice for the service was issued and the payment was also received after the change in the effective rate of tax. In such a case, the date of payment or the issuance of the invoice, whichever is earlier, will be deemed to be the date on which the service was rendered and that will be the point of taxation. The present case is not governed by this sub-clause. Sub-clause (iii) takes care of a case where the payment is also received before the change in the effective rate of tax, but the invoice for the same was issued after the change. In such case the point of taxation shall be the date of payment which will be deemed to be the date on which the service was provided. The petitioner's case is not governed by this sub-clause either.

14. The case of the petitioner is governed by sub-clause (ii). Under this clause where the taxable service has been provided before 01.04.2012 and the invoice was also issued before 01.04.2012, but the payment is received after 01.04.2012, then the date of issuance of invoice shall be deemed to be the date on which the service was rendered and, consequently, the point of taxation.

15. The result of the discussion will be that where the services of the chartered accountants were actually rendered before 01.04.2012 and the invoices were also issued before that date, but the payment was received after the said date, the rate of tax will be 10% and not 12%. The circulars in question have not taken note of this aspect, and as noted

earlier have proceeded on the erroneous assumption that the old Rule 7 continued to govern the case notwithstanding the introduction of the new Rule 7 which does not provide for the contingency that has arisen in the present case.

16. In view of the foregoing discussion the circulars are quashed as being contrary to the Finance Act, 1994 and the Point of Taxation Rules, 2011. The Point of Taxation Rules, 2011 have been notified in exercise of the powers conferred upon the Central Government under Clause (a) and Clause (hhh) of sub-section (2) of Section 94 of the Finance Act, 1994 and they are also required to be placed before both the Houses of Parliament under sub-section (4) of Section 94. They thus have the force of law. The circulars have to be in conformity with the Act and the Rules and if they are not, they cannot be allowed to govern the controversy.

17. It is well-settled that a Circular which is contrary to the Act and the Rules cannot be enforced. In **Commissioner of Central Excise, Bolpur vs Ratan Melting & Wire Industries** 2008 (13) SCC (1) a Constitution Bench of Supreme Court held as under:-

> "7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

18. The writ petitions are accordingly allowed but in the circumstances, with no order as to costs. Since we have quashed the Circulars, prayer (b) in the writ petition becomes infructuous.

ILR (2013) III DELHI 1765
CRL. A.

VIKAS **....APPELLANT**

VERSUS

THE STATE OF (NCT OF DELHI) & ORS. **....RESPONDENTS**

(S.P. GARG, J.)

CRL. A. NO. : 917/2011 & 1055/2011 **DATE OF DECISION: 05.02.2013**

Indian Penal Code, 1860—Section 34, 308, 323—Accused arrested and challaned to trial for committing offence u/s 308/34. On appreciation of evidence, accused convicted for offence u/s 323/34. Cross appeals—Accused challenging conviction and complainant challenging acquittal of accused u/s 308—Held—Accused were residing in same premises and had property disputes. A quarrel had taken place on trivial issue. Accused were not armed with deadly weapons. Only a single brick blow was inflicted on the temporal region of the complainant and as per MLC it was a mere cut and lacerated wound. Within a few hours the complainant was discharged. No attempt was made to inflict repeated blows from the brick No harm was caused to any other family member of complainant—These circumstances rule out intention of the accused to cause injuries which could be fatal. Conviction of accused u/s 323 maintained—Appeal filed by victim dismissed. Convicts have been sentenced to imprisonment till the rising of the Court. Considering the age, character, antecedents and the fact that two of them are government servants, instead of sentencing them at once to any punishment these are ordered to be released on probation of good conduct on furnishing personal bonds.

On scrutinizing the statement of witnesses including the complainant coupled with medical evidence I find no illegality in the findings of the Trial Court whereby the accused persons were held responsible for causing injuries to Vikas in furtherance of their common intention. Complainant-Vikas has filed complaint case. Under Section 156(3) Cr.P.C., the Metropolitan Magistrate directed the police to register case under Section 308 IPC. While appearing as PW-1 the complainant categorically named the accused persons for causing injuries to him on his head with a brick. He attributed specific role to the accused persons. PW-2 (Sri Kishan), complainant's father, admitted him in AIIMS. He also deposed that the accused Sunil Kumar, Gir Raj caught hold Vikas and Nanak gave a brick blow on his head. PW-4 (Smt.Savitri), PW-5 (Ramwati) have also corroborated the oral testimony of complainant-PW-1 (Vikas). All these witnesses were cross-examined at length but no material contradictions/ discrepancies emerged in their statements to disbelieve them. The accused did not deny their presence at the spot. The accused Sunil Kumar and Nanak also sustained some injuries in the incident and were medically examined. It further ensures their presence at the spot and lends credence to the prosecution story that a quarrel took place between the two parties on the said date. On receipt of DD No.35A from PCR on 15.11.2005 around 05:00 A.M., PW-6 (SI Nizamuddin) reached the spot. Accused Nanak, Gir Raj and Sunil were arrested and Kalandra under Section 107/ 151 Cr.P.C. was prepared against them. Copies of the DD No.35A and DD No.4A were exhibited as Ex.PW6/A and Ex.PW6/B respectively. Copy of the Kalandra is exhibited as Ex.PW6/C. PW-7 (Dr.Prem Parkash) proved MLC (Ex.PW7/ A) prepared by Dr.Ram Niranjan Sharma. One injury i.e. cut and lacerated wound was found on the left temporal region. There is no conflict between the ocular and medical evidence. There was no delay in lodging the First Information Report when Kalandra under Section 107/151 Cr.P.C. was lodged soon after the incident. The complainant was taken to AIIMS and was medically examined at 05:17 A.M. i.e. within half

hour of the occurrence. Injuries were opined simple caused by blunt object. Injuries sustained by Sunil Kumar and Nanak were only abrasion and were possible during quarrel. On appreciating the evidence, the Trial Court held the accused persons perpetrators of the crime. I find no reasons to deviate from these findings. The Trial Court has convicted the accused, and rightly, under Section 323 IPC. Admittedly, the complainant and the accused persons were close relatives. They were residing in the same premises. It is undisputed that property dispute was going on between them and civil litigation was pending about the partition of the property. The quarrel had taken place over a trivial issue when the motor-cycle was parked in the passage by complainant's relative. The accused persons were not armed with any deadly weapons. Only a single brick blow was inflicted on the temporal region of the complainant and as per the MLC (Ex.PW-7/A) it was a mere cut and lacerated wound. Its dimensions were not given in the MLC. Within a few hours the complainant was discharged from the hospital. He was not admitted for medical treatment for the injuries sustained by him. It is not clear from where the brick was taken to inflict injury. The brick was not seized from the spot. No attempt was made to inflict repeated blows with the brick. No harm was caused to any other family member of the complainant who reached the spot. All these facts and circumstances categorically rule out that there was intention of the accused persons to cause injuries which could be fatal. PW-7 (Dr.Prem Prakash) in the cross-examination stated that normally an injury of this nature would not cause death. **(Para 4)**

In the light of the above discussion, conviction of the accused persons under Section 323 IPC is maintained. Regarding the order on sentence the convicts have been sentenced to imprisonment till the Rising of the Court (TRC) with fine of Rs.1,000/- each. The convicts have prayed for release on probation as two of them are government servants and any such conviction and sentence would affect their

service career. There is force in the submissions of the convicts. The incident had taken place all of a sudden over a trivial issue of parking of the motor-cycle in the passage. The parties are related to each other. The accused are not previous convicts. Two of them are government servants. The accused were also arrested under Section 107/151 Cr.P.C. They remained in custody for some period after their arrest under Section 308 IPC. **(Para 5)**

Considering all these facts and circumstances the order of sentence requires modification and instead of sentence till TRC and fine of Rs. 1,000/- each, the convicts are given benefit of probation. Considering their age, character, antecedents and the fact that two of them are government servants, instead of sentencing them at once to any punishment, they are ordered to be released on probation of good conduct on their furnishing personal bond in the sum of Rs.20,000/- each with one surety each in the like amount to the satisfaction of the Trial Court for a period of one year, to appear and receive sentence when called upon and in the meantime they shall keep peace and be of good behavior. **(Para 6)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. L.K. Verma & Mr. Dinkar Verma, Advocates, Mr. Ashok Mahipal, Advocate.

FOR THE RESPONDENTS : Mr. M.N. Dudeja, APP ASI Sham Sunder, PS Defence Colony.

RESULT: Appeal of Accused disposed of with directions. Victim's appeal dismissed.

S.P. GARG, J.

1. Nanak, Gir Raj and Sunil Kumar were arrested in case FIR No. 192/2006 and challaned to the court of trial for committing offence under Section 308/34 IPC. Allegations against them were that on 15.11.2005 at

about 05:45 A.M. at House No.376, Masjit Moth, they in furtherance of common intention, voluntarily caused injury to Vikas and attempted to commit culpable homicide not amounting to murder. The prosecution examined eight witnesses. Statements of the accused under Section 313 Cr.P.C. were recorded and they pleaded false implication. On appreciating the evidence and considering the rival contentions of the parties by the impugned judgment all the three accused persons were convicted for committing offence under Section 323/34 IPC. They were sentenced to undergo imprisonment till the Rising of the Court (TRC) with fine Rs. 1,000/- each.

2. The convicts have preferred Crl.A.No.1055/2011 challenging their conviction and sentence under Section 323/34 IPC. The complainant has preferred Crl.A.No.917/2011 challenging acquittal of the accused persons under Section 308 IPC. The victim further challenged the sentence awarded to the accused persons which was not sufficient.

3. I have heard the learned APP for the State and learned counsel for the appellants in both the appeals and have examined the Trial Court record.

4. On scrutinizing the statement of witnesses including the complainant coupled with medical evidence I find no illegality in the findings of the Trial Court whereby the accused persons were held responsible for causing injuries to Vikas in furtherance of their common intention. Complainant-Vikas has filed complaint case. Under Section 156(3) Cr.P.C., the Metropolitan Magistrate directed the police to register case under Section 308 IPC. While appearing as PW-1 the complainant categorically named the accused persons for causing injuries to him on his head with a brick. He attributed specific role to the accused persons. PW-2 (Sri Kishan), complainant's father, admitted him in AIIMS. He also deposed that the accused Sunil Kumar, Gir Raj caught hold Vikas and Nanak gave a brick blow on his head. PW-4 (Smt.Savitri), PW-5 (Ramwati) have also corroborated the oral testimony of complainant-PW-1 (Vikas). All these witnesses were cross-examined at length but no material contradictions/discrepancies emerged in their statements to disbelieve them. The accused did not deny their presence at the spot. The accused Sunil Kumar and Nanak also sustained some injuries in the incident and were medically examined. It further ensures their presence at the spot and lends credence to the prosecution story that a quarrel

took place between the two parties on the said date. On receipt of DD No.35A from PCR on 15.11.2005 around 05:00 A.M., PW-6 (SI Nizamuddin) reached the spot. Accused Nanak, Gir Raj and Sunil were arrested and Kalandra under Section 107/151 Cr.P.C. was prepared against them. Copies of the DD No.35A and DD No.4A were exhibited as Ex.PW6/A and Ex.PW6/B respectively. Copy of the Kalandra is exhibited as Ex.PW6/C. PW-7 (Dr.Prem Parkash) proved MLC (Ex.PW7/A) prepared by Dr.Ram Niranjan Sharma. One injury i.e. cut and lacerated wound was found on the left temporal region. There is no conflict between the ocular and medical evidence. There was no delay in lodging the First Information Report when Kalandra under Section 107/151 Cr.P.C. was lodged soon after the incident. The complainant was taken to AIIMS and was medically examined at 05:17 A.M. i.e. within half hour of the occurrence. Injuries were opined simple caused by blunt object. Injuries sustained by Sunil Kumar and Nanak were only abrasion and were possible during quarrel. On appreciating the evidence, the Trial Court held the accused persons perpetrators of the crime. I find no reasons to deviate from these findings. The Trial Court has convicted the accused, and rightly, under Section 323 IPC. Admittedly, the complainant and the accused persons were close relatives. They were residing in the same premises. It is undisputed that property dispute was going on between them and civil litigation was pending about the partition of the property. The quarrel had taken place over a trivial issue when the motor-cycle was parked in the passage by complainant's relative. The accused persons were not armed with any deadly weapons. Only a single brick blow was inflicted on the temporal region of the complainant and as per the MLC (Ex.PW-7/A) it was a mere cut and lacerated wound. Its dimensions were not given in the MLC. Within a few hours the complainant was discharged from the hospital. He was not admitted for medical treatment for the injuries sustained by him. It is not clear from where the brick was taken to inflict injury. The brick was not seized from the spot. No attempt was made to inflict repeated blows with the brick. No harm was caused to any other family member of the complainant who reached the spot. All these facts and circumstances categorically rule out that there was intention of the accused persons to cause injuries which could be fatal. PW-7 (Dr.Prem Prakash) in the cross-examination stated that normally an injury of this nature would not cause death.

5. In the light of the above discussion, conviction of the accused

persons under Section 323 IPC is maintained. Regarding the order on sentence the convicts have been sentenced to imprisonment till the Rising of the Court (TRC) with fine of Rs.1,000/- each. The convicts have prayed for release on probation as two of them are government servants and any such conviction and sentence would affect their service career. There is force in the submissions of the convicts. The incident had taken place all of a sudden over a trivial issue of parking of the motor-cycle in the passage. The parties are related to each other. The accused are not previous convicts. Two of them are government servants. The accused were also arrested under Section 107/151 Cr.P.C. They remained in custody for some period after their arrest under Section 308 IPC.

6. Considering all these facts and circumstances the order of sentence requires modification and instead of sentence till TRC and fine of Rs. 1,000/- each, the convicts are given benefit of probation. Considering their age, character, antecedents and the fact that two of them are government servants, instead of sentencing them at once to any punishment, they are ordered to be released on probation of good conduct on their furnishing personal bond in the sum of Rs.20,000/- each with one surety each in the like amount to the satisfaction of the Trial Court for a period of one year, to appear and receive sentence when called upon and in the meantime they shall keep peace and be of good behavior.

7. The appeal filed by the victim-Vikas i.e.Crl.A.No.917/2011 is dismissed.

8. Crl.A.No.1055/2011 filed by the convicts is disposed of while maintaining the conviction under Section 323/34 IPC and modifying the order on sentence as stated above.

9. Trial court record be sent back forthwith.

ILR (2013) III DELHI 1772

CRL. A.

ASGAR ALI ....APPELLANT

VERSUS

THE STATE (NCT OF DELHI) ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 255/2011 DATE OF DECISION: 18.02.2013
CRL. M.B. NO. : 336/2011

Indian Penal Code, 1860—Section 376—Indian Evidence Act, 1872—Section 6—Appeal against conviction on the grounds that conviction based on testimony of prosecutrix and her mother without independent corroboration—Vital discrepancies and contradictions in the statements of witnesses. Doctor who examined the prosecutrix, not produced. Doctor who appeared deposed facts which were not mentioned in the MLC—Held—Prosecutrix is a child victim; has no ulterior motive to falsely implicate the accused. Despite searching cross examination no material discrepancies emerged in the statement to discard her version. Her conduct is quite reasonable and natural and is relevant under section 6 of Evidence Act—No inconsistency in the version given by her in her statements under S. 161 and 164 Cr. PC and in the Court—Ocular testimony of prosecutrix is in consonance with medical evidence—Non examination of doctor and non production of medical report would not be fatal to the prosecution case, if evidence of prosecutrix and other witnesses is worthy of credence. Conviction based upon fair appraisal of the evidence and requires no interference.

Learned counsel for the appellant challenged the findings of the Trial Court and urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of the prosecutrix and her mother without independent corroboration. She pointed out various vital discrepancies and contradictions in the statements of the witnesses. The doctor who medically examined the prosecutrix was not produced. The doctor who appeared in her place deposed facts which were not mentioned in the MLC (Ex.PW-12/A). The prosecutrix was unable to clarify what 'wrong act' was done with her. PW-4 (Saira) admitted in the cross-examination that she had visited the accused in Tihar Jail. Only purpose the prosecutrix's mother to visit Tihar Jail was to persuade him to permit his son Dildar for marriage with her. The exact age of the prosecutrix could not be ascertained. The Trial Court did not give due weightage to the defence version without any valid reasons. Forensic Science Laboratory report did not find any semen and blood. Learned APP urged that the judgment is based upon fair appraisal of the evidence and no interference is called for. The prosecutrix had supported the prosecution in its entirety and her testimony requires no corroboration. **(Para 3)**

I have considered the submissions of the parties and have examined the record. The First Information Report was lodged on the statement of the prosecutrix 'X' (Ex.PW-3/A) and she disclosed how and under what circumstances, the accused committed rape upon her forcibly without her consent. The occurrence took place on 17.03.2007 at 08.00 P.M. The First Information Report was lodged at 09.35 P.M. without any delay promptly. It rules out possibility of any fabrication. Prosecutrix's statement was recorded under Section 164 Cr.P.C. on 21.03.2007. PW-11 (Sh.Naresh Kumar, ACJ) proved the proceedings recorded under Section 164 Cr.P.C. In her statement, the prosecutrix named the accused for committing rape on her person on 17.03.2007 at 08.00 P.M. in his house. **(Para 4)**

The prosecutrix is a child victim. Her ossification test was conducted and her age was ascertained 11 to 13 years. She had no ulterior motive to falsely implicate the accused in the incident. The accused had allured the innocent child to his house on the pretext to prepare food for him and thereafter, ravished her when none of his family member was present in the house. Despite searching cross-examination, no material discrepancies emerged in the statement to discard her version. She stood the test of cross-examination. Her conduct is quite reasonable and natural as soon after reaching house, she narrated the entire occurrence to her mother. Her conduct is relevant under Section 6 of the Indian Evidence Act. There is no inconsistency in the version given by her in her statements under Sections 161, 164 Cr.P.C. and in the Court. **(Para 6)**

Ocular testimony of the prosecutrix is in consonance with medical evidence. In the MLC (Ex.PW-12/A) proved by PW-12 (Dr.Geetika Goel) scratch marks were noticed on the nose and face of the prosecutrix. The alleged history recorded in the MLC reveals that she was sexually assaulted by the accused Asgar Ali on 17.03.2007 at 08.00 P.M. It also records that clothes of the prosecutrix were stained over blood. She was examined soon after the occurrence at 11.30 P.M. at GTB Hospital. As per FSL report (Ex.PW-13/A) human semen was detected on Ex.2a (salwar) and Ex.4 (underwear). In **'State vs. Dayal Sahu',** AIR 2005 SCC 2471, the Supreme Court even held that non-examination of doctor and non-production of medical report would not be fatal to the prosecution case if the evidence of prosecutrix and other witnesses is worthy of credence and inspire confidence. **(Para 8)**

The conviction is based upon fair appraisal of the evidence and requires no interference. Regarding order on sentence, the accused was awarded minimum sentence as he committed rape with a child. No reduction in substantive sentences is called for. Regarding fine Rs. 25,000/- under Section 376

IPC, it is reduced to Rs. 5,000/- and in default of payment of fine, he shall undergo SI for two months. Fine Rs. 1,000/- under Section 506 IPC is maintained. However, in default of payment of fine Rs. 1,000/-, he shall undergo SI for fifteen days. **(Para 10)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. Stuti Gujral, Advocate.

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

CASE REFERRED TO:

1. *State* vs. *Dayal Sahu,* AIR 2005 SCC 2471.

RESULT: Appeal disposed of.

S.P. GARG, J.

1. The appellant-Asgar Ali impugns his conviction and sentence in Sessions Case No. 192/2006 arising out of FIR No. 193/2007 PS Welcome by which he was held guilty for committing offences punishable under Sections 376/506 IPC and sentenced to undergo RI for ten years with fine Rs. 25,000/- under Section 376 IPC and in default of payment of fine to further undergo RI for one year. He was also sentenced to undergo RI for two years with fine ' 1,000/- under Section 506 IPC and in default of payment of fine to further undergo RI for two months. Both the sentenced were to operate concurrently.

2. Allegations against the accused were that on 17.03.2007 at about 08.00 P.M. at Fakiri Wali Gali, behind Shanta Colony Police Booth, he committed rape upon 'X' (assumed name) aged about 11 years and threatened her to kill. During the course of investigation, the prosecutrix was medically examined. The accused was arrested. The exhibits were sent to Forensic Science Laboratory. The Investigating Officer recorded statements of the witnesses conversant with the facts. After completion of the investigation, he submitted a charge-sheet against the accused under Sections 376/506 IPC. The accused was duly charged and brought to trial. The prosecution examined as many as thirteen witnesses to prove the charges. In his 313 Cr.P.C. statement, the accused pleaded false implication. He stated that prosecutrix wanted to marry his son and when

he objected to that, she falsely implicated him in this case. DW-1 (Habib Khan) stepped in the witness box in his defence. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment held the accused guilty for committing the aforesaid offences. Being aggrieved, the accused has preferred the appeal.

3. Learned counsel for the appellant challenged the findings of the Trial Court and urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of the prosecutrix and her mother without independent corroboration. She pointed out various vital discrepancies and contradictions in the statements of the witnesses. The doctor who medically examined the prosecutrix was not produced. The doctor who appeared in her place deposed facts which were not mentioned in the MLC (Ex.PW-12/A). The prosecutrix was unable to clarify what 'wrong act' was done with her. PW-4 (Saira) admitted in the cross-examination that she had visited the accused in Tihar Jail. Only purpose the prosecutrix's mother to visit Tihar Jail was to persuade him to permit his son Dildar for marriage with her. The exact age of the prosecutrix could not be ascertained. The Trial Court did not give due weightage to the defence version without any valid reasons. Forensic Science Laboratory report did not find any semen and blood. Learned APP urged that the judgment is based upon fair appraisal of the evidence and no interference is called for. The prosecutrix had supported the prosecution in its entirety and her testimony requires no corroboration.

4. I have considered the submissions of the parties and have examined the record. The First Information Report was lodged on the statement of the prosecutrix 'X' (Ex.PW-3/A) and she disclosed how and under what circumstances, the accused committed rape upon her forcibly without her consent. The occurrence took place on 17.03.2007 at 08.00 P.M. The First Information Report was lodged at 09.35 P.M. without any delay promptly. It rules out possibility of any fabrication. Prosecutrix's statement was recorded under Section 164 Cr.P.C. on 21.03.2007. PW-11 (Sh.Naresh Kumar, ACJ) proved the proceedings recorded under Section 164 Cr.P.C. In her statement, the prosecutrix named the accused for committing rape on her person on 17.03.2007 at 08.00 P.M. in his house.

5. While appearing before the Court as PW-3, she proved the version given to the police and the Metropolitan Magistrate at the first instance without any variation. She deposed when she was returning to her house at about 07.00 P.M. on the day of incident and was crossing through in front of Delhi Wala Hotel, the accused who was known, asked her to make food for him as his daughter was not at home. She cooked rice and dal for him at his house. When she was kneading flour (atta), the accused came from behind, closed her mouth and forcibly made her lie on the floor and raped her (galat kam kiya). He threatened that if she disclosed the incident to anyone, he would kill her. She did not tell out of fear. When she went to her house, she narrated the occurrence to her mother. She took her to the Police Station and her statement (Ex.PW-3/A) recorded. She was cross-examined at length. In the cross-examination, she elaborated that accused's daughter, daughter-in-law and four sons lived in the house. However, she clarified that at the time of occurrence, none was present. She further disclosed that she sustained injuries on her shoulder. The accused tore her salwar and did the 'act' with her. She identified her torn salwar (Ex.PW-3/Article-1) which she was wearing at the time of occurrence. The Court made observation that the salwar was torn from the front side. She further stated that the accused committed rape with her for five minutes. She had started bleeding after rape. Blood had not fallen on the ground where rape was committed. She volunteered to add that the blood had fallen on the ground at the Police Station. She received bruises on her legs during the 'act'. She handed over her clothes to the doctor in the hospital. She denied that her mother intended to marry the accused's son Dildar. She denied that the statement was tutored by her mother. She volunteered that she stated whatever had happened with her.

6. The prosecutrix is a child victim. Her ossification test was conducted and her age was ascertained 11 to 13 years. She had no ulterior motive to falsely implicate the accused in the incident. The accused had allured the innocent child to his house on the pretext to prepare food for him and thereafter, ravished her when none of his family member was present in the house. Despite searching cross-examination, no material discrepancies emerged in the statement to discard her version. She stood the test of cross-examination. Her conduct is quite reasonable and natural as soon after reaching house, she narrated the entire occurrence to her mother. Her conduct is relevant under Section 6 of the Indian Evidence

Act. There is no inconsistency in the version given by her in her statements under Sections 161, 164 Cr.P.C. and in the Court.

7. PW-4 (Saira), X's mother has corroborated her version in its entirety. When the occurrence was revealed to her by the prosecutrix soon after the incident, she took her to the Police Station and lodged the First Information Report without any delay. She fairly admitted that she had visited the accused in Tihar Jail. She offered plausible explanation that she was compelled to visit jail under pressure from accused's two sons.

8. Ocular testimony of the prosecutrix is in consonance with medical evidence. In the MLC (Ex.PW-12/A) proved by PW-12 (Dr.Geetika Goel) scratch marks were noticed on the nose and face of the prosecutrix. The alleged history recorded in the MLC reveals that she was sexually assaulted by the accused Asgar Ali on 17.03.2007 at 08.00 P.M. It also records that clothes of the prosecutrix were stained over blood. She was examined soon after the occurrence at 11.30 P.M. at GTB Hospital. As per FSL report (Ex.PW-13/A) human semen was detected on Ex.2a (salwar) and Ex.4 (underwear). In **'State vs. Dayal Sahu',** AIR 2005 SCC 2471, the Supreme Court even held that non-examination of doctor and non-production of medical report would not be fatal to the prosecution case if the evidence of prosecutrix and other witnesses is worthy of credence and inspire confidence.

9. From the very inception, the prosecution case was that rape was committed upon the prosecutrix. The counsel for the appellant did not seek any clarification in the cross-examination as to what was meant by *'galat kam'*. The Trial Court specifically noted that 'rape' was committed upon the prosecutrix. Minor contradictions or discrepancies highlighted by counsel are not enough to discredit the cogent and reliable testimony of the child victim. The prosecutrix in the cross-examination claimed that her mother used to treat the accused like her father. The accused did not produce any credible evidence to establish that PW-4 (Saira) intended to marry his son Dildar. Dildar was not examined in defence. PW-4 (Saira) explained that she visited Tihar Jail to meet the accused once. She volunteered to add that her husband was missing. She was pressurized by the accused's sons to get the accused released from jail otherwise she would face dire consequences. She named Nazim and Dildar who pressurized her. She further told that even after meeting the accused in

jail, they continued to pressurize her whenever they met her on the way. She left Delhi and went to her in-laws' house at Badaiyun. Her husband was missing at that time. He has since returned. In these circumstances, visit of the prosecutrix's mother cannot be encashed by the accused. Besides it, it is unbelievable that PW-4 (Saira) would level false allegation of rape with her unmarried child/daughter to cast a stigma on her for the rest of her life. It is relevant to note that PW-4 (Saira) had four children and the prosecutrix was aged about 11 years. There was least possibility of her to marry accused's son as alleged. The defence deserves outright rejection.

10. The conviction is based upon fair appraisal of the evidence and requires no interference. Regarding order on sentence, the accused was awarded minimum sentence as he committed rape with a child. No reduction in substantive sentences is called for. Regarding fine Rs. 25,000/- under Section 376 IPC, it is reduced to Rs. 5,000/- and in default of payment of fine, he shall undergo SI for two months. Fine Rs. 1,000/- under Section 506 IPC is maintained. However, in default of payment of fine Rs. 1,000/-, he shall undergo SI for fifteen days.

11. The appeal is disposed of in the above terms. The Trial Court record be sent back forthwith. The Crl.M.B.336/2011 stands disposed of being infructuous.

ILR (2013) III DELHI 1780
CRL. A.

DEEPAK KUMAR **....APPELLANT**

VERSUS

STATE (DELHI) **....RESPONDENT**

(S.P. GARG, J.)

CRL. A. NO. : 232/2010 **DATE OF DECISION: 07.03.2013**

Indian Penal Code, 1860—Section 342, 452, 307, 34—Appeal against conviction and sentence u/s 342, 452, 307, 34 on the grounds that conviction based on sole testimony of complainant. Inconsistent versions as on which date and place the accused were identified by complainant. No crime weapon recovered from accused. Statement of complainant was recorded after inordinate delay and there is discrepancy whether it was recorded at the police station or at his residence—Held—Discrepancies in versions is of no consequence as accused refused to participate in TIP proceedings and the complainant thereafter identified him in Court. Complainant has no ulterior motive to falsely recognize the accused. There was no valid reason for the accused to decline participation in TIP proceedings, adverse inference to be drawn against the accused. Complainant has offered reasonable explanation for delay in recording statement. Minor contradictions as to where the statement was recorded is not enough to throw away his entire version about the incident given in Court—Held—Prosecution unable to find motive of the accused to inflict vital injuries to the victim. It is settled legal proposition that motive has greater significance in a case, involving circumstantial evidence but where direct evidence is available, which

is worth relying upon, motive loses its significance. Ocular testimony of witnesses as to the occurrence cannot be disregarded only by reason of the absence of motive. Appeal has no merits and is dismissed.

Learned counsel for the appellant- Deepak urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error to base conviction on the sole testimony of the complainant- Mukesh Jain. PW-1 (Mukesh Jain) and PW-8 (SI Rajinder Singh), Investigating Officer gave inconsistent version as on which date and place the accused were identified by the complainant. Mukesh Jain claimed that he had identified the accused when they were being produced at Tis Hazari Court on 25.09.1997. The Investigating Officer on contrary claimed that the accused were identified by the complainant on 16.09.1997. DW-1 (Ravinder Singh Bisht) from Tihar Jail categorically deposed that on 25.09.1997 the accused was not produced at Tis Hazari Court in any case. Counsel further pointed out that no crime weapon was recovered from the accused. Statement of the complainant was recorded after inordinate delay and there is discrepancy whether it was recorded at the Police Station or at his residence. It is also not clear if landlord of the complainant was present at the time of recording his statement. Counsel emphasized that Section 34 IPC is not attracted. There was no exhortation by the accused and the complainant made vital improvement in his deposition before the Court. Learned APP urged that complainant- Mukesh Jain had no extraneous consideration to implicate the accused. Medical evidence corroborates his testimony in its entirety. **(Para 4)**

The crucial question is as to who was the author of the injuries caused to the complainant. Victim's testimony is very crucial to establish the guilt of the accused. He was not acquainted with the assailants. There was no animosity with the accused. He did not name the assailants in his statement recorded on 25.07.1997 (Ex.PW-1/DA). The assailants could

not be arrested in this case. On 16.08.1997, Daily Diary (DD) No.42B (Ex.PW-8/D) was recorded intimating arrest of the accused at Police Station Moti Nagar in FIR No. 430/1997. The Investigating Officer- SI Rajinder Singh came to know accused's involvement in the incident from the disclosure statements recorded in the said case. Thereafter, he moved an application (Ex.PW-8/E) for Test Identification Parade on 19.08.1997. The accused were produced in muffled faces in the Court. The accused declined to participate in TIP Proceedings. PW-9 (Sh.A.S.Dateer), MM proved the proceedings Ex.PW-9/A and Ex.PW-9/B. An adverse inference is to be drawn against the accused for not participating in the TIP Proceedings. **(Para 6)**

It is true that there is inconsistency in the statement of PW-1 (Mukesh Jain) and PW-8 (SI Rajinder Singh) about the date when the complainant identified the accused in Tis Hazari Court. The discrepancy is of no consequence as the accused did not participate in the TIP Proceedings and the complainant, thereafter, identified him in the Court. The accused was arrested by the police of PS Moti Nagar in FIR No.430/1997. There was no occasion for the Investigating Officer to show him to the complainant before moving an application for TIP. Moreover, the complainant had no ulterior motive to falsely recognise the accused. There was no valid reason for the accused to decline participation in TIP proceedings. **(Para 9)**

Complainant has offered reasonable explanation for delay in recording statement. He remained admitted in the hospital for ten days and was unfit to make statement. When he was discharged from the hospital, the Investigating Officer recorded his statement. Minor contradictions as to where his statement was recorded at Police Station or at his residence is not enough to throw away his entire version about the incident given in the Court. In **'Kathi Bharat Vajsur and Anr. Vs. State of Gujarat',** AIR 2012 SC 2163, the Supreme Court held :

"19. This Court, in the case of **Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra** : (2010) 13 SCC 657, summarized the law on material contradictions in evidence thus:

30. While appreciating the evidence, the court has to take into consideration whether the contradictions/ omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan.)" **(Para 11)**

The prosecution was unable to find out motive of the accused to inflict vital injuries to the victim. It is a settled legal proposition that motive has greater significance in a case, involving circumstantial evidence but where direct evidence is available, which is worth relying upon, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only by the reason of the absence of motive. **(Para 12)**

Both Deepak and Vinod had gone to the complainant's shop and were armed with weapons. They both participated in the crime. The appellant made the victim fall on the ground and put an iron chain around his neck. They fled the spot together. They were apprehended in FIR No. 430/1997, PS Moti Nagar. It can be inferred that both shared common intention to inflict injuries to the complainant and Section 34 IPC was attracted. Conviction of the appellant is based upon proper appreciation of the evidence and no interference is called for. **(Para 13)**

In the light of above discussion, appeal filed by the appellant lacks merits and is dismissed. The conviction and sentence are maintained. The appellant is directed to surrender and serve the remainder of his sentence. For this purpose, he shall appear before the Trial court on 14th March, 2013. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment. **(Para 14)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Mohd. Shamikh, Advocate.

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

CASES REFERRED TO:

1. *Kathi Bharat Vajsur and Anr.* vs. *State of Gujarat,* AIR 2012 SC 2163.
2. *Prem Singh* vs. *State of Haryana,* 2011 (10) SCALE 102.
3. *State of Uttar Pradesh* vs. *Naresh and Ors.,* (2011) 4 SCC 324.
4. *Sunil Kumar Sambhudayal Gupta (Dr.)* vs. *State of Maharashtra* : (2010) 13 SCC 657.
5. *Abdul Sayed* vs. *State of Madhya Pradesh,* (2010) 10 SCC 259.
6. *Shyam Babu* vs. *State of Haryana :* AIR 2009 SC 577.
7. *State of Haryana* vs. *Surender:* AIR 2007 SC 2312.
8. *Teerath Singh (D) by LR* vs. *State* 2007 (1) ALL LJ (NOR) 143 (UTR).
9. *Munna* vs. *State (NCT of Delhi)* : AIR 2003 SC 3805 (3809).

RESULT: Appeal dismissed.

S.P. GARG, J.

1. The appellant- Deepak Kumar challenges correctness of the judgment dated 25.03.2000 and order on sentence dated 27.03.2000 in Sessions Case No. 246/1997 arising out of FIR No. 280/1997 PS Kirti

Nagar by which he and Vinod Kumar were convicted for committing offences punishable under Sections 342/452/307/34IPC and sentenced to undergo RI for five years with total fine Rs. 5,000/-.

2. On 14.07.1997 at around 05.00 P.M., Mukesh Jain, Sales-man at the shop at M/s. Sultan Chand Vimal Prakash, at I-140, Kirti Nagar was present in the shop. At that time two boys entered the shop and made enquiries from the complainant- Mukesh Jain for nylon. He went to the rear room to bring nylon. The said two boys followed him. He was stabbed with knife. The assailants fled the spot. Daily Diary (DD) No.38B (Ex.PW-8/A) was recorded at 06.30 P.M. at Police Station Kirti Nagar on getting information that an individual has been stabbed at I-140, Kirti Nagar. The investigation was marked to SI Rajinder Singh who with constable went to the spot. Injured Mukesh Jain had already been taken to Deen Dayal Upadhayay Hospital (in short DDU Hospital). The Investigating Officer collected his MLC but he was declared unfit to make statement. Since no eye witness was available, SI Rajinder Singh lodged First Information Report vide endorsement Ex.PW-8/B over DD entry. He went to the spot; prepared site plan (Ex.PW-8/C); got the scene of incident photographed; lifted blood sample from the spot and prepared seizure memo.

3. On 16.08.1997, Daily Diary (DD) No.42B was recorded intimating that Deepak Kumar and Vinod have been arrested in case FIR No.430/1997, Police Station Moti Nagar. SI Rajinder Singh went to Police Station Moti Nagar and collected their disclosure statements. The accused was arrested. Both Deepak and Vinod declined to participate in Test Identification Proceedings. During the course of investigation, the Investigating Officer recorded statements of the witnesses conversant with the facts. On completion of investigation, a charge-sheet was submitted in the Court. The accused were duly charged and brought to trial. On appreciating the evidence and taking into consideration the contentions of both the parties, the Trial Court, by the impugned judgment held both of them guilty for the offences mentioned previously. Being aggrieved, Deepak has preferred the present appeal.

4. Learned counsel for the appellant- Deepak urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error to base conviction on the sole testimony of the complainant- Mukesh Jain. PW-1 (Mukesh Jain) and PW-8 (SI Rajinder

Singh), Investigating Officer gave inconsistent version as on which date and place the accused were identified by the complainant. Mukesh Jain claimed that he had identified the accused when they were being produced at Tis Hazari Court on 25.09.1997. The Investigating Officer on contrary claimed that the accused were identified by the complainant on 16.09.1997. DW-1 (Ravinder Singh Bisht) from Tihar Jail categorically deposed that on 25.09.1997 the accused was not produced at Tis Hazari Court in any case. Counsel further pointed out that no crime weapon was recovered from the accused. Statement of the complainant was recorded after inordinate delay and there is discrepancy whether it was recorded at the Police Station or at his residence. It is also not clear if landlord of the complainant was present at the time of recording his statement. Counsel emphasized that Section 34 IPC is not attracted. There was no exhortation by the accused and the complainant made vital improvement in his deposition before the Court. Learned APP urged that complainant- Mukesh Jain had no extraneous consideration to implicate the accused. Medical evidence corroborates his testimony in its entirety.

5. Daily Diary (DD) No.38B (Ex.PW-8/A) was recorded at 06.30 P.M. It records that an individual was stabbed with a knife at I-140, Kirti Nagar. The victim was taken to DDU Hospital on 14.07.1997 at 06.55 P.M. by HC Surender Kumar of PCR. Two clean lacerated wounds were noticed on his abdomen. The injuries were dangerous in nature inflicted with sharp weapon. The complainant remained admitted in DDU Hospital for ten days and was discharged on 23.07.1997. He was unfit to make statement. Apparently, the injuries were not self-inflicted. The victim had no reason to fake injuries on his body.

6. The crucial question is as to who was the author of the injuries caused to the complainant. Victim's testimony is very crucial to establish the guilt of the accused. He was not acquainted with the assailants. There was no animosity with the accused. He did not name the assailants in his statement recorded on 25.07.1997 (Ex.PW-1/DA). The assailants could not be arrested in this case. On 16.08.1997, Daily Diary (DD) No.42B (Ex.PW-8/D) was recorded intimating arrest of the accused at Police Station Moti Nagar in FIR No. 430/1997. The Investigating Officer- SI Rajinder Singh came to know accused's involvement in the incident from the disclosure statements recorded in the said case. Thereafter, he moved an application (Ex.PW-8/E) for Test Identification Parade on 19.08.1997. The accused were produced in muffled faces in the Court. The accused

declined to participate in TIP Proceedings. PW-9 (Sh.A.S.Dateer), MM proved the proceedings Ex.PW-9/A and Ex.PW-9/B. An adverse inference is to be drawn against the accused for not participating in the TIP Proceedings.

7. While appearing as PW-1, Mukesh Jain without any hesitation identified the appellant as one of the assailants and attributed specific role to him. He proved the version given to the police in his statement (Ex.PW-1/DA) without any variation. He identified and recognised Deepak as the assailant who had put iron chain around his neck. Vinod had stabbed him with knife on his abdomen. He identified shirt (Ex.P1) which he was wearing at the time of incident. In the absence of any ill-will or ulterior motive, the complainant was not imagined to falsely identify Deepak. Testimony of complainant on material facts remained unchallenged and uncontroverted in the cross-examination. Ocular testimony of PW-1 is consistent with medical evidence. PW-2 (Dr. P.S.Sarangi) examined the patient. He was of the opinion that the nature of injury suffered by him was 'dangerous'. His endorsements to that effect are Ex.PW-2/A and Ex.PW-2/B. There are no good reasons to disbelieve the opinion given by the expert witness. PW-4 (Dr.Poonam Aggarwal) also proved MLC (Ex.PW-4/A) when the victim was taken to casualty on 14.07.1997. There is no conflict between the ocular and medical evidence. The testimony of a stamped witness has its own relevance and efficacy. The fact that the witness had sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. The testimony of the injured witness is accorded a special status in law. This is a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of crime and because the witness will not want to let the actual assailant to go unpunished merely to falsely involve a third party for the commission of the offence. In the case of **'State of Uttar Pradesh vs.Naresh and Ors.',** (2011) 4 SCC 324, the Supreme Court held:

> "The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein."

8. In the case of **'Abdul Sayed Vs.State of Madhya Pradesh',** (2010) 10 SCC 259, the Supreme Court held :

> "The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness".

9. It is true that there is inconsistency in the statement of PW-1 (Mukesh Jain) and PW-8 (SI Rajinder Singh) about the date when the complainant identified the accused in Tis Hazari Court. The discrepancy is of no consequence as the accused did not participate in the TIP Proceedings and the complainant, thereafter, identified him in the Court. The accused was arrested by the police of PS Moti Nagar in FIR No.430/1997. There was no occasion for the Investigating Officer to show him to the complainant before moving an application for TIP. Moreover, the complainant had no ulterior motive to falsely recognise the accused. There was no valid reason for the accused to decline participation in TIP proceedings.

10. In **'Prem Singh vs. State of Haryana',** 2011 (10) SCALE 102, the Supreme Court held :

XXX XXX XXX

> "13. The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could

identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. In my considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-Appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case.

14. In the matter of **Shyam Babu v. State of Haryana** : AIR 2009 SC 577 where the accused persons had refused to participate in T.I. parade, it was held that it would speak volumes, about the participation in the Commission of the crime specially if there was No. statement of the accused under Section 313 Code of Criminal Procedure that he had refused to participate in the T.I. Parade since he had been shown to the witnesses in advance. In the matter of **Munna v. State (NCT of Delhi)** : AIR 2003 SC 3805 (3809) as also in the **State of Haryana v. Surender:** AIR 2007 SC 2312; in **Teerath Singh (D) by LR v. State** 2007 (1) ALL LJ (NOR) 143 (UTR) the Supreme Court still further had been pleased to hold that if the statement of the accused refusing to participate in T.I. Parade which was recorded in the order of the Magistrate was missing under Section 313 Code of Criminal Procedure, it was held that it was not open to the accused to contend that the statement of the witnesses made for the first time in Court identifying him should not be relied upon."

11. Complainant has offered reasonable explanation for delay in recording statement. He remained admitted in the hospital for ten days and was unfit to make statement. When he was discharged from the hospital, the Investigating Officer recorded his statement. Minor

contradictions as to where his statement was recorded at Police Station or at his residence is not enough to throw away his entire version about the incident given in the Court. In **'Kathi Bharat Vajsur and Anr. Vs. State of Gujarat',** AIR 2012 SC 2163, the Supreme Court held :

> "19. This Court, in the case of **Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra** : (2010) 13 SCC 657, summarized the law on material contradictions in evidence thus:
>
> 30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan.)"

12. The prosecution was unable to find out motive of the accused to inflict vital injuries to the victim. It is a settled legal proposition that motive has greater significance in a case, involving circumstantial evidence but where direct evidence is available, which is worth relying upon, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only by the reason of the absence of motive.

13. Both Deepak and Vinod had gone to the complainant's shop and were armed with weapons. They both participated in the crime. The appellant made the victim fall on the ground and put an iron chain around his neck. They fled the spot together. They were apprehended in FIR No. 430/1997, PS Moti Nagar. It can be inferred that both shared common intention to inflict injuries to the complainant and Section 34 IPC was attracted. Conviction of the appellant is based upon proper appreciation of the evidence and no interference is called for.

14. In the light of above discussion, appeal filed by the appellant lacks merits and is dismissed. The conviction and sentence are maintained.

The appellant is directed to surrender and serve the remainder of his sentence. For this purpose, he shall appear before the Trial court on 14th March, 2013. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment.

ILR (2013) III DELHI 1791
CRL. A.

BIHARI LAL & ANR. ....APPELLANTS

VERSUS

STATE (NCT OF DELHI) ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 227/1996 DATE OF DECISION: 12.03.2013

Indian Penal Code, 1860—Section 148, 149, 395—Appeal against conviction under section 148, 149 and 395 on the grounds that conviction based on testimonies of interested witnesses, no independent public witness was associated at any stage of the investigation—Held—Appellant could not illicit material discrepancies in the cross examination of victims who had no ulterior motive to falsely implicate the accused. There is no good reason to disbelieve the cogent and reliable testimony of the victims. Minor contradictions, discrepancies and improvements highlighted by the counsel do not effect the core issue and are insignificant. Presence of accused as member of unlawful assembly is sufficient for conviction. He was not a mute spectator or passive witness. U/s 149 IPC even if no overt act is imputed to a particular person, the presence of the accused as a part of unlawful assembly is sufficient for conviction. Every member of an unlawful assembly is vicariously liable for the acts done by others either in prosecution of common object or members of assembly knew were likely to be committed. Conviction based upon fair appraisal of the evidence and requires no interference.

Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its real perspective and fell into grave error to base conviction on the testimonies of interested witnesses, PW-2 (Som Singh) and his wife PW-6 (Nirmal Kaur). The Trial Court ignored vital discrepancies emerging in their statements without valid reasons. No independent public witness was associated at any stage of the investigation. PWs 2 and 6 exonerated Daulat Ram, Mahesh and Raju and did not assign any role to them. The defence version was not given due weightage. Learned Special Public Prosecutor urged that PWs 2 and 6 had no extraneous consideration to implicate the accused.

(Para 3)

On scrutinizing the testimony of PW-2 and PW-6, it reveals that the appellant could not elicit material discrepancies in their cross-examination to disbelieve them. PWs 2 and 6 were victims and had no ulterior motive to falsely implicate the accused. They were having no prior animosity with the accused who was residing in their neighbourhood since long. They were not expected to let the real culprit go scot free and to falsely implicate innocent persons. The accused was known to the victim prior to the occurrence and was identified beyond any doubt. He was identified by the witnesses without hesitation as one of the members of the unlawful assembly. There are no good reasons to disbelieve the cogent and reliable testimony of the victims. They were fair enough to claim that only ornaments which PW-6 was wearing were robbed by Saleem and Pappu. She even did not attribute any overt act to the present appellant Bihari Lal for breaking open the door or robbing her ornaments. She even did not state that the appellant gave any slaps to her.

This makes their testimonies most reliable and trustworthy. Minor contradictions, discrepancies and improvements highlighted by the counsel do not affect the core issue and are insignificant. These are not sufficient reasons to throw away the entire testimony of the natural witnesses. In their statement under Section 313 Cr.P.C. the accused came up with the plea that he was falsely implicated as he was not ironing the clothes of the witnesses. This defence deserves outright rejection. For a trivial issue the victims are not imagined to falsely implicate him. The defence witnesses contradicted themselves in their deposition before the court. The Trial Court gave detailed reasons to discard the version given by them. It is relevant to note that the appellant has also been convicted in other similar cases. **(Para 6)**

Presence of accused as member of unlawful assembly is sufficient for conviction. He was not a mute spectator or passive witness. Under Section 149 IPC even if no overt act is imputed to a particular person, the presence of the accused as a part of unlawful assembly is sufficient for conviction. He was not a passive witness. In **State of U.P. Vs.Kishanpal & Ors.** the Supreme Court held that once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused. Mere membership of the unlawful assembly is sufficient and every member of an unlawful assembly is vicariously liable for the acts done by others either in prosecution of common object or members of assembly knew were likely to be committed. **(Para 7)**

The conviction of the appellant is based on fair appraisal of the evidence and needs no interference. Regarding order on sentence plea has been made to take lenient view as the appellant has suffered trial for 25 years. He has remained in custody since long. It is not disputed that the appellant was not a beneficiary. He did not rob any gold ornaments which PW-6 was wearing. No robbed articles were recovered from his possession. He was not armed with any deadly

weapon. He did not inflict any injury to the victim. He did not break open the house or caused harm to the witnesses or their family members. Considering all these mitigating circumstances, order on sentence is modified and substantive sentence of the appellant is reduced to RI for three years with fine of Rs. 5,000/- and failing to pay the fine, he shall undergo SI for three months. **(Para 8)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. R.K. Bali, Advocate.

FOR THE RESPONDENT : Mr. H.J.S. Ahluwalia, Slp. P.P. for the State.

RESULT: Appeal disposed of.

S.P. GARG, J.

1. Appellant-Bihari Lal impugns judgment dated 04.10.1996 in Sessions Case No.9/1996 arising out of FIR No.426/1984 registered at Police Station Kalyan Puri by which he was convicted for committing offences punishable under Section 148 and 395 IPC read with Section 149 IPC. Vide order dated 05.10.1996 he was sentenced to undergo rigorous imprisonment for five years with total fine of Rs. 30,000/-.

2. Allegations against the accused were that on 01.11.1984 at about 09.00 P.M. near House No.396, Block No.21, Trilok Puri, he, Daulat Ram, Rajjan, Mahesh, Raju and other unknown persons formed an unlawful assembly, the object of which was to kill people, loot and burn their houses and in prosecution of the said common object, they looted house of complainant-Som Singh (PW-2). They were armed with deadly weapons. The prosecution examined seven witnesses. In the statement under Section 313 Cr.P.C., the accused pleaded false implication. DW-1 (Krishan Kumar), DW-2 (Raj Karan Singh) and DW-3 (Ram Chander) appeared in defence. On appreciating the evidence and considering the rival submissions of the parties, the Trial Court by the impugned judgment convicted Bihari Lal and Rajjan for the offences described previously. Raju, Mahesh and Daulat Ram were acquitted of all the charges. Being aggrieved, Bihari Lal and Rajjan preferred the appeal. It is relevant to note

that during the pendency of the appeal Rajjan expired. His death was verified and vide order dated 9th April, 2012, the appeal stood abated qua him.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its real perspective and fell into grave error to base conviction on the testimonies of interested witnesses, PW-2 (Som Singh) and his wife PW-6 (Nirmal Kaur). The Trial Court ignored vital discrepancies emerging in their statements without valid reasons. No independent public witness was associated at any stage of the investigation. PWs 2 and 6 exonerated Daulat Ram, Mahesh and Raju and did not assign any role to them. The defence version was not given due weightage. Learned Special Public Prosecutor urged that PWs 2 and 6 had no extraneous consideration to implicate the accused.

4. I have considered the submissions of the parties and examined the record. Earlier no separate FIR was registered in respect of rioting that took place in Block No.21, Trilok Puri. Sessions Case No.9/1996 was filed after directions by the High Court for splitting up of challan filed in FIR 426/1984 on the basis of various incidents having taken place on different dates and on different basis. Statement of complainant-Som Singh (PW-2) was recorded and he disclosed that on 01.11.1984 at about 09.00 P.M. a crowd of rioters came to his house and broke open the door. Due to fear, he went on the first floor. His household articles were looted. His wife's golden ear-rings were taken away by the rioters. He named Bihari Lal (Dhobi), Saleem (President of Sanjay Camp Jhuggis), Rajjan (who used to sell fish), Daulat Ram (who used to sell clothes), Pappu (fruitwala) and Mahesh (Baniya) amongst the rioters. During the course of investigation, they all were arrested. Statements of witnesses conversant with the facts were recorded.

5. While appearing as PW-2 (Som Singh) proved the version given to the police at the first instance without any variation. He deposed that on the next day of Mrs.Gandhi's death at about 7.00/7.30 P.M. a crowd of rioters armed with dandas, sarias and other such like instruments came to their mohalla. The crowd was crying *'MARO, MAAR DO MAAR DO'*. The crowd attacked his house and broke the door. His wife was standing at the door and they started beating her. He was able to recognize Pappu-fruitwala, Rajjan, Saleem and Bihari amongst the crowd. The crowd forcibly removed the earrings of his wife. Pappu and Saleem

were foremost among the rioters in removing the earrings. Rajjan hit the door of the house. He was carrying a dragger. He ran away from the house through the back door. Neighbours gathered and told the rioters that he (Som Nath) was not a sikh and was a clean shaved person. They protected them and saved the life of his family members. PW-2 identified Rajjan and Bihari Lal. He exonerated Daulat Ram, Mahesh and Rajjan and stated that they were not seen in the crowd. In the cross-examination, he denied the suggestion that after hearing the news of riots, he had left his house for security and safety and had taken shelter in someone's house. He elaborated that after running away from his house, he took shelter in the house of Prem Chand and did not return till the situation became normal. He was taken to a refugee camp on the third day of the riots. His family had taken shelter in some other house. His statement was recorded on 19th November, 1984. He had gone to the police station earlier to lodge report but it was not recorded. He further clarified that he had run away from the stairs which were opening inside his room and were leading to the roof and after reaching the roof, he jumped to the another roof of different house. He did not lodge any claim with the Commissioner of Claims. PW-6 (Nirmal Kaur) corroborated PW-2's version in its entirety. She also named Saleem, Pappu, Bihari and Rajjan to be among the crowd who came to their house. They were armed with lathis, iron rods, swords and such like other striking instruments. She further deposed that Saleem and Pappu snatched her ornaments which she was wearing. She was also slapped by them and after that she became unconscious. Her husband fled after she was attacked. In the cross-examination, she stated that she was shifted to relief camp on the third day of the riots, by military people. Her two sons had taken shelter in the house of Pandits. She was not aware as to where her husband was at that time. He met her in the camp after three days. She fairly admitted that she could not see the total number of rioters outside the house. She was unable to tell who broke open the door. She fairly disclosed that except breaking open the door and snatching her ornament, no other looting was done in the house at that time.

6. On scrutinizing the testimony of PW-2 and PW-6, it reveals that the appellant could not elicit material discrepancies in their cross-examination to disbelieve them. PWs 2 and 6 were victims and had no ulterior motive to falsely implicate the accused. They were having no prior animosity with the accused who was residing in their neighbourhood since long.

They were not expected to let the real culprit go scot free and to falsely implicate innocent persons. The accused was known to the victim prior to the occurrence and was identified beyond any doubt. He was identified by the witnesses without hesitation as one of the members of the unlawful assembly. There are no good reasons to disbelieve the cogent and reliable testimony of the victims. They were fair enough to claim that only ornaments which PW-6 was wearing were robbed by Saleem and Pappu. She even did not attribute any overt act to the present appellant Bihari Lal for breaking open the door or robbing her ornaments. She even did not state that the appellant gave any slaps to her. This makes their testimonies most reliable and trustworthy 'Minor contradictions' discrepancies and improvements highlighted by the counsel do not affect the core issue and are insignificant. These are not sufficient reasons to throw away the entire testimony of the natural witnesses. In their statement under Section 313 Cr.P.C. the accused came up with the plea that he was falsely implicated as he was not ironing the clothes of the witnesses. This defence deserves outright rejection. For a trivial issue the victims are not imagined to falsely implicate him. The defence witnesses contradicted themselves in their deposition before the court. The Trial Court gave detailed reasons to discard the version given by them. It is relevant to note that the appellant has also been convicted in other similar cases.

7. Presence of accused as member of unlawful assembly is sufficient for conviction. He was not a mute spectator or passive witness. Under Section 149 IPC even if no overt act is imputed to a particular person, the presence of the accused as a part of unlawful assembly is sufficient for conviction. He was not a passive witness. In **State of U.P. Vs.Kishanpal & Ors.** the Supreme Court held that once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused. Mere membership of the unlawful assembly is sufficient and every member of an unlawful assembly is vicariously liable for the acts done by others either in prosecution of common object or members of assembly knew were likely to be committed.

8. The conviction of the appellant is based on fair appraisal of the evidence and needs no interference. Regarding order on sentence plea has been made to take lenient view as the appellant has suffered trial for 25 years. He has remained in custody since long. It is not disputed that

the appellant was not a beneficiary. He did not rob any gold ornaments which PW-6 was wearing. No robbed articles were recovered from his possession. He was not armed with any deadly weapon. He did not inflict any injury to the victim. He did not break open the house or caused harm to the witnesses or their family members. Considering all these mitigating circumstances, order on sentence is modified and substantive sentence of the appellant is reduced to RI for three years with fine of Rs. 5,000/- and failing to pay the fine, he shall undergo SI for three months.

9. The appeal stands disposed of in the above terms.

10. Trial court record be sent back forthwith.

ILR (2013) III DELHI 1798
CO. PET.

GUJARAT STATE FINANCIAL SERVICES LTD. ....PETITIONER

VERSUS

THAPAR AGRO MILLS LTD. ....RESPONDENT

(S. MURALIDHAR, J.)

CO. PET. NO. : 81/1996 DATE OF DECISION: 20.03.2013

Companies Act, 1956—Sections 391 to 394—Scheme of Compromise and arrangement—Sanctioned and company ordered to be wound up vide order dated 25.04.2000—Scheme of compromise and arrangement proposed—Petition filed for sanction of the scheme—Order for holding of meeting of the shareholders, secured and unsecured creditors—Meeting accordingly held—shareholders, secured creditors and unsecured creditors approved the scheme—Petitioner stated the scheme will benefit all the parties concerned

and will be in public interest—Notices issued to Ministry of Corporate Affairs and also the official liquidator—Objections filed by the OL and the Regional Director (RD), Ministry of Corporate Affairs—OL stated strategic investor not disclosed—The balance sheets, profit and loss accounts and re-structing of existing liabilities highly fanciful and imaginary—New plant and machinery would be quite expensive—RD stated no mention of rehabilitation of the workmen—Not stated about having obtained no objection from SEBI and Stock exchanges—Propounder filed affidavit stating no objection received from all the stakeholders—Rejoinder to objection of OL filed wherein it was stated all creditors except IFCI approved the scheme—Strategic investors paid substantial amount—Scheme viable and if given effect to, will wipe out all liabilities of TAML (THAPAR AGRO MILLS LTD.)—Net worth certificate enclosed total cost of the scheme is much more than assests—Further affidavit filed by propounder updating information regarding dues of creditors—Some dues already paid in full—Some payable within 30 days of sanction of the scheme and some within 4 months of the sanction—Counter Affidavit filed by IARC—Agreed to receive the balance in 4 months—IFCI agreed to accept the balance in 6 months—IDBI acknowledged payment—Held, 90% shareholders, secured and unsecured creditors approved the scheme—Strategic investor demonstrated its bonafides—Terms of balance amount payment reasonable—Objections of OL do not survive—Points raised by RD also accounted for entire sums claimed by departments and statutory bodies—Govt. bodies served of the notice of meeting—No objections filed till date—Sanction accorded to the scheme with modifications—Petition allowed.

Important Issue Involved: Function of the Court while sanctioning the compromise or arrangement is limited to oversee that the compromise or arrangement arrived at is lawful and that the affairs of the company were not concluded in a manner prejudicial to the interest of its members or to public interest of its members or to public interest, that is to say, it should not be unfair or contrary to public policy or unconscionable. Once these things are satisfied, the scheme has to be sanctioned as per the compromise arrived at between the parties.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Co. Pet. No. 81/1996 Mr. Manish K. Bishnoi, Advocate for the OL Mr. S.B. Singh Advocate for Auction Purchaser/applicant in CA Nos. 322 and 440 of 2013. Co. Pet. No. 425/2011: Mr. Rajiv Bahl, Mr. S.B. Singh, Advocate for Auction Purchaser/Applicant in CA Nos. 322 and 440 of 2013. Mr. Arun Kathpalia with Mr. C.S. Gupta, Advocate for ex-Management/Propounders. Ms. Amrita Mishra, Advocate for SBI Mutual Fund. Mr. Arvind Kumar Singh, Advocate for IFCI Ltd. Mr. Sanjiv Kakra with Mr. Irfan Ahmed, Advocates for IARC. Mr. Sangram Patnaik, Advocate for IDBI.

FOR THE RESPONDENT : Mr. Arun Kathpalia with Mr. C.S. Gupta, Advocates for ex-Management/Propounders. Mr. Arvind Mishra, Advocate for SBI Mutual Fund. Mr. Arvind Kumar Singh, Advocate for IFCI Ltd. Mr. Sanjiv Kakra with Mr. Irfan Ahmed,

Advocates for IARC. Mr. Sangram Patnaik, Advocate for IDBI.

CASES REFERRED TO:

1. *Hindustan Lever* vs. *State of Maharashtra* (2004) 9 SCC 438.
2. *Miheer H. Mafatlal* vs. *Mafatlal Industries Ltd.* (1997) 1 SCC 579.

RESULT: Petition allowed. Sanction accorded. Direction issued.

S. MURALIDHAR, J.

1. Co. Pet. No. 425 of 2011 has been filed by the former Directors/ Share Holders of the Respondent company, Thapar Agro Mills Ltd. ('TAML') for sanction of the Scheme of compromise and arrangement ('Scheme') under Sections 391 to 394 of the Companies Act, 1956 ('Act') for revival of TAML which was ordered to be wound up by the Court by an order dated 25th April 2000 in Co. Pet. No. 81 of 1996.

2. Earlier, by an order dated 11th May 2011 in Co. Appln. Nos. 742 and 744 of 2011 in Co. Pet. No. 81 of 1996, the Court had issued directions for holding of the meeting of the share holders, secured and unsecured creditors of TAML. Pursuant to the said order a meeting of the secured creditors was 9th held on July 2011. 5 of the secured creditors representing 90.57% approved the Scheme. In the meeting of the equity share holders held on the same day, 62 share holders representing 100% of the members present and voting approved the Scheme. At the meeting of the unsecured creditors held on the same day, 41 unsecured creditors representing 99.07% approved the Scheme. It is stated that apart from the fact that the Scheme has been approved by over 90% of the share holders and secured and unsecured creditors of TAML, the Scheme will also benefit all the parties concerned and will be in public interest.

3. A copy of the Scheme has been enclosed as Annexure P-3 to Co. Pet. No. 425 of 2011. The main features of the Scheme have been set out in paras 9.10 and 9.20 of Co. Pet. No. 425 of 2011 as under:

"9.10

Settlement with creditors:

That the applicant contributories/shareholders and ex-directors, promoters with the help of Strategic Investor are able to work out settlement with majority of secured creditors ensuring revival and sustainability of the company on long term basis. The secured creditors are i.e. State Bank of Patiala ('SBOP'), State Bank of India ('SBI'), Industrial Finance Corporation of India ('IFCI'), Standard Chartered Bank ('SCB'), Punjab State Industrial Development Corporation ('PSIDC'), Punjab National Bank ('PNB') and Punjab Financial Corporation ('PFC'). State Bank of Patiala & Punjab National Bank have already assigned their dues in favour of securitization company-International Assets Reconstruction Company Private Limited ('IARC') vide deed of Assignment dated 20th March 2009 & dated 24th December 2009 respectively. State Bank of India is also in the process of assigning dues in favour of IARC. TAML has classified it's creditors in various classes based on preferential payments, security interest created, agreements and instruments executed between parties. The applicant contributories/ex-management have negotiated One Time Settlement of dues of secured creditors and also paid upfront amount with the help of Strategic Investor. The present scheme is therefore on very realistic basis. In views of One Time Settlement with State Bank of Patiala/IARC, State Bank of India, Industrial Financial Corporation Limited, Punjab State Industrial Development Corporation, Punjab Financial Corporation, Punjab National Bank/IARC and Standard Chartered Bank, settled dues shall be paid as per the payment schedule in the Scheme."

"9.20

Settlement Terms:

In terms of present Scheme, the dues and liabilities of secured creditors, unsecured creditors, statutory liabilities and other liabilities are being paid as under:

A. Class-I Secured Creditors

Sl. No.	Name	Settlement negotiated	Already paid
(a)	State Bank of Patiala & Punjab National Bank both assigned to M/s. International Assets Reconstru-ction Company Private Limited.	1000.00	250.00
(b)	IFCI Limited (@)	170.00	10.00
(c)	Punjab State Industrial Development Corporation Limited	253.50 247.24 (**)	38.03 209.21
(d)	State Bank of India	245.00	12.25
(e)	ICICI assigned to Standard Chartered Bank	45.00 (*)	0.00
(f)	Punjab Financial Corporation	6.43 (**)	6.43
	Total	1719.93	525.92

Settlement Letters issued by secured creditors have already been filed with this Hon'ble Court enclosed marked as Annexure P-4 (Colly), Annexure P-5 (Colly), Annexure P-6 (Colly), Annexure P-7 (Colly) & Annexure P-8 (Colly).

(*) Applicant has already approached SCB for settlement at Rs.45 lakhs and approval is yet to be received. Copy of letter for settlement is enclsosed as Annexure P-9. (@) IFCI has issued letter to revoke OTS but as per OTS terms, pending settlement amount will carry interest.

(**) Dues of PSIDC and PFC have been paid full.

B. Class II-Fixed Deposit Holder & Employee Dues

Sl. No.	Name	Settlement offered
1.	Fixed Deposit Holders	312.30
2.	Employees claim	0.73
	Total	313.03

C. Class III-Govt. Dues & Statutory liabilities

No.	Particulars	Settlement offered (Rs. In lakhs)
1.	Ministry of Commerce, DGFT, Ludhiana	90.00
2.	Office of the Dy. Commissioner Excise Taxation —do—	11.81 4.38
3.	Dy Excise and Taxation Comm, Ambala	25.19
4.	Income Tax, Delhi	35.64
5.	Municipal Taxes and other Taxes	61.19
	Total (A)	228.21

Principal dues of Rs.17.78 lakhs of P.F. Department will be paid at Par.

D. Class IV-NCD Holders (Unsecured)

Sl. No.	Name	Settlement offered
	NCD Debenture Holders	170.00
	Total (20% of 170.00 principals)	

E Class V-Lease Finance, ICD, Bills Discounting & unsecured creditors including unsecured creditors obtained decree:

Sl. No.	Name	Settlement offered
	Unsecured creditors including lease finance, ICD, bills discounting, Bridge loans, raw material suppliers etc. including obtained decree from competent courts.	275.76
	Total (15% of principals)	275.76"

4. Notice in Co. Pet. No. 425 of 2011 was issued to the Regional Director ('RD'), Northern Region, Ministry of Corporate Affairs as well as the Official Liquidator ('OL') on 3rd October 2011.

5. One of the objections by the OL is that the claim does not disclose the name of the strategic investor whose help is sought for reviving TAML. The projected balance sheets, profit and loss accounts and restructuring of existing liabilities are stated to be "highly fanciful and imaginary" and "baseless and very vague". Second objection is that the Scheme proposed to set a Solvent Extraction Plant at Ludhiana for which new plant and machinery would have to be bought for a sum of Rs.200 lakhs. It is stated that since the old plant and machinery was sold at Rs.2.05 crores the new plant and machinery would be much more expensive.

6. In the affidavit of the RD it is pointed out that apart from the fact that the name of the strategic investor is not disclosed there is no mention about any rehabilitation of the workmen. It is further stated that there is no mention also whether the company has obtained no objection from the Securities and Exchange Board of India ('SEBI') and the Stock Exchanges.

7. An affidavit dated 20th January 2012 has been filed by Mr. Satish Thapar, one of the former Directors of TAML stating that pursuant to the publication effected in the newspapers as directed by the Court, no objection has been received from any share holder, secured creditors, unsecured creditors or any other party.

8. Mr. Satish Thapar has on 3rd March 2012 filed a rejoinder to the objections of the OL. In this he has disclosed that except IFCI all other creditors have accepted the Scheme upfront. It is further stated that the total payment of Rs.525.92 lakhs through the strategic investor itself

establishes the bonafides of the Scheme. It is further stated that the Scheme is viable and if given effect to, all the liabilities of TAML will be wiped out. As regards the strategic investor, it is explained as under:

> "A very close friend of the promoters have (sic has)come forward to help in settlement and to revive company. The promoters had given personal guarantee and there is huge decree passed by Debt Recovery Tribunals. The promoters considered appropriate to settle dues of the creditors and revive operations, hence they requested close old family friend for help. Shri Karam Singh Bath resident of H.No. 285, New Jawahar Nagar, Jalandhar and Mr. Pavitar Singh resident of H.No.678, Urban Estate Phase-II, Jalandhar who are financially strong and capable of bringing funds agreed to help promoters by bringing funds through their closely held company M/s. Silverline Build Tech Private Limited having registered office at 306-L/1, Model Town Jalandhar, Punjab. The net worth of the said company is more than Rs.16 crores (sixteen crores) and net worth of Mr. Karam Singh Bath & family is around Rs.230 Crores (Two hundred thirty crores) and net worth of Mr. Pavitar Singh is around Rs.33 crores (Thirty three crores)."

9. A copy of the net worth certificate as on 30th January 2012 as duly certified by the Chartered Accountant ('CA') has been enclosed. It is pointed out that there are no imaginary figures either in the projected balance sheet or in the profit and loss account. It is stated that under the Scheme, the total payments of Rs.2,724.71 lakhs have been envisaged and the total cost of the Scheme is approx. Rs.36.50 crores which is much more than the total value of all the assets. The plant and machinery proposed to be set up is of much lower capacity than the earlier plant and machinery which was sold at scrap value of Rs.2.05 crores. The present revival process involves only a small capacity of Solvent Extraction Plant having capitalisation value of around Rs.200 lakhs. It is accordingly submitted that there is no basis of comparison with the earlier plant and machinery as stated by the OL. It is pointed out that the Scheme has already received the support and confidence of 90% of the stake holders.

10. An affidavit has been filed on 11th October 2012 by Mr. Satish Thapar updating the information regarding the dues of the creditors. As far as the SBOP, the PNB, the SCB and the SBI are concerned, the debts

owing to them have been assigned to IARC. The negotiated settlement amount as regards IARC is Rs.1,290 lakhs of which a sum of Rs.262.50 lakhs has been paid. The dues of the PSIDC (Rs.247.24 lakhs) and of the PFC (Rs.6.43 lakhs) have already been paid in full. It is stated in para 5 that it is proposed that the dues of the IFCI together with interest would be paid within 30 days of the sanction of the Scheme and the dues of IARC and other unsecured creditors within four months of the sanction of Scheme. A sum of Rs.526.17 lakhs has been already brought in by the strategic investor which demonstrates the bonafides shown by it to revive the company. It is explained that the revival is in two phases: (a) establish the operations of the oil mill in the first phase and (b) real estate development of surplus assets in second phase. A sum of Rs. 0.73 lakhs is offered for settling the claims of the employees.

11. On 10th December 2012, a counter affidavit was filed by IARC stating that Rs.250 lakhs deposited with it has been kept in a no lien account. It is submitted by IARC that TAML should be directed to pay it the settlement amount as per the Scheme.

12. The submissions of learned counsel for the parties have been heard at some length.

13. Counsel for IARC states on instructions that IARC agrees that after appropriating the sum of Rs. 250 lakhs kept in the no lien account towards its dues, the balance amount would be paid by TAML to IARC within four months of the sanction of the Scheme.

14. Counsel for the IFCI states on instructions that IFCI is agreeable that the balance amount owing to it can be paid to by TAML within six months from the date of the sanction of the Scheme together with simple interest @ 15% per annum.

15. Counsel for the IDBI acknowledges that out of the sum of Rs.49.20 lakhs owing to it, a sum of Rs.41 lakhs has already been paid. Further, a post dated cheque ('PDC') dated 31st March 2013 has been issued in its favour for the balance sum of Rs. 8.20 lakhs.

16. It has been stated by Mr. Arun Kathpalia, learned counsel appearing for the Propounders on instructions that the said PDC when presented for payment will be honoured. He further states that in the unlikely event of the cheque not being honoured IDBI can have recourse to all the remedies available to it in accordance with law. He also states

that the former Director of TAML will give an undertaking by way of an affidavit to the above effect.

17. The above submissions have been considered by the Court. The broad principles governing the consideration by the Company Court of a Scheme presented to it under Section 394 of the Act for revival of a company have been explained by the Supreme Court in **Miheer H. Mafatlal v. Mafatlal Industries Ltd.** (1997) 1 SCC 579 and later reiterated in **Hindustan Lever v. State of Maharashtra** (2004) 9 SCC 438. It was explained in the latter decision in (SCC para 32, p.457) that: "Function of the Court while sanctioning the compromise or arrangement is limited to oversee that the compromise or arrangement arrived at is lawful and that the affairs of the company were not conducted in a manner prejudicial to the interest of its members or to public interest, that is to say, it should not be unfair or contrary to public policy or unconscionable. Once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties." It was also explained in **Hindustan Lever** as under (SCC, p. 451):

> "While exercising its power in sanctioning the scheme of amalgamation, the court is to satisfy itself that the provisions of statute have been complied with. That the class was fairly represented by those who attended the meeting and that the statutory majority was acting bona fide and not in an oppressive manner. That the arrangement is such as which a prudent, intelligent or honest man or a member of the class concerned and acting in respect of the interest might reasonably take. While examining as to whether the majority was acting bona fide, the court would satisfy itself to the effect that the affairs of the company were not being conducted in a manner prejudicial to the interest of its members or to public interest. The basic principle underlying such a situation is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to public policy and unconscionable or against the law."

18. The Court proceeds to examine the Scheme for revival presented to it by the former Directors of TAML in light of the above principles. The explanation offered by Mr. Satish Thapar in his affidavit in regard

to the objections raised by the OL merits acceptance. What weighs with the Court first is that over 90% of the share holders, secured creditors and unsecured creditors of TAML have approved the Scheme. The second factor is that the strategic investor has demonstrated its bonafides by bringing in the money which has been used to pay off some of the secured creditors as noted hereinbefore. Thirdly, the terms on which the balance amount will be paid to the creditors appears to be reasonable. Learned counsel appearing on behalf of the creditors have conveyed to the Court that they accept the terms of payment as proposed. Therefore the objections of OL do not survive. This also accounts for the points raised by the RD in its report.

19. In para 2 (C) of the affidavit filed by Mr. Satish Thapar on 11th October 2012, the claims of the Government and statutory bodies as accepted by the Propounders have been set out. Mr. Arun Kathpalia, learned counsel for the Propounders, explains that these figures were taken from the Report No. 596 of 2012 dated 10th October 2012 of the OL which has enclosed as Annexure-B a copy of the report of the Committee that had examined the claims of the creditors as well as Government and employees. In the said report the claims of Government and employees have been set out as under:

"C. Claims of Government and Employees (Preferential Payment) under Section 530.

	Claims Received	Claims Admitted /Rejected	Remarks
1. Ministry of Commerce, DGFT, Ludhiana	90,00,000.00	90,00,000.00	
2. Office of the Dy. Commissioner (i) Excise Taxation, Ludhiana (ii)	11,80,689.00 4,37,792.00	5,49,554.00 1,73,211.00	
3. Dy. Excise & Taxation Commissioner-	25,18,740.00	25,18,740.00	

Cum-Collector, Ambala			
4. Income Tax Department, New Delhi.	35,64,000.00	Rejected	Claims are not received. 1. Relates to a period of 91-92 to 97-98 (2) not in proper form.
5. N.C. Bhatt, Manager	1,14,920.00	20,000.00	(Admitted under Section 530.)"

20. As against the above determination, the Propounders have in the affidavit dated 11th October 2012 accounted for the entire sums claimed by each of the above Government departments and statutory bodies. Further it has been undertaken that the principal dues of Rs.17.78 lakhs of the Provident Fund Department which have been raised subsequently will be paid.

21. Mr. Manish K. Bishnoi, learned counsel for the OL submitted that it was not clear whether the above Government agencies had in fact been served notices. As far as the above submission is concerned, it is seen that along with Co. Pet. No. 425 of 2011 the Propounders have placed as Annexure P11 the list of unsecured creditors. This includes the above Government departments and statutory bodies. It is this list that was placed before the Chairperson of the meeting of unsecured creditors convened pursuant to the orders passed by this Court. The report of that meeting was chaired by Mr. P.K. Mittal. He has sworn an affidavit dated 15th July 2011 enclosing his report of meeting as Annexure-A. He has stated that the unsecured creditors were "summoned by notice served individually upon them in person by post and by advertisements published in Delhi Edition of 'Indian Express' (English) in its issue dated 14th June, 2011 and in 'Veer Arjun' (Hindi) in its issue dated 14th June, 2011. Ludhiana Edition of 'Indian Express' (English) dated 14th June, 2011 and 'Ajit Samachar' (Hindi) dated 14th June, 2011 and duly held at Hotel Parkland Exotica, Chhatarpur Mandir Road, Mehrauli, New Delhi on 9th July, 2011 at 3.00 P.M." The report also notes that 44 unsecured creditors attended the meeting by which they approved the Scheme.

22. When notices have been served of the meeting to approve the Scheme on all the unsecured creditors including the Government

departments, the requirement of giving them an opportunity to object to the Scheme has been fulfilled. When no objection till date has been received, it cannot be presumed that they have any objection to the Scheme as such. Nevertheless, Mr. Arun Kathpalia, learned counsel appearing for the Propounders on instructions makes a statement that the Propounders will file an affidavit in this Court within three days stating that if there are any further statutory or Government dues that may be found to be payable by TAML, they will be paid in accordance with law. With the above statement there are no further objections to the Scheme.

23. Accordingly, sanction is hereby accorded to the Scheme as propounded by the Propounders with the modifications as indicated hereinabove and subject to TAML filing an affidavit by way of undertaking in this Court within three days stating that:

(i) the post dated cheque dated 31st March 2013 issued to IDBI will be honoured upon presentation.

(ii) the balance dues of the IFCI will be paid within six months from today together with simple interest @ 15% per annum.

(iii) IARC will be permitted to appropriate Rs.2.5 crores kept with it in a no lien account towards its dues. The balance dues of IARC will be paid within four months from the date of sanction of the Scheme.

(iv) apart from clearing the statutory dues as mentioned in the Scheme, any further statutory dues that may become payable will be paid by the Propounders in accordance with law. The dues of the Government and statutory bodies as mentioned in the Scheme and in the affidavit dated 11th October 2012 of Mr. Satish Thapar will be paid within four months from the date of sanction of the Scheme.

24. The fund position of TAML as on 5th September 2012 is Rs.78,61,836. The OL will after paying of the dues of the security agency as well as deducting the expenses incurred by the OL thus far (for which a detailed statement will be filed in these proceedings by the OL with a copy to the Propounders within four weeks) release the balance sum to the Propounders simultaneous with handing over to the Propounders possession of the registered office and any other movable or immovable assets that have been seized and which remain in the possession of the OL together with the books of accounts, records and all other documents within a period of four weeks from today. This is subject to the Propounders furnishing to the OL copy of the affidavit by

way of undertaking in terms of the above directions given by the Court.

25. With such handing over of the books of accounts, the OL will stand discharged and Co. Pet. No. 81 of 1996 will be closed.

26. Within 30 days TAML will file with the ROC an intimation of revival of TAML and take all other appropriate steps including filing of final returns, balance sheets and other statutory documents in accordance with law.

27. In the event there is any default in any of the above steps, it will be open to the parties to approach this Court for directions.

28. Company Petition No. 425 of 2011 is disposed of in the above terms.

CA No. 322 of 2013 in Co. Pet. No. 81 of 1996 (for modification of order dated 29th September 2005)

29. This is an application for modification of order dated 29th September 2005 passed by the Court in regard to purchase of 8.78 acres of land by the Applicant belonging to TAML at Rudrapur, Tehsil Kichha, District Nainital (Uttarakhand). It is stated that earlier the Applicant had filed an application, being CA No.1178 of 2004 which was disposed of by the Court on 29th September 2005 rejecting the prayer of the Applicant that he should be given possession of 12 acres of land instead of nine acres. Counsel for the parties confirm that the sale was made to the Applicant of only 8.78 acres and possession was also given to him of that extent of land.

30. In the present application, it is now stated that in CA No.1178 of 2004, the prayer was in two parts. One relating to the area of the land and the other relating to removal of encroachment by the former Directors from the office of the unit which was sold to the Applicant in auction. Counsel for the Applicant states that although the said application was disposed of, nothing was said about the encroachment and that therefore the Applicant wishes to renew the said prayer regarding encroachment by way of this application.

31. Possession of the extent of 8.78 acres of land was given to the Applicant way back in 2004. The application earlier filed by the Applicant was also disposed of on 29th September 2005. The Applicant has waited for almost nine years thereafter to file the present application. It is, therefore, not possible for the Court to entertain his prayer at this stage.

In the event that the Applicant is aggrieved by any unauthorized encroachment on the land in question, it will be open to the Applicant to take recourse to other remedies as may be available to the Applicant in accordance with law.

32. The application is dismissed with the above observations.

CA No. 440 of 2013 in Co. Pet. No. 81 of 1996 (for handing over of the balance/left out land as noted in order dated 29th September 2005)

33. In view of the fact that the Scheme propounded by the former Directors of TAML has been approved by a separate order, passed today, this application does not survive and is dismissed as such.

ILR (2013) III DELHI 1813
W.P.

X (ASSUMED NAME OF THE PROSECUTRIX) ....PETITIONER

VERSUS

THE STATE (N.C.T. OF DELHI) & ORS. ....RESPONDENTS

(S.P. GARG, J.)

W.P. (CRL.) NO. : 449/2013 DATE OF DECISION: 22.03.2013

Constitution of India, 1950—Article 226—Writ petition—Code of Criminal Procedure, 1973—Section 482—Medical Termination of Pregnancy Act, 1971—Section 3—Termination of pregnancy—Victim of rape—Medically examined—Had pregnancy of 6 weeks—Living alone in Delhi; does not want to bear a child—Writ petition filed for directions to State for terminating her pregnancy and to preserve the foetus for DNA test—Status report filed—Pregnancy can be terminated with minimal know risks—State has no objection for

termination of pregnancy—Enquiries made—Victim is major; has consultation with her counsel; understands the consequences of her act—Expressed willingness to terminate the pregnancy—Consent of woman essential for termination of pregnancy—Likely to face mental, physical, social and economical problems in future—Petition allowed—Directions issued.

Important Issue Involved: The provision in the Medical Termination of Pregnancy Act, 1971 indicate that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any mental illness.

The Explanation to Section 3 contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman.

A woman has the option to get the pregnancy terminated by a registered medical practitioner, if it does not exceed 12 weeks. If the duration of the pregnancy exceeds 12 weeks but does not exceed 20 weeks, such a termination can be done by not less than two registered medical practitioner, who will give the opinion whether the continuance of the pregnancy would involve a risk to the life of the pregnant woman and grave injury to her physical and mental health.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Ms. Kiran Singh, Advocate.

FOR THE RESPONDENT : Mr. Pawan Sharma, Standing Counsel (Criminal)

CASE REFERRED TO:

1. *Suchita Srivastava and Anr.* Vs. *Chandigarh Administration,* (2009) 9 SCC 1.

RESULT: Petition allowed.

S.P. GARG, J. (OPEN COURT)

1. The petitioner-'X' has filed the present writ petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure seeking directions to the respondents for terminating her pregnancy and to preserve the fetus for DNA test.

2. Notice was issued to the respondents. Status report has been filed and it is taken on record. I have made enquiries from the petitioner in the presence of her counsel Ms.Kiran Singh, Advocate in the chamber. She has expressed her willingness to get her pregnancy terminated. She states that she is unable to carry the pregnancy to full term due to social stigma as she is victim of rape. I have also made enquiries from Kapil who in chamber separately. He had no objection to the petitioner getting her pregnancy terminated. He admitted that he was already married and has children. I also had conversation with Arti, petitioner's friend separately. She volunteered to take care of the petitioner during her termination of pregnancy.

3. 'X' lodged report with the police on 31.01.2013 and case vide FIR No.22/2013 under Section 376/506 IPC was registered against Kapil. She was medically examined at AIIMS on 31.01.2013. It was found that she was having pregnancy of six weeks duration. Her statement under Section 164 Cr.P.C. was recorded. Kapil was arrested and is in custody.

4. Petitioner is not legally married to Kapil and he is already married and has children. Allegedly, he established physical relations with 'X' on false promise to marry her. Kapil did not inform 'X' his marital status before seeking her consent for physical relationship. She became pregnant as a result of the alleged rape. During her medical examination, it was found that she was pregnant for about six weeks at that point of time. She is living alone with her friend in Delhi and her parents are not aware of her association with Kapil. She does not want to bear a child as she was cheated by Kapil and intends to punish him.

5. State has no objection if 'X' gets her pregnancy terminated. Kapil has also not objected to it. 'X' is major aged about 22 years. She has consultation with her counsel Ms. Kiran Singh. She understands the consequence of her act. On 21.03.2013, she was medically examined at AIIMS and as per doctors, opinion, pregnancy can be terminated with minimal known risks. The victim has expressed her willingness to terminate

the pregnancy. The Court must respect her decision. In **'Suchita Srivastava and anr. Vs. Chandigarh Administration',** (2009) 9 SCC 1, the Supreme Court held :

> "37. As evident from its literal description, the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court's decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evidence that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights."

6. A plain reading of provision in the Medical Termination of Pregnancy Act, 1971 clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer any 'mental illness'. The Explanations to Section 3 have contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman. In such circumstances, consent of the pregnant woman is an essential requirement for proceeding with the termination of the pregnancy under Section 3 of the Act. Any woman has the option to get the pregnancy terminated by a registered medical practitioner, if it does not exceed 12 weeks. If the duration of the pregnancy exceeds 12 weeks but does not exceed 20 weeks such a termination can be done by not less than two registered medical practitioners, who will give the opinion whether the continuance of the pregnancy would involve a risk to the life of the pregnant woman and grave injury to her physical and mental health.

7. To carry a child in her womb by a woman as a result of conception through an act of rape is extremely traumatic, humiliating and psychologically devastating. 'X' hails from the poor strata of the society and is likely to face innumerable mental, physical, social and economical problems in future. There are no reasons to prevent her not to exercise her option voluntarily in her interest.

8. For the forgoing reasons, the petition is allowed with the direction to the SHO of the concerned police station or any other responsible police officer with lady police officer to accompany the complainant 'X' and produce her before Medical Superintendent, AIIMS within three days to get her pregnancy terminated where Board of two medical practitioners would be constituted by the Medical Superintendent on that day itself. The Medical Board would take the decision immediately for termination of the pregnancy and it will be terminated in accordance with the provision of Section 3 of the Act. They shall preserve the fetus and DNA test will be conducted thereupon and its report shall be produced before the Trial Court at the earliest.

9. The petition is allowed in the above terms. Arti, X's friend shall be permitted to take her care. Needless to say, 'X' will be provided proper medicine, diet and nutritious food as may be necessary for her health. Copy of the order be sent to the Medical Superintendent, AIIMS.

10. Copy of the order be given dasti to the Investigating Officer under the signatures of the Court Master.

ILR (2013) III DELHI 1817
W.P. (C)

VIJAY SINGHAL & ORS. ....PETITIONERS

VERSUS

GOVT. OF NCT OF DELHI & ANR. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

W.P. (C) NO. : 195/2013 DATE OF DECISION: 22.03.2013

(A) Constitution of India, 1950—Article 226—Code of Criminal Procedure, 1973—Section 327—Ban imposed on reporting of a rape trial which has a seering public interest—Interpretation of S. 327—Whether open trial a rule—Does S. 327 (2) which provides for in camera trial in a rape case envisages access and is so in what manner—Advisory was issued by the Public Relations Officer, of the Delhi Police that since the Magistrate had taken cognizance u/s 302 and 376 (2)(g) IPC in the charge sheet, the provisions of section 327(2) and (3) of the CrPC got triggered—Petitioner moved an application before the Magistrate seeking permission to report the Court proceedings which was dismissed by the Magistrate—Present writ petition filed challenging the ban—Petitioner contends that the primary object of S. 327 is to provide for a fair trial—Sub Section 2 and 3 were introduced by amendment to protect the dignity of rape victim—As victim has died, sub Section 2 and 3 will have no applicability and that the media had acted with due restraint in reporting the case—Provisions of s. 327 being used to cover the inadequacy of the State, in particular, that of the police—Blanket ban is illegal—Respondent contended that right of the media to report Court proceedings is not an absolute right as is clearly envisaged in Sub-section (3) of s. 327 CrPC—Ban was imposed taking into account the sensitivity of the case, the safety of accused and the concern of the Court to maintain anonymity qua the identity of the victim, her family as also the accused—Held: Composite and a close reading of the provisions of Section 327 of the Cr.P.C. clearly point to the fact:

(i) that the general principle of open public trial is a rule, which ought not to be disturbed except in exceptional circumstances;

(ii) under proviso to Sub Section (1) of Section 327, it is the Court which is empowered to exclude the public generally or any particular person having regard to the facts and circumstances of each case. For example, where the case involves examination of say indecent material which could embarrass women and children, if present in Court; the Court could ask for their exclusion.

(iii) even with offences involving rape and other allied offences, referred to in Sub Section (2) of Section 327, there is discretion vested in the Court to grant access to any particular person or persons based on the Presiding Judge's wisdom or on an application of any of the parties. It is not as if the use of the word 'shall' in the main part of Sub Section (2) of Section 327, has emasculated the Presiding Judge of his/her discretion in the matter.

(iv) The fact that there is discretion vested in the Judge to permit printing or publication of trial proceedings, is evident both on a plain reading of the provisions of Sub Section (3) of Section 327 alongwith the proviso. **(Para 24.8)**

Guidelines for the mode and manner in which such discretion is to be exercised.

(i) In a case involving inquiry or trial into rape ordinarily the proceedings will be held in camera. The concerned Court, while passing the order will take into account the concerns of the victim; the family members of the victim, if the victim is dead; the concerns of the accused, as also the interest, of the witnesses.

(ii) In employing this discretion, what would have to be borne in mind, would be whether affording access to the trial by public at large, would lead to embarrassment to the victim or the family of the victim, effect on the quality of evidence that may be placed before the Court in the form of testimonies, the issues concerning safety and security of the parties, including witnesses and accused. In so far as the aspect of safety and security is concerned, the Court would engage the state authorities for provision of adequate measures in that behalf. The measures, however, cannot include complete ouster of access to Court proceedings by members of public. Safety and security issues can be met, as experience has taught us, by either shifting the venue of trial or by beefing up the security. (See **Kehar Singh's** case and recent trial in **Mohammed Ajmal Mohammad Amir Kasab**

alias Abu Mujahid v. State of Maharashtra, (2012) 9 SCC 234).

(iii) The concerns with regard to the victim and her family can also be met by Court excluding wholly or in part the members of public during the trial. The Court could also direct reduction of portions of the testimony if the same is found to be indecent or impacts the character and reputation of the victim or the accused.

(iv) The status of the party should be least of the Court concerns.

(v) The court should assess whether access to public, and by necessary implication its surrogate, that is, the media, impede administration of justice. It will have to be borne in the mind that freedom of speech and expression under Article 19(1)(a) of the Constitution of India includes the freedom of press. A right which is subject to reasonable restriction under clause (2) of Article 19(1)(a). See observations in **Sakal Papers (P) Ltd. and Ors. Vs. The Union of India,** AIR 1962 SC 305. This right is conferred upon not only the disseminator of the speech (i.e., the media in this case) but also the recipient, which would be the public at large. See **Tata Press Ltd. Vs. Mahanagar Telephone Nigam Ltd. and Ors.,** (1995) 5 SCC 139 at page 156 paragraph 24, Secretary, **Ministry of Information and Broadcasting, Govt. of India and Ors. Vs. Cricket Association of Bengal and Ors.,** (1995) 2 SCC 161 at page 196 paragraph 20. The Court in Tata Press went further by holding that even commercial speech was part of free speech and thus protected under Article 19(1)(a) of the Constitution. In gauging the situation at hand, the test of "necessity" and "proportionality" would have to be employed (see **Sahara's** case).

(vi) The right to fair trial will have to be kept in a balance alongwith the right to know. The weight used, will be the "ends of justice". This weight will determine the tilt of the balance. **(Para 27)**

Further Held—Even in a rape trial the Court is required to consider the various facets and dimensions obtaining in the case-mechanical approach is to be abjured—Directions issued in the present case.

(i) The Court will allow access to one representative journalist of each of the accredited National dailies. The Petitioners before me represent some of them.

(ii) The reporting shall not include the name of the victim or those of the members of the family of the victim or the complainant or witnesses cited in the proceedings.

(iii) The reportage shall exclude that part of the proceedings, which the Court specifically so directs.

(iv) The reporters of UNI and PTI and other national dailies shall share their stories with representatives of other newspapers and members of the electronic media. **(Para 29)**

Therefore, the questions which come to fore are:-

(i) Is open trial, a rule?

(ii) Does Sub Section (2) of Section 327 of Cr.P.C., which provides for an in camera trial in a rape case, envisage access? If so, in what manner?

(iii) What are the factors to be kept in mind when, a Court decides to exercise its power under Section 327 (2) of Cr.P.C. **(Para 10)**

On behalf of the Petitioners, arguments were advanced by Ms. Meenakshi Lekhi, while on behalf of the Respondents, submissions were made by Mr. Dayan Krishnan. 16.1 Ms. Lekhi broadly made the following submissions :-

(i). The Petitioners seeking access to Court proceedings are responsible senior correspondents of both print and electronic media. The ghastly incident came to light because of the intercession and involvement of the media.

(ii). The advisory dated 05.01.2013 was issued at 09.00 p.m. on the said date by the Respondents to cover up their inadequacy. The Respondents had failed to advert to the provisions of Section 302 of the IPC which was brought to light by the correspondens. The power to issue a direction under Section 327(2) and (3) of the Cr. P.C. vests with the Court and not with the Respondents.

(iii). The primary object of Section 327 of the Cr. P.C. is to provide for a fair trial in an open Court which would safeguard the right of the accused to be tried fairly and hence, advance the cause of justice.

(iv). Sub Sections (2) and (3) of Section 327 of the Cr. P.C. were brought onto the statute book by virtue of Criminal Law (Amendment) Act, 1983 (in short 1983 Act) with the object of protecting the dignity of a rape victim and to enable the victim to depose comfortably in surroundings which she may not be too familiar with. The essence of the provision being to improve the quality of evidence brought forth by the prosecutrix i.e., the victim.

(v). In view of the fact that, in the instant case the victim has died, the provisions of Section 327(2) and (3) would have no applicability. Both the advisory and the impugned order dated 07.01.2013 and 21.01.2013 issued by the learned Magistrate and learned ASJ violate the fundamental rights of the Petitioner under Article 19(1)(a) and 21 of the Constitution of India. The impugned advisory and the orders of the Court below amount to a gag order, which is an anti-thesis to the principle that Court trials should be held in public gaze, to which, public should have access.

(vi). The Media has acted with due responsibility and restraint despite the fact that the name of the victim and her family members is in public domain. The media applied self-restraint, even prior to the impugned advisory and / or orders issued in that behalf by the Respondents and Courts below, respectively. The fact that the victim's name is in public domain was sought to be established, by drawing my

attention to the affidavit dated 04.02.2013, apparently filed by the father of the victim with the South Delhi Municipal Corporation so that they could dedicate a park or a school or any other welfare institution or a scheme to the memory of the victim.

(vii). To buttress her submission, Ms. Lekhi also pointed to the fact that, the sole eye witness to the crime had appeared on television and given his version of the events as they transpired on the fateful day.

(ix). It was further contended that because the media highlighted the case, both this Court as well as the Supreme Court, commenced suo motu proceedings; albeit qua other aspects involving the same crime.

(x). The provisions of Section 327 cannot be used to cover the inadequacy of the State, in particular those of the police.

(xi). A blanket ban is illegal. Reasonable restrictions can be imposed, where for example testimony of one witness may affect the testimony of another witness. The Court, while passing the impugned order, failed to apply the test of "necessity" and "proportionality", adverted to, by the Constitution Bench of the Supreme Court in the case of **Sahara India Real Estate Corporation Limited and Ors. Vs. Securities and Exchange Board of India and Anr.,** (2012) 10 SCC 603.

(xii). The Court was required to balance the two competing rights, that is, the right of the public to know and have access to Court trials as against right of the victim's family and that of the accused to confidentiality. In the instant case, neither the family of the victim nor the accused has sought **in camera** trial, and instead, **in camera** trial, is sought by the State.

(xiii). If access is granted to the Petitioners, they would abide by the principle of confidentiality qua the name of the victim and her family members and also adhere to any reasonable

restrictions imposed by the Court from time to time in the interest of prosecution of the case and the endeavour of the Court to reach a just conclusion in the matter. In support of her submissions, reliance was also placed on the following judgments :-

> **Naresh Shridhar Mirajkar and Ors. Vs. State of Maharashtra and Anr.,** AIR 1967 (54) SC 1, **Trilochan Singh Johar and Anr. Vs. State and Anr.** 98 (2002) DLT 228; In **Re Vijay Kumar** (1996) 6 SCC 466; **Kehar Singh and Ors. Vs. State (Delhi Administration),** AIR 1988 SC 1883. **(Para 16)**

On the other hand. Mr Dayan Krishnan, on behalf of the Respondents made the following submissions in opposition to the contentions raised on behalf of the Petitioners.

(i) The writ petition was not maintainable. The Petitioners instead of approaching this Court by way of a petition under Article 226 of the Constitution of India, ought to have either filed a revision petition under Section 397 or a petition under Section 482 of the Cr.P.C.;

(ii) The provisions of Section 327(2) of the Cr.P.C. mandates that an inquiry as also a trial in respect of an offence of rape should be carried out in camera. The accused in this case are inter alia charged with offences under Section 376(2)(g) and Section 377 of the IPC. In respect of this proposition reliance was placed on two judgments of the Supreme Court: **State of Punjab vs Gurmit Singh** (1996) 2 SCC 384 and **Sakshi vs Union of India and Ors.** 2004 (5) SCC 518. In addition, reference is also made to the 84th report of the Law Commission pursuant to which Sub Sections (2) & (3) were incorporated in Section 327 of the Cr.P.C. in addition to, the insertion of Section 228A in the IPC;

(iii) To emphasise the point, that the in camera trial was mandatory while trying cases pertaining to sexual offences, reliance was placed on the directions passed by the Supreme Court in Sakshi's case, whereby it is now declared that the

provisions of Section 327(2) of the Cr.P.C. would, in addition, apply even in respect of an inquiry and/or trial of offences under Section 354 and 377 of IPC.

(iv) The right of the media to report Court proceedings is not an absolute right, which is why, Sub Section (3) of Section 327 of Cr.P.C. makes it unlawful for any person to print or publish any matter in relation to proceedings where section 327(2) has been triggered.

(v) Since the Petitioners have not challenged the constitutional vires of Section 327(2) of Cr.P.C., the Petitioners are required by law to comply with the orders passed by the Court below. This argument was sought to be supported, once again, by relying upon extracts from the 84th report of the Law Commission.

(vi) The object of a trial is to meet the ends of justice, and if, in order to achieve that end there is a competition, in a manner of speaking, between the right to a free trial as against the right to freedom of expression, the former would trump the latter. In respect of this proposition reliance was placed on the judgments of the Supreme Court in **Mirajkar's** case and the **Sahara's** case.

(vii) The judge, presiding over the trial, has the power under Section 327 of the Cr.P.C. to regulate access in any given case depending on the circumstances and atmosphere prevailing in the Court. This right is vested in the presiding Judge or Magistrate statutorily by the proviso to Sub Section (1) of Section 327 of the Cr.P.C. The fact that the presiding judge has discretion even in circumstances where order is passed, under Sub Section (2) of Section 327 of the Cr.P.C., is apparent on a reading of the first proviso to Section 327(2) and the proviso to Section 327(3) of the Cr.P.C. This discretion would naturally be exercised in the light of facts and circumstances obtaining in each case. The Courts below have taken the necessary circumstances into account, while passing orders under Section 327(2) of the Cr.P.C.

(viii) The media had been repeatedly cautioned against excessive publicity, in cases where it has led to interference in administration of justice. Reliance in this regard was placed on the judgment of the Supreme Court in **Sidhartha Vashisht alias Manu Sharma vs State (NCT of Delhi)** 2010 (6) SCC 1 as also the judgment of the Supreme Court in the Sahara's case and the judgment of the Bombay High Court, in the case of, **Mustaq Moosa Tarani vs Govt. of India** dated 31.03.2005 passed in WP(C) 269/2005.

(ix) Publication of information in respect of trials which are ordered to be held **in camera** tantamounts to contempt of Court under the provisions of Section 7 of the Contempt of Courts Act, 1971.

(x) There was no illegality in the Delhi Police issuing the impugned advisory since, Section 327 (2) and (3) of the Cr.P.C. are mandatory in nature and no specific order is required to be issued by the trial Court in this behalf. The advisory was issued as a measure of "Courtesy" to the media, as violation of the provisions of Section 327(2) and (3) of the Cr.P.C., would require the police to register FIRs under Section 228A of the IPC.

(xi) The provision in Sub Section (2) of Section 327 of the Cr.P.C. which mandates **in camera** trial is not unique to this particular statute, as there are several other statutes which provide for in camera trial. Reference in this regard was made to Order 32A Rule (2) of the Code of Civil Procedure, 1908 (in short CPC); Section 22 of the Hindu Marriage Act, 1955; Section 43 of the Parsi Marriage and Divorce Act, 1936; Section 33 of the Special Marriage Act, 1954; Section 11 of the Family Courts Act, 1984; Section 16 of the Protection of Women from Domestic Violence Act, 2005; Section 22 (eeee) of the Mental Health Act, 1987; Section 237(2) of the Cr.P.C. in respect of prosecution of defamation under Section 199(2) of the Cr.P.C.; Section 265B(4) in a case involving plea bargaining; Section 17 of the National Investigation Agency Act, 2008; Section 36AJ of the Banking

Regulation Act, 1949; Section 52 M of the Insurance Act, 1938; Section 17 of the State Bank of India (Subsidiary Banks) Act, 1959. Reference was also placed to statutes of other nations as well as international covenants and treaties to emphasise the point that exclusion of media in order to ensure fair trial was not peculiar to India. Reliance in this behalf was placed on the Sexual Offences (Amendment) Act, 1992; Youth Justice and Criminal Evidence Act, 1999; Sexual Offences Act, 2003 which amended Section (2) of the Sexual Offences (Amendment) Act, 1992 whereby the array of offences in respect of protection of the identity of the victim was widened; Section 41 of the Criminal Procedure and Investigation Act, 1996; Judicial Proceedings (Regulation of Reports) Act, 1926; Section 8 and 8C of the Magistrate Courts Act 1980; Part 16 of the Criminal Procedure Rules, 2012; Section 46 of the Youth Justice and Criminal Evidence Act, 1999; Section 8(1)(d) of the Court Suppression and Non-Publication Orders Act, 2010 No.106 of New South Wales; Article 68 of the Rome Statute of the International Criminal Court; Article 14 and 19 of the International Covenant on Civil and Political Right (ICCPR); Article 10 of the European Convention on Human Rights; Siracusa Principles on the Limitation and Derogation provisions in the ICCPR; the Madrid Principles on the Relationship between the Media and Judicial independence. In addition, the Canadian position was sought to be explained by referring to the following publication: The Canadian Justice System and the Media by the Canadian Judicial Council and the judgment of the Canadian Court in **Dagenais v. Canadian Broadcasting Corporation and National Film Board of Canada** (1994) 3 S.C.R. 835 (Per Lamer C.J.C., at p. 878). **(Para 17)**

The sum and substance of Mr Dayan Krishnan's submission was that the impugned orders have been passed taking into account the sensitivity of the case, the safety of the accused and the concern of the Court to maintain anonymity qua the identity of the victim, her family, as also, the accused. These concerns, according to Mr Dayan, outweighed the right of

the media conferred under Article 19(1)(a) of the Constitution of India. **(Para 18)**

(B) Constitution of India, 1950—Article 226—Code of Criminal Procedure, 1973—Section 397, 482—Respondents contend that present writ petition is not maintainable—Ought to have filed a revision petition u/s 397 or a petition u/s 482 of the CrPC—Held, as all three proceedings would lie in the High Court, as presently positioned, the mere fact that the Petitioners have chosen to approach this Court by way of a petition under Article 226 of the Constitution of India, will not come in the way of the Court entertaining petition. The power under Article 226 of the Constitution, which is available to the Court, is far wide. As a matter of fact, the Petitioners not being a party to the criminal proceeding, would perhaps not be entertained if, a revision petition were to be filed under Section 397 of the Cr.P.C. or a petition under Section 482 of the Cr. P.C. This would, however, not fetter the Court from entertaining proceedings on its own against orders of the Court below, if deemed fit, in a given case.

The other objection taken by the learned counsel for the Respondents is that the present proceeding is not maintainable as the Petitioners ought to have taken recourse to the provisions of Section 397 and 482 of the Cr.P.C. and not to a proceeding under Article 226 of the Constitution of India. According to me this argument is untenable as all three proceedings would lie in the High Court, as presently positioned. The mere fact that the Petitioners have chosen to approach this Court by way of a petition under Article 226 of the Constitution of India, will not come in the way of the Court entertaining a petition. The power under Article 226 of the Constitution, which is available to the Court, is far wider. As a matter of fact, the Petitioners, not being a party to the criminal proceeding, would perhaps not be entertained if, a

revision petition were to be filed under Section 397 of the Cr.P.C. or a petition under Section 482 of the Cr.P.C. This would, however, not fetter the Court from entertaining proceedings on its own against orders of the Courts below, if deemed fit, in a given case. (see **Sarveshwar Singh Vs. State,** 1999 "Cr. LJ 2179) **(Para 31)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Ms. Meenakshi Lekhi, Mr. Harish Pandey & Mr. Jitendra Kr. Tripathi, Advocates.

FOR THE RESPONDENTS : Mr. Dayan Krishnan, ASC with Ms. Manvi Priya, Advocate.

CASES REFERRED TO:

1. *Sahara India Real Estate Corporation Limited and Ors.* vs. *Securities and Exchange Board of India and Anr.,* (2012) 10 SCC 603.
2. *Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid* vs. *State of Maharashtra,* (2012) 9 SCC 234).
3. *Sidhartha Vashisht alias Manu Sharma* vs. *State (NCT of Delhi)* 2010 (6) SCC 1.
4. *Sakshi* vs. *Union of India and Ors.* 2004 (5) SCC 518.
5. *Trilochan Singh Johar and Anr.* vs. *State and Anr.* 98 (2002) DLT 228.
6. *Basavaraj R. Patil and Ors.* vs. *State of Karnataka and Ors,* AIR 2000 SC 3214 at page 3222 paragraph 24.
7. *Kush Saigal & Ors.* vs. *M.C. Mitter & Ors.* (2000) 4 SCC 526).
8. *Sarveshwar Singh* vs. *State,* 1999 Cr. LJ 2179).
9. *State of Punjab vs Gurmit Singh* (1996) 2 SCC 384.
10. *Tata Press Ltd.* vs. *Mahanagar Telephone Nigam Ltd. and Ors.,* (1995) 5 SCC 139 at page 156 paragraph 24, Secretary.

11. *Ministry of Information and Broadcasting, Govt. of India and Ors.* vs. *Cricket Association of Bengal and Ors.,* (1995) 2 SCC 161 at page 196 paragraph 20.
12. *Dagenais* vs. *Canadian Broadcasting Corporation and National Film Board of Canada* (1994) 3 S.C.R. 835.
13. *Kehar Singh and Ors.* vs. *State (Delhi Administration),* AIR 1988 SC 1883.
14. *Globe Newspaper Co.* vs. *Superior Court* (1982) 457 US 596.
15. *Richmond Newspaper Inc.* vs. *Virginia* (1980) 448 US 555.
16. *Gannet Co.* vs. *De Pasquale* (1979) 443 US 368.
17. *Naresh Shridhar Mirajkar and Ors.* vs. *State of Maharashtra and Anr.,* AIR 1967 (54) SC 1.
18. *Sakal Papers (P) Ltd. and Ors.* vs. *The Union of India,* AIR 1962 SC 305.
19. *State of U.P.* vs. *Babu Ram Upadhya,* AIR 1961 SC 751.
20. *Prasanta Kumar Mukherjee* vs. *the State,* AIR (39) 1952 Calcutta 91.
21. *Government of the Province of Bombay* vs. *Hormusji Manekji,* AIR 1947 (34) P.C. 200 at page 205 in paragraph 24.
22. *Kailash Nath Agarwal* vs. *Emperor,* AIR 1947 (34) Allahabad 436.
23. *Cora Lillian Mc Pherson* vs. *Oran Leo Mc Pherson,* AIR 1936 PC 246 at page 250.
24. *Nathusing* vs. *Emperor,* (1925) 26 Cri. LJ 1130.

RESULT: Passing of interim directions.

RAJIV SHAKDHER, J.

1. 16 December, 2012 once again heightened the sense of insecurity which women of this city and perhaps in most parts of this country carry in their sub conscious mind. A young lady was raped and mauled in a moving bus and left to die on the street, without a stitch of cloth

on herself. Her companion was brutalized and beaten when, he attempted to intervene.

2. The news of this heinous and dastardly act spread like wild fire. There was revulsion and disgust at the sheer bestiality of the act.

3. People spilled out on roads, in spontaneous groups. Some came to express solidarity with the young lady (who at that point of time was battling for her life), some to express their disapproval at the ineffectiveness of the State apparatus and others to exhort the administration, to deal sternly with the perpetrators of the crime.

4. There were impassioned debates on these and various other aspects, connected with crime against women in the print and electronic media. The social media was not far behind. Views were expressed by all and Sundry, from the experts to lay people. Views ranged from opinions on what should have been done, to what ought to have been done. An already complex debate went into a free fall when it was discovered that one of the accused may be a juvenile.

4.1. Fortunately, the accused were caught in quick time. A Commission of Enquiry was set up with an eminent jurist Chief Justice J.S. Verma (Retd.) at its head followed by another Commission headed by Ms.Usha Mehra, a retired Judge of this Court. Since then the J.S. Verma Committee has submitted its recommendations to the Government of India, as a consequence of which an ordinance has been passed. The Government of India is mulling over a draft Criminal Law (Amendment) Bill of 2013. This Court also lent its shoulder to the issue, by setting up Fast-track Courts to deal with cases of sexual offences against women.

5. The debate is on, to lower the age of juveniles in conflict with law. Strident voices heard on television and, views expressed through print media, debate : as to how the Juvenile Justice Act, 2000 (as the JJ Act) should be interpreted and how such interpretation would render JJ Act inapplicable, to such like crimes.

5.1 It is professed in some quarters that in the very least the JJ Act should be amended to either lower the age of juvenility or exclude such like crimes, committed by juveniles, from the purview of the JJ Act.

5.2 There is a contra view as well, which cautions against a knee-jerk reaction. This Section of the populace seeks status quo on JJ Act,

advises against awarding death penalty to rapists or punishment of castration, whether chemical or otherwise; categorising such punishments as degrading and inhuman.

6. Both, the discourse as well as debate is on. There is, thus, undeniably a huge public interest in the prosecution of the case. With the victim dead, (she lost her battle for survival on 29.12.2012 in a Singapore Hospital), committal proceedings over and the accused charged; the trial has commenced. The six accused before the trial Court and eighty (80) witnesses, the prosecution wishes to examine; the Police; the Prosecutor; and the Court; are in the public gaze. As one speaks, one of the accused has died in custody.

7. With this background, to deny, that there is a seering public interest in the prosecution of the case, would be to act like an ostrich, whose head is buried in sand. But then, law made by Parliament which has the will of the very same people behind it, who seek access to Court proceedings, should ride this tumultuous phase.

8. The question is, therefore, what is the law on the subject. Section 327 of the Code of Criminal Procedure, 19731[1] (hereinafter referred to as Cr.P.C.) provides in the first instance for an open trial which, is caveated with a directive that, in a case involving rape, trial "shall" be held in camera. Simultaneously, it confers jurisdiction on the Court to

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1. 327. Court to be open

(1) The place in which any Criminal Court is held for the Purpose of inquiring into or trying any offence shall be deemed to be an open Court to which the public generally may have access, so far as the same can conveniently contain them.

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access, to or be or remain in, the room building used by the Court.

[(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376D of the Indian Penal Code (45 of 1860) shall be conducted in camera.

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court.]

either, on its own, or on an application of parties, allow access to any particular person of their choice.

9. The Court is also conferred with the discretion to lift the ban on reporting.

10. Therefore, the questions which come to fore are:-

(i) Is open trial, a rule?

(ii) Does Sub Section (2) of Section 327 of Cr.P.C., which provides for an in camera trial in a rape case, envisage access? If so, in what manner?

(iii) What are the factors to be kept in mind when, a Court decides to exercise its power under Section 327 (2) of Cr.P.C.

11. Before I proceed further with regard to the issues raised in the writ petition, it may be relevant to sketch out briefly the background circumstances adverted to in the writ petition and the submissions of the counsels for both sides.

11.1. As indicated above, the incident of gang rape occurred on 16.12.2012. Consequently, an FIR bearing no.413/2012 was registered, initially, under Section 376 of the Indian Penal Code, 1860 (in short IPC).

11.2. The victim was given treatment in a local hospital in the city. On her condition deteriorating, she was removed for treatment to a hospital in Singapore. The victim, as indicated above, succumbed to her injuries, on 29.12.2012.

11.3 On completion of investigation, a chargesheet was filed by the State with the Metropolitan Magistrate, South District, Saket, New Delhi (in short the Magistrate).

11.4 It appears, since the prosecution somehow failed to advert to the provisions of Section 302 of the IPC, in the chargesheet; an application was moved to rectify the error. Apparently, this application was allowed.

11.5 Evidently, on 05.01.2013, an advisory was issued by the Public Relations Officer, of the Delhi Police advising people at large that since the Magistrate had taken cognizance of the chargesheet filed in FIR No.403/2012, with PS Vasant Vihar, on 05.01.2003, the provisions of Section 327(2) and (3) of the Cr.P.C. had got triggered, as cognizance

had been taken under the provisions of Section 302 and Section 376(2)(g) of the IPC. In other words, the advisory indicated that, it would not be lawful for any person to print or publish any matter in relation to such proceedings except with the previous permission of the Court.

11.6 Apparently, on 07.01.2013, an application was moved by some, amongst the Petitioners, to seek permission of the learned Magistrate to report on the case. It is the say of the Petitioners that, the learned Magistrate refused to entertain the application on the short ground that no order had been passed by the Court, in that behalf. The application filed though, is not on record.

11.7 It is averred though: that it is the Respondents who were responsible for creation of an unruly situation by failing to regulate the ingress of persons to the Court premises; a situation which resulted in the learned Magistrate passing the impugned order.

11.8 In the order dated 07.01.2013, which was apparently passed at 2.00 p.m., the learned Magistrate noted that the accused, who were in judicial custody, and had been brought to Court from the Central Jail, Tihar, pursuant to a production warrant, could not be produced as the Lockup-Incharge was not assured of a safe passage for the accused. The apprehension of the Special Public Prosecutor, that the safety of the undertrials was an issue, was also noted by the learned Magistrate. 11.9 Having regard to the aforesaid, the learned Magistrate invoked the provisions of Section 327(2) and (3) of the Cr.P.C. The specific observations made and directions issued in this behalf are as follows :-

> "...Keeping in view the situation which is arisen in the present case, making it impossible to proceed with the Court proceedings, I am invoking section 327(2) and (3) Cr.P.C. The proceedings in this case will from now on proceed u/s. 327(2) Cr. P.C. i.e., the inquiry and the trial shall be held in camera. Hence, all the public persons and everybody who is present in the Court room unconnected with this case are directed to clear the Court room and also the passage from the judicial lockup till the Court room in order to ensure safe passage of the accused persons and also in order to enable the Court to proceed.
>
> I am also invoking provision u/s. 327(3) Cr.P.C. at the request of ld. Special Public Prosecutor for the State. It shall not be

lawful for any person to print or publish any matter in relation to the proceedings in this case except with the permission of the Court...” 11.10. It appears that, a Criminal Revision Petition was preferred by two Advocates, namely, one Ms. Poonam Kaushik and Mr.D.K. Mishra, in their personal capacity, before the District & Sessions Judge, which was dismissed by order dated 09.01.2013.

12. It is in the background of these facts that, the present writ petition was moved for the first time on 11.01.2013. Notice was issued on the said date. At that stage, it was made clear by me, that no interim orders could be passed and that pendency of proceedings would not come in the way of the committal proceedings, which at that point in time, were pending before the learned Magistrate. It was, however, left to the discretion of the Metropolitan Magistrate to examine the manner in which proceedings would be recorded at the end of each day. The notice was made returnable on 13.02.2013.

13. On 13.02.2013, the Respondents sought time to bring their counter affidavit on record. The learned counsel for the Respondents also informed the Court that in the meanwhile, an order had been passed by the Additional Sessions Judge (Special Fast Track Court), Saket, New Delhi (in short ASJ) dated 21.01.2013, taking the same view as that which was taken by the learned Magistrate, in order dated 07.01.2013.

14. It appears that the learned ASJ passed a separate order on 21.01.2013, pursuant to an application dated 17.01.2013 being filed by one, Swami Omji, purported founder and Chairman of Sexual Rape Victims Federation. By this application, a prayer was apparently made to lift the ban imposed by the learned Magistrate to hold proceedings in camera as also with respect to publication of matters pertaining to FIR No.413/2013. This application is also not on record, though a reference to the same is made in the order dated 21.01.2013, passed by the learned ASJ.

15. Consequently, an application being : CM No.2557/2013 was filed, seeking to amend the writ petition. The said application was allowed by order dated 28.02.2013, as the amendments sought were formal in nature, and were not opposed by the Respondents. Since, the Respondents did not wish to file a fresh counter affidavit and were desirous of having the counter affidavit already filed as being read in opposition to the amended writ petition, arguments in the matter were heard.

SUBMISSIONS OF THE COUNSELS

16. On behalf of the Petitioners, arguments were advanced by Ms. Meenakshi Lekhi, while on behalf of the Respondents, submissions were made by Mr. Dayan Krishnan. 16.1 Ms. Lekhi broadly made the following submissions :-

(i). The Petitioners seeking access to Court proceedings are responsible senior correspondents of both print and electronic media. The ghastly incident came to light because of the intercession and involvement of the media.

(ii). The advisory dated 05.01.2013 was issued at 09.00 p.m. on the said date by the Respondents to cover up their inadequacy. The Respondents had failed to advert to the provisions of Section 302 of the IPC which was brought to light by the correspondens. The power to issue a direction under Section 327(2) and (3) of the Cr. P.C. vests with the Court and not with the Respondents.

(iii). The primary object of Section 327 of the Cr. P.C. is to provide for a fair trial in an open Court which would safeguard the right of the accused to be tried fairly and hence, advance the cause of justice.

(iv). Sub Sections (2) and (3) of Section 327 of the Cr. P.C. were brought onto the statute book by virtue of Criminal Law (Amendment) Act, 1983 (in short 1983 Act) with the object of protecting the dignity of a rape victim and to enable the victim to depose comfortably in surroundings which she may not be too familiar with. The essence of the provision being to improve the quality of evidence brought forth by the prosecutrix i.e., the victim.

(v). In view of the fact that, in the instant case the victim has died, the provisions of Section 327(2) and (3) would have no applicability. Both the advisory and the impugned order dated 07.01.2013 and 21.01.2013 issued by the learned Magistrate and learned ASJ violate the fundamental rights of the Petitioner under Article 19(1)(a) and 21 of the Constitution of India. The impugned advisory and the orders of the Court below amount to a gag order, which is an anti-thesis to the principle that Court trials should be held in public gaze, to which, public should have access.

(vi). The Media has acted with due responsibility and restraint

despite the fact that the name of the victim and her family members is in public domain. The media applied self-restraint, even prior to the impugned advisory and / or orders issued in that behalf by the Respondents and Courts below, respectively. The fact that the victim's name is in public domain was sought to be established, by drawing my attention to the affidavit dated 04.02.2013, apparently filed by the father of the victim with the South Delhi Municipal Corporation so that they could dedicate a park or a school or any other welfare institution or a scheme to the memory of the victim.

(vii). To buttress her submission, Ms. Lekhi also pointed to the fact that, the sole eye witness to the crime had appeared on television and given his version of the events as they transpired on the fateful day.

(ix). It was further contended that because the media highlighted the case, both this Court as well as the Supreme Court, commenced suo motu proceedings; albeit qua other aspects involving the same crime.

(x). The provisions of Section 327 cannot be used to cover the inadequacy of the State, in particular those of the police.

(xi). A blanket ban is illegal. Reasonable restrictions can be imposed, where for example testimony of one witness may affect the testimony of another witness. The Court, while passing the impugned order, failed to apply the test of "necessity" and "proportionality", adverted to, by the Constitution Bench of the Supreme Court in the case of **Sahara India Real Estate Corporation Limited and Ors. Vs. Securities and Exchange Board of India and Anr.,** (2012) 10 SCC 603.

(xii). The Court was required to balance the two competing rights, that is, the right of the public to know and have access to Court trials as against right of the victim's family and that of the accused to confidentiality. In the instant case, neither the family of the victim nor the accused has sought **in camera** trial, and instead, **in camera** trial, is sought by the State.

(xiii). If access is granted to the Petitioners, they would abide by the principle of confidentiality qua the name of the victim and her family members and also adhere to any reasonable restrictions imposed by the Court from time to time in the interest of prosecution of the case and the endeavour of the Court to reach a just conclusion in the matter. In support of her submissions, reliance was also placed on the following

judgments :-

Naresh Shridhar Mirajkar and Ors. Vs. State of Maharashtra and Anr., AIR 1967 (54) SC 1, **Trilochan Singh Johar and Anr. Vs. State and Anr.** 98 (2002) DLT 228; In **Re Vijay Kumar** (1996) 6 SCC 466; **Kehar Singh and Ors. Vs. State (Delhi Administration),** AIR 1988 SC 1883.

17. On the other hand. Mr Dayan Krishnan, on behalf of the Respondents made the following submissions in opposition to the contentions raised on behalf of the Petitioners.

(i) The writ petition was not maintainable. The Petitioners instead of approaching this Court by way of a petition under Article 226 of the Constitution of India, ought to have either filed a revision petition under Section 397 or a petition under Section 482 of the Cr.P.C.;

(ii) The provisions of Section 327(2) of the Cr.P.C. mandates that an inquiry as also a trial in respect of an offence of rape should be carried out in camera. The accused in this case are inter alia charged with offences under Section 376(2)(g) and Section 377 of the IPC. In respect of this proposition reliance was placed on two judgments of the Supreme Court: **State of Punjab vs Gurmit Singh** (1996) 2 SCC 384 and **Sakshi vs Union of India and Ors.** 2004 (5) SCC 518. In addition, reference is also made to the 84th report of the Law Commission pursuant to which Sub Sections (2) & (3) were incorporated in Section 327 of the Cr.P.C. in addition to, the insertion of Section 228A in the IPC;

(iii) To emphasise the point, that the in camera trial was mandatory while trying cases pertaining to sexual offences, reliance was placed on the directions passed by the Supreme Court in Sakshi's case, whereby it is now declared that the provisions of Section 327(2) of the Cr.P.C. would, in addition, apply even in respect of an inquiry and/or trial of offences under Section 354 and 377 of IPC.

(iv) The right of the media to report Court proceedings is not an absolute right, which is why, Sub Section (3) of Section 327 of Cr.P.C. makes it unlawful for any person to print or publish any matter in relation to proceedings where section 327(2) has been triggered.

(v) Since the Petitioners have not challenged the constitutional vires of Section 327(2) of Cr.P.C., the Petitioners are required by law to

comply with the orders passed by the Court below. This argument was sought to be supported, once again, by relying upon extracts from the 84th report of the Law Commission.

(vi) The object of a trial is to meet the ends of justice, and if, in order to achieve that end there is a competition, in a manner of speaking, between the right to a free trial as against the right to freedom of expression, the former would trump the latter. In respect of this proposition reliance was placed on the judgments of the Supreme Court in **Mirajkar's** case and the **Sahara's** case.

(vii) The judge, presiding over the trial, has the power under Section 327 of the Cr.P.C. to regulate access in any given case depending on the circumstances and atmosphere prevailing in the Court. This right is vested in the presiding Judge or Magistrate statutorily by the proviso to Sub Section (1) of Section 327 of the Cr.P.C. The fact that the presiding judge has discretion even in circumstances where order is passed, under Sub Section (2) of Section 327 of the Cr.P.C., is apparent on a reading of the first proviso to Section 327(2) and the proviso to Section 327(3) of the Cr.P.C. This discretion would naturally be exercised in the light of facts and circumstances obtaining in each case. The Courts below have taken the necessary circumstances into account, while passing orders under Section 327(2) of the Cr.P.C.

(viii) The media had been repeatedly cautioned against excessive publicity, in cases where it has led to interference in administration of justice. Reliance in this regard was placed on the judgment of the Supreme Court in **Sidhartha Vashisht alias Manu Sharma vs State (NCT of Delhi)** 2010 (6) SCC 1 as also the judgment of the Supreme Court in the Sahara's case and the judgment of the Bombay High Court, in the case of, **Mustaq Moosa Tarani vs Govt. of India** dated 31.03.2005 passed in WP(C) 269/2005.

(ix) Publication of information in respect of trials which are ordered to be held **in camera** tantamounts to contempt of Court under the provisions of Section 7 of the Contempt of Courts Act, 1971.

(x) There was no illegality in the Delhi Police issuing the impugned advisory since, Section 327 (2) and (3) of the Cr.P.C. are mandatory in nature and no specific order is required to be issued by the trial Court in this behalf. The advisory was issued as a measure of "Courtesy" to

the media, as violation of the provisions of Section 327(2) and (3) of the Cr.P.C., would require the police to register FIRs under Section 228A of the IPC.

(xi) The provision in Sub Section (2) of Section 327 of the Cr.P.C. which mandates **in camera** trial is not unique to this particular statute, as there are several other statutes which provide for in camera trial. Reference in this regard was made to Order 32A Rule (2) of the Code of Civil Procedure, 1908 (in short CPC); Section 22 of the Hindu Marriage Act, 1955; Section 43 of the Parsi Marriage and Divorce Act, 1936; Section 33 of the Special Marriage Act, 1954; Section 11 of the Family Courts Act, 1984; Section 16 of the Protection of Women from Domestic Violence Act, 2005; Section 22 (eeee) of the Mental Health Act, 1987; Section 237(2) of the Cr.P.C. in respect of prosecution of defamation under Section 199(2) of the Cr.P.C.; Section 265B(4) in a case involving plea bargaining; Section 17 of the National Investigation Agency Act, 2008; Section 36AJ of the Banking Regulation Act, 1949; Section 52 M of the Insurance Act, 1938; Section 17 of the State Bank of India (Subsidiary Banks) Act, 1959. Reference was also placed to statutes of other nations as well as international covenants and treaties to emphasise the point that exclusion of media in order to ensure fair trial was not peculiar to India. Reliance in this behalf was placed on the Sexual Offences (Amendment) Act, 1992; Youth Justice and Criminal Evidence Act, 1999; Sexual Offences Act, 2003 which amended Section (2) of the Sexual Offences (Amendment) Act, 1992 whereby the array of offences in respect of protection of the identity of the victim was widened; Section 41 of the Criminal Procedure and Investigation Act, 1996; Judicial Proceedings (Regulation of Reports) Act, 1926; Section 8 and 8C of the Magistrate Courts Act 1980; Part 16 of the Criminal Procedure Rules, 2012; Section 46 of the Youth Justice and Criminal Evidence Act, 1999; Section 8(1)(d) of the Court Suppression and Non-Publication Orders Act, 2010 No.106 of New South Wales; Article 68 of the Rome Statute of the International Criminal Court; Article 14 and 19 of the International Covenant on Civil and Political Right (ICCPR); Article 10 of the European Convention on Human Rights; Siracusa Principles on the Limitation and Derogation provisions in the ICCPR; the Madrid Principles on the Relationship between the Media and Judicial independence. In addition, the Canadian position was sought to be explained by referring to the following publication: The Canadian Justice System and the Media by the

Canadian Judicial Council and the judgment of the Canadian Court in **Dagenais v. Canadian Broadcasting Corporation and National Film Board of Canada** (1994) 3 S.C.R. 835 (Per Lamer C.J.C., at p. 878).

18. The sum and substance of Mr Dayan Krishnan's submission was that the impugned orders have been passed taking into account the sensitivity of the case, the safety of the accused and the concern of the Court to maintain anonymity qua the identity of the victim, her family, as also, the accused. These concerns, according to Mr Dayan, outweighed the right of the media conferred under Article 19(1)(a) of the Constitution of India.

REASONS

19. The issues raised in the present case quite undeniably not only paint a wide canvas, but also demonstrates the increasing awareness of the citizenry to know, how the three principal organs of the State are functioning. These being: the Executive, the Legislature and the Judiciary, represented by Courts. For the citizenry to know the health of the State organs, which operate in their own well defined orbits, i.e., jurisdictional space, it requires a surrogate, which is, the media. It is, therefore, for good reason, that this medium of access, available to the public at large, is called the Fourth Estate.

20. It is for this reason that open trial is a rule, and wherever exceptions are carved out, they are made only to secure the ends of justice. The Courts as an institution have for ages now, in most democracies across the world followed the principle of open trials fundamentally to provide for itself the moral authority, which has the backing of the Will of the people in the form of the Constitution or otherwise, to decide the fate of people whose cases are brought before it for adjudication. It may sound clichTd but it is true, a Court enhances and secures authority for itself by functioning in full public glare, as it neither has the power of the purse nor the sword of the State, to lend support to its core area of work, which is adjudication.

21. Therefore, it cannot be argued in this day and time that open trials are not the rule. This fundamental principle is recognized by our Courts as also the Supreme Court in judgment after judgment, including judgments cited before me, i.e., the **Naresh Mirajkar** case, the **Sahara** case and the **Kehar Singh** case. Reference may also be made to :-

Cora Lillian Mc Pherson Vs. Oran Leo Mc Pherson, AIR 1936 PC 246 at page 250; **Kailash Nath Agarwal Vs. Emperor,** AIR 1947 (34) Allahabad 436, **Prasanta Kumar Mukherjee Vs. the State,** AIR (39) 1952 Calcutta 91 and In **Re M.R. Venkataraman,** AIR (37) 1950 Madras 441.

22. On the aspect of the importance of a public trial, the observations of Mr Justice Jagannath Shetty (as the then was) in **Kehar Singh's** case are most apposite. It would be important to remind ourselves that the Supreme Court in that case was dealing with a case which involved the assassination of a sitting Prime Minister of this country, i.e., late Mrs Indira Gandhi, and on an appeal preferred by the accused against their conviction by this Court, one of the preliminary question which the Court was to called upon to deal with was: whether shifting of the trial of the case to Tihar Jail impeded a public trial, which was contemplated under Section 327 (1) of Cr.P.C. Though the Court went on to hold that the mere fact that trial in that case was held in Tihar Jail, could not be construed as not being a trial open to public in the facts which emerged in that case, it emphasised the importance of a public trial. While doing so, it touched upon various facets which emanate in the course of a public trial, and thus, highlighted its importance qua public at large. Though the discussion on this aspect begins from paragraph 177 of Mr Justice Jagannanath Shetty's judgment, I may only extract some of the observations which are instructive and relevant for the purposes of this case:

> "....186. It may now be stated without contradiction that jail is not a prohibited place for trial of criminal cases. Nor the jail trial can be regarded as an illegitimate trial. There can be trial in jail premises for reasons of security to the parties, witnesses and for other valid reasons. The enquiry or trial, however, must be conducted in open Court. There should not be any veil of secrecy in the proceedings. There should not even be an impression that it is a secret trial. The dynamics of judicial process should be thrown open to the public at every stage. The public must have reasonable access to the place of trial. The Presiding Judge must have full control of the Court house. The accused must have all facilities to have a fair trial and all safeguards to avoid prejudice.
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> .....

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192. The main part of Sub-sec(1) embodies the principle of public trial. It declares that the place of inquiry and trial of any offence shall be deemed to be an open Court. It significantly uses the words "open Court". It means that all justice shall be done openly and the Courts shall be open to public. It means that the accused is entitled to a public trial and the public may claim access to the trial. The Sub Section however goes on to state that "the public generally may have access so far as the place can conveniently contain them". What has been stated here is nothing new. It is implicit in the concept of a public trial. The public trial does not mean that every person shall be allowed to attend the Court. Nor the Court room shall be large enough to accommodate all persons. The Court may restrict the public access for valid reasons depending upon the particular case and situation. As Judge Cooley states (Cooley's Constitutional Law, Vol. I, 8 Ed. 647):

> It is also requisite that the trial be public. By this is not meant that every person who seems fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where regard for public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility into the importance of their functions and the requirement is fairly observed if, without partiality or favouritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded

altogether.

193. The proviso to Sub Section (1) of Section 327 specifically provides power to the Presiding Judge to impose necessary constraints on the public access depending upon the nature of the case. It also confers power on the Presiding Judge to remove any person from the Court house. The public trial is not a disorderly trial. It is an orderly trial. The Presiding Officer may, therefore, remove any person from the Court premises if his conduct is undesirable. If exigencies of a situation require, the person desiring to attend the trial may be asked to obtain a pass from the authorised person. Such visitors may be even asked to disclose their names and sign registers. There may be also security checks. These and other like restrictions will not impair the right of the accused or that of the public. They are essential to ensure fairness of the proceedings and safety to all concerned.

194. So much as regards the scope of public trial envisaged under Section 327(1) of the code. There are yet other fundamental principles justifying the public access to criminal trials: The crime is a wrong done more to the society than to the individual. It involves a serious invasion of rights and liberties of some other person or persons. The people are, therefore, entitled to know whether the justice delivery system is adequate or inadequate. Whether it responds appropriately to the situation or it presents a pathetic picture. This is one aspect. The other aspect is still more fundamental. When the State representing the society seeks to prosecute a person, the State must do it openly. As Lord Shaw said with most outspoken words {**Scott v. Scott:** 1913 A.C. 417: It is needless to quote authority on this topic from legal, philosophical, or historical writers.

> It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial". "The security of

> securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise...." (emphasis supplied)

22.1 It may also be important to note that the Court in that case closely examined the records of the Court to see as to whether those who were desirous of attending the trial were allowed to attend the trial, subject to permission and adherence to regulatory measures, put in place. It was also noticed that members of both domestic and international press, who approached the trial Judge were granted permission to cover the proceeding. As a matter of fact, even law students were allowed to witness the trial though in batches. (See paragraphs 197 to 202).

22.2 That there are exceptions to the rule of open trial, is also no longer in doubt. It is recognized by the Supreme Court in Naresh Mirajkar's case that in order to secure the ends of justice, a Court has the right to order **in camera** trials whether wholly or in part. This was the law which has prevailed in this country for several decades. What is, therefore, to be examined in this particular case is: whether the statute provides for something which was not already the declared law on the issue.

22.3 Sub Section (1) of Section 327 of Cr.P.C[2]. clearly mandates an open trial. It encapsulates the Statutory Will, which is, that the place in which any criminal Court holds an inquiry or tries an offence, shall be deemed to be an open Court, to which public would generally have access subject to constraints, if any, of space. The proviso to Sub Section (1), undoubtedly, confers a discretion on the Court to exclude the public or any particular person from access to a proceeding, room

2. Pari materia with Section 352 of the Code of Criminal Procedure, 1898.

or the building in which the Court is housed. The emphasis on judicial discretion and manner in which it is to be employed is best described in the observation made in **Kailash Nath Agarwal and Anr. Vs. Emperor** A 1947 ALL 436 at page 489. Also see **Nathusing Vs. Emperor,** (1925) 26 Cri. LJ 1130. In Kailash Nath, Justice Malik observed :-

> "..22. I cannot lightly brush aside the complaint that was made to me, while I was receiving applications, by more than one senior counsel, practicing in this Court, of the treatment that they had received while they were engaged to do their duty in defending their clients. Everyone of them complained that there was inordinate amount of delay outside the jail and inside the jail; the learned Magistrate failed to realize that he must, as far as possible, try to reproduce the atmosphere of a Court room. The learned Magistrate may have been compelled to hold his inquiry inside the jail by reason of the Standing Order mentioned by the District Magistrate in his order rejecting the application for transfer. I can find no provision in the Criminal Procedure Code which compels a Magistrate to hold his Court in the usual Court room. Section 352 Cr.P.C.[3], probably contemplates that a Magistrate can hold his Court anywhere he likes. The Standing order cannot bind the learned Magistrate in his judicial capacity, but as both the Executive and the judicial functions are not separated, the executive order directing the Magistrate to hold his Court inside the jail is probably binding on him. But the learned Magistrate, wherever he may be compelled to sit by executive orders, is bound by the provisions of section 352 Cr.P.C., and he must realize that the place where the trial is held must be something that an open Court to which the public generally may have access so far as the same can conveniently contain them. The discretion to exclude the public generally or any particular person at any stage of any inquiry or trial must be

3. Section 352. Courts to be open—The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conceniently contain them:

Provided that the Presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particlular person, shall not have access or be or remain in, the room or building used by the Court.

a judicial discretion exercised by him. I am laying emphasis on this point because, to my mind, if the Magistrate is compelled to hold a trial in jail, then the jail must become something like an open Court where any member of the public may have a right of access, if the room in which the trial is being held can conveniently contain him and unless the learned Magistrate, for reasons which he must, to my mind, record, decides to exclude the public or any particular person. In a jail the Magistrate must himself be subject to the jail rules and subject to the authority of the officer in charge of the jail, and though in theory, if the public is given free access, I can see no objection to a trial being held in jail, in practice I do not think it is possible, unless the jail rules make provision for such enquiries or trials in jail when any member of the public may have a right to attend.

(emphasis supplied)

23. In A.I.R. 1917 Lah. 311 where the trial was held in jail, it was argued that it was vitiated on that account. The learned Judge observed:

> "There is nothing to show that admittance was refused to any one who desired it or that the prisoners were unable to communicate with their friends, or counsel. No doubt it is difficult to get counsel to appear in the jail and for that reason if for no other such trials are usually undesirable, but in this case the executive authorities were of the opinion that it would be unsafe to hold the trial elsewhere."

I am, however, of the opinion, with great respect to the learned Judge, that it is not necessary for the accused to prove that any person who actually desired admittance was refused. It is for the prosecution to satisfy the Court that any person who desired to attend could do so and there was no prohibition against his admittance.

24. It is well established in England that every Court of justice is open to every subject of the King and that a right to an open trial is one of the cherished rights of the subject. It is not necessary for me to give a historical survey of how the right has grown, but the point has now been settled by a decision of the

House of Lords in 1913 A. C. 417 where it was emphasized that even in a case where the parties had agreed that a case may be heard in camera, a Judge would have no right to exclude the public, except in some special class of cases, unless the parties agreed to appoint him an arbitrator and to hear the case as such. Those special cases are : wardship and relation between the guardian and ward, and secondly the care and treatment of lunatics. A third ground was mentioned by Viscount Haldane, L.C., that if it was strictly necessary for the attainment of justice and the Court was satisfied that by noting short of the exclusion of the public it is possible to do justice, can a judge decide to sit in camera. Even this ground was not accepted by the Earl of Halsbury who though that this would be leaving the matter too much to the discretion of individual Judges, who might think that in their view the paramount object of the administration of justice could not be attained without a secret hearing. It is not necessary for me to go into this question further as, unlike the law in England, the Criminal Procedure Code in India gives a Criminal Court a right to exclude the public generally or any particular person, but this being an exception to a very well settled rule, to my mind, the Magistrate must record his reasons for doing so if he decides to exclude either the public or a section of the public; and it must be understood that it is a matter within the judicial discretion of the Magistrate himself and not a matter about which he can be controlled by executive orders.

25. Though, therefore, I am of the opinion that it was not illegal for the learned Magistrate to hold the enquiry in jail or anywhere else, the learned Magistrate must realize that the place where the enquiry is held must be deemed to be an open Court where the public as such have a right to attend and that such right may be controlled in a proper case on special grounds by the Court and not by the jail rules or by the officer incharge of the jail. If the Magistrate cannot have the absolute right to regulate proceedings at the place where he is holding trial, he ought not to hold the trial or the enquiry at such a place.

22.4 The principle of open trial was altered with the Criminal Law

(Amendment) Act of 1983 with respect to **inter alia** an inquiry or trial of an offence of rape and allied offences. Pursuant to the recommendations of the Law Commission made in its 84th report and Sub Section (2) alongwith the first proviso and Sub Section (3) were inserted, while the earlier provision was re-numbered as Sub Section (1).

22.5 While, Sub Section (2) begins with a non-obstante clause, and thus, goes on to state that an inquiry into a trial of rape and allied offences, **"shall be conducted in camera"**, Sub Section (3) of Section 327, makes it unlawful for any person to **"print"** or **"publish"** any matter in relation to any such proceedings save and except with the previous permission of the Court.

22.6 Both Sub Section (2) and (3) of Section 327 are followed by two vital provisos. The first proviso in Sub Section (2) confers a discretion on the Court to allow access to or, be or, remain in the room or building in which the Court is housed, to any particular person either on its own or, on an application moved by either party. Similarly, the proviso to Sub Section (3) confers a discretion on the Court to lift the ban on printing or publishing of trial proceedings, in relation to a proceeding of rape, subject to maintenance of confidentiality of the names and addresses of the parties.

23. Having regard to the fact that open trial, (which is based on the principle that sunlight is the best disinfectant), is both a shield and a sword, in a manner of speaking, available to the Court to protect itself from baseless and scurrilous rumours of having done a hatchet or a shoddy job based on extraneous influence - it is a weapon which only the Court can wield.

23.1 There is, to my mind, intrinsic evidence with regard to the same in the form of the provisos inserted in Sub Section (2) and (3) of Section 327. The Court is the best judge of how it is to regulate its proceedings, keeping in mind its polestar that, its discretion to exclude or regulate access to Court proceedings is to be exercised only in the best interest of administration of justice.

23.2 Having regard to the above, in my opinion, the State had no business to issue an advisory in that behalf. Therefore, the argument of Mr Dayan Krishnan that the advisory was issued by the police only as a measure of "Courtesy" to the media, is completely untenable, keeping

in mind the statutory purpose and the manner in which Courts are required to function. By such an action, the State in a sense sought to usurp the discretion which was vested entirely in the Court.

24. In order to appreciate why such a discretion was conferred on the Court, in respect of inquiry and/or trial into an offence of rape, one would have to advert to the recommendations of the Law Commission contained in its 84th report. Suffice it to say, the recommendations quite clearly provided for exception being made to the general rule of public trial based on its concerns qua the following, in cases involving sexual offences: (i) narration of intimate details in the course of trial; (ii) embarrassment to the victim in the event, narration of the incident is made in full public glare, which may affect the quality of evidence; (iii) the burden which the complainant and the accused are required to discharge in a case involving commission of sexual offence, which infuses **"a real risk of Court room defamation repeated in the press";** and (iv) lastly, the stigma which is attached to the accusation of rape which may follow the accused years after his acquittal leading to "unpleasant", "humiliating" and "embarrassing" experience.

24.1 As regards publication of names of victim and the accused, in cases involving charges of rape, the Law Commission considered the issue both from the point of view of victim and the accused at the stage of investigation and trial. In so far as anonymity of the victim and the accused at the stage of investigation was concerned, it left it to the good sense of "journalistic profession", while qua trial, in relation to rape and other allied offences insertion of a new provision, i.e., Section 228A, was recommended. The relevant extracts of the Law Commission report in respect of the changes to be brought about in Section 327 of the Cr.P.C. as it was then obtaining, were as follows:

> "...5.7 In the light of the above discussion, a specific proviso should be added to Section 327 of the Code of Criminal Procedure, as under: -
>
> proviso to be added to section 327 of the Code of Criminal Procedure, 1973.
>
> "Provided further that unless the presiding judge or magistrate, for reasons to be recorded directs otherwise, the inquiry into and trial of rape or allied offence shall be conducted in camera.

Explanation - In this Sub Section, the expression 'rape or allied offence' applies to -

(a) an offence punishable under section 354 or section 354A of the Indian Penal Code;

(b) an offence punishable under section 376, section 376A, section 376B or section 376C of that Code;

(c) an attempt to commit, abetment of or conspiracy to commit any such offence as is mentioned in clause (a) or (b) of this Explanation.

Further, the following Sub Section should be added to section 327:-

Sub Section to be added to section 327, Code of Criminal Procedure, 1973 after re-numbering present section of Sub Section (1).

"(2) Where any proceedings are held in camera, it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the Court...."

.....

.....

Section 228A, IPC

(to be inserted)

"228A. Where, by any enactment for the time being in force, the printing or publication of any matter in relation to a proceeding held in a Court in camera is declared to be unlawful, any person who prints or publishes any matter in violation of such prohibition shall be punished with fine which may extend to rupees one thousand."

24.2 It is interesting to note that even though the recommendation of the Law Commission did not provide for the insertions of a proviso, a proviso was nevertheless was introduced in the statute. The first proviso to Sub Section (2) introduced at the time of enactment of the Criminal (Amendment) Act 1983.

24.3 The second proviso to Sub Section (2) of Section 327, which provides for **in camera** trials to be conducted, as far as practicable by a woman judge or a Magistrate, was as a matter of fact introduced by Act 5 of 2009 w.e.f. 31.12.2009.

24.4 Similarly, the proviso to Sub Section (3) of Section 327, which provides that the ban on printing and publication of trial proceedings in relation to an offence of rape may be lifted subject to maintenance of confidentiality of name and addresses of parties, was also introduced by the same Act, i.e., Act 5 of 2009 w.e.f. 31.12.2009.

24.5 A perusal of the recommendations would show that in certain respects the legislature went beyond the recommendations of the Law Commission, while in other aspects it held back.

24.6 The legislature, under Sub Section (2) of Section 327 widened the scope by encapsulating within its realm even the stage of inquiry and not just the trial of offence of rape and other allied offences. The legislature further widened the scope by allowing access to the proceedings or for grant of permission to any particular person to remain in the room or the building in which the Court is housed, by inserting a proviso to that effect in Sub Section (2) of Section 327. As indicated above, as a matter of fact, in 2009 the legislature has gone further by conferring upon the Court, the discretion to lift the ban on printing and publication.

24.7 In so far as the recommendation of the Law Commission was concerned, on the aspect of extension of anonymity both to the victim as well as the accused, the legislature held back by according protection only to the victim.

24.8 Therefore, a composite and a close reading of the provisions of Section 327 of the Cr.P.C. clearly, in my view, point to the fact:

(i) that the general principle of open public trial is a rule, which ought not to be disturbed except in exceptional circumstances;

(ii) under proviso to Sub Section (1) of Section 327, it is the Court which is empowered to exclude the public generally or any particular person having regard to the facts and circumstances of each case. For example, where the case involves examination of say indecent material which could embarrass women and children, if present in Court; the Court could ask for their exclusion.

(iii) even with offences involving rape and other allied offences, referred to in Sub Section (2) of Section 327, there is discretion vested in the Court to grant access to any particular person or persons based on the Presiding Judge's wisdom or on an application of any of the parties. It is not as if the use of the word 'shall' in the main part of Sub Section (2) of Section 327, has emasculated the Presiding Judge of his/her discretion in the matter.

(iv) The fact that there is discretion vested in the Judge to permit printing or publication of trial proceedings, is evident both on a plain reading of the provisions of Sub Section (3) of Section 327 alongwith the proviso.

25. Therefore, the contention on behalf of the Respondents that if there is an inquiry or a trial of an offence of rape and other allied offences referred to in Sub Section (2) of Section 327, then as a matter of law, the proceedings will have to be held in camera without the Court employing the necessary discretion in the matter, is a submission which cannot be accepted. The scheme of Section 327, in my opinion, runs counter to the submission made on behalf of the Respondents.

25.1 Any other interpretation of Sub Section (2) of Section 327 of Cr. P.C. will open up the provision to the danger of falling foul of Articles 14 and 19 of the Constitution. The proviso, by conferring the necessary discretion on the court saves such a situation from coming to pass. Thus the word "shall" in Sub Section (2) would not prevent the court from employing its discretion to grant access to proceedings for good and substantial reasons. The Petitioners, therefore, in my view were not required to challenge the constitutional vires of Sub Section (2) of Section 327 as contended by Mr.Krishnan.

25.2 The proviso has to be read with the main provision. It has to have schematic theme. A proviso cannot be read in a manner which will render it redundant. (See observations in **Government of the Province of Bombay v. Hormusji Manekji,** AIR 1947 (34) P.C. 200 at page 205 in paragraph 24 followed in **Kush Saigal & Ors. v. M.C. Mitter & Ors.** (2000) 4 SCC 526).

25.3 The word "shall" thus appearing in the main part of Sub Section (2) of Section 327 will have to be read in the contextual framework of the entire provision. The real intention of Sub Section (2)

of Section 327 being to leave the matter to the discretion of the court, that is, whether access has to be granted and if so, to what extent. And in employing this discretion, substantial weight would have to be given to the fact that enquiry or trial deals with an offence of rape. That the word "shall" is not always to be construed as directory admitting of no discretion is best illustrated by the following observations of the Supreme Court in **State of U.P. Vs. Babu Ram Upadhya,** AIR 1961 SC 751 where the court observed that :-

> "...29. The relevant rules of interpretation may be briefly stated thus : When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is for is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered..."

25.4 Also see judgment of Supreme Court in **Basavaraj R. Patil and Ors. Vs. State of Karnataka and Ors,** AIR 2000 SC 3214 at page 3222 paragraph 24 where the Court relaxed the rigour of Section 313(1)(b) of the Cr.P.C. which uses the word "shall", by allowing examination of accused, in appropriate cases, without being physically present.

26. The question, therefore, really is: if this is a discretion; which as adverted to hereinabove, only a Court can exercise, what is the mode and manner in which such a discretion is to be exercised.

27. Undoubtedly, if it is a discretion vested in the Court before whom proceedings are being conducted, no directions can be issued which are cast in stone. What can, however, be set forth based on the principles deducible from the judgment of both the Supreme Court and other Courts, are broad guidelines in such like cases.

(i) In a case involving inquiry or trial into rape ordinarily the proceedings will be held in camera. The concerned Court, while passing the order will take into account the concerns of the victim; the family members of the victim, if the victim is dead; the concerns of the accused, as also the interest, of the witnesses.

(ii) In employing this discretion, what would have to be borne in mind, would be whether affording access to the trial by public at large, would lead to embarrassment to the victim or the family of the victim, effect on the quality of evidence that may be placed before the Court in the form of testimonies, the issues concerning safety and security of the parties, including witnesses and accused. In so far as the aspect of safety and security is concerned, the Court would engage the state authorities for provision of adequate measures in that behalf. The measures, however, cannot include complete ouster of access to Court proceedings by members of public. Safety and security issues can be met, as experience has taught us, by either shifting the venue of trial or by beefing up the security. (See **Kehar Singh's** case and recent trial in **Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra,** (2012) 9 SCC 234).

(iii) The concerns with regard to the victim and her family can also be met by Court excluding wholly or in part the members of public during the trial. The Court could also direct redaction of portions of the testimony if the same is found to be indecent or impacts the character and reputation of the victim or the accused.

(iv) The status of the party should be least of the Court concerns.

(v) The court should assess whether access to public, and by necessary implication its surrogate, that is, the media, impede administration of justice. It will have to be borne in the mind that freedom of speech and expression under Article 19(1)(a) of the Constitution of India includes the freedom of press. A right which is subject to reasonable restriction under clause (2) of Article 19(1)(a). See observations in **Sakal Papers (P) Ltd. and Ors. Vs. The Union of India,** AIR 1962 SC 305. This right is conferred upon not only the disseminator of the speech (i.e., the media in this case) but also the recipient, which would be the public at large. See **Tata Press Ltd. Vs. Mahanagar Telephone Nigam Ltd. and Ors.,** (1995) 5 SCC 139 at page 156 paragraph 24, Secretary, **Ministry of Information and Broadcasting, Govt. of India and Ors. Vs. Cricket**

Association of Bengal and Ors., (1995) 2 SCC 161 at page 196 paragraph 20. The Court in Tata Press went further by holding that even commercial speech was part of free speech and thus protected under Article 19(1)(a) of the Constitution. In gauging the situation at hand, the test of "necessity" and "proportionality" would have to be employed (see **Sahara's** case).

(vi) The right to fair trial will have to be kept in a balance alongwith the right to know. The weight used, will be the "ends of justice". This weight will determine the tilt of the balance.

28. Let us examine whether the two impugned orders of the Courts below meet the broad principles set forth hereinabove: The victim is dead. The identity of the victim and family members is known. The domestic media, in this case, as expected has acted with maturity and self-restraint by refraining from disclosing either the identity of the accused or that of the family members. The orders of the Court below show at least one of the accused demanded, though orally, that proceedings be made open to public. One will have to assume that this request was not made in the pejorative sense (see Sahara case). At the close of arguments, I was informed that 35 witnesses out of the total of 87 witnesses cited have been examined, the number today would be much more.

28.1 There is a huge public interest, apart from the criminality, in knowing whether there was a lapse, if any, in the working of the State apparatus. The case will perhaps provide empirical material to bring about a systemic change in the State apparatus.

28.2 The impugned orders were passed almost in anticipation that there will be trial by media. Therefore, the judgments cited by Mr Dayan on this aspect have no relevance at this stage. This was put to Mr Dayan, who in his usual fairness accepted this position.

28.3 The Courts below seem to have been overtaken by the event. A gathering of large number of people can never be reason for imposing complete ban on access to Court proceedings. These concerns can be addressed by putting in place appropriate regulatory measures. The State will have to lend its might to ensure that Court proceedings are held without impediment in a smooth and orderly fashion.

28.4 None of this was considered by the Courts below, in a holistic manner. While the first order of the learned Magistrate was passed prior

to committal of proceedings, the second order, which is the order of the learned ASJ, was passed after the case was committed to the session Court. The first order, by virtue of subsequent events, has lost its legal efficacy. In so far the order dated 21.01.2013 is concerned, it cannot be sustained for the very reasons set out above. The Courts below in that sense acted with material irregularity in exercise of jurisdiction vested in it in law. There is a high purpose in the provisions of Section 327 of Cr.P.C. Even in a rape trial, the Court is required to consider the various facets and dimensions obtaining in the case before taking a decision one way or the other. A mechanical approach is to be abjured.

29. Ordinarily, I would have directed the Court concerned to employ its discretion in the light of the discussion above. Given the time and resource constraint and since it is not desirable that the sessions Court spend time and energy which is presently required to be used for bringing about an expeditious closure of the proceedings, I propose to pass the following directions so that a calibrated access is granted to Court proceedings:

(i) The Court will allow access to one representative journalist of each of the accredited National dailies. The Petitioners before me represent some of them.

(ii) The reporting shall not include the name of the victim or those of the members of the family of the victim or the complainant or witnesses cited in the proceedings.

(iii) The reportage shall exclude that part of the proceedings, which the Court specifically so directs.

(iv) The reporters of UNI and PTI and other national dailies shall share their stories with representatives of other newspapers and members of the electronic media.

30. Before I conclude, there are a couple of submissions, which I propose to deal with.

30.1 In the course of arguments an important question came to be raised, which is, that failure to grant access to Petitioners, who are members of the press, violates their fundamental right under Article 19(1)(a) of the Constitution. Ms Lekhi, impugned both, the advisory issued by the Respondents as well as the two orders of the Courts

below, one passed by the learned Magistrate and the other by the learned ASG, on this very ground. While the advisory could be challenged on this very ground, the same cannot be said qua an order of the Court. An order of the Court cannot be challenged on the ground that it violates fundamental rights.

30.2 A Court decides a matter or an issue which has a collateral effect on the main matter. Such a decision is amenable to challenge ordinarily by taking recourse to statutory or constitutional remedies. The judicial verdict by itself, delivered by a Court, in relation to a matter brought before it for adjudication, cannot effect fundamental rights of a citizen, much less under Article 19(1)(a) of the Constitution. The impugned orders, can be challenged though, either under Article 226 or under Article 136 of the Constitution of India. The orders by themselves cannot thus violate the Petitioners' right under Article 19(1)(a) of the Constitution. (See the observations made in **Naresh Mirajkar's** case at pages 11 to 15 in paragraphs 38 to 50.)

30.3 This aspect was also considered by Mr Justice Jagannath Shetty (as he then was) in the **Kehar Singh's** case. [see paragraph 203 at page 709]. The Court, after considering the extract from **Naresh Mirajkar's** case referred to three decisions of the Supreme Court of United States in paragraphs 205 to 207. These being: **Gannet Co. vs De Pasquale** (1979) 443 US 368; **Richmond Newspaper Inc. vs Virginia** (1980) 448 US 555 and **Globe Newspaper Co. vs Superior Court** (1982) 457 US 596. After examining the judgments Mr Justice Jagannatha Shetty concluded as follows: "...208 It will be clear from these decisions that the mandatory exclusion of the press and public to criminal trials in all cases violates the First Amendment to the United States Constitution. But if such exclusion is made by the trial Judge in the best interest of fairness to make that exclusion, it would not violate that constitutional right....."

31. The other objection taken by the learned counsel for the Respondents is that the present proceeding is not maintainable as the Petitioners ought to have taken recourse to the provisions of Section 397 and 482 of the Cr.P.C. and not to a proceeding under Article 226 of the Constitution of India. According to me this argument is untenable as all three proceedings would lie in the High Court, as presently positioned. The mere fact that the Petitioners have chosen to approach this Court by

way of a petition under Article 226 of the Constitution of India, will not come in the way of the Court entertaining a petition. The power under Article 226 of the Constitution, which is available to the Court, is far wider. As a matter of fact, the Petitioners, not being a party to the criminal proceeding, would perhaps not be entertained if, a revision petition were to be filed under Section 397 of the Cr.P.C. or a petition under Section 482 of the Cr.P.C. This would, however, not fetter the Court from entertaining proceedings on its own against orders of the Courts below, if deemed fit, in a given case. (see **Sarveshwar Singh Vs. State,** 1999 "Cr. LJ 2179)

31.1 The power of the High Court to issue writs extends not only for enforcement of rights conferred under Part III of the Constitution but also for **"any other purpose"**. The Petitioners in this case seek access to a Court proceeding, which they say has been denied to them, based on an erroneous and/or irregular exercise of jurisdiction conferred on the Courts below. The challenge is also to the advisory issued by the Respondents on the ground that it violates the Petitioners' fundamental right under Article 19(1)(a) of the Constitution. To my mind, the present petition filed under Article 226 of the Constitution is, the appropriate remedy.

32. The argument advanced by Mr. Krishnan, based on the judgment of the Supreme Court in the case of Gurmit Singh and Sakshi has relevance to the extent that ordinarily in an enquiry or trial of an offence of rape and / or allied offences, should be held in camera. The Supreme Court's exhortation in that regard, however, cannot be construed in manner so as to exclude the trial Courts, discretion to act otherwise for good reason. The Supreme Court, in my opinion, consciously uses the words "invariably" as against exclusionary words such as "must" and "without fail" when opining in paragraph 24 at pages 404 and 405 of its judgment that such trials should be held in camera and that trial Courts should "liberally" take recourse to the provisions of Sub Sections (2) and (3) of Section 327 of Cr.P.C.

32.1 To my mind there could be myriad situations in which the trial Court may not want to take recourse to Sub Section (2) of Section 327 of Cr.P.C. even in a rape trial. Take a case where the victim is a woman of small means, who is put into flesh trade by a group of persons, enjoying power and pelf. The accused in such case may want the entire

proceedings to be held in camera. The trial Court while protecting the victim from unwanted public glare may still consider opening certain phases of the trial to public. One of the reasons for adopting such a course, out of many, could be to send out a signal that a fair trial would be held, which would remain impervious to powerful influences.

32.2 Every case therefore to my mind needs employment of judicial discretion which would cater to a given fact situation. It cannot be, as is sought to be argued by Mr. Krishnan, that once it is established that offence to be tried is an offence of rape (or other allied offences), the Judge would have no choice, but to hold the trial in camera.

32.3 Furthermore, in Sakshi's case, the Petitioner had approached the Supreme Court in a petition filed under Article 32 of the Constitution of India seeking a declaration that the term "sexual intercourse", as contained in Section 375 of the IPC would include all kinds of penetration and not be confined to penile / vaginal penetration. While the Supreme Court declined relief in respect of this prayer, it issued two significant directions. The first direction issued was that provisions of Section 327(2) of the Cr.P.C. would also apply to an inquiry or trial of offences under Section 354 and 377 of the IPC.

32.4 The second direction issued was qua precautions to be taken while holding a trial in a child sex abuse or a rape case. The Supreme Court had no occasion to deal with the issues raised in the present writ petition.

33. At the end, it is hoped that the reportage will confine itself to the news as it is, and not transgress into areas which are, the domain of the Court. There is a thin, but a clear and distinct, line dividing the two which, if respected, will augur well for institutional integrity.

34. Accordingly, the writ petition is allowed in terms of prayers (i) and (ii). The advisory dated 05.01.2013 and order dated 22.01.2013 passed by learned ASJ are set aside; order dated 07.01.2013 having lost its legal efficacy. The Sessions Court shall hereon allow access to Court in terms of directions contained in paragraph 29.

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CRL. L.P

STATE **....PETITIONER**

VERSUS

RAHUL **....RESPONDENT**

(GITA MITTAL & J.R. MIDHA, JJ.)

CRL. L.P. NO. : 250/2012 **DATE OF DECISION: 15.04.2013**

Code of Criminal Procedure, 1973—Section 378(1)—Indian Penal Code, 1860—Sections 376 and 377—Indian Evidence Act, 1872—Section 118—Statement of a child witness—Manner of conducting competency test—Insufficient attention paid; no real assessment of the capacity and capabilities children accorded special treatment—Extensive guidelines laid down by the Supreme Court and the Delhi High Court—Pronouncements bind all trial courts in Delhi—Knew no exceptions—Adherence is mandatory—Questions put should meet the requirements of law having special regard to age and circumstances of the person required to depose—Questions to be put to child witness ought to be sensitively framed—Education, socio economic background, age and capacity to be kept in mind—Directions issued.

Important Issue Involved: Section 118 of the Indian Evidence Act contains the expression 'competent to testify' as well as 'court considers'. It cites some circumstances which may prevent the child from being able to testify. It is, therefore inherent that before recording the testimony of a person, the court has to be satisfied that the person is not

prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of tender years, extreme old age, disease, (whether of body or mind), or any other cause of the same kind. There is therefore no prohibition by age or otherwise so far as competency to give evidence is concerned.

The competency inquiry means the witness ability and willingness to tell the truth and the capacity to perceive, to recollect and to communicate the evidence.

A common sense approach should be taken when dealing with the testimony of young children and same standards as expected from adults should not be expected from young children.

Children have been accorded special treatment by the legislature and courts because of their special needs. The court room environment is unfamiliar and would definitely be intimidating to a child who is required to testify as a witness. The trauma if the child witness is a victim is only further aggravated.

The first and the foremost guideline on the subject of competenacy testing and mandated in every binding judicial pronouncement on the subject is to maintain anonymity of the identity of the victim on the prime requirement is to ensuring the best interests of the child under all circumstances.

The questions that the trial judge would be required to put to the witness have to meet the requirements of law as well as the binding principles laid down in several judicial pronouncements and the authoritative texts having special regard to the age and circumstances of the person who is required to depose.

The judges and magistrates should always record their opinion that the child understands the duty of speaking truth.

Not having taken oath only goes to the creditability and not the competency of the witness.

While evaluating the testimony of a child (who is a victim as well), the circumstances which would be considered would be the tender age of the child; its demeanor; possibility of tutoring, etc.

The Court appearances impact children more drastically than they do adults and may bring alive the trauma the child has seen (or may have experienced, if a victim). Which may reduce the child into a state of terrified silence. The judge has to step in to ensure removal of the fear and apprehensions being nursed by the child in the Court.

The guidelines laid down in judicial precedents know no exceptions and adherence is mandatory. Their application at every stage of the proceedings is essential so as to get the best evidence from the child witness.

It is the fundamental responsibility of every court to ensure the welfare and best interest of the child which has to remain the paramount consideration under all circumstances.

The questions which put to the child witness ought to be sensitively framed keeping in mind the socio-economic background of the child, the age as well as the capacity of the child which the trial judge would evaluate when the child is produced before him.

The trial courts to carefully evaluate the questions which they put to child witnesses as well as compliance with the guidelines to minimize the secondary traumatisation of a child witness by the courtroom experience.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. Dayan Krishnan, Additional Standing Counsel with Ms. Manvi Priya, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Director of Public Prosecutions, Transwal* vs. *Minister of Justice and Constitutional Development* (2009) 4 SA 222 (CC); (2009) 2 SARC 130 (CC).
2. *Virender* vs. *The State of NCT of Delhi* Crl.A.No.121/2008.
3. *Ratansinh Dalsukhbhai Nayak* vs. *State of Gujarat,* (2004) 1 SCC 64.
4. *Dattu Ramrao Sakhare* vs. *State of Maharashtra,* (1997) 5 SCC 341.
5. *Prem Shankar Sachhan* vs. *State* 20 (1981) DLT 55 (DB).
6. *Rameshwar* vs. *The State of Rajasthan* (1952) 1 SCR 377.

RESULT: Directions issued.

GITA MITTAL, J. (Oral)

1. By this order we are considering the issue of evaluation of the competency of a child to testify in court proceedings. The instant petition has been filed under Section 378(I) of the Cr.P.C. seeking leave to appeal against the judgment of acquittal dated 20th October, 2011 whereby the respondents herein was acquitted of the charges punishable under Sections 376 and 377 of the Indian Penal Code by the learned Additional Sessions Judge in the case arising out of FIR No.45/2010, registered by the police station Nabi Karim.

2. Upon consideration of the leave petition, we had directed issuance of notice for the service of the respondents on the 3rd of September, 2012. However, the notice was not served upon the respondents and, therefore, the notice was again directed to be issued.

3. Mr. Dayan Krishnan, learned Additional Standing counsel for the State has submitted that quite apart from the challenge on merits, there is a very important aspect of the criminal trials which requires to be

immediately addressed, especially in the light of the proceedings in the present case. Mr. Dayan Krishnan, Additional Standing Counsel has placed a copy of the statement of the child victim, who was examined as prosecution witness no.6 in the trial on the 21st of April, 2011. He has drawn our attention to the manner in which the learned trial judge has conducted the competency test of the child witness. It is submitted that the matter of conducting the test for competency of a child witness to depose is a critical part of the child testimony and unfortunately insufficient attention is being paid to it. Mr. Dayan Krishnan, Additional Standing Counsel urges that most courts have a set pattern of questions which are put indiscriminately to every child witness. As a result there is no real assessment of the capacity and capabilities of the child, thereby impacting the quality of the child evidence. He impresses upon us that this aspect deserves immediate attention. It is pointed out that so far as consideration of this aspect of the child witness testimony is concerned, no issue arises and it is independent of and does not impact the consideration of the case on merits. The matter has been listed today for this purpose alone.

Statutory Prescription

4. Before proceeding to examine this issue, it is necessary to examine the statutory prescription with regard to competency of any person to give evidence in Court. In this regard Section 118 of the Indian Evidence Act provides as follows:

> **"118.** Who may testify.- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation.— A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

Competency Inquiry – nature of

5. Section 118 of the Indian Evidence Act contains the expression *'competent to testify'* as well as *'court considers'*. It cites some circumstances which may prevent the child from being able to testify. It is, therefore inherent that before recording the testimony of a person, the court has to be satisfied that the person is not prevented from

understanding the questions put to them, or from giving rational answers to those questions, on account of tender years, extreme old age, disease, (whether of body or mind), or any other cause of the same kind. There is therefore no prohibition by age or otherwise so far as competency to give evidence is concerned.

6. We may first consider the meaning of the expression *'competency to testify'* and the manner in which an examination is to be conducted and conclusion could be reached in this regard. This expression has arisen for consideration not only in this country but internationally. International jurisprudence on this aspect has been placed before us by Mr. Dayan Krishnan, the learned Additional Standing counsel for the State which we note hereafter.

7. Our attention has been drawn to the pronouncement of the Supreme Court of Canada reported at (1993) 4 SCR 2231, **R. vs. Marquard** wherein the court interpreted the "competency inquiry' to mean the witness ability and willingness to tell the truth, and the capacity to perceive, to recollect and to communicate the evidence.

8. In yet another pronouncement reported at (1990) 2 SCR 3, **R. vs. B.(G).,** the Supreme Court of Canada has observed that since children may see the world differently from adults, some details which may appear to be important to adults like time and place may be missing from their recollection. The court suggested that judiciary should take a common sense approach when dealing with the testimony of young children and not expect the same standards from young children as they expect from adults.

9. Valuable light is shed on the impact of a court appearance on a child and the duty of the court towards child witness by a pronouncement of the Constitutional Court of South Africa in the judgment reported at (2009) 4 SA 222 (CC); (2009) 2 SARC 130 (CC) **Director of Public Prosecutions, Transwal v. Minister of Justice and Constitutional Development**. In South Africa, protection is to be given to the child complainants in giving evidence in criminal proceedings involving sexual offences to ensure the foundational constitutional values of human dignity, achievement of equality and advancement of human rights and freedoms under Section 28 (2) of the Constitution which requires that in all matters concerning a child's best interests must be of paramount importance. Further, the Criminal Law (Sexual Offences and Related Matters)

Amendment Act [which effectuated the amendment to the Criminal Procedure Act (CPA)] was introduced so that protection is given to child complainants when their evidence is being recorded in criminal proceedings involving sexual offences. With regard to administration of justice, the Constitutional Court noted the following questions which arose in this regard:

> "5 .First, whether the provisions of the CPA that were enacted to protect child complainants from the mental stress and anguish associated with testifying in criminal proceedings are being interpreted and implemented consistently with the Constitution. Second, the duty of all superior courts including this Court (as the upper guardian of all minors) – if any – to investigate any failure to implement these provisions which deny child complainants the protection they constitutionally deserve, once any failure to do so is brought to the Court's attention."

10. The Constitutional Court was concerned with two rape cases- the first, involving change of rape of a 13 year old girl child by one Mr. Phaswane. In the second, charge of rape of an 11 year old girl by one Mr. Mokoena was levelled. In the Phaswane trial, before the witness testified she was questioned by the court in order to determine whether she understood the import of an oath, and if not, whether she understood what it meant to speak the truth. While the court was not satisfied that she understood the import of an oath, it nevertheless concluded that the child understood the difference between truth and falsehood. The child was accordingly admonished to speak the truth.

11. In the Mokoena trial the child complainant was allowed to give evidence with the aid of an intermediary. We find emphasis on consideration of the best interests of the child by Courts in the judgment authored by Nacobo, J placing reliance on the UN Guidelines when he wrote thus:

> "78. The Economic and Social Council of the United Nations has developed Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (Guidelines). The main objective of these Guidelines is to 'set forth good practice on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles'. These Guidelines provide a useful guide to the understanding of the rights of the child to have his or her best interests given primary consideration in all

> matters concerning the child. They provide that child complainants and witnesses should receive special protection and assistance that they need in order to prevent hardship and trauma that may arise from their participation in the criminal justice system. In particular, in the context of the best interests of the child, the Guidelines set forth the following principle:
>
> "(c) While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:
>
> (i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;
>
> (ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development..

79. It is apparent from the CRC and the Guidelines that courts are required to apply the principle of best interests by considering how the child's rights and interests are, or will be, affected by their decisions. The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings. Child complainants and witnesses should testify out of sight of the alleged perpetrator and in a child-friendly atmosphere.[77] This means that, where necessary, child witnesses should be assisted by professionals in giving their testimony in court. However, each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected.[78] Children must be treated with dignity and compassion.[79] In my view, these considerations

77. Para 30(d) and 31(b) of the Guidelines.

78. Para 11 of the Guidelines.

79. Para 10 of the Guidelines.

should also inform the principle that the best interests of the child are of paramount importance in all matters concerning the child as envisaged in section 28(2) of the Constitution..

12. The Court noted that Section 170A(1) was introduced into the CPA to prevent a child from undergoing *'undue mental stress or suffering'* by permitting the child to testify through an intermediary; to give evidence shielded from the accused by testifying in another room, electronic devices via CCTV or sitting behind a screen that blocks the child's view of the accused but allows the child to be seen; creating an atmosphere conducive for a child to speak freely about the events relating to the offence. It was reiterated that the statutory provision must be construed to give effect to its object to protect child complainants from exposure to undue mental stress or suffering when they give evidence.

13. The observations of the Constitutional Court on the impact of a Court appearance on a child squarely apply to all children and read thus:

> "101. A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child sits alone in the witness stand, away from supportive relatives such as a parent. The child has to testify in the presence of the alleged abuser and other strangers including the presiding judicial officer, the accused's legal representative, the court orderly, the prosecutor and other court officials. While the child may have met the prosecutor before – at least one assumes that the prosecutor would have interviewed the child in preparing for trial – the conversation now takes place in a context that is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom that they refuse to say anything are not unknown."

So far as conduct of the competency assessment of the child is concerned, it was held as follows:

> "102. The child would be questioned by the judicial officer in order to satisfy himself or herself that the child understands that he or she is under a duty to speak the truth or understands the

> import of the oath. Regrettably this questioning, although well-meaning, is often theoretical in nature and may increase the child's sense of confusion and terror. The child may wonder why he or she is being subjected to this questioning. That is not all."

14. This of course is not the end of the matter. There is the added agony of making the statement (i.e. giving evidence) in the presence of the accused. The Constitutional Court has elaborated on this aspect of the Court appearance and also extracted a portion of the child's examination which must be considered by every trial judge:

> "103. The child is obliged to give evidence in the presence of the accused. This is what happened in the Phaswane matter. The accused will be a few paces from the child, and will invariably be staring at the child while the child gives evidence. Perhaps the accused will have threatened the child with death or physical harm if he or she should tell anyone about what the accused had done to him or her. At this stage the child may wonder whether he or she will be punished for speaking the truth that the judicial officer had admonished him or her to speak. This may put the child to an unfortunate choice: either testify and risk the accused carrying out his or her threat, or say nothing. In these circumstances, it would not be surprising for the child to refuse to testify.
>
> 104. If the child decides to speak, then the prosecutor will take him or her through his or her evidence. The questioning of a child requires special skills, similar to those required to run day care centres or to teach younger children. Questioning a child in court is no exception: it requires a skill. Regrettably, not all of our prosecutors are adequately trained in this area, although quite a few have developed the necessary understanding and skill to question children in the court room environment. If the questioning by the prosecutor is not skilled, the result is what happened in the Phaswane matter. The following exchange between the prosecutor and the interpreter illustrates the point:
>
> "PROSECUTOR: What did you mean when you said that he had slept with you?

– He had raped me. What do you mean with rape, we must know what you understand under rape?

– Yes I personally do not know what rape is, I heard from people who say that there is a thing called rape.

Okay but we need to know what happened, you were tripped and then you fell on the ground and he took out a condom. We must know why do you say you have been raped, what did he do to you?

– Rape is sexual intercourse.

What is sexual intercourse?

– Sexual intercourse is when one person has sex with another person.

But we do not know what that means, we need to know what you think what happened, not what you think. You must tells us why do you say that you have been raped and why did you say that the accused had sexual intercourse with you. What did he do, did he take his finger and scratch you on your ear or what did he do, why do you say it is sexual intercourse?

INTERPRETER: I think with the permission of the court of course, I do understand what the state wants to elicit from the witness, it is just that the Prosecutor does not have proper words which can be cut down to the level of the understanding of this. All the question the words that come, I saw a pitch high. The state does not have proper words which are curtailed to the level of the understanding of this, and I do understand what she is saying but I am just afraid to say what she did not say, because I end up being testifying."

15. The ordeal of the cross examination and its purpose was highlighted in para 105 which reads as follows:

"105. The child is then cross-examined with the sole purpose of discrediting the child. If the accused is not legally represented, the accused may conduct the cross-examination. The effect of this on the child can be terrifying especially where the accused is an adult relative of the child. The child may agree with questions

put by the accused for fear of punishment if he or she disagrees. If the cross-examination is conducted by the legal representative, the child will be taken through his or her evidence in the most minute detail. The cross-examination may bring out facts that were so grotesque that the child could never have imagined being forced to recount them. The child will be taken to task for placing events, often months after they had occurred, out of sequence and for not being able to remember important details concerning the events. In this intimidating and bewildering atmosphere, the child complainant is required to relive and reveal sordid details of the horror that he or she went through."

16. And the impact of having to repeat the same story to different persons takes its toll child as this noted in para 106 and 107:

"106. And moreover, the child has been telling the same story to several adults by now, most of whom are strangers: first, to a relative to whom the report was first made; then to a mother; then to a social worker, if she or he has been lucky to have been referred to one; then to a district surgeon or a medical practitioner – this time, the story-telling is accompanied by physical examination; then to a police officer at the charge office where the offence is reported; then to the investigating officer who will now be in charge of the case, where more details are now required; and then perhaps to the public prosecutor for a pre-trial interview, if the child is lucky to have one or if the public prosecutor has the time to conduct one. At times, the abuse may have been discovered by a caring teacher at a day-care centre or at school, and this adds to the list of people to whom the story is told. Then to the court, before an audience of strangers and in the atmosphere described above.

107. Those who know more about child behaviour from a professional point of view tell us that children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten their sense of shame and guilt at what happened to them."

17. The Constitutional Court has succinctly summed up the impact of the Court appearance on the child witness finally in the following terms:

"108. A child complainant who relates in open court in graphic detail the abusive acts perpetrated upon him or her and in the presence of the alleged perpetrator, will in most cases experience undue stress or suffering. This experience will be exacerbated when the child is subjected to intensive and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the emotional and psychological well-being of the child complainant as the original abusive act was. Indeed, High Courts have come to accept that the giving of evidence in cases involving sexual offences exposes complainants .to further trauma possibly as severe as the trauma caused by the crime. It is precisely this secondary trauma that section 170A(1) seeks to prevent."

18. The Court then clearly pronounced that use of the measures which protects the child from secondary traumatisation has the following valuable impact on the testimony of the child:

"116. Following the approach outlined here not only protects child complainants from unnecessary trauma, it helps to ensure that the trial court receives evidence that is more freely presented, more likely to be true and better understood by the court. Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures. In my view, these special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all." (Emphasis supplied)

19. So far as the approach of court and exercise of judicial discretion is concerned, the Constitutional Court of South Africa ruled thus:

"123. What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion.[109] This means that the child must 'be treated in a caring and sensitive manner'.[110] This requires "taking into account

109. Paras 10-4 of the Guidelines.

110. Para 10 of the Guidelines.

[the child's] personal situation, and immediate needs, age, gender, disability and level of maturity".[111] In short, "[e]very child should be treated as an individual with his or her own individual needs, wishes and feelings".[112] Sensitivity requires the child's individual needs and views to be taken into account.[113] The exercise of judicial discretion in the appointment of an intermediary allows a judicial officer to assess "the individual needs, wishes and feelings" of each child. This, in my view, conforms to the principle that the best interests of the child must be of paramount importance in matters concerning the child."

(underlining by us)

20. It is trite that children have been accorded special treatment by the legislature and courts because of their special needs. The court room environment is unfamiliar and would definitely be intimidating to a child who is required to testify as a witness. The trauma if the child witness is a victim as well is only further aggravated. This important subject has received attention of the United Nations as well which has framed the **"United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005.** which recognize that children are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. The UN Guidelines further state that girls are particularly vulnerable and may face discrimination at all stages of the justice system. The UN Guidelines stress the importance of ensuring dignity, including physical, mental and moral integrity of the child witness; the justice process should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethic, cultural, religious, linguistic and social background, caste, socio-economic condition, as well as special needs of the child including health, ability and capacities.

21. The present case is concerned with the alleged commission of offence of rape. So far as examination of the testimony of witnesses, including child witnesses, in cases involving sexual offences are concerned,

111. Id.

112. Para 11 of the Guidelines.

113. Para 9(d) of the Guidelines.

the same has been the subject matter for consideration before the Supreme Court of India as well as this court in several cases. Extensive guidelines have been laid down by the Supreme Court as well as the Delhi High Court in several judgments with regard to every stage of a criminal investigation as well as trials. These guidelines in cases regarding sexual offences laid down in judicial precedents as well as additional guidelines have been compiled in the decision dated 29th September, 2009 authored by one of us (Gita Mittal, J.) in Crl.A.No.121/2008, **Virender vs. The State of NCT of Delhi** (reported at 2009 (4) JCC 2721).

22. So far as the manner in which the statement of the child witness is to be examined is concerned, we may usefully reproduce hereunder para 83(iv) of the above judgment mentioned above wherein the guidelines relating to the cases involving sexual offences are set out. The same reads thus:

"83. xxx

I. xxx

II. xxx

III. xxx

IV COURT

(i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref : Court On Its Own Motion vs. State & Anr)

(ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.

(iii) The trials into allegations of commission of rape must invariably be "in camera" . No request in this behalf is necessary. (Ref : **State of Punjab vs. Gurmit Singh**)

(iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref: (2007 (4) JCC 2680 Court On Its Own Motion vs. State & Anr.)

(v). The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.

(vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref : **Sakshi vs UOI**).

(vii) Competency of the child witness should be evaluated and order be recorded thereon.

(viii) The trial court is required to be also satisfied and ought to record its satisfaction that the child witness understands the obligation to speak the truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence.

There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.

(ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.

(x) The statement of the child victim shall be recorded promptly

and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi)

(xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her.

(xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim.

(xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure;

(xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref Sudesh Jakhu vs. K.C.J. & Ors).

This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony.

(xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing.

(xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented.

(xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref : Sakshi vs UOI).

(xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref : Sakshi vs. UOI)

(xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to harass or intimidate the child witness.

(xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref : **Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.**)

(xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for , to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. (Ref: AIR 1997 SC 1023 (para 12) **State of Rajasthan vs. Ani alias Hanif & Ors.)**

(xxii) The court should ensure that the embarrassment and

reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.

(xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance 'gandi harkatein' or 'batamezein' have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.

(xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.

(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record. (xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref : Sakshi vs. UOI)

(xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref: State of Punjab vs. Gurmit Singh)

To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced, humane and ensure

protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child."

23. In addition, certain general guidelines have been mandated in this pronouncement which reads as follows:-

"V GENERAL

(i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.

(ii) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

(iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness. This would create and inspire a feeling of confidence and trust in the child.

(iv) The child victim shall not be separated from his/her parents/ guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/ guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi)

(v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a valuable tool in the proceedings to ensure that the complete truth is brought out.

(vi) No court shall detain a child in an institution meant for adults.(Ref : Court On Its Own Motion vs. State of N.C.T. of Delhi). This would apply to investigating agencies as well.

(vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted..

24. This pronouncement binds all trial courts in Delhi. It certainly bound the trial judge who was seized of the trial arising out of FIR 45/ 2010 in the instant case.

25. It is essential to note that all these concerns apply to all stages of a child witnesses court appearance including the competency examination of the child and evaluation of her/his response thereto. We cannot emphasise enough that the legislation, the statutory requirements as well as the jurisprudence on the subject have kept the best interest of the child as the complete focus of every action, especially Court proceedings and the decision. This aspect cannot be compromised in any manner. The matter assumes even greater importance in cases involving the sexual offences and abuse of the child as in the present case.

26. In this regard, the protocol captioned as *"Guidelines for Recording of Evidence of Vulnerable Witnesses in Criminal Matters"* is in vogue for the operationalization of the Child Victim Court Room in the District Courts in Delhi*. Currently, these guidelines are being applied in the Child Witnesses Court Room in the District Courts at Karkardooma. These Guidelines only reinforce the principles and the jurisprudence that has been referred to above.

27. In the United States Federal Court and the majority of state courts children are presumed competent to testify (US Code 18 USCS § 3509(c), 2004) unless a legal challenge is raised about the witness' competency. Compelling reasons other than age must exist for a Court to order a competency evaluation of the child witness (US Code 18 USCS § 3509(c), 2004). To raise the issue of competency of a child witness an understanding of abilities and skills needed to be competent to testify is essential. The enumeration by Sherrie Bourg Carter (Psychologist) in her Article "Child Witness Competency : when Should the Issue be Raised?"** of the standards which courts would apply is thus:-

- Adequate intelligence and memory to store information.
- The ability to observe, recall, and communicate information.
- An awareness of the difference between truth and a lie.
- An appreciation of the meaning of an oath to tell the truth.
- An understanding of the potential consequences of not telling the truth.

28. Ms. Carter further elaborates that when a challenge is formally raised, the burden falls upon the Court to make a determination as to whether the child is competent to testify. The courts in the USA usually adopt one or a combination of the following methods:

- Assessment by a court appointed expert in forensic child psychology or psychiatry.
- The child witness is brought to the courtroom and

* http://delhihighcourt.nic.in/writerwaddata/upload/NotificationFile_LCWCD2x4.PDF.

** http://www.forensic-experts.net/general.php?category=Publications%2FNewsletters &headline=Articles of the Institute of Behavioural Science and the Law (IBSL) retrieved

questioned by the attorneys and/or the judge about competency-related matters.

- The judge reviews the child's sworn statement and/or deposition.
- Testimony is taken from those who are familiar with the child's abilities or those who interviewed the child about the alleged incident.

After this the court may hold another hearing where both sides file motions, examine witnesses including expert witnesses, cite case law. The Court then makes a ruling as to whether the child is competent to testify.

29. Guidance on the nature of questions which could facilitate a fair evaluation of the child's competency is also found in this writing. Some questions which have been suggested by Sherrie Bourg Carter for enabling the judges to determine the competency of the child include the following:-

I. **For determining Intelligence and Memory –** For a young child, questions about family, school, counting, and knowledge of the alphabet and colors can provide sense of the child's intelligence and memory. With older children, more difficult intellectual skills determining their literacy level would provide information about their intelligence and memory.

II. **Ability to Observe, Recall and Communicate -** Examples of recent experiences about which child can be questioned should include what the child ate or who the child saw that day. An example of the distant past events should include what happened say on the child's birthday or memorable holiday or a field trip or a vacation. Further questioning could be about attended, and what gifts were received. (Of course, these questions are required to be put keeping in view the socio-economic background and literacy of the child, especially in our country). III. Understanding of Truth and Lie – To assess a child's understanding of these concepts, questions about right and wrong, real and make-believe, truth and lie typically are asked.

As this issue is of extreme importance in our context, the view of the author may be considered in extenso and reads thus:-

"...it is important to recognize that some types of questions are more developmentally appropriate than others. For example, when assessing children's understanding of these dichotomies, interviewers routinely ask children if they know the *difference* between them. However, asking children to explain the difference between two concepts is a more developmentally difficult task than asking what each concept means. In other words, questions such as, *"What does it mean to tell the truth?"* and *"What does it mean to tell a lie?"* are more developmentally appropriate for young children than asking, *"What is the difference between the truth and a lie*?"

It also is important to recognize that very young children often are unable to answer even these easier questions in a narrative form due to their underdeveloped language skills. In one study, researchers found that none of the four-year-olds in their sample were able to define either truth or lie whereas 87.5% of the eight-year-olds were able to define both concepts (Michelle Aldridge & Joanne Wood, *Interviewing Children: A Guide for Child Care and Forensic Practitioners,* 1998). This does not necessarily mean that four-year-olds do not understand the meaning of truth and lies. It also does not mean that the open-ended questions should not be asked. Some developmentally advanced children may be able to answer in a narrative form, but if not, there are acceptable alternative questions to help determine if and how much a child understands these concepts.

For example, young children usually have an easier time answering multiple-choice questions, such as *.If I said my hair is brown, is that the truth or a lie?"* In fact, it is quite common for interviewers or legal professionals to ask several of these basic questions. While there is nothing wrong with doing this, such questions really are not sufficient for several reasons. First, although most children can correctly answer these types of basic questions, they do not provide an answer to the real question of whether the child understands what it means to tell the truth and what it means to tell a lie. While they may be appropriate preliminary questions, the standard *"If I said my hair is brown* .... type of questions mostly establishes whether a child knows his or her colors and can provide a correct or incorrect answer.

Secondly, such questions do not place children in scenarios similar to what judges are ultimately considering when determining witness competency. The pertinent question is whether a child who is placed in a particular situation (the courtroom) and asked questions about an event they either witnessed or experienced (the alleged incident) can distinguish what is the truth and what is a lie. Therefore, in addition to the relatively simple questions, more situationally relevant questions should be asked when assessing a child's competency to testify, such as:

♦ If I told your mom that you just yelled at me, would that be the truth or a lie?

♦ If you told your mom that I hit you, would that be the truth or a lie?

♦ If you told your teacher that something bad happened to you, but it really didn't happen – you were making it up - would you be telling the truth or a lie?

Competent children should be able to consistently provide correct answers to these multiple-choice questions".

IV. **Meaning of Taking an Oath –** Here also, the observations of the author shed valuable light and reads as follows:-

"Children usually are not familiar with the word, oath, but most recognize the word, promise. Because taking an oath and making a promise are similar concepts, it is more developmentally appropriate and more productive to ask children if they know what it means to make a promise. Furthermore, substituting the word, promise, for the word, oath, when swearing in child witnesses has become increasingly more common and accepted throughout the legal system (Task Force on Child Witnesses, American Bar Association Criminal Justice Section, The Child Witness in Legal Cases, 2002).

Still, as with other open-ended, definition-type questions, young children may not be able to readily answer the question, .What does it mean to make a promise?. If this is the case, follow-up questions also should be asked to better assess the child's appreciation, such as:

♦ If you promise your mom that you are going to eat your lunch, what should you do? 'and' Why?. 'If you promise to tell the truth today, what should you do? 'and' Why?.

Children also should be asked what might happen, both to the child and the person being lied about, if they said something happened to them and it was not true. Examples of such questions are:

♦ When you get caught telling a lie, what usually happens to you?

♦ If you said that your classmate hit you and it was not true – you were making it up – what could happen to you for lying?

♦ If you said that your sister hit you and it really didn't happen, but your dad believed you, what could happen to your sister?

In cases where a child witness struggles with responding appropriately to questions about promising, the issue of competency may need to be raised."

30. The author further notes that while judges and attorneys believe that a child who can correctly answer questions such as, *"If I said my hair is green, is that the truth or a lie?"* understands the difference between the truth and a lie and is, therefore, competent to testify, a review of the legal standards for competency to testify throughout the majority of states shows that the standard is not that simple to meet. Legal standards for competency to testify generally require witnesses to not only understand the concepts of truth and lie, but also to appreciate the meaning of an oath to tell the truth and an understanding of the potential consequences of not telling the truth as well as abilities to observe, recall, and communicate information.

31. The importance of the evaluation is underlined by the author who states that as a pre-trial challenge to the competency of a child witness is crucial for the outcome of the case, the competency requirements must be well understood by attorneys and judges.

32. The Judge thus evaluates the child's intelligence and capacity as a competent witness or to ascertain whether she understands the

meaning of oath. This is also the mandate of Section 118 of the Indian Evidence Act.

What may the trial judge ask?

33. We are deeply concerned with the manner in which any child in the court system is treated. The issue of not only the manner in which children are treated in the court system, but the nature and propriety of questions which would be appropriate for them. Judges are not trained in child psychology and may also have had very little experience and interaction with children. Just as adults, it is impossible to fathom what goes through a child's mind or predict as to how a particular experience or question may impact them. Some insight into the manner a competence examination ought to be conducted by the Court is to be found in the paper **Child Witnesses: the Judicial Role (2007) 8 (2) The Judicial Review 281-294 by Dr. Judy Cashmore, Associate Professor, Sydney Law School (former Member, the Judicial Commission of New South Wales, Australia).** In view of the significance of the issue, the relevant extract of the paper on this aspect is extracted below:

> **"Competence testing**
>
> Children are presumed to be competent and can give unsworn evidence if the court is satisfied they understand the difference between the truth and a lie. This presumption is reasonable given the research findings on children's understanding of truth and lies, and promises. Children as young as four or five recognise deliberately false statements as lies but tend to be over-inclusive and more stringent than older children and adults because they tend to include incorrect guesses and exaggerations as lies. They also expect to be caught out and to be punished if they lie.
>
> Despite the presumption of competence, some children are still subjected to inappropriate questioning about their understanding of truth and lies. Several children and a parent/carer in the child sexual assault specialist jurisdiction evaluation study commented on the confusing nature of the questions about truth-telling. One 15-year-old with a learning difficulty said, for example:
>
> *"He made me confused. He asked me what the truth was, and I was thinking about it and he said =Did you listen to me, young man?' and he just kept asking the same thing".*

> His foster mother also commented on his difficulty:
>
> *"His speech goes when he is really nervous, and he was struggling to talk. That was hard for him because the judge did not give him time to answer. He said =Are you listening, can you understand what I'm saying' and that just flustered him more and he could not get his answers out. And when that happens, he just clams up, and he just says 'yep', 'nup'."*
>
> It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between the truth and a lie. Attempts to ask more concrete questions may, however, raise other difficulties. For example:
>
> - *Would it be the truth or a lie if* **I said** (if asked by a judge/magistrate)? There are two problems with this question. First, it asks the child to call the judge/magistrate a liar. Secondly, asking children whether a given statement matches reality (for example, colour of clothing) does not indicate whether they know the difference between a truth and a lie. A lie requires the intention to deceive or mislead.
> - *If I said there were eight people in the room,* **and if** there were only ...? This question requires the child to keep in mind two conditional or hypothetical statements, in addition to the problem alluded to above.
> - *Have you ever told a lie?* **No.** Children are likely to be very uncomfortable admitting that they have lied, especially in court to a judge or lawyer.
> - *What would happen to you if you told a lie here today?* A child who answers by saying 'nothing' may be seen as not understanding the consequences of lying but some children do not accept the premise of the question - they have no intention of lying - so they may say "nothing".
> - For example, one exchange between an adult and a child: *If you tell a lie, will you get into trouble? No.*
>
> You won't get into trouble? **No ... But I am not going to tell a lie.**

Since some children may not elaborate and give a reason for their answer, it would therefore be better to ask - .If your brother/sister/friend broke a plate and said you broke it to save getting into trouble, would that be the truth or a lie?"

34. We may note that we have hardly come across a case where the question as to whether the child witness understands the meaning of truth, lie and oath is not a standard.

35. The importance of judicial leadership in cases involving children is expressed by L. Sas in "The Interaction Between Children's Development Capabilities and the Courtroom Environment: The Impact on Testimonial Competency, Research Report (RR02-6e)"[***], [November 2002, Department of Justice, Canada], when she stated thus:

"Children's feelings of goodwill and their high expectations of the adults in court are especially extended towards the judiciary. Children cannot understand how a judge will not believe them when they are telling the truth. Many children have unrealistic expectations of the judge, seeing the judge as someone who will right all the wrongs that have been committed by the accused. It is not surprising that explanations of how a judge arrives at a decision employing a standard of beyond a reasonable doubt is so hard for child witnesses to comprehend. They expect the judge to see the events from their perspective. This is one of the reasons why court preparation is so important for child witnesses..

Competency testing in the present case

36. Before coming to the actual statement, we may refer to some essential facts some of which were before the trial judge in the challan. In the present case, the alleged incident took place in public toilet in the Multani Danda, Pahar Ganj area. The child victim/ witness was one of the four sisters who did not appear to be having the care of their parents and was living with their aunt (described by the child as Bua). So far as the victim is concerned, she appeared to be under the guardianship of her maternal aunt.

*** http://canada.justice.gc.ca/en/ps/rs/rep/2002/interaction/inter.pdf (retrieved on 24 January 2007).

37. The child victim was examined by the trial judge on the 21st of April, 2011. The statement has been annexed with the paper book placed before us.

38. The first and foremost guideline mandated in every binding judicial pronouncement on the subject is to maintain anonymity of the identity of the victim. The several judicial pronouncements and guidelines noted above are based on the prime requirement of ensuring the best interests of the child under all circumstances. We are constrained to note that the trial Court has completely ignored this guideline and has recorded the full particulars, including the name of the child, before recording the statement.

39. We may now extract the examination by the trial judge in the present case to ascertain this very aspect of the matter:

"Q. What is your age?

Ans. My aunt Baby knows it.

Q. For how many years you are going to school?

Ans. For the last one year.

Q. Do you know how to read Hindi or English?

Ans. I know to read Hindi only.

Q. Whether one should speak truth or false?

Ans. Truth.

Q. Why one should speak truth or false?

Ans. Silence, as she does not reply.

Q. Whether one should speak truth in the court or not?

Ans. Yes, one should speak truth.

Q. Do you watch T.V.?

Ans. No, we do not have T.V.

Q. Do you know who is prime minister of India?

Ans. No.

Q. Who are your family members?

Ans. We are four sisters living with our Bua as our mother had already expired and my father is missing for long time."

40. After putting the above questions and a consideration of the witnesses answers noted above, the learned trial judge held that the witness did not understand the meaning of the oath and therefore her statement was recorded without oath.

41. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State points out that from the very case of the prosecution, the learned trial judge was conscious of the socio-economic status of the child and consequently most of the questions put to the child were completely unfair and unmerited.

42. We find from the questions put to the child that the learned trial judge was well aware of the fact that she was one of the four sisters who were being looked after by their Bua for the reason that their mother had expired and father was missing for the long time. The child was not going to school. The incident had taken place in public toilet and the child appeared to be coming from a household with little economic means.

43. In this background, the questions put to the child as to whether she watches television and her disclosing that she does not have television was certainly not circumstance appropriate. Given the level of her education as well as her background, the further question as to who was the Prime Minster of India was wholly unwarranted.

44. The questions that the trial judge would be required to put to the witness have necessarily to meet the requirements of law as well as the binding principles laid down in the several judicial pronouncements and the authoritative texts noted by us having special regard to the age and circumstances of the person who is required to depose.

Importance of Child testimony

45. So far as the parameters within which the inquiry by the court shall be conducted are concerned, in the judgment reported at (1952) 1 SCR 377 **Rameshwar vs. The State of Rajasthan** (at page 382), the Supreme Court held that *"it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking truth"* In this precedent the court had recorded that the child did not understand the nature of the oath, however continued to record the child's evidence which circumstance by itself was construed as the record of competence. It was also held that not having taken oath only

goes to the credibility, and not the competency of the witness. The court relied upon the testimony of the prosecutrix who was eight years old and upheld the conviction of the accused for the offence of rape. The court had observed that while evaluating the testimony of such child, the circumstances which would be considered would be the tender years of the child; its demeanor; possibility of tutoring, etc.

46. In (2004) 1 SCC 64, **Ratansinh Dalsukhbhai Nayak vs. State of Gujarat,** the Supreme Court upheld the conviction of the appellants under Section 302 IPC relying upon the evidence of a ten years old child. The court prescribed the requirements, which the court would meet before recording the evidence of a child witness in para 7 in the following terms:-

> "The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial judge who notices her manners, her apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as her understanding of the obligations of an oath."

47. On the weight to be attached to child testimony, in para 5 of the case reported at (1997) 5 SCC 341, **Dattu Ramrao Sakhare vs. State of Maharashtra,** the Supreme Court has made the following valuable observations:-

> "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the

corroboration to such evidence from other dependable evidence on record."

48. Such being the weight which may be attached to a child witness testimony, a fair trial would mandate that the best child testimony is ensured.

Impact of a court appearance on the child

49. It needs no elaboration that Court appearances impact children more drastically than they do adults. The foreboding and austere Court rooms; people in black and white uniforms; the presence of the offender against whom the child has to testify may bring alive the trauma the child has seen (or may have experienced, if a victim). All of this may reduce the child into a state of terrified silence. This is where the judge has to step in to ensure removal of the fear and apprehensions being nursed by the child in the Court.

50. The following courtroom experiences of child witness recorded by **Dr. Judy Cashmore,** in **(Child Witnesses: The Judicial Role [(2007) 8(2) The Judicial Review 281-294)** as to why they could not give a full and proper account of their evidence shed valuable light on the present issue as well:

"There were several reasons children felt they could not give a full and proper account of their evidence. First, they were constrained by the questions and by the directions they were given about how they could answer. Several children were upset that they could not .tell the truth, the whole truth, and nothing but the truth., because they were told by either the judge or the lawyer, to "just answer the question that was asked". They also reported being cut off or interrupted by the lawyer. For example:

"It was very hard because he [lawyer] would not let me speak. He would ask me a question and he would not let me respond to it. He'd just cut me off.. (15-year-old complainant)

"Like I'd go to tell him what happened and he'd just say, 'No, just answer the question'. Like, you want to tell them the whole story, and they say, 'No, you can't say that. If you don't say it this way, you can't say it at all'.. Who was saying that? The other guy, the defence guy. (11-year-old complainant)

Second, some felt constrained by admissibility issues and by having to carefully edit their 'stories' to suit. For example, Alice, a 16-year-old, was giving evidence in relation to a series of sexual assaults against her in one trial, and in relation to assaults against several other complainants in two other separate trials. She spoke of her difficulty in trying to answer questions 'out of context' - without referring to the other complainants - and her consequent discomfort at appearing hesitant and unreliable before the jury.

"No, I had been told that I could not mention any other cases but some questions that they asked, you couldn't answer without mentioning the other people because that's how it worked, that's how it happened. So I was thinking, 'Am I going to look like I am lying because I am hesitating? - because I didn't know how to answer without mentioning them. I feel negative about the court experience now because there are just so many things you can't say which makes it very hard for the jury to understand a lot of other things you know are connected to them'. (15-year-old complainant)

Third, some children had difficulty in understanding the questions, consistent with the findings of numerous other studies on the difficulty of 'legal language' 8 For example:

"It was quite hard ... and a bit annoying. They were speaking mumbo jumbo. Words I could not understand. (15-year-old complainant)

Finally, some child witnesses were clearly frustrated by what they saw as unnecessary questioning about irrelevant details by the defence lawyer and dissatisfied that their attempts to give honest answers were used to make them appear to be an unreliable witness. For example: .There were so many questions that you cannot possibly remember the details over two years. He asked questions about things that were really irrelevant, like how long did Petra stay for, so he got me saying a number of times 'I don't really remember'. And it worked; so then he could say to the jury that she doesn't remember.. (16-year-old complainant.

51. We may point out even at the cost of repetition that the directions

by the courts noted above, made with the best interests of the child at the center, take care of all these issues.

52. Our attention has been drawn to the Division Bench pronouncement reported at 20 (1981) DLT 55 (DB), **Prem Shankar Sachhan vs. State** wherein in para 22, the court observed that the testimony of a child witness can be *"spontaneous and unsparing, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion, and given confidence to come out with what was seen"*. It was thereafter held as follows:-

> "The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. Courts should also while permitting full scope for cross-examination of such witnesses be careful to see that they are not subjected to unnecessary confusion, harassment or unduly made conscious of the awe of formal court atmosphere and the public gaze..

53. The guidelines noticed above in para 83(iv), have factored in avoidance of interface with the accused; use of screens/video links; avoidance of multiple court appearances; sensitive questioning and cross examination of the child and ensuring minimization of secondary transaction of the child witness (who may be a victim).

Duty of the court

54. What needs emphasis, however, is that the guidelines laid down in judicial precedents know no exceptions and adherence is mandatory. Their application at every stage of the proceedings is most essential so as to get the best evidence from the child witness, necessary for conviction of the guilty as well as for preventing the innocent from punishment. We repeat that these principles have to be followed at the stage of conducting the competency examination of the child witness as well.

55. Even more important is the fundamental responsibility of every court to ensure the welfare and best interests of the child which has to remain the paramount consideration under all circumstances. Unfortunately, this aspect during the trial is more often a casualty than not. Regrettably the trial court without realizing, are thereby violating with impunity binding judgments of the Supreme Court and this Court. Important statutory provisions are being ignored impacting not only the quality of important child witnesses but the result of the trial. The inevitable consequence is that best interest of the child suffer as well.

Conclusions

56. We are presently considering the matter of a competency examination by a trial judge.

57. To say the least in the instant case, the trial judge has completely ignored the best interest of the child witness who testified before him. He has also ignored the mandate of law as well as the several judicial pronouncements which have been mentioned hereinbefore.

58. The questions which were put to the child witness ought to have been sensitively framed keeping in mind the socio-economic background of the child, education of the child, the age as well as the capacity of the child which the trial judge would evaluate when the child is produced before him.

59. It is not for us to frame a template with regard to the questions which may be appropriate in a particular case. Some examples suggested by experts have been noted herein. The discussion suggests propriety of some questions which could be put to the child. However, the questions which have been put in the instant case were certainly inappropriate, were insensitive and violated the basic human rights of the child witness.

60. The trial courts would be well advised to pay heed to the several cautions by the experts and carefully evaluate the questions which they put to child witnesses as well as compliance with the guidelines to minimize the secondary traumatisation of a child witness by the courtroom experience.

61. We are concerned only with the violation of the guidelines noted in para 14 and the nature of questions framed and put by the learned trial judge for as the competency examination. Given the importance of the issue, this matter cannot be ignored by us. We make it clear that nothing above in this order is an expression of opinion on either the statement of the child or on the merits of the judgment against which the present leave petition has been filed by the State. The impugned judgment does not reflect any challenge by the defence to the competency of the child to give evidence in the present case. We have examined herein only the general principles which would govern a competency examination of the child witness before the court and the propriety of the questions framed by the learned trial judge.

In view of the above discussion, we direct that a copy of this order be sent to the Principal, District and Sessions Judge who shall circulate this order to all judges in the District Courts who shall ensure compliance of the judicial precedents and guidelines laid therein.

List the petition on 27th May, 2013, the date already fixed.

ILR (2013) III DELHI 1897
W.P.(C)

PANCHAM SINGH ...PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 337/1998 DATE OF DECISION: 17.04.2013

Border Security Force Act, 1968—Section 11—Border Security Force Rules, 1969—Rule 22—Sector HQs Hospital, Amritsar referred petitioner to Base Hospital, Jalandhar for further treatment—Petitioner neither reported in that hospital nor informed respondents and went to his home town, Moradabad—As petitioner's period of absence exceeded 30 days, a Court of Inquiry was conducted—Show cause was also dispatched to petitioner informing that it was tentatively proposed to terminate his services by way of order of dismissal—Petitioner failed to respond to respondents and vide impugned orders, petitioner dismissed from service and appeal of petitioner also rejected—Orders challanged before HC—Plea taken, petitioner was unwell and was taking treatment for tuberculosis and for this reason has failed to report at place of duty—

Held—Petitioner had gone to his home town, Moradabad instead of Base Hospital, Jalandhar consciously—Medical certificate relied upon by petitioner is after petitioner received show cause notice—There is no contemporary record of prescriptions, treatment or of any medication(s) which petitioner may have taken, if he was actually sick or was under treatment—Stand of respondents that no reply having been received from petitioner and petitioner having been given a notice to show cause in accordance with law, respondents had no option but to pronounce order recording its satisfaction that petitioner was absent without leave without any reasonable cause and his further retention in service was undesirable—Treating petitioner's absence as a period of petitioner having been on leave without pay would not impact order of punishment—Writ petition dismissed.

Important Issue Involved: (A) On petitioner's period of absence exceeding 30 days and on petitioner's failure to give any reply to the show cause notice given in accordance with law, respondents can record satisfaction that petitioner was absent without leave and without any cause and his further retention in service was undesirable.

(B) Treating the period of the petitioner's absence as a period of the petitioner having been on leave without pay would not impact the order of punishment.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Ms. Tamali Wad, Advocate.

FOR THE RESPONDENTS : Ms. Satya Saharawat, Advocate for Mr. Ankur Chhiber, Advocate.

CASES REFERRED TO:

1. *State of Rajasthan and Another* vs. *Mohammed Ayub Naz* reported in 2006 I AD (SC) 308.

2. *Ex, Const. Akhilesh Kumar* vs. *The Director General, BSF & Ors.* WP (C) No.6577/2002.

RESULT: Dismissed.

GITA MITTAL, J. (ORAL)

1. The instant writ petition assails an order dated 27th January, 1994 passed by the Commandant, 40th Battalion, BSF, dismissing the petitioner from service w.e.f. 27th January, 1994 and the order 8th February, 1994 passed by the Sector Headquarters, Amritsar rejecting the appeal of the petitioner.

2. The undisputed facts giving rise to the present petition are briefly noticed hereafter. The petitioner was appointed as a Constable in the Border Security Force on 1st April, 1987. He was under treatment for some ailment at the Sector Headquarter Hospital, Amritsar. On the 8th September, 1993, the petitioner was referred for his treatment to the Base Hospital, Jalandhar. In this regard, reliance has been placed by the parties on the Discharge Summary dated 9th September, 1993 issued by the Sector HQs. Hospital which clearly requires the petitioner to report to the Base Hospital, Jalandhar for further treatment.

3. It is admitted that on 9th September, 1993 itself, the petitioner left by train for Jalandhar. However, he never reached the Base Hospital, Jalandhar. As per the petitioner, he became unconscious in the train and on regaining senses, he found that he was in Ambala city. The petitioner proceeded from Ambala City to his home town in Moradabad albeit without any intimation to either the Base Hospital, Jalandhar or his Unit.

4. The respondents have claimed that they thereafter received knowledge in December, 1993 that the petitioner had not reported to the Base Hospital, Jalandhar for treatment. As a result, they sent a letter to the petitioner at his home address directing him to join duties but the petitioner neither reported to the unit nor responded to the communication from the respondents. The petitioner has claimed that on 10th September, 1993, he had sent a telegraphic information to the respondents. This fact is, however, disputed by the respondents. In this regard, the petitioner

has placed a typed copy of a certificate dated 25th April, 1994 issued by the In-charge of the Communication Centre, Amroha, District Moradabad certifying that the petitioner had sent a telegram to the Commandant,40th Battalion, BSF Khasa Campt district, Amritsar, Punjab. However, this certificate by itself would not establish either the contents of the telegram or the receipt of the telegram by the respondents. The respondents have denied receipt of any such telegraphic communication on affidavit and would have discharged any onus or burden of proof in order to meet the requirement of General Clauses Act and the Indian Evidence Act.

5. The respondents urge that they were, thereafter, constrained to make inquiries with regard to the petitioner's whereabouts and despatched a letter dated 5/6th January, 1994 to the SHO of the Police Station Rajabpur, District Moradabad, Uttar Pradesh requesting steps for tracing the petitioner as well as to the petitioner's father Shri Fateh Singh calling upon him to send the petitioner to join his duty forthwith. The respondents have explained that for the reason that the petitioner's period of absence exceeded 30 days, a Court of Inquiry was also directed on 7th January, 1994 into the same and was duly conducted.

6. In addition to the above, on 11th January, 1994, the respondents dispatched a show cause notice to the petitioner informing the petitioner that he was absent without leave for a long period and consequently, his further retention in service was considered undesirable. The Commandant of the 40th Battalion, BSF also thereby informed the petitioner that it was tentatively proposed to terminate his services by way of an order of dismissal. Opportunity was given to the petitioner to represent any defence against the proposed action before the 25th January, 1994. By the same communication, the petitioner was informed that in case he failed to reply, the respondents would consider that he had no defence to put forward. It is an admitted position that the petitioner failed to respond to the respondents before the 25th January, 1994.

7. We now enter the arena of dispute between the parties. The petitioner claims that he sent a response to the show cause notice on 25th January, 1994. The respondents have disputed receipt of any such response from the petitioner. Unfortunately, the petitioner has failed to place copy of the reply which he claims to have sent to the respondents. Even the contents thereof or the reasons espoused for the petitioner's absence is not disclosed.

8. Before us, Ms.Tamali Wad, learned counsel for the petitioner has vehemently urged that the petitioner was unwell and was taking treatment for tuberculosis and for this reason had failed to report at the place of duty. However, this submission is to be noted only for the sake of rejection.

9. Keeping in view the petitioner's state of health, the Sector Headquarters Hospital, Amritsar had very carefully recommended the petitioner and referred for further treatment to the Base Hospital at Jalandhar which was certainly a larger hospital with expert medical facilities maintained by the respondents. The petitioner has very deliberately failed to report to the Base Hospital, Jalandhar. Even if his plea of having fallen unconscious was to be accepted, the petitioner is unable to explain as to why he did not go to Jalandhar barely one and a half hours or two hours journey from Amritsar. Instead he has consciously proceeded to his village Bhawalpur Basli, PO Sarkada Kamal, district Moradabad in Uttar Pradesh which was a much longer distance away. This was certainly a conscious act on the part of the petitioner.

10. As per the medical certificate on which the petitioner places reliance, he has taken treatment between 10th September, 1993 and 13th December, 1993 from some Primary Health Centre of tuberculosis at Manota. Even this plea is difficult to accept inasmuch as the medical certificate on which the petitioner has relied, is dated 18th January, 1994 which is after the petitioner received the show cause notice dated 11th of the January, 1994 from the respondents. The medical certificate is not supported by any contemporary record of either prescriptions, treatment or of any medication(s) which the petitioner may have taken, if he was actually sick or was under treatment. We are noticing this fact only in view of the categorical submission on behalf of the petitioner that his absence was bona fide and only on account of sickness. Interestingly the second document, a fitness certificate relied upon by the petitioner also date 18th of January, 1994 has been obtained from the Primary Health Centre, Joya, Moradabad. These documents do not inspire confidence.

11. The plea of the petitioner is difficult to believe given the afore-noticed facts. The petitioner does not even attempt an explanation for his absence between 13th December, 1993 and 27th January, 1994. In the above circumstances, the stand of the respondents that no reply having been received from the petitioner and the petitioner having been given a

notice to show cause in accordance with law, the respondents had no option but to pronounce an order dated 27th January, 1994 recording its satisfaction that the petitioner was absent without leave w.e.f. 8th September, 1993 without any reasonable cause and his further retention in service was undesirable.

12. It is urged by Ms.Wad, learned counsel for the petitioner that the respondents have legalised the period of the petitioner's absence w.e.f. 8th September, 1993 to 27th January, 1994 and had treated the same as a period of the petitioner having been on leave without pay. In the given facts and circumstances, this would not impact the order of punishment. The petitioner admits that no leave had been sanctioned in favour of the petitioner. The petitioner not only remained absent but he did not care even to inform his employers with regard to the same nor entered any explanation when called upon to do so.

13. For this reason, no fault can be found even in the order dated 8th February, 1994. The respondents have exercised jurisdiction in accordance with Section 11 read with Rule 22 of the Border Security Force Act. In this regard, our attention is drawn to the pronouncement of the Division Bench of this court in WP (C) No.6577/2002 **Ex, Const. Akhilesh Kumar Vs. The Director General, BSF & Ors.** wherein in para 9, the court held thus:-

> "Being aggrieved of the aforesaid action this writ petition is filed on which we have heard the learned counsel appearing for the parties. Counsel for the petitioner has submitted before us that the petitioner was on leave and he was receiving medical treatment for a head injury. On going through the record we find that the petitioner had undergone surgery for Arachanoid Cyst Temporal Lobe. However after the said period the petitioner joined 30 Bn. BSF on 27th October, 1995. The petitioner for the said period i.e. from 1st June, 2000 to 16th July, 2000 was found to be roaming here and there as stated by his own father. It is also indicated from the said report submitted by the police that the petitioner was not interested to rejoin duties. The petitioner belongs to a disciplined force and therefore it was incumbent upon him to inform the respondents regarding his absence even if there was any difficulty for the petitioner to rejoin the duties. He ignored all notices issued to him by the respondents directing

him to rejoin his duties. Having no other alternative, action has been taken against the petitioner in accordance with the provision of Section 11 of the BSF Act. Under similar circumstances actions taken by the respondents exercising power under the same provision of law have been upheld. In that regard our attention is drawn to a Division Bench decision of this Court in **Ex.Ct.Raj Kishan v. Union of India and Others** - CWP No.7665/2001, disposed of on 4th September, 2002. In the said decision also a similar issue came up for consideration before this Court. It was held in the said decision that since the show cause notice issued to the petitioner was in accordance with law and incorporated the opinion of the Commandant that retention of the petitioner in service was undesirable and since his trial by security force court was held to be inexpedient and impracticable and therefore there is no illegality or irregularity in passing the impugned order. Similar is the situation in the present case also. Competent authority in the show cause notice recorded that retention of the petitioner in service was undesirable and his trial by security force court was inexpedient and impracticable. Cases of **Gauranga Chakraborty v. State of Tripura** reported in (1989) 3 SCC 314 and Union of India v. Ram Pal reported in 1996 (2) SLR 297 were also referred to wherein it was held that the power exercised by a Commandant under Section 11(2) read with Rule 177 was an independent power which had nothing to do with the power exercisable by a security force court and once show cause notice was issued in terms thereof, no further inquiry was required to be held if the delinquent person failed to reply to the notice and to deny the allegations in the process.

Our attention is also drawn by the counsel appearing for the petitioner to a medical certificate dated 4th February, 2001 which is placed on record in support of his contention that the petitioner was indisposed during the entire period during which he was allegedly absent unauthorisedly. The said medical certificate is issued by CMO, Fategarh. On going through the said medical certificate we find that he was advised rest for the period from 12th July 2000 to 4th February 2001 which is the period during which he was unauthorisedly absent. The said certificate does not state that the petitioner had undergone any surgery in the

said hospital of the CMO Fategarh. It was only a certificate stating that he was suffering from post operative arachanoid cyst with eplileptic seizure and advised rest for the aforesaid period. The said operation as already indicated was done in the year 1992 and we do not find any reason given in the said certificate for advising rest to the petitioner for such a long period. Except for that medical certificate no other contemporaneous record is placed on record to show that he was ever admitted to any hospital nor any document is placed on record to show and indicate that he was purchasing medicines or he was even examined as an out door patient around the same time. We have already referred to the report of the police from which it is indicated that the petitioner was not in the hospital for the father of the petitioner would have definitely given such a statement to the police if it would have been so. Therefore the aforesaid medical certificate does not inspire confidence and cannot at all be relied upon.

Considering the facts and circumstances of this case we are of the considered opinion that ratio of the aforesaid decisions of this Court as also of the Supreme Court are squarely applicable to the facts and circumstances of this case as in the present case also the independent power vested in the Commandant under Section 11(2) read with Rule 177 was exercised after issuing show cause notice to the petitioner in terms thereof. Therefore we hold that no further inquiry was required to be held in view of the fact that the petitioner has failed to file any reply to the show cause notice and to deny the allegation in the process.

In a recent decision of the Supreme Court in **State of Rajasthan and Another v. Mohammed Ayub Naz** reported in 2006 I AD (SC) 308 the Supreme Court after referring to many other precedences has held that absenteeism from office for prolong period of time without prior permission by the Government servant has become a principal cause of indiscipline which have greatly affected various Government services. It is also held that in order to mitigate the rampant absenteeism and wilful absence from service without intimation to the Government the Government has promulgated a rule that if the government servant remains willfully absent for a period exceeding one month

and if the charge of willful absence from duty is proved against him, he may be removed from service. The Supreme Court held that the order of removal from service passed in the said case was the only proper punishment to be awarded in view of the fact that Government servant was absent from duty for long period without intimation to the Government. **Ram Pal** (supra) is also a case where action was taken by the respondents under the provisions of Section 11(2). In the said decision it was held that once a show cause notice is issued recording tentative opinion as required, nothing further was required to be done in the said case as the employee did not reply to the notice. Therefore it was held that as there was no denial of the allegation nor was there any request for holding an inquiry, therefore the action taken is justified."

The principles laid down in this judicial precedent squarely apply to the present case.

14. For all the foregoing reasons, we find no merits in this writ petition which is hereby dismissed.

ILR (2013) III DELHI 1905
W.P. (C)

INDUS TOWERS LIMITED ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

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

W.P. (C) NO. 4976/2011 DATE OF DECISION: 18.04.2013

Constitution of India, 1950—Articles 14, 19(1) (g) and 265 and entry 97 of List I (Union List) of 7th Schedule—Delhi Value Added Tax Act, 2004—Section 2(1) (zc) (vi) and 84—Finance Act, 1994—Section 65 (105) (zzzq)—Commissioner, Department of Trade and Taxes to Govt. of NCT of Delhi on examination of agreement entered into between petitioner and telecom operators, held that entire amount of consideration received from sharing telecom operators for providing access to passive infrastructure would amount to consideration for transfer of right to use goods and was exigible to tax—Order challanged before HC—Plea taken, there was no transfer of right in any goods by petitioner to sharing telecom operators and therefore, levy of VAT on assumption to contrary was wholly erroneous and untenable—Held—Petitioner has not transferred possession of passive infrastructure to sharing telecom operators in manner understood in law—Limited access provided to them can only be regarded as permissive use or a limited licence to use the same—Possession of passive infrastructure always remained with Indus—Sharing telecom operators did not therefore, have any right to use passive infrastructure—Assessment order framed on basis that petitioner transferred right to use passive infrastructure to sharing telecom operators, quashed.

The right to use the goods – in this case, the right to use the passive infrastructure – can be said to have been transferred by Indus to the sharing telecom operators only if the possession of the said infrastructure had been transferred to them. They would have the right to use the passive infrastructure if they were in lawful possession of it. There has to be, in that case, an act demonstrating the intention to part with the possession of the passive infrastructure. There is none in the present case. The passive infrastructure is an indispensible requirement for the proper functioning of the active infrastructure which is owned and operated by the sharing telecom operators. The passive infrastructure is shared by several telecom operators and that is why they are referred to as sharing telecom

operators in the MSA. The MSA merely permits access to the sharing telecom operators to the passive infrastructure to the extent it is necessary for the proper functioning of the active infrastructure. The MSA also defines "site access availability" as meaning the availability of access to the sharing operator to the passive infrastructure at the site. Clause 2 of the MSA which has been quoted above provides for "site access" and Clause 1.7 limits the site access availability to the sharing operator on use – only basis so far as it is necessary for installation, operation and maintenance etc. of the active infrastructure; the clause further states that the sharing operator does not have, nor shall it ever have, any right, title or interest over the site or the passive infrastructure. **(Para 19)**

Important Issue Involved: When petitioner has not transferred the possession of the passive infrastructure to the sharing telecom operators in the manner understood in law, the limited access provided to them can only be regarded as a permissive use or a limited licence to use the same. Entire amount of consideration received from sharing telecom operators is not exigible to tax under the Delhi Value Added Tax Act.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. N. Venkataraman, Sr. Advocate with Mr. R. Satish Kumar, Mr. Parivesh Singh and Ms. Anjali Chauhan, Advocates.

FOR THE RESPONDENTS : Mr. Parag P. Tripathi, Sr. Advocate with Mr. Siddhartha, Advocate on behalf of R-3. Ms. Sonia Sharma, Sr. Standing Counsel for Service Tax Department/R-4. Mr. Vaibhav Agnihotri, proxy for Ms. Kanika Agnihotri, Advocate for UOI/R-1.

CASE REFERRED TO:

1. *Indus Towers Ltd.* vs. *Deputy Commissioner of Commercial Taxes Enforcement,* 2012 (285) ELT 3 (Kar).

RESULT: Allowed.

R.V. EASWAR, J.

1. This is a writ petition filed by M/s Indus Towers Ltd., (hereinafter referred to either as "Indus" or as "the petitioner") seeking the issuance of a writ of certiorari quashing the order of the Commissioner, Department of Trade and Taxes, Government of NCT of Delhi passed on 29.04.2011 on the ground that it is *ultravires* Articles 14, 19(1)(g) and 265 and entry 97 of List I (Union List) of the 7th Schedule to the Constitution of India. A prayer has also been made seeking directions to the Union of India, Ministry of Finance, New Delhi, which is the first respondent herein, to refund the taxes paid by the petitioner under the Finance Act, 1994 on the activity of the provision of "passive infrastructure services" or in the alternative to direct the said respondent to deposit the taxes paid under the Finance Act, 1994 for appropriation towards the tax liability arising out of the impugned order.

2. The petition arises in the following circumstances. Indus, which is the petitioner herein, is a company incorporated under the Companies Act, 1956. Its business is to provide access to the telecom operators, on shared basis to the telecom towers installed by it as well as the shelter, diesel generator sets, air conditioners, electrical goods, DC power systems, battery etc. Indus is a company registered with the Department of Telecommunication for providing passive infrastructure services and related operations and maintenance services to various telecommunications operators in India on a shared basis. It is the policy of the Government of India to encourage extensive infrastructure sharing and in pursuance with the policy, the telecom operators were required to create a high quality, rapid and wide coverage of mobile telecommunications network in India. The passive infrastructure facilities or services could be shared by several telecom operators so that it becomes cost-effective. Indus provides such passive infrastructure services to the extent permitted by the applicable laws in India and was willing to offer them and share the equipment with several telecom operators to the extent permitted by the laws of India. Accordingly, it put up passive infrastructure facilities at

several places. The arrangement works this way. Indus would put up the towers and a shelter which is a construction in which the telecom operators are permitted to keep and maintain their base terminal stations (BTS), associated antenna, back-haul connectivity to the network of the sharing telecom operator and associated civil and electrical works required to provide telecom services. The telecom tower and shelter, both put up by the petitioner, is called "the passive infrastructure". In addition to the tower and shelter, Indus also provides diesel generator sets, air conditioners, electrical and civil works, DC power system, battery bank etc. All these are known as passive infrastructure. The "active infrastructure" consists of the BTS, associated antenna, back-haul connectivity and other requisite equipment and associated civil and electrical works required to provide the telecommunication services by the telecom operator at a telecommunication site other than the passive infrastructure. Whereas the active infrastructure is owned and operated by the sharing telecom operator, passive infrastructure is owned by Indus, the petitioner herein. There could be several operators who may use the tower and shelter which are parts of the passive infrastructure by keeping their BTS etc. therein and sharing the entire passive infrastructure on an agreed basis. The antennae belonging to the sharing telecom provider may be put up or installed at different heights in the tower as per the requirements of the sharing telecom operators.

3. The working of the telecom network basically involves the process of receiving and transmitting the telecom signals. The active infrastructure which is owned and put up by the sharing telecom operators needs certain conditions for proper functioning and uninterrupted telecom network/signals. These conditions are maintenance of a particular temperature, humidity level, safety etc. These conditions are ensured by the passive infrastructure made available by the petitioner to the sharing telecom operators. We may examine this in some detail at a later stage.

4. The impugned order is an order dated 29.04.2011 passed by the Commissioner, Department of Trade and Taxes to the Government of NCT of Delhi, who is the respondent No.3 in the present proceedings, in No.280/CDVAT/2010/13 in an application filed by the petitioner before him under Section 84 of the Delhi Value Added Tax 2004 (DVAT). The petitioner provided the passive infrastructure services to sharing telecom operators and received consideration therefor. The questions before the

Commissioner, Department of Trade and Tax, in his words, were as follows :-

> "Whether in the facts and circumstances the provision of Passive Infrastructure Services by the Applicant to Sharing Operator's would tantamount to 'Transfer of right to use goods' as per Section 2(1)(zc)(vi) of the DVAT Act, 2004 and therefore become liable to tax under the DVAT Act."
>
> "If yes, then how should the sale price as per section 9(1)(zd) of the DVAT act be determined for the purpose of discharging the liability under DVAT Act?"

The Commissioner on an examination of the agreement entered into between the petitioner and M/s Sistema Shyam Tele Services Ltd., which was taken as representative of the agreements entered into by the petitioner with various telecom operators, held that the entire amount of consideration received from the sharing telecom operators for providing access to the passive infrastructure would amount to consideration for the transfer of the right to use goods as defined in Section 2(1)(zc)(vi) of the DVAT Act and was exigible to tax under the said Act. He however held that since a separate bill was being raised for consumption of energy by each sharing operator as per actual consumption as detailed in the contract, the charges collected by the petitioner on this account shall be exempt from the levy of value added tax.

5. The contention of the petitioner in this writ petition is that the aforesaid order is contrary to law and ultra vires Articles 14, 19(1)(g) and 265 of the Constitution of India read with Entry 97 of the List I of the 7th Schedule to the Constitution and at any rate there was no transfer of the right in any goods by the petitioner to the sharing telecom operators and therefore the levy of VAT on the assumption to the contrary was wholly erroneous and untenable. The stand taken by the respondents is that there was a transfer of the right to use the goods and therefore the consideration therefor is chargeable to VAT.

6. In order to appreciate the rival contentions it is necessary to examine the specimen agreement entered into between the petitioner and M/s Systema Shoam Tele Services on 25.02.2009. The parties are agreed that this agreement can be taken as representative of all the agreements entered into by the petitioner with the sharing telecom operators. Since

we have already referred to the description of "active infrastructure" and "passive infrastructure", which is substantially as per the definition of these terms in the agreement, it is not necessary to refer to them again. Clause 2 provides for "site access". Clause 2.1 provides for 'provision of passive infrastructure" by Indus. This clause reads as under: -

"2.1 Provision of Passive Infrastructure

2.1.1 Upon the Sharing Operator fulfilling its obligations in accordance with this Agreement, Indus shall provide Site Access Availability to the Sharing Operator in accordance with the terms and conditions of this Agreement.

2.1.2 Throughout the Term of this Agreement, the Sharing Operator shall be entitled to provide notice to Indus of those Sites in relation to which it wishes to be granted Site Access Availability (a "Service Order"). The process for issuing a Service Order shall be as specified in Schedule 1 (Site Access Availability).

2.1.3 In the event that the Service Orders received by Indus in respect of any Site(s) mean that the available Passive Infrastructure at such Site(s) are over-subscribed, an applicant whose Service Order was received by Indus prior to another Service Order shall be given priority by Indus while allocating such Passive Infrastructure to the relevant applicants.

2.1.4 With respect to each Site in relation to which Indus is able to grant Site Access Availability, the Parties shall execute a Service Contract in accordance with the procedure set out in Schedule 1 (Site Access Availability), and the provisions of each Service Contract shall include the standard terms set out in Schedule 5 (Standard Site Access Terms). Each Service Contract shall be duly stamped and the applicable stamp duty shall be at the Sharing Operator's expense.

2.1.5 Upon the execution of a Service Contract in respect of a Site, the Sharing Operator shall have the right to install the Sharing Operator Equipment or any portion thereof at such Site at the mutually agreed place. The Sharing Operator shall have access to each such Site for all installation activities and Indus shall provide to the Sharing Operator the necessary means of access

for the purpose of ingress and egress from each such Site in accordance with the terms of the Service Contract. Provided, however, that only the representatives of the Sharing Operator with proper identification or its properly authorised sub-contractors shall be allowed such access to the Sites.

2.1.6 The right, title and interest in and to the Site and Passive Infrastructure, including any enhancements carried out by Indus, shall vest with Indus and all such enhancements thereto shall be at the sole cost and expense of Indus. Enhancements in this context means the augmentation in capacity carried out by Indus to achieve increased sharing. The right, title and interest in and to the Sharing Operator Equipment shall always vest with the Sharing Operator subject to the provisions of this Agreement.

2.1.7 The Sharing Operator shall have Site Access Availability on "use-only basis" for installation, operation and maintenance etc. of its Active infrastructure for which the Sharing Operator shall be liable to make payments to Indus in accordance with this Agreement and the Sharing Operator undertakes that neither does it have nor shall it ever have any right, title or interest over the Site or Passive Infrastructure. The Sharing Operator is not nor shall be deemed to be the tenant of Indus and no tenancy shall be deemed to ever exist over the Site/ Passive Infrastructure.

2.1.8 It is expressly agreed by the Sharing Operator that nothing contained in this Agreement or otherwise shall create any title, right, tenancy or any similar right in favour of the Sharing Operator."

As per clause 2.5, the right of site access availability is non-extensive and Indus would retain the right to provide site access availability to other telecom operators and the sharing operator would retain the right to seek passive infrastructure services from other passive infrastructure providers. Clause 3 provides for operation and maintenance of the equipment of the sharing operator. Under clause 3.1.2, the equipment installed by the sharing operator shall be operated and maintained by the sharing operator and in order to conduct the operation and maintenance activities, it shall have the right to replace, repair, add or otherwise modify the sharing operator equipment and the frequencies over which the equipment operates.

In order to do so, the sharing operator shall be provided access to the sites by providing ingress and agrees from such site by only the authorised representatives of the sharing operator or its properly authorised sub-contractors. Clause 3.2 requires Indus to ensure that the operation and maintenance services which are provided by it to the sharing telecom operators are in accordance with "good industry practice" and only by suitably qualified, skilled and experienced personnel. The information relating to processes and proceedings to monitor the performance shall be shared with the sharing operators on a monthly basis. Certain consequences follow if operation and maintenance service levels fall short of the required standards which are not relevant for the present purpose.

7. Clause 4 provides for the rights of Indus. Under clause 4.1, so far as the sites are concerned, Indus shall have the right to require that whenever any access is needed by the sharing operator or its approved contractor, such access is supervised by Indus or its nominees. Indus shall also have the right to use and grant access to any site including the infrastructure provided by it (which obviously means the passive infrastructure) for the provision of such services to any party or for such other purposes as Indus may in its discretion decided to support from time to time. Clause 4.2 delineates the rights of Indus to ask for relocation of the equipment of the sharing telecom operator; such relocation may occur due to acquisition of a site or action by a Government authority or any order of a Court of law etc. Under clause 5.2 it shall be the responsibility of Indus to ensure that any other operators on the side do not cause any damage or install any equipment which would harmfully interfere or physically obstruct the equipment of any sharing operator existing at the site. The infrastructure of Indus (the passive infrastructure) shall be maintained by it in proper state of repair and condition. There are certain other responsibilities and covenants which are not very relevant for our purpose.

8. Clause 5.3 provides for the warranties and covenants of the sharing operator. It is generally to ensure that its employees and agents and sub-contractors comply with the terms and conditions of the contract, to comply with all applicable laws and desist from doing anything which might cause or otherwise result in a breach by Indus, maintain its equipment in a good and safe state of repair and condition, to desist from installing

equipment or machinery of a type or frequency which would cause harmful interference or physical obstruction to any equipment belonging to Indus or of any other sharing operator of the site, and to generally share information with Indus and cooperate with and assist Indus in connection with the purpose of the obligations under the contract etc.

9. Clause 6 speaks of "charges". Clause 6.1 provides that Indus shall charge the sharing telecom operator the charges in accordance with Schedule 3. The charges can be revised or reviewed on an annual basis. Clause 6.2 provides that all invoices submitted by Indus shall be paid within 15 days of the receipt thereof. Clause 6.3 provides for consequences of late payment which are not relevant for our purpose.

10. Clause 10 confers upon Indus the right to advertise on the passive infrastructure. It says that Indus shall have the exclusive right to lease, licence or grant space on each site or passive infrastructure on the site to any their party for the purposes of placing hoardings, banners and other advertisements and the sharing telecom operator shall not have any right of objection. However, the right of Indus to do so shall not adversely affect the connectivity network or passive infrastructure of the sharing telecom operator in any manner; in case of any such complaint from a telecom operator the hoardings/advertisement shall be removed.

11. Schedule 1 to the contract provides for "site access availability" and provides for several technical details and requirements relating to the antenna, ground based tower, roof top tower, time lines for site deployment, site access service credit for acquisition and deployment etc. Schedule 2 provides for "operation and maintenance service". Only 3 clauses need to be noticed. Clause 1.8 obliges Indus to ensure proper access to the sites for all authorised personnel of sharing telecom operator for the purposes set out in Clause 3.1.2 which we have already noticed. Clause 1.9.3 sets out the rates at which the petitioner has to pay the operation and maintenance service credits to the sharing operator for its failure to ensure the required uptime service levels. The said clause may be reproduced since considerable emphasis was laid by the petitioner on it, which we shall notice later :

> 1.9.3 The Operation and Maintenance Service Credits payable by Indus to the Sharing Operator for failure to achieve the above Uptime Service Levels are as set out below.

Operation and Maintenance Service Level	% of Total Rate payable by Indus
99.95% or greater	0.0%
99.90% or greater but less than 99.95%	5.0%
99.70% or greater but less than 99.90%	7.5%
99.50% or greater but less than 99.70%	10.0%
99.00% or greater but less than 99.50%	25.0%
Less than 99.00%	30.0%

The Operation and Maintenance Service Credits payable by Indus in accordance with the table above shall be applicable in respect of those Sites in the relevant Circle which are below the Operation and Maintained Service Level Specified in paragraph 1.9.2 above."

Clause 1.10 obliges Indus to submit a report of the reasons for any unplanned downtime, to the sharing operator within five business days of the rectification of the downtime. In case of breach of this condition, Indus is liable to pay service credits in accordance with pre-determined rates which are as follows :

Time period of Indus Downtime	% of Total Rate payable by Indus
24 consecutive hours or more, but less than 36 consecutive hours	50%
36 consecutive hours or more, but less than 48 consecutive hours	75%
48 consecutive hours or more	100%

12. Schedule 3 provides for "charges".

13. Sub-clause (d) of clause (29A) of article 366 of the Constitution of India reads as follows: -

> "366. Definitions. – In this Constitution, unless the context otherwise requires, the following expressions have the meanings

> hereby respectively assigned to them, that is to say –
>
> xxxxx xxxxx xxxxx
>
> (29A) "tax on the sale or purchase of goods" includes –
>
> xxxxx xxxxx xxxxx
>
> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;"
>
> Clause (12) defines "goods" to include "all materials, commodities and articles".

14. In the DVAT Act, 2004 the word "sale" is defined in section 2(1)(zc) in the following manner: -

> "Section 2 – Definitions
>
> (1) In this Act, unless the context otherwise requires, -
>
> xxx
>
> (zc) "Sale" with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any state government, to another) and includes-
>
> xxxxx xxxxx xxxxx
>
> (vi) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;"

15. In the light of the above provisions, the question for consideration is whether there is a transfer by Indus of the right to use any goods in favour of the sharing telecom operators which would attract value added tax within the terms of the DVAT Act, 2004.

16. The main point urged on behalf of the petitioner was that there was no transfer of the right to use any goods by Indus in favour of the sharing telecom operators since the provision of "Passive Infrastructure" was essentially a service which was taxed as a service provided "in relation to support services of business or categories, in any manner"

under section 65 (105) (zzzq) of the Finance Act, 1994. It was contended that the same transaction which was treated as a taxable service cannot also be treated as a sale or deemed sale under the DVAT Act. It was contended that at any rate there was no transfer by Indus of the right to use any goods in favour of the sharing telecom operators.

17. We were taken through the agreement dated 25.02.2009 (which is referred to as the "master service agreement" or MSA) and it was contended on the basis of the terms thereof that the Passive Infrastructure provided by the petitioner does not involve any transfer of right to use any goods in favour of the sharing telecom operators. Strong reliance, inter alia, was placed on the judgment dated 07.09.2011 of the Karnataka High Court reported as **Indus Towers Ltd. vs. Deputy Commissioner of Commercial Taxes Enforcement,** 2012 (285) ELT 3 (Kar), a judgment which disposed of several writ appeals filed by different petitioners of which the present petitioner was one. It was pointed out that the terms and conditions of the MSA were examined by the Karnataka High Court which came to the conclusion that no transfer of any right to use the goods was involved. It was submitted that the Karnataka High Court (supra) has concluded, for reasons stated in the judgment, that the petitioner provided services in relation to site access, power conversion, air-conditioning and safe keeping for which it received a consolidated service revenue from the sharing telecom operators and that there was neither a sale of goods nor a deemed sale so as to attract levy of tax under the Karnataka Value Added Tax, 2003.

18. The contention put forward on behalf of the respondents (VAT department) is that the question whether there was any transfer of the right to use the goods can be decided only on the basis of the facts of the case. It was in this context submitted that the Karnataka High Court had posed to itself an erroneous question for decision, the question making an erroneous assumption that the petitioner was carrying on an activity which was a service provided by it and since the question itself was framed on an erroneous assumption, the answer given by the Court was consequently wrong and, therefore, the entire matter needs to be looked into afresh. It was submitted that having regard to the terms and conditions of the MSA and the facts brought on record, the conclusion that is inescapable is that there was a transfer of the right to use the "Passive Infrastructure" by Indus in favour of the sharing telecom operators attracting the levy of value added tax.

19. We are in respectful agreement with the view taken by the Karnataka High Court in the judgment sited (supra). The right to use the goods – in this case, the right to use the passive infrastructure – can be said to have been transferred by Indus to the sharing telecom operators only if the possession of the said infrastructure had been transferred to them. They would have the right to use the passive infrastructure if they were in lawful possession of it. There has to be, in that case, an act demonstrating the intention to part with the possession of the passive infrastructure. There is none in the present case. The passive infrastructure is an indispensible requirement for the proper functioning of the active infrastructure which is owned and operated by the sharing telecom operators. The passive infrastructure is shared by several telecom operators and that is why they are referred to as sharing telecom operators in the MSA. The MSA merely permits access to the sharing telecom operators to the passive infrastructure to the extent it is necessary for the proper functioning of the active infrastructure. The MSA also defines "site access availability" as meaning the availability of access to the sharing operator to the passive infrastructure at the site. Clause 2 of the MSA which has been quoted above provides for "site access" and Clause 1.7 limits the site access availability to the sharing operator on use – only basis so far as it is necessary for installation, operation and maintenance etc. of the active infrastructure; the clause further states that the sharing operator does not have, nor shall it ever have, any right, title or interest over the site or the passive infrastructure. The Clause also takes care to declare that the sharing operator shall not be deemed to be the tenant of Indus and no tenancy rights shall be deemed to exist over the site/passive infrastructure. Clause 2.1.8, presumably by way of abundant caution, states that it is expressly agreed by the sharing operator that nothing contained in the MSA or otherwise shall create any title, right, tenancy, or any similar right in favour of the sharing operator.

20. There are other provisions in the MSA which control the right of the sharing operator to gain access to the site and the passive infrastructure. For instance, Clause 3.1.2 states that the access shall be limited to the purpose of carrying out operation and maintenance activities and that too only to the authorised representatives or properly authorise sub-contractors of the sharing operator. Clause 1.8 of the Schedule 2 of the MSA has to be read along with the above clause. The tables set out in this schedule providing for payment of service credits by Indus to the

sharing operators for failure to achieve the uptime service levels and those prescribing payment of service credits by Indus to the sharing operators for non-submission of the reports and providing for stiff penalties for any failure on the part of Indus show that it is the responsibility of Indus to ensure that the passive infrastructure functions to its full efficiency and potential, which in turn means that it has to be in possession of the passive infrastructure and cannot part with the same in favour of the sharing telecom operators. With several such restrictions and curtailment of the access made available to the sharing telecom operators to the passive infrastructure and with severe penalties prescribed for failure on the part of the Indus to ensure uninterrupted and high quality service provided by the passive infrastructure, it is difficult to imagine how Indus could have intended to part with the possession of part of the infrastructure. That would have been a major impediment in the discharge of its responsibilities assumed under the MSA. The limited access made available to the sharing telecom operators is inconsistent with the notion of a "right to use" the passive infrastructure in the fullest sense of the expression. At best it can only be termed as a permissive use of the passive infrastructure for very limited purposes with very limited and strictly regulated access. It is therefore difficult to see how the arrangement could be understood as a transfer of the right to use the passive infrastructure.

21. When Indus has not transferred the possession of the passive infrastructure to the sharing telecom operators in the manner understood in law, the limited access provided to them can only be regarded as a permissive use or a limited licence to use the same. The possession of the passive infrastructure always remained with Indus. The sharing telecom operators did not therefore, have any right to use the passive infrastructure,

22. A careful perusal of the judgment of the Karnataka (supra) shows that the following propositions were laid down: -

a) No operation of the infrastructure is transferred to the sharing telecom operator. The latter is only provided access to use the passive infrastructure, but Indus has retained the right to lease, licence etc. the passive infrastructure to any advertising agency;

b) The entire infrastructure is in the physical control and possession of Indus at all times and there is no parting of the same nor any transfer of the right to use the equipment or

apparatus;

c) The permission granted to the telecom operator to have access to the passive infrastructure for limited purposes is loosely termed by the taxing authorities as "a right to use the passive infrastructure";

d) There is no intention on the part of the Indus to transfer the right to use; it is only a licence or an authority granted to telecom operator as defined in Section 52 of the Easements Act, 1952. A licence cannot in law confer any right; it can only prevent an act from being unlawful which, but for the licence, would be unlawful. A licence can never convey by itself any interest in the property;

e) The entire MSA has to be read as a whole without laying any undue emphasis upon a particular word or clause therein. What is permitted under the MSA is a licence to the telecom operators to have access to passive infrastructure and a permission to keep equipments of the sharing telecom operator in a pre-fabricated shelter with provision to have ingress and agrees only to the authorised representatives of the mobile operator.

23. We find it difficult to agree with the criticism of the counsel for the respondents that the Karnataka High Court posed to itself a question which erroneously assumed the activity of Indus to be a service and consequently the answer given was also wrong. We do not find any trace of such an assumption permeating through the judgment, though the question as framed by the High Court refers to ".....the service provided by the assessees to its customers.....". It may be that the words used in the question were inaccurate but that does not take away anything from the substance of the judgment, if we may say so with respect. The substance of the judgment is what we have paraphrased in the previous paragraph.

24. Several authorities were cited before us, particularly on behalf of the petitioner. However, we do not think it necessary to refer to them since the question whether there was any transfer of right to use the goods is essentially a question to be determined on the facts and circumstances of each case and having regard to the terms of the agreement entered into between the parties. We therefore do not think it

necessary to burden this judgment with a discussion of the authorities.

25. In CM 3589/2005, the petitioner has prayed for quashing of the assessment order dated 16.1.2012 which was passed subsequent to the filing of the writ petition. Since we have accepted the contentions of the petitioner, the assessment order framed on the basis that the petitioner transferred the right to use the passive infrastructure to the sharing telecom operators is quashed, as also the impugned order dated 29.04.2011.

26. In the result the writ petition is allowed. There shall be no order as to costs.

ILR (2013) III DELHI 1921
W.P. (C)

AJIT KUMAR **....PETITIONER**

VERSUS

COMMISSIONER OF POLICE AND ORS. **....RESPONDENTS**

(PRADEEP NANDRAJOG & V. KAMESHWAR RAO, JJ.)

W.P. (C) NO. : 2372/2010 **DATE OF DECISION: 18.04.2013**

Indian Penal Code, 1860—Section 308, 341 and 34—Probation of Offenders Act, 1958—Section 4 and 12—Petitioner was successful at selection process for post of Constable Executive in Delhi Police but was not offered appointment—Commissioner of Police took view that in view of his being guilty of having committed offence punishable under Section 308 of IPC though released on probation for which he had furnished a bond to keep good behaviour for two years, petitioner was unfit to be appointed as a Constable in Delhi Police—This led to filing of OA which was dismissed—Order challanged before HC—Plea taken, release on probation washes away finding of culpability for having committed offence punishable under Section 308—Per contra plea taken, release of petitioner would not wash away wrong conduct of petitioner—Held—Larger question which falls for consideration in this case is, whether petitioner having been released under Section 4 of Offenders Act, does not suffer disqualification because of Section 12 of said Act—Release of petitioner under Section 4 of Offenders Act would not obliterate conduct / act which constitutes offence—Petitioner would not be entitled to any relief even on interpretation of Section 12 of Offenders Act—So when conduct / act constituting offence is not washed of, employer in this case, Delhi Police was within its right not to appoint petitioner as Constable (Executive) Male, that too, when no right is said to have accrued in favour of petitioner who was only on threshold of being appointed—In law or facts petitioner would not be entitled to get appointed as Constable Executive (Male)—Conclusion of Tribunal cannot be interfered with.

Important Issue Involved: Release of the petitioner under Section 4 of the Offenders Act would not obliterate the conduct/act which constitutes the offence. When the conduct/act constituting the offence is not washed of, the employer in his case, the Delhi Police was within its rights not to appoint the petitioner as a Constable (Executive) Male, that too, when no right had accrued in his favour as he was only on the threshold of being appointed.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Nitin Thakur, Advocate.

FOR THE RESPONDENTS : Ms. Ruchi Sindhwani with Ms. Bandana Shukla, Advocates.

CASES REFERRED TO:

1. *Gokul Ram Meena* vs. *Govt. of NCT of Delhi & Others* 177(2011) Delhi Law Times 471 (DB).
2. *Sushil Kumar Singhal* vs. *The Regional Manager, Punjab National Bank* reported in VI (2010) SLT 84=(2010) IV LLJ 297 (SC).
3. *Sushil Kumar Singhal* vs. *The Regional Manager, Punjab National Bank,* 2010 (8) SCALE.
4. *Satraj Singh* vs. *Union of India and Ors.* reported in 2007 IX AD (Delhi) 241.
5. *Punjab Water Supply Sewerage Board and Anr.* vs. *Ram Sajivan and Anr.,* (2007) 9 SCC 86.
6. *ITB Police* vs. *Sanjay Binjola* reported in IV (2001), SLT 28=II (2001)CCR 240 (SC) =(2001) 5 SCC 317.
7. *State of U.P.* vs. *Ranjit Singh,* AIR 1999 SC 1201.
8. *Harichand* vs. *Director of School Education,* (1998) 2 SCC 383.
9. *Harichand* vs. *Director of School Education,* AIR 1998 SC 788.
10. *Additional Deputy Inspector General of Police, Hyderabad* vs. *P.R.K. Mohan,* (1997) 11 SCC 571.
11. *Karam Singh* vs. *State of Punjab and Anr.,* (1996) 7 SCC 748.
12. *Shankarsan Dash* vs. *Union of India,* reported in AIR 1991 SC 1612.
13. *Union of India and Ors.* vs. *Bakshi Ram,* (1990) 2 SCC 426.
14. *Trikha Ram* vs. *V.K. Seth and Anr.,* (1987) Supp. SCC 39.
15. *Union of India* vs. *Trilochan Patel,* AIR 1985 SC 1612.
16. *Shankar Dass* vs. *Union of India and Anr.,* AIR 1985 SC 772.
17. *Aitha Chander Rao* vs. *State of Andhra Pradesh,* 1981 (Suppl.) SCC 17.

18. *Divisional Personnel Officer, Southern Railway and Anr.* vs. *T.R. Chellappan,* AIR 1975 SC 2216.

RESULT: Dismissed.

V. KAMESWAR RAO, J. (Oral)

1. The challenge in this writ petition is to the order dated January 11, 2008 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in OA No.1498/2008 whereby the plea of the petitioner for a direction to the respondents herein, to appoint him as Constable (Executive) Male in Delhi Police was rejected.

2. An FIR No.78/2002 was registered in which apart from two others, the petitioner was named as an accused for offences committed under Section 308/341/34 IPC, P.S. Vasant Vihar. The same culminated in an order of guilt. The petitioner was released on probation and for which he furnished a bond to keep good behaviour for two years.

3. Pursuant to an advertisement inviting applications to fill up posts of Constable Executive in Delhi Police, the petitioner applied and was successful at the selection process but found offer of appointment not coming his way because the Commissioner of Police took the view that in view of his being guilty of having committed an offence punishable under Section 308 IPC the petitioner was unfit to be appointed as a Constable in Delhi Police.

4. But before taking the final decision the petitioner was put to notice on April 10, 2007 and his response was received on April 27, 2007 in which the petitioner took the stand that as per law he being released on probation would require him not to be visited with any civil consequences. The response was found to be unconvincing vide order dated May 17, 2007 it was informed to the petitioner that his candidature was cancelled. This led to the filing of OA No.1498/2008 in which petitioner challenged the order dated May 17, 2007 as also the show cause notice dated April 10, 2007.

5. Vide the impugned dismissing OA No.1498/2008 the Tribunal has concluded as under:-

> "Although Section 12 of the Probation of Offenders Act, refers to a situation where a presumption is presented, we do not think it is relevant for us to hold that the past period of life of a person

thereby automatically is to be wished away. So long as there is a consideration of factors, a decision by the administrative authority about the desirability of a person to be introduced into service normally vests in themselves. In Government service, mostly the weeding exercises can be done only till the time of appointment and once a person becomes member of a service even if undesirably, procedural formalities may pose problems to get rid of the person. Therefore, adoption of strict standards, after a holistic view of the situation may not be objectionable".

6. Contention of the petitioner is that be released on probation washes away the finding of culpability for having committed an offence punishable under Section 308 IPC. Per contra Ms.Ruchi Sindhwani, learned counsel appearing for the respondents submits that release of the petitioner would not wash away the wrong conduct of the petitioner. It is expected that a person appointed in Government service must be above board and strict standards have to be adopted, as since the appointment is in a police force. She relies upon the following judgments AIR 1998 SC 788 **Harichand v. Director of School Education,** 2010 (8) SCALE **Sushil Kumar Singhal v. The Regional Manager, Punjab National Bank,** 2007 IX AD (Delhi) 241 **Satraj Singh v. Union of India & Ors.,** 177(2011) Delhi Law Times 471 (DB) **Gokul Ram Meena v. Govt. of NCT of Delhi & Others**.

7. It is seen that even though the Tribunal referred to Section 12 of the Offenders Act, it did not deliberate much on it and decided the case more on facts. No doubt the facts become relevant, when the appointment is in a police force. The larger question which falls for our consideration in this case, is whether petitioner having been released under Section 4 of the Offenders Act, does not suffer disqualification because of Section 12 of the said Act. We feel that the issue is no more res integra having decided by the Supreme Court in a plethora of judgments which are also followed by this Court. In the opinion reported as 2007 (IX) AD (Delhi) 241 **Satraj Singh v. Union of India & Ors.** a Division Bench held as under:-

"10. **Union of India v. Bakshi Ram** (1990) 2 SCC 426 was an appeal from a decision of the Rajasthan High Court, wherein the Rajasthan High Court, relying upon Section 12 of the Act had held that release on probation was the effect of removing the

disqualification attaching to the employees conviction under Section 10(n) of CRPF Act. The Hon'ble Supreme Court reversed the said decision of the High Court. Paragraphs 8 to 13 of the said decision being relevant are produced herein below:

"8. It will be clear from these provisions that the release of the offender on probation does not obliterate the stigma of conviction. Dealing with the scope of Sections 3, 4 and 9 of the Probation of Offenders Act, Fazal Ali, J., in The Divisional Personnel Officer, Southern Railway and Anr. Etc. V. T.R.Challappan etc., [1975] 2 SLR 587 at 596 speaking for the Court observed:

These provisions would clearly show that an order of release on probation comes into existence only after the accused is found guilty and is convicted of the offence. Thus the conviction of the accused or the finding of the Court that he is guilty cannot be washed out at all because that is the sine qua non for the order or release on probation of the offender. The order of release on probation is merely in substitution of the sentence to be imposed by the Court. This has been made permissible by the Statute with a humanist point of view in order to reform youthful offenders and to prevent them from becoming hardened criminals. The provisions of Section 9(3) of the Act extracted above would clearly show that the control of the offender is retained by the criminal court and where it is satisfied that the conditions of the bond have been broken by the offender who has been released on probation, the Court can sentence the offender for the original offence. This clearly shows that the factum of guilt on the criminal charge is not swept away merely by passing the order releasing the offender on probation. Under Sections 3,4, or 6 of the Act, the stigma continues and the finding of the misconduct resulting in conviction must be treated to be a conclusive proof. In these circumstances, therefore, we are unable to accept the argument of the respondents that the order of the Magistrate releasing the offender on probation obliterates the stigma of conviction."

8. On similar lines in the decision reported as AIR 1998 SC 788 **Harichand v. Director of School Education** the Supreme Court 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 the 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, suffer 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."

9. In a recent decision in **Sushil Kumar Singhal's** case (supra), after analysing the law including the judgments referred above the Supreme Court has held as under:-

"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).

11. In **Divisional Personnel Officer, Southern Railway and Anr. v. T.R. Chellappan,** AIR 1975 SC 2216, this Court observed that the conviction of an accused, or the finding of the Court that he is guilty, does not stand washed away because that is the sine-qua-non for the order of release on probation. The order of release on probation is merely in substitution of the sentence to be imposed by the Court. Thus, the factum of guilt on the criminal charge is not swept away merely by passing the order under the Act, 1958.

12. In **Trikha Ram v. V.K. Seth and Anr.,** (1987) Supp. SCC 39, this Court had held that if a person stands convicted and is given the benefit of the provisions of the 1958, Act, he can be removed from service only on the ground that he stood convicted. But by virtue of the provisions of Section 12 of the 1958, Act, his removal cannot be a "disqualification" for the purposes provided in other Statutes such as the Representation of the People Act, 1950. The same view has been reiterated by this Court in **Union of India and Ors. v. Bakshi Ram,** (1990) 2 SCC 426; **Karam Singh v. State of Punjab and Anr.,** (1996) 7 SCC 748; and **Additional Deputy Inspector General of Police, Hyderabad v. P.R.K. Mohan,** (1997) 11 SCC 571.

13. In **Shankar Dass v. Union of India and Anr.,** AIR 1985 SC 772, this Court has held that the order of dismissal from service, consequent upon a conviction, is not a disqualification

within the meaning of Section 12 of the 1958, Act. The court held as under:

> "There are Statutes which provide that the persons, who are convicted for certain offences, shall incur certain disqualification; for example, Chapter III of the Representation of Peoples Act, 1951 entitles 'disqualification' for Membership of Parliament and State Legislatures, and Chapter IV entitles 'disqualification' for voting, contains the provisions which disqualify persons convicted of certain charges from being the Members of Legislatures or from voting at election to the legislature. That is the sense in which the word 'disqualification' is used in Section12 of the Probation of Offenders Act.....Therefore, it is not possible to accept the reasoning of the High Court that Section 12 of the 1958 Act takes away the effect of conviction for the purpose of service also."

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...."

15. In **Union of India v. Trilochan Patel,** AIR 1985 SC 1612, some part of the Judgment in **T.R. Chellappan** (supra) was overruled by the Constitution Bench of this Court. But the observations cited hereinbefore were not overruled.

16. In **Punjab Water Supply Sewerage Board and Anr. v. Ram Sajivan and Anr.,** (2007) 9 SCC 86, this Court explained that the Judgment in **Aitha Chander Rao** (supra) did not lay

down any law as no reason has been assigned in support of the order. Thus, the same remained merely an order purported to have been passed under Article 142 of the Constitution of India. This Court allowed the disciplinary authority to initiate the disciplinary proceedings in accordance with law and pass an appropriate order, in spite of the fact that in the said case, the court, after recording the conviction, had granted benefits of the provisions of the Act, 1958 to the employee.

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."

10. After considering the position of law as it stood in the year 2007 including some of the judgments referred above, this Court in the opinion in **Satraj Singh's** case (supra) held that the issue: whether the disqualification from which an employee is saved under Section 12 of the Act would also include action against him by his employer under his conditions/rules is no more res integra.

11. Further in **Gokul Ram Meena's** case (supra) this Court upheld the order of the Tribunal rejecting the OA filed by the petitioner in that case seeking direction for being appointed as Constable (Male) Executive in identical circumstances by summing up in para 6 as under:-

> "6. The stand of the Petitioner is that when he submitted the application form, the case registered vide aforesaid FIR was sub judice against him in the court of Judicial Magistrate, 1st Class, Thana Gazi. The Petitioner had already mentioned about the case in the application form. The said case has been decided on 1st June, 2009 by the court of Judicial Magistrate, 1st Class, Thana Gazi, Distt. Alwar (Rajasthan) wherein Petitioner and co-accused persons are acquitted under Section 323, 341, 354 and 451 IPC due to compromise. The Petitioner is convicted Under Section

143 IPC and the court has given the benefit of Section 3 of the Probation of Offenders Act, 1958 and it is ordered that in terms of Section 12 of Probation of Offenders Act, the conviction would have no adverse effect on Petitioner and one Sh. Gopi Ram in future in their Government service or otherwise. In view of the above directions, Respondents are not justified in cancelling his candidature.

The Tribunal has considered the aforesaid aspect of the matter in the light of judgment of this Court in **Satraj Singh v. Union of India and Ors.** reported in 2007 IX AD (Delhi) 241 wherein after relying on the judgment of the Supreme Court in Commandant, 20th Battalion, **ITB Police v. Sanjay Binjola** reported in IV (2001), SLT 28=II (2001)CCR 240 (SC) =(2001) 5 SCC 317, it is held that the directions issued by the Session Judge, Bikaner to the effect that the conviction of the Petitioner therein shall not have any adverse effect on his service was held to be without jurisdiction and therefore not binding on the Respondents. Following the aforesaid judgment the Tribunal has rejected the contention raised by the Petitioner that the direction of the Court of Judicial Magistrate, 1st Class, Thana Gazi, Distt. Alwar, Rajasthan in judgment dated 1st June, 2009 to the effect that the conviction of Petitioner would have no adverse effect in future in Government Service is not binding on the Tribunal.

Recently, the Supreme Court in **Sushil Kumar Singhal v. The Regional Manager, Punjab National Bank** reported in VI (2010) SLT 84=(2010) IV LLJ 297 (SC) after taking note of various decisions on the issue, where after conviction, a person was released on probation, has upheld the dismissal of an employee who was convicted for an offence involving mortal turpitude. Even in the said case, Appellant therein was given the benefit of Section 12 of the Probation of Offenders Act by the criminal court. If that is so, there is no reason to uphold the contention of Petitioner who is involved in a serious crime."

12. From the above it is seen that the position of law qua Section 12 of the Offenders Act is well settled. Section 12 would not come to the rescue of the petitioner. His release under Section 4 of the Offenders Act would not obliterate the conduct/act which constitutes the offence.

The petitioner would not be entitled to any relief even on the interpretation of Section 12 of the Offenders Act.

13. So when the conduct/act constituting the offence is not washed of, the employer in this case, the Delhi Police was within its rights not to appoint the petitioner as Constable (Executive) Male, that too, when no right is said to have accrued in favour of the petitioner who was only on the threshold of being appointed. In this regard we reiterate the following paragraph of the judgment of this Court in **Gokul Ram Meena's** case (supra) wherein this Court in paragraph 6 has held as under:-

> "Further Petitioner is seeking employment in Police which requires utmost integrity, propriety and uprightness of character. Considering the nature of offence, material on record, role of Petitioner therein and that there is no honorable acquittal, the Screening Committee has not found him fit for the job. Petitioner was undergoing selection process and was not issued any appointment letter. In view of the judgment in **Shankarsan Dash v. Union of India,** reported in AIR 1991 SC 1612, Petitioner cannot claim any indefeasible right of appointment."

14. Looking from any perspective, that is, in law or on facts the petitioner would not be entitled to get appointed as Constable Executive (Male). The conclusion of the Tribunal cannot be interfered with.

15. This writ petition is dismissed but without any order as to costs.

ILR (2013) III DELHI 1933
C.P.

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD. ....PETITIONER

VERSUS

TULIP TELECOM LTD. ORS. ....RESPONDENTS

(S. MURALIDHAR, J.)

CCP (CO.) NO. : 3/2013 IN CO. PET. NO. : 395/2012 & CO. APP. NOS. : 454&455/2013 DATE OF DECISION: 25.04.2013

Indian Companies Act, 1956—Section 433(e), 434, 439—Winding up petition on the grounds of inability to pay debt—Settlement arrived at during pendency. Recorded in order and petition disposed of with direction that if there is default of even one installment, the petitioner are at liberty to take remedy of contempt and also provisional liquidator should also be appointed. Default in payment—Application for appointment of Provisional Liquidator and for reviving of Company petition filed—Affidavit filed by respondent for dropping the notice of contempt and for modification of order—Held—Despite unambiguous language of the order, Respondent did not seek directions of the Court when it became plain to it that it would be unable to adhere to the undertakings given to the Court in the event the CDR scheme was approved. Reasons stated in the affidavit are neither satisfactory nor convincing. Respondent not in a position to repay the outstanding amounts which it owes the petitioner. Applications allowed. Company petition revived and provisional liquidator appointed.

Subsequent to the above hearing, when the case was listed

on 21st November 2012, the Court was informed that the parties had arrived at a settlement and that the Respondent was willing to pay the balance sum along with interest at the agreed rate on the reducing balance basis. The following order was passed on that date:

> "The parties have arrived at a settlement. Respondent shall pay a sum of Rs. 45.50 crores along with interest at the agreed rate on the reducing balance within a period of 14 months from today. Complete payment shall be made by 31.12.2013; the payment shall be made by installment i.e. Rs. 3 crores per month; the first installment of Rs. 3 crores shall be paid by the respondent to the petitioner on or before 30.11.2012; second installment shall be paid on or before 31.12.2012 and so on; the last installment will be in the sum of Rs. 3.50 crores along with interest at the agreed rate on the reducing balance and as noted supra this complete payment shall be made by 31.12.2013.
>
> An affidavit to the said effect of the Director of the Company shall be filed within one week from today detailing the schedule of these payments; in case of even one single default the petitioner shall be at liberty to take appropriate action under the contempt law; in such an eventuality, the provisional liquidator shall also stand appointed.
>
> Both the parties agreed that this order shall not be communicated or used in the Media or Press by either party. This order may not also be uploaded on the net.
>
> With these directions, this petition as also the pending applications stand disposed of." **(Para 8)**

Following the above order of the DB, ANZ filed CA No. 455 of 2013 seeking revival of Co. Pet. No. 395 of 2012.CA No. 454 of 2013 was for appointment of the Official Liquidator

('OL') as the Provisional Liquidator ('PL') of TTL. The other prayer was that pending the final hearing and disposal of the said application TTL should be restrained from in any manner transferring, selling, disposing off, parting with possession of or encumbering any of its assets. It must be noted at this stage that although the DB granted TTL leave to file an application seeking modification of the order dated 21st November 2012, TTL filed no such application. It was ANZ who filed the aforementioned two applications. Notice was directed to issue in the said two applications by the Court on 22nd March 2013, and they were listed on 18th April 2013. **(Para 11)**

Simultaneously, ANZ also filed CCP (Co.) No. 3 of 2013 against TTL in which notice was directed to issue by the Court on 22nd March 2013. At that hearing, Mr. Sheetesh Khanna, Advocate accepted notice on behalf of TTL. The Court directed replies to be filed both to CA Nos. 454 and 455 of 2013 as well as CCP (Co.) No. 3 of 2013 by 10th April 2013 and rejoinder to be filed before the next date. When the matter was listed on 18th April 2013, the Court noted that no reply had been filed by TTL, and passed the following order:

> "1. The Court finds that despite opportunity granted on 22nd March 2013 to the Respondent in this contempt petition to file a reply on or before 10th April 2013 no reply has been filed by the Respondent till date.
>
> 2. Mr. G.L. Rawal, learned Senior counsel appearing for the Respondent prays for some more time to file a reply.
>
> 3. The Court had enquired of Mr. Rawal whether the Respondent would be willing to, as a condition for being granted more time to file a reply, and considering that this is a contempt petition arising out of the earlier orders passed by the Court on 21st November

> 2012, offer security in the form of unencumbered fixed assets of the Respondent for the outstanding amount of over Rs. 32 crores owing to the Petitioner. The matter was passed over till 2.15 pm for this purpose. At 2.15 pm Mr. Rawal was unable to make a categorical statement on whether any of the fixed assets that are sought to be offered by the Respondent as security are unencumbered.
>
> 4. The Court finds that the order dated 21st November 2012 stated that in case of "even one single default" by the Respondent the Petitioner would be at liberty to take appropriate action under the contempt law, and "in such an eventuality the provisional liquidator shall also stand appointed".
>
> 5. Mr. Rawal submitted that the order appointing the provisional liquidator should not be passed today and that the Respondent should be given an opportunity of placing on record certain documents concerning a corporate debt restructuring ('CDR') Scheme that has been arrived at with the secured creditors. He, however, is candid that the said CDR Scheme does not deal with the liability owing to the Petitioner. In the circumstances, the Court finds no justifiable reason for the Respondent not filing a reply to the contempt petition till date.
>
> 6. The Court has been shown a copy of order dated 28th January 2013 of the Division Bench in Company Appeal No. 5 of 2013 which was filed by the Respondent against the order dated 21st November 2012. While dismissing the said appeal the Division Bench gave liberty to the Respondent to apply to this Court for clarification or modification of the order dated 21st November 2012. Till date the Respondent has not filed such an application for modification or clarification of the said order.

7. In the circumstances, the Court sees no reason why further indulgence should be granted to the Respondent. Consequently, for necessitating today's adjournment, the Respondent will pay to the Petitioner a sum of Rs. 25,000 as costs by the next date. The Managing Director of the Respondent is directed to remain present in Court on the next date, i.e., 22nd April 2013 at 10.30 am.

8. List on 22nd April 2013 at 10.30 am.

9. Order be given *dasti* to learned counsel for the parties under the signature of the Court Master."

(Para 12)

The Court is not a little surprised that despite the unambiguous language of the order dated 21st November 2012, TTL did not seek directions from this Court when it became plain to it that it would be unable to adhere to the undertaking given to the Court in the event that the CDR Scheme was approved. On the contrary, it is pointed by ANZ that part-payments were made of the January 2013 instalment by TTL in February 2013. Also, Lt. Col. Bedi was unable to produce any document whereby any of the other secured lenders of TTL had expressly prohibited TTL from making the payment to ANZ. **(Para 22)**

The reasons stated in the affidavits filed by Lt. Col. Bedi by way of explanation as to why TTL was unable to adhere to the undertaking given by it to the Court, as recorded in the order dated 21st November 2012, are neither satisfactory nor convincing. The said order was affirmed by the DB on 28th January 2013. As already noted, despite the DB giving TTL liberty to apply to the Court for modification of the order dated 21st November 2012, including the condition regarding appointment of the PL, TTL filed no such application. It is only in the affidavit tendered in Court that TTL has made a prayer for modification of the order but without indicating what modification is being sought. It is difficult to believe that when the Court passed the order dated 17th December

2012, the CDR Scheme was not already in contemplation and yet, neither ANZ nor the Court was informed of it at that stage. Independent of any notice that ICICI may have sent ANZ about the meeting of secured lenders, it is inexcusable that having filed an affidavit undertaking to make payments in terms of the agreement recorded in the order dated 21st November 2012, TTL made no effort to inform the Court of its inability to honour that commitment. **(Para 23)**

Despite sufficient opportunities and time granted to TTL, it has been unable to satisfactorily explain the disobedience of the order dated 21st November 2012. If, indeed, TTL was not in a position to adhere to its commitment, as recorded in the order dated 21st November 2012, it ought to have informed the Court, making a full disclosure of the application made by it for the CDR Scheme and sought modification in terms of the leave granted by the DB. It is not even clear whether the DB was made aware of the CDR mechanism when the appeal was heard by it. **(Para 24)**

An officer of TTL dealing with finance was present in the Court. He explained that the current bank balance of TTL is only Rs. 10 lakhs and that the daily income to the tune of around Rs. 60 lakhs is being utilised to pay statutory and other dues. It is plain that given the fund position, TTL would be in no position to repay its debt owing to ANZ.

(Para 25)

Even according to CDR, TTL is expected to restructure the debt owing to ANZ. Till date, TTL has not even proposed any such restructuring. Mr. Rawal states that some time may be given for that purpose. He has also tendered a synopsis of submissions in which reliance is placed on the decisions in **Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.** 1972 (42) Company Cases 125, **New Swadeshi Mills of Ahmedabad Ltd. v. Dye-Chem Corporation** 1986 (59) Company Cases 183 (Guj), **In Re: Rishi Enterprises** 1992 (73) Company Cases 271 (Guj). Mr. Kaul on the other hand presses for the appointment of

the PL as that was an eventuality already stipulated in the order dated 21st November 2012. **(Para 26)**

From the affidavits tendered in Court it is clear to the Court that as of now, TTL is not in a position to repay the outstanding amounts which it owes ANZ. A case for passing orders under Section 433(e) and (f) read with Sections 434 and 439 of the Act is made out. While it is possible that the CDR Scheme grants a moratorium to TTL on repayments of loans of the secured lenders, the payment of the dues owing to TTL is entirely governed by the order dated 21st November 2012 (as corrected by the order dated 17th December 2012) which has not been varied till date and, having attained finality, is binding on TTL. The CDR Scheme approved by the lenders does not deal with this aspect at all except requiring TTL to restructure the liability. TTL has not taken the first step in that direction. Only in response to the notice issued to it in the contempt petition, and after two adjournments it has come up with a vague prayer for modification of the order dated 21st November 2012. Again, TTL has not been able to explain how it proposes to clear the outstanding dues of ANZ and within what time frame. **(Para 28)**

In light of the above discussion, the following conclusions and directions are issued:

(i) CA No. 455 of 2013 is allowed and Co. Pet. No. 395 of 2012 is revived.

(ii) Co. Pet. No. 395 of 2012 is admitted. A copy of the petition be served on the OL attached to this Court within five days.

(iii) The OL is appointed as the PL of TTL. The OL is directed to take over all the assets, books of accounts and records of TTL forthwith. The OL shall also prepare a complete inventory of all the assets of TTL before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value

the assets. He is permitted to take the assistance of the local police authorities, if required.

(iv) Publication of the citation of the petition be effected in the Official Gazette, 'The Statesman' (English) and 'Veer Arjun' (Hindi) in terms of Rule 24 of the Companies (Court) Rules, 1959 ('Rules'). The cost of publication shall be borne by ANZ.

(v) The Directors of TTL are directed to strictly comply with the requirements of Section 454 of the Act and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from when this order becomes operational. They will also file affidavits in this Court, with advance copies to the OL, within four weeks setting out the details of all the assets, both movable and immovable, of TTL and enclose therewith the balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years.

(vi) The order and directions at (ii) to (v) above will not be given effect to for a period of nine weeks from today to enable TTL to make payment of the outstanding amount to ANZ by that time. It will also be open to both ANZ and TTL to approach the Court for further directions in that regard.

(vii) In the event that no payment is made and/or neither party applies to the Court for any directions, the above order appointing the PL will become operational on the expiry of nine weeks from today. In that event, ANZ will forthwith inform the OL who will thereafter proceed to take steps in terms of this order without delay. In such event the OL will file a status report by the next date.

(viii) TTL represented by Lt. Col. Bedi is found to have wilfully disobeyed the order dated 21st November

2012, as modified by the order dated 17th December 2012. TTL through Lt. Col. Bedi will now show cause on the next date as to why TTL should not be punished for contempt of Court. Lt. Col. Bedi, as MD of TTL, is permitted to file an affidavit on this aspect before the next date. He shall also be personally present in the Court on the next date. **(Para 31)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Neeraj Kishan Kaul, Senior Advocate with Mr. Rajendra Barot and Mr. Gaurav Kothari, Advocates.

FOR THE RESPONDENTS : Mr. G.L. Rawal, Senior Advocate with Mr. Kuljeet Rawal and Mr. Himanshu Singh, Advocates with Mr. H.S. Bedi, MD in person.

CASES REFERRED TO:

1. *New Swadeshi Mills of Ahmedabad Ltd.* vs. *Dye-Chem Corporation* 1986 (59) Company Cases 183 (Guj).
2. *Madhusudan Gordhandas and Co.* vs. *Madhu Woollen Industries Pvt. Ltd.* 1972 (42) Company Cases 125.

RESULT: Applications allowed.

S. MURALIDHAR, J.

1. Co. Pet. No. 395 of 2012 was filed by the Petitioner, Australia and New Zealand Banking Group Ltd. ('ANZ'), under Section 433(e) and (f)read with Sections 434 and 439 of the Companies Act, 1956 ('Act') seeking the winding up of Tulip Telecom Ltd. ('TTL'), on the ground that TTL was unable to pay its debts.

2. Pursuant to a facility agreement dated 3rd August 2011, ANZ sanctioned TTL a working capital facility aggregating to Rs. 50,00,00,000 of which Rs. 20,00,00,000 were in the form of overdraft facility and Rs. 30,00,00,000 in the form of short term loan. TTL executed a demand promissory note of the same date in favour of ANZ for a sum of Rs. 50,00,00,000. According to ANZ, as on 29th June 2012, the total

outstanding dues of TTL were Rs. 49,22,89,203 along with interest @ 4% p.a. over and above the applicable rate of interest. A legal notice dated 29th June 2012 was issued by ANZ, followed by reminders on 13th and 24th July 2012.

3. It is stated that on or around 26th July 2012, ANZ received a proposal from TTL setting out a repayment schedule agreeing to pay Rs. 50,00,00,000 and in addition, a sum of Rs. 2,50,00,000 towards interest in four instalments, beginning 7th August 2012 and ending 7th November 2012.ANZ, in response, offered a revised repayment schedule which was agreed to by TTL by a letter dated 1st August 2012. TTL also issued post dated cheques ('PDCs') and furnished a personal guarantee dated 31st July 2012 issued and executed by its Managing Director ('MD') Lt. Col. Hardeep Singh Bedi (hereinafter referred to as 'Lt. Col. Bedi'). A request was made by TTL to ANZ to defer depositing PDCs by ten days but the said request was declined. When ANZ presented the first PDC in the sum of Rs. 12,50,00,000 on 7th August 2012 for payment, it was dishonoured. Thereafter, the winding up petition was filed.

4. At the first hearing of the petition on 31st August 2012, Mr. G.L. Rawal, learned Senior counsel along with Mr. Himanshu Singh, learned counsel, appeared on behalf of TTL. The following order was passed by the Court on that date:

> **"CO.PET. No. 395/2005 (sic. 2012) & C.A. No. 1606/2012** Petitioner seeks winding up of the respondent company; the parties had entered into a facility agreement on 03.8.2011 pursuant to which respondent had borrowed a sum of Rs.50 crore which has been sanctioned under the aforenoted agreement. On 02.5.2012 the respondent had agreed to pay the outstanding dues to the petitioner (page 69 of the paper book); thereafter post dated cheques issued by the respondent stood dishonoured; the details of these cheques find mention at para 98 of the paper book. Submission being that in spite of issuance of legal notice the amount has not been liquidated.
>
> At this stage learned counsel for the respondent has put in appearance; he accepts notice. Complete set of paper book has been furnished. Learned counsel for the respondent under instructions from his client states that a sum of Rs. 8 crores would be paid within two weeks from today and another sum of

Rs.2 crores will positively be paid within 10 days thereafter. The proposal for paying the balance amount in a time bound frame shall be placed before the Court on the next date. In case the undertaking so given before this Court is not honoured, learned counsel for the petitioner states that he would press for orders on his application for interim relief. Counsel for the petitioner further points out that the respondent has committed default qua other creditors also and he wishes to bring this fact on record; additional affidavit is permitted to be filed by the petitioner within a period of one week from today.

Renotify on 18.09.2012."

5. On 18th September 2012, the following order was passed:

"Learned counsel for the petitioner points out that the undertaking given by the respondent in terms of the last order has not been complied as the cheque issued by the respondent stood dishonoured.

Learned counsel for the respondent undertaking on behalf of his client undertakes that the said payment will be made through banker's cheque/demand draft to the petitioner tomorrow; he requests that the matter be listed for directions only for that purpose for tomorrow.

Learned counsel for the petitioner presses his interim application C.A. No.1606/2012. Additional affidavit of the petitioner dated 12.9.2012 is also on record detailing the liabilities of the respondent qua other persons. In view of the aforenoted circumstances which have now emanated it would be expedient that the respondent is restrained from transferring, alienating or dissipating his assets immovable and moveable except in the normal course of business till further orders.

Renotify for directions for 19.9.2012."

6. On 19th September 2012, the Court noted that a sum of Rs. 8,00,00,000 had been paid to learned counsel for ANZ by way of a demand draft. The Court directed that "the payment schedule as contained in the earlier order of this Court be adhered to."On 12th October 2012, the following order was passed in CA No. 1961 of 2012:

"Learned counsel for the petitioner points out that the sum of Rs.2crores which had to be paid by 25.9.2012 has not been paid. Payment schedule has also not been furnished.

Learned counsel for the respondent undertakes (on behalf of his client) that he shall pay this amount of Rs.2 crores within 10 days from today and the payment schedule shall also be furnished within 10 days.

Reply be also filed within 10 days.

For compliance; renotify for 02.11.2012."

7. On 2nd November 2012, the following order was passed:

"C.A. No. 1961/2012 in Co.Pet.395/2012

In terms of the last direction Rs.2 crores have since been paid by the respondent to the petitioner.

The respondent has tendered a submission duly supported by the affidavit of the Mr. Hardeep Singh Bedi, Managing Director of the respondent company. The proposal states that the balance sum of Rs.40 crores shall be paid in monthly instalments of Rs.2 crore each with interest at the agreed rate on the reducing balance; which figure is disputed by the learned counsel for the petitioner who has drawn attention of this Court to Page 98 of the paper book wherein the agreed amount to be repaid by the respondent to the petitioner is Rs.42.5crores. This proposal is not acceptable to the learned counsel for the petitioner who states that the sum involved is heavy and he is not agreeable to this proposal and the respondent himself in the month of August had issued post dated cheques up to 07.11.2012 for complete payment and he cannot now wriggle out of this proposal. He is asking for enlargement of time which is not acceptable to the petitioner.

This Court has put a proposal to the respondent which is to the effect that the entire payment be paid by the respondent to the petitioner within an outer limit of 10 months from the next date of hearing with interest at the agreed rate on the reducing balance. Learned counsel for the petitioner will also take instruction on this proposal which has been put to the respondent by the Court. Learned counsel for the respondent also seeks time to take

instruction in this regard. In case this proposal does not to fructify arguments will be heard on merits.

Reply if any be filed within 10 days with advance copy.

List for direction on 21.11.2012."

8. Subsequent to the above hearing, when the case was listed on 21st November 2012, the Court was informed that the parties had arrived at a settlement and that the Respondent was willing to pay the balance sum along with interest at the agreed rate on the reducing balance basis. The following order was passed on that date:

"The parties have arrived at a settlement. Respondent shall pay a sum of Rs. 45.50 crores along with interest at the agreed rate on the reducing balance within a period of 14 months from today. Complete payment shall be made by 31.12.2013; the payment shall be made by installment i.e. Rs. 3 crores per month; the first installment of Rs. 3 crores shall be paid by the respondent to the petitioner on or before 30.11.2012; second installment shall be paid on or before 31.12.2012 and so on; the last installment will be in the sum of Rs. 3.50 crores along with interest at the agreed rate on the reducing balance and as noted supra this complete payment shall be made by 31.12.2013.

An affidavit to the said effect of the Director of the Company shall be filed within one week from today detailing the schedule of these payments; in case of even one single default the petitioner shall be at liberty to take appropriate action under the contempt law; in such an eventuality, the provisional liquidator shall also stand appointed.

Both the parties agreed that this order shall not be communicated or used in the Media or Press by either party. This order may not also be uploaded on the net.

With these directions, this petition as also the pending applications stand disposed of."

9. An affidavit dated 5th December 2012 was filed by Lt. Col. Bedi in terms of the above order dated 21st November 2012 detailing the schedule of payments as agreed between the parties. Subsequently, an application, CA No.2438 of 2012 was filed for correcting the figure of

Rs. 45.50 crores to Rs. 42.50 crores in the order dated 21st November 2012. The said application, with the consent of both the parties, was by an order dated 17th December 2012, allowed and the figure was corrected accordingly. Another application, CA No. 2424 of 2012, for directions was disposed of on the same day by the following order:

"Co. Application No. 2424/2012

Averments contained in the application have been denied by the respondent. Submission of the applicant is that the settlement amount of Rs.42.50 crores which has to be paid along with interest at the agreed rate on the reducing balance in terms of the directions of this Court dated 21.11.2012 had clearly stipulated that the interest on the reduced balance shall be paid along with each instalment. Learned counsel for the respondent states that the order was ambiguous. This is now clarified. It is made clear that the interest on the reduced balance at the agreed rate on each instalment shall be paid along with the instalment. Learned counsel for the respondent points out that the instalment of November, 2012 has since been paid; admittedly interest on the said instalment has not been paid; learned counsel for the respondent states that this interest shall be paid positively on or before 31.12.2012 and the interest falling due on the instalment of December, 2012 shall be cumulatively paid along with interest due for January, 2013 instalment.

Application disposed of in the above terms.

Order dasti."

10. It appears that against the order dated 21st November 2012, TTL filed an appeal, being Co. Appeal No. 5 of 2013, which was disposed of by the Division Bench ('DB') on 28th January 2013 by the following order:

"Co.App. 5/2013 & CM No. 1361/2013 (Stay)

The impugned order dated 21.11.2012 refers to and incorporates the settlement arrived at between the parties. The appellant herein has agreed to pay a sum of Rs. 45.50 crores along with interest at the agreed rate on the reducing balance within a period of 14 months from 21.11.2012in instalments of 3 crores each per

month. The last instalment is to be paid on or before 31.12.2013.

Learned counsel for the appellant submits that instalments for the month of November and December, 2012 have already been paid with interest and the instalment for the month of January, 2013 will be paid by31.01.2013.

The grievance of the appellant herein is that the learned Company Judge while recording the settlement has observed that in case there is a default of even one single instalment, the respondent would be at liberty to take appropriate action under the contempt law and in such an eventuality the provisional liquidator should also be appointed. We notice that interests of the appellant have also been protected by observing that the order passed by the Court would not be communicated or used in the Media or Press by either party or uploaded on the net.

We do not think there is any need for this Court to interfere with the impugned order as it is based upon the settlement arrived at between the parties. In case the appellant requires any clarification or modification for any reason including the said term/condition was not agreed or accepted, they can approach the Company Court for the said clarification/modification.

Keeping in view the nature of the order, we are not inclined to issue notice. The appeal is disposed of accordingly. Pending application also stands disposed of.

Dasti."

11. Following the above order of the DB, ANZ filed CA No. 455 of 2013 seeking revival of Co. Pet. No. 395 of 2012.CA No. 454 of 2013 was for appointment of the Official Liquidator ('OL') as the Provisional Liquidator ('PL') of TTL. The other prayer was that pending the final hearing and disposal of the said application TTL should be restrained from in any manner transferring, selling, disposing off, parting with possession of or encumbering any of its assets. It must be noted at this stage that although the DB granted TTL leave to file an application seeking modification of the order dated 21stNovember 2012, TTL filed no such application. It was ANZ who filed the aforementioned two applications. Notice was directed to issue in the said two applications by

the Court on 22nd March 2013, and they were listed on 18th April 2013.

12. Simultaneously, ANZ also filed CCP (Co.) No. 3 of 2013 against TTL in which notice was directed to issue by the Court on 22nd March 2013. At that hearing, Mr. Sheetesh Khanna, Advocate accepted notice on behalf of TTL. The Court directed replies to be filed both to CA Nos. 454 and 455 of 2013 as well as CCP (Co.) No. 3 of 2013 by 10th April 2013 and rejoinder to be filed before the next date. When the matter was listed on 18th April 2013, the Court noted that no reply had been filed by TTL, and passed the following order:

"1. The Court finds that despite opportunity granted on 22nd March 2013 to the Respondent in this contempt petition to file a reply on or before 10th April 2013 no reply has been filed by the Respondent till date.

2. Mr. G.L. Rawal, learned Senior counsel appearing for the Respondent prays for some more time to file a reply.

3. The Court had enquired of Mr. Rawal whether the Respondent would be willing to, as a condition for being granted more time to file a reply, and considering that this is a contempt petition arising out of the earlier orders passed by the Court on 21st November 2012, offer security in the form of unencumbered fixed assets of the Respondent for the outstanding amount of over Rs. 32 crores owing to the Petitioner. The matter was passed over till 2.15 pm for this purpose. At 2.15 pm Mr. Rawal was unable to make a categorical statement on whether any of the fixed assets that are sought to be offered by the Respondent as security are unencumbered.

4. The Court finds that the order dated 21st November 2012 stated that in case of "even one single default" by the Respondent the Petitioner would be at liberty to take appropriate action under the contempt law, and "in such an eventuality the provisional liquidator shall also stand appointed".

5. Mr. Rawal submitted that the order appointing the provisional liquidator should not be passed today and that the Respondent should be given an opportunity of placing on record certain documents concerning a corporate debt restructuring ('CDR')

Scheme that has been arrived at with the secured creditors. He, however, is candid that the said CDR Scheme does not deal with the liability owing to the Petitioner. In the circumstances, the Court finds no justifiable reason for the Respondent not filing a reply to the contempt petition till date.

6. The Court has been shown a copy of order dated 28th January 2013 of the Division Bench in Company Appeal No. 5 of 2013 which was filed by the Respondent against the order dated 21st November 2012. While dismissing the said appeal the Division Bench gave liberty to the Respondent to apply to this Court for clarification or modification of the order dated 21st November 2012. Till date the Respondent has not filed such an application for modification or clarification of the said order.

7. In the circumstances, the Court sees no reason why further indulgence should be granted to the Respondent. Consequently, for necessitating today's adjournment, the Respondent will pay to the Petitioner a sum of Rs. 25,000 as costs by the next date. The Managing Director of the Respondent is directed to remain present in Court on the next date, i.e., 22nd April 2013 at 10.30 am.

8. List on 22nd April 2013 at 10.30 am.

9. Order be given *dasti* to learned counsel for the parties under the signature of the Court Master."

13. On 22nd April 2013, Lt. Col. Bedi appeared in Court. Mr. Rawal tendered an affidavit of that date of Lt. Col. Bedi. The opening para of the affidavit stated that the MD of TTL was making "submission for dropping the notice of contempt and modification" of the order dated 21st November 2012 regarding appointment of the OL. Inter alia, it was stated that TTL had already made a total payment to ANZ of Rs. 20,01,68,000 and that this showed that TTL had "all bonafide to pay the amount to the petitioner." It was pointed out in para 6 of the affidavit that TTL is in the field of providing internet and data service; it is servicing to more than 5,000 customers across 200 cities on wireless and across 300 cities through 16,000 km fibre network; it has a market capitalization of over Rs. 30 billion; it has an investment of Rs. 32.8 billion partly funded and partly through operational cash flows; that 4000

families are surviving by direct employment provided by TTL while more than 6-7000 people are earning their livelihood besides providing business to TTL suppliers of raw material and services; that TTL is contributing a huge amount of direct and indirect revenue by way of taxes running into thousands of crores of rupees and that the present turnover of TTL is Rs. 2,000 crores. It was pleaded that due to severe economic crisis worldwide and adverse situation in the market, TTL took a temporary blow to its working and its market capitalization fell from Rs. 30 billion to Rs. 5 billion. Consequently, there had been an adverse impact on the cash flow of TTL.

14. It was stated in para 9 of the affidavit that various banks and financial institutions, who were secured lenders of TTL, "in or about January 2013" , participated in a corporate debt restructuring ('CDR') mechanism, at the instance of TTL. These included Bank of India, Indian Overseas Bank, Punjab National Bank, Axis Bank Limited, IDBI Bank, Canara Bank, Bank of Baroda, Dena Bank, Central Bank of India, Andhra Bank, LIC of India and others. It was stated that TTL's failure to make payment to ANZ in terms of the settlement entered into between the parties as recorded in the order dated 21st November 2012 was not intentional and was beyond the control of TTL. It was added that even the payment of salaries of the employees of TTL has been delayed. It was stated in para 13 of the affidavit that the valuation by an independent valuer of the assets of TTL was undertaken at the instance of the secured lenders, of which the leading was ICICI bank ('ICICI').The valuation exercise so undertaken placed the value of the assets of TTL as Rs. 4,426.19 crores, whereas the liabilities owing towards CDR and other lenders, inclusive of ANZ, worked out to Rs. 3067.63 crores. On this basis, it was stated that the money owing to ANZ constituted 1.44% of the sum owing to other lenders. It is stated that "now in terms of CDR no preferential payment can be made as such in these circumstances respondent hands are tied as the survival of the respondent on the strength of CDR." In para 17 of the affidavit it was stated as under:

> "I say respondent has all intend and bonafide to pay the amount to the petitioner though at present the petitioner is unsecured lender and the respondent is ready to make it secured lender and to create pari pasu (sic. pari passu) charge towards liability of about Rs. 32 crores (and interest as may have accrued) out of the various assets of respondent company as detailed in the

valuation report."

15. In the above circumstances, it is stated that any disruption of TTL's business will shut down the operations of a large number of banks who would not be accepting the payments. In para 19 of the affidavit it is stated that TTL applied for CDR on 31st December 2012 covering the period from 1st October 2012 to 31st December 2012 and its request has been accepted by all the major banks who have lent it Rs. 2,300 crores. It is stated that "it is advisable" that ANZ should become a "secured lender" at par with other secured lenders. In paras 20 and 21, Lt. Col. Bedi states that he was responsible for computerization of the Army Headquarters at Delhi for about three years during his service in the Army and that he was awarded the Vishisht Seva Medal for that work. He stated in para 21 that he is a law abiding citizen and respects the orders of the Court and "have taken all my best and bonafide efforts to comply with the orders, however, for the reason as above said further amounts could not be paid as CDR prohibits, respondent from making any preferential payments and now CDR is requirement for the survival of the respondent company." In the above circumstances, in para 22 of the affidavit, it was prayed that "the order dated 21.11.2012" may be modified/varied "to the extent of directions" having been issued for the appointment of the OL and further that the Court should withdraw the notice of contempt.

16. Enclosed with the affidavit is a letter dated 12th April 2013 written by Mr. Prakash Joshi, Dy. General Manager of CDR Cell to Mr. Naveen Atrishi, Dy. General Manager, ICICI communicating the decision taken by CDR in its EG meeting held on 25th March 2013. It is stated that the CDR Scheme of TTL has been approved. Inter alia, various proposals for repayment of term loans of the secured lenders have been set out. The manner of restructuring of the holders of fully convertible commercial bonds ('FCCB') has also been set out. In para

> (x) of the said letter, it is stated as under: "(x) The company has to ensure that all non-CDR lenders including FCCB are to be restructured as stipulated in final scheme. The company to provide undertaking for the same."

17. Enclosed with the letter is the CDR Scheme that has been approved. Sub-para VI of para 1.5, which is relevant for the present purpose, reads as under:

> "VI. TTL should open a Current Account with the MI, to be designated pre-TRA account and all transactions to be routed through this account. Company should submit cash budget for 3 months. "Holding-on-operations" shall be allowed in the Pre TRA account by the lenders till implementation of the package."

18. In para 4.4 titled "Unsecured loans, lessors etc." the CDR Scheme notes that, as on 30th September 2012, a sum of Rs. 42 crores is due to ANZ. The said para notes in a foot note that "TTL has paid Rs.15 Crore to ANZ under a court order. The balance amount is proposed to be restructured in line with other TL lenders."

19. Considering that Lt. Col. Bedi has in his affidavit stated that TTL had applied for the CDR on 31st December 2012, more than a month after the order dated 21st November 2012 was passed, the Court enquired whether he had told the secured lenders' participating in the CDR about the Court orders, and in particular the order dated 21st November 2012. In response, Mr. Rawal drew the attention of the Court to the foot note in para 4.4 of the CDR Scheme which has been extracted hereinbefore. It simply notes that a sum of Rs. 15 crores has been paid under 'Court orders'. It is, therefore, not clear at all whether the CDR members were aware of the order dated 21st November 2012 and its true import.

20. In response to another query whether TTL had informed ANZ of its complying with CDR on 31st December 2012 and further whether it informed ANZ that as a result of CDR it would be unable to make any payment, Lt. Col. Bedi stated that several meetings have been held by ANZ when it was asked to participate in the CDR, but it failed to do so. The above submission was denied, on instructions, by Mr. Neeraj Kishan Kaul, learned Senior counsel for ANZ. He submitted that in any event, irrespective of whether ANZ was informed by TTL, which it was not, TTL ought to have accepted the order dated 21st November 2012, which recorded TTL's undertaking to make payment in terms of the settlement recorded in that order.

21. By way of an application dated 22nd April 2013, supported by an affidavit dated 23rd April 2013 of Lt. Col. Bedi (tendered in the Court by Mr. Rawal at the time of mentioning on 23rd April 2013) two documents were sought to be placed on record. The first is a letter dated

2nd January 2013 addressed by ICICI Bank to the lenders of TTL, including ANZ, inviting them to a meeting on the CDR Scheme on 8th January 2013 at New Delhi. The second is a letter dated 10th January 2013 addressed by ICICI Bank to the lenders of TTL, including ANZ, enclosing the minutes of the meeting held on 8th January 2013. It is stated in the application that despite the said notice ANZ did not attend the meeting of the lenders. It is further stated that "as per understanding and bonafide belief further amount could not be released" to ANZ in terms of the order dated 21st November 2012. In the application and in the affidavit dated 23rd April 2013 of Lt. Col. Bedi in support thereof it is stated that the MD of TTL tenders "unconditional apology and throw(s) himself at the mercy of the Court."

22. The Court is not a little surprised that despite the unambiguous language of the order dated 21st November 2012, TTL did not seek directions from this Court when it became plain to it that it would be unable to adhere to the undertaking given to the Court in the event that the CDR Scheme was approved. On the contrary, it is pointed by ANZ that part-payments were made of the January 2013 instalment by TTL in February 2013. Also, Lt. Col. Bedi was unable to produce any document whereby any of the other secured lenders of TTL had expressly prohibited TTL from making the payment to ANZ.

23. The reasons stated in the affidavits filed by Lt. Col. Bedi by way of explanation as to why TTL was unable to adhere to the undertaking given by it to the Court, as recorded in the order dated 21st November 2012, are neither satisfactory nor convincing. The said order was affirmed by the DB on 28th January 2013. As already noted, despite the DB giving TTL liberty to apply to the Court for modification of the order dated 21st November 2012, including the condition regarding appointment of the PL, TTL filed no such application. It is only in the affidavit tendered in Court that TTL has made a prayer for modification of the order but without indicating what modification is being sought. It is difficult to believe that when the Court passed the order dated 17th December 2012, the CDR Scheme was not already in contemplation and yet, neither ANZ nor the Court was informed of it at that stage. Independent of any notice that ICICI may have sent ANZ about the meeting of secured lenders, it is inexcusable that having filed an affidavit undertaking to make payments in terms of the agreement recorded in the order dated 21st November 2012, TTL made no effort to inform the Court of its inability to honour

that commitment.

24. Despite sufficient opportunities and time granted to TTL, it has been unable to satisfactorily explain the disobedience of the order dated 21st November 2012. If, indeed, TTL was not in a position to adhere to its commitment, as recorded in the order dated 21st November 2012, it ought to have informed the Court, making a full disclosure of the application made by it for the CDR Scheme and sought modification in terms of the leave granted by the DB. It is not even clear whether the DB was made aware of the CDR mechanism when the appeal was heard by it.

25. An officer of TTL dealing with finance was present in the Court. He explained that the current bank balance of TTL is only Rs. 10 lakhs and that the daily income to the tune of around Rs. 60 lakhs is being utilised to pay statutory and other dues. It is plain that given the fund position, TTL would be in no position to repay its debt owing to ANZ.

26. Even according to CDR, TTL is expected to restructure the debt owing to ANZ. Till date, TTL has not even proposed any such restructuring. Mr. Rawal states that some time may be given for that purpose. He has also tendered a synopsis of submissions in which reliance is placed on the decisions in **Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.** 1972 (42) Company Cases 125, **New Swadeshi Mills of Ahmedabad Ltd. v. Dye-Chem Corporation** 1986 (59) Company Cases 183 (Guj), **In Re: Rishi Enterprises** 1992 (73) Company Cases 271 (Guj). Mr. Kaul on the other hand presses for the appointment of the PL as that was an eventuality already stipulated in the order dated 21st November 2012.

27. Significantly, the CDR does not envisage creating any pari passu charge in favour of ANZ for the amount owed by TTL to ANZ. Lt. Col. Bedi states that there is no such restriction on TTL. However, the Court would not like to go by that statement since there is nothing in the CDR Scheme to suggest that creation of a pari passu charge in favour of an unsecured lender is permissible.

28. From the affidavits tendered in Court it is clear to the Court that as of now, TTL is not in a position to repay the outstanding amounts which it owes ANZ. A case for passing orders under Section 433(e) and (f) read with Sections 434 and 439 of the Act is made out. While it is

possible that the CDR Scheme grants a moratorium to TTL on repayments of loans of the secured lenders, the payment of the dues owing to TTL is entirely governed by the order dated 21st November 2012 (as corrected by the order dated 17th December 2012) which has not been varied till date and, having attained finality, is binding on TTL. The CDR Scheme approved by the lenders does not deal with this aspect at all except requiring TTL to restructure the liability. TTL has not taken the first step in that direction. Only in response to the notice issued to it in the contempt petition, and after two adjournments it has come up with a vague prayer for modification of the order dated 21st November 2012. Again, TTL has not been able to explain how it proposes to clear the outstanding dues of ANZ and within what time frame.

29. The order dated 21st November 2012 is unambiguous about the consequences of any default committed by TTL in making payments to ANZ in terms of the agreement recorded in that order. The relevant portion of the order reads thus:

> "An affidavit to the said effect of the Director of the Company shall be filed within one week from today detailing the schedule of these payments; in case of even one single default the petitioner shall be at liberty to take appropriate action under the contempt law; in such an eventuality, the provisional liquidator shall also stand appointed."

The affidavit dated 5th December 2012 filed by Lt. Col. Bedi on behalf of TTL, in terms of the above order, reaffirmed the agreement between the parties and was in the nature of an undertaking to stand by the agreement. The consequence of the failure to do so was spelt out in the order dated 21st November 2012 itself. One was the appointment of a PL and the other the initiation of contempt proceedings against TTL.

30. The fact that there has been disobedience by TTL of the above order is plain. The conduct of TTL in not making any move to have the order varied, despite the order of the DB, despite TTL applying for the CDR Scheme and despite TTL knowing that it was going to be unable to adhere to the payment schedules stated in the affidavit dated 5th December 2012, leads the Court to conclude that the disobedience of the order dated 21st November 2012 by TTL is wilful and not bonafide. The background to the passing of the order dated 21st November 2012 has also to be kept in view. The apology now offered by Lt. Col. Bedi is

unconvincing and cannot be accepted. TTL does appear to have taken it for granted that the CDR Scheme somehow absolved TTL of the responsibility of having to honour its commitments to the Court. The binding nature and the solemnity of the undertaking given by parties to the Court has to be enforced if there has to be respect for the rule of law.

31. In light of the above discussion, the following conclusions and directions are issued:

(i) CA No. 455 of 2013 is allowed and Co. Pet. No. 395 of 2012 is revived.

(ii) Co. Pet. No. 395 of 2012 is admitted. A copy of the petition be served on the OL attached to this Court within five days.

(iii) The OL is appointed as the PL of TTL. The OL is directed to take over all the assets, books of accounts and records of TTL forthwith. The OL shall also prepare a complete inventory of all the assets of TTL before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

(iv) Publication of the citation of the petition be effected in the Official Gazette, 'The Statesman' (English) and 'Veer Arjun' (Hindi) in terms of Rule 24 of the Companies (Court) Rules, 1959 ('Rules'). The cost of publication shall be borne by ANZ.

(v) The Directors of TTL are directed to strictly comply with the requirements of Section 454 of the Act and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from when this order becomes operational. They will also file affidavits in this Court, with advance copies to the OL, within four weeks setting out the details of all the assets, both movable and immovable, of TTL and enclose therewith the balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years.

(vi) The order and directions at (ii) to (v) above will not be given effect to for a period of nine weeks from today to enable TTL

to make payment of the outstanding amount to ANZ by that time. It will also be open to both ANZ and TTL to approach the Court for further directions in that regard.

(vii) In the event that no payment is made and/or neither party applies to the Court for any directions, the above order appointing the PL will become operational on the expiry of nine weeks from today. In that event, ANZ will forthwith inform the OL who will thereafter proceed to take steps in terms of this order without delay. In such event the OL will file a status report by the next date.

(viii) TTL represented by Lt. Col. Bedi is found to have wilfully disobeyed the order dated 21st November 2012, as modified by the order dated 17th December 2012. TTL through Lt. Col. Bedi will now show cause on the next date as to why TTL should not be punished for contempt of Court. Lt. Col. Bedi, as MD of TTL, is permitted to file an affidavit on this aspect before the next date. He shall also be personally present in the Court on the next date.

32. List on 10th July 2013.

ILR (2013) III DELHI 1958
W.P. (CRL.)

A.P. PATHAK **....PETITIONER**

VERSUS

CBI **....RESPONDENT**

(MUKTA GUPTA, J.)

W.P. (CRL.) NO. : 1372/2011 DATE OF DECISION: 03.05.2013

Prevention of Corruption Act, 1988—Section 13(1)(e) and Section 13(2)—Delhi Special Police Establishment Act (DSPE Act)—Section 6A—Complaint forwarded by CVC to CBI—Discreet verification done—FIR registered—Official website did not disclose the status of the petitioner—Investigation started—Searches conducted—During investigation, revealed the petitioner to be joint secretary level officer—Investigation kept in abeyance ex-post facto approval sought—Approval granted—Petition filed for quashing of FIR—Contended—Petitioner being joint secretary level officer, prior approval of the Central Government was mandatory before investigation undertaken—Subsequent approval is of no avail—CBI did not register preliminary inquiry—Acted in violation of its manual—FIR itself illegal; liable to be quashed—CBI contended—Petitioner in his communications referred himself as Director and never informed about his joint secretary level status—CBI not aware of his that status when FIR registered—Approval taken once his status was known—Investigation carried only thereafter—Held—Except checking the website, no efforts made to find out the status of the petitioner—Obligatory to obtain the consent from the Central Government—Approval can be taken ex-post facto as well on receipt

of information about the status of the petitioner, investigation kept on hold—Approval taken, thereafter investigation started—Investigation cannot be accepted or quashed piecemeal—Illegality committed at the inception of investigation gets cured—No averment as to miscarriage of justice, earlier investigation cannot be quashed—Petition dismissed.

Important Issue Involved: The aims and objects of the Legislation should be considered while deciding the issue whether the investigation is vitiated or not.

In introducing Section 6(A) to the DSPE Act, the policy of the Legislature is to afford adequate protection to public servants and to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause.

It was obligatory to obtain the consent of the State concerned to confer jurisdiction on the CBI to investigate any case arising within the jurisdiction of the State in the absence of which CBI has no jurisdiction to register the FIR and investigate the matter.

There is an obvious distinction between 'approval', 'consent' and 'sanction'. An 'approval' or 'consent' implies mere concurrence or agreement whereas 'sanction' confers authority on the person in whose favour power to grant sanction is conferred. The difference between 'approval', 'consent' and 'sanction' is that of degree.

Unlike sanction which is mandatory in nature and has to be obtained prior to taking cognizance, an approval can be taken ex-post facto as well.

Quashing earlier investigation prior to the approval, would be an incorrect procedure of law.

An investigation cannot be accepted or quashed piecemeal.

Once the approval is taken having become aware of the status of the person concerned, the illegality committed at the inception of investigation gets cured.

[Vi Ku]

APPEARANCES:

FOR THE PETITIONER : Mr. Amrender Sharan, Sr. Advocate with Mr. Pramod Kr. Dubey, Mr. Amit Singh, Mr. Someshvar Jha, Advocates.

FOR THE RESPONDENT : Mr. P.K. Sharma, SC with Mr. Anil Kr. Singh, Advocate.

CASES REFERRED TO:

1. *Ms. Mayawati* vs. *Union of India and Anr.* (2012) 8 SCC 106
2. *M.C. Mehta* vs. *Union of India,* (2012) 8 SCC 132.
3. *Ripun Bora* vs. *State* (2012) ILR IDelhi 412.
4. *J& K Housing Board & Anr.* vs. *Kunwar Sanjay Krishan Kaul & Ors.* (2011) 10 SCC 714.
5. *M.C. Mehta* vs. *Union of India,* (2007) 1 SCC 137 : (2007) 1 SCC (Cri) 292.
6. *H.N. Rishbud* vs. *State of Delhi* (2007) 15 SCC 699.
7. *Dr. R.R. Kishore* vs. *CBI* 142 (2007) DLT 702.
8. *Captain Sube Singh and Ors.* vs. *Lt. Governor of Delhi and Ors.* (2004) 6 SCC 440.
9. *M.C. Mehta* vs. *Union of India,* (2003) 8 SCC 711.
10. *State of Kerala* vs. *M.S. Mani and Ors.* (2001) 8 SCC 82.
11. *State of Haryana & Ors.* vs. *Ch. Bhajan Lal and Ors.* AIR 1992 SC 604.
12. *K. Veeraswami* vs. *Union of India and Ors.* (1991) 3 SCC 655.

13. *State of Maharashtra* vs. *Janardan Ramchandra Nawankar,* 1987 Cri. L.J. 811.

14. *Hukam Chand Shyam Lal* vs. *Union of India & Ors.* (1976) 2 SCC 128.

15. *State of Andhra Pradesh* vs. *P.V. Narayana* (1971) 1 SCC 483.

16. *P. Sirajuddin* vs. *State* AIR 1971 SC 520.

17. *Dr. M.C. Sulkunte* vs. *State of Mysore* (1970) 3 SCC 513.

18. *Emperor* vs. *Khwaja Nazir Ahmed,* AIR 32 (1945) PC 18.

19. *Liverpool Borough Bank* vs. *Turner* [(1861) 30 LJ Ch 379].

RESULT: Petition dismissed.

MUKTA GUPTA, J.

1. By this petition the Petitioner seeks quashing of RC No. DAI-2011-A-0013 dated 31.08.2011 under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 (PC Act) and proceedings pursuant thereto including the investigation, in view of the non-compliance of mandatory provision of Section 6A of the Delhi Special Police Establishment Act (in short the DSPE Act).

2. Learned counsel for the Petitioner contends that since the Petitioner was a Joint Secretary level officer it was mandatory on the part of the CBI to have taken the prior approval of the Central Government under Section 6(A)(2) of the DSPE Act before proceeding with the investigation as no trap was to be laid immediately. The approval taken subsequently is of no avail as held by the Supreme Court in **State of Kerala Vs. M.S. Mani and Ors.** (2001) 8 SCC 82. The CBI failed to act in accordance with its manual on the source information which is statutory in nature. The CBI was required to register a preliminary enquiry. In the counter affidavit it is admitted that no preliminary enquiry was registered, thus there was gross violation of guideline 9.1 of the CBI manual. Reliance is placed on **P. Sirajuddin Vs. State** AIR 1971 SC 520, **State of Haryana & Ors. Vs. Ch. Bhajan Lal and Ors.** AIR 1992 SC 604 and **Ripun Bora Vs. State** (2012) ILR IDelhi 412. The law is well-settled. An illegally collected evidence pursuant to a legally registered FIR can be

used as evidence, however if the FIR itself is registered illegally then the entire evidence collected pursuant thereto has to be struck down and cannot be acted upon. Section 6(A) of the DSPE Act raises a complete bar on proceeding against a Joint Secretary level and above officer without the prior approval of the Central Government. The word used in the provision is "shall" showing its mandatory nature. Relying upon **Emperor vs. Khwaja Nazir Ahmed,** AIR 32 (1945) PC 18, **Hukam Chand Shyam Lal Vs. Union of India & Ors.** (1976) 2 SCC 128, **Captain Sube Singh and Ors. Vs. Lt. Governor of Delhi and Ors.** (2004) 6 SCC 440 and **J& K Housing Board & Anr. Vs. Kunwar Sanjay Krishan Kaul & Ors.** (2011) 10 SCC 714 it is contended that if the Statute requires a thing to be done in a particular manner then the same has to be done in that particular manner and not otherwise.

3. Learned counsel for the CBI on the other hand contends that in the present case the complaint was sent by the Chief Vigilance Officer of the Petitioner's Department to the Central Vigilance Commission (CVC) which directed the CBI to take proper action on 8th February, 2011. In cases referred by the CVC, the CBI may or may not register the FIR. Guidelines 9.1 and 9.2 of the CBI manual itself state that in a case of misconduct only and not criminal misconduct, the matter should be sent back to the concerned Department. After the receipt of the complaint on 8th February, 2011 the income-tax details of the Petitioner were collected. The Petitioner also made communications wherein he referred himself as Director and never informed that he was a Joint Secretary level officer. Further the official website of the Petitioner's Department was checked where also the Petitioner was not shown to be an officer of the Joint Secretary level and above. Since the CBI was not aware of the position of the Petitioner, the abovementioned FIR was registered on 31st August, 2011 and investigation started thereon. The moment it came to the notice of the investigating officer that the Petitioner was a Joint Secretary level officer, approval from the concerned Department was taken and further investigation was carried thereafter. Reliance is placed on **State of Andhra Pradesh Vs. P.V. Narayana** (1971) 1 SCC 483 and **Dr. M.C. Sulkunte Vs. State of Mysore** (1970) 3 SCC 513 to contend that even in case where there is non-compliance of mandatory provision the trial is not vitiated, except when there is grave miscarriage of justice. In the entire petition or the arguments made before this Court, there is no averment that there has been grave miscarriage of justice. Further in view of **K.**

Veeraswami Vs. Union of India and Ors. (1991) 3 SCC 655 the aims and objects of the Legislation should be considered while deciding the issue whether the investigation is vitiated or not.

4. In the rejoinder learned counsel for the Petitioner contends that the decisions relied upon by the learned counsel for the Respondent/ CBI are not applicable to the facts of the case as in the said case the trial had completed and thus in view of Section 465 Cr.P.C. it was held that error in grant of sanction does not vitiate the trial unless the accused has suffered grave miscarriage of justice.

5. I have heard learned counsel for the parties. Briefly the facts of the case are that a complaint was forwarded by the CVC to CBI on 8th February 2011 regarding acquisition of disproportionate assets by the Petitioner. On receipt of the complaint discreet verifications including calling of the income-tax details were made resulting in the registration of the abovementioned FIR on 31st August, 2011. As per the stand of the CBI during verification it was not revealed that status of the Petitioner was an officer of a Joint Secretary level as the list of Joint Secretary level empanelled officers on the DOPT website did not include the name of the Petitioner. After the registration of the FIR searches were conducted at the residential premises/ properties of the Petitioner on 2nd September, 2011 on the strength of the search warrants issued by the learned Special Judge, CBI, Patiala House Courts. During the search the Petitioner claimed himself to be an officer of the level of Joint Secretary. Thus a letter was sent to the Joint Secretary and Chief Vigilance officer of the Ministry of Road Transport and Highways on 28th September, 2011 and in the reply dated 29th September, 2011 it was clarified that the Petitioner was granted proforma promotion to the post of Chief Engineer (Civil) and thus was holding the post equivalent to Joint Secretary in the Govt. of India. Further investigation was kept in abeyance and on 20th October, 2011 CBI sought post-facto approval of the Government under Section 6(A) of the DSPE Act which was conveyed to the CBI vide letter of the Joint Secretary and Chief Vigilance officer of the Ministry dated 9th November, 2011.

6. In the present case the issues are whether the investigation in violation of Section 6(A) DSPE Act would be illegal and liable to be set aside and whether the ex post-facto approval would ratify the earlier investigation carried out. Before proceeding further it would be appropriate

to reproduce Section 6(A) of the DSPE Act which reads as under:

> "6A. Approval of Central Government to conduct inquiry or investigation
>
> (1) The Delhi Special Police Establishment shall not conduct any enquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act,1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to
>
> (a) the employees of the Central Government of the Level of Joint Secretary and above ; and
>
> (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government Companies, Societies and local Authorities owned or controlled by that Government.
>
> (2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to section 7 of the Prevention of Corruption Act, 1988 (49 of 1988.]"

7. A perusal of the decisions relied upon by the learned counsel for the Respondent would show that they were the cases wherein the legality of investigation was being considered after the trial was concluded and the accused therein had been convicted for the offences under the Prevention of Corruption Act (in short the PC Act). In the light of Section 19(3)(a) PC Act it was held that the illegality in the investigation did not vitiate the trial unless prejudice is caused. The same would have no application when the accused agitates the illegality at the first available opportunity. In the case in hand the complaint was received by the CBI on 8th February, 2011 and the FIR was registered on 31st August, 2011. During this period, enquiries were conducted including collection of income tax details, however except checking the website, no efforts were made by the enquiry officer to find out the status of the Petitioner which was improper. In introducing Section 6(A) to the DSPE Act, the policy of the Legislature is to afford adequate protection to public servants and to ensure that they are not prosecuted for anything done by them in the

discharge of their official duties without reasonable cause.

8. In **Ms. Mayawati Vs. Union of India and Anr.** (2012) 8 SCC 106 the issue of Section 6 of the DSPE Act came up for consideration before the Hon'ble Supreme Court and it was held that it was obligatory to obtain the consent of the State concerned to confer jurisdiction on the CBI to investigate any case arising within the jurisdiction of the State. The Hon'ble Supreme Court noted:

> "30. As rightly pointed out that in the absence of any direction by this Court to lodge an FIR into the matter of alleged disproportionate assets against the petitioner, the investigating officer could not take resort to Section 157 of the Code of Criminal Procedure, 1973 (in short "the Code") wherein the officer in charge of a police station is empowered under Section 156 of the Code to investigate on information received or otherwise. Section 6 of the DSPE Act prohibits CBI from exercising its powers and jurisdiction without the consent of the Government of the State. It is pointed out on the side of the petitioner that, in the present case, no such consent was obtained by CBI and submitted that the second FIR against the petitioner is contrary to Section 157 of the Code and Section 6 of the DSPE Act. It is not in dispute that the consent was declined by the Governor of the State and in such circumstance also the second FIR No. RC 0062003A0019 dated 5-10-2003 is not sustainable.
>
> 37. It is also brought to our notice that merely because various orders of this Court including the order dated 18-9-2003 [(2003) 8 SCC 696] have been communicated to various authorities in terms of the provisions of the Rules of this Court, CBI is not justified in putting the Assistant Registrar of this Court as the informant/complainant. Further, as rightly pointed out by Mr Salve, the complainant/Assistant Registrar would not and cannot be a witness in the case to corroborate the statements made in FIR No. RC 0062003A0019 dated 5-10-2003. As rightly pointed out, proceeding further, as if the said Assistant Registrar of this Court made a complaint cannot be sustained.
>
> 38. We have already pointed out after reading various orders of this Court which show that Taj Corridor was the subject-matter

> of reference before the Special Bench. Various directions issued in the order dated 18-9-2003 [(2003) 8 SCC 696] have to be read in the light of the previous orders dated 16-7-2003 [(2003) 8 SCC 706] , 21-8-2003 [**M.C. Mehta v. Union of India,** (2003) 8 SCC 711] and 11-9-2003 [**M.C. Mehta v. Union of India,** (2012) 8 SCC 132] as well as subsequent orders dated 25-10-2004 [**M.C. Mehta v. Union of India,** (2007) 1 SCC 137 : (2007) 1 SCC (Cri) 292] and 7-8-2006 [**M.C. Mehta v. Union of India,** (2012) 8 SCC 137] wherein this Court has clarified that it was not monitoring the disproportionate assets case. We are satisfied that a reading of all the orders of this Court clearly shows that the direction to lodge FIR was issued only with respect to Taj Corridor matter, more particularly, irregularities therein. In fact, the direction was confined to find out as to who cleared the project of Taj Corridor and for what purpose it was cleared and whether there was any illegality or irregularity committed by officers and other persons concerned in the State. We have already noted all those orders which clearly state that CBI is free to interrogate and verify the assets of the officers/ persons relating to release of Rs 17 crores in connection with Taj Corridor matter.
>
> 44. In the light of the above discussion, we hold that in the absence of any specific direction from this Court in the order dated 18-9-2003 [(2003) 8 SCC 696] or any subsequent orders, CBI has exceeded its jurisdiction in lodging FIR No. RC 0062003A0019 dated 5-10-2003. The impugned FIR is without jurisdiction and any investigation pursuant thereto is illegal and liable to be quashed, and is accordingly quashed. The writ petition is allowed."

9. In **Mayawati** (supra) the Hon'ble Supreme Court was dealing with a case of 'consent' from the State Government for the registration of FIR and to investigate the matter, in the absence of which the CBI had no jurisdiction to register the FIR and investigate the matter.

10. There is an obvious distinction between 'approval', 'consent' and 'sanction'. An 'approval' or 'consent' implies mere concurrence or agreement whereas 'sanction' confers authority on the person in whose favour power to grant sanction is conferred. The difference between

'approval', 'consent' and 'sanction' is that of degree. In **State of Maharashtra vs. Janardan Ramchandra Nawankar,** 1987 Cri. L.J. 811 the Bombay High Court while dealing with the distinction between 'consent' and 'sanction' held as under:

> "54. Besides, it must be remembered that Under Section 20 of the Prevention of Food Adulteration Act only consent of the Commissioner is necessary and not sanction. There is obvious difference between 'consent' and 'sanction'. 'Consent' implies mere concurrence or agreement whereas 'sanction' confers authority on the person in whose favour sanction is granted. Therefore, the considerations applicable in the case of 'sanction' would, in my opinion, not be applicable to a case where mere consent is required."

11. It is thus evident that unlike 'sanction' which is mandatory in nature and has to be obtained prior to taking cognizance, an 'approval' can be taken ex-post facto as well. There is yet another aspect which needs consideration in the present case. Though initial searches were conducted without the approval, however thereafter on receipt of the intimation from the Petitioner that he was Joint Secretary level officer, the investigation was kept on hold and approval was taken. Thus, if this Court quashes the earlier investigation prior to the approval, the same would be an incorrect procedure of law as investigation cannot be accepted or quashed piecemeal. Investigation has been defined by the Supreme Court in **H.N. Rishbud Vs. State of Delhi** (2007) 15 SCC 699 as:

> 5. To determine the first question it is necessary to consider carefully both the language and scope of the section and the policy underlying it. As has been pointed out by Lord Campbell in **Liverpool Borough Bank v. Turner** [(1861) 30 LJ Ch 379], "there is no universal rule to aid in determining whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed". (See Craies on Statute Law, p. 242, Fifth Edn.) The Code of Criminal Procedure provides not merely for judicial enquiry into or trial of alleged offences but also for prior investigation thereof. Section 5 of the Code shows that all offences

> "shall be investigated, inquired into, tried and otherwise dealt with in accordance with the Code" (except in so far as any special enactment may provide otherwise). For the purposes of investigation offences are divided into two categories "cognizable" and "non-cognizable". When information of the commission of a cognizable offence is received or such commission is suspected, the appropriate police officer has the authority to enter on the investigation of the same (unless it appears to him that there is no sufficient ground). But where the information relates to a non-cognizable offence, he shall not investigate it without the order of a competent Magistrate. Thus it may be seen that according to the scheme of the Code, investigation is a normal preliminary to an accused being put up for trial for a cognizable offence (except when the Magistrate takes cognizance otherwise than on a police report in which case he has the power under Section 202 of the Code to order investigation if he thinks fit). Therefore, it is clear that when the Legislature made the offences in the Act cognizable, prior investigation by the appropriate police officer was contemplated as the normal preliminary to the trial in respect of such offences under the Act. In order to ascertain the scope of and the reason for requiring such investigation to be conducted by an officer of high rank (except when otherwise permitted by a Magistrate), it is useful to consider what "investigation" under the Code comprises. Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. Thus investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition, it includes "all the proceedings under the Code for the collection of evidence conducted by a police officer". For the above purposes, the investigating officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has also the authority to

examine such person orally either by himself or by a duly authorised deputy. The officer examining any person in the course of investigation may reduce his statement into writing and such writing is available, in the trial that may follow, for use in the manner provided in this behalf in Section 162. Under Section 155 the officer in charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of the investigation. The search has to be conducted by such officer in person. A subordinate officer may be deputed by him for the purpose only for reasons to be recorded in writing if he is unable to conduct the search in person and there is no other competent officer available. The investigating officer has also the power to arrest the person or persons suspected of the commission of the offence under Section 54 of the Code. A police officer making an investigation is enjoined to enter his proceedings in a diary from day-to-day. Where such investigation cannot be completed within the period of 24 hours and the accused is in custody he is enjoined also to send a copy of the entries in the diary to the Magistrate concerned. It is important to notice that where the investigation is conducted not by the officer in charge of the police station but by a subordinate officer (by virtue of one or other of the provisions enabling him to depute such subordinate officer for any of the steps in the investigation) such subordinate officer is to report the result of the investigation to the officer in charge of the police station. If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefore under Section 170 of the Code. In either case, on the completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed form furnishing various details. Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the

commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173. The scheme of the Code also shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in Section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz. the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under Section 551.

12. In **Dr. R.R. Kishore Vs. CBI** 142 (2007) DLT 702 this Court quashed the investigation and permitted re-investigation after obtaining approval for the reason that no approval was taken at all. It was held:

> "28. After examining the aforesaid decisions of the Privy Council as well as of the Supreme Court, the following principles emerge:
>
> 1. If cognizance is taken on the basis of such an illegal investigation and no objection is taken at the initial stages and the trial proceeds to its conclusion and results in conviction then the same can be set aside only if it has resulted in a miscarriage of justice.
>
> 2. However, if the illegal investigation is brought to the notice of the Trial Court at the initial stages then the court ought not to proceed with the trial and be a mute spectator to the illegality and contravention of a mandatory provision but should direct reinvestigation so that the defect in investigation is cured."

13. Reliance of learned counsel for the Appellant on **State of Kerala Vs. M.S. Mani & Ors.** (supra) is misconceived and has no application to the facts of the present case. In the said case the Hon'ble Supreme Court observed that the contempt petition was filed on 17th May, 1999 and the consent of the Attorney General was obtained on 11th May, 2000 and that a subsequent consent would not convert the incompetent motion into a maintainable petition.

14. In the present case had the approval not been taken at all and the investigation completed, the same would have been illegal. Further an investigation cannot be set at naught piecemeal. Thus in view of the fact that the CBI had taken the approval after it became aware of the status of the Petitioner the illegality committed at the inception of investigation gets cured and the same would not permit this Court to quash the earlier investigation. In view of the aforesaid discussion the petition is dismissed.

ILR (2013) III DELHI 1971
BAIL APPLN.

MANJEET SINGH & ORS. ....PETITIONERS

VERSUS

STATE OF DELHI ....RESPONDENT

(R.V. EASWAR, J.)

BAIL APPLN. NO. : 631/2013 DATE OF DECISION: 06.05.2013

Code of Criminal Procedure, 1973—Section 438—Anticipatory Bail—Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989—Section 3—Section 18—Bar to grant anticipatory bail—Indian Penal Code, 1860—Section 34—Sections 341/323/34—Utterance of caste remark to the complainant—Complainant and his brothers beaten up—Final report submitted against the three accused persons—

Application for grant of anticipatory bail—Dismissed by the Sessions Judge—Preferred present application for anticipatory bail—Pleaded business rivalry between petitioners and complainant had filed petition alleging harassment by complainant—SHO was directed to provide adequate protection—DCP filed affidavit confirming business rivalry—FIR is an afterthough—Filed when the petitioner was in hospital having suffered beatings from the complainant—FIR is counter blast to FIR filed by the petitioner—The chain of events points to falsity of the complaint—challan filed is ambiguous—Continuous improvements made by complainant—Allegation of caste remark made after one month of the incident—Witness also made improvements—APP pleaded bar of Section 18 of the SC/ST Act to section 438 Cr. PC—Made caste remark in public view—Clear averments in the complaint—Held—Section 18 is an absolute bar to applicability of Section 438 Cr. PC—Absence of utterance in public view is the limited exception—Specific allegations against each of the accused a must—Section 34 IPC cannot be brought in aid—Accused Manjeet Singh uttered caste remark in a public street—No such charges against other two petitioners—Application of Manjeet Singh rejected—Other two petitioners admitted to bail.

Important Issue Involved: It is an absolute bar on the applicability of Section 438 of the Cr.P.C. to any case involving the arrest of any person on an allegation that he has committed an offence under the SC/ST Act

The bar of Section 18 of the SC/ST Act is absolute unless it can be shown that there is no specific averment in the complaint about the uttering of the caste name or remark.

The provisions of Section 18 of the SC/ST Act cannot be easily brushed aside by elaborate discussion on the evidence. Everything depends upon the nature of the averments made in the complaint.

The provisions of Section 18 of the SC/ST Act and Section 438 of the Code have to be construed in a very strict manner.

The strictly limited exceptions to the bar imposed by Section 18 appears to be where the complaint does not contain any specific averment about the insult or intimidation with intent to humiliate by calling by the caste name, absence of a specific averment that it was uttered in public view etc. If there is a specific averment in the complaint to this effect, Section 18 of the SC/ST Act is attracted.

There must be a specific allegation in the complaint against each of the accused and Section 34 of the IPC cannot be brought in aid to support on omnibus statement that the accused persons uttered humiliating words.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONERS : Mr. R.S. Juneja and Mr. Ankit Kumar, Advocates.

FOR THE RESPONDENT : Ms. Jasbir Kaur, APP for State with Insp. Rohitash Kumar, SHO, Farsh Bazar, Mr. Ritesh Bahri and Mr. Randeep Kr. Rehan, Advocates for complainant.

CASES REFERRED TO:

1. *Vilas Pandurang Pawar and Anr.* vs. *State of Maharashtra and Ors.* (2012) 8 SCC 795.
2. *Ashok Kumar Mahajan and Ors.* vs. *State of Punjab* (2010) (1) RCR (Crl.) Punjab and Haryana.
3. *Mukesh Kumar Saini and Ors.* vs. *State (Delhi Administration)* (2001)(2) JCC (Delhi) 235.
4. *Ramesh Prasad Bhanja and Ors.* vs. *State of Orissa* (1996) Crl.L.J.2743,

5. *Pankaj D Suthar* vs. *State of Gujrat* 1992(1) Crimes 1122 (Guj).

RESULT: Application rejected for one accused. Bail granted to other two.

R.V. EASWAR, J.

1. This is a petition for grant of anticipatory bail under Section 438 of the Criminal Procedure Code in respect of FIR No.264/12 under Section 341/323/34 of the IPC and Section 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, hereinafter referred to as "the SC/ST Act".

2. The brief facts giving rise to the present anticipatory bail application are these. According to the prosecution, on 22.7.2012, the complainant Harish Kataria and his brother Komal Kataria were in their shop and their other brother Sunil Kataria was roaming around in the street. At about 7.30 p.m., Manjeet Singh, the first of the present petitioners is alleged to have uttered a caste remark to Sunil Kataria calling him "O khatikde, I will make you forget how to do business". When Sunil Kataria told Manjeet Singh not to utter such words, Manjeet and his sons Sachin and Sagar and their servant Vijay Kumar beat up Sunil Kataria. When the complainant and his brothers tried to save Sunil Kataria, they were also beaten up. The allegation levelled by the complainant against Manjeet Singh was that he uttered the caste remark against Sunil Kumar Kataria which was an offence under the SC/ST Act. It appears that there was a further investigation by the police under Section 156(3) of the Cr.P.C. at the conclusion of which a final report was submitted against all the three accused persons, namely, Manjeet Singh Sachdeva, Sachin Sachdeva and Sagar Sachdeva. This final report was submitted on 11.3.2013 after examining about 19 witnesses. The final report refers to the statement of two witnesses, namely, Sanjeev Jain and Bharat Kwatra. They are said to have deposed that Manjeet Singh uttered the words "khatikde" as also the words "chamar" and "chude". The case of the prosecution thus is that all the three petitioners as well as their servant Vijay Kumar have committed the offence under Section 323/341/34 of the IPC read with Section 3(i)(x) of the SC/ST Act.

3. All the three persons i.e., Manjeet Singh, Sachin and Sagar applied for anticipatory bail but it was rejected by the lower court by

order dated 3.4.2013. A perusal of the order of the sessions court shows that it has relied heavily on the judgment of the Supreme Court in **Vilas Pandurang Pawar and Anr. Vs. State of Maharashtra and Ors.** (2012) 8 SCC 795 and has held that Section 18 of the SC/ST Act rules out the application of Section 438 of the Cr.P.C. in respect of persons who have committed an offence under the SC/ST Act. The sessions court has also found on a perusal of the statements recorded under Section 161 Cr.P.C. that all the accused persons had made caste abuses against the complainant and his brothers and that such utterances were made outside the shop in the gali within public view. Accordingly, the sessions court has held that prima facie the provisions of section 3(i)(x) of the SC/ST Act are attracted. Before the sessions court the accused had pleaded that the dispute arose basically out of business rivalry between the two parties who were running their business in the same street on opposite sides and where business rivalry is the reason for the dispute, anticipatory bail can be granted under Section 438 Cr.P.C. even where the accused is charged with the offence under the SC/ST Act. This contention was rejected by the sessions court on its understanding that the judgment of the Supreme Court cited supra ruled out the applicability of the Section 438 of the Cr.P.C. and Section 18 of the SC/ST Act. The anticipatory bail application was accordingly rejected.

4. The present petition for grant of anticipatory bail has been filed against the aforesaid order of the sessions court.

5. It is contended on behalf of the petitioners that the main reason for the complaint is the business rivalry between the petitioners and the complainant. It is contended that Manjeet Singh had filed W.P.Crl.1088/12 before this Court alleging harassment by the complainants by beating the petitioners. The writ court had directed the SHO to provide adequate protection to the petitioners and their family members and ensure that no bodily harm was caused to them. The DCP (East District) had filed an affidavit confirming the existence of business rivalry between the two parties and had also assured the court that protection will be given to the petitioners. On the filing of the affidavit and on being satisfied with the same, the petitioners withdrew the writ petition. In its order dated 18.10.2012, the writ court while dismissing the writ petition as withdrawn directed the police to review/withdraw the measures it had taken to provide security. On the basis of the writ proceedings, it is contended on behalf of the petitioners that the complaint was motivated by business

rivalry the existence of which was confirmed. It is further pointed out that the FIR is an afterthought since it was filed when the petitioner was in hospital having suffered beatings from the complainant a few hours prior to the FIR having been filed. It is submitted that the FIR was filed only as a counterblast to the FIR 263/2012 filed by the present petitioners against the complainants on 22.7.2012. It is pointed out that the complainant's FIR against the petitioners has been numbered as FIR 264/2012, which is the next number of the FIR filed by the petitioners. According to the learned counsel for the petitioners, this chain of events clearly points to the falsity of the complaint that the petitioners committed offences under the SC/ST Act by making caste remarks against the complainant. It is also contended that the challan dated 11.3.2013 filed by the IO was ambiguous inasmuch as it referred to continuous improvements having been made by the complainant Harish Kataria over his original statement and also to the fact that the complaints regarding allegation of caste remarks was made after one month of the incident, with several improvements. According to the learned counsel for the petitioners, even the two witnesses, i.e., Sanjeev Jain and Bharat Kwatra made improvements to their statements in as much as the original complaint only mentioned about the word *"Khatikde"* and not the words *"chamar"* and *"chude"*. It is pointed out that the challan itself states that evidence in support of passing the caste remarks within the public view has not come up, but the possibility of passing the caste remarks by the petitioners cannot be ruled out. This, according to the learned counsel, is an ambiguous statement.

6. In support of his submissions the learned counsel for the petitioner drew my attention to the following judgments :

1. **Ashok Kumar Mahajan and Ors. Vs. State of Punjab** (2010) (1) RCR (Crl.) Punjab and Haryana,

2. **Ramesh Prasad Bhanja and Ors. Vs. State of Orissa** (1996) Crl.L.J.2743,

3. **Mukesh Kumar Saini and Ors. Vs. State (Delhi Administration)** (2001)(2) JCC (Delhi) 235 and

4. **Pankaj D Suthar Vs. State of Gujrat** 1992(1) Crimes 1122 (Guj).

7. The learned counsel for the petitioners also contended that there is no allegation against Sachin Sachdeva and Sagar Sachdeva who are the sons of Manjeet Singh and therefore no prima facie case for Section 34 of the IPC has been made out.

8. On the other hand, the learned Additional Public Prosecutor placed strong reliance on the judgment of the Supreme Court in **Vilas Pandurang Pawar** (supra). She submitted that Section 18 of the SC/ST Act is a clear bar on the applicability of Section 438 of the Cr.P.C. She pointed out that the charges in this case are yet to be framed and that the custodial interrogation of the petitioner was required. She pointed out that there can be no doubt that Manjeet Singh did make the caste remark *"khatikde"* in a place which is open to public view and that it is supported by the statement of the two public witnesses i.e. Sanjeev Jain and Bharat Kwatra. She contended that in the light of the judgment of the Supreme Court cited supra the court has no option but to reject the application for anticipatory bail since the complaint contains a clear averment. My attention was drawn to the observations of the Supreme Court in paragraphs 9 and 10 of the judgment (as reported in SCC).

9. I have also heard the learned counsel for the complainant who had assisted the learned Additional Public Prosecutor, with the leave of this Court.

10. After careful consideration of the rival contentions and the material placed before me, I am afraid the petitioner Manjeet Singh Sachdeva cannot be granted anticipatory bail. Section 18 of the SC/ST Act reads as under :

> "18. Section 438 of the Code not to apply to persons committing an offence under the Act. – Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

A bare reading of the section shows that it is an absolute bar on the applicability of Section 438 of the Cr.P.C. to any case involving the arrest of any person on an allegation that he has committed an offence under the SC/ST Act. Though, there is some force in the contention of the learned counsel for the petitioners that despite the bar, it is still open to the court to grant bail in cases involving offences under the SC/ST

Act by invoking the Section 438 of the Code, but it is a very limited exception. A perusal of the judgment of the Supreme Court in **Vilas Panduranga Pawar** (supra), particularly the observations in paragraphs 9 and 10, shows that the bar of Section 18 of the SC/ST Act is absolute unless it can be shown that there is no specific averment in the complaint about the uttering of the caste name or remark. It was also observed that the provisions of Section 18 of the SC/ST Act cannot be "easily brushed aside by elaborate discussion on the evidence". In paragraph 12 of the judgment, it has been made clear that everything depends upon the nature of the averments made in the complaint.

11. Even the most liberal and broad understanding of the observations of the Supreme Court cannot overlook the very strict manner in which the provisions of Section 18 of the SC/ST Act and Section 438 of the Code have been construed. The strictly limited exceptions to the bar imposed by Section 18 appear to be where the complaint does not contain any specific averment about the insult or intimidation with intent to humiliate by calling by the caste name, absence of a specific averment that it was uttered in public view etc. If there is a specific averment in the complaint to this effect, Section 18 of the SC/ST Act is attracted. In the light of the judgment of the Supreme Court, it is difficult to accept the argument advanced by the learned counsel for the petitioners on the basis of the judgments of the Punjab and Haryana High Court, Orissa High Court and the Gujrat High Court (supra). Even in the case of **Mukesh Saini and Ors.** (supra) this Court granted anticipatory bail only because the offending words were found not to have been uttered in public view. The words were uttered while the brother of the complainant was dragged inside before the arrival of neighbours. That was thus a case which turned on the fact that there was no utterance in public view. In fact the Court recognised that there must be a specific allegation in the complainant against each of the accused and that Section 34 of the IPC cannot be brought in aid to support an omnibus statement that the accused persons uttered humiliating words. Thus it was on the peculiar facts of the case that this Court set the accused on bail. In the present case, however, there is prima facie evidence to show that at least one word about the caste of the complainant was heard uttered in public view. It was a public street and there are at least two witnesses who heard the word *'khatikde'* uttered by Manjeet Singh.

12. In the light of the aforesaid position, I am not able to accept the argument of the learned counsel for the petitioner that the charge sheet was ambiguous or that the complaint was motivated by business rivalry or previous enmity.

13. There is, however, no charge against the other two petitioners namely, Sachin Sachdeva and Sagar Sachdeva to the effect that they uttered any offending words under the SC/ST Act in public view. In fact, the learned additional public prosecutor fairly stated so before me.

14. In the above circumstances I reject the application filed by Manjeet Singh Sachdeva for anticipatory bail. The other two applicants namely Sachin Sachdeva and Sagar Sachdeva are however, granted anticipatory bail on each of them furnishing a personal bond in the sum of ‘25,000/- with one surety each of the like amount to the satisfaction of the IO/SHO/AO.

15. The petition is allowed in so far as it relates to Sachin Sachdeva and Sagar Sachdeva subject to the above conditions and it is dismissed so far as it relates to Manjeet Singh Sachdeva.

ILR (2013) III DELHI 1979
CO. PET.

IN THE MATTER OF
VODAFONE ESSAR SOUTH LTD. & ANR. ....PETITIONERS

(S. MURALIDHAR, J.)

CO. PET. NO. : 276/2010 DATE OF DECISION: 06.05.2013

Indian Companies Act, 1956—Section 392—Joint application by Transferor and Transferee company for dismissal of petition in which order was passed approving the scheme of demerger of NLD and ILD from Transferor Company to Transferee company. ROC apprised the Court that Central Government had no

objection to Applicants withdrawing the petition subject to following conditions:

(a) Views of Income Tax Department to be ascertained by the Court;

(b) Right of Applicant companies to file applications in the Court seeking approval of a Scheme of Arrangement or Amalgamation be restricted for at least two years

(c) Appropriate costs may be awarded to the Central Government. **(Para 4)**

Held:- Entire Scheme was made conditional upon the approvals being granted by DoT for the transfer of NLD and ILD licenses from Transferor Company to Transferee Company—If that is not possible for charge of criterion brought about after the sanction of the Scheme by the Court, then obviously the Scheme cannot be given effect to. Request of Applicants that they should be permitted to revert to the position prior to sanctioning of the scheme, cannot be refused.

Court is unable to discern any tax angle arising since demerger has not taken effect. Clarified that order not to come in the way of the ITD taking action in accordance with law. **(Para 8)**

Plea of RD that right of Applicant’s to file applications be restricted, cannot be countenanced for simple reason that a statutory right of parties to seek judicial remedies cannot be sought to be curtailed.

Cost of Rs. 20,000/- to be paid to Central Government by Applicants.

Application allowed. Order of sanction of Scheme recalled.

In the present case, it is seen that the entire Scheme was made conditional upon the approvals being granted by the DoT for the transfer of the NLD and ILD licences from the Transferor company to the Transferee company. If that was not possible for reason of change in the eligibility criteria brought about after the sanction of the Scheme by the Court, then obviously the Scheme cannot be given effect to. The request by the Applicants that they should be permitted to revert to the position in which that were prior to the sanctioning of the Scheme cannot, therefore, be refused. As pointed out by the Bombay High Court in **Topworth Steels & Powers Pvt. Ltd.,** the Court is not denuded of its inherent powers to restore the parties to the situation in which they were placed prior to the sanctioning of the Scheme if the very basis for the Scheme to become effective does not exist. Further, the central government has also expressed no objection to the prayer in this application being allowed subject only to three conditions which will be dealt with next. **(Para 7)**

The plea of the RD that the right of the Applicant companies to file applications in the Court for approval of a Scheme of amalgamation or arrangement be restricted for a period of two years, cannot be countenanced for the simple reason that a statutory right of the parties to seek judicial remedies cannot be sought to be curtailed. **(Para 9)**

The present application is allowed with costs of Rs. 20,000 which will be paid to the Central Government by the Applicant companies within three weeks. The order passed by this Court on 28th March 2011 is recalled and the Company Petition No. 276 of 2010 is dismissed as withdrawn. The Applicant companies will write to the ROC within 30 days enclosing a certified copy of this order and withdraw their earlier letter dated 30th March 2011 by which a certified copy of the Court's order dated 28th March 2011 was forwarded to the RD. **(Para 10)**

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. Rajiv Nayyar, Senior Advocate with Mr. Anirudh Das, Advocate for Petitioners/Applicants in CA 526 of 2013. Mr. K.S. Pradhan, Deputy Registrar of Companies for Regional Director (Northern Region).

RESULT: Application allowed.

S. MURALIDHAR, J.

Co. Appl. No. 526 of 2013 (for directions)

1. This is a joint application by Vodafone Essar South Limited (now Vodafone South Limited) (hereafter referred to as 'the Transferor company') and Vodafone Essar Space Limited (now Vodafone Spacetel Limited) (hereafter referred to as 'the Transferee company') [hereafter also collectively referred to as 'Applicant companies'] under Section 392 of the Companies Act, 1956 ('Act') praying for dismissal as withdrawn of main Company Petition No. 276 of 2010 in which an order was passed by this Court on 28th March 2011 approving the Scheme of Demerger ('Scheme') of the National Long Distance ('NLD') and International Long Distance ('ILD') businesses from the Transferor company into the Transferee company.

2. In terms of the Scheme that was approved by the Court, the effective date was under Clause 1.1 (f) defined as the date on which the last of the approvals or events specified under Clause 17 of Part III of this Scheme was to be obtained. Under Clause 17, the Scheme was made conditional upon and subject to "the requisite consent, approval or permission of the Department of Telecommunications ('DoT'), Government of India, any authority or department thereof, or any other statutory or regulatory authority including the Reserve Bank of India, which may by law be necessary for the implementation of this Scheme."

3. On 30th March 2011, the Transferor company made an application in the DoT for permission to transfer the NLD/ILD licences held by it to the Transferee company. On 9th May 2012, the DoT wrote to the Transferor company communicating its rejection of the request for transfer of the NLD/ILD licences from the Transferor company to the Transferee

company. Thereafter the Transferor company wrote to the DoT on 30th January 2013 asking it to reconsider the decision. Thereafter the Applicant companies took a decision at their respective Board meetings held on 14th March 2013 that in view of the changed eligibility criteria no purpose would be served in pursuing request for transfer of NLD/ILD licences from Transferor company to Transferee company. Accordingly on 18th March 2013 the Transferor company wrote to the DoT stating that it had decided not to proceed with the matter and that its application should be treated as closed. It is in the above circumstances that the Applicants have moved the CA No. 526 of 2013 in present application praying that the order passed on 28th March 2011 in Company Petition No. 276 of 2011 should be recalled and the said petition be permitted to be withdrawn.

4. In response to the notice issued in this application, a letter dated 10th April 2013 addressed by the Regional Director (Northern Region) in the Ministry of Corporate Affairs ('MCA'), Government of India to the Registrar of Companies ('ROC'), Delhi has been produced by Mr. K.S. Pradhan, Deputy ROC. In the said letter the ROC has been advised to apprise this Court that the Central Government has stated that it has no objection to the Applicants withdrawing Company Petition No. 276 of 2010 subject to the following conditions:

(a) The views of the Income Tax Department ('ITD') be ascertained by the Court;

(b) The right of the Applicant companies to file applications in the Court seeking approval of a Scheme of Arrangement or Amalgamation be restricted for at least two years, and

(c) Appropriate costs may be awarded to the Central Government.

5. Mr. Rajiv Nayyar, learned Senior counsel appearing for the Applicant companies points out that as far as the views of the ITD are concerned, the Scheme as approved by the Court has not come into effect and no demerger of the NLD and ILD businesses from the Transferor company into the Transferee company has taken place. As a result, there is no change in the situation that existed prior to the sanction of the Scheme. Therefore, there was no tax angle to the reversal of the above transactions and the consequent withdrawal of the Co. Pet. No. 276 of 2010. He also refers to the decision of the Bombay High Court in Company Application No. 389 of 2011 in Company Scheme Petition

No. 43 of 2011 (In Re: **Topworth Steels & Powers Pvt. Ltd.**) in which it was held that if the Scheme approved by the Company Court, has for valid reasons, not been able to be given effect to, then the Company Court can again be approached under Section 392 (1) read with Section 392 (2) for passing appropriate orders to recall the order sanctioning Scheme.

6. An examination of the order passed by the Bombay High Court in **Topworth Steels & Powers Pvt. Ltd.,** reveals that the Court there was faced with more or less the same situation as the case at hand. There the Scheme as approved by the Bombay High Court under Section 391 of the Act could not be given effect to since the mining licences in question could not be transferred from the Transferor to the Transferee companies. After discussing the scope of the powers of the Company Court under Sections 391 and 392 of the Act, it was concluded that the Court has the power to give directions in regard to any matter or make any modification for the proper working of the compromise or arrangement subject to such arrangement having come into effect. However, in exercise of its inherent powers, the Company Court can, in peculiar facts, where the Scheme has itself not come into effect, recall its order sanctioning the Scheme.

7. In the present case, it is seen that the entire Scheme was made conditional upon the approvals being granted by the DoT for the transfer of the NLD and ILD licences from the Transferor company to the Transferee company. If that was not possible for reason of change in the eligibility criteria brought about after the sanction of the Scheme by the Court, then obviously the Scheme cannot be given effect to. The request by the Applicants that they should be permitted to revert to the position in which that were prior to the sanctioning of the Scheme cannot, therefore, be refused. As pointed out by the Bombay High Court in **Topworth Steels & Powers Pvt. Ltd.,** the Court is not denuded of its inherent powers to restore the parties to the situation in which they were placed prior to the sanctioning of the Scheme if the very basis for the Scheme to become effective does not exist. Further, the central government has also expressed no objection to the prayer in this application being allowed subject only to three conditions which will be dealt with next.

8. As regards ascertaining the views of the ITD, the Court is unable to discern any tax angle arising since the demerger has not taken effect

and the Applicant companies continue as they were prior to the Scheme being sanctioned. Nevertheless, it is clarified that this order will not come in the way of the ITD taking any action in exercise of its powers in accordance with law. The Court has not expressed any view whatsoever on the question of any income tax liability of the Applicant companies. As and when any action is sought to be taken by the ITD in accordance with law as a result of the earlier order and the present order passed by this Court, it would be open to the Applicant companies to urge their pleas before the ITD.

9. The plea of the RD that the right of the Applicant companies to file applications in the Court for approval of a Scheme of amalgamation or arrangement be restricted for a period of two years, cannot be countenanced for the simple reason that a statutory right of the parties to seek judicial remedies cannot be sought to be curtailed.

10. The present application is allowed with costs of Rs. 20,000 which will be paid to the Central Government by the Applicant companies within three weeks. The order passed by this Court on 28th March 2011 is recalled and the Company Petition No. 276 of 2010 is dismissed as withdrawn. The Applicant companies will write to the ROC within 30 days enclosing a certified copy of this order and withdraw their earlier letter dated 30th March 2011 by which a certified copy of the Court's order dated 28th March 2011 was forwarded to the RD.

ILR (2013) III DELHI 1986
LPA

PUNJAB MOTOR WORKSHOP ....APPELLANT

VERSUS

DDA AND ANR. ....RESPONDENTS

(N.V. RAMANA, CJ. & JAYANT NATH, J.)

LPA NO. : 2121/2006 DATE OF DECISION: 06.05.2013

Constitution of India, 1950—Article 226—Respondent DDA came up with a scheme in 1970 for allotment of industrial plots to persons carrying on business in non conforming areas—Appellant applied for a plot asserting that he is carrying a business of reconditioning motor parts and using big machines, grinders, etc in a non conforming area at Nichalson Road, Delhi—On 1/2/1977 DDA sanctioned a one acre plot of land to the appellant and asked him to deposit a sum of Rs.2,33,193,.80/-—Appellant deposited only Rs. 1,06,600/- on the ground that he had not been given any description of the plot and its location and will deposit the balance only when the plot is made available—Vide communication dated 8/4/1981 and 22/2/1988 DDA conveyed to the appellant that the size of the plot was proposed to be reduced to 2000 sq. meter and he was now being considered for an allotment of an industrial plot in Okhla Industrial Area at the current market rate—Appellant protested to both the letters and pointed out that the reduction of plot area and demand for payment of a plot at current market price was unfair—Vide letter dated 31/1/1989 DDA finally rejected the application of the appellant for allotment of plot on the ground firstly that 50% of the payment had not been made by the appellant and

secondly that the industry of the appellant was a service industry and no purpose would be served by shifting it—Appellant challenged the said order in the writ petition which was dismissed by the Ld. Single Judge. Held: At no stage a binding allotment came to be made by DDA to the appellant and hence no vested right accrued in favour of the appellant. Whenever DDA made an offer, the appellant came up with a counter offer and a counter offer is not an acceptance of the offer. It is also to be taken note of that the appellant has already shifted his factory out of Nicholson Road, New Delhi and his factory and trade license had all expired and the premises is only being used for storage purposes and the DDA has taken a specific stand that the area of Nicholson Road is a conforming area—Appeal dismissed. However, DDA directed to refund the amount paid by the appellant along with interest.

A perusal of the above facts shows that at no stage a binding allotment came to be made by respondent DDA to the appellant. Whatever offers have been made by the respondent DDA to the appellant have been rejected by the appellant for one reason or the other. Hence, no binding allotment has been made by the respondent DDA in favour of the appellant. Hence, no vested right accrued in favour of the appellant. **(Para 18)**

The matter may also be looked at from another perspective. Whenever DDA made an offer to the appellant, the appellant has always come up with a counter offer. The legal position regarding contract is that a proposal must be accepted unconditionally. A counter offer is not an acceptance of the offer. Normally a counter offer destroys the original offer. Reference may be had in this context to the judgments of the Division Bench of Allahabad High Court in **U.P'State Electricity Board and another vs. M/s.Goel Electric Stores, Chandigarh,** AIR 1977 Allahabad 494 and Division Bench of the Kerala High Court in the case of Moolji Jaitha

and Co. –vs- Seth Kirodimal, AIR 1961 Kerala 21. **(Para 20)**

We would also like to take note of the fact that it appears that the appellant has already shifted his factory out of Nicholson Road, New Delhi. His factory license, trade license have all expired. As per inspection reports of Government of NCT of Delhi, the premises at Nicholson Road which was a tenanted premises appears to be run for storage purposes. **(Para 22)**

Important Issue Involved: The legal position regarding contract is that a proposal must be accepted unconditionally and a counter offer is not an acceptance of the offer.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Akshay Makhija, Ms. Sanjugeeta and Ms. Mahima Bahl, Advocate.

FOR THE RESPONDENT : Mr. Arjun Birbal, Advocate for DDA. Ms. Rajiv Nanda, Additional Standing Counsel for GNCTD/R-3. Ms. Suparna Srivastava, Standing Counsel for MCD/R-4.

CASES REFERRED TO:

1. *Golcha Hosiery Mills* vs. *DDA,* 63(1996) DLT 9 (DB).
2. *Gopa Wanti* vs. *DDA* (CW 1372/1988).

RESULT: Disposed of.

JAYANT NATH, J.

1. By the present Appeal the appellant impugns the Judgment dated 05.10.2006 passed by the learned Single Judge dismissing the Writ Petition of the Appellant.

2. It is the contention of the appellant that he is carrying business of machine shop, reconditioning motor parts, using big machines, lathes, grinders etc. in a non-conforming area at Nichalson Road, Delhi.

3. It is further contended that in 1970 DDA came up with a scheme for allotment of industrial plots to persons carrying on business in non-conforming areas. In terms of the policy, the appellant is stated to have deposited Rs.25,000/- as application money. On 01.02.1977, DDA sent a letter to the appellant sanctioning a one acre plot of land and asking the appellant to deposit a sum of Rs.2,33,193.80. The appellant contends that as DDA gave no description of the plot or its location, the appellant deposited a sum of Rs.1,06,600/- being 50% of the total cost of the plot with an undertaking to deposit the balance amount as and when the plot is made available on a term basis.

4. Thereafter on 8.4.1981 the appellant received another communication from DDA whereby the size of the plot was proposed to be reduced from 4840 sq.yards to 2000 sq.meters. An opportunity was given to the appellant to justify as to why the bigger size plot should be given to him. The appellant on 19.08.1981 protested against the act of DDA in seeking to reduce the size of the plot and gave several reasons to try and argue that the appellant is entitled to the plot as originally allotted.

5. On 22.02.1988, DDA conveyed to the appellant that the appellant was being considered for allotment of an industrial plot in Okhla Industrial Area, Phase-I, Delhi by bifurcating plot No.B-20, Okhla Industrial Area, Phase-I, Delhi at the current market rate. It is also stated that this was with the approval of the Land Allotment Advisory Committee. The appellant again protested vide letter dated 24.03.1988 pointing out that the demand for payment of the plot at current market price was unfair. Thereafter on 31.01.1989, the appellant received a letter from DDA rejecting the application of the appellant for allotment of industrial plot on two separate grounds, firstly that 50% of the payment has not been made by the appellant and secondly that the industry of the appellant was a service industry, the Committee felt that no purpose will be served by shifting the industry from its present premises. By present Writ Petition, the appellant challenged the said communication dated 31.01.1989 issued by DDA and, now seeks a Writ of Mandamus to be issued to DDA to allot an industrial plot to the appellant.

6. On the first ground taken by DDA for cancellation of the allotment i.e. non payment of the 50% of the price of the land the learned Senior Counsel for the appellant submits that the contention of DDA is erroneous as DDA itself vide letter dated 08.04.1981 had offered that instead of 4840 sq.yards, the appellant would only be offered 2000 sq.,mtrs of land. Keeping in account that the size of the plot had been reduced to almost half, it is contended that the payment already made by appellant of the sum of Rs.1,06,600/- plus application money of Rs.25,000/- would cover the cost of the reduced plot being offered by DDA. He argued that in view thereof cancellation of the plot on the grounds of non payment of 50% of the cost of the unit is an illegal act of DDA. The learned senior counsel further contends that the impugned order dated 05.10.2006 accepts the said submission of the appellant. He relies on paragraph 14 of the impugned judgment. He further submits that the only issue that was held against the appellant in the impugned order was whether the view taken by the Land Advisory Committee to cancel the allotment is tenable and justified.

7. On the second issue raised by DDA in the communication dated 31.01.1989 issued on the decision of the Land Allotment Advisory Committee, the learned senior counsel submits that the act of DDA is entirely illegal and erroneous as respondent MCD and Govt. of NCT of Delhi do not dispute that the factory of the appellant is in a non-confirming area. For the said purpose, he relies on an order dated 14.07.2008 passed by this Court whereby it was noted that the only question in this appeal is whether the appellant is permitted to operate his unit/factory from the existing location in view of the New Master Plan. This Court noted the contradictory stand of DDA and Chief Inspector of Factories and directed that in view of the contradictory stand taken by the said two functionaries, the Government of NCT of Delhi through Office of Chief Inspector of Factories be added as a party.

8. Learned senior counsel further relies on Order dated 17.02.2009 passed by this Court whereby MCD was granted time to file an Affidavit which would contain a reasoned decision in respect of the issue as to whether the appellant is carrying out its activities in a non conforming area or not. It was his contention that based on the said order of this Court, MCD filed a Counter-Affidavit where it is stated that two stretches of Nicholson Road have been declared as commercial street provided they have a ROW (Right of Way) highest of which is 13.6 meters. The

Affidavit also points out that for repair shops and workshops in case of automobiles the ROW cannot be less than 30 meters. As there is no right of way of 30 meters at Nicholson Road, it is argued that the MCD Affidavit clearly brings out that the factory of the appellant is in a non-confirming area.

9. The learned senior counsel for the appellant also relies upon a notesheet of DDA dated 08.06.1988 where it is stated that the DDA had come to a conclusion that the unit of the appellant is doing trade with the help of 17 HP power and employing 50 workers and hence the location of the unit may be taken as non-conforming.

10. In view of the above affidavit of MCD and note of DDA, it is the contention of the learned senior counsel for the appellant that the factory premises of the appellant at Nicholson Road, Delhi are in a non-conforming area. He further submits that the stand of respondent DDA, as stated in its impugned communication dated 31.01.1989, that the appellant is a service industry and that because mixed land use is in vogue, no purpose will be served by shifting the industry from the present premises, is a false and incorrect stand. He submits that DDA could not cancel the allotment of the appellant on the said erroneous basis. Factually, he submits that the factory of the appellant is in a non-confirming area and in accordance with the policy of the DDA the appellant was entitled to alternative plot as it had applied for, at the then prevailing land rates of 1977.

11. The learned senior counsel for the appellant also submits that the impugned Order erroneously relies upon the judgment dated 27.11.2003 in the case of **Gopa Wanti –vs- DDA** (CW 1372/1988) and **Golcha Hosiery Mills –vs- DDA,** 63(1996) DLT 9 (DB). He submits that the said two judgments have been wrongly relied upon in the impugned order and that they are based on facts of those cases inasmuch as in those cases the DDA was not insisting on the appellant for shifting from the place where the appellant is having its business.

12. The learned counsel appearing for respondent DDA has submitted that the appellant has no vested right for allotment of an alternative industrial plot. He further contends that despite two opportunities given to the appellant, the appellant failed to deposit 50% of the amount demanded by DDA. It is stated that on 01.02.1977 the appellant was asked to deposit a sum of Rs.2,33,193.80 but it failed to deposit the full amount.

He further submits that second opportunity was granted to the appellant on 08.04.1981 where he was offered a smaller plot of 2000 Sq.meters. He submits that the appellant again failed to make the payment or accept the offer of the respondent/DDA. Hence, it is his submission that there was no obligation on the part of DDA to allot a plot to the appellant.

13. Learned counsel for DDA further submits that the appellant was functioning from Nicholson Road, Delhi which was a confirming area. He further submits that subsequently the appellant had closed its factory/ manufacturing process and had shifted out of Delhi. He relied upon an inspection report dated 02.09.2008 of GNCT of Delhi which is an inspection carried out of the factory of the appellant. In the inspection, it is stated that no manufacturing process is observed, there are only four persons on the Roll of the appellant and no supply of water. The report further states that no plant and machinery is found in the premises and it is being used for storage of furniture. The report is duly signed by the concerned person from the appellant. He also relies on the Affidavit of Government of NCT of Delhi where it is stated that the factory license of the appellant was valid till 2004 and that the appellant has since 2004 not applied for renewal of his factory license. He further states that the appellant has in his Writ Petition falsely claimed that it is functioning with 80 machines and 100 persons are working. He hence contends that on both counts the communication issued by DDA dated 31.01.1989 is legal and valid.

14. Learned counsel for NCT of Delhi has reiterated the contentions of the counsel for DDA. He points out that the Government of NCT of Delhi had intimated DDA that the appellant has closed down its factory and no manufacturing activity was found at the site during inspection on 12.06.2008.

15. We are of the view that the appellant has failed to make out any case for interference with the judgment of the learned Single Judge. Pursuant to the policy of the respondent, the appellant had applied for a plot of one acre and paid Rs.25,000/-. On 01.02.1977 DDA, pursuant to the said application, directed the appellant to deposit a sum of Rs.2,33,983.80. Admittedly, the appellant on its own without any basis has deposited only Rs.1,06,600/- apart from Rs.25,000/- deposited earlier. A communication was addressed by the appellant on 02.03.1977 where the appellant protested stating that a demand could not be raised without

the draw of allotment for the plot and further no plot number has been mentioned. It, however, agreed to pay 50% of the amount of total payment demanded and sent a cheque for Rs.1,06,600/-. Hence, the appellant failed to comply with the demand of DDA dated 01.02.1977.

16. On 08.04.1981 the DDA again wrote to the appellant pointing out that in view of the recent resolution of the Land Allotment Advisory Committee where plots are more than 2000 sq.meters, the plot holders will be offered land upto 2000 sq.meteres and refund of the premium of the surrendered land would be made. An opportunity was given to the appellant that in case he wishes to retain the bigger size plot, he may give justification for the same. Vide letter dated 19.08.1981 the appellant again did not accept the offer of the respondent DDA and wrote a communication protesting the reduction in the size of the plot and also sought to justify their requirement for a large plot.

17. On 22.02.1988 respondent DDA informed the Appellant that they were being considered for allotment of an industrial plot in Okhla Industrial Area, Phase-I by bifurcating plot B-20, Okhla Industrial Area, Phase-I at current market rate and that the communication is issued with the approval of the Land Allotment Advisory Committee. Again, the appellant did not accept the said offer of the respondent and on 24.03.1988 protested against allotment of a bifurcated plot at current market rate. The appellant protested that grave injustice has been caused to them as they have been offered a plot at current market rate whereas a substantial amount of Rs.1,31,600/- was held by DDA for a long time. This was of course followed by the communication dated 31.01.1989 issued by respondent DDA which rejected the request of the appellant for allotment of alternative industrial plot.

18. A perusal of the above facts shows that at no stage a binding allotment came to be made by respondent DDA to the appellant. Whatever offers have been made by the respondent DDA to the appellant have been rejected by the appellant for one reason or the other. Hence, no binding allotment has been made by the respondent DDA in favour of the appellant. Hence, no vested right accrued in favour of the appellant.

19. No doubt, as urged by learned counsel for the appellant, there has been considerable delay on the part of the DDA in dealing with the request/application of the appellant. However, in view of the facts mentioned, in our opinion the position regarding allotment does not change.

20. The matter may also be looked at from another perspective. Whenever DDA made an offer to the appellant, the appellant has always come up with a counter offer. The legal position regarding contract is that a proposal must be accepted unconditionally. A counter offer is not an acceptance of the offer. Normally a counter offer destroys the original offer. Reference may be had in this context to the judgments of the Division Bench of Allahabad High Court in **U.P'State Electricity Board and another .vs. M/s.Goel Electric Stores, Chandigarh,** AIR 1977 Allahabad 494 and Division Bench of the Kerala High Court in the case of **Moolji Jaitha and Co. vs. Seth Kirodimal,** AIR 1961 Kerala 21.

21. Similarly, regarding the contention of the appellant that it is operating from a non-confirming area, none of the respondents have admitted that the factory of the appellant is situated in a non-confirming area. In fact Government of NCT of Delhi and DDA have categorically stated that the appellant was working in confirming area. MCD in its Affidavit concludes that DDA should be in possession of necessary documents in terms of site plan/location plan of the premises in question, that are required to identify the land use and ROW of abutting roads as per the layout plan/zonal development plan and hence leaves it on DDA to determine the issue. In the light of this, we see no infirmity in the conclusions drawn by the learned Single Judge in the impugned Order regarding the conclusion of DDA in this regard not being arbitrary.

22. We would also like to take note of the fact that it appears that the appellant has already shifted his factory out of Nicholson Road, New Delhi. His factory license, trade license have all expired. As per inspection reports of Government of NCT of Delhi, the premises at Nicholson Road which was a tenanted premises appears to be run for storage purposes.

23. In view of the above, we see no reason to interfere in the impugned order. The said order also meets the ends of justice inasmuch as it directs refund of the amount paid by the appellant alongwith 12% compound interest for the period 01.04.1977 till 31.01.1989. The principal alongwith interest was to be paid by the respondent DDA within six weeks from the date of the order. Neither party has made any submissions regarding as to whether the said amount was paid to the appellant. We would only like to add that in case the said amount as directed by the learned Single Judge has not been refunded by the DDA , it shall immediately refund the amount alongwith simple interest at the rate of 9

% per annum w.e.f. 01.02.1989 till the date of receipt by the appellant. The present petition is accordingly disposed of.

ILR (2013) III DELHI 1995
ITA

COMMISSIONER OF INCOME TAX-III ....APPELLANT

VERSUS

SAMARA INDIA PVT. LTD. ....RESPONDENT

(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)

ITA NO. : 45/2013 DATE OF DECISION: 10.05.2013

Income Tax Act, 1961—Section 36(1)(vii)—Respondent Assessee took certain properties on lease where upon the lessors thereof were required to build a warehouse cum workshop and hand over the same to assessee—Assessee advanced certain sums to the lessors which were liable to be adjusted against monthly rent and had also incurred substantial expenditure on the development and interiors of the property—Workshop was however demolished by the DDA on 1/6/2000 by claiming that the leased land belonged to DDA and not the lessors—Assessee claimed a write off from his taxable income, a sum of Rs. 64,60,707, on account of the advance rent of Rs. 33,82,289 paid by him to the lessors and Rs. 30,78,418/- spent by him on the property and also filed a suit for recovery for the said amounts—Assessing Officer held that the amounts incurred being of enduring nature were capital expenditure and could not be written off—In the appeal filed before the CIT, decision of the Assessing Officer to disallow the writ

off of the amount spent on the workshop was upheld and with respect to the advanced amount, it was held that since the assessee had filed a civil suit for recovery for the said amount, it could not be allowed to be deducted as a revenue loss or a bad debt—On further appeal, the Tribunal granted relief with regard to the advance rent of Rs. 33,82,289 by holding that the pendency of the civil suit was not a bar on writing off the debt. Held: No infirmity in the view expressed by the Tribunal. For an assessee to claim deduction in relation to the bad debts it is now no longer necessary for the assessee to establish that the debt had become irrecoverable and it is sufficient if the assessee forms such an opinion and writes off the debt as irrecoverable in its accounts.

We find no infirmity in the view expressed by the Tribunal. It is not disputed that the assessee had paid a sum of Rs 33,82,289/- as advance which was to be adjusted against lease rents. The assessee had been carrying on business even prior to the lease agreement with respect to which advance had been made. The assessee had come to a conclusion that chances of recovery, of the amounts claimed from the lessors, in the near future were remote and had therefore written off the amount of Rs 64,60,707/- as irrecoverable in the previous year relevant to the assessment year 2004-2005. For an assessee to claim deduction in relation to the bad debts it is now no longer necessary for the assessee to establish that the debt had become irrecoverable and it is sufficient if the assessee forms such an opinion and writes off the debt as irrecoverable in its accounts. The decision of the Supreme Court in the case of the **T.R.F Ltd.** (supra) squarely covers the issue.

(Para 8)

Important Issue Involved: In order to obtain a deduction in relation to bad debts, it is not necessary for the assessee to establish that the debt, in fact has become irrecoverable: it is enough if the bad debts is written off as irrecoverable in the accounts of the assessee.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjeev Rajpal, Advocate.

FOR THE RESPONDENT : Mr. S. Krishnan, Advocate.

CASES REFERRED TO:

1. *Samara India Pvt. Ltd* vs. *Union of India & Ors.*: CS(OS) No.2467/2001.
2. *T.R.F Ltd.* vs. *CIT:* 323 ITR 397(SC).

RESULT: Appeal Dismissed.

VIBHU BAKHRU, J.

1. This is an appeal preferred by the revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") challenging the order dated 09.07.2012 passed by the Income Tax Appellate Tribunal, Delhi in ITA No.3692/Del/2009 in relation to the assessment year 2004-2005. The controversy in the present matter is limited to an amount of Rs 33,47,489/- which was paid as an advance rent by the assessee and had been written off as not recoverable in the previous year relevant to the assessment year 2004-2005.

2. The assessee is, *inter alia,* engaged in the business of dealing and servicing motor vehicles and had taken certain property on lease from three landowners (hereinafter referred to as "the lessors") for a period of three years renewable for two further periods of 3 years each. The property consisted of a plot of land whereupon the lessors were required to build a warehouse cum workshop and hand over the same to the assessee. In this regard, the assessee advanced certain sums to the lessors which were liable to be adjusted against monthly rent. The monthly rent for the property in question was agreed at Rs 32,400/- and the assessee was entitled to adjust a sum of Rs 17,400/- per month from the

advance paid by the assessee to the lessors. In addition to the advance paid by the assessee to the lessors, the assessee also incurred substantial expenditure on the development and interiors of the property. However, the workshop was demolished by the Delhi Development Authority on 01.06.2000 as the land which was subject matter of the lease agreement, in fact, belonged to the Delhi Development Authority and not the lessors. The assessee, thereafter, filed a suit in this Court being suit titled as **Samara India Pvt. Ltd v. Union of India & Ors.:** CS(OS) No.2467/2001. The said suit is still pending before this Court for recovery of the sums advanced by the assesse to the lessors and the amount expended by the assesse on development and interiors of the property.

3. The assessee has written off a sum of Rs 64,60,707/- as irrecoverable in the previous year relevant to the assessment year 2004-2005. This amount is an aggregate of two components, namely, advance rent of Rs 33,82,289/- paid by the assessee to the lessors and Rs 30,78,418/- spent by the assessee on the property.

4. The assessing officer disallowed the entire amount of Rs 64,60,707/-, written off by the assessee in his profit and loss account, by holding that the amount represented capital expenditure and thus writing off the said amount was not allowable as a deduction from the taxable income of the assessee. Accordingly, the Assessing Officer passed an assessment order dated 30.11.2006 inter-alia disallowing the amount written off by the assesse as irrecoverable and adding a sum of Rs 64,60,707/ -to the income of the assessee. It is relevant to state that the genuineness of the expenditure was not doubted by the Assessing Officer and the Assessing Officer disallowed the amount written off on the ground that the amount incurred by the assesse was on development and improvement of the leasehold property and was of an enduring nature and thus could not be considered as revenue expenditure. The Assessing Officer held that in view of the explanation to Section 32(1) of the Act, capital expenditure incurred by an assessee in respect of a building not owned by him, was required to be treated in the same manner as if the expenditure had been incurred on a building owned by the assessee.

5. The assessee preferred an appeal before the CIT (Appeals) challenging the addition Rs 64,60,707/- on account of advance rent paid to the lessors and the amount expended by the assessee on the workshop which was lost on account of demolition carried out by the DDA. The

CIT (Appeals) noted the fact that the assessee had filed a suit inter-alia claiming the said amount from the lessors. The CIT (Appeals) made a distinction between the amount spent by the assessee on carrying out the renovation and betterment of the workshop and the amount paid by the assessee as advance rent. The CIT (Appeals) upheld the decision of the Assessing Officer to disallow the write off of a sum of Rs 30,78,418/- spent by the assessee on the workshop. In respect of the sums advanced by the Assessee to the lessors, the CIT (Appeals) deleted the addition to the extent of Rs 34,800/and upheld the addition of Rs 33,47,489/- to the income of the assessee. The CIT (Appeals) held that as the property was demolished on 01.06.2000 i.e. after a period of only two months from the commencement of the previous year 20002001, an amount of Rs 34,800/- (i.e. Rs. 17,400/-for each month) was liable to be adjusted from the advance rent in terms of the lease agreement entered into between the assessee and the lessors of the property. However, the addition of the balance amount of Rs 33,47,489/- was upheld by CIT (Appeals) not on the ground that the same was a capital expenditure but on basis that the same could not be allowed as a revenue loss as the assessee had filed a civil suit for recovery of that amount and the same was being pursued. The CIT (Appeals) held that as the assessee was pursuing its remedies before a Court by way of a civil suit for recovery of the amounts advanced to the lessors, it could not be held that the amounts had become bad debts. The relevant portion of the order passed by the CIT (Appeals) is quoted below:

> "8.5.5. It is noticed that the amount disallowed by the AO as loans and advances was Rs 64,60,707/-, under explanation to section 32(1) of the Act and after disallowing capital loss of Rs 30,78,418/-, balance amount of Rs 33,82,289/- (Rs 64,60,707 - Rs 30,78,418) was towards payment of advance rent by the assessee company to the lessor. The property was demolished on 1st June, 2000 and advance rent @ Rs 17,400/- per month (para 8.5.2.-2) for a period of two months amounting to Rs 34,800/-would be allowed. The balance amount of Rs 3,47,489/- is not being allowed as a revenue loss since the assessee company has filed a Civil Suit in the High Court of Delhi and claimed advance rent of Rs 33,82,289/- from the Defendants 3 to 9 (the lessor). Since this amount is outstanding to the assessee company which is being pursued by them by way of filing a

> Civil Suit, it cannot be called a bad debt at this stage and allowed as a revenue expenditure. The case laws referred to by the assessee are not applicable to the facts and circumstances of the case. In **Lucent Technologies Hindustan Ltd. v. JCIT,** 106 TTJ (Bang) 205 the case was of repair/renovation of a cinema hall taken on lease; in the instant case, a plot of land was converted into a warehouse cum workshop which is a capital expenditure. Similarly, Agra Color Lab (P) Ltd v. ITO 86 TTJ (Agra) 836 and Escorts Ltd v. ACIT 102 TTJ (Del) 522 are not applicable as it was expenditure on furnishing, painting etc and not on conversion of plot of land to a warehouse cum workshop.
>
> Accordingly, a sum of Rs 33,47,489/- of advance rent and Rs 30,78,418/- of capital expenditure is confirmed, relief allowed is only Rs 34,800/- of advance rent adjusted till the demolition of building."

6. The revenue accepted this order and did not file an appeal before the Income Tax Appellate Tribunal. However, the assessee preferred an appeal from the decision of the CIT (Appeals). The Tribunal upheld the decision of the Assessing Officer and the CIT (Appeals) with regard to the amount of Rs 30,78,418/- spent by the assessee on the workshop as capital expenditure but granted relief to the assessee with regard to the addition made by the Assessing Officer in respect of the advance rent of Rs 33,82,289/- which had been written off by the assessee, in his profit and loss account, as irrecoverable.

7. Following the decision of the Supreme Court in the case of the **T.R.F Ltd. v. CIT:** 323 ITR 397(SC), the Tribunal held that pendency of the civil suit was not a bar on writing off the debt if in the opinion of the assessee its probability of recovery was remote. The Tribunal did not accept the view of the CIT (Appeals) that writing off advance rent was not permissible since the assessee was pursuing the suit for recovery of the said amount.

8. We find no infirmity in the view expressed by the Tribunal. It is not disputed that the assessee had paid a sum of Rs 33,82,289/-as advance which was to be adjusted against lease rents. The assessee had been carrying on business even prior to the lease agreement with respect to which advance had been made. The assessee had come to a conclusion that chances of recovery, of the amounts claimed from the lessors, in

the near future were remote and had therefore written off the amount of Rs 64,60,707/- as irrecoverable in the previous year relevant to the assessment year 2004-2005. For an assessee to claim deduction in relation to the bad debts it is now no longer necessary for the assessee to establish that the debt had become irrecoverable and it is sufficient if the assessee forms such an opinion and writes off the debt as irrecoverable in its accounts. The decision of the Supreme Court in the case of the **T.R.F Ltd.** (supra) squarely covers the issue. The Supreme Court had examined the import of the amendment in Section 36(1)(vii) of the Income Tax Act w.e.f. 01.04.1989 and held as under:

> "After the amendment of sec. 36(1)(vii) of the Income Tax Act, 1961, with effect from 1st April, 1989, in order to obtain a deduction in relation to bad debts, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable : it is enough if the bad debts is written off as irrecoverable in the accounts of the assessee."

9. Following the aforesaid decision in the case of **T.R.F Ltd.** (supra), we find that the appeal does not raise any substantial question of law for our consideration.

10. We accordingly, dismiss the present appeal and leave the parties to bear their own costs.

ILR (2013) III DELHI 2002
CS (OS)

RECKIT BENKCISER (INDIA) LTD. ....PLAINTIFF

VERSUS

HINDUSTAN UNILEVER LTD. ....DEFENDANT

(M.L. MEHTA, J.)

CS (OS) NO. : 375/2013 DATE OF DECISION: 14.05.2013

Code of Civil Procedure, 1908—Order XXXIX Rule 1 & 2—Interim Injunction—Plaintiff a manufacturer of the famous antiseptic liquid under the trademark 'DETTOL'—Plaintiff came out with a new product 'DETTOL HEALTHY KITCHEN' Dis and Slab Gel, a kitchen cleaner which helps kill germs. Defendant manufacturer of rival kitchen cleaner 'VIM LIQUID'—Defendant came out with an advertisement purportedly disparaging the plaintiff and its brand DETTOL, equating its product to a "Harsh Antiseptic"—Plaintiff alleged that reference in the advertisement of defendant was clearly directed to the plaintiff's brand DETTOL being referred to as a Harsh Antiseptic and that the defendant attempted to misrepresent that the plaintiff had done nothing but repackage its Antiseptic Liquid as DETTOL HEALTHY KITCHEN. Injunction Granted. Held—Prima facie the impugned advertisement subtly yet certainly targets the plaintff's brand and its product—It it common knowledge that the plaintiff's brand DETTOL is synonymous with the term antiseptic in the FMCG market in India. The public at large carry an impression in their minds that all DETTOL products are antiseptic. Therefore, the usage of the term antiseptic in the impugned advertisement directs the viewers of the advertisement to the plaintiff's brand or product. Held, The generic disparagement of a rival product, without

specifically identifying to pin-pointing the rival product is obejctionable—False, misleading, unfair and deceptive advertising is not protected under "Commercial speech"—Comparative advertising is permissible as long as while comparing own with rival/ competitor's product, the latter's product is not derogated, discredited, disgraced, though while comparing some amount of 'showing down' is implicit; however the same should be within the confines of *De Beers Abrasive v. International General Electric Co.,* **1975 (2) All ER 599, which Courts in India have frequently referred to.**

With regards to comparative advertising, the law is well settled. This Court in the case of **Dabur India Ltd v. Colortek Meghalaya Pvt. Ltd and Godrej Sara-Lee,** (Supra), while referring to the law laid down by the Supreme Court, has shaped the following guiding principles regarding puffery of a product:

> (i) An advertisement is commercial speech and is protected by Article 19(1) (a) of the Constitution
>
> (ii) An advertisement must not be false, misleading, unfair or deceptive.
>
> (iii) Of course, there would be some grey areas but these need not necessarily be taken as serious representation of facts but only as glorifying one's product. **(Para 14)**

This Court in Dabur-Colortek also considered the finding of the Division Bench of this Court in **Pepsi Co. Inc. &Ors vs. Hindustan Coca cola Ltd. & Anr.,** 2003 (27) PTC 305 (Del) (DB), and added a fourth prong to this test, i.e.

> (iv) While glorifying its product, an advertiser may not denigrate or disparage a rival product. **(Para 15)**

[Di Vi]

APPEARANCES:

FOR THE PLAINTIFF : Mr. C.M. Lall, Advocate with Ms. Nancy Roy, Ms. Ekta Sarin, Mr. Jawahar Lal, Advocates for the plaintiff.

FOR THE DEFENDANT : Mr. Sandeep Sethi, Sr. Advocate. with Ms. Rukmani Bobde, Mr. Kumar Shashank, Advocate for the defendant.

CASES REFFERED TO:

1. *Marico Ltd.* vs. *Adani Wilmar Ltd.,* CS(OS) Nos. 246 and 319 of 2013.
2. *Dabur India Ltd* vs. *Colortek Meghalaya Pvt. Ltd and Godrej Sara-Lee,* 2010 (44) PTC 254 (Del).
3. *Paras Pharmaceuticals Ltd* vs. *Ranbaxy Laboratories Ltd,* AIR 2008 GUJ 94.
4. *Reckitt Benckiser (India) Ltd.* vs. *Hindustan Unilever Ltd.,* 2008 (38) PTC 139 (Del.) (DETTOL Soap Case).
5. *Paras Pharmaceuticals Ltd* vs. *Ranbaxy Laboratories Ltd,* AIR 2008 GUJ 94.
6. *Eureka Forbes Ltd.* vs. *Pentair Water India Pvt. Ltd,* 2007 (35) PTC 556 (Karn).
7. *Dabur India Limited* vs. *Emami Limited,* 2004 (29) PTC 1 (Del).
8. *Dabur India Limited* vs. *Palmolive India Ltd,* 2004 (29) PTC 401 (Del).
9. *Pepsi Co. Inc. &Ors* vs. *Hindustan Coca cola Ltd. & Anr.,* 2003 (27) PTC 305 (Del) (DB).
10. *Reckit Benckiser (India) Ltd.* vs. *Naga Ltd. & Ors.,* 2003 (26) PTC 535 (Del).
11. *Chemfab Alkhalis Ltd.* vs. *S. Balasubramanian,* MANU/ TN/1566/2001.
12. *Reckitt Benckiser South Africa (PTY) Ltd.* vs. *Hindustan Unilever South Africa (PTY) Ltd.; Reckitt Colman of*

India Ltd vs. *M.P. Ramchandran & Anr,* 1999 PTC (19) 741

13. *Colgate Palmolive (India) Ltd.* vs. *Hindustan Lever Ltd.,* AIR 1999 SC 3105.

14. *Reckitt & Colman of India Ltd* vs. *Jyothi Laboratories Ltd.,* (1999) 2 CALLT 230 (HC).

15. *Tata Press Ltd.* vs. *MTNL* (1995) 5 SCC 139.

16. *De Beers Abrasive* vs. *International General Electric Co.,* 1975 (2) All ER 599.

17. *Imperial Tobacco Company* vs. *Albert Bonnan,* AIR 1928 Cal 1.

RESULT: Defendant restained/Plaint allowed.

M.L. MEHTA, J.

I.A. 3267/2013 (under Order XXXIX Rule 1 & 2, CPC)

1. This is a suit for commercial disparagement. The plaintiff has sought an interim injunction restraining the defendant from publishing advertisements or using any depiction or any other indica which disparages the goodwill and reputation of the plaintiff's product sold under the trade mark **DETTOL HEALTHY KITCHEN**. A brief summary of the controversy is as follows.

2. The plaintiff's case is that it has been involved with the manufacture of the famous antiseptic liquid under the trademark DETTOL for over 70 years and is a market leader of this segment with approximately 85% of the market share in India. Recently, the plaintiff has come up with a new product **DETTOL HEALTHY KITCHEN** Dish and Slab Gel", which is purportedly the first kitchen cleaner with an active ingredient (Lactic Acid) which helps kill germs. The plaintiff claims that the product has clinically been proven to have germ killing capabilities and is claimed to be much more efficacious than ordinary kitchen cleaners.

3. To promote their new product, the plaintiff came out with an advertising campaign on television comparing the germ killing capabilities of its product and the defendant's **VIM LIQUID**. In addition, the plaintiff also introduced a print advertising campaign. Both these advertisements purportedly contained truthful statements about the germ killing capabilities

of the two competing products. Admittedly, the defendant herein filed a suit against the plaintiff for disparaging advertisement before the Calcutta High Court vide Suit No. TN 50 of 2013. However, the Court passed a consent order in this matter allowing the plaintiff to continue with the impugned television advertisement subject to small variations.

4. The plaintiff contends that in retaliation, the defendant came out with an advertisement published in the Sunday Times Edition dated February 24, 2013, in which the defendant has purportedly disparaged the plaintiff and its brand **DETTOL**. It is contended that in the advertisement, the defendant has maliciously equated its product to a "Harsh Antiseptic". The question asked in the initial portion of the advertisement is:

> "A Harsh Antiseptic or the power of 100 lemons – which one would you choose to clean your child's tiffin?"

The plaintiff alleges that this reference in the advertisement was clearly directed to the plaintiff's brand DETTOL being referred to as a Harsh Antiseptic. The plaintiff contends that an attempt has been made to misrepresent to the consumers that the plaintiff's **DETTOL ANTISEPTIC LIQUID** and **DETTOL HEALTHY KITCHEN** have the same ingredients. It also contends that the defendant has attempted to misrepresent that the plaintiff has done nothing but repackage its Antiseptic Liquid as **DETTOL HEALTHY KITCHEN** and the reference to "harsh antiseptic" in itself is denigrating of the plaintiff's brand DETTOL.

5. The plaintiff contends that to further worsen the misrepresentation, the defendant's advertisement mentions:

> "An Antiseptic is for cleaning wounds and floors. Would you use to clean the utensils your family eats from?"

It contends that this statement further established the target brand to be that of the plaintiff's DETTOL ANTISPETIC LIQUID which is extensively advertised for the use in cleaning wounds and floors, particularly in hospitals. The plaintiff has also sought to clarify that DETTOL ANTISEPTIC LIQUID and DETTOL HEALTHY KITCHEN have entirely different formulations. Though both the products have efficient germ killing capabilities, DETTOL ANTISEPTIC LIQUID contains chloroxylenol (PCMX), whereas

DETTOL HEALTHY KITCHEN is said to contain Lactic Acid.

6. The plaintiff also contends that the advertisement thereafter mentions

"NO ONE REMOVES GREASE BETTER*

NO ONE REMOVES GERMS BETTER*

This claim is said to contain a disclaimer in very fine print stating

"*compared to leading brands tested under lab conditions on selective organisms and as per lab cleaning test/consumer test."

7. The plaintiff contends that this is a false statement because it is clinically tested that its product was more efficacious at germ killing than the defendant's product, as evidenced from the SGS Report filed by the plaintiff. The plaintiff also submits that despite being more effective in respect of germ killing, it also has a toxicology report declaring that the plaintiff's DETTOL HEALTHY KITCHEN does not result in any human health concern.

8. The plaintiff contends that this advertisement campaign by the defendant is outside the parameters of allowed competitive advertising and blatantly denigrates the reputation and goodwill of the plaintiff's brand. And that the defendant being in the same sector as that of the plaintiff is well aware of the goodwill and reputation attached to the plaintiff's brand DETTOL and is aiming at illegally destroying this reputation for its own commercial benefits thereby causing an irreparable injury to the plaintiff. It is also contended that the defendants are attempting to increase the market share of their product VIM LIQUID by defaming and disparaging the worth and reputation of the plaintiff's product because, the plaintiff's product is a new entrant into the same market sector as the defendant's.

9. The plaintiff, relied on the cases of **Reckitt Benckiser (India) Ltd. v. Hindustan Unilever Ltd.,** 2008 (38) PTC 139 (Del); **Reckitt Benckiser South Africa (PTY) Ltd. v. Hindustan Unilever South Africa (PTY) Ltd.; Reckitt Colman of India Ltd v. M.P. Ramchandran & Anr,** 1999 PTC (19) 741; **Paras Pharmaceuticals Ltd v. Ranbaxy Laboratories Ltd,** AIR 2008 GUJ 94; **Reckitt & Colman of India Ltd v. Jyothi Laboratories Ltd.,** (1999) 2 CALLT 230 (HC); **Dabur India Limited v. Emami Limited,** 2004 (29) PTC 1 (Del); **Dabur India**

Limited v. Palmolive India Ltd, 2004 (29) PTC 401 (Del); **Eureka Forbes Ltd. vs. Pentair Water India Pvt. Ltd,** 2007 (35) PTC 556 (Karn); **Dabur India Ltd v. Colortek Meghalaya Pvt. Ltd and Godrej Sara-Lee,** 2010 (44) PTC 254 (Del); **Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.,** AIR 1999 SC 3105; **Chemfab Alkhalis Ltd. vs. S. Balasubramanian,** MANU/TN/1566/2001.

10. In response to these allegations, the defendant has filed a reply stating that the impugned advertisement made no reference to DETTOL HEALTHY KITCHEN Dish & Slab Gel. The defendant submits that the ad-campaign only sought to inform the consumers that harsh antiseptics were not fit for cleaning utensils. And that the impugned advertisement uses the term HARSH ANTISEPTIC by which they mean those antiseptics which are particularly strong in concentration and that the plaintiff's product, by their own classification does not fall under the category of 'harsh antiseptic' and therefore, the complaint of the plaintiff was baseless and frivolous.

11. The defendant contends that merely because the plaintiff sold antiseptic liquid did not rationally imply that the impugned advertisement denigrated or disparaged the kitchen and slab gel of the plaintiff. And that the plaintiff has not filed any conclusive evidence to show that the overwhelming majority of consumers associate the term 'harsh antiseptic' in reference to the plaintiff's products. Further, the defendant submits that it is entitled to puff its products; and that the plaintiff cannot be hypersensitive to such a puffery. And that the advertisement campaign was purely intended to promote their product to be superior to those of other competitors which was within their fundamental right of free speech and expression as guaranteed under Art. 19(1) (a) of the Constitution. The defendant submits that the advertisement was in line with the principles as postulated by Advertising Standards Council of India (ASCI). It is also claimed that the plaint is a retaliatory action made out of vengeance against the suit filed by the defendant against the plaintiff in the Calcutta High Court.

12. In furtherance of its contentions, the defendant has relied upon the cases of **Imperial Tobacco Company v. Albert Bonnan,** AIR 1928 Cal 1; **Reckit Benckiser (India) Ltd. v. Naga Ltd. & Ors.,** 2003 (26) PTC 535 (Del); **Marico Ltd. v. Adani Wilmar Ltd.,** CS(OS) Nos. 246 and 319 of 2013; **Reckitt Benckiser South Africa (PTY) Ltd. v.**

Hindustan Unilever South Africa (PTY) Ltd.; Reckitt Colman of India Ltd v. M.P. Ramchandran & Anr, 1999 PTC (19) 741; **Paras Pharmaceuticals Ltd v. Ranbaxy Laboratories Ltd,** AIR 2008 GUJ 94; **Dabur India Limited v. Emami Limited,** 2004 (29) PTC 1 (Del); **Dabur India Ltd v. Colortek Meghalaya Pvt. Ltd and Godrej Sara-Lee,** 2010 (44) PTC 254 (Del); and **Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.,** AIR 1999 SC 3105.

13. I have heard the arguments of the Ld. Counsels for both parties and also perused through the documents placed on record including the impugned newspaper advertisement. I am of the considered view that prima facie the impugned advertisement subtly yet certainly targets the plaintiff's brand DETTOL and its product DETTOL HEALTHY KITCHEN. I have arrived at this conclusion for the following reasons.

14. With regards to comparative advertising, the law is well settled. This Court in the case of **Dabur India Ltd v. Colortek Meghalaya Pvt. Ltd and Godrej Sara-Lee,** (Supra), while referring to the law laid down by the Supreme Court, has shaped the following guiding principles regarding puffery of a product:

(i) An advertisement is commercial speech and is protected by Article 19(1) (a) of the Constitution

(ii) An advertisement must not be false, misleading, unfair or deceptive.

(iii) Of course, there would be some grey areas but these need not necessarily be taken as serious representation of facts but only as glorifying one's product.

15. This Court in Dabur-Colortek also considered the finding of the Division Bench of this Court in **Pepsi Co. Inc. &Ors vs. Hindustan Coca cola Ltd. & Anr.,** 2003 (27) PTC 305 (Del) (DB), and added a fourth prong to this test, i.e.

(iv) While glorifying its product, an advertiser may not denigrate or disparage a rival product.

16. A Ld. Single Judge of this Court, in the **Marico** Case (supra), while observing the principles laid down by the Division Bench in the **Dabur-Colortek** Case (supra), stated that the generic disparagement of a rival product, without specifically identifying or pin-pointing the rival product is objectionable. It was held that, in view of the law laid down

Tata Press Ltd. v. MTNL (1995) 5 SCC 139, false, misleading, unfair and deceptive advertising is not protected under 'commercial speech'. It was additionally observed that earlier judgments, which held that a tradesman is entitled to declare his goods to be the best in the world even though the declaration is untrue and to say that his goods are better than his competitors, even though such statement is untrue, is no longer good law. The Division Bench in the **Dabur-Colortek** Case (supra) also held that while hyped-up advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if it does so, it must have some reasonable factual basis for the assertion made and that it is not permissible for anybody to make an off-the-cuff or unsubstantiated claim that his goods are the best in the world or that his goods are better than that of a rival.

17. The Ld. Single Judge in the Marico Case has also placed reliance on an earlier finding of a Division bench of this Court in the **Pepsi Co.** Case (supra) wherein it was held that comparative advertising is permissible as long as while comparing own with rival/competitors product, the latter's product is not derogated, discredited, disgraced, though while comparing some amount of 'showing down' is implicit; however the same should be within the confines of **De Beers Abrasive v. International General Electric Co.,** 1975 (2) All ER 599, which Courts in India have frequently referred to. The case sums up the law relating to false advertising causing injury to rival traders group pithily as under:

> "the law is that any trader is entitled to puff his own goods even though such puff as a matter of pure logic involves the denigration of his rival's good...Notices...reading 'the best tailor in the world', 'the best tailor in this town' and the 'best tailor in this street' do not commit an actionable offence. Where however, the situation is not that the trader is puffing his own goods but turns to denigrate the goods of his rival ...then the situation is not so clear-cut. The statement 'my goods are better than X's' is only a more dramatic presentation of what is implicit in the statement 'my goods are the best in the world' and would not be actionable. However, the statement 'my goods are better than X's because X's are absolute rubbish' would be actionable."

18. Moreover, the subsequent Division Bench in Dabur-Colortek echoed the same view as under:

"In Pepsi Co. it was held that certain factors have to be kept in mind while deciding a question of disparagement. These factors are (i) intent of the commercial; (ii) manner of the commercial; and (iii) storyline of the commercial and the message sought to be conveyed. While we agree with these factors, we would like to amplify or restate them in the following terms:-

(1) The intent of the advertisement - this can be understood from its story line and the message sought to be conveyed.

(2) The overall effect of the advertisement - does it promote the advertiser's product or does it disparage or denigrate a rival product? In this context it must be kept in mind that while promoting its product the advertiser may, while comparing it with a rival or a competing product, make an unfavorable comparison but that might not necessarily affect the story line and message of the advertised product or have that as its overall effect.

(3) The manner of advertising - is the comparison by and large truthful or does it falsely denigrate or disparage a rival product? While truthful disparagement is permissible, untruthful disparagement is not permissible."

19. At this juncture, it must be borne in mind that this Court at this stage should take only a prima facie opinion and not render any final finding on the correctness or otherwise of the claims in the advertisement of the defendant. While both the plaintiff and defendant have produced various lab reports to corroborate the 'germ killing' and 'germ removal' capabilities of their respective products, this is not the stage in this suit for me to determine the veracity of the claims made in the adverts. It is only for me to determine if the impugned advertisement makes a reference, either express or implied to the product of the plaintiff and denigrates it. Though the defendant has vehemently contended that its advertisement is not directed towards the plaintiff's product and is directed towards general awareness of the customers regarding the inappropriate usage of antiseptic in washing utensils, it is common knowledge that the plaintiff's brand DETTOL is synonymous with the term antiseptic in the FMCG market in India. The plaintiff has also furnished Google image results for the search term 'antiseptic', wherein the plaintiff's products constitute the majority of the search results. Though I am not squarely relying on

the finding of this Court in the case of **Reckitt Benckiser (India) Ltd. v. Hindustan Unilever Ltd.,** 2008 (38) PTC 139 (Del.) (DETTOL Soap Case), it is pertinent to note that the Court has observed the existence of the notion that all DETTOL products are antiseptic. In the Dettol Case, it was observed by this Court thus –

"It is true that the plaintiff's soap - DETTOL Original - is not an antiseptic soap whereas the soap shown in the advertisement has been referred to as "an ordinary antiseptic soap". An argument was advanced on the part of the defendant that because of this, the soap shown in the advertisement did not and could not refer to the plaintiff's soap. The learned counsel for the plaintiff submitted that the reference to an antiseptic soap in the said advertisement is, in fact, a further pointer to the plaintiff's product, although, the plaintiff's soap - DETTOL Original - is not an antiseptic soap. According to him, this is so because of the well-known fact that the plaintiff's antiseptic liquid product has been utilised for years in homes as well as in hospitals for various cuts and wounds and other antiseptic purposes. The public at large, therefore, carry an impression, right or wrong, in their minds that all DETTOL products are antiseptic. The defendant, being aware of this, has specifically shown an antiseptic soap so that the viewers of the advertisement shall immediately be directed towards the plaintiff's DETTOL products. This, along with the other features mentioned above, clearly establishes the link between the soap shown in the advertisement and the plaintiff's soap. I agree with these submissions." (emphasis supplied).

20. As observed in the DETTOL Soap Case, for reasons right or wrong, the public at large carry an impression in their minds that all DETTOL products are antiseptic. Therefore, the usage of the term antiseptic in the impugned advertisement directs the viewers of the advertisement to the plaintiff's brand or product. However, the defendant has contended that it has deliberately used the term 'harsh antiseptic' to connote antiseptic which is concentrated.

21. I do not find any merit in the defendant's submissions that the term 'harsh antiseptic' did not refer to the plaintiff's brand or product, but was used to connote an antiseptic which was concentrated. I am of the opinion that the usage of the term 'harsh antiseptic' in fact refers to

an antiseptic which is harsh, wherein the term 'harsh' is used as an adjective. If the defendant chose to convey to the consumers a general warning regarding the harmful effects of antiseptic products which were concentrated, the term 'concentrated antiseptic' would have conveyed it more aptly without any negative connotation as attached with the word 'harsh'. By using the adjective 'harsh' along with the indicative word 'antiseptic' with respect to cleaning utensils from which food is consumed, the defendant is trying to connote the consumers that the plaintiff's product, DETTOL HEALTHY KITCHEN, has the same effect as that of its other product DETTOL ANTISEPTIC LIQUID. Such a linkage between the two products with completely different formulations misleads the consumers and deters them from purchasing the plaintiff's product, thereby affecting them prejudicially.

22. With respect to the defendant's argument that the plaintiff has not established conclusively that the overwhelming majority of consumers associate the term 'harsh antiseptic' in reference to the plaintiff's products, I have seen the media reports filed by the plaintiff. It is prima facie clear from the reports carried out in leading press agencies such as Business Standard, as well as internet and social media such as indiatelevision.com, firstpost.com, twitter.com and other blogging sites, the public is aware that the impugned advertisement is directed towards the plaintiff's brand/ product and perceived as the response of the defendant to a new entrant in the kitchen cleaners market.

23. Relying upon the ratio of Dabur-Colortek, Pepsi-Co as well as De Beers, the defendant's claim that "NO ONE REMOVES GREASE BETTER;NO ONE REMOVES GERMS BETTER" can be considered to fall within the purview of permissive comparative advertising. However, by stating that, "An Antiseptic is for cleaning wounds and floors. Would you use to clean the utensils your family eats from? An antiseptic is for cleaning wounds and floors. Would you use it to clean the utensils your family eats from?", the defendant is to that extent impliedly referring to the plaintiff's product by appealing to the consumer's perception that the plaintiff's product must be a 'harsh antiseptic'; and thereby denigrating the plaintiff's product.

24. I am of the considered opinion that the plaintiff has made out a prima facie case and demonstrated that the irreparable injury and balance of convenience lies with it. Therefore, I hereby pass an interim order

restraining the defendant to the extent indicated above from publishing the impugned advertisement or any other similar advertisement or depiction aimed at disparaging the goodwill and reputation of the plaintiff's brand DETTOL or its product DETTOL HEALTHY KITCHEN in all media including print and/or electronic media. Ordered accordingly.

ILR (2013) III DELHI 2014
LA APP.

KARTAR SINGH ....APPELLANT

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(V.K. JAIN, J.)

LA APP NO. : 383/2009 DATE OF DECISION: 16.05.2013

Land Acquisition Act, 1894—Section 4, 6 & 14—Land of appellant was notified to be acquired—Land Acquisition Collector passed award and awarded compensation in favour of appellant—Being dissatisfied with compensation, appellant sought reference which was forwarded by Land Acquisition Collector but with objection that reference petition was time barred—Reference petition was rejected—Reference was then made to Ld. Additional District Judge—Respondent filed written statement and raised preliminary objection of reference being barred by limitation and therefore, not maintainable—No replication to written statement was filed and no issue on plea of limitation taken by respondent, was framed—However, Ld. Additional District Judge vide impugned order rejected reference as barred by limitation—Aggrieved, appellant preferred

appeal. Held If the plea of limitation can be decided without recording evidence, it may not be necessary to frame an issue before returning a finding on such a plea. If, however, the decision on a plea of limitation requires recording of evidence, it would not be appropriate to return a finding without framing an issue and giving an opportunity to the parties to lead evidence by disputing the factual aspect of the issue.

No issue with respect to limitation was framed by the Reference Court. In my view, considering that the respondent had taken a preliminary objection that the reference was barred by limitation, it was necessary for the Reference Court to frame an issue on the point of limitation and thereafter given an opportunity to the parties to lead evidence on that issue. **(Para 6)**

Important Issue Involved: If the plea of limitation can be decided without recording evidence, it may not be necessary to frame an issue before returning a finding on such a plea. If, however, the decision on a plea of limitation requires recording of evidence, it would not be appropriate to return a finding without framing an issue and giving an opportunity to the parties to lead evidence by disputing the factual aspect of the issue.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Dr. Vijendra Mahndiyan and Ms. Fallavi Awasthi, Advocates.

FOR THE RESPONDENTS : Mr. Sanjay Kumar Pathak, Advocates.

RESULT: Appeal disposed of.

V.K. JAIN, J. (ORAL)

1. The land of the appellant was notified by way of notification dated 24.7.1998 issued under Section 4 of the Land Acquisition Act,

followed by declaration dated 4.8.1998 under Section 6 of the aforesaid Act. The award number 06/LAC/CL/2000 came to be passed by the Land Acquisition Collector on 3.8.2000. The compensation was fixed by the Land Acquisition Collector @ Rs.11.20 lac per acre. Being dissatisfied with the compensation awarded to him, the appellant sought a reference under Section 18 of the Land Acquisition Act. The reference was forwarded by the Land Acquisition Collector on 30.5.2001. However, while forwarding the reference, the Land Acquisition Collector, recorded that a notice under Section 12(2) of the Act dated 30.5.2001 was sent to the appellant which was received by him on 2.6.2001 and despite that he had submitted the reference on 12.9.2001, which was beyond three months, though it ought to have been within 42 days and, therefore, the reference petition was rejected on 17.3.2004.

2. On the reference being made to the learned Additional District Judge, a written statement was filed by the respondent-Union of India and in the said written statement a preliminary objection was taken that the reference was barred by limitation and, therefore, was not maintainable. It was further stated in the written statement that despite issue of statutory notice on the petitioner, he failed to file the reference petition within the prescribed period and, therefore, the petition was barred by limitation. No replication to the written statement was filed and no issue on the plea of limitation taken by the respondent was framed. The learned Additional District Judge vide impugned order dated 24.12.2008 rejected the reference as barred by limitation.

Section 18(2) of the Land Acquisition Act which prescribes the period of limitation for filing reference under sub section 1 of the said Section reads as under:

> "(2) The application shall state the grounds on which objection to the award is taken: Provided that every such application shall be made-
>
> (a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;
>
> (b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub- section (2), or within six months from the date of the Collector' s award, whichever period shall first expire."

3. It would thus be seen that if a person seeking reference was present either in person or through a counsel at the time the award was made, the reference is to be sought within six weeks from the date of the award and in other cases it can be sought within six weeks of receipt of notice from the Collector under Section 12(2) of the Act or within six months from the date of the award, whichever period expires first.

4. A perusal of award in question would show that it does not indicate that on 3.8.2000 the appellant or his counsel was present at the time it was announced. A perusal of notice dated 30.5.2001 issued by the Land Acquisition Collector to the appellant Kartar Singh would show that the said notice purports to have been received by one Ajit Singh on 2.6.2001. The report on the notice does not indicate the relationship of Mr. Ajit Singh with the appellant but, it is otherwise an admitted case as he is the son of the appellant.

5. Section 45 of the Land Acquisition Act prescribes the mode of service of notice and to the extent it is relevant, the said Section reads as under:

> "45. Service of notices.-
>
> (1) Service of any notice under this Act shall be made by delivering or tendering a copy thereof signed, in the case of a notice section 4, by the officer therein mentioned, and, in the case of any notice, by or by order of the Collector or the Judge.
>
> (2) Whenever it may be practicable, the service of the notice shall be made on the person therein named.
>
> (3) When such person cannot be found, the service may be made on any adult male member of his family residing with him; and, if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the officer aforesaid or of the Collector or in the court- house, and also in some conspicuous part of the land to be acquired: Provided that, if the Collector or Judge shall so direct, a notice may be sent by post, in a letter addressed to the person named therein at his last known residence, address or place of business and 6[registered under sections 28 and 29 of the Indian Post Office Act, 1898 (6 of 1898), and service of it may be proved by the production of the addressee' s receipt."

It would be seen form a perusal of the above section that ordinarily a notice issued under the provisions of the Act including notice under Section 12 thereof is required to be tendered to the person to whom the notice is addressed. It is only in case such a person cannot be found that the service can be made on an adult male of his family residing with him and if no such adult member can be found, the notice can be affixed on the outer door of the house in which the person named in the notice ordinarily resides or carries on business or it can be affixed in conspicuous place in the office of the concerned officer or of collector or on the Court house as also on conspicuous part of the acquired land. The report on the notice dated 30.5.2001 does not indicate that the appellant Kartar Singh was not found present when the notice was taken by the process server to his residence. One possibility is that the appellant was not available at his residence and, therefore, notice was served upon his son. The other possibility can be that though the appellant was present, his son of his own took the notice or was directed by the appellant to take the notice on his behalf.

6. As noted earlier, no replication was filed by the appellant to the written statement of the respondent before the Reference Court. No issue with respect to limitation was framed by the Reference Court. In my view, considering that the respondent had taken a preliminary objection that the reference was barred by limitation, it was necessary for the Reference Court to frame an issue on the point of limitation and thereafter given an opportunity to the parties to lead evidence on that issue.

If the plea of limitation can be decided without recording evidence, it may not be necessary to frame an issue before returning a finding on such a plea. If, however, the decision on a plea of limitation requires recording of evidence, it would not be appropriate to return a finding without framing an issue and giving an opportunity to the parties to lead evidence by disputing the factual aspect of the issue.

7. Had the learned Additional District Judge framed an issue on the point of limitation, the appellant would have got an opportunity to place his stand before the Court and lead evidence in support of the stand taken by him. Had the appellant filed replication and admitted receipt of notice by his son on 2.6.2001, probably evidence might not have been necessary

but, considering the fact that neither the appellant of his own filed any replication nor was he asked to do so despite plea of limitation taken by the respondent in its written statement, recording of evidence was necessary before returning a finding on the issue of limitation which the respondent had taken in its written statement. In fact the Reference Court did not at all go into the issue of service of notice and returned a finding on limitation merely on the basis of the endorsement made by the Land Acquisition Collector.

8. Mr. Pathak, learned counsel for the respondent states that since the appellant did not contest the plea of limitation taken in the written statement by filing a replication and did not claim that the notice was not received by his son or that his son despite receiving the notice did not inform him and also did not take a plea that notice in accordance with Section 45 of the Act had not been served upon the appellant, there is no justification in remanding the matter back to the Reference Court and there was no necessity for the Reference Court to frame an issue on this aspect. However, I do not find any force in these submissions. In my view in the absence of admission of receipt of notice by the appellant, the learned Additional District Judge without framing an issue, and recording evidence, could not have returned a finding on the issue of limitation even if no replication was filed by the appellant for the simple reason that the issue of limitation having been raised by the respondent, it was for the respondent to prove the service of notice under Section 12 of the Act upon the son of the appellant.

For the reasons stated herein above, the learned order dated 24.12.2008 passed by the learned Additional District Judge is set aside and the matter is remanded back to him for framing an issue on the point of limitation, give opportunity to the parties to lead evidence on the said issue and thereafter pass an appropriate order in accordance with law. The parties shall appear before the learned District Judge on 8.7.2013. The fresh order in terms of the above directions shall be passed by the learned Additional District Judge within six months of the parties appearing before him. The appeal stands disposed of.

The trial court record be sent back forthwith along with a copy of this order.

ILR (2013) III DELHI 2020
W.P. (C)

S.K. BAHL ....PETITIONER

VERSUS

DELHI DEVELOPMENT AUTHORITY & ORS. ....RESPONDENTS

(V.K. JAIN, J.)

W.P. (C) NO. : 16305/2004 DATE OF DECISION: 20.05.2013

Sale—Power of Attorney and Agreement to Sell—Transfer of Ownership—Brief Facts—Respondents 2 and 3 were allotted a residential plot bearing No. 135, Block K-I, Chittranjan Park, New Delhi, and a perpetual lease deed dated 01.10.1990 was executed in their favour—Case of the petitioner is that vide Agreement to Sell dated 23.10.1990, coupled with a registered Power of Attorney of the same date, ownership of room No. 2 on the ground floor, measuring 142 squire feet was transferred to him for a consideration of Rs. 60,000/- and he is in physical possession of the same—Lease of the aforesaid property was cancelled by the Lieutenant Governor of Delhi vide order dated 10.11.1992—Pursuant to cancellation of the lease deed, an eviction order dated 16.06.2000 came to be passed by the Estate Officer against the petitioner and other occupants of the building—Appeal preferred against the order of the Estate Officer, was dismissed by the learned Additional District Judge vide his order dated 07.12.2002—During pendency of the appeal before the Estate Officer, the said property was sealed by DDA on 16.09.2002—An application is alleged to have been submitted to DDA for converting the aforesaid property from leasehold to freehold and on refusal of DDA to convert the aforesaid property into freehold a writ petition being W.P. (C) No. 4693 of 2003 was filed by

the petitioner, challenging the aforesaid decision of DDA—The said petition came to be disposed of vide order dated 18.11.2003—A demand letter dated 08.12.2003 was then issued by DDA, requiring him to deposit a sum of Rs. 1,17,87,223/-, comprising Rs. 73,89,895/- towards misuse charges for the period from 31.11.1990 to 16.09.2002, Rs. 31,350/- towards restoration charges, Rs. 15,000/- towards de-sealing charges, Rs. 75,000/- towards maintenance charges, Rs. 42,35,222/- towards unearned increase, Rs. 22,695/- towards ground rent and Rs. 18,061/- towards interest on ground rent—Aggrieved from the sealing, the petitioner preferred the present writ petition, seeking direction to the respondent to deseal the premises with immediate effect subject to the undertaking to pay the legitimate demand of misuse charges as and when raised. Held—The first question which arises for consideration in this case is as to whether the petitioner has any locus standi to maintain this writ petition—Admittedly, the land underneath building in question was allotted by DDA to respondents 2 and 3 and not to the petitioner—Though the petitioner claims to have purchased a portion of the property subject matter of the writ petition, admittedly, no sale deed has been executed in his favour—Petitioner has neither, submitted to DDA nor filed in this Court the Power of Attorney and Agreement to Sell alleged to have been executed by respondents 2 and 3 in his favour—In the absence of such documents, it is not possible to accept the case set out by the petitioner in this regard—Assuming, however, that there was an Agreement to Sell, coupled with a Power of Attorney executed by respondents 2 and 3 in favour of the petitioner in respect of a portion of the property subject matter of this writ petition, he does not become owner of the portion of the property subject matter of this writ petition, he does not become owner of the occupied by him merely on the strength of the Agreement to Sell and Power of Attorney, alleged to have been executed in his favour, nor does such a transaction constitute "sale" as held by the Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Anr.* (2012) 1 SCC 656—Since the petitioner is not the owner/lessee/allottee of the property subject matter of this writ petition, he has absolutely no locus standi to file a writ petition, challenging the sealing of the aforesaid property by DDA—It is only the owner/lessee/allottee of the property who can maintain such a petition—Petition has been filed in the individual capacity of the petitioner and not as attorney of the lessees/allottees who have been impleaded as respondents 2 and 3 in the writ petition—For this reason alone, the writ petition is liable to be dismissed. Even assuming that the petitioner has the locus standi to maintain a writ petition against sealing of the property, no ground for de-sealing the property has been made by him—Property came to be sealed inter alia on account of unauthorized construction and misuse of the property, in contravention of the terms of the lease deed—This is not the case of the petitioner that there was no unauthorized construction in the property—Admittedly, the property in question was leased out for residential purpose and could not have been used for a non-residential purpose, without prior permission of the lessor—This is not the case of the petitioner that the said property is being used only for residence and no portion of the property is being used for a non-residential purpose—In fact, petitioner did not even dispute his liability to pay misuse charges till the date the property in question came to be sealed by DDA—This is also not the case of the petitioner that the misuse in the property has since been stopped altogether and the unauthorized construction has since been demolished—Therefore, there is no ground, on merits, for de-sealing the property subject matter of the writ petition—No merit

in the writ petition and the same is hereby dismissed.

The first question which arises for consideration in this case is as to whether the petitioner has any locus standi to maintain this writ petition. Admittedly, the land underneath building in question was allotted by DDA to respondents 2 and 3 and not to the petitioner. Though the petitioner claims to have purchased a portion of the property subject matter of the writ petition, admittedly, no sale deed has been executed in his favour. The petitioner has neither submitted to DDA nor filed in this Court the Power of Attorney and Agreement to Sell alleged to have been executed by respondents 2 and 3 in his favour. In the absence of such documents, it is not possible to accept the case set out by the petitioner in this regard. Assuming, however, that there was an Agreement to Sell, coupled with a Power of Attorney executed by respondents 2 and 3 in favour of the petitioner in respect of a portion of the property subject matter of this writ petition, he does not become owner of the portion occupied by him merely on the strength of the Agreement to Sell and Power of Attorney, alleged to have been executed in his favour, nor does such a transaction constitute 'sale'. **(Para 6)**

The following view taken by Supreme Court in **Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Anr.** (2012) 1 SCC 656 is pertinent in this regard:-

> "11. Section 54 of Transfer of Property Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property.
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> X X X
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> 13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of

> grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.
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> X X X
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> 14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivo.
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> X X X
>
> 15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in **Asha M. Jain v. Canara Bank:** 94 (2001) DLT 841 that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintended misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.
>
> 16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such

transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act."

Since the petitioner is not the owner/lessee/allottee of the property subject matter of this writ petition, he has absolutely no locus standi to file a writ petition, challenging the sealing of the aforesaid property by DDA. It is only the owner/lessee/allottee of the property who can maintain such a petition. It would be pertinent to note here that the petition has been filed in the individual capacity of the petitioner and not as attorney of the lessees/allottees who have been impleaded as respondents 2 and 3 in the writ petition. For this reason alone, the writ petition is liable to be dismissed.

(Para 7)

Even if I proceed on the assumption that the petitioner has the locus standi to maintain a writ petition against sealing of the property, no ground for de-sealing the property has been made by him. As stated in the counter-affidavit of DDA, the property came to be sealed inter alia on account of unauthorized construction and misuse of the property in contravention of the terms of the lease deed. This is not the case of the petitioner that there was no unauthorized construction in the property. Admittedly, the property in question was leased out for residential purpose and could not have been used for a non-residential purpose, without prior permission of the lessor. This is not the case of the petitioner that the said property is being used only for residence and no portion of the property is being used for a non-residential purpose. In fact, during the course of arguments the learned counsel for the petitioner did not even dispute the liability of the petitioner to pay misuse charges till the date the property in question came to be sealed by DDA. This is also not the case of the petitioner that the misuse in the property has since been stopped

altogether and the unauthorized construction has since been demolished. Therefore, there is no ground, on merits, for de-sealing the property subject matter of the writ petition.

(Para 10)

Important Issue Involved: Power of Attorney and Agreement to Sell—Even if there was an Agreement to Sell, coupled with a Power of Attorney in favour of the petitioner in respect of a portion of the property, he does not become owner of the portion occupied by him merely on the strength of the Agreement to Sell and Power of Attorney, alleged to have been executed in his favour, nor does such a transaction constitute "sale" as held by the Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Anr.* (2012) 1 SCC 656.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. R.M. Sinha, Advocate.

FOR THE RESPONDENT : Mr. Arun Birbal, Advocate.

CASES REFERRED TO:

1. *Suraj Lamp and Industries Pvt. Ltd.* vs. *State of Haryana and Anr.* (2012) 1 SCC 656.
2. *Asha M. Jain* vs. *Canara Bank:* 94 (2001) DLT 841.

RESULT: Appeal dismissed.

V.K. JAIN, J.

1. The respondents 2 and 3 in this petition, namely, Shishir Kumar De and Smt. Jyotsana De were allotted a residential plot bearing No. 135, Block K-I , Chittranjan Park, New Delhi, and a perpetual lease deed dated 01.10.1990 was executed in their favour. The case of the petitioner is that vide Agreement to Sell dated 23.10.1990, coupled with a registered Power of Attorney of the same date, ownership of room No. 2 on the ground floor, measuring 142 square feet was transferred to him for a consideration of Rs 60,000/- and he is in physical possession of the

same. The lease of the aforesaid property was cancelled by the Lieutenant Governor of Delhi vide order dated 10.11.1992. Pursuant to cancellation of the lease deed, an eviction order dated 16.06.2000 came to be passed by the Estate Officer against the petitioner and other occupants of the building. The appeal preferred against the order of the Estate Officer was dismissed by the learned Additional District Judge vide his order dated 07.12.2002. During pendency of the appeal before the Estate Officer, the said property was sealed by DDA on 16.09.2002. An application is alleged to have been submitted to DDA for converting the aforesaid property from leasehold to freehold and on refusal of DDA to convert the aforesaid property into freehold a writ petition being W.P.(C) No. 4693 of 2003 was filed by the petitioner, challenging the aforesaid decision of DDA. The said petition came to be disposed of vide order dated 18.11.2003. A demand letter dated 08.12.2003 was then issued by DDA, requiring him to deposit a sum of Rs1,17,87,223/-, comprising Rs 73,89,895/- towards misuse charges for the period from 31.11.1990 to 16.09.2002, Rs 31,350/- towards restoration charges, Rs 15,000/- towards de-sealing charges, Rs 75,000/- towards maintenance charges, Rs 42,35,222/- towards unearned increase, Rs 22,695/- towards ground rent and Rs 18,061/- towards interest on ground rent.

2. Aggrieved from the sealing, the petitioner preferred the present writ petition, seeking the following reliefs:-

> "issue a writ of mandamus, certiorari or any other writ or order of the like nature thereby directing the respondent to deseal the premises with immediate effect as the respondent failed to raise the demand pursuant to order dated 18.11.2003 passed by this Hon'ble Court in Writ Petition (Civil) No. 2647 of 2004, however, subject to the undertaking to pay the legitimate demand of misuse charges as and when raised."

3. The writ petition was amended with the permission with the permission of the Court and the following is the prayer made in the amended writ petition:

> "issue a writ of mandamus, certiorari or any other writ or order of the like nature thereby directing the respondent to deseal the premises with immediate effect as the respondent failed to raise the demand pursuant to order dated 18.11.2003 passed by this Hon'ble Court in Writ Petition (Civil) No. 2647 of 2004, however, subject to the undertaking to pay the legitimate demand of misuse charges as and when raised in the light of the notifications detailed in para 8 of the writ petition."

4. During pendency of this writ petition, the learned counsel for the petitioner stated before this Court on 23.04.2009 that 50% of the amount of Rs 1,17,87,223/-, demanded by DDA towards misuse charges, restoration charges, de-sealing charges and unearned increase etc., would be deposited on or before 31.07.2009 and the balance amount will be deposited on or before 31.12.2009. He also requested that on deposit of 50% of the amount DDA should be asked to de-seal the property and the petitioner would give an undertaking that in case of failure to deposit the balance amount, DDA would be at liberty to re-seal the property. After recording the aforesaid statement, the counsel for DDA was directed to obtain instruction as to whether as per conversion scheme and circulars issued by DDA, 50% unearned increase could be waived and the petitioner could be asked to pay surcharge. However, the petitioner did not make deposit in terms of statement made on 23.04.2009. When the writ petition came up for hearing on 30.08.2010, pay orders for a total sum of Rs 58,93,612/- were handed over to the counsel for DDA towards 50% of the impugned demand and a direction was sought to de-seal the property. This request was, however, rejected by this Court, noticing that the petitioner had on 23.04.2009 agreed to pay the entire amount of Rs 1,17,87,223/-, in two instalments and, therefore, de-sealing could not be ordered on payment only on 50% of the impugned demand. The petitioner preferred an appeal against the order dated 30.08.2010 and the said appeal was disposed of with the following order:

> "The writ court, on 23rd April, 2009, had directed the petitioner to deposit 50% of the demanded dues of the DDA and, thereafter, the question of de- sealing was to be considered. When the matter was listed on 30th August, 2010, the learned Single Judge came to hold as follows:
>
> "Mr.R.M.Sinha, learned counsel appearing on behalf of the petitioner, submits that in terms of order dated 23.04.2009, the impugned demand to the extent of 50% can even be waived and, therefore, he requests that directions may be given to the respondent No.1/DDA for de-sealing of premises in question as

50% of the impugned demand stands paid.

This submission is of no consequence because whether the impugned demand can be waived to the extent of 50% or not shall be seen at the time of final hearing of the case. In the facts and circumstances of the case, the request of the petitioner for de-sealing of premises in question is rejected. However, the payment of 50% of the impugned demand made by the petitioner shall be without prejudice to rights and contentions of the parties on merit of the case."

Having heard the learned counsel for the parties, we are only inclined to modify the order that if the appellant would deposit a further sum of Rs.10 lakhs by 18th October, 2010, the premises shall be de-sealed by 25th October, 2010 positively."

The learned counsel for the respondent-DDA submits that the petitioner did not place correct facts before the Division Bench since he did not inform the Court that on 23.04.2009, he had agreed to pay not only 50%, but the whole of the demanded amount of Rs 1,17,87,223/-, though he had sought time till 31.07.2009 to deposit the initial 50% amount and time till 31.12.2009 to deposit the balance 50% amount.

5. In its counter-affidavit, the respondent-DDA has stated that the lease deed of property in question was cancelled on account of unauthorized construction, misuse of the property and unauthorized sale of various portions of the said property in contravention of the terms of the lease deed. According to DDA, the aforesaid plot was supposedly sold to the petitioner and one Mr Barar, who were misusing the building as a commercial complex. An application was received from respondents 2 and 3, allottees of the said plot, for conversion of the property from leasehold to freehold after its alleged sale. The signatures, bearing on the said application, seemed to be forged, since they were different from the signatures of the allottees on the perpetual lease deed. The petitioner did not produce any document, evidencing the alleged sale and did not file even the copies of Power of Attorney and Agreement to Sell relied upon by him. It is further stated in the counter-affidavit of DDA that a demand letter for payment of restoration of charges, misuse charges, etc. can be issued to the petitioner only on furnishing of the above said document by him and for this purpose he has to submit an application as per the

circular issued in this regard by DDA. It is also stated in the counter-affidavit that DDA converts property from leasehold into freehold subject to payment of misuse charges, etc. as per the conversion policy and circulars pertaining to cases where lease was cancelled. According to DDA, the petitioner does not have any right in the property in question. According to DDA, the petitioner is liable to pay charges for a) misusing the premises; b) de-sealing charges; c) restoration charges; d) unearned increase; e) ground rent; f) maintenance charges.

6. The first question which arises for consideration in this case is as to whether the petitioner has any locus standi to maintain this writ petition. Admittedly, the land underneath building in question was allotted by DDA to respondents 2 and 3 and not to the petitioner. Though the petitioner claims to have purchased a portion of the property subject matter of the writ petition, admittedly, no sale deed has been executed in his favour. The petitioner has neither submitted to DDA nor filed in this Court the Power of Attorney and Agreement to Sell alleged to have been executed by respondents 2 and 3 in his favour. In the absence of such documents, it is not possible to accept the case set out by the petitioner in this regard. Assuming, however, that there was an Agreement to Sell, coupled with a Power of Attorney executed by respondents 2 and 3 in favour of the petitioner in respect of a portion of the property subject matter of this writ petition, he does not become owner of the portion occupied by him merely on the strength of the Agreement to Sell and Power of Attorney, alleged to have been executed in his favour, nor does such a transaction constitute 'sale'.

7. The following view taken by Supreme Court in **Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Anr.** (2012) 1 SCC 656 is pertinent in this regard:-

"11. Section 54 of Transfer of Property Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property.

X X X

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on

behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.

X X X

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivo.

X X X

15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in **Asha M. Jain v. Canara Bank:** 94 (2001) DLT 841 that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintended misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act."

Since the petitioner is not the owner/lessee/allottee of the property

subject matter of this writ petition, he has absolutely no locus standi to file a writ petition, challenging the sealing of the aforesaid property by DDA. It is only the owner/lessee/allottee of the property who can maintain such a petition. It would be pertinent to note here that the petition has been filed in the individual capacity of the petitioner and not as attorney of the lessees/allottees who have been impleaded as respondents 2 and 3 in the writ petition. For this reason alone, the writ petition is liable to be dismissed.

8. It was contended by the learned counsel for the petitioner that since this Court had, vide order dated 18.11.2003 passed in W.P.(C) No. 4693/2003, directed conversion of the aforesaid property into freehold in the joint names of all the occupants, subject to deposit of various charges and further subject to confirmation by DDA of the stoppage of misuse, it is not open to DDA to dispute the locus standi of the petitioner. I, however, find no merit in the contention. The order dated 18.11.2003 was passed by the Court on the representation of the petitioner that respondents 2 and 3 had sold various portions of the property to different persons and the successors-in-interest had applied for conversion of the said property into freehold. Since it transpires that there was no 'sale' of any portion of the suit property to the petitioner as execution of Agreement to Sell, coupled with Power of Attorney does not amount to sale of the property as held by Supreme Court in **Suraj Lamp** (supra), it would be difficult to accept the contention, advanced by the learned counsel for the petitioner. In any case, the only prayer made in this writ petition is for de-sealing of the property and conversion of the property from leasehold to freehold is not the subject matter of the writ petition. When this was pointed out to the learned counsel for the petitioner, during the course of arguments, he drew my attention to the order dated 06.09.2011 passed by this Court, noticing the contention of the petitioner that in accordance with the policy of the DDA, the petitioner was willing to have the leasehold rights converted into freehold upon payment of 33% extra, he being the transferee from the original lessee and not liable to pay unearned increase demanded by DDA. After noticing the submission made by the learned counsel for the petitioner, the Court directed the counsel for DDA to state the stand of DDA on eligibility of the petitioner to pay 33% extra conversion charges in lieu of unearned increase. In compliance of the said order, DDA filed an additional affidavit dated 18.01.2012, stating therein that the petitioner before this Court had not

sought any permission from DDA for transfer of property in question to him and that in the event of a permission being granted by the lessor for transfer of the property, 50% of the unearned increase payable to DDA in terms of clause 5(a) of the lease deed. As regards conversion policy, it was pointed out in the additional affidavit of DDA that the petitioner is not eligible to pay conversion charges in lieu of unearned increase since he never applied for conversion of the leasehold rights into freehold in his favour. During the course of arguments, my attention was drawn to the conversion policy of DDA which inter alia provides that in cases where the lessee/sub-lessee/allottee has parted with possession of the property, conversion is allowed provided:

> "a) application for conversion is made by a person holding power of attorney from lessee/sub-lessee/allottee to alienate (self/transfer) the property.
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> b) proof is given of possession of the property in favour the person in whose name the conversion is being sought;
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> c) where there are successive power of attorneys, conversion is allowed after verifying the factum of possession provided that the linkage of original lessee/sub-lessee/allottee with the last power of attorney is established and attested copies of power of attorneys are submitted."

9. It was pointed out by the learned counsel for the respondent that since the petitioner did not apply for conversion of property in question into freehold and did not submit documents such as Power of Attorney and Agreement to Sell, alleged to have been executed by respondents 2 and 3 in his favour, he is not eligible for conversion of the said property into freehold. Thus, neither the conversion of property in question into freehold is a subject matter of this writ petition nor is petitioner otherwise eligible for conversion of the said property into freehold unless he complies with the requirements stipulated in the conversion policy notified by DDA in this regard.

10. Even if I proceed on the assumption that the petitioner has the locus standi to maintain a writ petition against sealing of the property, no ground for de-sealing the property has been made by him. As stated in the counter-affidavit of DDA, the property came to be sealed inter alia on account of unauthorized construction and misuse of the property in

contravention of the terms of the lease deed. This is not the case of the petitioner that there was no unauthorized construction in the property. Admittedly, the property in question was leased out for residential purpose and could not have been used for a non-residential purpose, without prior permission of the lessor. This is not the case of the petitioner that the said property is being used only for residence and no portion of the property is being used for a non-residential purpose. In fact, during the course of arguments the learned counsel for the petitioner did not even dispute the liability of the petitioner to pay misuse charges till the date the property in question came to be sealed by DDA. This is also not the case of the petitioner that the misuse in the property has since been stopped altogether and the unauthorized construction has since been demolished. Therefore, there is no ground, on merits, for de-sealing the property subject matter of the writ petition.

11. For the reasons stated hereinabove, I find no merit in the writ petition and the same is hereby dismissed. The property in question was de-sealed by DDA pursuant to an interim order passed by this Court. Since the writ petition is being dismissed, on merits, it would be open to DDA to re-seal the property in accordance with law.

In the facts and circumstances of the case, there shall be no order as to costs.

ILR (2013) III DELHI 2035
W.P. (C)

NEERAJ KUMAR PRASAD ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 6396/2012 DATE OF DECISION: 23.05.2013

Servide Law—Appointment to the post of Head Constable (Ministerial) as a OBC candidate, belonging to the caste "Sonar"—Brief facts—Petitioner applied for the post of Head Constable (Ministerial) as a OBC candidate, belonging to the caste "Sonar"—He was asked to appear for the written examination, held on 10th July, 2011—At this stage, respondents made an endorsement that the OBC certificate furnished by Petitioner was not in the prescribed format—Petitioner successfully undertook the written examination on 13th August, 2011 and was required to appear for the 2nd phase tests, i.e. typing speed/shorthand test on the 27th of September, 2011—Having successfully cleared the same, Petitioner was required to appear for the interview on 3rd October, 2011 where he again produced his caste certificate dated 28th May, 2011 issued from the office of the Deputy Commissioner, East Singhbhum, Jamshedpur, Jharkhand—This certificate was rejected by the respondents on the ground that his caste certificate was not in the prescribed format and the petitioner was told to get another caste certificate within a week—Petitioner promptly approached the District Magistrate of East Singhum, Jamshedpur but unfortunately, the Circle Officer passed an order dated 8th October, 2011 arbitrarily declining/refusing to issue a certificate to

the petitioner on the ground that his family's land was not recorded in the Government record and therefore he could not be issued a domicile certificate—Document endorses the fact that the petitioner was covered within "Other Backward Category" under the "Sonar" caste and an affidavit and salary slip had been submitted—Head of the Panchayat in the village Aundi Post Chilkahr, Balia, Uttar Pradesh issued a caste certificate in the Central Government format by the Tehsildar, Rasda, balia, Uttar Pradesh to the effect that he belonged to "Sonar" caste which is covered in the Other Backward Category—This certificate submitted by the petitioner on the 5th of November, 2011 with the office of respondent no.5—In the medical examination which was conducted on 15th November, 2011, the petitioner was declared medically fit and he was informed that he would finally receive his appointment letter—Despite all these directives, nothing was done for a period of five months—After passage of five months, by a letter dated 5th March, 2012 sent by respondent no.5, the petitioner was informed that for the reasons that the OBC certificate dated 15th October, 2011 had been issued from District Balia (Uttar Pradesh) whereas his earlier certificate had been issued from Jharkhand State, he was required to give an explanation for submitting the OBC certificate from two States—Petitioner was also required to provide domicile certificate from concerned authorities—Petitioner obtained a domicile certificate dated 23rd April, 2012 by the office of the Deputy District Officer Ballia and submitted the same to respondent no.4—In response to the report dated 5th June, 2012, was informed vide letter dated 19th July, 2012 that the matter was still under consideration—Finally a communication dated 7th August, 2012 was issued by respondent no.5 informing the petitioner that his candidature was being cancelled on the ground that despite opportunities, he had not produced the

Other Backward Category/Domicile certificate from his home town—Hence, the present Writ Petition. Held—Both the certificate which have been produced by the petitioners and furnished to the respondents were genuine—Both certificates affirm the petitioner's claim that he belongs to the "Sonar" sub-caste which fell under the category of Other Backward Class—It is an admitted position before us that the petitioner's father Om Prakash Prasad is employed as Head Constable (Driver) by the Central Reserve Police Force under the OBC category—This is a material factor which was within the knowledge of the respondents—It was brought to the notice of the respondents—Yet they have chosen to deliberately overlook the same—Therefore, so far as the claim of the petitioner to the effect that he was covered under the OBC category is concerned, the same could not have been doubted—Petitioner cannot be denied employment at this stage on the specious ground that the certificate was not in the prescribed format or the certificates were submitted belatedly—Grave and unwarranted injustice has been done to the petitioner—He has been made to run from pillar to post without any fault on his part despite the admitted factual position especially with regard to the caste of his father and the fact that his father was recruited under the Other Backward category and continues to be so even on date—Petitioner's certificates were also unfairly doubted—Respondents also unreasonably sat over the matter for several days—Writ petition is allowed.

It is apparent from the above that the both the certificates which have been produced by the petitioners and furnished to the respondents were genuine. Both certificates affirm the petitioner's claim that he belongs to the 'Sonar' sub-caste which fell under the category of Other Backward Class. We may notice yet another description in the instant case. It is an admitted position before us that the petitioner's father

Om Prakash Prasad is employed as Head Constable (Driver) by the Central Reserve Police Force under the OBC category. This is a material factor which was within the knowledge of the respondents. It was brought to the notice of the respondents. Yet they have chosen to deliberately overlook the same. This was a material factor. Therefore, so far as the claim of the petitioner to the effect that he was covered under the OBC category is concerned, the same could not have been doubted. Where is the occasion to raise the objections which the respondents have raised one after another in respect of this petitioner? **(Para 16)**

In the facts and circumstances, certainly the petitioner cannot be denied employment at this stage on the specious ground that the certificate was not in the prescribed format or the certificates submitted belatedly. **(Para 17)**

In the given facts and circumstances, we feel that grave and unwarranted injustice has been done to the petitioner. He has been made to run from pillar to post without any fault on his part despite the admitted factual position especially with regard to the caste of his father and the fact that his father was recruited under the Other Backward category and continues to be so even on date. The petitioner's certificates were also unfairly doubted. The respondents also unreasonably sat over the matter for several days.

In view of the above, we direct as follows:

(i) the order dated 7th August, 2012 is hereby held to be illegal and is set aside and quashed.

(ii) the respondents are directed to forthwith issue an offer of appointment to the petitioner to the post of Head Constable (Ministerial) for which he was selected and has cleared all tests.

(iii) In the facts and circumstances, the petitioner will be deemed to have been appointed on the date when his batchmates were appointed and selected, with notional

benefits of seniority and salary fixation at the appropriate levels.

(iv) the respondents shall compute the salary of the petitioner on the date he joins service granting him all financial benefits to which he would be entitled at par with his batchmates.

(v) the respondents shall pass appropriate order of this effect within two weeks from today.

(vi) The petitioner shall be entitled to costs of the present litigation which are quantified at Rs.30,000/- which shall be paid to the petitioner within four weeks from today.

This writ petition is allowed in the above terms.

Dasti to parties. **(Para 18)**

Important Issue Involved: Appointment to the post of Head Constable (Ministerial) as a OBC candidate, belonging to the caste "Sonar"—Both the certificates which have been produced by the petitioners and furnished to the respondents were genuine—Both certificates affirm the petitioner's claim that he belongs to the "Sonar" sub-caste which fell under the category of Other Backward Class—It is an admitted position before us that the petitioner's father Om Prakash Prasad is employed as Head Constable (Driver) by the Central Reserve Police Force under the OBC category—This is a material factor which was within the knowledge of the respondents.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Ms. Rekha Palli and Ms. Amrita Prakash, Advocates.

FOR THE RESPONDENTS : Mr. Ankur Chhibber, Advocates.

RESULT: Appeal dismissed.

GITA MITTAL, J. (Oral)

1. Pursuant to the advertisement issued on 6th October, 2010 for the post of Assistant Sub-Inspectors (Stenographers) and Head Constable (Ministerial) in the Central Reserve Police Force, the petitioner had applied for the post of Head Constable (Ministerial) as a OBC candidate, belonging to the caste 'Sonar'.

2. The petitioner contends that his application was made to respondent no.4 at Neemuch, Madhya Pradesh and was accompanied with all relevant documents. The petitioner has submitted that the documents were checked by the respondents on 12th March, 2011 as well as his physical measurement was verified. He was thereafter issued an information slip requiring him to appear for the written examination held on 10th July, 2011. It is at this stage when the respondents made an endorsement that the OBC certificate furnished by the petitioner was not in the prescribed format. The petitioner successfully undertook the written examination on 13th August, 2011 and was required to appear for the 2nd phase tests, i.e., typing speed/shorthand test on the 27th of September, 2011.

3. Having successfully cleared the same, the petitioner was required to appear for the interview on 3rd October, 2011 where he again produced his caste certificate dated 28th May, 2011 issued from the office of the Deputy Commissioner, East Singhbhum, Jamshedpur, Jharkhand.

This certificate was rejected by the respondents on the ground that his caste certificate was not in the prescribed format and the petitioner was told to get another caste certificate within a week.

4. The petitioner promptly approached the District Magistrate of East Singhum, Jamshedpur on 7th October, 2011 with an application enclosing all relevant documents as well as affidavit requesting for early issuance of a caste certificate as per the Central Government format. Unfortunately, the Circle Officer passed an order dated 8th October, 2011 arbitrarily declining/refusing to issue a certificate to the petitioner on the ground that his family's land was not recorded in the Government record and therefore he could not be issued a domicile certificate. Perusal of this document dated 8th October, 2011 shows that the document endorses the fact that the petitioner was covered within 'Other Backward Category' under the 'Sonar' caste and an affidavit and salary slip had

been submitted. Having failed to obtain the certificate in prescribed format, the petitioner on 15th October, 2011 approached the Head of the Panchayat in the village Aundi Post Chilkahr, Balia, Uttar Pradesh where he was issued a caste certificate in the Central Government format by the Tehsildar, Rasda, balia, Uttar Pradesh to the effect that he belonged to 'Sonar' caste was is covered in the Other Backward Category. This certificate could thereafter be submitted by the petitioner only on the 5th of November, 2011 with the office of respondent no.5.

5. The petitioner submitted this certificate of the office of the Deputy Inspector (Recruitment) at New Delhi who by a signal dated 28th October, 2011 directed the Deputy Inspector General Police (Medical) Composite Hospital, Neemuch to the effect that the petitioner's candidature for the applied post may be accepted and called upon the Deputy Inspector General to conduct the petitioner's medical examination.

6. In the medical examination which was conducted on 15th November, 2011, the petitioner was declared medically fit and he was informed that he would finally receive his appointment letter. Despite all these directives, nothing was done for a period of five months.

7. Finally, after passage of five months, by a letter dated 5th March, 2012 sent by respondent no.5, the petitioner was informed that for the reasons that the OBC certificate dated 15th October, 2011 had been issued from District Balia (Uttar Pradesh) whereas his earlier certificate had been issued from Jharkhand State, he was required to give an explanation for submitting the OBC certificate from two states. The petitioner was also required to provide domicile certificate from concerned authorities.

8. The petitioner therefore returned to the District Balia (Uttar Pradesh) on account of his family's origin being located in the District Balia (U.P.) and his maternal family was also residing at District Balia, he was issued a domicile certificate dated 23rd April, 2012 by the office of the Deputy District Officer. The petitioner submitted this with the representation dated 7th May, 2012 to respondent no.4. The petitioner has submitted that an inquiry has been made by the respondents from the concerned Tehsildar regarding the petitioner's caste and domicile certificate issued from District Balia (Uttar Pradesh) and the same was found to be genuine. We find that this averment of the petitioner has not been disputed in the counter affidavit.

9. So far as the appointment of the petitioner was concerned, nothing moved. In response to the report dated 5th June, 2012, was informed vide letter dated 19th July, 2012 that the matter was still under consideration. Finally a communication dated 7th August, 2012 was issued by respondent no.5 informing the petitioner that his candidature was being cancelled on the ground that despite opportunities, he had not produced the Other Backward Category/Domicile certificate from his home town.

10. The petitioner was thus compelled to approach this court as well as because his further representation dated 27th September, 2012 received no response at all.

11. The present writ petition is pending in this court since 3rd October, 2012 and has been opposed by the respondents who have filed their counter affidavit repudiating the same.

12. During the hearing of the matter on 22nd April, 2013, given the doubt which was created before us with regard to the same issue that the petitioner possessed the certificate from two States, we were persuaded to pass the following order:

> "1. On a consideration of the matter, we are of the view that the respondents should verify the authenticity of the certificate dated 28th May, 2011 issued by the Deputy Commissioner, East Singhbhum, Jamshedpur (at page 100) certifying that the petitioner falls under the backward category as well as the authenticity of the certificate dated 15th October, 2011 issued by the Officer of the Tehsil Rasada, District-Balia, Uttar Pradesh (at page 53) also certifying that the petitioner belongs to the "Sonar" sub-Caste which was under the other backward category.
>
> 2. We may note that the respondents admit that the petitioner's father, Sh. Om Prakash, Head Constable (CRPF personnel) also belongs to the OBC category. The respondents shall also verify as to whether the "Sonar" sub-Caste continues to belong to the Other Backward Category.
>
> 3. The verification shall be done within 4 weeks from today and placed before this Court before next date of hearing. Dasti.
>
> 4. List on 23rd May, 2013."

13. The respondents have today placed a communication dated Nil May, 2013 pursuant to the verification conducted by them in respect of the OBC caste certificate dated 24th October, 2007 issued by the Anumandal Padakhikari, Dhalbhum, Jamshedpur (Jharkhand) as well as the OBC caste certificate dated 15th October, 2011 issued by the Tehsildar, Rasda, District, Balia (U.P.) which had been produced by the petitioner before the respondents. The same is taken on record. As per the communication dated Nil, May, 2013, it is reported as follows:

> "3. The Anumandal Padadhikari, Dhalbhum Jamshedpur (Jharkhand) vide letter No.480 dated 07/05/2013 has intimated that caste certificate No.535/06-07 dated 24/10/2007 of Shri Neeraj Kumar Prasad S/O Shri Om Prakash Prasad is entered in their caste certificate issue registere and it is correct.
>
> 4. The Tehsildar, Rasda, Distt, Balia (U.P.) vide letter No.140/ P.P.L. dated 13/05/2013 has intimated that as per their record OBC caste certificate of "Sonar" Caste No.63311317122 dated 15/10/2011 has been issued to Shri Neeraj Kumar Prasad S/O Shri Om Prakash by this office, At present "Sonar" caste comes under OBC category.
>
> 5. Further, the DIGP (Law) Dte Genl. vide signal No.J.II-254/ 2012-LWP-I dated 09/05/2013 directed to this GC to verify whether the "SONAR" sub caste continues to belong to OBC.
>
> xxx xxx xxx"

14. So far as the submission that the certificate was not in the prescribed format is concerned, this objection was also admittedly removed by the petitioner when he produced the certificate dated 15th October, 2011 issued by the Tehsildar, Rasda, District Balia (Uttar Pradesh).

15. It is submitted before us during the course of arguments that the certificate has been submitted by the petitioner beyond the last date. The petitioner has explained the circumstances in which the delay was occasioned. The explanation of the petitioner has not been controverted. We also find the explanation genuine and certainly beyond the control of the petitioner. There is no delay which is attributable to the petitioner in submission of the documents.

16. It is apparent from the above that the both the certificates

which have been produced by the petitioners and furnished to the respondents were genuine. Both certificates affirm the petitioner's claim that he belongs to the 'Sonar' sub-caste which fell under the category of Other Backward Class. We may notice yet another description in the instant case. It is an admitted position before us that the petitioner's father Om Prakash Prasad is employed as Head Constable (Driver) by the Central Reserve Police Force under the OBC category. This is a material factor which was within the knowledge of the respondents. It was brought to the notice of the respondents. Yet they have chosen to deliberately overlook the same. This was a material factor. Therefore, so far as the claim of the petitioner to the effect that he was covered under the OBC category is concerned, the same could not have been doubted. Where is the occasion to raise the objections which the respondents have raised one after another in respect of this petitioner?

17. In the facts and circumstances, certainly the petitioner cannot be denied employment at this stage on the specious ground that the certificate was not in the prescribed format or the certificates submitted belatedly.

18. In the given facts and circumstances, we feel that grave and unwarranted injustice has been done to the petitioner. He has been made to run from pillar to post without any fault on his part despite the admitted factual position especially with regard to the caste of his father and the fact that his father was recruited under the Other Backward category and continues to be so even on date. The petitioner's certificates were also unfairly doubted. The respondents also unreasonably sat over the matter for several days.

In view of the above, we direct as follows:

(i) the order dated 7th August, 2012 is hereby held to be illegal and is set aside and quashed.

(ii) the respondents are directed to forthwith issue an offer of appointment to the petitioner to the post of Head Constable (Ministerial) for which he was selected and has cleared all tests.

(iii) In the facts and circumstances, the petitioner will be deemed to have been appointed on the date when his batchmates were appointed and selected, with notional benefits of seniority and salary fixation at the appropriate levels.

(iv) the respondents shall compute the salary of the petitioner on the date he joins service granting him all financial benefits to which he would be entitled at par with his batchmates.

(v) the respondents shall pass appropriate order of this effect within two weeks from today.

(vi) The petitioner shall be entitled to costs of the present litigation which are quantified at Rs.30,000/- which shall be paid to the petitioner within four weeks from today.

This writ petition is allowed in the above terms.

Dasti to parties.

ILR (2013) III DELHI 2045
FAO

SUMAN SINGH ....APPELLANT

VERSUS

SANJAY SINGH ....RESPONDENT

(PRADEEP NANDRAJOG & V. KAMESHWAR RAO, JJ.)

FAO NO. : 108/2013 & 109/2013 DATE OF DECISION: 23.05.2013

Hindu Marriage Act, 1957—Section 9, 13(1)(ia): Petition filed by husband for dissolution of marriage on grounds of cruelty. On same day petition filed by wife for restitution of conjugal rights. Vide common judgment, petition for dissolution of marriage allowed and petition for restitution of conjugal rights dismissed. Appeal filed by wife-Held—Cruelty may be mental of physical. In physical cruelty there can be tangible and direct evidence, but in case of mental cruelty there is no direct evidence. The concept of proof beyond shadow of doubt is to be applied in criminal trials no to civil matters and certainly not to matters of such delicate personal relationships as those of husband and wife. First, enquiry must begin as to the nature of cruel treatment; second, the impact of such treatment in the mind of the spouse, Ultimately it is a matter of interpretation to be drawn by taking into account the nature of conduct and is effect on the complaining spouse. Conduct has to be considered in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down precise definition or to give exhaustive description of the circumstances which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extend due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, entitling the complaining spouse to secure divorce. Filing numerous police complaints against husband and his family members with the police and in husband's office that they used to demand dowry and treated her with cruelty when she failed to fulfill their demands and that husband was having illicit relations with his colleague amounts to mental cruelty thereby entitling him to decree of divorce u/s 13(1)(ia). Trial Court's order affirmed.

A matrimonial dispute is not just a legal dispute, but more importantly it is a family problem and a social concern. Matrimonial disputes should not be viewed from the glasses of legal technicalities. They should be appreciated at the human level of being a conflict between a husband and wife. Such issues should be dealt with sensitively rather than mechanically. Thus, a pragmatic approach and not a pedantic one is required while dealing with matrimonial disputes.

(Para 15)

While dealing with the concept of 'cruelty', in the decision reported as AIR 2005 SC 534 **A.Jayachandra v. Aneel Kaur,** the Supreme Court observed as under:

> "The expression 'cruelty' has not been defined in the Hindu Marriage Act, 1955. The said expression has been used in relation to human conduct or human behavior. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. It may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger, The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live." **(Para 16)**

Cruelty need not be physical. If from the conduct of the spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare, then such conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. **(Para 17)**

Cruelty may be mental or physical. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party. If the cruelty is physical, the Court will have no problem in determining it. It is a question of fact and degree. In physical cruelty, there can be tangible and direct evidence, but in case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are

brought out in evidence. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those, of husband and wife. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per-se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. **(Para 18)**

To constitute cruelty, the conduct complained of should be 'grave and weighty' so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than *'ordinary wear and tear of married life'*. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure it as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, would not amount to cruelty. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular

case, keeping in view the physical and mental condition of the parties, their character and social status. A too technical and hypersensitive approach would be counter productive to the institution of marriage. Conduct has to be considered in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent, due to the conduct of the other spouse, that it would be impossible for them to live together without mental agony, torture or distress, entitling the complaining spouse to secure divorce. **(Para 19)**

Applying the ratio of law laid down by the Supreme Court in **Deepa's** case (supra), we have no hesitation in holding that by filing numerous false complaints against Sanjay and his family members with the police and in the office of Sanjay that Sanjay and his family members used to demand dowry from her and treated her with cruelty when she failed to fulfill their demands and that Sanjay was having an illicit relation with his colleague, Suman has caused 'mental cruelty' to Sanjay thereby entitling him to a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. **(Para 31)**

In view of above discussion, impugned judgment dated December 14, 2010 passed by the Principal Judge, Family Courts, Rohini, Delhi granting decree of divorce in favor of Sanjay and dismissing application for restitution of conjugal rights filed by Suman is affirmed. **(Para 32)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. Padmini Gupta, Advocate.

FOR THE RESPONDENT : Respondent in person.

CASES REFERRED TO:

1. *K. Srinivas Rao* vs. *D.A. Deepa* 2013 III AD (SC) 458.
2. *Surender Pal* vs. *Kanwaljeet Kaur* 151 (2008) DLT 341.
3. *A. Jayachandra* vs. *Aneel Kaur,* AIR 2005 SC 534.

RESULT: Appeal dismissed.

PRADEEP NANDRAJOG, J.

1. On February 26, 1999, respondent Sanjay and appellant Suman got happily married and the two were blessed with a daughter born on June 15, 2002 followed by another bundle of delight, another daughter born on February 10, 2006.

2. Unfortunately, relations soured with passage of time. Sanjay sought dissolution of the marriage alleging cruelty and Suman sought restitution of her conjugal rights.

3. Both Sanjay and Suman reached the Court on July 19, 2010. It appears both were aware of the action proposed to be taken by the other. Petition filed by Sanjay under Section 13(1)(ia) of the Hindu Marriage Act was filed on July 19, 2010, which was the date when Suman's application under Section 9 of the Hindu Marriage Act was also filed.

4. Whereas Suman alleged that within a few days of the marriage Sanjay's behaviour changed because he was aggrieved of insufficient dowry brought by her notwithstanding her family members having spent lavishly when the two got married; but she bore him. His behaviour turned rude and he started picking up quarrel on trivial matters and additionally he would even turn physical, but she continued to suffer to maintain the family bond but realized that Sanjay have developed intimacy with another woman and had left the matrimonial house compelling her to seek restitution of her conjugal rights. Sanjay pleaded that the marriage was a dowry-less marriage and during 10 years thereafter he was regularly harassed and tortured by Suman who degraded and insulted him at the drop of the hat and even would misbehave with his parents. To save the marriage he left his parents and since January 2005 started living separately from his parents. But Suman's attitude did not change. In the year 2006 he purchased Flat No.91, Pocket IV, Sector2, Rohini in Suman's name hoping that she would improve. But she did not. She even started visiting his office and created ugly scenes by abusing him. She not only threatened

but lodged false complaints with the police alleging false facts against him and his parents. She repeatedly threatened to commit suicide and leave a note recording false facts to teach him and his parents a lesson.

5. Sanjay's written statement to Suman's petition is his version pleaded in the petition filed by him seeking dissolution of the marriage; of course he denied the insinuations against him, and as regards Suman, she denied the insinuation against her but pleaded that theirs was a love marriage solemnized on March 22, 1997 without telling the parents and that subsequently, in front of her parents she and Sanjay performed the rituals of marriage on February 26, 1999. For 3 years after the marriage she and Sanjay lived with a friend and shifted to the house of Sanjay's parents in May 2002 but since they never approved of the marriage she and Sanjay shifted to a residential accommodation before Sanjay purchased a flat in her name in Rohini part sale consideration whereof was paid by her mother; but would continue to harass and misbehave with her. He developed intimate relations with a lady named Jyoti and therefore wanted Suman to divorce her and that Sanjay was pressurizing her mother to transfer ownership of her property situated in Sultanpuri in his favour.

6. In HMA No.527/2010 filed by Suman, following issues were settled:

> "1. Whether the Petitioner is entitled to the restitution of conjugal rights as prayed? OPP
>
> 2. Relief."

7. In HMA No.685/2010 filed by Sanjay, following issues were settled:

> "1. Whether after solemnization of marriage, the Respondent has treated the Petitioner with cruelty? OPP
>
> 2. Whether the Petitioner is entitled to the decree of divorce as prayed? OPP
>
> 3. Relief."

8. Evidence was led by the parties in HMA No.685/2010 filed by Sanjay. In support of his case, Sanjay examined himself as PW-1. In his examination-in-chief, Sanjay PW-1 deposed on the lines of averments made in the divorce petition filed by him. He was cross-examined, and

being relevant, a part of the cross-examination is being noted as under:

> "I was married with the respondent about 13 years back but I do not remember the date. Our marriage was love marriage. My parents were not agree for the marriage but the parents of the respondent were agreed for the marriage....After marriage I resided with the respondent at rental accommodation at P2/ 401-402, Sultanpuri, Delhi. Presently, I am posted at Directorate of Family Welfare, Metcalfe House, Delhi, as UDC....I always resided with the respondent at rental accommodation. For two years after the marriage, we resided at rented accommodation but I do not remember the exact period and thereafter. I along with the respondent shifted to my parental home. I along with the respondent resided at my parental home for about 6 years...Presently, I am residing separately from the respondents since 1 + years...I know Ms. Jyoti Sharma as she was earlier my colleague. Ms. Jyoti Sharma never met me after the year 2007. Again said, she met me 2-3 times in the year 2007 in connection with official work. It is wrong to suggest that I used to meet Ms. Jyoti Sharma after the year 2007....It is wrong to suggest that my father in drunken condition has thrown out the respondent after quarrelling with the respondent. It is correct that after throwing out the respondent from the matrimonial home, after some time we lived together in a rented accommodation.... It is wrong to suggest that I have not purchased any flat in the name of the respondent in the year 2006. It is wrong to suggest that I had purchased the said flat in the name of the respondent in the year 2005 with the contribution of money given by the mother of the respondent. I used to come home after 12 midnight. I used to come home between 9 PM to 10 PM. It is wrong to suggest that I used to come home after 12 midnight. (Vol. I used to come late due to the nature of work assigned to me by the department as I was appointed as a caretaker). It is wrong to suggest that I used to spend time with one Jyoti after close of working hours at 5.00 PM...I have no liability except the petitioner and my two minor children... It is wrong to suggest that we are residing separately since January 2007 or that there is no cohabitation since September 2008. It is wrong to suggest that I am deposing falsely."

9. Suman examined herself as RW-1 and deposed in harmony with the averments made in the written statement filed by her to the petition seeking divorce filed by Sanjay. She proved a complaint, Ex.RW-1/1 dated July 28, 2010, submitted by her to Deputy Commissioner of Police, Outer District, Delhi, which complaint records that Sanjay and his father used to harass Suman for dowry. She was cross-examined and being relevant, a part of the cross-examination is being noted as under:

> "It is correct that I have filed a petition against the respondent (petitioner in the HMA No.685/10). It is also correct that I have also filed a complaint against the respondent (petitioner in the HMA No.685/10) and his other family members under Section 498A/406 IPC. The complaint was filed by me in August, 2010 but the complaint was made earlier to DCP, Outer. It is correct that the petition filed by me under Domestic Violence Act has been dismissed from the court of Ms. Rachna Tiwari Lakhanpal, the ld. M.M., Delhi. The respondent (petitioner in the HMA No. 685/10) has committed cruelty towards me in the year 1999 at the time of Raksha Bandhan. I have not made any complaint in the year 1999. I have also not made any complaint since 1999 to 2010. It is correct that all the complaints have been made by me after August, 2010. I have not mentioned any incident in my affidavit Ex.PW1/A.
>
> I am graduate. It is correct that I have not mentioned in my affidavits Ex.PW1/A regarding demand of dowry and beatings and cruelty by the respondent (petitioner in the HMA No.685/10) and his other family members. It is correct that I have mentioned in my domestic violence petition that I had purchased the flat bearing No.91, Second Floor, LIG Flat, Pocket-4, Sector-2, Rohini, Delhi after selling my jewellery. I have not filed any petition against the respondent (petitioner in the HMA No. 685/10) in respect of demand of dowry as well as cruelties during the period 1999 to 2010. It is correct that I have no matrimonial relations with respondent (petitioner in the HMA No. 685/10) for the last about 3 and a half years...I have not told about my cruelty as well as demand of dowry to my mother and other family members...It is correct that I made so many complaints against my husband. It is correct that all the complaints have been made by me after August, 2010 as I came to know about

> Ms. Jyoti Sharma. It is wrong to suggest that the respondent (petitioner in the HMA No. 685/10) is not having any relations with Ms. Jyoti Sharma....I have seen Jyoti Sharma with the respondent (petitioner in the HMA No. 685/10) at C-1, 368, Third Floor, Muskan Apartment, Sector-17, Rohini, Delhi. (Vol. The said property is in the name of Jyoti Sharma and mentioned as Jyoti Sharma, W/o Sanjay Sharma). I have not filed any documents regarding the said property as I have approached the concerned authority through RTI but still, I have not received any information. It is wrong to suggest that the respondent is not having illicit relations with Ms. Jyoti Sharma.
>
> It is correct that the complaints dated 30.06.2010, 01.07.2011, 18.05.2011, 21.07.2011, 25.10.2011, 01.06.2011, 28.10.2010, 13.08.2010 and 28.07.2010 have been filed by me and the same are Ex.RW-1/PX (Colly). It is correct that I had a few differences with the respondent like not giving me quality time....It is correct that I am also filed a petition under Domestic Violence Act and the same was also dismissed by Ms. Rachna Tiwari Lakhanpal, the ld. M.M. I did not file any appeal against the said order of ld. MM since we have got our house property back. After the marriage, my father-in-law and two brothers-in-law raised demands of dowry. I never lodged any complaint against the said in-laws with police or any other authority.
>
> It is correct that I have stated in my affidavit that my husband had illicit relation with one Ms. Jyoti Sharma his colleague. It is also correct that I want to stay with my husband despite his having illicit relationship with the said Jyoti Sharma. It is correct that I have not cohabited with my husband for last 4 years. I made several efforts to stay with my husband. I even suggested that he may continue with his illicit relationship but stay in the house with us. It is wrong to suggest that I am deposing falsely." **(Emphasis Supplied)**

10. By a common judgment dated December 14, 2012, the learned Additional Principal Judge, Family Courts, Rohini, Delhi has allowed petition seeking dissolution of the marriage filed by Sanjay being HMA No.685/2010, and has dismissed HMA No.527/2010 re-numbered as HMA No.273/2011 filed by Suman. The learned Judge has held that Sanjay has

successfully established cruelty as pleaded by him at the hands of Suman.

11. In so concluding, it has been held by the learned Trial Judge that:

(i) In spite of being cross-examined on material points no contradictions to render unreliable Sanjay's testimony were brought out;

(ii) Sanjay was not found wavering on material points;

(iii) On may material points Suman's lawyer had not cross-examined Sanjay i.e. had not even dared to challenge Sanjay's sworn testimony;

(iv) Complaints lodged by Suman alleging dowry harassment at the hands of Sanjay and his parents were ex-facie false;

(v) Suman had failed good to establish Sanjay having illicit relationship with another lady and said allegations would cause immense mental pain and agony;

(vi) Sanjay's testimony that whenever he visited Suman's parental house he was treated badly could be rebutted by Suman by examining her family members, whom she did not requiring an adverse inference to be drawn against her.

12. It would be most apposite to note the following portion of the impugned judgment passed by the learned Trial Judge:

"39. The failure of the Respondent/her counsel, in not putting forward her case in cross-examination of the Petitioner/husband and failure to give suggestions in rebuttal of his deposition constitute and are deemed, to be admissions on her part. The Petitioner, has thus, clearly brought over the record that the Respondent started harassing and torturing him just a few days after the marriage. She pressurized him to get separated from his family members. She was brought to the matrimonial home by the parents of the Petitioner but due to her nature/conduct, she (with the Petitioner), was asked to leave the house, after staying for a few days. The Petitioner has, also, brought over the record that the Respondent did not like him talking to his parents and other family members. She did not like him to sit with them even

when they were unwell. She never wanted him to help them financially, to whatever little extent he could.

45. It is a general rule that one who asserts a fact or claim has to prove it. The burden of proof is on him, who asserts it and not on him who denies. [Reliance placed on 1 (2005) DMC 397 (DB)]. The nature of proof required in the matrimonial matters is different. The facts alleged by a spouse about their private intimate life are not supposed to be known to any other person and no corroboration can be expected in such case. To seek a corroboration to a fact alleged by a spouse to a marriage regarding the healthy or unhealthy character of their intimate relation which belongs to the sacred and secrets precincts of marital life, and which are known only to the spouses and which are not supposed to be known to any other living soul on the surface of the planet, would amount to shutting one's eye towards the facts of life and reality. Corroboration, therefore, to the version of either spouse can hardly be expected to come from any other independent source. Such matters are always decided on preponderance of probabilities. (Reliance placed on A versus B-1985 Matrimonial Law Reporter 326).

46. It is, also, well settled law that where accusations and allegations have been leveled by the parties against each other, the court has to consider the context in which such accusations etc. have been made. the court, also, has to keep in mind the physical and mental condition of the parties, as well as their social status and has to consider the impact of the personalities and conduct of one spouse on the mind of the other, weighing all the incidents and quarrels between the spouses from that point of view. The conduct of a spouse has to be examined in the light of the other spouse's capacity for endurance and extent to which that capacity is known to the spouse. (Reliance placed on 151 (2008) DLT 341-**Surender Pal vs Kanwaljeet Kaur**).

47. The parties are well-educated and come from middle class section of the society...

48. The values that middle class section of our Indian society holds, are well known. The in-laws and other relations expect due regards from the newly-wed wife. In fact it is expected that

she gets-up early, prepares breakfast, lunch and dinner for the entire family herself or with the assistance of other family members. It is, also, expected that such a newly-wed greets the guests and visitors to the house respectfully. It is, also, expected that she serves lunch or dinner to them and if it does not happen, they feel disgraced in the presence of others. If the newly-wed does not behave in such manner as expected from her, they are bound to suffer mental pain and agony. The Respondent, in the instant case, remained indifferent towards the feelings of the Petitioner's parents and other family members. She did not care for any visitor (s), any guest (s) or any relation (s) of the Petitioner or even his friend (s). The Petitioner, therefore, would have suffered mental pain and agony, due to such acts of omission and commission on the part of the Respondent." **(Emphasis Supplied)**

13. Aggrieved by the impugned judgment dated December 14, 2012 passed by the Trial Judge granting decree of divorce to Sanjay and dismissing HMA No.527/2010 filed by Suman seeking restitution of conjugal rights, Suman has filed the above captioned appeals.

14. Section 13(1)(ia) of the Hindu Marriage Act, 1955 prescribes that any marriage, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party 'has, after the solemnization of the marriage, treated the petitioner with cruelty'.

15. A matrimonial dispute is not just a legal dispute, but more importantly it is a family problem and a social concern. Matrimonial disputes should not be viewed from the glasses of legal technicalities. They should be appreciated at the human level of being a conflict between a husband and wife. Such issues should be dealt with sensitively rather than mechanically. Thus, a pragmatic approach and not a pedantic one is required while dealing with matrimonial disputes.

16. While dealing with the concept of 'cruelty', in the decision reported as AIR 2005 SC 534 **A.Jayachandra v. Aneel Kaur,** the Supreme Court observed as under:

"The expression 'cruelty' has not been defined in the Hindu Marriage Act, 1955. The said expression has been used in relation

to human conduct or human behavior. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. It may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger, The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live."

17. Cruelty need not be physical. If from the conduct of the spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare, then such conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case.

18. Cruelty may be mental or physical. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party. If the cruelty is physical, the Court will have no problem in determining it. It is a question of fact and degree. In physical cruelty, there can be tangible and direct evidence, but in case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those, of husband and wife. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per-se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

19. To constitute cruelty, the conduct complained of should be 'grave and weighty' so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than *'ordinary wear and tear of married life'*. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure it as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, would not amount to cruelty. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case, keeping in view the physical and mental condition of the parties, their character and social status. A too technical and hypersensitive approach would be counter productive to the institution of marriage. Conduct has to be considered in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent, due to the conduct of the other spouse, that it would be impossible for them to live together without mental agony, torture or distress, entitling the complaining spouse to secure divorce.

20. In the backdrop of above legal position, we proceed to examine the present case.

21. In the instant case, it is the claim of Sanjay that Suman treated him with cruelty after their marriage was solemnized. On the other hand, Suman claims that it was Sanjay who treated her with cruelty and that she is ready to forgive Sanjay and lead a matrimonial life with him.

22. As already noted hereinabove, the Trial Judge has accepted the case set up by Sanjay that Suman had treated him with cruelty after

solemnization of their marriage. The mainstay of the decision of the Trial Judge is that the failure of counsel appearing for Suman to put forward the case of Suman to Sanjay in his cross-examination and giving suggestions to him regarding number of the allegations leveled against her by him in his examination-in-chief goes to show that Suman had *'admitted'* as correct the allegations of cruelty leveled against her by Sanjay.

23. The aforesaid approach adopted by the Trial Judge is too narrow and pedantic. It is true that the cross-examination of Sanjay by the counsel acting for Suman is most unsatisfactory because with respect to numerous incidents deposed to by Sanjay the counsel has not even bothered to even suggest that the same are untrue. But, human relations have not to be severed due to level of advocacy falling below acceptable standards. In an adversarial litigation, which we follow in India, if a Judge were to find that a counsel's standard has not reached the desired level and the litigation ceases to be adversarial, the Judge must step in. We often use the phrase that a Judge is a match referee. We do not use the phrase that the Judge is an umpire. Now, an umpire has a static position as in the game of cricket. But a referee, as is to be found in a game of football, runs up and down in the field keeping a hawk's eye on the football to ensure that nobody fouls.

24. A closer look at the impugned judgment would reveal that the learned Trial Judge had adopted different yardsticks while appreciating the evidence led by the parties. In case of Sanjay, his sole testimony has been held to be sufficient by the leaned Trial Judge on the ground that *'to seek a corroboration to a fact alleged by a spouse to a marriage regarding the healthy or unhealthy character of their intimate relation which belongs to the sacred and secrets precincts of marital life, and which are known only to the spouses and which are not supposed to be known to any other living soul on the surface of the planet, would amount to shutting one's eye towards the facts of life and reality'*. On the other hand, an adverse inference has been drawn against Suman for not examining her family members to disprove allegations leveled by Sanjay that he was not treated properly by family members of Suman whenever he went to her parental house. One of the allegations leveled by Suman against Sanjay was that the family members of Sanjay used to misbehave with her and instigate Sanjay to treat her with cruelty since they did not approve of their marriage. The learned Judge has not drawn an adverse inference against Sanjay who has likewise not produced his

parents to rebut the same.

25. As observed by us in the preceding paras, a pragmatic approach and not a pedantic one is required while dealing with matrimonial disputes. The Trial Judge has dealt with the evidence led by the parties in a very superficial manner.

26. We take upon ourselves the task of examining the evidence led by the parties in order to arrive at a just decision in the present case.

27. A careful analysis of the evidence led by the parties brings out the following: Sanjay and Suman had a clandestine love affair because both knew that their family members would be against their relationship. They probably solemnized a secret marriage and two years thereafter on February 26, 1999, with the blessings of Suman's parents the two got officially married, but without any approval from parents of Sanjay. For about 2 years after their marriage, Sanjay and Suman stayed in a rented accommodation. Thereafter they shifted to the parental house of Sanjay. On June 15, 2002 Sanjay and Suman were blessed with a baby girl Shriya. For the next 5 years Sanjay and Suman stayed at the parental house of Sanjay, during which period they were blessed with another baby girl, Harleen on February 10, 2006. In the year 2007 Sanjay and Suman along with the two daughters shifted to a rented accommodation and finally to a house purchased in Suman's name by funds partly made available by Sanjay and partly by Suman's parents.

28. The city of Delhi is a costly place to live. Family budgeting and especially when a child is born is becoming a herculean task even for the financially well-off and even they come under financial stress and the same burdens and causes stress on the matrimonial bond.

29. From the fact that Sanjay and Suman, as admitted by Suman herself, got secretly married on March 22, 1997 without informing their parents and for 2 years hid the marriage till when the two officially got married on February 26, 1999; but only in presence of her parents, we have sufficient proof that the marriage was a dowry-less marriage and Sanjay's parents never reconciled to their son marrying a girl not of their choice. Thus, ex-facie, Suman's allegations that her in-laws harassed her for dowry from the inception of the marriage is incorrect. Admittedly, for another three years the couple lived with a friend of Sanjay. They shifted to the house of Sanjay's father, where Sanjay's parents resided

in May, 2002 and the reason appears to be the fact that Suman was in the family way. Shriya was born on June 15, 2002. It appears that by said time the anger of Sanjay's parents had vanished. The couple resided in the house of Sanjay's parents for a few years, and a second child was born, but it is apparent that things were not moving in the right directions evidenced by the fact that firstly the couple shifted to a residential accommodation and then to a flat purchased in Suman's name by finances provided partly by Sanjay and partly by Suman's mother. It is apparent that between the young couple, they were managing well. But, two more lives meant two more mouths to be fed and it appears that the economic pressures of family budgeting started taking their toll. Whereas Suman is a housewife and Sanjay works, and we are given to understand earns about Rs. 45,000/- per month, Suman started suspecting Sanjay's fidelity towards her. She probably could not understand that in a workplace where even women work, her husband was bound to be speaking to his female colleagues. The young couple could not sort out their affairs and Suman was ill-advised to lodge false complaints alleging dowry harassments not only by Sanjay but even his father. We cannot overlook the fact that Sanjay had contributed for a flat to be purchased in the name of Suman. The pressure-cooker seems to have exploded in the year 2009. Sanjay had deposed of Suman coming to his office and creating a scene. Complaints have been made by Suman to the police contents whereof which she has not been able to prove as true; and on the contrary from the admitted facts noted above any reasonable person would draw the conclusion that the complaints alleging dowry harassment from the inception not only by Sanjay but even his parents are ex-facie false. Admittedly Sanjay's parents did not bless the couple when they officially got married on February 26, 1999. If they were not present at the scene, where is the question of they demanding dowry from the very inception of the marriage. The fact that Sanjay and Suman resided with Sanjay's friend till the year 2002 is proof of the fact that both of them were persona-nongrata in the house of Sanjay's parents. Thus, there would be no question of a dowry demand being raised till said year. Admittedly, the two shifted to the house of Sanjay's parents when Suman was in the advanced stage of pregnancy. Within less than 3 weeks of the couple shifting to the house of Sanjay's parents, they were blessed with a baby girl. They shifted out of the house somewhere in the year 2007 and it is apparent that things were not too well. The only probable reason which one can fathom is that the dislike for Suman could not be bridged.

But the fact that Sanjay left the house of his parents is proof of the fact that he was ready to stand by Suman. The young couple along with their two daughters took a house on rent but probably found the rent to be a strain on their finances. It appears that the usual matrimonial discord which we find in a large number of houses in Delhi i.e. the difficulty faced to beat the inflation and manage the family budget started taking its toll. Suman's parents stepped in to provide some finances and some were provided by Sanjay to buy a flat in Suman's name. The fact that the flat was purchased in Suman's name tells us that her parents were wanting to secure their daughter when they provided part finances. But the fact that even Sanjay provided part finances and still allowed the flat to be purchased in Suman's name evidences that he had no motive to extract dowry. It was a desperate attempt of the young couple to not only acquire a property but get rid of the liability to pay monthly rent. All this budgeting must have taken a toll. Small skirmishes seems to have turned into ugly spats finally ending up with Suman accusing her husband of having developed illicit relations, probably for the reason Sanjay was reaching home late; and as regards him, the probable reason could be: the thought of returning to a comfortless home with a nagging wife waiting resulting in his spirits being more often depressed than excited and therefore the return to the house being late. The young couple appears to have been caught in a vicious circle of cause and effect. Suman's nagging led Sanjay to return home late and Sanjay's late returning to home in turn triggering further nagging and thereby compelling Sanjay to return home late and late and in turn the nagging becoming severe till it reached the uncomfortable level for Sanjay to tolerate any further when Suman started lodging false complaints with the police.

30. At this juncture, we note the decision of the Supreme Court reported as 2013 III AD (SC) 458 **K. Srinivas Rao v D.A. Deepa** in which decision, on the subject of making unfounded complaints to the police, and the same being treated as constituting mental cruelty, the Supreme Court observed as under :

> "14. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false

complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.

xxxxxxxx

22. We need to now see the effect of the above events. In our opinion, the first instance of mental cruelty is seen in the scurrilous, vulgar and defamatory statement made by the respondent-wife in her complaint dated 4/10/1999 addressed to the Superintendent of Police, Women Protection Cell. The statement that the mother of the appellant-husband asked her to sleep with his father is bound to anger him. It is his case that this humiliation of his parents caused great anguish to him. He and his family were traumatized by the false and indecent statement made in the complaint. His grievance appears to us to be justified. This complaint is a part of the record. It is a part of the pleadings. That this statement is false is evident from the evidence of the mother of the respondent-wife, which we have already quoted. This statement cannot be explained away by stating that it was made because the respondent-wife was anxious to go back to the appellant-husband. This is not the way to win the husband back. It is well settled that such statements cause mental cruelty. By sending this complaint the respondent-wife has caused mental cruelty to the appellant-husband.

23. Pursuant to this complaint, the police registered a case under Section 498-A of the IPC. The appellant-husband and his parents had to apply for anticipatory bail, which was granted to them. Later, the respondent-wife withdrew the complaint. Pursuant to the withdrawal, the police filed a closure report. Thereafter, the respondent-wife filed a protest petition. The trial court took cognizance of the case against the appellant-husband and his parents (CC No. 62/2002). What is pertinent to note is that the respondent-wife filed criminal appeal in the High Court challenging the acquittal of the appellant-husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence punishable under Section 498-A of the IPC. She filed criminal revision seeking enhancement of the punishment awarded to the appellant-husband for the offence

under Section 498-A of the IPC in the High Court which is still pending. When the criminal appeal filed by the appellant-husband challenging his conviction for the offence under Section 498-A of the IPC was allowed and he was acquitted, the respondent-wife filed criminal appeal in the High Court challenging the said acquittal. During this period respondent-wife and members of her family have also filed complaints in the High Court complaining about the appellant-husband so that he would be removed from the job. The conduct of the respondent-wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant-husband, in filing appeal questioning the acquittal of the appellant-husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. We have no manner of doubt that this conduct has caused mental cruelty to the appellant-husband.

24. In our opinion, the High Court wrongly held that because the appellant-husband and the respondent-wife did not stay together there is no question of the parties causing cruelty to each other. Staying together under the same roof is not a precondition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouse's life miserable. This is what has happened in this case.

28. In the ultimate analysis, we hold that the respondent-wife has caused by her conduct mental cruelty to the appellant-husband and the marriage has irretrievably broken down."
(Emphasis Supplied)

31. Applying the ratio of law laid down by the Supreme Court in **Deepa's** case (supra), we have no hesitation in holding that by filing numerous false complaints against Sanjay and his family members with the police and in the office of Sanjay that Sanjay and his family members used to demand dowry from her and treated her with cruelty when she

failed to fulfill their demands and that Sanjay was having an illicit relation with his colleague, Suman has caused 'mental cruelty' to Sanjay thereby entitling him to a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955.

32. In view of above discussion, impugned judgment dated December 14, 2010 passed by the Principal Judge, Family Courts, Rohini, Delhi granting decree of divorce in favor of Sanjay and dismissing application for restitution of conjugal rights filed by Suman is affirmed.

33. Parties are left to bear their respective costs.

ILR (2013) III DELHI 2066
ITA

THE COMMISSIONER OF INCOME TAX DELHI-II **....APPELLANT**

VERSUS

JAIN EXPORT PVT. LTD. **....RESPONDENT**

(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)

ITA NO. : 235/2013 **DATE OF DECISION: 24.05.2013**

Income Tax Act, 1961—Section 41 (1)—Respondent assessee company was engaged in the business of trading in agricultural commodities and for the assessment year 2008-2009 declared its taxable income as nil on the assertion that it did not conduct any business in the year 2007-2008 and suffered losses—The return was originally accepted but subsequently on finding that the liabilities due to four sundry creditors had ceased to exist, the Assessing Officer added a sum of Rs. 1,57,15,137, being the aggregate

of the amounts shown as payable to the said four sundry creditors, as income of the assessee under Section 41 (1) of the Act—On appeal, CIT agreed with the assessee that since it continued to reflect amounts payable to its creditors in its balance sheets, there would be no cessation of liability and CIT detected the additions made by the AO with respect to amounts payable to all creditors except one creditor namely M/S Elephanta Oil and Vanaspati Ltd. on the ground that the assessee had failed to establish the genuineness of the said liability—On further appeal, Tribunal accepted the plea raised by assessee that its books of accounts had been examined in the past and it would not be correct now to doubt the genuineness of its transactions. Held: It is well settled that in order to attract the provisions of Section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived and if an assessee continues to reflect amounts payable to its creditors in its balance sheets, there would be no cessation of liability. The liability of the assessee towards M/S Elephanta Oil and Vanaspati Ltd. cannot thus, be considered as having ceased and the said liability also cannot be held to be time barred for reflecting an amount as outstanding in the balance sheet by a Company amounts to the Company acknowledging the debt for the purposes of section 18 of the Limitation Act, 1963 and since the assessee Company has continued to reflect amounts payable to M/S Elephanta Oil and Vanaspati Ltd. in its balance sheets, the period of limitation would stand extended. Further, the genuineness of a credit entry can only be examined in the year when the liability was recorded as having arisen and in the present case the liability having been recorded in the year 1984-85, and the Revenue having accepted it over several years, it was not open to the CIT to doubt its genuineness, more so when no credit entry had been made in the

books of the assessee in the previous year relevant to the assessment year 2008-2009.

Although, enforcement of a debt being barred by limitation does not *ipso facto* lead to the conclusion that there is cessation or remission of liability, in the facts of the present case, it is also not possible to conclude that the debt has become unenforceable. It is well settled that reflecting an amount as outstanding in the balance sheet by a company amounts to the company acknowledging the debt for the purposes of Section 18 of the Limitation Act, 1963 and, thus, the claim by M/s Elephanta Oil & Vanaspati Ltd. can also not be considered as time barred as the period of limitation would stand extended. Even, otherwise, it cannot be stated that M/s Elephanta Oil & Vanaspati Ltd. would be unable to claim a set-off on account of the amount reflected as payable to it by the assessee. Admittedly, winding up proceedings against M/s Elephanta Oil & Vanaspati Ltd. are pending and there is no certainty that any claim that may be made by the assessee with regard to the amounts receivable from M/s Elephanta Oil & Vanaspati Ltd. would be paid without the liquidator claiming the credit for the amounts receivable from the assessee company. It is well settled that in order to attract the provisions of Section 41(1) of the Act, there should have been an irrevocable cession of liability without any possibility of the same being revived. The assessee company having acknowledged its liability successively over the years would not be in a position to defend any claim that may be made on behalf of the liquidator for credit of the said amount reflected by the assessee as payable to M/s Elephanta Oil & Vanaspati Ltd.

(Para 21)

We may also add that, admittedly, no credit entry has been made in the books of the assessee in the previous year relevant to the assessment year 20082009. The outstanding balances reflected as payable to M/s Elephanta Oil & Vanaspati Ltd. are the opening balances which are being carried forward for several years. The issue as to the

genuineness of a credit entry, thus does not arise in the current year and this issue could only be examined in the year when the liability was recorded as having arisen, that is, in the year 1984-1985. The department having accepted the balances outstanding over several years, it was not open for the CIT (Appeals) to confirm the addition of the amount of Rs. 1,53,48,850/- on the ground that the assessee could not produce sufficient evidence to prove the genuineness of the transactions which were undertaken in the year 1984-85. **(Para 22)**

Important Issue Involved: (A) In order to attract the provisions of section 41 (1) of the Income Tax Act, it is necessary that there should have been a cessation or remission of liability and if an assessee continues to reflect amounts payable to its creditors in its balance sheets, there would be no cessation of liability.

(B) Reflecting an amount as outstanding in the balance sheet by a Company amounts to the Company acknowledging the debt for the purposes of Section 18 of the Limitation Act, 1963.

(C) The genuineness of a credit entry can only be examined in the year when the liability was recorded as having arisen.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjeev Sabharwal, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *CIT* vs. *Sugauli Sugar Works (P). Ltd.:* [1999] 236 ITR 518 (SC).

2. *J. K. Chemicals Ltd.* vs. *CIT:* [1966] 62 ITR 34 (Bom).
3. *'Bombay Dyeing and Manufacturing Co. Ltd.* vs. *State of Bombay:* AIR 1958 SC 328.

VIBHU BAKHRU, J

1. This appeal is filed, on behalf of the revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), challenging the order dated 30.03.2012 passed by Income Tax Appellate Tribunal, setting aside the addition of sum of Rs. 1,53,48,850/- made by the Assessing Officer on account of purported cessation of liability.

2. The assessee is a company incorporated under the Companies Act, 1956. The assessee company was engaged in the business of trading in agricultural commodities, however, the assessee did not conduct any business in the year 2007-2008 relevant to the assessment year 2008-2009. The assessee filed its return of income, on 25.09.2008, for the assessment year 2008-2009 showing a loss and declaring taxable income as nil. The return was initially accepted under Section 143(1) of the Act, however, subsequently, the return was selected for scrutiny. The Assessing Officer examined the balance sheet of the assessee company for the relevant period and noted that the balance sheet disclosed a sum of Rs. 1,57,54,011/- as sundry creditors. The said amount comprised the following outstanding credit balances:

S.No.	Name	Amount
1	M/s Elephanta Oil &Vanaspati Ltd.	Rs. 1,53,48,850/-
2	M/s Geo-chem Laboratories (P) Ltd.	Rs. 41,231/-
3	M/s Jain House, Calcutta	Rs. 30,210/-
4	M/s Ramji Lal Investments (P) Ltd.	Rs. 38,874/-
5	Sh. Sohan Lal Ghai	Rs. 2,94,846/-

3. The credit balances against the aforementioned creditors have been outstanding since several years. In the case of M/s Elephanta Oil & Vanaspati Ltd., the amount of Rs. 1,53,48,850/- was outstanding in the books since 19841985. The Assessing Officer called upon the assessee to provide confirmations from the creditors regarding the balance outstanding to their credit. The assessee filed a balance confirmation from M/s Ramji Lal Investments (P) Ltd. but could not provide confirmations from any of the other aforementioned creditors. The

Assessing Officer also issued notices under section 133(6) of the Act to the creditors, for the purpose of verifying the credit balance outstanding against their names. The notice issued to M/s Elephanta Oil & Vanaspati Ltd., M/s Geo-chem Laboratories (P) Ltd., M/s Jain House, Calcutta and Sh. Sohan Lal Ghai were returned un-served.

4. The Assessing Officer accepted the amount of Rs. 38,874/- outstanding to the credit of M/s Ramji Lal Investments (P) Ltd., but held that the balance liabilities in respect of other sundry creditors, which were lying unclaimed since several years, were liable to be added back to the income of the assessee under Section 41(1) of the Act. The Assessing Officer was of the view that there was cessation of these liabilities as there was no possibility of the creditors claiming the same in the near future. Accordingly, the aggregate of the balances outstanding to the credit of the aforementioned four creditors (i.e. M/s Elephanta Oil & Vanaspati Ltd., M/s Geo-chem Laboratories (P) Ltd., M/s Jain House, Calcutta and Sh. Sohan Lal Ghai) amounting to sum of Rs. 1,57,15,137/- were added back to the income of the assessee.

5. Aggrieved by the assessment order dated 01.11.2010 passed by the Assessing Officer, the assessee preferred an appeal before the CIT (Appeals), *inter-alia,* on the ground that there was no cessation of liabilities as the assessee continued to be liable for the amounts shown as outstanding against various creditors. In respect of the amount payable to M/s Elephanta Oil & Vanaspati Ltd., the assessee explained that M/s Elephanta Oil & Vanaspati Ltd. also owed a sum of Rs. 1,57,10,690.53/- to the assessee which was reflected as receivable in the balance sheet of the assessee company and thus in net terms M/s Elephanta Oil & Vanaspati Ltd. owed the assessee company a sum of Rs. 3,61,840.78. The amount payable to M/s Elephanta Oil & Vanaspati Ltd. was liable to be adjusted against the amount receivable from M/s Elephanta Oil & Vanaspati Ltd. and thus there could not be any cessation of liability towards the said creditor. The assessee company also provided its final accounts for the years ended on 31.03.2009 and 31.03.2010 which indicated the balances outstanding to the various sundry creditors continued to be reflected in the balance sheets of the assessee company for the subsequent years. It was, thus, contended by the assessee that, since the assessee continued to acknowledge the credit balances in the subsequent period also, there could be no cessation of its liability to pay the creditors.

6. It was also submitted on behalf of the assessee that the amounts payable to M/s Elephanta Oil & Vanaspati Ltd. were on account of certain bank guarantees which had been furnished by M/s Elephanta Oil & Vanaspati Ltd., on behalf of the assessee company, to the custom authorities. The assessee also gave details of the bank guarantees that had been issued by the bank against certain imports that had been made by the assessee company in the year 1984-85. M/s Elephanta Oil & Vanaspati Ltd. had become a sick company and had filed a reference before the Board of Industrial and Financial Reconstruction (BIFR). The BIFR was of the opinion that M/s Elephanta Oil & Vanaspati Ltd. be wound up and accordingly, winding up proceedings have been initiated in this Court and the official liquidator has been appointed as the provisional liquidator to take over possession of the books and accounts and other records of the M/s Elephanta Oil & Vanaspati Ltd.

7. The CIT (Appeals) deleted the addition made by the Assessing Officer with regard to the balance outstanding to the credit of M/s Geo-chem Laboratories (P) Ltd., M/s Jain House, Calcutta and Sh. Sohan Lal Ghai on the ground that the assessee had continued to reflect the liabilities against the names of these creditors in the subsequent period i.e. in the final accounts for the years ended on 31.03.2009 and 31.03.2010. The CIT (Appeals) held that as the assessee company continued to reflect amounts payable to those creditors there was no cessation of liability and consequently, the provisions of Section 41(1) of the Act were inapplicable. However, in the case of M/s Elephanta Oil & Vanaspati Ltd., the CIT (Appeals) upheld the addition made by the Assessing Officer, not on the ground that there was cessation of liability, but on the basis that the assessee had failed to establish the genuineness of the liability towards M/s Elephanta Oil & Vanaspati Ltd. The decision of the CIT (Appeals) was, inter-alia, based on the fact that the assessee had not been able to trace or produce any evidence with regard to the bank guarantees on account of which the liability to pay a sum of Rs. 1,53,48,850/- had arisen. The contention of the assessee that the transaction related back to the year 1984-1985 and had been accepted as genuine by the revenue through a series of scrutiny assessment made in the past, was not accepted. The plea of the assessee that, since the matter related to 1984-1985, the assessee could not produce the evidence of the initial transaction, was also not found to be acceptable by the CIT (Appeals).

8. While, the decision of the CIT (Appeals) was accepted by the revenue, the assessee preferred an appeal before the Income Tax Appellate Tribunal, *inter-alia,* challenging the confirmation of addition of Rs. 1,53,48,850/- by the CIT (Appeals). The Tribunal accepted the contention of the assessee that a sum of Rs. 1,57,10,690.53 was owed by M/s Elephanta Oil & Vanaspati Ltd. to the assessee company and thus, the net effect of the same would be that no amount would be payable by the assessee to M/s Elephanta Oil & Vanaspati Ltd. and a sum of Rs. 3,61,840.78 would be receivable after setting off the amount of Rs. 1,53,48,849/ which was standing to the credit of M/s Elephanta Oil & Vanaspati Ltd. The Tribunal was of the view that it was not correct to only accept the figure relating to the amount that was receivable by the assessee company while rejecting the amount payable by the assessee company to M/s Elephanta Oil & Vanaspati Ltd.

9. Aggrieved by the order passed by the Tribunal, the revenue has preferred the present appeal. It is contended before us on behalf of the revenue that there has been a cessation of liability of Rs. 1,53,48,849/- and the Tribunal has erred in setting aside the addition made on that account. It is further urged that the Tribunal was in error in taking note of the amount receivable from M/s Elephanta Oil & Vanaspati Ltd. while, considering the provisions of Section 41(1) of the Act. Whilst, it was conceded before us that the genuineness of the initial transaction was not in challenge, it was contended that the fact that the amount payable to M/s Elephanta Oil & Vanaspati Ltd. has been outstanding for 25 years indicated that the liability has ceased. It has been pleaded on behalf of the revenue that the following questions arise for our consideration:

1. "Whether ITAT erred in setting aside an amount of ` 1,53,48,850.00 holding that there was no cession of liability?"
2. "Whether while considering provisions of section 41(1) the net liability that after providing for receivables is to be considered or is relevant?"

10. We are unable to appreciate the stand taken on behalf of the revenue, which has, apparently, not been consistent. The Assessing Officer, inter-alia, added a sum of Rs. 1,57,15,137, being the aggregate of the amounts shown as payable to various sundry creditors, as income under Section 41(1) of the Act. Whilst the Assessing Officer held that

the liabilities due to the sundry creditors had ceased, the genuineness of the initial transaction on account of which the amounts were payable to various creditors was not made an issue. The only issue raised by the Assessing Officer was that since the outstanding balances had remained static on the books of the assessee for several years (in the case of M/s Elephanta Oil & Vanaspati Ltd. for over 25 years), there was no possibility of any claim being made by the creditors and the amount of liabilities outstanding were liable to be added as income of the assessee.

11. The CIT (Appeals) did not accept the reasoning of the Assessing Officer and deleted the addition made by the Assessing Officer with respect to amounts reflected as payable to various sundry creditors on the ground that assessee company continued to reflect the amounts payable even in the subsequent periods. The CIT (Appeals) held that there could be no cessation of liability as the assessee company continued to acknowledge its debt towards the creditors. However, the CIT (Appeals) concluded that the amount outstanding to the credit of M/s Elephanta Oil & Vanaspati Ltd. was not genuine as the assessee could not produce any confirmation or evidence of the original transaction which was undertaken in 1984-1985. It is relevant for us to notice that the revenue did not prefer any appeal against the order of the CIT (Appeals), and thus, accepted his decision that there was no cessation of liability in cases where the assessee company continued to acknowledge the amount owed by it to its creditors.

12. The question whether there had been any cessation of liability was thus not before the Tribunal as the Tribunal was only considering the correctness of the decision of the CIT (Appeals) wherein the transaction giving rise to the liability payable to M/s Elephanta Oil & Vanaspati Ltd. had been doubted. The Tribunal came to the conclusion, and rightly so, that the books of the assessee had been examined in the past and it would not be correct to accept a part of the account relating to a party and rejecting another part of the account. Whereas, the part of the account relating to dealings with M/s Elephanta Oil & Vanaspati Ltd. which resulted in the amount being receivable from M/s Elephanta Oil & Vanaspati Ltd. was accepted by the CIT (Appeals), the amount payable to the same entity was rejected. Accordingly, the Tribunal deleted the addition of Rs. 1,53,48,850/- confirmed by the CIT (Appeals).

13. The genuineness of the transaction entered into by the assessee

in 1984-85 with M/s Elephanta Oils & Vanaspati Ltd. is not being assailed before us and the only controversy sought to be raised before us is whether there has been cessation of liability owed by the assessee to M/s Elephanta Oil & Vanaspati Ltd. In our view, that question doesn't arise in the present case since the decision of the CIT (Appeals) that there is no cession of liability in cases where the debt has been acknowledged by the assessee company has already been accepted by the revenue. However, as the question whether there is any cessation of liability in the relevant previous year warranting an addition in terms of Section 41(1) of the Act has been urged on behalf of the revenue, we consider it appropriate to examine the same.

14. Section 41(1) of the Act is relevant and is quoted below:

> "41. Profits chargeable to tax-(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,-
>
> (a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or
>
> (b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly

> chargeable to income-tax as the income of that previous year.
>
> Explanation 1. – For the purposes of this sub-section, the expression 'loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof' shall include the remission or cessation of any liability by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts."

15. Indisputably, Explanation 1 to section 41(1) of the Act, which was inserted, w.e.f. 01.04.1997 is not applicable, as the assessee has not written off the liability to pay M/s Elephanta Oil & Vanaspati Ltd. in its books of accounts.

16. The Supreme Court in the case of **CIT v. Sugauli Sugar Works (P). Ltd.:** [1999] 236 ITR 518 (SC) has held that section 41(1) of the Act contemplates obtaining by the assessee an amount either in cash or any other manner or any benefit by way of cessation or remission of liability. In order to come within the sweep of section 41(1) it is necessary that the benefit derived by an assessee results from cessation or remission of a trading liability. The relevant extract from the decision of the Supreme Court in the case of **CIT v. Sugauli Sugar Works (P.) Ltd.** (supra) is quoted below:

> "3. It will be seen that the following words in the section are important: 'the assessee has obtained, whether in cash or in any other manner whatsoever any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him'. Thus, the section contemplates obtaining by the assessee of an amount either in cash or in any other manner whatsoever or a benefit by way of remission or cessation and it should be of a particular amount obtained by him. Thus, the obtaining by the assessee of a benefit by virtue of remission or cessation is sine qua non for application of this section."

17. The only issue that needs to be considered is whether the liability towards M/s Elephanta Oil & Vanaspati Ltd. has ceased on account of efflux of time.

18. The Supreme Court in the case of **'Bombay Dyeing and Manufacturing Co. Ltd.' v. State of Bombay:** AIR 1958 SC 328 has clearly held that even in cases where the remedy of a creditor is barred by limitation the debt itself is not extinguished but merely becomes unenforceable. The Court observed as under:

> "The position then is that, under the law, a debt subsists notwithstanding that its recovery is barred by limitation....."

19. This view has also been taken by the Supreme Court in the case of **CIT v. Sugauli Sugar Works P. Ltd.** (supra). In the said case, it was contended on behalf of the revenue that the liability has come to an end as the creditors in the said case had not taken any action to recover the amounts due to them for twenty years. The Supreme Court affirmed the decision of the Bombay High Court in the case of **J. K. Chemicals Ltd. v. CIT:** [1966] 62 ITR 34 (Bom) wherein the words "cessation or remission" had been interpreted. The Supreme Court quoted the following passage from the judgment of the Bombay High Court in the said case of **J. K. Chemicals Ltd. v. CIT** (supra):

> "The question to be considered is whether the transfer of these entries brings about a remission or cessation of its liability. The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his liability. Remission has to be granted by the creditor. It is not in dispute, and it indeed cannot be disputed, that it is not a case of remission of liability. Similarly, a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the operation of law, i.e., on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to honour his liability when payment is demanded by the creditor, or a contract between the parties, or by discharge of the debt-the debtor making payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability. We have already held in **Kohinoor mills'** case [1963] 49 ITR 578 (Bom) that the mere fact of the expiry of the period of limitation to enforce it, does not by itself constitute cessation of the liability. In the instant case, the liability

> being one relating to wages, salaries and bonus due by an employer to his employees in an industry, the provisions of the Industrial Disputes Act also are attracted and for the recovery of the dues from the employer, under section 33C(2) of the Industrial Disputes Act, no bar of limitation comes in the way of the employees."

After quoting the above passage, the Supreme Court held as under:

> "This judgment has been quoted by the High Court in the present case and followed. We have no hesitation to say that the reasoning is correct and we agree with the same."

20. In order to attract the provisions of Section 41(1) of the Act, it is necessary that there should have been a cessation or remission of liability. As held by the Bombay High Court, in the case of **J. K. Chemicals Ltd.** (supra), cessation of liability may occur either by the reason of the liability becoming unenforceable in law by the creditor coupled with debtor declaring his intention not to honour his liability, or by a contract between parties or by discharge of the debt. In the present case, the assessee is acknowledging the debt payable to M/s Elephanta Oil & Vanaspati Ltd. and there is no material to indicate that the parties have contracted to extinguish the liability. Thus, in our view it cannot be concluded that the debt owed by the assessee to M/s Elephanta Oils & Vanaspati Ltd. stood extinguished.

21. Although, enforcement of a debt being barred by limitation does not *ipso facto* lead to the conclusion that there is cessation or remission of liability, in the facts of the present case, it is also not possible to conclude that the debt has become unenforceable. It is well settled that reflecting an amount as outstanding in the balance sheet by a company amounts to the company acknowledging the debt for the purposes of Section 18 of the Limitation Act, 1963 and, thus, the claim by M/s Elephanta Oil & Vanaspati Ltd. can also not be considered as time barred as the period of limitation would stand extended. Even, otherwise, it cannot be stated that M/s Elephanta Oil & Vanaspati Ltd. would be unable to claim a set-off on account of the amount reflected as payable to it by the assessee. Admittedly, winding up proceedings against M/s Elephanta Oil & Vanaspati Ltd. are pending and there is no certainty that any claim that may be made by the assessee with regard to the amounts receivable from M/s Elephanta Oil & Vanaspati Ltd. would be paid without the liquidator claiming the credit for the amounts receivable from the

assessee company. It is well settled that in order to attract the provisions of Section 41(1) of the Act, there should have been an irrevocable cession of liability without any possibility of the same being revived. The assessee company having acknowledged its liability successively over the years would not be in a position to defend any claim that may be made on behalf of the liquidator for credit of the said amount reflected by the assessee as payable to M/s Elephanta Oil & Vanaspati Ltd.

22. We may also add that, admittedly, no credit entry has been made in the books of the assessee in the previous year relevant to the assessment year 20082009. The outstanding balances reflected as payable to M/s Elephanta Oil & Vanaspati Ltd. are the opening balances which are being carried forward for several years. The issue as to the genuineness of a credit entry, thus does not arise in the current year and this issue could only be examined in the year when the liability was recorded as having arisen, that is, in the year 1984-1985. The department having accepted the balances outstanding over several years, it was not open for the CIT (Appeals) to confirm the addition of the amount of Rs. 1,53,48,850/- on the ground that the assessee could not produce sufficient evidence to prove the genuineness of the transactions which were undertaken in the year 1984-85.

23. The present appeal does not disclose any substantial question of law for our consideration and is, accordingly, dismissed.

ILR (2013) III DELHI 2080
W.P. (C)

BHAGAT SINGH ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 3583/2013 DATE OF DECISION: 30.05.2013

Service Law—Denial of appointment to the post of Constable (GD) in the Central Armed forces—Signatures in capital letters in English—Petitioner has impugned Memorandum dated 15th March, 2013 vide which his candidature for the post of Constable (GD) in the ITBPF was cancelled on the ground that upon scrutiny of the documents, the respondents found that the petitioner has signed in capital letters of English which was not permissible as per notice of the examination. Held—Issues raised in the instant writ petition are squarely covered by the judicial pronouncements of this Court in the following cases (i) Decision dated 24th February, 2012 in W.P. (C) No. 1004/2012 titled as *Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another.* (ii) Decision dated 5th November, 2012 in W.P. (C) No. 6959/2012 titled as *Bittoo v. Union of India and Another,* (iii) Decision dated 4th December, 2012 in W.P. (C) No. 7158/2012 titled as Pawan Kumar and Union of India and Another—The adjudication in the above noted judgments and orders would guide adjudication of the present matter as well—It is well settled that there is no law which prohibits a person to sign in capital letters—As observed in *Pawan Kumar* (Supra), a signature is a trait which a person develops over a

period of time and these traits can develop even with reference to capital letters—Petitioner cannot be denied consideration for appointment, and if otherwise eligible for the appointment, to the post of Constable (GD) in the ITBPF on the ground his signatures have been done in English capital letters—Writ petition is allowed in the above terms.

It is submitted that the issues raised in the instant writ petition are squarely covered by the judicial pronouncements of this court in the following cases and that the instant petition can be disposed of in the light and the reasons recorded therein. :-

(i) Decision dated 24th February, 2012 in W.P.(C) No. 1004/2012 titled as **Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another.**

(ii) Decision dated 5th November, 2012 in W.P. (C) No. 6959/2012 titled as Bittoo v. Union of India and another.

(iii) Decision dated 4th December, 2012 in W.P.(C) No. 7158/2012 titled as Pawan Kumar and Union of India and another. **(Para 4)**

We find there is no dispute to the material facts. The impugned order sets out the above reason for the same. The adjudication in the above noted judgments and orders would guide adjudication of the present matter as well. **(Para 5)**

It is well settled that there is no law which prohibits a person to sign in capital letters. As observed in **Pawan Kumar** (supra), a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters. **(Para 6)**

Important Issue Involved: Denial of appointment—Signatures in capital letters in English—Railways Act—It is well settled that there is no law which prohibits a person to sign in capital letters—It has been held in the judgment of this Court in *Pawan Kumar* (Supra) that a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Shanker Chhabra, Advocate.

FOR THE RESPONDENT : Mr. Ankur Chhiber and Ms. Aakriti Jain, Advocates for UOI.

CASES REFERRED TO:

1. *Delhi Subordinate Services Selection Board and Another* v. *Neeraj Kumar and Another* W.P.(C) No. 1004/2012.

RESULT: Appeal dismissed.

GITA MITTAL, J. (Oral)

CM No. 6713/2013 (Exemption)

Allowed subject to all just exceptions.

The application stands disposed of.

W.P.(C) 3583/2013

1. With the consent of both the sides, this writ petition is taken up for hearing.

2. The instant case relates to selection as a Constable(GD) in the Central Armed Police Forces pursuant to an advertisement issued in 2012. There appears to be an error in the typing of the year in the date of the impugned Memorandum. The year thereof has been wrongly mentioned as '2012' instead of '2013'. The error is apparent inasmuch as the said communication has been issued with regard to a Selection Process conducted in August, 2012.

3. Vide the instant petition, the petitioner has impugned this Memorandum dated 15th March, 2013 (wrongly mentioned as 15th March, 2012) vide which the petitioner's candidature for the post of Constable (GD) in the ITBPF was cancelled on the ground that upon scrutiny of the documents, the respondents found that the petitioner has signed in capital letters of English which was not permissible as per notice of the examination.

4. It is submitted that the issues raised in the instant writ petition are squarely covered by the judicial pronouncements of this court in the following cases and that the instant petition can be disposed of in the light and the reasons recorded therein. :-

(i) Decision dated 24th February, 2012 in W.P.(C) No. 1004/ 2012 titled as **Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another.**

(ii) Decision dated 5th November, 2012 in W.P. (C) No. 6959/ 2012 titled as Bittoo v. Union of India and another.

(iii) Decision dated 4th December, 2012 in W.P.(C) No. 7158/ 2012 titled as Pawan Kumar and Union of India and another.

5. We find there is no dispute to the material facts. The impugned order sets out the above reason for the same. The adjudication in the above noted judgments and orders would guide adjudication of the present matter as well.

6. It is well settled that there is no law which prohibits a person to sign in capital letters. As observed in **Pawan Kumar** (supra), a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters.

7. For the reasons recorded in the judgments and orders as mentioned above, we are of the view that the writ petitioner cannot be denied consideration for appointment, and if otherwise eligible for the appointment, to the post of Constable (GD) in the ITBPF on the ground his signatures have been done in English capital letters.

8. In this background and in the light of the facts as mentioned above, while setting aside the Memorandum dated 15th March, 2013 (wrongly written as '2012'), we allow the writ petition with the following directions to the respondents:-

(i) The respondents shall treat the petitioner's application as valid and shall consider the petitioner's entitlement to selection and appointment as a Constable (GD) in ITBPF keeping in view his merit position in the Selection List and any other criteria as is applicable in the instant case; and

(ii) The respondents shall ensure that all the necessary steps towards this purpose are completed within a period of six weeks from today and would be conveyed to the petitioner accordingly.

9. This writ petition is allowed in the above terms.

10. Dasti.

CM No. 6712/2013

In view of the order passed in the writ petition, this application is rendered infructuous and disposed of accordingly.